

COX PLEA ON TAPES DENIES PRESIDENT IS 'PROPER JUDGE'

Prosecutor, in Court Brief,
Says Nixon Is 'Bound'
to His Accused Aides

POLITICAL RISKS CITED

Evidence Called Material to
Public Charges, Power
and Place in History

By WARREN WEAVER Jr.

Special to The New York Times

WASHINGTON, Aug. 13 — Archibald Cox, the Watergate special prosecutor, argued today that President Nixon could not be "a proper judge" of whether the public interest requires his making tape recordings of White House conversations available to a grand jury investigation.

Mr. Cox presented his argument in a brief filed in Federal

Summary of the brief
appears on Page 20.

District Court, the latest move in the prosecutor's attempt to win a court decision forcing the President to honor a subpoena and make the tapes available.

The brief noted that the President's "highest and closest aides and associates have been accused in sworn testimony" before the Senate committee headed by Senator Sam J. Ervin Jr.

The President, Mr. Cox declared, "is bound to them not only by the natural emotions of loyalty and gratitude but also by the risk that his present political power and future place in history will be linked to the effect of disclosure to the grand jury on them."

Personal Role Cited

"The evidence on the tapes also may be material to public accusations against the respondent [President Nixon] himself, a question to which he can hardly be indifferent. We call attention to these facts without disrespect to the respondent or his office," the brief continued.

Even if Mr. Nixon could disregard his own interest in the dispute, the prosecutor said, "confidence in the integrity and impartiality of the legal system, as between the high and lowly, still would be impaired through violation of the ancient precept that no man shall be the judge of his own cause."

Reply Due Friday

The Cox brief was a 67-page response to a White House brief filed last Tuesday; after a White House reply on Friday, the case will be argued on Aug. 22.

Today's legal statement, the first full exposition of the prosecutor's case against the President, made these major points:

¶The Nixon lawyers' assertion that the President has "the power and thus the privilege to withhold information" on the basis of his own judgment "runs contrary to our entire constitutional tradition" by equating physical power with legal privilege.

¶The President waived any

Continued on Page 20, Column 1

Continued From Page 1, Col. 1

right of confidentiality he may have enjoyed as to the White House conversations, permitting "a flood of incomplete and contradictory testimony" and adding, in some cases, "his own version."

"Now respondent [the President] asserts a privilege to withhold the most complete record available to supplement faulty recollections, resolve contradictions and fill in important details. The law is not so capricious," the brief said.

¶Making the tapes available to the grand jury now will not threaten the access of future Presidents to free and candid advice from aides because "surely there will be few occasions upon which a grand jury will have similar cause to believe there is material evidence of criminality of high

officials in the papers and documents in the executive offices of the President."

¶The President does not have any absolute "executive privilege" to withhold information, and the courts, rather than the President, have the power to decide when his qualified privilege outweighs the public interest in making such facts available.

No 'Absolute Authority'

The Cox brief quoted from a 1971 decision of the United States Court of Appeals for the District of Columbia, which held that an executive department official could not be given "absolute authority to determine what documents in his possession" should be permitted to come before the court.

"Otherwise," the court said, "the head of any executive department could have the power on his own say-so to cover up all evidence of fraud and corruption when a Federal court or grand jury was investigating malfeasance in office, and this is not the law."

As Mr. Cox filed his papers, lawyers for the Senate Watergate committee and the White House agreed, at least tentatively, to speed the course of a parallel lawsuit, by the committee against the President with regard to producing some tapes.

The committee filed its action last Thursday, asking that the President be required to reply in 20 days instead of the 60 normally given the Government. While reserving their right to ask for more time, the White House lawyers accepted Aug. 29 as the date for answering the Congressional suit.

The special prosecutor, in his brief, said it was wrong to regard his suit against the President "as a struggle between the powers of the judiciary and the prerogatives of the President."

"Rather," he said, "what is

involved is the respondent's refusal to respond to a demand from the people, speaking through their organ, the grand jury. Unlike a monarch, the President is not the sovereign."

Mr. Cox maintained that it was irrelevant to question, as the White House attorneys did, whether the courts could force Mr. Nixon to comply with their orders as long as there was no legal question that they had the authority to issue them.

"The effect of a President's physical power to disobey a court order is wholly specula-

tive at this juncture," the prosecutor's brief observed, "and undoubtedly will remain so. There is no reason to believe that respondent would disregard a final binding order fixing legal responsibilities.

"Certainly, the contention that the court could not force him into prison does not strip the court, as opposing counsel mistakenly argue, of the jurisdiction to order compliance with a valid subpoena."

Mr. Cox declared that the contention of the President's lawyers that the investigation could be advanced with evidence other than that in Mr. Nixon's control amounted to "attempting to wash their hand of the risk that any resulting prosecution might have to be abandoned if exculpatory evidence were being withheld."

Inquiry Held Important

"Nor can it be argued," the prosecutor continued, "that termination of this grand jury investigation would be a tolerable or just price to pay to allow respondent 'the choice' of refusing to produce the evidence. The seriousness of the putative offenses and the high offices held by these possible implicated preclude that solution."

At several points in the brief, Mr. Cox quoted from Prof. Charles Alan Wright of the University of Texas, who is working as a legal consultant to the White House on the case. Mr. Cox used statements from Professor Wright's text book on Federal practice and procedure against the arguments the professor made on behalf of the President.

Mr. Cox quoted Professor Wright as saying that the courts should determine the validity of a claim of executive privilege and that scholars had found little support for basing executive privilege on the separation of powers.

The prosecutor cited his opponent as saying of instances in which executive privilege was claimed that "in other cases in which the litigant's need for the information has seemed to outweigh the Government's interest in secrecy, the claim of privilege has been overruled and disclosure has been ordered."