

Highlights of Judge Sirica's Decision

John J. Sirica's 23-page decision that the President must surrender his tapes relied heavily on legal and political precedents—on the theory of the Constitution, the trial of Aaron Burr and President Truman's unsuccessful attempt to take over the steel industry. In threading his way through this maze, Sirica carefully took up and rejected virtually all the arguments that the White House lawyers had presented. His verdict, though phrased with the density of legal language, is a historic document. Excerpts:

The court has found it necessary to adjudicate but two questions for the present: 1) whether the court has jurisdiction to decide the issue of privilege, and 2) whether the court has authority to enforce the subpoena *duces tecum* [a subpoena requiring a person to appear before a court with whatever documents the court needs as evidence].

A search of the Constitution and the history of its creation reveals a disfavor of Government privileges, or at least uncontrolled privileges. Early in the Convention of 1787, the delegates cautioned each other concerning the dangers of lodging immoderate power in the Executive Department. This attitude persisted throughout the convention.

The court cannot agree with respondent [President Nixon] that it is the Executive that finally determines whether its privilege is properly invoked. Judicial control over the evidence in a case cannot be abdicated to the caprice of Executive officers. It is emphatically the province and duty of the Judicial Department to say what the law is.

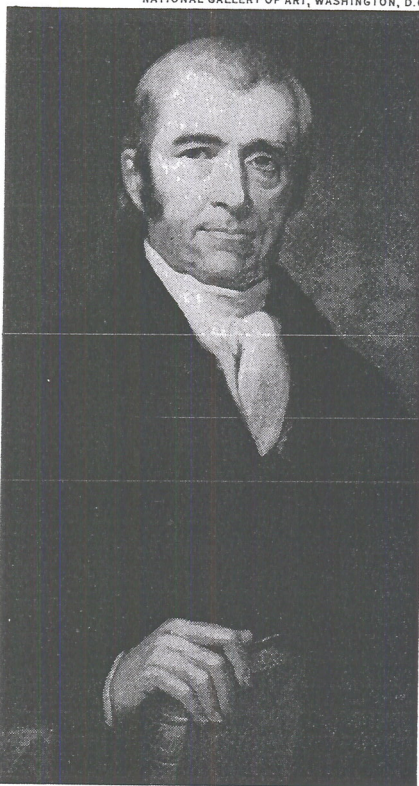
[It is a] well-established premise that the grand jury has a right to every man's evidence and that for purposes of gathering evidence, process may issue to anyone. The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it.

The burden here is on the President to define exactly what it is about his office that court process commanding the production of evidence cannot reach there. To be accurate, court process in the form of a subpoena *duces tecum* has already issued to the President, and he acknowledges that . . . courts possess authority to direct such subpoenas to him. A distinction is drawn, however, between authority to issue a subpoena and authority to command obedience to it. It is this second compulsory process that the President contends may not reach him. The burden yet remains with the President, however, to explain why this must be so. What distinctive quality of the presidency permits its incumbent to withhold evidence? To

argue that the need for presidential privacy justifies it is not persuasive. On the occasions when such need justifies suppression, the courts will sustain a privilege. This is a judicial decision.

To argue that it is the separation of powers that bars compulsory court process from the White House is also unpersuasive. Such an argument tends to set the White House apart as a fourth branch of Government.

The special prosecutor has correctly noted that the framers' intention to lodge the powers of Government in separate bodies also included a plan for interaction between departments. A "watertight" division of different functions



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JUSTICE JOHN MARSHALL (1755-1835)
No exception whatever.

was never their design. The Legislative Branch may organize the judiciary and dictate the procedures by which it transacts business. The judiciary may pass upon the constitutionality of legislative enactments and in some instances define the bounds of congressional investigations. The Executive may veto legislative enactments, and the legislature may override the veto. The Executive appoints judges and justices and may bind judicial decisions by lawful Executive orders. The judiciary may pass on the constitutionality of Executive acts.

It is important to note here the role of the grand jury. Chief Justice Marshall, in considering whether a subpoena

na might issue to the President of the United States, observed: "In the provisions of the Constitution, and of the statute, which give to the accused a right to the compulsory process of the court, there is no exception whatever."

The grand jury is well known to Anglo-American criminal justice as the people's guardian of fairness. The grand jury derives its authority directly from the people, and when that group, independent in its sphere, acts according to its mandate, the court cannot justifiably withhold its assistance, nor can anyone, regardless of his station, withhold from it evidence not privileged.

The grand jury's showing of need here is well documented and imposing . . . [If Former Presidential Counsel John Dean's] testimony is corroborated, it will tend to establish that a conspiracy to obstruct justice reached the highest level of Government. It is true, of course, that other testimony indicates that the conversations did not include direct evidence of criminal misconduct. While this is not the time or place to judge credibility, Dean's testimony cannot be dismissed out of hand.

The court cannot, as matters now stand, rule that the present claim of privilege is invalid. The President contends that the recorded conversations occurred pursuant to an exercise of his duty to "take care that the laws be faithfully executed." Although the court is not bound by that conclusion, it is extremely reluctant to finally stand against a declaration of the President of the United States on any but the strongest possible evidence. Need for the evidence requires that a claim not be rejected lightly. The court is simply unable to decide the question of privilege without inspecting the tapes.

The court is unable to design a more cautious approach consistent with both the demonstrated critical need for the evidence and the serious questions raised concerning the applicability of the privilege asserted. The court has attempted to walk the middle ground between a formula to decide the question of privilege at one extreme, and a wholesale delivery of tapes to the grand jury at the other. The one would be a breach of duty, the other an inexcusable course of conduct.

To paraphrase Chief Justice Marshall, if it be apparent that the tapes are irrelevant to the investigation, or that for State reasons they cannot be introduced into the case, the subpoena *duces tecum* would be useless. But if this be not apparent, if they may be important in the investigation, if they may be safely heard by the grand jury, if only in part, would it not be a blot on the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the court did not at least call for an inspection of the evidence in chambers?