

# Sirica Wants To Listen to Nine Tapes

By George Lardner Jr.  
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U. S. District Court Judge John J. Sirica yesterday ordered President Nixon to turn over the tapes of nine conversations about the Watergate scandal for private judicial review.

Overriding Mr. Nixon's claims of presidential immunity from court orders, Judge Sirica said he would listen to the tapes and determine what portions, if any, should go to the federal grand jury that subpoenaed them.

The White House said flatly that Mr. Nixon "will not comply with this order."

Sirica said he failed to see "any reason for suspending the power of courts to get evidence and rule on questions of privilege simply because it is the President of the United States who holds the evidence."

In a statement issued at San Clemente, however, the White House insisted that even secret "in camera" inspection of the recordings by the judge would be "inconsistent" with the President's views on the separation of powers doctrine and on the need to preserve the "confidentiality of private presidential conversations."

Anticipating an appeal of his ruling, Sirica gave Mr. Nixon's lawyers five days to ask for its reversal in a higher court. They are widely expected to take the case to the U.S. Circuit Court of Appeals here.

The White House said only that the President's attorneys were "considering the possibility of obtaining appellate review or how otherwise to sustain the President's position." It did not elaborate.

Judge Sirica dismissed as "unpersuasive" Mr. Nixon's claims that "the constitutional separation of powers . . . bars compulsory court process from the White House." In a 23-page opinion, he also said he could not accept any blanket claims of executive privilege based on the need for presidential privacy.

Instead, the judge said, it is up to the judicial branch to determine whether those claims are justified. "The court," he said, "is simply unable to decide the question of privilege without inspecting the tapes."

In making his decision, Sirica said he had tried to "walk the middle ground between a failure to decide the question of privilege at one extreme, and a wholesale delivery of tapes to the grand jury at the other."

"The one," he said, "would be a breach of duty; the other, an inexcusable course of conduct."

Watergate Special Prosecutor Archibald Cox, who demanded the nine tape recordings on behalf of the Watergate grand jury here, said through a spokes-



JUDGE JOHN J. SIRICA  
... cites 1787 debate

man that he was "very pleased" with Sirica's ruling. "If appellate review is sought," Cox said, "we will do everything possible to expedite the proceedings."

Sen. Sam J. Ervin Jr. (R-N.C.), chairman of the Senate Watergate committee, also praised the ruling, calling it "a great victory for the search for truth." Earlier in the day, the committee asked Judge Sirica for a summary judgment

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in its favor on the committee's own suit for some of the judge emphasized, Charles Pinckney, the South Carolina delegate, observed in a later Senate speech that the Constitution was meant to give only "very limited" privileges to Congress and that "no privilege of this kind was intended for the executive."

Since then, Sirica said, the Supreme Court has recognized an executive privilege "for military secrets." But in the 1952 Reynolds decision affirming that doctrine, the judge said, the court reserved the right to determine whether the privilege had been properly invoked.

Quoting Chief Justice John Marshall's edict in 1803 in the case of Marbury vs. Madison, Sirica wrote: "It is emphatically the province and duty of the judicial department to say what the law is . . ."

In reasserting that authority Sirica said: "For the courts to abdicate this role

The President refused to

comply with the Cox subpoena. Through his lawyers, asserted an "absolute power" to maintain the secrecy of his conversations with top White House aides and campaign officials even though they are under grand jury investigation.

Sirica, however, said that it is well established that "the grand jury has a right to every man's evidence and that for purposes of gathering evidence, process may issue to anyone." He said it might develop that the conversations are laced with so much legitimately privileged material that it would be impossible to extract any parts of them for the grand jury, but he emphasized that this is a decision for the courts to make.

"Executive fiat," the judge said, "is not the mode of resolution."

In rejecting the White House claims to the contrary, Judge Sirica said that the framers of the Constitution consistently showed "a general disfavor of government privileges, or at least uncontrolled privileges."

He said James Madison specifically suggested during the 1787 Constitutional Convention that the framers consider "what privileges ought to be allowed to the executive," but the upshot, the judge said, was that "none were deemed necessary, or at least that the Constitution need not re-

cord any." In addition, the judge emphasized, Charles Pinckney, the South Carolina delegate, observed in a later Senate speech that the Constitution was meant to give only "very limited" privileges to Congress and that "no privilege of this kind was intended for the executive."

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to Presidents, or to anyone else, to make each officer the judge of his own privilege, would dishonor the genius of our constitutional system and breed unbearable abuse."

The judge emphasized his intention to turn over to the grand jury any portions of the tapes that he determines not to be privileged.

"To call for the tapes in camera is thus tantamount to fully enforcing the subpoena as to any unprivileged matter," he said.

Throughout the decision, Sirica relied heavily on the pronouncements of Chief Justice Marshall in 1807 when he directed President Thomas Jefferson to produce documents for the treason case involving Aaron Burr.

In issuing a subpoena to Jefferson, Marshall said: "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."

Turning to the Watergate tapes, Sirica said: "The burden here then, is on the President to define exactly what it is about his office that court process commanding the production of evidence cannot reach there." He said that the claim of Mr. Nixon's lawyers that the President is not subject to the same rules as other government officials "tends to set the White House apart as a fourth branch of government."

Judge Sirica acknowledged that "the court has not the physical power to enforce its order to the President," but he called this immaterial.

"Regardless of its physical power to enforce them, the court has a duty to issue appropriate orders," Sirica said. "In any case, the courts have always enjoyed the good faith of the executive branch . . . and there is no reason to suppose that the courts in this instance cannot again rely on that same good faith."