Summary of Brief Filed by Cox Seeking the White

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WASHINGTON, Aug. 13—Following is a summary by Archibald Cox, the special Watergate prosecutor, of the legal brief filed by Mr. Cox in connection with his suit to compel President Nixon to provide a grand jury with recordings of White House conversations and related documents:

The President has an enforceable legal duty not to withhold material evidence from a grand jury. The grand jury occupies a fundamental position in the administration of public justice. There is no exception for the President from the guiding principle that the public, in the pursuit of justice, has a right to every man's evidence. These propositions were recognized as early as 1807 in United States v. Burr 25 Fed. Cas. 30 No. 14,692D (C.C.D. Va. 1807). They have critical importance in a grand jury inquiry into gross misconduct by high officals in the executive offices of the President.

The decision in United States v. Burr is but a specific application of two historic constitutional principles: (1) Even the highest executive officials are subject to the rule of law, which it is emphatically the province and duty of the courts to declare; and (2) the rights and obligations of the President and other high executive officers are defined and judicial orders are entered on the premise that these officials, rather than interpose their naked power, will obey the law's explicit and particularized commands.

Immunity Claim Scored

Accordingly, the Court of Appeals for this circuit, like every other Federal court, has rejected the claim that absolute executive privilege flows from the constitutional separation of powers. It has ruled that it is for the judiciary—not the executive—to determine what materials may be held confidential because of a particular exigency and what evidence must be produced. Committee for Nuclear Responsibility, Inc., v. Seaborg, 463 F. 2D 788, 792-94 (D.C. Cir. 1971).

The subpoena was properly directed to the President, and the court has power to enforce it. Counsel's claim that the President, because of his great powers, has immunity from orders enforcing legal obligations is inconsistent with our entire constitutional tradition.

The President cannot be limited by judicial intrusion into the exercise of his constitutional powers under Article II. Here, however, the grand jury is not seeking to control the President in the exercise of his constitutional powers, for, as we show, he has no constitutional power to withhold the evidence sought by the subpoena merely by his own declaration of the public interest.

The grand jury is seeking evidence of criminal conduct that the respondent happens to have in his custody—largely by his personal choice. All the court is asked to do is hold that the President is bound by legal duties in appropriate cases just as other citizens—in this case, by the duty to supply documentary evidence of crime. In the language of the authoritative precedents, this is a "ministerial duty."

Traditional Rule Out

Contrary to counsel's argument, enforcement of the subpoena would not create the threat of "potential disclosure of any and all converations" nor does our submission suggest that every participan in a Presidential conversation would have to speak "in continual awareness that at any moment any Congressional committee, or any prosecutor working with a grand jury, could at will command the production of the verbatim record of every word written or spoken."

Not only are the facts of the case much narrower, but a settled rule of evidence protects a broad range of Presidential papers and conversations against disclosure when the court decides—after in camera inspection when necessary—that the public interest in the secrecy of the particular items outweighs the need for the evidence in the administration of justice.

The present case does not fall within the traditional rule of executive privilege as administered by the courts. Counsel for respondent wisely refrain from pressing such a claim. Under the usual rule, the court—not the President—determines whether particular documents are privileged by weighing the need for the evidence against any governmental interest in secrecy.

Here, the only possible governmental interest in secrecy is encouraging openness and candor in giving advice and promoting the free flow of discussion in deliberations upon executive policy by asunwarranted in the present case for two independent reasons. First, the interest in confidentiality is never sufficent to support an official privilege where there is reason to believe that the deliberations may have involved criminal misconduct. Second, under the particular circumstances of the present case, the need of the grand jury for the critically important evidence provided by the recordings upon a question of wrongdoing by high officials and party leaders easily outsuring a measure of confidentiality.

United Press International

Staff members of special Watergate prosecutor, Archibald Cox, arriving at U.S. District Court in Washington yesterday with the legal brief urging Judge John J. Sirica to order the release of Presidential tapes. From the left are Philip A. Lacovara, counsel; Jim Barker, press aide, and Peter M. Kleindler, executive assistant.

House Tapes

Preservation of secrecy is weighs the slight risk to the freedom of executive discussions.

There will be few occasions upon which a grand jury will have similar cause to believe there may be material evidence of the criminality of high officials in the papers and documents in the executive office of the President.

The aides of future Presidents are not likely to be timid because of this remote danger of disclosure. If there be some small risk of greater reticence, it is not too great a price to pay to preserve the integrity of the office of the president.

Privilege Held Waived

Even if the tape recordings might once have been covered by a privilege, any such claim to continued secrecy has been waived by the extensive testimony, given with respondividual versions of the dent's consent, publicizing individual versions of the conversations.

In his public statement of May 22, 1973, respondent announced that "executive privilege will not be invoked as to any testimony concerning possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up."

In accordance with that statement, Dean, Mitchell, Ehrlichman and Haldeman already have testified extensively before the Senate committee and/or in other proceedings concerning the conversations specified in the subpoena. Haldeman even was allowed access to various tapes after he left government office and gave testimony based upon his listening to the tapes denied the grand jury.

Respondent and his counsel themselves have made comments for publication upon the content of the conversations. Under familiar legal principles those disclosures waive any right to further confidentiality. Not even a President can be allowed to select some accounts of a conversation for public disclosure and then to frustrate further grand jury inquiries by withholding the best evidence of what actually took place.