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President Responds To Cox

Brief Places Secrecy Ahead Of Prosecution

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President Nixon claimed through his lawyers yesterday that he has "the absolute power" to maintain the secrecy of his tapes on the Watergate scandal.

In a sharply worded brief filed in U. S. District Court here, the White House suggested that Watergate Special Prosecutor Archibald Cox was simply seeking "the last ounce of flesh" in demanding the tapes for a federal grand jury here.

Even if the tapes are vital to the successful prosecution of some cases against Watergate conspirators, Mr. Nixon's lawyers contended, the courts would have no choice but to dismiss such cases.

"The court may tell the executive that it is to produce, but if the executive chooses not to do so, it is free to make that choice and the only power in the court is to dismiss the prosecution," the White House said.

The 16-page brief defending the President's refusal to hand over nine recordings of his conversations with top White House aides and campaign officials about the Watergate scandal was the final one to be filed before a full-dress hearing in federal court here Wednesday.

Mr. Nixon has refused to comply with a grand jury subpoena for the tapes on the grounds that their production would "cripple all future Presidents" by exposing their private conversations to public scrutiny.

Cox, however, insists that he tapes, recorded by a spe-

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cial unit of the Secret Service, are needed to sort out murky and conflicting accounts of White House involvement in the Watergate cover-up.

In their brief, the White House lawyers maintained that Cox was "being unduly gloomy" in suggesting that withholding of the tapes, whose existence came to light last month at hearings of the Senate Watergate committee, could wreck his investigation.

Far from that, they argued, Cox was in effect contending that obtaining "every possible bit of evidence" and "every possible count" for the criminal indictments that are expected is more important than "the confidentiality that the President regards as indispensable. . . ."

"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," the White House said.

The President has indicated that he would abide by a definitive Supreme Court ruling in the unprecedented battle, but some lawyers read yesterday's White House brief as suggesting that an unfavorable ruling by the high court might lead to Mr. Nixon's insistence that any prosecutions hinging on the tapes be abandoned instead.

The White House acknowledged that Watergate is no "ordinary case" and that Mr. Nixon, on April 30, gave Attorney General-designate Elliot L. Richardson "absolute authority" over prosecutions stemming from the scandal, an authority that Richardson "re-delegated" to Cox.

As a result, the President's lawyers said, it is up to Cox to decide "whom to prosecute and whether to comply with judicial requests for production of material in his hands." But they emphasized, "the President has not delegated the non-delegable duty" of deciding whether to claim executive privilege for "presidential papers."

Mr. Nixon discussed the brief with White House counsel Leonard Garment, J. Fred Buzhardt and Charles Alan Wright Wednesday. Composed

largely by Wright, a self-styled "conservative" law professor from the University of Texas who is serving as the President's constitutional expert, the pleading was "virtually complete" when Mr. Nixon reviewed it, deputy White House press secretary Gerald Warren told reporters.

Cox has contended that compliance with his subpoena for the tapes would pose "only a minimal threat" to candor in the Oval Office since it isn't often that "material evidence of criminality" might be secured from accounts of the conversations there.

The White House disputed that notion with surprising vigor and a set of hypothetical examples suggestive of talks ranging from Vice President Spiro T. Agnew's own problems with a federal grand jury in Baltimore to the administration's secret bombing of Cambodia in 1969-70.

For example, the White House brief said, "a high constitutional officer is informed that he is under investigation by a grand jury. Quite properly he discusses this with the President. Are testimony, recordings or notes about that conversation now to be subpoenaed by the grand jury making the investigation. . . .?"

Again, the White House lawyers said, "The President, in consultation with his highest advisers, determines that it is necessary to bomb enemy sanctuaries in a supposedly neutral country adjacent to a battle area, but that for diplomatic reasons, the bombing must be kept secret. Will those conversations go to a grand jury if it is subsequently claimed that a high official perjured himself in denying the bombing before a congressional committee?"

The White House said it did not want "to press these examples too far," adding 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 President's lawyers contended that "the inhibiting effect" on a chief executive's conversations would still be "very extensive" if records of any of them had to be reproduced.

The White House denied Cox, intimations, in a brief filed earlier this week, that Mr. Nixon was trying to set himself "above the law." But the President's counselors said the White House was upholding the proposition that the presidency "has certain unique attributes," including "the absolute need to be able to speak freely" and "the absolute power to decide what may be disclosed to others."