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Text of Appeals Court Memorandum on Dispute Over Nixon Tapes

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WASHINGTON, Sept. 13 — A memorandum issued today by the United States Court of Appeals for the District of Columbia Circuit, addressed to President Nixon, United States District Judge John J. Sirica, and Archibald Cox, special prosecutor in the Watergate case:

From the able exposition by counsel in the unusually full oral argument allowed by the Court in this case, it appeared to the Court that the issues dividing the parties might be susceptible of resolution by procedures other than those set forth in either District Judge Sirica's opinion or the briefs of the parties. The Court has been, and is, conscious of the public importance of this matter and the public interest in the earliest possible resolution of it.

The doctrine under which courts seek resolution of a controversial ruling is particularly applicable here. The possibility of a resolution of this controversy without the need for a constitutional ruling is enhanced by the stature and character of the two counsel charged with representation of each side in this cause, and by the circumstances that each was selected for his position, directly or indirectly, by the Chief Executive himself.

Whereas Judge Sirica contemplated an in camera examination of the subpoenaed tapes, which would have necessitated the presence of the judiciary, we conceive of an examination of the tapes by the Chief Executive or his delegate, assisted by both his own counsel, Professor Wright, and the

special prosecutor, Professor Cox. We say this without intimating a decision on any question of jurisdiction or privilege advanced by any party. Apart from noting that the likelihood of successful settlement along the lines indicated contemplates a voluntary submission of such portions of the tapes to the two counsel as satisfies them, we do not presume to prescribe the details of how the Chief Executive will work with the two counsel. National Interest Cited

This procedure may permit the different approaches of the parties to converge. The President has maintained that he alone should decide what is necessarily privileged and should not be furnished the grand jury. The special prosecutor has

maintained that he should have the opportunity of examining the material and asserting its relevance and importance to the grand jury investigation. If the President and the special prosecutor agree as to the material needed for the grand jury's functioning, the national interest will be served. At the same time, neither the President nor the special prosecutor would in any way have surrendered or subverted the principles for which they have contended.

If after the most diligent efforts of all three concerned, there appear to be matters the President deems privileged and the special prosecutor believes necessary and not privileged, then this Court will discharge its duty of determining the controversy with

the knowledge that it has not hesitated to explore the possibility of avoiding constitutional adjudication. Even if this were to occur, the issues remaining for resolution might be substantially narrowed and clarified.

We have issued this memorandum without interrupting the schedule for post-argument memoranda by the parties. The overriding public interest in this case demands our best and most expeditious efforts in the meantime. The Court asks that if be advised, by both counsel, not later than Sept. 20, 1973, whether the approach indicated in this memorandum has been fruitful.

The clerk is directed to transmit this memorandum to all parties to the instant proceedings and to file it in the record.