

COURT SAYS NIXON CAN BE QUESTIONED

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Orders Him to Testify in
Civil Lawsuit Involving
Wiretap of Halperin
NYTimes

By LESLEY OELSNER
Special to The New York Times

WASHINGTON, Sept. 24—
Former President Richard M.
Nixon testified under oath in a de-
position before a security Council official.

Mr. Nixon had asked the
Federal District Court, to
time that a President or former
in such discussions.

Claim Is Questioned

Judge Smith also suggested
that a former President might
not be entitled to claim this
privilege at all.

"It is questionable whether
an ex-President retains the ca-
pacity to invoke Presidential
confidentiality—a form of exe-
cutive privilege," Judge Smith
said in a five-page opinion and
order filed late this afternoon.

"A former President should
not be subjected to endless
subpoenas and depositions con-
cerning actions taken during
his administration," he said.
"The incumbent President, the
'head of the department,' can
claim the privilege on a prede-
cessor's behalf." But he added:

"Privilege has not been in-
voked by the incumbent Execu-
tive. Mr. Nixon makes the claim
on his own behalf as a private
citizen."

Judge Smith did not actually
decide the issue of whether a
former President could assert
privilege, apparently because he

did not consider it necessary.

Instead, the judge found that
even if it was assumed for the
sake of argument that a former
President could make the claim,
the necessity for the testimony
in this case outweighed the
interests that would be pro-
tected by Mr. Nixon's claim.

Judge Smith thus decided, in
effect, that the claim of priv-
ilege could be overridden in at
least some circumstances in
civil cases.

Landmark Decision

Last year, in a landmark case
involving the subpoena of Mr.
Nixon's tapes of 64 Watergate-
related White House conversa-
tions, the United States Su-
preme Court ruled that Presi-
dential privilege could be over-
ridden by compelling need in
criminal cases.

In a footnote to that deci-
sion, however, the Court left
unclear the effect of a claim of
privilege in a civil suit, saying:

"We are not here concerned
with the balance between the
President's generalized interest
in confidentiality and the need
for relevant evidence in civil
litigation."

Dr. Harperin and his family
are suing Mr. Nixon and sev-
eral others—including Secre-
tary of State Kissinger and
John D. Ehrlichman, John N.
Mitchell, H. R. Haldeman and
Robert C. Mardian, former
Nixon Administration officials
—for allegedly wiretapping the
Halperin telephone illegally for
21 months beginning in 1969.

They are asking for a dam-
age award of \$100 a day for
the length of the wiretapping
—the damage amount set in
the Federal statute on illegal
wiretapping—as well as injunc-
tive relief banning the use of
records of overheard conversa-
tions.

Mr. Nixon, as Judge Smith
noted in his opinion today, has
admitted authorizing the wire-
tap program that included Dr.
Halperin—a program in which

13 officials and four newsmen
were overheard on the taps,
purportedly in an attempt to
find and stop leaks of classified
information.

Archivist Testifies

Special to The New York Times

LOS ANGELES, Sept. 24—
Mary Walton Livingston, a long-
time employe at the National
Archives, testified here today
about the activities of Ralph G.
Newman, the Chicago bookstore
owner who appraised Presi-
dent Nixon's Vice-Presidential
papers.

Her remarks came during the
fourth day of the Government's
case against Frank DeMarco
Jr., the lawyer accused of pre-
paring false documents to give
Mr. Nixon a substantial tax de-
duction on a donation of his
Vice-Presidential papers to the
National Archives in 1969.

Shirrah Neiman, assistant
Watergate special prosecutor,
contends that Mr. DeMarco
made a false statement to the
Internal Revenue Service when
he said he had discussed the
Noxon papers with Mr. New-
man in April, 1969.

Mr. Newman told Congres-
sional investigators that he and
Mr. DeMarco had this conver-
sation in late October, 1969.
The timing is considered cru-
cial because the deduction Mr.
Nixon received for the 1969
donation was disallowed by the
I.R.S. in 1974 because it had
been made after July 25, 1969,
when a new tax law prohibiting
deductions for such gifts went
into effect.

Mrs. Livingston testified that
in April, 1969, Mr. Newman
had looked only at papers in
Room 14-W of the Archives
building, not those in Room
19-E.

In his opening statement, Jay
Horowitz, the Watergate spe-
cial prosecutor in charge of the
case, told the jury that only
the deeded papers from Mr.
Nixon's 1968 gift were in Room
14-W. He also said the 1969 pa-
pers were in Room 19-E and
that Mr. Newman did not enter
Room 19-E until November,
1969.

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