

Cox Files Rebuttal On Tapes

Cites Nixon's 'Legal Duty' To Produce

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President Nixon "has no constitutional power to withhold the evidence" contained in nine tape recordings of his conversations with White House aides about the Watergate scandal, Special Prosecutor Archibald Cox argued yesterday.

In a 68-page memorandum filed in U. S. District Court here, Cox presented a point-by-point counterargument to a White House brief which declared last week that Mr. Nixon is "answerable to the nation but not to the courts."

The special prosecutor sought to show that, in effect, the federal grand jury seeking the tapes is a representative of the nation because its authority is derived from the people.

Noting that the White House brief had discussed the tape issue in terms of a battle between the executive and the judicial branches of government, Cox contended the description creates a "false conflict."

"Rather, what is involved is the respondent's [Mr. Nixon's] refusal to respond to a demand from the people, speaking through their organ, the grand jury."

Cox quoted the nation's first chief justice, John Jay, who also was one of the authors of the Federalist Papers, written in 1787 and 1788 to define the meaning of the Constitution. "Jay noted, 'Sovereignty is the right to govern . . . it rests with the people; . . . our governors are the agents of the people,'" Cox said, citing a 1793 Supreme Court opinion.

"Unlike a monarch, the President is not sovereign," the prosecutor added.

His answer to the White

House brief enlarged the debate in the momentous constitutional controversy over separation of powers and executive privilege, two doctrines which Mr. Nixon has invoked in refusing to release the tape recordings of eight presidential meetings and one telephone call dealing with Watergate.

Last week the Senate select committee investigating the scandal also filed suit to compel production of five of the tapes an certain documents.

Cox's memorandum strongly indicates that the grand jury will not return any indictments until after the courts settle the constitutional issues.

See TAPES, A3, Col. 1

TAPES, From A1

He asked for "early resolution of the question," contending that any grand jury indictments dealing with the alleged cover-up of the Watergate break-in "would be of questionable propriety" before it receives the evidence contained in the tapes which could resolve conflicts in the testimony of several Watergate witnesses.

"Our basic submission is that the President of the United States, like the humblest citizen, has an enforceable legal duty not to withhold from the grand jury material evidence the production of which the court determines to be in the public interest."

The prosecutor attacked the contention in the Nixon brief which did not question the "power of the court to issue a subpoena to the President" but argued that he is not obliged to comply with it.

"A subpoena is a judicial command," Cox said. "If it is valid, compliance is a legal duty."

He also challenged the White House reliance on an 1867 case, *Mississippi vs. Johnson*, in which the state tried unsuccessfully to enjoin President Andrew Johnson from enforcing the Reconstruction acts.

The Nixon brief cited an argument in that case made by Attorney General Henry Stanbery, who said the President is above the process or jurisdiction of any court.

Cox contended, however, that the Supreme Court, while ruling for Johnson, "emphatically refused to accept the Attorney General's claim of royal immunity for the President of the United States."

In the Johnson case, he

added, "the court had no occasion to decide that no federal court could ever issue any order to the President, and it did not do so." Instead, its decision was really an early expression of the idea that "political questions" like enforcement of the Reconstruction acts cannot be adjudicated, Cox insisted.

"Happily, the possession of the naked physical power to frustrate the court has never led the executive branch to disregard a judicial determination of legal rights and obligations."

In an oblique reference to a White House statement that Mr. Nixon "would abide by a definitive decision of the highest court," Cox underlined the point by saying, "There is no reason to believe that respondent (the President) would disregard a final binding order fixing legal responsibilities."

The prosecutor noted that the White House brief, written mainly by University of Texas Law Prof. Charles Alan Wright, argued that a court-ordered disclosure of the tapes would severely damage the presidency and destroy it as an equal branch of government.

Cox argued that the grand jury "is not seeking to control the President in the exercise of his constitutional powers."

Mr. Nixon's assertion of executive privilege to protect the confidentiality of free and open advice his aides give him is not sufficient when "there is reason to believe that the deliberations may have involved criminal misconduct," the prosecutor said.

Cox cited several cases in which the courts have asserted their right to determine whether a claim to executive privilege is valid.

He contended that Mr. Nixon himself could not be "a proper judge of whether the greater public interest lies in giving the evidence to the grand jury or withholding it. His highest and closest aides and associates have been accused in sworn testimony.

"Respondent 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 respondent himself—a question to which he can hardly

be indifferent."

Cox insisted he was not calling attention to the problem to be disrespectful of Mr. Nixon or his office. Rather, he argued, even if the President could judge fairly, "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."

Seeking to refute the White House argument that disclosure of the tapes would set a dangerous precedent, Cox contended that a similar scandal involving "high presidential assistants . . . is unlikely to recur."

Enforcement of the subpoena, he said, "will set only a narrow precedent, albeit a precedent of historic importance in reaffirming the American constitutional tradition that no man is above the law."

Cox conceded the White House contention that more tapes may be demanded by people under indictment who may want to use them to help establish their innocence.

But he said that withholding the tapes would endanger the prosecution of some indictments and added:

"... There could hardly be a greater cause for loss of public confidence in our governmental institutions than frustration of the prosecution of a chief executive's aides and political associates by his withholding of material evidence."

The Cox and White House documents present divergent views of what the American constitutional system is all about. The White House brief stresses the separateness of the three branches of government; Cox argues that "the respective 'powers' of each branch frequently interact."