

5-2 Appellate Vote Rejects Claims of Absolute Privilege

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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.

But it said that U.S. District Court Judge John J. Sirica should sift them first in an elaborate 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 admissible as probative and corroborative of the truth concerning the testimony."

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 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 Special Prosecutor Archibald Cox to inspect the recordings with him "for the limited purpose of aiding the court in de-

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termining 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.

The unsigned majority opinion said, "The central question before us is, in essence, whether the President may, in his sole discretion, withhold from a grand jury evidence in his possession that is relevant to the grand jury's investigations."

"The Constitution makes no mention of special presidential immunities," the court said.

Then it added, "Counsel for the President nonetheless would have us infer immunity from the President's political mandate, or from his vulnerability to impeachment, or from his broad discretionary powers.

"These are invitations to re-fashion the Constitution and we reject them," the court said.

The judges said they acknowledged "the long-standing judicial recognition of executive privilege" but they said it "depends on a weighing of the public interest."

The court directed that Sirica "may give the grand jury portions relevant to Watergate, by using excerpts in part and summaries in part in such a way as not to divulge aspects . . . entitled to confidential treatment."

The dissenters agreed that the court has the right to review claims of privilege but disagreed with the majority that the President must turn over the tapes.

MacKinnon wrote in his dissent that, "I would recognize an absolute privilege for confidential presidential communications . . . to compel disclosure of these tapes which contain communications between a President and his most intimate advisers would endanger seriously the continued efficacy of the presidential decision-making process."

MacKinnon and Wilkey, the other dissenter, were the only Nixon appointees participating in the decision.

Two members of the nine-judge court, Judges Roger Robb and Edward A. Tamm, disqualified themselves from the case.

University of Texas law Prof. Charles Alan Wright, representing Mr. Nixon, and Watergate Special Prosecutor Cox argued their cases before the seven appeals court judges on Sept. 11. In addition, they filed nearly 200 pages of written arguments with the court.

In an unusual move two days after the oral arguments the court issued an unsigned memorandum in which it suggested that the President let Cox, a member of the executive branch, listen to the tapes to determine if they contained important evidence for the grand jury.

Cox could do so, the court

said, without violating the principle of separation of powers which has played such a central role in the President's arguments against releasing the tapes.

"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," it added "neither the President nor the special prosecutor would in any way have surrendered or subverted the principles for which they have contended."

Cox and White House lawyers met three times to discuss the proposed compromise, but to no avail.

One week later, in nearly identical letters, they advised the court "that these sincere efforts were not fruitful."

Thus, the stage was set for the court to resume its deliberations on the constitutional issues raised.

The appeals court ruling came more than two months after Cox subpoenaed tapes of nine presidential conversations related to Watergate.

On the same day, July 23, the Senate Watergate commit-

tee subpoenaed tapes of five conversations.

Three days later, Mr. Nixon notified Sirica, Cox and the committee that he would not comply with the subpoenas.

The President contended that under the Constitution the three branches of government — executive, legislative and judicial—are co-equal and that one cannot force another to obey its orders.

In addition, he argued that a President must retain the right to maintain the confidentiality of discussions with his advisers.

Cox responded that a grand jury has a right to every man's evidence.

"The highest executive officials, like all citizens, are subject to the rule of law and may be required by the courts to comply with their legal obligations," Cox argued.

The special prosecutor asked Sirica to order Mr. Nixon to comply with the subpoena.

He said the tapes were essential evidence for determining not only guilt, but innocence of several high officials including the President himself. He said they also could resolve conflicts in testimony from various presidential aides.