

Court Nips Senate Bid For Tapes

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The U.S. Court of Appeals yesterday unanimously rejected the Senate Watergate committee's longstanding subpoena for five of President Nixon's Watergate tape recordings.

Speaking for the court in a 17-page opinion, Chief Judge David L. Bazelon said the committee had failed to show a pressing enough need for the recordings in light of "the peculiar circumstances of this case."

The decision was a sharp blow for the Senate committee, which discovered the existence of the tapes last July. Its lawyers had argued that the five recordings were no longer confidential and that any remaining claims of executive privilege for them were especially misplaced in view of the allegations of wrongdoing concerning Mr. Nixon's conduct.

The court, however, held that the tapes were still privileged even though they have been turned over to the Watergate grand jury and the House Judiciary Committee and even though the White House has now made censored transcripts public.

Bazelon said "the confidentiality of the presidential decision-making process" was still too important to cast aside without a compelling showing of the Watergate committee's own need for the tapes.

The ruling appeared to go farther in support of executive privilege than any other judicial decision so far. The Senate Watergate committee's chief counsel, Samuel Dash, refused to comment on it.

A successful petition for Supreme Court review seems unlikely since the

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committee is scheduled to go out of business June 30.

Listing the House Judiciary Committee's ongoing impeachment inquiry as one of the "peculiar circumstances" that influenced its decision, the court called the Senate committee's demand for the tapes "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the committee's subpoena."

The court said it says no reason why the committee could not complete its own work and come up with legislative recommendations and remedies for the Watergate scandal without the recordings.

Despite the different outcome, Bazelon described the ruling as thoroughly consistent with the appeals court order last fall requiring Mr. Nixon to surrender most of the same tapes for the Watergate grand jury.

In that 5-to-2 decision, rendered last October, the court said that presidential conversations were "presumptively privileged" but held that the presumption "must fail in light of the uniquely powerful showing" which then-Watergate prosecutor Archibald Cox made on the grand jury's behalf.

Bazelon said yesterday that last October's decision was carefully designed "to ensure that the President and those upon whom he relies in the performance of his duties could continue to work under a general assurance that their deliberations would remain confidential."

So long as that assurance can be overcome "only by a strong showing of need by another institution of government," Bazelon said, "the effective functioning of the presidential office will not be impaired."

Judges J. Skelly Wright, Carl E. McGowan, Harold Leventhal and Spottswood W. Robinson III joined in Bazelon's decision for the court. Judges Malcolm R. Wilkey and George E. Mackinnon concurred in separate one-page opinions.

First subpoenaed by the Senate committee last July, the five tapes at issue involve conversations between Mr. Nixon and former White House counsel John W. Dean III on Sept. 15, 1972, and Feb. 28, March 13 and March 21, 1973. Two meetings were held on March 21.

The dispute went to the

appeals court after U. S. District Court Judge Gerhard A. Gesell dismissed the Senate committee's lawsuit in February solely on the grounds that release of the tapes might prejudice forthcoming Watergate criminal trials.

Gesell at the same time had rejected Mr. Nixon's blanket claims of executive privilege for the recordings. He held that the President should at least have submitted a particularized statement of just what portions of the five tapes he was still unwilling to give up.

Bazelon, however, said a blanket claim of privilege was good enough unless a strong case for overturning it could be presented at the outset.

"We find that the select committee has failed to make the requisite showing," the ruling said.

The court also rejected the contention of Senate lawyers that the claim of privilege was misplaced because the committee's hearings last year had made out "a prima facie case that the President and his closest associates have been involved in criminal conduct."

"It is true, of course," Bazelon said, "that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible wrongdoing."

But even under last October's ruling, which led to surrender of the tapes for the grand jury, Bazelon said "the showing required to overcome the presumption of confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal, but instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment."

The court pointed out that the House Judiciary Committee already has copies of all five for its impeachment inquiry.

"So far as these subpoenaed tapes are concerned," Bazelon wrote, "the investigative objectives of the two committees substantially overlap. He said there was no reason to overturn a claim of executive privilege simply so that both committees could have the tapes for its investigative purposes. The Senate committee's demand for them,

the ruling said, was, from a congressional standpoint "merely cumulative."

As a result, the court reasoned, the committee's need for the tapes boiled down to the question of whether they are vital "to the performance of its legislative function."

The judges held that the transcripts made public by the White House, even though marked by deletions and ambiguities, were sufficient for any legislative recommendations.

The Senate committee, Bazelon wrote, had not pointed out any "specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain.