

Joseph Kraft

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# Now It's Up to the Court

If the Supreme Court sustains the President's claim that he does not have to turn over subpoenaed matter to the Special Prosecutor, then Mr. Nixon may well be home from Watergate scot free. If, as seems much more likely, the Court rules against Mr. Nixon, impeachment is still on track.

So the Supreme Court has, in practice, become the whole ball game. For many reasons, nobody can be comfortable about that.

The impeachment process should engage the broadest political issues in the nation. Legitimacy itself, the right relation of the governed to those who rule, is at stake.

But the Supreme Court is a narrow body. Its membership is tiny. It is drawn from a particular, not to say peculiar, profession. It positively likes to settle issues on small points of law.

If nothing else, leaving the impeachment issue up to the Supreme Court is to put too much up for decision by an atypical group apt to reach its verdicts by a reasoning process remote from the thinking of most citizens. As Felix Frankfurter wrote in the *Denis* case, "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society."

Already one confusion is apparent. As the central issue in the case now under consideration, the Supreme Court is deciding the right of the Watergate Special Prosecutor to have access to the White House tapes.

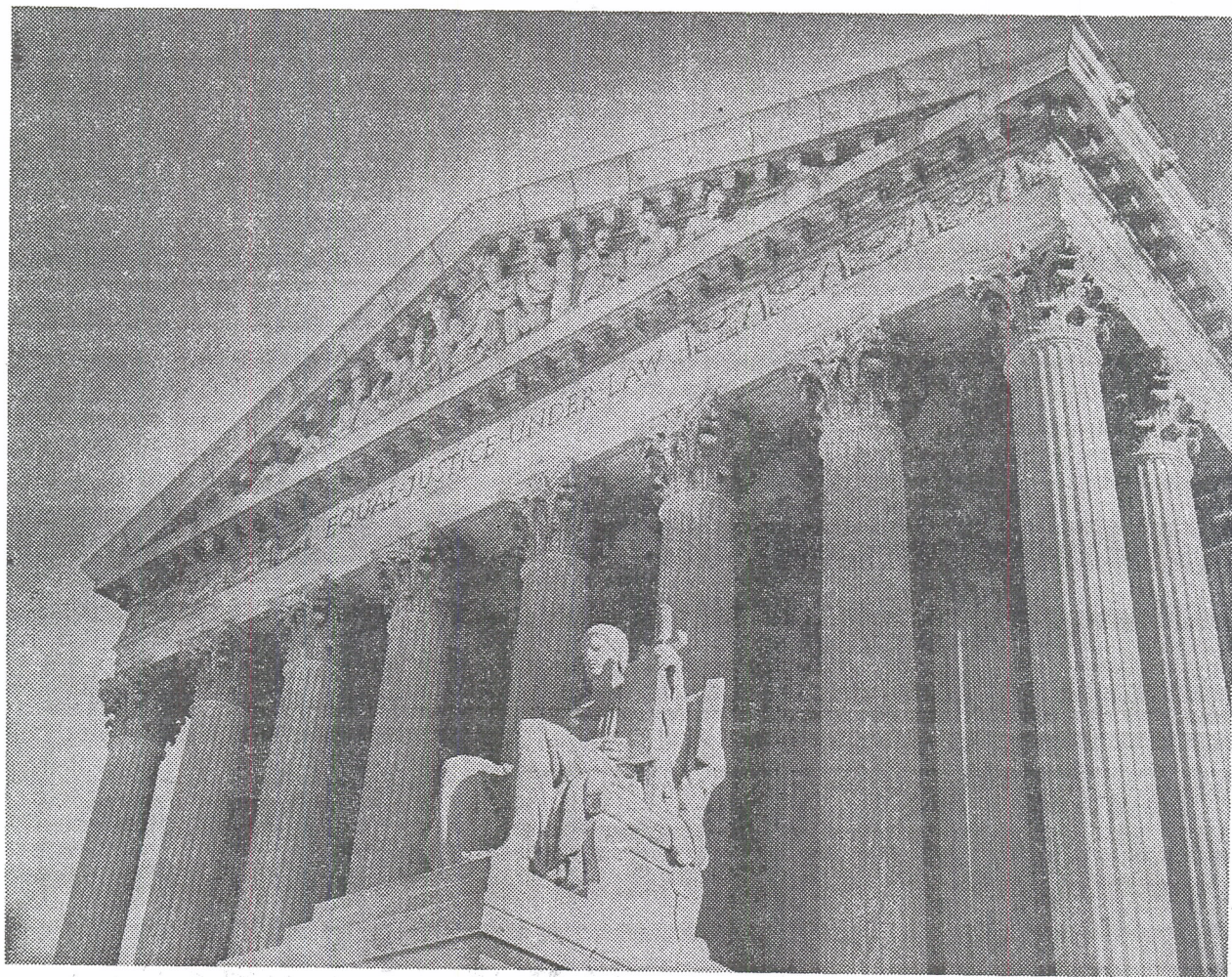
Because it is conducting an impeachment inquiry, not merely some criminal trials, the House Judiciary committee has far more cogent claims on the White House tapes than the Special Prosecutor. But the committee's claims are going, in practice, to be decided by the arguments of the Special Prosecutor.

Probably not one citizen in a hundred will understand the distinction. So luxurious is the confusion that the President's counsel, James St. Clair, was able to argue yesterday that the Supreme Court should not decide on the Special Prosecutor's claim because that would amount to improper intervention in the impeachment.

The reason for the passing of the impeachment buck to the Supreme Court is not in doubt. It lies first and foremost in the congressional instinct for tugging at the forelock when confronted by the President.

In line with the institutional impulse to fink for the White House, the whole Congress has tended to approach the impeachment issue defensively. Demo-





By Charles Del Vecchio—The Washington Post

cratic leaders, especially Chairman Peter Rodino of the Judiciary Committee, have felt a primary obligation to show that they were not acting in a partisan fashion. As a result they have organized an impeachment inquiry, impartial to the point of being almost directionless.

The directionless inquiry prepared a void which has now been filled by the worst kind of partisanship. In the absence of a strong case, Republicans in the Congress have been exposed to the pressure of the hard-core Nixonites in their own party. Some Democrats were tempted to make the case which the committee leadership was not making by improper means, such as leaks.

When it finally came to asserting its supreme right to manage the impeachment, the Congress was nowhere. In effect, the committee abdicated its job to the Supreme Court.

If the Congress failed to live up to its responsibility, those of us in television and the press did not do much better. Except in rare cases, the impeachment proceeding was not presented to the nation as the unfolding of a significant democratic institution.

On the contrary, because they had opened up the Watergate inquiry, investigative reporters who are normally held in check when fundamental institutions are at stake, were given their head in the impeachment coverage. Journalistically, the impeachment procedure became a cocky competition for juicy items.

Leaks came into their own, with the usual result that important developments were often overlooked. The public, while not any more prone to support the President, came to have a jerky and confused impression of what

was actually happening. Thus, there was nourished an overwhelming disposition to have done with the whole thing — a feeling which further promotes a willingness to leave the issue to the Supreme Court.

Thus the Supreme Court has emerged as the national arbiter largely because other institutions have not risen to the challenge of impeachment. No doubt the Court will do the right thing, now as so often in the past.

But dependence on the Court shows how much Watergate has been a tragedy for all of us. Mr. Nixon and his men have not only disgraced the Presidency by their behavior. They have dragged down the Congress and the press. It is a small consolation that —so far, at least—they have not delegitimized the courts.