

JUDGE SIRICA ORDERS NIXON TO YIELD TAPES  
TO HIM FOR A DECISION ON GRAND JURY USE;  
PRESIDENT DECLARES HE 'WILL NOT COMPLY'

A HISTORIC RULING

President First Since  
Jefferson Directed to  
Yield His Records

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WASHINGTON, Aug. 29—President Nixon was ordered today 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

*Text of Judge Sirica's opinion will be found on Page 20*

not comply with the order."

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

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.

Another Clash Possible

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

At San Clemente, where President Nixon is vacationing, officials announced that he would not comply with the court order on the ground that inspection of the tapes by a judge "is inconsistent with the President's position relating to the question of separation of powers as provided by the Constitution and the necessity of maintaining precedents of confidentiality of private presidential conversations . . ."

The White House statement said that the President's lawyers were considering an appeal "or how otherwise to sustain" Mr. Nixon's legal position.

The last phrase raised the possibility that the President might ignore the order rather than appeal it, thus precipitating another constitutional clash between the executive and judicial branches.

Marshall Ruling Cited

Judge Sirica said that 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.

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 excise the privileged portions and pass the unprivileged portions along to the Watergate grand jury. Archibald Cox, the special prosecutor, is presiding over the panel.

"If privileged and unprivileged evidence are so inextricably connected that separa-

Continued on Page 21, Column 1

Continued From Page 1, Col. 8

tion becomes impossible," he continued, "the whole must be privileged and no disclosure made to the grand jury."

Only once before, in 1807, had a Federal court ordered 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 Jefferson to furnish a letter for the treason trial of Aaron Burr.

President Nixon's lawyers, led by Prof. Charles Alan Wright of the University of Texas Law School, had argued a week ago that he was not willing to permit a secret inspection of the tapes by the court 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 today, "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?"

Judge 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.

"In all candor," he 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."

He 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.

Relies on Good Faith

He said 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."

"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 phrase meant.

If the President decided not to appeal Judge Sirica's ruling, as tonight's White House statement hinted, he might then argued that he had only promised to obey the Supreme Court, which has not spoken on the disputed issues involved.

Mr. Cox and his legal staff, advised of the President's 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 United States Court of Appeals and then, if unsuccessful, to the Supreme Court.

The prosecutor had asked Judge 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 spokesman for Mr. Cox 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."

Validity Recognized

Judge Sirica said that 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 wished to keep secret "in the public interest."

But, he added, he could not agree with the President "that it sthe executive that finally determines whether its privilege is properly invoked."

"The availability of evidence, including the validity and scope privileges, is a judicial decision," he said.

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

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

4th Branch of Government

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

In the Aaron Burr case, the defendant asked the Federal court, where he was on trial in Richmond, to subpoena President Jefferson to produce a letter from one of his co-conspirators in 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, probably contained confidential material that the President should not be compelled to disclose, perhaps even "state secrets" that might endanger "the national safety."

But Chief Justice Marshall ruled 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 properly then compel compliance if the subject was the President.

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

watertight