# 'False Conflict'

NYT 5/16/77

When the members of the Constitutional Convention of 1787 created this country's structure of Government, they did not divide it into separate, watertight compartments. The power of governing was shared among the executive, legislative and judicial branches — each of them checking, balancing and restraining the other two.

Thus, Congress has most of the legislative power but its approval of a bill does not make it a law until the President signs it or it is passed by two-thirds majority over his veto. Subsequently, the courts interpret the law's precise meaning and, if they so decide, they can throw it out as unconstitutional. What is true of the legislative power is true of all the other powers of government. None is exempt from judicial review; none immune from the interaction of the different branches; none is outside the bounds of the Constitution.

In their legal brief on the Watergate tapes, President Nixon's attorneys were therefore on weak ground when they asserted that the constitutional separation of powers precluded the courts from commanding him to make those tapes available to a grand jury. "It would be wholly inadmissible for the President to seek to compel some particular action by the courts. It is equally inadmissible for the courts to seek to compel some particular action from the President," the White House brief declared.

Special prosecutor Archibald Cox effectively rebutted that argument in his reply this week. Mr. Cox pointed out that a President can compel "some particular action by the courts" because the courts have a legal duty to give effect to his executive orders. Similarly, the courts can compel a particular action from a President as the Supreme Court did in the 1952 steel strike when it directed President Truman to restore the steel mills to their private owners.

The Cox memorandum cites Justice Jackson's epigrammatic observation in his concurring opinion in the steel case: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

Since interdependence and reciprocity are the norms of behavior envisaged by the Constitution, it is farfetched to contend, as Mr. Nixon's lawyers do, that a Chief Executive could possibly have the right — on his own authority and beyond any review by the courts — to withhold evidence of putative crimes from a grand jury. In Mr. Cox's phrase, it is "a false conflict" to frame that question in terms of some vast struggle between the powers of the courts and the prerogatives of the President.

Moreover, even if the tapes of the President's conversations relating to Watergate could be regarded as covered by executive privilege, Mr. Nixon has effectively waived that privilege. He did so by allowing H. R. Haldeman, by then a private citizen, to listen to one of the tapes prior to his testimony before the Senate Committee. J. Fred Buzhardt, special counsel to the President, has also presumably had access to the tapes in preparing the White House analysis of the conversations between Presiden Nixon and John W. Dean 3d. Finally, the President set forth in his May 22 statement his own version of some of the disputed conversations. No public interest is served by these capricious, one-sided incomplete disclosures.

Any tapes having to do with Watergate matters must go to the grand jury, whether they hurt or help the President's case. Only a court can decide what is relevant evidence. A President like every other citizen cannot be a judge of evidence affecting his own interests and his own past and present associates.