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APPELLATE COURT ASKS COMPROMISE IN TAPES DISPUTE

Bids Nixon Voluntarily Yield
Portions of Recordings to
Cox and Wright for Study

REPLIES DUE IN A WEEK

Unusual Proposal, Designed
to Avoid Confrontation, Is
Accepted by Prosecutor

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Special to The New York Times

WASHINGTON, Sept. 13—

—An out-of-court compromise solution to the dispute between President Nixon and the Watergate grand jury over the White House tape recordings was proposed today by the United States Court of Appeals for the District of Columbia circuit.

In a highly unusual move, the seven judges who heard the case issued a unanimous memorandum urging the President and lawyers for both

Text of court memorandum
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sides to avoid a constitutional confrontation by themselves settling the issue of the nine recordings sought by the grand jury.

More specifically, the court recommended that Mr. Nixon voluntarily submit portions of the recordings to Archibald Cox, the Justice Department's special prosecutor, and Prof. Charles Alan Wright, the chief White House attorney, for their examination.

Suit Could Be Dropped

The two attorneys, together with the President himself or his delegate, would decide what parts of the tapes could properly go to the grand jury. Presumably, if they agreed, the lawsuit to force Mr. Nixon to produce the recordings would be withdrawn.

In New York City, meanwhile, attorneys for former Attorney General John N. Mitchell have issued a subpoena for any White House tapes that might be related to the charges of

obstruction of justice that he faces. The Government moved to quash the subpoena. [Details on Page 22.]

The tapes at issue in the Appeals Court here involve conversations, between the President and key White House aides, about the burglary of Democratic headquarters in the Watergate complex in June, 1972, and subsequent efforts to cover up high-level participation in the crime. The court heard arguments in the case earlier this week.

Cox Accepts Proposal

The court asked the White House and the special prosecutor to advise it within a week, by Sept. 20, "whether the approach indicated in this memorandum has been fruitful."

Mr. Cox announced almost immediately that he would 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 White House said only that the court's memorandum had been received and was be-

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ing studied by the office of the White House counsel. Professor Wright has returned to Austin, Tex., to resume his teaching schedule at the University of Texas Law School.

The Court of Appeals proposal apparently originated spontaneously with the judges. Aides to Mr. Cox reported that the prosecutor had made no such suggestion, and Professor Wright said in a telephone interview that the White House legal team was not responsible.

In the 600-word memorandum issued late today, the Court of Appeals judges declared, "The doctrine under which courts seek resolution of a controversy without a constitutional ruling is particularly applicable here."

Could Narrow Issues

The court said that out-of-court settlement of the intense legal and political contest over the tape recordings would be in "the national interest." Even if agreement could not be reached between the parties, the judges predicted, "the issues remaining for resolution might be substantially narrowed and clarified."

The Court of Appeals did not suggest that chief Judge John J. Sirica of the Federal District Court here should take any part in the screening of the tapes. In his ruling of Aug. 29,

which was appealed by both sides, the judge ordered the President to submit the tapes to him for private examination to determine which parts, if any, could be transmitted to the grand jury.

The court specifically avoided attempting to draw any guidelines for its proposed unofficial screening of the tapes by the President, Mr. Cox and Professor Wright.

All the judges said was that the success of their plan depended on "a voluntary submission of such portions of the tapes to the two counsel as satisfies them."

Could Excise Parts

Such a solution would apparently permit Mr. Nixon to satisfy his legal position that the doctrine of executive privilege gives him the power to withhold any of his private communications when he regards such action as in the public interest.

As suggested by the court, he would be able to excise from the tapes any material involving national security and any

remarks that dealt with the exercise of his constitutional duties as President. Thus, the decision as to what was privileged would remain with Mr.

In the bare outline it put forward, the court did not specify whether the President would physically cut privileged sections out of the tapes themselves or merely delete the sections from a printed transcript.

Then the special prosecutor and the President's attorney for this case would examine the remaining portions of the White House conversations and pass on to the grand jury all information that was relevant to its criminal inquiries.

"If the President and the special prosecutor agree as to the material needed for the grand jury's functioning," the court said, "the national interest will be served. At the

same time, neither the President nor the special prosecutor would in any way have subverted the principles for which they have contended."

Would 'Discharge Duty'

If an impasse results, the Court of Appeals would resume consideration of the case and "discharge its duty of determining the controversy with the knowledge that it has not hesitated to explore the possibility of avoiding constitutional adjudication."

One key to the success of the Court of Appeals compromise would be the willingness of Mr. Cox to accept President Nixon's assurance that deleted portions of the tapes did not include any potential evidence of criminal activity.

Some observers believed that the proposal might offer the White House a way out of the controversy, which it has been seeking. Mr. Nixon hinted at his last news conference that he might make the tapes public voluntarily if the Supreme Court upheld his right to keep them private.

Highly Unusual Step

Under normal judicial procedure, courts attempt to resolve disputes on the narrowest grounds possible and to avoid, in the process, any more interpretation of the Constitution than is absolutely necessary to reach a decision.

It is a rare occurrence, however, for a Federal appellate court to issue a memorandum advising the parties to undertake an out-of-the-court

settlement to eliminate the necessity of the judge's reading a new meaning into the language of the Constitution.

That the District of Columbia court took such a position was even more unusual, for its judges seldom hesitated to plunge into unexplored and controversial constitutional territory.

stature and character" of Mr. Cox and Professor Wright enhanced the possibility of avoiding a constitutional ruling in the case, together with the fact that each of them had been "selected for his position, directly or indirectly, by the Chief Executive."

Mr. Cox was selected as special prosecutor by Attorney General Elliot L. Richardson, who was chosen by Mr. Nixon.

Text of Court's Memorandum on Dispute Over Nixon's Tapes

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WASHINGTON, Sept. 13— Following is the text of 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 controversy without a constitutionally 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 counsels charged with representation of each side in this case, 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 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.

We say this without intimating a decision on any question of jurisdiction or privilege advanced by any party. Apart from nothing 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 con-

tended.

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 it 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.