

# Struggle Over the White House Tapes Goes to Appeals

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WASHINGTON, Sept. 9—The struggle between President Nixon and the Watergate grand jury for possession of the coveted White House tape recordings moves tomorrow onto an uncertain battleground, the United States Court of Appeals for the District of Columbia.

The future of the historic lawsuit remains in doubt because the appellate court is neither as liberal or predictable as its popular image, and the issues presented in the contest between Archibald Cox, the special prosecutor, and the White House are not likely to divide judges along traditional liberal and conservative lines.

All nine members of that court, headed by chief Judge David L. Bazelon, will hear arguments in the case on Tuesday, one day after legal briefs from both sides are to be turned in. Final papers will be submitted on Friday, and a decision is expected in a week or 10 days more.

This court has a persistent reputation as ultra-liberal, producing some radical decisions, particularly in the area of criminal law, that reverse the trial courts below and, in turn, must be reversed by the Supreme Court to restore—in the eyes of the appeals court's detractor—balance to the law.

But this image, partly exaggerated and partly undeserved, is not likely to provide much guidance for legal observers attempting to anticipate how the Bazelon court may handle the critically important Watergate tapes case.

For one thing, many of the more controversial decisions of this Court of Appeals—one of

11 circuit courts whose geographical jurisdiction blankets the country—have been handed down by three-judge panels, the routine way of disposing of appeals from decisions of the Federal District Courts.

Although the panels are drawn by lot, they have often seemed to produce two-judge majorities that reflected the viewpoint of the court's liberal hard core: Chief Judge Bazelon and Circuit Judges J. Skelly Wright and Spottswood W. Robinson 3d.

On Tuesday, however, all nine judges will be hearing the case—the legal term is sitting en banc—and it is difficult to predict how a majority will be assembled.

Judge Harold Leventhal, a former counsel to the Democratic National Committee, frequently aligns himself with the Bazelon bloc. Judge Carl McGowan, once a protégé of Adlai Stevenson, is regarded by lawyers who practice before the court as somewhat more independent, a "swing" vote.

At the other end of the ideological spectrum are Judges Edward Allen Tamm, Roger Robb, George E. MacKinnon and Malcolm R. Wilkey, the so-called conservative bloc; but they do not always fall together so neatly as to be predictable.

Judge Tamm, an appointee of President Johnson, spent 18 years with the Federal Bureau of Investigation before going on the district court bench in 1948.

The other three judges are all appointees of President Nixon. Generally speaking, Judge MacKinnon is considered the most conservative and Judge Wilkey the most liberal, with Judge Robb somewhere in

between.

But lawyers who have followed the White House tapes case closely believe that its key issues are not the kind that put Republicans and conservatives into one camp, in support of the President and Democrats and liberals into another, behind Mr. Cox and the grand jury.

One major question that the Court of Appeals must resolve is whether the general requirement that all citizens must provide information on criminal activity to an investigating grand jury applies to Mr. Nixon in the same way as it does to everyone else. This is basically an issue of law and order.

A second question is whether the President, as head of the executive branch, is immune from any sort of oversight by the courts. Mr. Nixon's lawyers have argued that he is, but constitutional conservatives on the bench, both in the Court of Appeals and the Supreme Court, might see it differently.

"You could just as easily argue," said one Washington lawyer familiar with the case, "that liberal judges should support the Nixon position because they have traditionally stood for a strong independent chief executive, free from interference by the Congress or the courts."

Following this rationale, some observers were willing to venture a prediction that the Court of Appeals would vote 7 to 2, or even 8 to 1, to uphold District Court Judge John J. Sirica's ruling that he should be given the tapes or determine in private what parts, if any, should go to the grand jury.

There was considerable doubt, however, whether the Court of Appeals would go be-

yond rejecting the White House appeal and rule, as Mr. Cox has urged, that the tapes be submitted directly to the grand jury without screening, or at

least that Judge Sirica be required to meet some objective standards in reviewing the White House tapes for criminal evidence.