

Nixon Brief Denies Courts Can Force Tapes' Release

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By WARREN WEAVER Jr.

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WASHINGTON, Aug. 7 — White House lawyers told a Federal district judge today that the courts had no power to force President Nixon to provide a grand jury with tape recordings of his conversations if he believed it was not in the public interest.

In a 10,000-word brief, the President's attorneys maintained that, even if those conversations involved details of a criminal plan, Mr. Nixon had the right to withhold them so as to protect the confidentiality of Presidential communications.

The brief was the first detailed statement of Mr. Nixon's

grounds for refusing to make public the tapes sought by Archibald Cox, the special Watergate prosecutor. It contended that Congress had a constitutional right to impeach

Excerpts from Nixon brief are on Page 18.

the President and that the people could vote him out of office but that he was otherwise immune from the court orders applicable to other citizens as long as he was in office.

The six-man Nixon defense team also contended, for the first time, that the President could not be prosecuted for any crime until after he was impeached, convicted and removed by Congress. This question is not directly involved in the lawsuit over the tapes but has been in the forefront of recent political speculation.

"If there were any question of Presidential involvement in the crimes the special prosecutor is investigating—and the President's statements have

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categorically denied any such involvement," the brief stated, "this would not be within the jurisdiction of this court, the special prosecutor or the grand jury.

"The President of the United States is not above the law. He is liable to prosecution and punishment in the ordinary course of law for crimes he has committed, but only after he has been impeached, convicted and removed from office."

Argument Set Aug. 22

In a three-minute ceremony in Federal District Court here this morning, J. Fred Buzhardt, special counsel to the President, filed his brief with Chief Judge John J. Sirica, who set dates for a further exchange of legal papers and ordered Mr. Cox and the White House lawyers to hold oral arguments before him on Aug. 22.

However the judge rules, an appeal to the United States Court of Appeals for the District of Columbia, and then to the Supreme Court, seems inevitable. Depending on the pace of judicial action, the high court could get the case in September or October.

The claim of Presidential immunity from legal process raised the question whether Mr. Nixon would abide by any Supreme Court decision ordering him to turn the tapes and other documents over to Mr. Cox and the grand jury investigating the Watergate affair.

White House spokesmen have said that the President would obey a "definitive decision" by the high court, but his attorneys argued today that he was not required to do so because the judicial branch was not superior to the executive branch.

In the brief signed by six of them, the President's lawyers made the following major contentions:

¶The courts have the power to subpoena the President, but this does not create any obligation on his part to produce the information being sought.

¶Presidents from George Washington to the present have refused to provide information to Congress, a practice recently called executive privilege, and repeated usage has confirmed the practice as constitutional.

¶The White House tapes contain "information of a highly confidential nature not relevant to this inquiry"; if they were released, "No person could ever be assured that his own frank and candid comments to the President would not eventually be made public."

¶The President, in his statement of May 22 on the Watergate scandal, did not agree to suspend executive privilege as to the tapes but only as to "testimony concerning possible criminal conduct."

¶Mr. Nixon has not waived his right to exercise executive privilege with respect to the tapes, either by any statement of cooperation with the grand jury or by allowing them to be heard by "a very few people in and out of government, in whom he seeks advice."

Other Evidence Cited

The Nixon brief declared that withholding the tapes would not prevent the prosecution of "any who have betrayed his confidence by committing crimes" because Mr. Cox should be able to produce enough other evidence.

"But the President has concluded," his lawyers said, "that even if he should be

mistaken about this in some particular case, the public interest in a conviction, important though it is, must yield to the public interest in preserving the confidentiality of the President's office."

Submitting the brief in addition to Mr. Buzhardt were Leonard Garment, counsel to the President; Prof. Charles Alan Wright of the University of Texas, a White House legal consultant, and three staff attorneys—Douglas M. Parker, Robert P. Andrews and Thomas P. Marinis Jr.

Judge Sirica ordered Mr. Cox, who was in the courtroom, to file an answer to the White House brief by Aug. 13 and gave the President's lawyers until Aug. 17 to respond to that.

Second Suit to Be Filed

Later this week, a second Watergate lawsuit will be initiated when attorneys for the Senate select committee headed by Senator Sam J. Ervin Jr., Democrat of North Carolina, go into the same court seeking to force the President to pro-

vide the taped conversations to them.

Legal authorities believe the Cox suit, to which the White House responded today, will be decided first. Senator Ervin has expressed some concern whether the Federal court has jurisdiction to consider an action brought by the committee.

The Buzhardt team's brief seemed to encounter the most level difficulty when it argued that the doctrine of executive privilege could be extended to keep from a grand jury any conversations involving criminal activity that might have taken place in Mr. Nixon's presence.

"Although remarks made by others in conversations with the President may arguably be part of a criminal plan on their part," the White House lawyers maintained, "the President's participation in those conversations was in accordance with his constitutional duty to see that the laws are faithfully executed."

A Presidential Claim

"It is the President, not those who may be subject to indictment by this grand jury, who is claiming executive privilege.

"He is doing so, not to protect those others, but to protect the right of himself and his successors to preserve the confidentiality of discussions in which they participate in the course of their constitutional duties. and thus ultimately to

protect the right of the American people to informed and vigorous leadership from their President of a sort for which confidentiality is an essential prerequisite."

The Nixon attorneys maintained that any decision requiring the President to produce recordings or notes of his private conversations would make it "sim,ly impossible for any President of the United States to function" thereafter.

"The creative interplay of open and spontaneous discussion is essential in making wise choices on grave and important issues," the White House brief maintained. "A President would be helpless if he and his advisers could not talk freely, if they were required always to guard their words against the possibility that next month or next year those words might be made public.

The Issue Defined

"The issue in this case is nothing less than the continued existence of the Presidency as a functioning institution."

Mr. Cox is expected to tell Judge Sirica in response that no President is immune from legal process as the Kings of England are, and that Mr. Nixon does not enjoy any absolute right, free from review by the courts, to determine what White House records can be withheld from a grand jury.

Any exercise of executive privilege, the prosecutor has said, must be weighed against the social importance of making the particular information available for law enforcement, with a judge entitled to make such a decision.