

Nixon Tape Ruling Unclear on What Judge May Inspect

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Despite President Nixon's decision to comply with a court ruling and to turn over nine tape recordings to U.S. District Court Chief Judge John J. Sirica, it was not clear yesterday how much Sirica will be allowed to inspect, and indeed whether he will be given the original tapes.

The apparent ambiguity results from the Oct. 12 ruling of the U.S. Court of Appeals. In that ruling, the court outlined a procedure for President Nixon to turn over the tapes and other materials to Sirica for his secret inspection. The Court of Appeals procedure did not deal in detail with potential problems that may arise as the decision is implemented.

The fundamental problem of the court's ruling is that it does not absolutely and without qualification order President Nixon to turn over to Sirica in their original state all the materials sought previously by the special Watergate prosecutor. Nor does the decision give Sirica the same access to the White House tapes that President Nixon apparently had offered to Sen. John C. Stennis (D-Miss.) in Mr. Nixon's attempt to reach an out-of-court settlement of the issue.

"In so far as the President makes a claim that certain material may not be disclosed because the subject matter relates to national defense or foreign relations," the court said, "he may decline to transmit that portion of the material and ask the District Court to reconsider whether in camera inspection of the material is necessary."

The Court of Appeals ruling thus leaves open the question whether President Nixon may "transmit" tapes to Sirica after having first taken out "that portion" of the tape dealing with "national defense or foreign relations" or whether the issue must first be discussed with Sirica before any alteration is made.

In the event that President Nixon determines that a portion of the materials to be inspected by Sirica does deal with national defense or foreign relations, the court said, "the special prosecutor is entitled to inspect the claim and showing and may be heard thereon, in chambers. If the judge sustains the privilege, the text of the government's statement will be preserved in the court's record under seal."

The court thus leaves it to the White House initially to describe what it is that President Nixon does not desire to turn over to Sirica for inspection. "Without compromising the confidentiality of the information," the court said, "the analysis should contain descriptions specific enough to identify the basis of the particular claim or claims."

Without having access to the original tapes in their unaltered form, however, Sirica has no guarantee that the White House "analysis" envisioned by the court would be an accurate statement of the portion that President Nixon might wish to withhold.

President Nixon's chief legal adviser on the tapes controversy, University of Texas Prof. Charles Alan Wright, referred briefly to the procedure as he said he understood it during a press briefing on Tuesday.

"I am informed that there is at least one tape, perhaps more, that contains national security information, Wright said. "The Court of Appeals order is, where we believe there is anything that re-

gards national security, that we should make a submission to Judge Sirica in chambers as to why we believe this involves the national security; that if he accepts our decision on that, that portion of the tape is excised. If he does not, the relevant showing is sealed and we are allowed to take an appeal to the Court of Appeals on whether it truly was or was not national security."

Wright did not say in what manner the "portion of the tape" would be "excised" if Sirica agreed. Would it be physically cut from the original tape? Would the original tape be copied with that portion deleted? Or would the tape be played to Sirica by a White House representative so that portion to be deleted would be skipped?

The procedure outlined by the Court of Appeals envisioned that the special prosecutor would be a party to the decision when the White House was requesting not to turn over portions of the tapes to Sirica. However, President Nixon abolished the office of special prosecutor on Saturday.

Who will take the special prosecutor's place? "I would assume that the Department of Justice would," Wright said Tuesday when asked that question.

The office of special prosecutor was established after the Senate insisted last May that Elliot Richardson would not be confirmed as Attorney General without his appointing an independent special prosecutor, reflecting the lack of confidence in the ability of the administration to conduct an investigation of itself.

If the White House is allowed by Sirica to alter the tapes or to submit a copy of the tapes with portions deleted, what assurance does he have that the deleted portions deal with national security only? Sirica is understood to be considering employing electronics experts to examine the tapes, but some authorities contend that alterations of tapes done by experts cannot be detected.

In the absence of an independent special prosecutor, what assurance is there that a White House definition of national security will be properly contested by whoever stands in for the special prosecutor?

The claim already has been made by former White House officials that the break-in at the office of Daniel Ellsberg's psychiatrist was a legitimate act under the President's "inherent power" to protect national security.

Ad, finally, if the issue comes back to the Court of Appeals over whether a matter is legitimately national security or not and if the White House position is rejected, what assurance is there that President Nixon will not again attempt to sidestep an adverse court ruling thus bringing the issue back to where matters stood over the past weekend?