# High Court To Study Jury Citing of Nixon

By George Lardner Jr. 6/16/74
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The Supreme Court agreed yesterday to consider whether the Watergate grand jury overstepped itself in naming President Nixon as an unindicted co-conspirator in the Watergate cover-up.

The justices officially disclosed at the same time the grand jury's accusation that "Richard M. Nixon . . . was a member of the conspiracy to defraud the United States and to obstruct justice" in the scandal.

The court refused, however, to make public any other portions of the sealed legal briefs and hearings on the issue last month before U.S. District Court Judge John J. Sirica.

The only excerpt made public stated that:

"On February 25, 1974, in the course of its consideration in the instant case, the June 5, 1972, grand jury, by vote of 19-0, determined that there is probable cause to believe that Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice charged in Count 1 of the instant indictment, and the grand jury authorized the special prosecutor to identify Richard M. Nixon (among others) as an unindicted co-conspirator in connection with subsequent legal proceedings in this case."

Mr. Nixon asked the Supreme Court last week to review the constitutionality of the grand jury's action. The court had already agreed to consider Special Prosecutor Leon Jaworski's efforts to subpoena new evidence from the President despite Mr. Nixon's claims of executive privilege.

In approving the President's request, the justices said they would hear arguments on the grand jury's authority at the same July 8 hearing that they had already scheduled to take up Jaworski's subpoena.

The prosecutor is demanding the tapes and other records of 64 White House conversations which he says are needed for the September cover-up trial of six of Mr. Nixon's former top aides and campaign advisers.

Justice William H. Rehnquist took no part in yesterday's ruling. The court's order did not say how many justices voted to add Mr. Nixon's challenge of the grand jury's authority to the issues before them, but at least four votes were required under court rules.

Jaworski disclosed the grand jury's explosive allegation against Mr. Nixon last month at secret hearings before Judge Sirica on the need for the 64 subpoenaed tapes. The judge decided to enforce the subpoena and ordered Mr. Nixon on May 20 to surrender the recordings for Sirica's private inspection.

The Surpeme Court agreed on May 31 to take up the controversy under special rules

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reserved for cases of "imperative public importance."

News of the grand jury's naming of the President as an unindicted co-conspirator leaked out a few days later. Both the White House and Watergate prosecutors then asked that the entire record of the hearings before Judge Sirica be released on the grounds that they contained no other big secrets, but lawyers for the cover-up case defendants objected.

The Supreme Court apparently decided to keep the documents under seal simply to avoid a new round of defense protests over prejudicial pretrail publicity.

The justices said the first round of legal briefs would still be due on June 21 and any replies by July 1. Oral arguments have been set for July 8 at 10 a.m.

Mr. Nixon has contended that the grand jury's action amounts to an improper interference with the impeachment powers vested in the House of Representatives. The President's chief defense lawyer, James D. St. Clair, has also protested that the grand jury's allegation, if it is allowed to stand, "could be interpreted to mean that a President would be subject to similar action by any grand jury throughout the United States."

Jaworski has defended the charge as both "necessary and appropriate" to criminal prosecution of the cover-up case in the courts. The special prosecutor has suggested that, as a matter of law, the President might even be subject to indictment, although Jaworski is known to have counseled the grand jury against such a step.

The question of whether impeachment must come first has never been settled. The Constitution says only, "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless by liable and subject to indictment, trial, judgment and punishment, according to law."

The White House has taken the position that this means Mr. Nixon cannot even be named an unindicted co-conspirator, much less indicted, so long as he remains President. But some legal scholars contend that the impeachment provisions of the Constitution were simply meant to prevent federal officials from pleading double jeopardy in case they should be impeached first and indicted later.

The highest court ruling on the issue was a decision earlier this year by the Seventh U.S. Circuit Court of Appeals in Chicago upholding the 1971 bribery conviction of Circuit Judge Otto Kerner. The court said it saw no reason to exempt any federal officials from indictment.

". . . Whatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government, they do not exempt the members of those branches 'from the operation of the ordinary criminal laws,'" the appeals court said. "Criminal conduct is not part of the necessary funtion performed by public officials."

Lawyers for both Kerner and the government expect the Supreme Court to decide, before adjourning this summer, whether to hear the Kerner case in the fall.

In yesterday's order involving Mr. Nixon, the justices said they also wanted to hear arguments on whether Judge Sirica's May 20 ruling directing enforcement of the subpoena against the President was "an appealable order."

Normally, an individual who contests a subpoena must first be held in contempt and it is only the lower court's finding of contempt that can be appealed.

In Mr. Nixon's case, however, both White House lawyers and Watergate prosecutors have taken the position that it would be unseemly to require that the President be held in contempt in order to get the controversy reviewed by higher courts.

The high court concluded yesterdday's ruling by directing that any portions of legal briefs dealing with issues under seal be similarly submitted under seal. Watergate prosecutors and White House lawyers were also directed to refrain at the July 8 hearing "from disclosing any portions of the record that are under seal."

The sealed records include Jaworski's justifications for each of the 64 tapes he is seeking, even though all of these justifications are based on public testimony.

The secret grand jury evi-

dence against Mr. Nixon himself, however, has not been transmitted to the Supreme Court.

The President has asked Sirica to send the evidence to the high court, but Jaworski is opposing that effort. The prosecutor contends that the White House has no basis for seeking what amounts to a trial in the Supreme Court on the merits of the grand jury's decision and is entitled only to attack its legality.

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**Charles R. Breyer of the Watergate Special Prosecutor's staff leaves Supreme Court with a copy of its decision to study the Watergate grand jury's powers.**