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Cox's Claim to the Tapes

President Nixon might have half a leg to stand on if he were only battling the Senate Watergate committee over access of the tapes of his phone and office conversations. But unfortunately for the President, special Watergate prosecutor Archibald Cox is also after the tapes.

Mr. Cox has an overwhelming case. If he is forced to press it, he is in a position to engage the Supreme Court, divide the administration and push the administration further down the road to impeachment.

The Cox case for access to the tapes is more weighty than the case of the Watergate committee for a variety of legal and political reasons. For one thing, there is the separation of powers issue.

Mr. Nixon is the head of the executive branch of government, and the Senate committee is part of the legislative branch. Each branch is entitled to a certain confidentiality in its deliberations. That applies to relations between a judge and his clerks, and a senator and his aides, as much as to a president and his advisers.

Thus, there is at least the color of an argument for the proposition that Mr. Nixon can keep the inner deliberations of the White House away from the senators. If nobody else, tendentious lawyers can confuse the issue by arguing that the doctrine of executive privilege entitles the President to withhold the tapes from the committee.

But Mr. Cox is part of the executive branch. He was appointed by Mr. Nixon's Attorney General, Elliot Richardson, with the assent of the President.

To claim, as the White House is now doing, that he would breach the separation of powers by using the tapes for proceedings in court is absurd. It is like saying that if the President and Ron Ziegler decided to bump off Pat Nixon, a duly authorized special prosecutor could be denied access to the evidence because of executive privilege.

Apart from eliminating the phony constitutional issue, Cox's position heightens the true issue—the criminal issue. The basic fact in the fight for the tapes is that they contain evidence of criminal action.

For example, the tape of the President's meeting with John Dean and H. R. Haldeman on Sept. 15, 1972, which Mr. Cox has specifically requested, will show one of three things.

Either Dean committed perjury in telling the Senate Watergate committee he was congratulated by the President for his role in the cover-up. Or Dean and Haldeman participated in the cover-up (and the obstruction of justice) without the President's knowledge. Or all three were involved in the crime of obstructing justice.

There is no excuse in the common law or the constitution for any person to withhold evidence of a crime. Indeed the present Supreme Court, in an opinion last June, cited Jeremy Bentham's dictum that not even the Prince of Wales, or the Archbishop of Canterbury or the Lord High Chancellor could refuse to give evidence in a petty crime involving a chimney sweep.

But Cox's mandate, as an official of

the Justice Department, is precisely to investigate crime. His directive from Attorney General Richardson gives him "full authority for investigating and prosecuting . . . all offenses arising out of the 1972 presidential election." Thus in resisting Cox's demand for the tapes, the President is standing on the weakest possible ground. He is refusing the most fundamental of his duties. He is refusing to execute the laws.

Finally there are the politics. Unlike at least some members of the Senate committee, Mr. Cox does not have an ax to grind. He has not aired grievances to the press or the public. Not even Mr. Nixon, in the fullness of his self-compassion, can argue that Mr. Cox has been trying to "get" him.

In these circumstances, Cox is in strong position to go after the tapes. He is going to ask the courts to subpoena the material. He will surely be able to take the case to the Supreme Court, perhaps convoked in extraordinary session this summer. It is hardly thinkable that his request will be denied even by the Nixon court.

In addition, Cox has some credit to draw down inside the administration. Attorney General Richardson, in particular, is under pressure to stand up for his man. If he doesn't he will show himself to be a complete White House flunk. If he does, there will be additional pressure on the White House to give way.

Lastly, Cox can go public. Apart from the few documents he has already released, he has an abundant correspondence with J. Fred Buzhardt, the



Archibald Cox

White House counsel on Watergate. It runs from the end of May to the present. It shows who has been careful, responsible and patient in an effort to discover what happened. It shows who has been cooperative.

What all this means is that Mr. Cox, not the Senate committee, should lead the battle of the tapes. He has by far the best case. He can give Mr. Nixon and his legal hirelings a taste of the truth that they will never forget. If he does not finally acquire the tapes, he can dramatize what more and more people are coming to understand—that the fit place for dealing with the President's role in Watergate is an impeachment proceeding.