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Nixon Ordered to Surrender Tapes

Panel Votes 5-2 Against Immunity

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The U.S. Circuit Court of Appeals here ordered President Nixon yesterday to surrender his secret Watergate tape recordings with sharply limited exceptions.

In a 5-to-2 decision, the court rejected Mr. Nixon's claims of absolute privilege to the tapes and upheld the Watergate grand jury's right to relevant evidence that they might contain.

The court majority voiced the hope that the President and Watergate Special Prosecutor Archibald Cox might still get together on what portions of the tapes should be turned over to the grand jury.

But should that hope "prove unavailing," the court said that U.S. District Court Judge John J. Sirica should review the recordings in an elaborate "in camera" secret inspection.

"The simple fact is that the conversations are no longer confidential," the court said of Mr. Nixon's talks with top White House aides and campaign advisers about the Watergate scandal.

"Where it is proper to testify about oral conversations taped recordings of those conversations are admissable as probative and corroborative of the truth concerning the testimoney."

The court majority acknowledged that presidential conversations are "presumptively privileged," but held that this presumption "must fail in the face of the uniquely powerful showing made by the special prosecutor in this case."

The White House was given five business days to take the controversy to the Supreme Court.

The unsigned majority opinion was supported by Chief U.S. Circuit Judge David L. Bazelon and Judges J. Skelly Wright, Harold Leventhal, Carl E. McGowan and Spottswood W. Robinson III.

Judges Malcolm R. Wilkey and George E. MacKinnon each issued separate, basically dissenting opinions — partially concurring and partially dissenting.

The court majority said that the President could decline to transmit any portions of the tapes that relate to "national defense or foreign relations" but on the condition that he ask Sirica to reconsider his blanket order for private judicial review of all the recordings.

Beyond that, the court ruled, "The President will present all other items uncovered" by Sirica's Aug. 28 order, with an accompanying index setting out what segments he believes should be withheld from the grand jury on other grounds and what segments he thinks can be disclosed without further ado.

The court also authorized Sirica to permit Watergate

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Special Prosecutor Archibald Cox to inspect the recordings with him "for the limited purpose of aiding the court in determining the relevance of the material to the grand jury's investigations."

Should Sirica invite Cox to listen in, however, the appellate court said the judge should also give the White House a chance to come back before him to protest that move.

The recordings at issue involve nine of Mr. Nixon's conversations with his advisers about the Watergate scandal between June 20, 1972, shortly after the discovery of the break-in and bugging at Democratic National Committee headquarters, and April 15, 1973, when Mr. Nixon had an hour-long talk with then-White House counsel John W. Dean III.

Flatly rejecting the President's claim that forced production of the tapes would threaten "the continued existence of the presidency as a functioning institution," the court said the controversy was "unlikely soon, if ever, to recur."

Cox's office said in a short statement that it was "very pleased with the decision which, on first reading of the opinion, appears fully to sustain our postion."

"Mr. Cox," the statement added, "expressed complete willingness to pursue the Court of Appeals suggestion that the President and he try to reach agreement as to what portions of the subpoenaed evidence are necessary to the grand jury's task."

An earlier attempt at an out-of-court compromise failed last month after a series of meetings between Cox and White House lawyers—suggested by all seven appellate judges—proved unproductive.

In yesterday's ruling, the appellate majority emphasized that it was the President himself who declined to assert any privilege with respect to oral testimony by present and past White House aides, either before the grand jury or before the Senate Watergate committee.

As a result, the 41-page opinion stated, detailed Senate testimony by those aides enabled Cox to show not only "significant likelihood" of a wide-ranging criminal conspiracy, but also that important evidence about it "was contained in statements made by the President's advisers during certain conversations that took place in his office.

"Most importantly, perhaps, significant inconsistencies in the sworn testimony of these advisers relating to the content of the conversations raised a distinct possibility," the court said, "that perjury had been committed before the (Senate) committee and, perhaps, before the grand jury itself."

Turning to the President's claims of immunity from court orders, the majority opinion said in sharp language that it could not accept them.

"These are invitations to refashion the Constitution," the court said, "and we reject them.

"Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: 'With all its defects and delays and inconveniences, men have discovered no technique for long preserving free government except that the executive be under the law . . . ' Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen."

The majority skirted the question of whether the President could be subjected to criminal prosecution before impeachment by Congress—except to say impeachment provides no immunity from "routine court process," such as a subpoena.

In fact, the court added, "By contemplating the possibility of post-impeachment trials for violations committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the President of the routine legal applications that confine all citizens."

White House lawyers had urged the appellate court not to enter a compulsory order against the President that it could not enforce, but the majority said that "the want of physical power" to enforce court judgments was no argument against rendering them.

The court also repudiated the claim that the President was the sole judge of his own privilege. "To the contrary," the ruling said, "the courts have repeatedly asserted that eh applicability of the privilege is in the end for them and not the Executive to decide."

In any event, the court emphasized that its decision was in no way based on any notion that the President himself "was involved in, or even aware of, any alleged criminal activities." In fact, the majority said, "we freely assume, for the purposes of this opinion, that the President was engaged in performance of his constitutional duty" in consulting with his advisers.

Indeed, "if the claim of absolute privilege was recognized," the court warned, "its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and their representatives, including Congress, the courts as well as grand juries, state governments, state officials, and all state subdivisions. . . .

"Support for this kind of mischief simply cannot be spun from incantations of the doctrine of separation of powers."

Relying heavily on the holdings of Chief Justice John Marshall in directing a subpoena to President Thomas Jefferson stemming from the treason trial of Aaron Burr in

1807, the Circuit Court of Appeals seemed doubtful that much of the recordings' material could be withheld on national security grounds

"With the possible exception of material on one tape," the court emphasized, "the President does not assert that the subpoenaed items involved military or state secrets . ."

"Nevertheless," the decision stated, "we hold that the District Court may order disclosure of all portions of the tapes relevant to matters within the proper scope of the grand jury's investigations, unless the Court judges that the public interest served by non-disclosure of particular statements or information outweighs the need for that information demonstrated by the grand jury."

In setting out the procedures for review of the tapes by Sirica, the court prescribed secret hearings for any dispute over discussions about "national defense or foreign relations" that the White House declined to transmit. The special prosecutor will have a chance to be heard.

Judge MacKinnon, in a 65-page dissent, emphasized his view that a "protected independence" for each of the three branches of government, "is vital to the proper performance of its specified constitutional duties."

MacKinnon said that, "In my opinion, an absolute privilege exists for presidential communications . . . if it is possible to convince the court to compel the disclosure of presidential communications, then a President cannot guarantee confidentiality to his advisers."

MacKinnon also suggested that if the President's claimed privilege were upheld, he "would then be free voluntarily to type up a transcript of the recordings that are the subject of the litigation and as presented to the grand jury with the material deleted that he considers confidential." His actions, MacKinnon said, then would "be submitted to the test of public opinion and eventually, when the tapes are released for prosperity, to the test of history."

In a 79-page dissent, Judge Wilkey said the procedure for reviewing the tapes set out by the court majority was "very logical," but he called it one "which might be gone through by the President, but not by the Judicial Branch." He accused the majority of ignoring the constitutional principle of the separation of powers.

The majority, however, insisted that its decision was actually narrow in scope.

"As we view the case," the court majority concluded, "then the order represents an unusual and limited requirement that the President produce material evidence. We think this required by law, and by the rule that even the Chief Executive is subject to the mandate of law when he has no valid claim of privilege."