

Appeals Court Panel Seeks Views on Sirica Decision on Watergate Evidence

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WASHINGTON, Sept. 11—The controversy over grand jury access to secret White House tape recordings was very nearly submerged in legal confusion today as the case was argued before the United States Court of Appeals for the District of Columbia Circuit.

Questioning from the bench, while it covered a broad area, raised considerable doubt that the appellate court would reverse District Judge John J. Sirica and find that President Nixon had an absolute legal privilege to keep the Watergate tape recordings secret, even if they contained criminal evidence.

On the other hand, the atmosphere of judicial uncertainty was so pervasive that there was little evidence that the judges would comply with the request of Archibald Cox, the Watergate special prosecutor, to order the tapes submitted directly to the grand jury, without any intermediate inspection by Judge Sirica.

Seven judges—two members of the appeals court disquali-

Continued on Page 36, Column 1

Continued From Page 1, Col. 1

fied themselves—directed questions for three hours at Mr. Cox, Professor Charles Alan Wright, the President's lawyer, and two attorneys defending Judge Sirica on his decision of Aug. 29.

Many of the questions went unanswered, indicating that both the White House and the special prosecutor have had difficulty interpreting Judge Sirica's ruling and how it would be put into effect if the courts ultimately uphold it. Even the judge's own lawyers did not seem entirely clear as to what his opinion meant.

As a result, the appeals court may have to spend more time reaching a decision than had been expected, possibly making fairly extensive changes in the lower court ruling. Originally a decision had appeared possible by the end of next week.

Inspection Ordered

Last week the judge ordered the President to submit the nine tapes sought by Mr. Cox to him for an inspection "in camera." The judge would then decide what portions should be kept secret as private Presidential communications and would relay the rest of the information to the grand jury.

Among the ensuing problems, however, was the fact that Judge Sirica appeared to rule that some form of executive privilege existed. He did not define it, however, and thus did not say what standards he would apply in reviewing the tapes.

In addition, as Judge Harold

Leventhal pointed out during today's arguments, Judge Sirica did not defie what he meant by "in camera." Ordinarily, it refers to acts by a judge in complete privacy, without any representatives of the parties in a case present.

If Judge Sirica's proposed screening was designed to eliminate irrelevant material, Judge Leventhal observed, he might want to admit Mr. Cox and Professor Wright or their legal aides because they would have much more knowledge than he as to what information might prove relevant.

'Nondecision' Charged

The President's lawyer, Professor Wright, called the Sirica ruling "a nondecision" and disclosed that the White House had considered making a motion for reconsideration and clarification in the District Court two weeks ago, rather than appealing, because of the legal uncertainty.

Judge Sirica was represented in the appeals court today by two law professors from American University, Anthony C. Morella and George D. Horning Jr., because he was technically being sued by the President and the special prosecutor, both asking the court to nullify his decision.

Mr. Morella denied a report in The Washington Post that Judge Sirica had agreed to Mr. Cox's request for admitting a representative of the prosecutor to any screening session. All the judge had said, his lawyer declared, was that he would welcome screening guidelines from the appeals court, as Mr. Cox had suggested.

The two judges who did not

sit on the case were Roger Robb, a Nixon appointee, and Edward Allen Tamm, who was named to the court by President Lyndon B. Johnson. Judge Robb reportedly disqualified himself because a former law partner had worked for the Committee for the Re-election of the President. No reason was given for Judge Tamm's action.

Generally, Mr. Cox and Professor Wright repeated the legal arguments they had made in the district court and amplified in briefs filed with the appeals court yesterday.

Mr. Wright, who teaches at the University of Texas, said that upholding the Sirica decision would be comparable to making "one hole below the waterline of a ship, no matter how small" that would yield to the hydraulic pressure of the seas and put the ship in danger.

The President's lawyer said it was "demonstrably unsound" to argue, as Mr. Cox has, that there should be an exception to the general rule of confi-

dentiality of Presidential papers when evidence is being sought for an investigation of crime.

If the President abused his privilege by concealing evidence of a crime on his own part, Mr. Wright declared, he would lose the privilege. But if a White House aide abuses his obligation to the President by discussing a criminal conspiracy with him, he maintained, the President may still invoke his privilege and refuse to make evidence of that conversation available to a grand jury.

Mr. Wright said he recognized that "the tradition is very strong that judges should have the last word" as to what evidence should be available, but "in a Government organized as ours is, there are times when that simply cannot be the case."

The special prosecutor told the appellate court judges that they did not have to make

"a black and white choice" between full public access to all Presidential papers or an absolute privilege, determined only by the President, as the White House has urged.

Mr. Cox said that the nine tapes he sought would resolve conflicting testimony about White House conversations between, for example, H. R. Haldeman, the former chief of staff, and John W. Dean 3d, the former counsel.

"It is necessary, either way, to have these tapes," he told the court.

"Our country is blessed," Mr. Cox declared, "by the fact that Presidents, when the time came, have always bowed to the decisions of the Supreme Court. I have confidence that this principle will prevail here."

Mr. Wright asked Chief Judge David L. Bazelon to allow him more time to file a reply brief, now due on Friday. The judge reserved decision on the request. Mr. Cox said he would file his final papers tomorrow.