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Excerpts From Brief by President's Lawyers in Cox's

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WASHINGTON, Aug. 17— Following are excerpts from the text of a reply brief filed in United States District Court today by attorneys for President Nixon in the action brought by Archibald Cox, the Justice Department's special prosecutor, seeking White House tape recordings and other documents bearing on the Watergate investigation:

The principal theme of the [Cox] *brief in support is that* this conflict may appropriately be resolved by the judiciary and that it is more important that a grand jury have access to every possible bit of evidence and that indictments against wrongdoers contain every possible count than that the confidentiality that the President regards as indispensable to the performance of his constitutional duties be preserved.

This theme recurs throughout the brief in support. It is stated most badly in the topic sentence at page 54:

"The need of the grand jury for the evidence in the impartial administration of justice is greater than the public interest served by secrecy."

This notion that the extraction of the last ounce of flesh by the criminal process is the highest and most important purpose of government, and that courts have the power to impose this goal on the Chief Executive though he believes that to pursue it will harm other important governmental interests, is not the law.

If there be any authority for the proposition that the courts have power to determine that the requirements of justice make it necessary that a prosecution continue, though the executive branch has determined to the contrary on the basis of other governmental interests, we are unaware of it, the special prosecutor has not cited it, and it would be in the teeth of the authorities here cited.

'This Is Not True'

The brief in support suggests that it is "a false conflict to see the present controversy as a struggle between the powers of the judiciary and the prerogatives of the President," and indicates that the authority of the grand jury is derived from the people themselves, rather than from a court. Brief in support 44. The short answer is that this is not true.

A grand jury is an arm of the court, and it does not have power, any more than does the court that convenes it, to decide that it is more important that a particular prosecution go forward than that other important governmental interests be protected.

Surely the special prosecutor is being unduly gloomy when he suggests that his failure to obtain the tapes might require "termination of this grand jury investigation." Brief in support 28. The grand jury investigation was in progress long before the existence of the tapes was known. As we said in our initial submission, it is not the President's view that refusal to produce these tapes will defeat prosecution of any who have betrayed his confidence by committing crimes.

But regardless of what events may prove to be the case on questions of the kind just mentioned, the controlling fact is that there is no power in the judicial branch to decide that the public interest requires a particular criminal investigation or prosecution to continue if the executive branch has determined that other Governmental interests dictate to the contrary.

When we said that the President has "the power and thus the privilege to withhold information," brief in opposition 3, we were not, as the special prosecutor mistakenly supposes, brief in support 40-42, referring to "physical power." We were referring instead to the fact that an important part of the "executive power . . . vested in a President of the United States of America" is the power to decide whether he will sacrifice the confidentiality he deems essential to the proper functioning of that office in order to make possible a particular criminal prosecution. This is a power that resides in the executive alone. No court has any power to make the choice that the brief in support asks.

Despite intimations in the brief in support, we have not suggested and do not contend in any way that the President is above the law. What we have undertaken to assert and support is the proposition that the office of the Presidency is treated differently under the law, that the Presidency has certain unique attributes, few in number but indispensable to its character and effective operations, and among these, perhaps more important than any other, is Presidential privacy — the right, indeed the absolute need, to be able to speak freely, to encourage others to speak freely, and thereby encourage confidence that the President and he alone has the absolute power to decide what may be disclosed to others.

It is a simple fact of history that no President has ever been compelled to produce information if he thought the public interest would be harmed by doing so, and, as

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we have pointed out before, consistent practice has its own weighty claims in construing the constitution.

Though it is consoling to be given the assurance that "compliance with the subpoena will not interfere with or burden in any direct or material way the proper performance of the duties and responsibilities of the President or the executive office," brief in support 43, the President who has occupied that great office for 4½ years, has reached a very different judgment. He has solemnly represented, both to this court and to the country that the con confidentiality of his conversations in connection with his official duties is absolutely essential to the effective performance of his duties.

Any suggestion that this case is unique because high Presidential advisers are being investigated for possible criminal acts flies in the face of history. Teapot Dome is merely the most celebrated of a number of lamentable instances in which persons in high office betrayed their public trust. It has been even more common for charges that are never substantiated to be made against those at the highest levels of government. The well-known incident in which former President Truman and Justice Tom C. Clark refused to comply with subpoenas requiring them to appear before a House committee involved charges that, while Mr. Truman was President and Justice Clark was Attorney General, they had participated in knowingly promoting a proven Soviet spy to a position in which he would be better able to serve his foreign employers. New York Times, Nov. 14, 1953, at 1. There have been many similar charges of serious crimes against high officials throughout our history, and often there has been enough in support of the charge to establish probable cause for a subpoena, if the theory being advanced in this case were to be accepted.

Of course it is true that in the vast majority of Presidential conversations there would never be anything said that could arguably be material evidence in a criminal investigation. But the inhibiting effect comes from the difficulty of a particular participant in a particular conversation being sure that this is true, unless he is certain that he knows the motivations of all of the other participants. Thus the deterrence of a ruling that courts can compel disclosure of Presidential conversations would be very extensive even though the actual instances in which disclosure would be ordered would be less frequent, though still hardly unique.