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Lawyer Says No Force Can Command Tapes

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President Nixon's lawyer yesterday protested that the surrender of any of Mr. Nixon's Watergate tapes to a federal grand jury would open the door to unlimited invasions of presidential privacy.

Charles Alan Wright, the President's chief constitutional adviser, told the U.S. Circuit Court of Appeals here that there were no circumstances under which Mr. Nixon could be forced to give up the recordings.

He urged the appellate judges to avoid the "aura of confrontation" that a court order directing the President to yield the tapes would produce.

Instead, he proposed that the court simply "suggest what it feels should be done" and rely on "the President's good judgment" to follow through voluntarily.

Mr. Nixon has said that he would obey a "definitive" ruling of the Supreme Court on the issue, but he has refused to spell out what he would regard as definitive. At the same time, he has pointedly left open the possibility that he might yield the tapes voluntarily if he won in the courts.

Wright's suggestion to the appellate court amounted to a request for no binding ruling at all.

Only seven judges of the nine-member appellate court

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were present at the hearing in the packed ceremonial courtroom on the 6th floor of the U.S. Courthouse here.

Judges Edward A. Tamm and Roger Robb, both considered members of the Circuit Court's conservative wing, disqualified themselves, court officials reported. Tamm gave no reasons. Robb said he was stepping aside because he and Kenneth Wells Parkinson, the attorney for the Committee to Re-Elect the President, had once been members of the same law firm.

The courtroom debate centered on the White House's attempts to overturn U.S. District Judge John J. Sirica's order directing Mr. Nixon to give him the nine recordings for private judicial review.

The disputed conversations involve nine of Mr. Nixon's discussions with top White House aides and campaign advisers about Watergate between June 20, 1972—shortly after discovery of the break-in and bugging at Democratic national headquarters here—and April 15, 1973, when the President had a long talk with then-White House counsel John W. Dean III.

Wright gave little more than a hint that the President might produce excerpts of the tapes on his own accord if he wins the court battle against having them subpoenaed. Under questioning by Judge Harold Leventhal, the White House lawyer also called it "conceivable" that the President would choose to give a deposition about the conversations, though Wright said he doubted that the courts could require it.

The exchanges, however, were brief. Instead, throughout the hearing, Wright concentrated on what he called "the great damage to the presidency" if Mr. Nixon should be compelled to give up the recordings. He said Mr. Nixon has refused to release them "not to protect John Dean or John Ehrlichman or anyone else," but to safeguard the presidency.

Warning that an adverse ruling would leave "no limit on the extent to which presidential privacy can be invaded," Wright protested that even release of limited segments of the tapes for the Watergate grand jury would entitle any defendants indicted on the basis of that information to the complete recordings.

He said that under a 1969 Supreme Court ruling, the defendants would even have access to sensitive national security discussions that are also on the tapes.

Watergate Special Prosecutor Archibald Cox, who followed Wright to the podium, disagreed sharply. He maintained that the ruling Wright cited dealt only with conversations improperly overheard by the government to begin with.

Should any Watergate defendants demand the full tapes, Cox said he would first demand some showing that segments withheld from the grand jury would help their defense. Any disputes about that, Cox argued, could also be resolved by more "in camera" inspection of the recordings.

Beyond that, Cox maintained, speculation about what the defense might get later on should be no bar to the grand jury's access to relevant evidence now.

Urging the appellate court to stiffen Judge Sirica's ruling, Cox maintained that he and his prosecutors should at least be permitted to listen to the recordings with Judge Sirica and single out the conversations that the grand jury needs. He suggested that any "state secrets" on the tapes could be deleted at the outset by the White House on submission of an affidavit setting out the need for the editing.

"The case here requires more attention to the facts than my brothers are willing to give it," Cox said of Mr. Nixon's lawyers. Watergate, the prosecutor said, has been replete with allegations of White House involvement, charges of perjury and subornation of perjury, and reported promises of presidential clemency in return for silence by the seven defendants initially brought to court.

In that context, Cox maintained, the need to preserve the confidentiality of the President's conversations is far outweighed by the need to get the truth and preserve the integrity of the White House as an institution.

Under questioning by Judge George E. MacKinnon, Cox said he felt a "prima facie" showing of criminal conduct in the conversations had been clearly made against several of Mr. Nixon's former aides, and, if John Dean's testimony before the Senate Watergate committee were to be believed, against the President.

Judge Sirica's lawyers, Anthony C. Morella and George D. Horning Jr., asked the appeals court to uphold his Aug. 29 ruling, although they invited the judges to add to it any "guidelines" that they saw fit.

Judge Leventhal suggested that Sirica could permit both Cox and White House lawyers to sit in while he reviews the tapes, but Morella said he did not think this could be done without instructions from the appellate court.

Leventhal said Sirica in his Aug. 29 ruling had already rejected Mr. Nixon's blanket claims of privilege for the tapes and had simply left the door open for the White House to assert the secrecy of selected portions on narrower grounds. But Morella disputed that, too.

"The judge (Sirica) did not rule on the broad assertion of privilege," Morella declared. "He wants to determine that in camera."

"It sounds like we're appealing from a non-decision, not a decision," Wright replied.

Near the close of the hearing, Judge Malcolm R. Wilkey suggested that Mr. Nixon "exercise his privilege in the same way as (Thomas) Jefferson did" with a letter subpoenaed for Aaron Burr at his trial in 1807.

In that case, Wilkey said, Jefferson withheld certain portions and submitted the rest of the letter to the court. The judge asked why Mr. Nixon could not do that with the tapes and give Sirica an affidavit summarizing what he had kept back and why.

Wright called this "not . . . an untenable possibility," but made no commitments. He said he doubted it would prove satisfactory.

The appeals court wound up the day by acceding to Wright's request for more time to file final briefs in the case. Under the new deadlines, Cox must submit his before Friday evening and the White House will have a week to respond.

The appellate court is still likely to rule before the Supreme Court reconvenes in October.