

# JUDGES RULE 5-2

## Historic Decision Finds President Not Above Law's Commands

By LESLEY OELSNER  
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WASHINGTON, Oct. 12—In what it called an "unavoidable" and "extraordinary" ruling, the United States Court of Appeals held tonight that President Nixon must turn over to the Federal District Court here the disputed White House tape recordings possibly bearing on Watergate crimes.

By a 5-to-2 vote, the appeals court said that the District

Excerpts from court opinions will be found on Page 21.

Court could then give the Watergate grand jury any relevant material, unless it felt that there was some public interest to be served by withholding "particular" statements or information.

"Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty," the court said. "He is not above the law's commands."

### Order Is Upheld

Participants in today's decision were David L. Bazelon, chief judge, and J. Skelly Wright, Carl McGowan, Harold Leventhal, Spottswood W. Robinson, 3d, George E. MacKinnon and Malcolm R. Wilkey.

The court's ruling, issued at 6 P.M. through the clerk's office on the fifth floor of the Federal Courthouse here, thus substantially upheld the order last August of Federal District Judge John J. Sirica, although it appeared to take an even tougher stance against the President than Judge Sirica had.

The appellate court made its ruling in response to requests by both Mr. Nixon and Archibald Cox, the special Watergate prosecutor, to reverse Judge Sirica. Mr. Cox, who had initiated the proceedings when he had a subpoena issued for the tapes, asked the appeals court to order that the tapes be turned over directly to the grand jury.

Mr. Nixon, for his part, asked

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the court to rule that Judge Sirica was incorrect in ordering any disclosure of the tapes by the White House.

The Court of Appeals ruling was of historic magnitude, involving as it did a clash between the President of the United States and the nation's judicial system.

### Court Hints at Sadness

Over and over in its opinion, the court noted this and indeed hinted at its own sadness at being forced to make such a ruling. At one point, for instance, it said, "Here, unfortunately, the court's order must run directly to the President, because he has taken the unusual step of assuming personal custody of the Government property sought by subpoena."

The court tried unsuccessfully last month to avoid making a ruling, asking the parties to make an out-of-court compromise. In its decision today, it showed that it still felt, even now, that the constitutional crisis that the lawsuit had caused could be set aside.

"Perhaps," it said, "the President will find it possible to reach some agreement with the special prosecutor as to what portions of the subpoenaed evidence are necessary to the grand jury."

The office of the special prosecutor, in a statement issued tonight, said that it would be amenable to the court's suggestion. "Mr. Cox expressed complete willingness to pursue the Court of Appeals suggestion that the President, and he try to reach agreement as to what portions of the subpoena evidence are necessary to the grand jury's task," the statement said.

The two-sentence statement also said, "We are very pleased with the decision, which on first reading of the opinion appears fully to sustain our position."

Tonight, Gerald L. Warren, the President's deputy press secretary, said that the White House was "studying" the opinion. However, the President said previously that he would abide by a "definitive" ruling from the judiciary, but he declined to define what that meant.

Sources at the White House said tonight that the President would simply sit tight and wait for the Supreme Court to decide the matter.

The court acknowledged implicitly that the attempt to find an out-of-court settlement might be as futile as the last attempt.

"Should our hope prove unavailing," the court said, "we think that in camera inspection is necessary and appropriate method of protecting that grand jury's interest in securing

relevant evidence."

### Further Suits Possible

It also noted that further litigation could follow — even without an appeal from tonight's decision — before the tape recordings reached the jury.

The court was rejecting the President's "all-embracing claim of prerogative," it said in its opinion, but nevertheless the President "will have an opportunity to present more particular claims of privilege if accompanied by an analysis in manageable segments."

It specifies, for instance, that where the President asserts that certain portions may not be disclosed because of national defense or foreign relations, he can decline to transmit these portions and ask the District Court to reconsider whether in camera inspection is necessary.

The President, it said, is to give the District Court "all other items covered by the order, with specification of which segments he believes may be disclosed and which not." If either side wishes, the court said, the District Court would then hold a hearing in chambers.

After the hearing, the Court of Appeals went on, the District Court has three options: To sustain fully the President's claim of full privilege; to order disclosure of all or a segment of the material, or to "fashion a complete statement" for the grand jury of whatever parts of the material "bear on possible criminality."

### Nine Conversations

The Court of Appeals—which stayed its own order for five days to permit appeal to the Supreme Court — noted that when the District Court followed the above procedure, it "shall provide a reasonable stay to allow the President an opportunity to appeal."

The Court of Appeals decision came in book form, about 200 pages long including a 41-page "per curiam" opinion representing the five-man majority on the basic ruling (as well as a unanimous ruling on the question of the court's jurisdiction in the case) and two separate opinions by the judges who dissented from the main order.

The majority's ruling, finally, was that the District Court could order disclosure of all portions of the tapes relevant to the grand jury, unless it found the public interest to demand nondisclosure of "particular" items.

The tape recordings sought by Mr. Cox are recordings of nine different conversations held by the President with White House and campaign aides. The conversations—one on the telephone and the others in person—were held on seven different days, the first on June 20, 1972, and the last on April 15, 1973.

One of those conversations,

took place in the President's Oval Office on Sept. 15, 1972, the day that the seven Watergate burglars were indicted for conspiracy and various other offenses. Present were the President, his counsel at the time, John W. Dean 3d, and his staff director, H. R. Haldeman.

In a nationally televised appearance before the Senate Watergate committee last summer, Mr. Dean testified that in that conversation, Mr. Nixon congratulated his counsel on the "good job" he had done in containing the investigation of the break-in.

In a subsequent appearance, Mr. Haldeman testified that the group had discussed the Watergate indictments, but he swore that the President had not congratulated Mr. Dean for thwarting the investigation.

In a letter to Senator Sam J. Ervin Jr., chairman of the Watergate committee, the President refused to release the tapes, saying that he had personally reviewed a "number" of them, and "the tapes are entirely consistent with what I know to be the truth."

"If release of the tapes would settle the central questions at issue," the President wrote, "then their disclosure might serve a substantial public interest that would have to be weighed very heavily against the negatives of disclosure."

"The fact is that the tapes would not finally settle the central issues before your committee."

He also argued that, "as in any verbatim recording of information conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways."

The existence of the tapes became known last July 16 in one of the Senate's committee's most dramatic sessions, when a former deputy assistant of Mr. Nixon took the witness stand as a surprise witness.

### Rationale Is Given

The assistant—Alexander P. Butterfield, now the head of the Federal Aviation Agency—testified that since early 1971 virtually all of Mr. Nixon's official White House conversations had been recorded.

In his testimony, Mr. Butterfield in effect gave the rationale that led to the historic legal battle behind today's decision.

"If one were, therefore, to reconstruct the conversations at any particular date," asked the committee's chief counsel, Samuel Dash, "what would be the best way to reconstruct these conversations, Mr. Butterfield, in the President's Oval Office?"

"Well, in the obvious manner, Mr. Dash," Mr. Butterfield said. "To obtain the tape and play it."

On July 23, acting on behalf of the special grand jury investigating the Watergate break-in, Mr. Cox had a subpoena issued to the President demanding the tape recordings.

In a letter to the United States District Court, Mr. Nixon declined to turn over the tapes, saying:

"I follow the example of a long line of my predecessors as President of the United States who have consistently adhered to the position that the President is not subject to compulsory process from the courts."

But Mr. Cox—the Harvard Law School professor and one-time solicitor General named on May 18 to the special prosecutor's post by Attorney General Elliot L. Richardson after public demands by lawyers and politicians for an independent inquiry — insisted that Mr. Nixon provide the material.

#### Legal Battle Follows

A historic legal battle between the White House and the special prosecutor ensued. The first tentative resolution came on Aug. 29, when Judge Sirica took a stand midway between those of the opposing parties.

He ruled that Mr. Nixon would have to turn over the tapes to the court for an in camera (in his chambers) examination, in which the court would decide whether the tapes were covered by executive privilege.

If the tapes were privileged, Judge Sirica said, he would not turn them over to the prosecutor. In a footnote to his opinion, he said, "The court must determine whether the conditions for privilege exist. Should it so find, it does not then judge the wisdom of withholding evidence in the public interest."

But, Judge Sirica said in his opinion, "if after judicial examination in camera any portion of the tapes is ruled not subject to privilege, that portion will be forwarded to the grand jury at the appropriate time."

He said that the court was "willing" to recognize and give effect to an executive privilege based on the need for Presidential secrecy. He was not entirely clear, however, as to how he would decide the factual issue of whether the material in question was privileged or not.

He did indicate that one of the tests would be the need for the material. Beyond that, though, he said, "If the interest served by a privilege is abused or subverted, the claim of privilege fails."

Both sides appealed to the United States Court of Appeals here. And the court, hoping to deflate the growing constitutional crisis and avoid a showdown between the President and the courts, asked the sides

on Sept. 13 to see if they themselves could work out a compromise.

The court's request was rare.

But it explained it in this way:

"If, after the most diligent efforts of all three concerned there appear to be matters the President deems privileged and the special prosecutor believes necessary and not privileged, then this court will discharge its duty of determining the controversy with the knowledge that it has not hesitated to explore the possibility of avoiding constitutional adjudication."

On Sept. 20, the parties informed the court that they had not been able to agree. With that, the court began work on today's decision.

But to get to that point, the court first had to deal with and ultimately reject President Nixon's two main contentions: That he was immune from compulsory process by the courts, and that his executive privilege was absolute, so he had sole discretion to decide whether or not to disclose Presidential communications.

Even before that, it had to decide whether it had the power to rule on the precise question before it, the power of the President to withhold the tapes from the grand jury. But on this issue, all seven judges who heard the case (the two other members of the court did not take part) did agree.

"All members of this court agree that the District Court has and this court has, jurisdiction to consider the President's claim of privilege," the court said.

#### Question of Immunity

Then, after recounting the background of the case, the court took up the question of immunity.

"The Constitution makes no mention of special Presidential immunities," the court said. "Indeed, the executive branch is afforded none. This silence cannot be ascribed to oversight."

The President's counsel, the court went on, "nonetheless would have us infer immunity from the President's political mandate, or from his vulnerability to impeachment, or from his broad discretionary powers. These are invitations to refashion the Constitution, and we reject them."

As for the argument regarding impeachment, the court said that the impeachment clause, by mentioning postimpeachment criminal proceedings, "itself reveals that the incumbency does not relieve the President of the routine legal obligations that confine all citizens."

The court turned next to the issue of executive privilege and

the related one of separation of powers. Basically, it found that the fundamental American precept that the branches of government be separate would be harmed, rather than bolstered, if the executive were allowed an absolute executive privilege.

The court did recognize the existence of executive privilege, acknowledging that there has been "longstanding judicial recognition" of the privilege. But it also noted that courts had also long asserted that "the applicability of the privilege is in the end for them and not the executive to decide."

#### 1807 Case Cited

The court cited the case of U. S. v. Burr, where the Supreme Court in 1807 ruled that a subpoena could be issued to President Jefferson, as establishing the principle that "application of executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure on a particular case."

In this case, it said, the presumption in favor of privilege "must fail in the face of the uniquely powerful showing made by the special prosecutor in this case."

It was in this area that the court appeared to be taking a tougher stance than Judge Sirica did. Judge Sirica had said that the President's claim of privilege would be rejected only upon strong evidence.

The phrase had caused some confusion, and some observers had interpreted it to mean that Judge Sirica would rule that there was no privilege only if the conversations disclosed that the President was, as tonight's decision put it in discussing the phrase, "not engaged in the performance of his constitutional duty."

The Court of Appeals said that if Judge Sirica had in fact meant this, "we cannot agree." The grand jury showing of need "in no sense relied on any evidence that the President was involved in, or even aware of, any alleged criminal activity."

The court said that it freely assumed for the purposes of the opinion that the President was indeed "engaged in the performance of his constitutional duty," and that nonetheless the District Court could order disclosure.