

Cox Asks That Tapes Be Sent to Grand Jury

By George Lardner Jr.
Special Prosecutor Archibald Cox hardened his demands for President Nixon's Watergate tapes yesterday with a bid for their direct delivery to the federal grand jury investigating the scandal.

In a petition filed yesterday afternoon, Cox asked the U.S. Circuit Court of Appeals here to bypass U.S. District Court to inspect the recordings himself.

At the least, Cox maintained, his prosecutors should be permitted to listen to the tapes when Sirica does.

It was the second day in a row that Sirica has found his Aug. 29 order directing Mr. Nixon to turn the tapes over to him under attack. White House lawyers asked the appellate court Thursday to uphold the President's claims of absolute secrecy for the recordings.

"Everybody's suing me now," Sirica observed after a copy of Cox' petition was served on him. Accordingly, the judge enlisted two lawyers to help him defend his ruling as it stands.

It all added up to a dizzy day in the Court of Appeals with both the Senate Watergate committee and consumer groups scrambling for a chance to be heard at the same hearing next Tuesday—along with the White House, Sirica and Cox—on their own demands for the tapes and other White House documents that Mr. Nixon has refused to give up.

Cox and the White House joined forces momentarily in trying to fend the others off.

The Senate Watergate committee, contending that congressional interest in the tapes ought not be ignored, asked the nine-judge court for 10 minutes at the Tuesday hearing so that it could be fully apprised of all aspects of the executive privilege issue.

Unlike Cox, the Senate committee's lawyers indicated in a friend-of-the-court brief, they want to emphasize that the disputed materials relate "to

the President's own possible criminal conduct."

At the same time, Public Citizen, Inc., which has been suing the Nixon administration over a controversial 1971 increase in milk price supports, pressed its request for simultaneous review of its demand for some 67 White House memos concerning the dairy industry and the 1971 price increase. A lower court has already ordered that the memos be produced for in camera in chambers inspection.

Circuit Court Clerk Hugh E. Kline indicated that no ruling on the Senate committee's request or that of Public Citizen, Inc. would be made before Monday.

Following the pattern of Mr. Nixon's lawyers, Cox sued Sirica directly and named the President as a "party in interest."

Dissatisfied with the judge's holding that he could not reject the President's claims of privilege without hearing the tapes, the special prosecutor contended that "as a matter of law, there is no privilege as to all, or at least as to some of the conversations recorded on the tapes. . . ."

Despite Mr. Nixon's claims of a public interest in preserving the confidentiality of his conversations, Cox and his counsel, Philip A. Lacovara, said there was substantial reason to believe some of the statements on the recordings, aside from those of the President, "were made . . . pursuant to a conspiracy to obstruct justice."

Under those circumstances, the prosecutors argued, the tapes cannot be withheld "under any construction of executive privilege" based on the need for confidential government discussions.

Whatever privilege might be left for the nine tapes at issue, Cox argued, has already been waived by the voluminous testimony about those meetings before the Senate Watergate committee and by the President's own promise in a May 22 speech.

Mr. Nixon said then that "executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in matters presently under investigation, including the Watergate affair and the alleged cover-up."

In short, Cox said, "the President has waived any confidentiality . . . that he otherwise may have been able to assert." As a result, the prosecutor contended, Sirica should have ordered the tapes turned over to the Watergate grand jury here without an in camera inspection to determine whether any portions are privileged.

Sirica has also indicated that he would listen to the recordings to excise any irrelevant material, but, Cox said, "ordinarily, lack of relevance is not a reason for withholding evidence from a grand jury . . . The Special Prosecutor has no intention of submitting irrelevant evidence to the grand jury."

Recognizing that the appellate court might still prefer private judicial review out of a "special respect due presidential papers and conversations," Cox said Sirica ought not be permitted to do that alone "without the assistance of counsel."

The judge, Cox said, "is not in a position to have accurate knowledge of the possible relevance of all portions of the tapes and documents. . . ."

By contrast, he said, "since the attorneys for the grand jury are familiar with the evidence already submitted, they should be given access to the portions claimed to be irrelevant at a hearing in chambers in order to advise the District Court. . . ."

Such a hearing, Cox said, would be conducted under the same rules of secrecy that prevail at grand jury sessions and the transcript of the hearing should be sealed.

The special prosecutor wound up with a warning about the fact that the Watergate grand jury's 18-month term will run out on Dec. 5.

"Failure to complete its task before expiration of its term," he said, "would result in a serious and unnecessary delay in the administration of justice."