# Access to Tapes Tests Cox' Power

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The controversy over access to President Nixon's tape recordings of staff conferences has developed into the first genuine test of the independence of special Watergate prosecutor Archibald Cox.

It is perhaps the first area into which Cox has ventured where he risks being told by his nominal superiors—Attorney General Elliot L. Richardson and the President himself—that he has gone too far.

Until now, Cox has moved with boldness and impunity to subpoena Mr. Nixon's tapes and to challenge in the federal courts the President's broad view of executive privilege.

At a press conference yesterday, the special prosecutor implied that he has Richardsons explicit support, because the Attorney General originally "made it clear I would be entirely free to pursue the evidence."

But Richardson has not spoken directly on the issue of the tapes.

The Attorney General issued a statement Tuesday, observing that Cox was "acting in full accord with the requirements of his job." Richardson added to reporters, however, that he did not necessarily feel that Cox has a clear "right of access" to the tapes.

And a day earlier, Charles A. Wright, the University of Texas law professor who is consulting with the White House on the matter, reminded Cox in a letter that he is "an ordinary prosecu- . . . subject to the instructions of your superiors, up to and including the President."

*News Analysis*

The question that was being asked in high Justice Department circles as the week wore on was whether and when the White House, if it is losing in court, might choose to exert that authority and issue "instructions" that undercut Cox.

Some sources in the department pointed out yesterday that one chip the President might ultimately choose to play is the standing rule that no government attorney may appeal a lower-court decision without the permission of the solicitor general, who generally represents the federal government in all cases before the Supreme Court.

The current solicitor general is a new man, Yale law school Professor Robert H. Bork, whose views on the issue in the tape controversy are not publicly known.

But Bork, who is himself responsible to the President through the Attorney General, could theoretically be directed by his superiors to step into the case.

According to the official "duties and responsibilities" spelled out for Cox when he was appointed, he has "full authority" for, among other things:

- "Reviewing all documentary evidence available from any source, as to which he shall have full access."
- "Determining whether or not to contest the assertion of 'executive privilege' or any other testimonial privilege."
- "Initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals."

The general understanding at Justice now is that Bork need not be consulted, even in a pro forma manner, before Cox files or arques an appeal.

Bork is expected to take a back seat if and when the issue reaches the Supreme Court, with two other professors, Cox and Wright, fighting it out before the justices — unless, of course, the White House orders him to get involved.

One high-ranking Justice Department official suggested yesterday that the Supreme Court might even invite Bork to enter the case, more or less as a neutral amicus curiae (friend of the court) whose views would be useful in resolving the dispute.

But another observed that the high court may simply refuse to take the case as posed by the Cox subpoena to the President, on the grounds that it is an "internal executive branch squabble" without "properly adverse parties."

Article III of the Constitution, which established the federal judiciary, says that "shall extend . . . to controthe power of the courts versies to which the United States shall be a party."

The official noted that it is unclear whether the courts have jurisdiction over a controversy between two officials of the executive branch, the President and the special prosecutor.

That problem would be avoided, of course, if the first subpoena case to reach the high court were the one growing out of the demand for the President's tapes by the Senate select Watergate committee.

In that event, the justices would be mediating between the executive and legislative branches, a role they have performed in the past—most recently, for example, in cases concerning the involvement of Sen. Mike Gravel (D-Alaska) in disclosure of the Pentagon Papers and the criminal charges against former Sen. Daniel Brewster (D-Md.).

But there too, Bork's potential role as solicitor general would be a major question mark. If he represented the White House against the Senate, as he would nirmally be expected to do, he might appear to have a conflict of interest in the companion case concerning the Cox subpoena.