

Judge Orders Tapes --  
Nixon Won't Comply

8-30-73

Sirica Wants to Hear  
Them Before Ruling  
on Confidentiality

Washington

President Nixon was ordered yesterday by Judge John J. Sirica to make tape recordings of White House conversations involving the Watergate case available to him for a decision on their use by a grand jury.

Presidential aides announced, however, that Mr. Nixon "will not comply with the order."

A White House statement said the President's lawyers were considering appealing the decision by Judge Sirica, who is chief judge of the U.S. District Court here, but it also hinted that they might find some other method of sustaining the President's legal position.

APPEAL

Faced with a refusal by Mr. Nixon to accept the court's ruling or to challenge it by an appeal, Archibald Cox, the special prosecutor, might initiate contempt proceedings or begin an appeal of his own, based on the court's refusal to give him the tapes directly.

It was only the second time in the nation's history that a court had required a President, against his will, to produce his private records as evidence, and the decision was certain to have serious political, governmental and legal consequences, both immediate and long-range.

Sirica said he was "simply unable" to decide whether the President's refusal to release the tapes and related documents was valid without inspecting the recordings himself. He upheld the authority of the court to take such action.

EVIDENCE

If he finds evidence relating to criminal activity in the tapes and it can be successfully separated from the privileged statements dealing with the President's official duties, the judge said, he will extract it and pass it along to the Watergate

grand jury over which Archibald Cox, the special prosecutor, is presiding.

"If privileged and unprivileged evidence are so inextricably connected that separation becomes impossible," he continued, "the whole must be privileged and no disclosure made to the grand jury."

Only once before, in 1807, has a federal court ordered

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a president to produce a document from his records, and Judge Sirica relied heavily on the decision by Chief Justice John Marshall that required President Thomas Jefferson to furnish a letter for the treason trial of Aaron Burr.

President Nixon's lawyers argued a week ago that he was not willing to permit a secret inspection of the tapes by Sirica because the President was the sole judge of what material should be withheld as privileged.

If the Watergate tapes "may be important in the investigation, if they may be safely heard by the grand jury," Judge Sirica asked in his opinion yesterday, "would it not be a blot on the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the court did not at least call for an inspection of the evidence in chambers?"

Sirica based his decision to a considerable extent on the need for all citizens, regardless of their social or political position, to cooperate with a grand jury investigation.

CANDOR

"In all candor," the judge said, "the court fails to perceive any reason for suspending the power of courts to get evidence and rule on questions of privilege in criminal matters simply because it is the President of the United States who holds the evidence."

Sirica called it "immaterial" whether the court had

the "physical power" to enforce an order against the President because the court "has a duty to issue appropriate orders" under any circumstances.

He noted that court decisions "have always enjoyed the good faith of the executive branch," even when the Supreme Court invalidated President Truman's seizure of the steel industry in 1952, "and there is no reason to suppose that the courts in this instance cannot again rely on that same good faith."

PUBLICLY

"Indeed," he added, "the President himself has publicly so stated."

What Mr. Nixon said, in response to a question at his televised news conference last week, was that he would comply with "a definitive order of the Supreme Court," leaving open the question of precisely what that meant.

If the President should decide not to appeal the Sirica ruling, last night's White House statement hinted, he might then argue that he had promised only to obey the Supreme Court, which has not spoken on the disputed issues involved.

STRATEGY

Cox and his legal staff, informed of the President's ambiguous statement, went into conference to discuss how they might counter a Nixon strategy that did not follow the traditional route of an appeal to the U.S. Court of Appeals and then, if unsuccessful, to the Supreme Court.

The prosecutor had asked Sirica to turn the tapes over directly to the grand jury, and some lawyers regarded it as theoretically possible that he could appeal the decision, insofar as it fell short of the full relief he had sought.

Earlier, before the White House refusal to comply had been announced, a Cox spokesman said: "Naturally, we are very pleased by Judge Sirica's decision. If appellate review is sought, we will do everything possible to expedite the proceedings."

PRIVILEGE

Sirica said he recognized the validity of "an evidentiary privilege based on the

need to protect presidential privacy," the legal doctrine the Nixon attorneys called "executive privilege" and said extended to any information the President wishes to keep secret "in the public interest."

But, he added, he could not agree with the President "that it is the executive that finally determines whether its privilege is properly invoked. The availability of evidence, including the validity and scope of privileges is a judicial decision."

Sirica rejected as "unpersuasive" the Nixon lawyers' contention that the President could not be served with legal process, such as subpoena, because this would violate the constitutional doctrine of separation of powers, the independence of the three branches of government.

RULE

He noted that the courts have not hesitated to rule on acts of both the legislative and executive branches, in cases such as the Truman steel seizure and the House of Representatives' exclusion of Adam Clayton Powell of New York, which was later overruled by the Supreme Court.

Sirica said that giving the President special immunity from court rulings "tends to set the White House apart as a fourth branch of government." The Constitution provides for interaction between the branches, he noted, and was never intended to establish separate "watertight" governmental divisions.

SUBPOENA

In the Aaron Burr case, the defendant asked the Federal Circuit Court, where he was on trial in Richmond, Va., to subpoena President Jefferson to produce a letter from one of his co-conspirators to the

White House. Chief Justice Marshall was presiding in the lower court, as Supreme Court justices often did in those days.

The prosecution opposed Burr's motion for a subpoena, saying that the letter was a private one to Jefferson and probably contained confidential material that the President should not be compelled to disclose, perhaps even "state secrets" that might endanger "the national safety."

#### DOUBT

But Marshall rules that the President, unlike the King of England, could be subpoenaed to provide essential information for a trial. At the same time, however, he expressed some passing doubt as to whether the court that issued such a subpoena could then compel compliance if the subject was the President.

The Nixon attorneys used this last statement to support their argument that the President is not subject to legal process as long as he occupies his office.

President Jefferson declined to appear in the court in Richmond, on the ground that it would take too much time away from his official duties, but he agreed to provide the letter and offered to testify by deposition if he could be questioned in Washington.

As a result, the question of whether the President could be compelled to produce records was never tested further in the courts, making Mr. Nixon the first chief executive to refuse to comply with a subpoena.

In his 23-page opinion yesterday, Sirica said he had found it necessary to answer only two questions:

"(1) Whether the court has jurisdiction to decide the issue of privilege, and (2) whether the court has authority to enforce the subpoena . . . by way of an order requiring production for inspection in camera (in private) . . . the court concluded that both of the questions considered must be answered in the affirmative."

*New York Times*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA )  
DUCES TECUM ISSUED TO )  
RICHARD M. NIXON, OR ANY )  
SUBORDINATE OFFICER, OF- )  
FICIAL, OR EMPLOYEE WITH )  
CUSTODY OR CONTROL OF CERTAIN )  
DOCUMENTS OR OBJECTS )

Misc. No. 47-73

**FILED**

AUG 29 1973

JAMES F. DAVEY, Clerk

#### ORDER

This matter having come before the Court on motion of the Watergate Special Prosecutor made on behalf of the June, 1972 grand jury of this district for an order to show cause, and the Court being advised in the premises, it is by the Court this 29th day of August, 1973, for the reasons stated in the attached opinion,

ORDERED that respondent, President Richard M. Nixon, or any subordinate officer, official or employee with custody or control of the documents or objects listed in the grand jury subpoena duces tecum of July 23, 1973, served on respondent in this district, is hereby commanded to produce forthwith for the Court's examination in camera, the subpoenaed documents or objects which have not heretofore been produced to the grand jury; and it is

FURTHER ORDERED that the ruling herein be stayed for a period of five days in which time respondent may perfect an appeal from the ruling; and it is

FURTHER ORDERED that should respondent appeal from the ruling herein, the above stay will be extended indefinitely pending the completion of such appeal or appeals.

*John P. Sirica*  
Chief Judge

AP Wirephoto

Text of Judge Sirica's order to White House to produce Watergate tapes