Showdown Before the Justices

The case called *The United States of America* v. *Richard Nixon* raises an ostensibly simple question: Does Federal Judge John Sirica have the right to review 64 still-secret White House tape recordings for possible use in the Watergate trial of six former Nixon aides? In fact, the issue on which the U.S. Supreme Court begins final deliberations this week is far more complex and far reaching. The ultimate ruling—and how Nixon responds to it—may vitally affect the impeachment proceedings and conceivably could alter the constitutional relationship between the Judicial and Executive branches of government.

Despite the masses of evidence already on the public record, the 64 tapes are widely believed to hold answers to some of the Watergate mysteries still unresolved. That is why Special Prosecutor Leon Jaworski subpoenaed the material —and perhaps why the President refused to comply with Sirica's order to produce it for judicial inspection. The White House tried to take the case to the Circuit Court of Appeals, which would have meant still more delay. Jaworski persuaded the Supreme Court to take the case directly.

The high court then called for and received lengthy written briefs from both sides. After the oral arguments in the tense and jammed chamber—there were 6,000 requests for 300 seats—the wait for a decision begins.

The two legal camps have been working under intense pressure to meet deadlines for two rounds of written briefs, then to prepare for the oral arguments. The President's lawyers have been operating under serious handicaps. His chief Watergate counsel, James St. Clair, overburdened on multiple fronts, was tied down to regular attendance at the Judiciary Committee's impeachment hearings. As the Supreme Court asked for briefs, Nixon's chief constitutional consultant, Charles Alan Wright, was off on a Baltic vacation cruise. Another top Nixon lawyer, J. Fred Buzhardt, was disabled by a heart attack.

The result was a wordy and unpolished main brief, written primarily by junior staff lawyers who worked through two all-night sessions to meet the deadline. Too late for normal printing, it was photocopied—and initially rejected by the court because the type was too small. The haste showed in the final printed copy too: the attorneys submitted the document "respectively," instead of "respectfully." By the time reply briefs were due, Wright was back at the White House temporarily, and under his direction the President's arguments were considerably strengthened.

The Jaworski staff had fewer problems. Although under the same time pressure, eight topflight lawyers divided the research chores by subjects and produced a more tightly reasoned and precedent-studded brief on time. Busy supervising the various Watergate inves-

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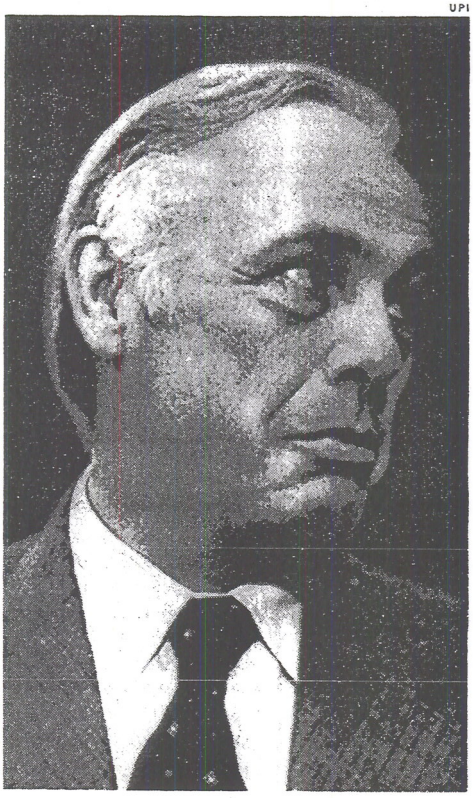

PRESIDENTIAL LAWYER ST. CLAIR

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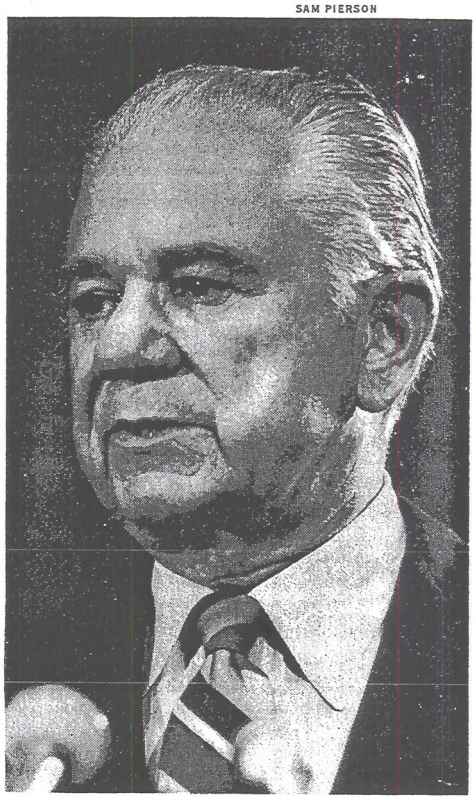

SPECIAL PROSECUTOR JAWORSKI

Examining the blank spaces on the constitutional canvas.

DAVID KENNERLY

RICARDO THOMAS

PROSECUTOR'S ASSISTANT LACOVARA

PRESIDENTIAL CONSULTANT WRIGHT

Arguments before a court reluctant to flirt with history.

tigations and prosecutions, Jaworski nevertheless gave the Supreme Court arguments his personal attention. He also had the skilled aid of Philip Lacovara, 30, his chief counsel and perhaps the sharpest mind on the 38-member legal staff. Despite the liberal image of the Jaworski team, Lacovara, a conservative, is a former Goldwater activist.

The oral arguments opposing the President before the Supreme Court were to be shared by Jaworski and Lacovara, both of whom had argued before the court previously. St. Clair, by contrast, was only admitted to practice before the Supreme Court last month and was to carry the full burden alone this week, apparently by his own choice.

However dramatic the lawyer-to-lawyer showdown, the written arguments were vitally important. Each side framed the questions differently, but the main constitutional issues were clear:

▶ Does the President have an absolute Executive privilege to withhold evidence in a criminal trial solely on his claim that it would not be in the public interest to produce it, or can such a claim be examined by a federal court to determine if it is proper?

▶ Are the courts powerless to issue a directive that the President comply with a subpoena because they may be unable to enforce such an order?

▶ Is a general claim of Executive privilege sufficient for the President to withhold confidential information when there is evidence that the President himself may have been a co-conspirator in the crime for which his former aides have been indicted?

▶ Did the Watergate grand jury have the legal right to name Nixon as an unindicted co-conspirator or, since its power to indict a President until after he leaves office is in doubt, was that act invalid?

The President's case depends heavily on a claim that the separation of powers among the branches of Government cannot be breached. The right to secret decision-making discussions within each branch is vital to that separation. If the courts can overrule Nixon's claims of privilege, this argument states, it would "impair markedly the ability of every President of the United States from this time forward to perform the constitutional duties vested in him."

Jaworski counters that no such absolute privilege exists, especially in a criminal case, and no future President is likely to be injured if the Supreme Court rules against Nixon. The Jaworski brief wryly observes: "Surely, there will be few occasions where there is probable cause to believe that conversations in the Executive Office of the President occurred during the course of a criminal conspiracy."

Many legal scholars feel that the Jaworski case will prove persuasive to a majority of the Justices if the court consents to rule on the constitutional issues. But the court under Chief Justice Warren Burger has sometimes been reluctant to flirt with history by tackling fundamental questions. Perhaps for this reason, both Jaworski and St. Clair have presented tantalizing arguments that could allow the Justices to rule on narrow grounds. Two short-cut routes to a pragmatic judgment are possible, providing a victory for either side. They are:

FOR NIXON. His best hope lies in challenging the jurisdiction of the courts to hear Jaworski's claim against the President. St. Clair argues that the dispute over the tapes is essentially an internal controversy wholly within the Executive branch of the Government. Under this reasoning, the President is the chief law enforcement officer and chief prosecutor. Therefore, only he has final authority to decide what evidence held by the Executive branch will be produced in a criminal case. Jaworski thus is merely an employee engaged in a quarrel with his boss. To argue otherwise would make the special prosecutor "a fourth branch of Government" and this would "destroy the tripartite form of government."

Jaworski replies that the President's

role in criminal prosecution has been delegated to the Attorney General by Congress; both the Attorney General and the President have specifically further delegated to the special prosecutor complete independence, including the right to go to court to force evidence from the White House. Unless Jaworski is fired—and Nixon has pledged that he would seek the concurrence of congressional leaders before attempting that —his office amounts to "a quasi-independent agency." Thus there is an urgent "justiciable controversy."

FOR JAWORSKI. The special prosecutor contends that even if Nixon has the right to claim a general privilege to protect his conversations, he has legally waived that privilege in the Watergate scandal. He did so by permitting his aides to testify about those talks, by releasing 1,308 pages of edited tape transcripts to the public and by letting H.R. Haldeman, who became one of the indicted conspirators, listen to tapes after leaving the White House staff. Since the President has arbitrarily opened the door to selective conversations on this topic, Jaworski says that he cannot slam it shut. "He cannot release only those portions he chooses and then stand on the privilege to conceal the remainder. No privilege holder can trifle with the judicial search for truth in this way."

Material of Life. St. Clair's rebuttal is that there is a crucial difference between allowing someone to testify and releasing a tape. While testimony can be neatly confined to a relevant topic, "recordings are the raw material of life. They contain spontaneous, informal, tentative and frequently pungent comments on a variety of subjects inextricably intertwined into one conversation." St. Clair ignores the fact that Sirica's order calls for screening by the court to delete such extraneous matter from the tapes.

St. Clair's brief plays upon the court's known reluctance to break new legal ground and warns that the Justices could, in effect, influence an impeachment process assigned solely by the Constitution to the Congress. Moreover, "there are blank spaces on the constitutional canvas that must be left untouched if the Constitution is to bear the same creative relation to our future that it has to our past."

The special prosecutor concedes that "the subpoenaed evidence may have a material bearing on whether he [the President] is impeached and, if impeached, whether he is convicted and removed from office." But that only means, according to Jaworski, that "the President cannot be a proper judge of whether the greater public interest lies in disclosing evidence subpoenaed for trial when that evidence may have a material bearing on whether he is impeached, and will bear heavily on the guilt or innocence of close aides and trusted advisers."

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If You Were Worried...

By William Safire

ESSAY

WASHINGTON—If you were worried about the outcome of the Supreme Court's deliberations about your case; if survival in office were your goal; and if you had a good instinct for the manipulation of the media—what would you do to get ready to turn a lemon into lemonade?

First, you would tell your press spokesmen to start playing a game called "rule-out roulette"—refusing to rule out the possibility of your defying the Supreme Court, pointedly declining to reiterate assurances given last year that you would abide by a "definitive" decision of the High Court.

Second, you would direct your lawyer to nourish speculation about the possibility of your defiance by declining to tell the justices you are seeking a Supreme Court "decision," saying only you wanted their "guidance and judgment"—which you could, if you wished, ignore.

Third, you would pass the word to every member of your official family not to give any off-the-record or deep-background hints to anyone that you might accede to the Court's demands, thereby fueling the rumors that it was your plan to defy the court and go down with separation-of-power flags flying.

Now why on earth would you want the jungle drums beating out that message of likely defiance if you were worried about the outcome of the case? Wouldn't that be getting people angry in advance?

Of course. Editorial writers would gobble up the bait, direly warning that if you dare to defy the Court, that in itself would be an impeachable offense. They would focus attention where you want it—not on the Court's coming decision, but beyond—on your reaction to the Court's decision.

In this way, you would subtly shift the focus of public concern away from "which way will the Court decide?" to "what will the President do if the Court decides against him?" You would thus regain some command of the situation.

Meanwhile, the torrents of abuse that are heaped upon you in the leaks and voluminous reports of Congressional committees are vitiated by the imminence of the Court decision and your reaction to it. Congressional-Presidential confrontation is old news; the possibility of a clash between judicial and executive branches is fresh news.

What happens when the Court decides? If the decision surprises everyone and is favorable to you, or at least not unfavorable, well and good; if the decision directs you to turn over the additional tapes, then the suspense you have built up would begin to pay off. The decision would not stand alone, a powerful support for the forces of impeachment; it would stand as the prelude to your own decision, as all eyes turn to you.

If you defy, you would deserve to be impeached, most people would say, not realizing the obverse of their judgment: *That if you do not defy, you would deserve not to be impeached.* Public opinion would be perfectly set up for your next move.

Assuming that there is no blood-stained dagger with Presidential fingerprints on it in the tapes now being demanded—assuming that they contain more of those damaging but inconclusive statements to which the public is now inured—you would announce a prime-time telecast of your response, the suspense about which you have carefully built up with the unwitting help of your most vitriolic critics.

"My fellow Americans," you would begin, "as the careers of those great dissenters, Oliver Wendell Holmes and Louis Brandeis, have shown, the majority of the Supreme Court is not always right. I believe that future generations, in the perspective of history, will come to agree with the eloquent dissent of Justice Soandso—" (Quote here from one dissent to the decision against you, if there is one).

Then you would relieve the suspense which you have manufactured with a gracious, even pious, acknowledgement of the supremacy of the Supreme Court in disputes between other branches and even within one branch. In so doing you may weaken the Presidency, but not so much as if you were to make a successful impeachment possible.

"I am a man of the law," you would assert bravely. "I accept the decision of the Supreme Court. I will make these tape transcripts public, along with 126 additional conversations that may be of interest. Let us see if this satisfies the Special Prosecutor and the Judiciary Committee—or if, as I suspect, they keep coming back for more in their strategy of 'delay, defame, destroy' . . ."

Public reaction would switch from a brief, stern "He'd better not defy the court" to a relieved "the President did the right thing, and if these tapes don't prove him guilty beyond a reasonable doubt, then the impeachment crowd has no right to keep harassing him."

And so you would have made lemonade out of an especially sour lemon. It would not be like winning a victory, but it would avert disaster, and there is some satisfaction in using your media opposition as a tool in building the suspense for your riposte.

That would be my plan, if I were worried. What would you do, if you were worried?

Eyes On Supreme Court

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In a Presidency of crisis under Nixon the United States is clearly able to maintain its international prestige — bargain as Richard Nixon did on his recent trip overseas — because he is the President and because it is the office of the Presidency more than the man which commands world-wide respect.

Frederick area residents are side by side with all Americans and the world in watching and waiting for the momentous decision expected any day from the Supreme Court on Nixon and the 64 withheld tapes.

Other nations, under parliamentary government, meet major crises with elections which determine by votes of confidence or no confidence whether the government of the moment will remain in power.

To Americans who accept their quadriennial elections for either keeping their government in office or voting it out, the parliamentary system may seem a most disorderly way to run a country.

To the United States which has always found strength in the foundation of its democratic form of government, the impending Supreme Court decision may for the first time test this strong, invincible principle of separation of powers.

The people are watching.

The decision of the high court if it upholds the doctrine of presidential privilege, will be seen by many as a vote of confidence in the Presidency as reflected in Nixon.

If the nine-man panel headed by Chief Justice Warren Berger abandons the doctrine of separation of powers and invades the executive branch of government by ordering Nixon-the-President to turn over the 64 tapes, the people could see the decision as a vote of no confidence in Nixon.

Indeed the people are waiting, all over the world, to witness the outcome of this crucial decision and its effect on our constitutional form of government.