

# Jaworski, St. Clair File Court Briefs On Withheld Data

By John P. MacKenzie  
Washington Post Staff Writer

6/24/74

President Nixon's lawyers told the Supreme Court yesterday that the grand jury named him as a co-conspirator in the Watergate cover-up in "a grotesque attempt to abuse the process of the judicial branch of government."

Special Prosecutor Leon Jaworski, however, in de-

scribing the same grand jury action, said it was taken "in deference to the office of the presidency and sensitive to the practical difficulties in indicting an incumbent President."

These sharply differing interpretations were made in massive legal briefs filed by each side in the battle over whether President Nixon must produce recordings and other evidence the prosecutor has demanded for the trial of former high White House and election campaign figures.

The briefs—a 149-page document filed by presidential counsel James D. St. Clair and two volumes totaling 169 pages by Jaworski—amounted to their definitive statements on how the high court should resolve the unprecedented test of presidential power. Written rebuttals are due in 10 days, followed by oral argument July 8.

The briefs ranged widely through America's constitutional history and culminated in St. Clair's warning that if Jaworski should prevail, "the constitutional balance would be altered in ways that no one alive today could predict or measure."

Jaworski contended that it would make a "travesty" out of the Watergate prosecutions if the President, "himself highly interested in the outcome," were left free to decide what evidence he will produce.

St. Clair and Jaworski clashed on every legal point in the case except the ques-

tion of whether the justices had the power to decide the case itself. Even on that question, the high court could disagree with the lawyers and avoid a definitive ruling by finding that decrees entered by U.S. District Court Judge John J. Sirica were not properly before the court.

St. Clair told the high court that it was "beyond judicial abilities" to decide against President Nixon on his claim of executive privilege because the chief executive's decision on 64 Watergate-related White House conversations was safeguarded by the separation of constitutional powers and the needs of presidential privacy.

See COURT, A5, Col. 1

## COURT, From A1

The President's lawyer raised anew the question whether Jaworski's status as a "lesser official" within the executive branch deprived the courts of any power to decide such an intra-executive branch dispute. Similar arguments before Judge Sirica touched off severe congressional criticism last month, and St. Clair acknowledged they were questioned by Jaworski on grounds of propriety.

Jaworski, citing the President's agreement to name an independent prosecutor

with the authority to take him to court over disputes on evidence, denied that he was so subordinate to Mr. Nixon that the court did not have a true adversary contest before it.

In fact, said Jaworski, it is the special prosecutor and not Mr. Nixon who represents "the United States" in the case. "The special prosecutor thus stands before the court independent of any direct control by the Attorney General or the President."

Because of executive and congressional agreements having the force of law, Jaworski said, "the President does not have the power to remove the special prosecutor and to appoint a replacement more to his liking."

The Nixon brief, holding as firmly as ever to the President's stand on executive privilege, reserved its bitterest language for the grand jury's 19-to-0 vote to name him as an unindicted co-conspirator along with cover-up defendants John N. Mitchell, H. R. Haldeman, John D. Ehrlichman and others.

The action by the grand jury, which the brief predicted "may well directly affect the outcome" of the House of Representatives impeachment inquiry, fortified Jaworski's claim the evidence he seeks is admissible at the trial. Partly for that reason St. Clair sought and obtained the Supreme Court's permission to argue that the move was beyond the jury's constitutional power.

"The characterization of the President of the United States as an unindicted co-conspirator," the brief said, "is nothing less than an attempt to nullify the presumption of innocence by a secret, non-adversary proceeding. The presumption of innocence is a fundamental of American justice. The grand jury's procedure is an implication of guilt which corrupts this ideal. To thus allow the special prosecutor to use such a constitutionally impermissible device... for the purpose of overcoming executive privilege, is wholly intolerable."

Jaworski said the grand

jury's finding is not subject to attack, especially by someone who is not a defendant in the case, but St. Clair said this argument "can be seen for what it is: an attempt to use a practical tool of law enforcement as a constitutional bludgeon to batter down the President's rights to due process."

Jaworski agreed that President Nixon had no legal recourse but disputed the reason. St. Clair said it was because Mr. Nixon could not be prosecuted criminally while holding office. Jaworski said the Constitution "contains no explicit presidential immunity from the

ordinary process of the criminal law prior to impeachment and removal, and there are substantial arguments that an implicit immunity is likewise not warranted by the Constitution."

The grand jury actually exercised restraint, Jaworski said, "out of deference to the President's public position," giving the special prosecutor the authority to disclose the finding when he found it necessary.

St. Clair said the grand jury, rather than prejudicing the impeachment probe, should have confined its action to transmitting evidence to the House Judiciary Committee, a move the President did not oppose when Judge Sirica approved it in March.

In apparent recognition that the high court's decision will affect the impeachment process, Jaworski rejected St. Clair's previous argument that the President "is answerable to the nation but not the courts."

He said the argument "merely highlights the salutary effect of requiring the executive to make its choice after the courts have adjudicated the relevant rights and obligations. Public responsibility cannot be fixed, however, until the alternatives have been defined. Only then can the people, as the ultimate rulers, know who controlled the course of events and who took what decisions."

Even beyond executive privilege, St. Clair said the President is entitled to a

separate right of "privacy and free expression" that would be invaded by the Jaworski subpoena.

If a President could not safeguard his private conversations, "he himself

would be seriously fettered. He would be less likely to seek out a broad range of advice and advisers. He would be constrained in his discourse . . . A President would be driven to striking poses for the record, for history, or for his own personal protection."

Jaworski said Mr. Nixon has made "selective" disclosures of some White House conversations and given Haldeman access to others. "No privilege holder can trifle with the judicial search for truth in this way," he added.