

# Cox Argues Nixon Can't Judge Tapes

## Washington

Archibald Cox, the Watergate special prosecutor, charged yesterday President Nixon could not be "a proper judge" of whether the public interest requires him to release tape recordings of White House conversations to a grand jury investigation.

In a brief filed in U.S. District Court yesterday, Cox 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, 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.

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

### CONFIDENCE

Even if Mr. Nixon could disregard his own stake in the dispute, the prosecutor declared, "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."

The Cox brief was 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. It was a 67-page response to a White House brief filed last Tuesday; after a White House reply on Fri-

day, the case will be argued on August 22.

### POINTS

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

- Mr. Nixon's 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 constitu-

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tional tradition" by equating physical power with legal privilege.

- The President waived any 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 the respondent (the President)" asserts a privilege to withhold the

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most complete record available to supplement faulty recollections, resolve contradictions and fill in important details," the Cox brief declared. "The law is not so capricious."

- Making the tapes available to the grand jury now will not threaten future Presidents' access 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.

### QUOTES

The Cox brief quoted from a 1971 decision of the U.S. 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 would 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 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 August 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."

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