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The Watergate Case: Enter the Supreme Court

By a strange circumstance, the Supreme Court has entered Watergate without the public knowing any details of the case it will review. As a result, the open discussion has been dominated by legalistic questions dear to professors of law.

But, in fact, the Supreme Court has been addressing itself to the substantive merits of the case as well as the legalistic aspects. So the Court's decision to hear arguments next month is a far more serious blow to the President than seems generally realized.

The Supreme Court decision to enter Watergate grew out of a request by Special Prosecutor Leon Jaworski for White House tapes of 64 conversations. Sixty-three of the conversations involve Mr. Nixon himself. All of them figure in the main Watergate case—the charge of conspiracy to obstruct justice.

The argument as to whether the tapes should be subpoenaed was made on May 13 before Judge John Sirica. Since the argument involved evidence highly prejudicial to the President, Jaworski, in keeping with the scrupulous fairness which has characterized his approach, asked that it be heard in secret. The White House counsel, James St. Clair, joined that petition. Judge Sirica went along.



By Oliphant for the Denver Post

On May 20, Judge Sirica ruled that the 64 tapes were subject to subpoena. Except for releasing a few excerpts, he kept the pleas which had been made to him the week before under judicial seal. Thus to this day, the public does not know the exact nature of the argument between the White House and Jaworski. All we have are the clues offered by the Sirica decision.

One issue which the Sirica decision identified is the issue of executive privilege. The White House apparently argued that the President could withhold the tapes as part of his executive privilege. Judge Sirica overruled that claim, as he had on an earlier occasion, on the grounds that executive privilege could not cover criminal activities. That principle is so well accepted, that it excited almost no comment.

A second issue which the Sirica decision identified is the issue of standing. St. Clair apparently argued that since Jaworski was an employee of the Pres-

ident, he had no right, or standing, to come into court against Mr. Nixon.

Judge Sirica ruled against that argument, on the grounds that it made a farce of the Special Prosecutor's role. But since the standing issue was novel, it excited much comment among legal scholars.

Professor Alexander Bickel of the Yale Law School asserted—very persuasively, it seemed to me—that it was a genuinely thorny question as to whether the Special Prosecutor had standing to go into court against the President. His argument seemed to imply that the Supreme Court should throw the case out, because the jurisdiction of the Prosecutor was so obscure.

Professor Paul Bator of the Harvard Law School showed that there is a common sense escape from the problem of standing. He asserted that as long as the President did not fire the Special Prosecutor, there could be dis-

putes between the two which the Supreme Court could legitimately adjudicate. The thrust of his argument was that if the President wanted to avoid a decision by the Supreme Court, he would have to run the grave political risk of firing Jaworski.

But there is, aside from executive privilege and standing, a far more potent issue—the issue of relevance. While we do not have the record, the merest surmise makes it certain that Jaworski placed at the heart of his plea to Judge Sirica the claim that the 64 tapes were absolutely essential to a criminal trial of the first magnitude. The White House apparently did not contest that claim. So Judge Sirica did not mention it in his decision, and it did not attract public notice.

But the Supreme Court had before it the record of the pleas to Judge Sirica. In deciding when to hear the case of the subpoenas, the Supreme Court probably did not pay much attention

to the legalistic arguments which hardly affect the timing of a ruling. The court almost certainly focused on the relevance of the issue to a major case due to come to trial on September 9.

Since the Supreme Court decided to hear the subpoena case in July, the argument of relevance must have been weighty. That means the President is in a bad pickle.

If the Supreme Court rules against him, he will either have to defy the court—which would be sure grounds for quick impeachment—or yield up evidence highly relevant to charges he obstructed justice. Even if the court goes with him, it will only be on the legal technicality that the Special Prosecutor does not have standing. In an impeachment situation, a technical, legalistic win in a case involving obstruction of justice is practically no win at all.