

7/14/73
W Post

Tapes Review Is Suggested

By George Lardner Jr.
Washington Post Staff Writer

The U.S. Circuit Court of Appeals here urged President Nixon yesterday to let Special Prosecutor Archibald Cox listen to his Watergate tapes in an effort to resolve the controversy without a constitutional showdown.

The court suggested that Mr. Nixon and Cox might then be able to agree on what portions of the tapes could be turned over to the Watergate grand jury here.

The compromise was proposed in a memo issued later yesterday afternoon. It was approved unanimously by the seven appellate judges presiding over the case.

"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," the court said.

"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," it said.

Putting a hurry-up timetable on the proposal, the appellate judges suggested that Cox and the President's chief lawyer, Charles Alan Wright, listen to the tapes with Mr. Nixon or a delegate named by the President within the next week.

The court asked for a report no later than next Thursday on "whether the approach indicated in this memorandum has been fruitful."

Cox quickly signified his willingness to try for an out-of-court settlement.

"I shall, of course, be more than glad to meet with the President or his delegate or any of his attorneys, in a sincere effort to pursue the Court of Appeals' suggestion to a mutually satisfactory conclusion," the special prosecutor said in a statement issued by his office.

At the White House, press secretary Gerald L. Warren said only that Mr. Nixon's lawyers were "studying the memo."

See TAPES, A14, Col. 2

TAPES From A1

The Court of Appeals hinted that the approach would be worthwhile even if the President and Cox could not agree on every segment of the disputed tapes.

"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," the memo stated.

"Even if this were to occur, the issues remaining for resolution might be substantially narrowed and qualified."

The proposal would seem to fall along the lines that Wright himself suggested on Mr. Nixon's behalf Tuesday during the circuit court's full-dress hearing on the issue.

The President's lawyer proposed then that the appellate court simply "suggest what it feels should be done" and rely on Mr. Nixon's "good judgment" to follow through voluntarily.

The disputed tapes involve nine of Mr. Nixon's conversations with top White House aides and campaign advisers between June 20, 1972—three days after discovery of the Watergate bugging at Democratic National Committee headquarters—and April 15, 1973, when the President had a long discussion with White House counsel John W. Dean III.

Cox obtained a grand jury subpoena for the recordings in July, maintaining that the tapes were crucial to the investigation of the Watergate bugging and subsequent cover-up of the scandal.

The President has refused to give up the tapes on the grounds that their surrender under court order would destroy the confidentiality of presidential conversations. The confrontation moved into the appeals court after U.S. District Court Judge John J. Sirica rejected Mr. Nixon's claims of presidential immunity and ordered the President to turn the tapes over for Sirica's inspection.

The course proposed yesterday would bypass Sirica, at least for the moment.

"Whereas Judge Sirica contemplated an in camera examination of the subpoenaed tapes, which would have necessitated the presence of the judiciary," the appellate court said, "we contemplate 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."

The memo emphasized, however, that the heart of its suggestion was "a voluntary submission of such portions of the tapes to the two counsel as satisfies them." The court said that it would "not presume to prescribe the details of how the Chief Executive will work with the two counsel."

Mr. Nixon has said that he has personally listened to only two of the nine recordings. Wright has said that he has not heard any of them. The

University of Texas law professor told Judge Sirica, however, that one of the tapes contains a national security discussion so sensitive that the President wouldn't even give Wright a hint of what it was about.

The circuit court emphasized that it was making its proposal without interrupting its schedule for final briefs in the case. Cox has already filed his and the White House response is due by closing hours Wednesday.

"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 memo said. But it added that "the doctrine under which courts seek resolution of a controversy without a constitutional ruling is particularly applicable here."

The judges said they felt the possibility of a resolution of the controversy "without the need for a constitutional ruling" was enhanced by "the stature and character" of both Cox and Wright "and by the circumstance that each was selected for his position, directly or indirectly, by the Chief Executive himself."

Box was named by Attorney General Elliot L. Richardson after Mr. Nixon gave Richardson full authority to select a special prosecutor. Cox has maintained that his standing as a member of the Executive Branch substantially undercuts the White House's protests that surrender of the tapes would violate the separation of powers.

Mr. Nixon has said that he would comply with a "definitive" Supreme Court

ruling on the issue, but he has refused to say what he would regard as definitive. If it succeeds, the circuit court's proposal could keep the case out of the Supreme Court altogether.