"The United States v. Richard M. Nixon, President, et al."

Under few political systems in the world could a head of state find himself locked in legal combat before his country's highest court as the proclaimed adversary of his own Government. Even by the distorted standards of Watergate, the case before the U.S. Supreme Court was unique in terms of law, politics and history. The President faced the lawful challenge of a Special Prosecutor he himself had appointed only seven months before. The prosecutor pleaded for a ruling to compel the release of evidence that might hasten Richard Nixon's removal from office by impeachment. The President, through his advocate, sought protection from such an order, plus the court's imprimatur on his very special view of presidential prerogatives.

It was a confrontation of high suspense because of the issues and because of the uncertainties of the climax. How broadly the court would rule, by what margin, and how the President would respond could only be guessed at week's end. Each of these elements could be crucial in the months ahead.

The specific legal questions before the court did not, of course, involve impeachment directly. As debated in a historic three-hour oral argument last week, the basic dispute was constitutional: Does the President have the power to withhold from use in the September conspiracy trial of six former aides 64 tape recordings of White House conversations—merely on his assertion that it is not in the public interest to release them? That extravagant claim of absolute Executive privilege, applying even to conversations that may have been part of a criminal conspiracy, had never been made to the court before.

There were signs that the answer from the Justices would be no. At week's end, it was understood, one Justice had already been assigned to write an outline for an opinion. That preliminary draft was to be used as a basis for discussing a final decision. Though not necessarily of one mind on all of the issues, the jurists plainly recognized both the constitutional importance and political explosiveness of the case. Therefore they were expected to try to find common ground for a unanimous ruling.

In a sense, the Justices as well as the parties involved have a stake in *United States of America* v. *Richard M. Nixon, President of the United States.* A panel that has been reluctant to break new judicial ground has now been asked to rule on a fundamental question involving the constitutional balance between the judiciary and the presidency. More immediately, the decision could force Nixon to yield evidence that might bolster the Special Prosecutor's conspiracy case against former Nixon aides and influence the eventual outcome of the impeachment process under way in the Congress by providing significant new evidence.

It is widely assumed that the tapes he is withholding are at least as harmful to his cause as the conversations he has already released—and little more is needed to convince all but his die-hard supporters in Congress that he was part of the cover-up conspiracy. Although no one could be sure, the additional material might even provide evidence to satisfy Presidential Defense Attorney James St. Clair's narrow definition of an impeachable act: A serious, indictable crime. Few constitutional scholars agree with St. Clair's restrictive view; most consider such a broad offense as failure to faithfully execute the laws grounds for impeachment.

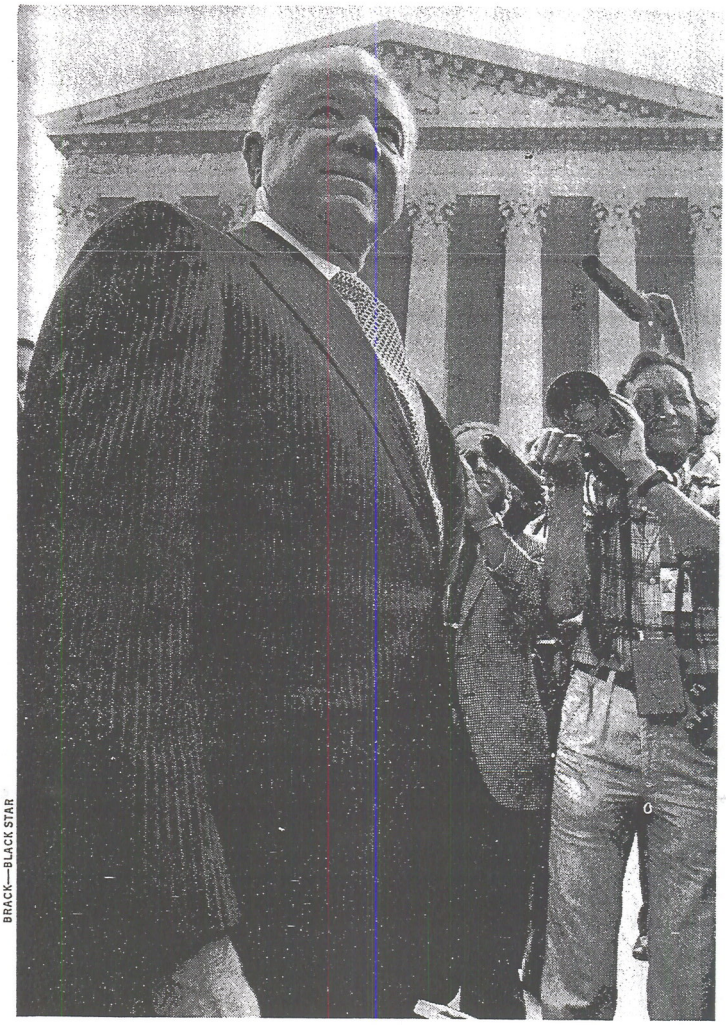
Ostensibly, Nixon's no-win choice in the face of an adverse decision would be to yield the tapes and their damaging contents or defy the Supreme Court. Theoretically, he could also, of course, take the embarrassing step of pleading his Fifth Amendment privilege against self-incrimination.

Failure to comply with the court would seem a certain route to impeachment in the House and conviction in the Senate. Even Vice President Gerald Ford, who contends that the prospect of impeachment has been diminishing, concedes that defiance of the court would create "a whole new ball game." Yale Law Professor Alexander Bickel, who has been both critical of and sympathetic toward various Nixon legal claims, declares, "I don't know anyone who argues that when you get to a court decree after adjudication there is any kind of moral or legal right to defy it." Nixon's rationale for intransigence would doubtless be based on the separation-of-powers principle expressed in briefs already submitted—that he must not subordinate the Executive Branch to the will of the judiciary in a matter he considers essential to the effective functioning of the presidency.

No President has ever explicitly defied a direct order of the Supreme Court when it was acting as a body. Franklin Roosevelt was apparently prepared to do so "to protect the economic and political security of this nation" in 1935, when the court was expected to rule that holders of Government bonds were entitled to payment in gold. But the court surprised him by voting, 5 to 4, to uphold his position. Andrew Jackson in 1832 sharply objected to a ruling that federal authorities, rather than the state of Georgia, should take jurisdiction over the case of a missionary to the Cherokee Indians who was imprisoned by the state. Jackson reputedly said, "Well, [Chief Justice] John Marshall has made his decision; now let him enforce it." That ruling, however, did not specifically require Jackson to take any action. Other Presidents have bowed to decisions they considered wholly wrong. When Harry Truman's seizure of strikebound steel mills during the Korean War was declared unconstitutional, he yielded to the Supreme Court ruling. "I have no ambition," he said, "to be a dictator."

Yet noncompliance by Nixon now remains at least a small possibility. St. Clair told reporters after the Supreme Court ar-

SPECIAL PROSECUTOR JAWORSKI ARRIVING AT SUPREME COURT



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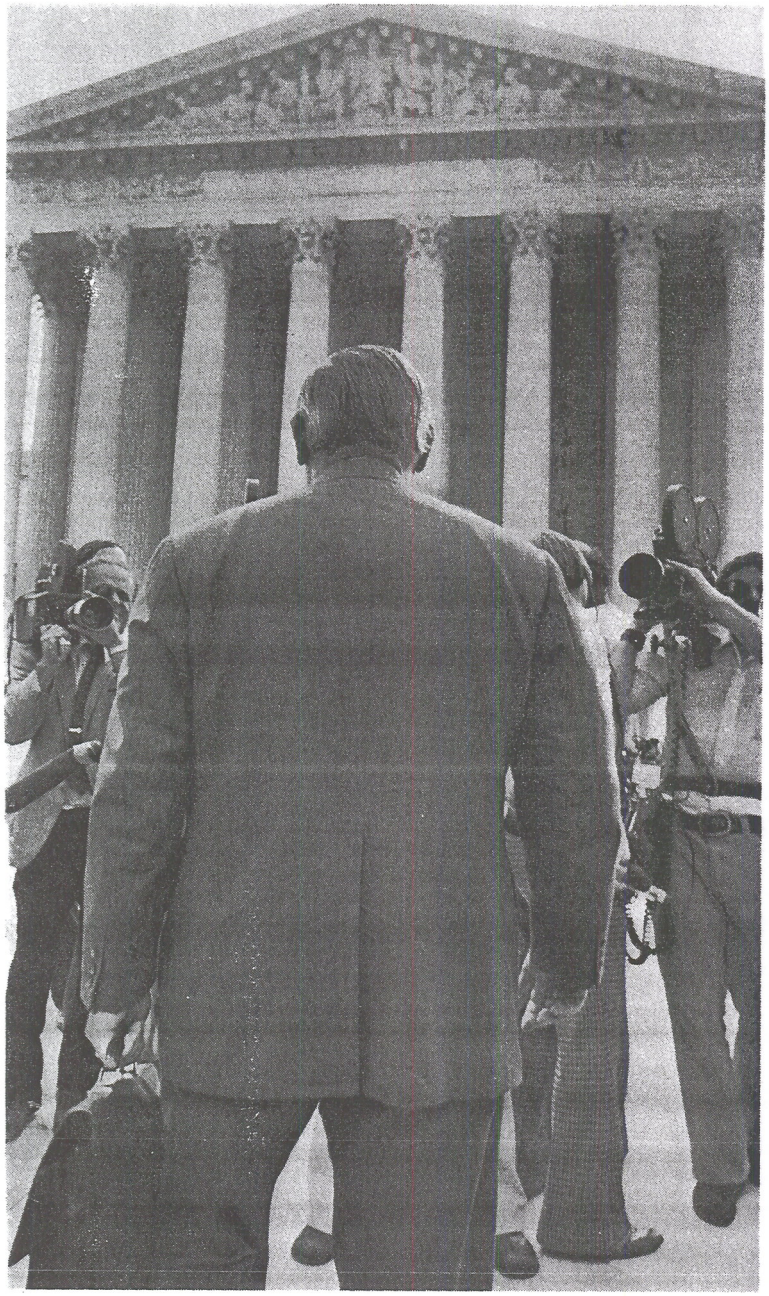

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PRESIDENTIAL LAWYER ST. CLAIR BEFORE ENTERING COURT

guments that he did not know whether the President would yield. It would seem more politically expedient, and more in keeping with previous tactics, for Nixon to cooperate in principle—and then delay actual delivery of the tapes as long as possible. St. Clair seemed to suggest that possibility when he said that it might take two months for the 64 tapes to be submitted for screening by Federal Judge John J. Sirica if Sirica's original order to produce the tapes is sustained by the Supreme Court. Special Prosecutor Leon Jaworski is now thinking in terms of a few days.

If the tapes are produced, the White House might report, as it has in the past, that some recordings mentioned in the subpoena simply were never made. So far the White House has said that 13 tapes previously sought do not exist. Others may contain gaps, like a 19-minute blank reported last week by the Special Prosecutor's office to have been discovered in one tape.

Assuming that Nixon does comply with an adverse decision, it seems unlikely that the tapes would reach the House in time for its impeachment debate. Democratic leaders are already reconciled to having the Judiciary Committee proceed with its vote on articles of impeachment without any such added evidence. The full House, too, probably will act without it. But senior Democrats who will be running the proceeding are confident that if the tapes must be yielded for the criminal trial of Nixon's former aides, the legal right of the Senate to acquire them for the trial of the President will be overpowering—and they will almost certainly be available by then.

However uncertain the final impact on Nixon's fate, the Supreme Court hearing with its anticipation of a high-stakes legal showdown gripped Washington. The event drew a mixed crowd of Washington's legal elite, some Watergate figures and an eager assemblage of college students, law instructors, office workers and tourists. Many people waited outside the imposing marble structure through two warm nights to get a crack at the 390 seats reserved for the public. Most were to be available only on a rotational basis, their occupants moving on after five minutes. When the doors opened at 9 a.m., the crowd jammed into the ornate, high-ceilinged chamber, squeezed shoulder-to-shoulder on benches or knee-to-knee on metal folding chairs. H.R. Haldeman, a defendant in the September trial, walked in beside Assistant Special Prosecutor Richard Ben-Veniste and found himself sitting beside Jaworski's wife in the VIP section.

The audience rose in silence as all nine black-robed Justices filed solemnly from behind maroon draperies and took their black leather swivel chairs behind their long, semi-hexagonal bench. From Chief Justice Warren Burger, sitting with white-haired dignity at the center, the Justices were positioned on his flanks in order of descending seniority: William O. Douglas, William J. Brennan, Potter Stewart, Byron R. White, Thurgood Marshall, Harry A. Blackmun, Lewis F. Powell Jr., William H. Rehnquist. After Burger briefly announced an action in an unrelated case, Rehnquist, a recent Justice Department colleague of two of the Watergate cover-up defendants, left the chamber. He did not take part in the Nixon case. "I feel like a starting player injured just before the big game," he has said. From their elevated platform, the unsmiling Justices imposingly dominated the scene.

As the trio of lawyers who argued the case took turns at the lectern, each was rendered somewhat less than life-size by the hugeness of the marble-columned chamber. Some of the tension eased as the arguments progressed. Occasionally a Justice would exchange asides with a colleague. The opposing attorneys shunned oratorical flights, spoke in calm tones that at times almost understated their cases. Yet each was distinctive.

Appearing first in opposing the President's attempt to overturn Judge Sirica's ruling, Special Prosecutor Jaworski spoke softly in the muted twang of a Texas gentleman. Almost immediately he was thrown off stride by technical questions from the unusually attentive and loquacious Justices. Although this was his fourth Supreme Court appearance, Jaworski even forgot the procedural reality that he was representing Sirica as well as his own position on the tapes subpoena; his counsel passed him a note reminding him of that fact.

Yet Jaworski rose to the moment in making his major point: "Now, the President may be right in how he reads the Constitution. But he may also be wrong. If he is wrong, who is to tell him so? This nation's constitutional form of government is in serious jeopardy if the President, any President, is to say that the Constitution means what he says it does, and that there is no one, not even the Supreme Court, to tell him otherwise."

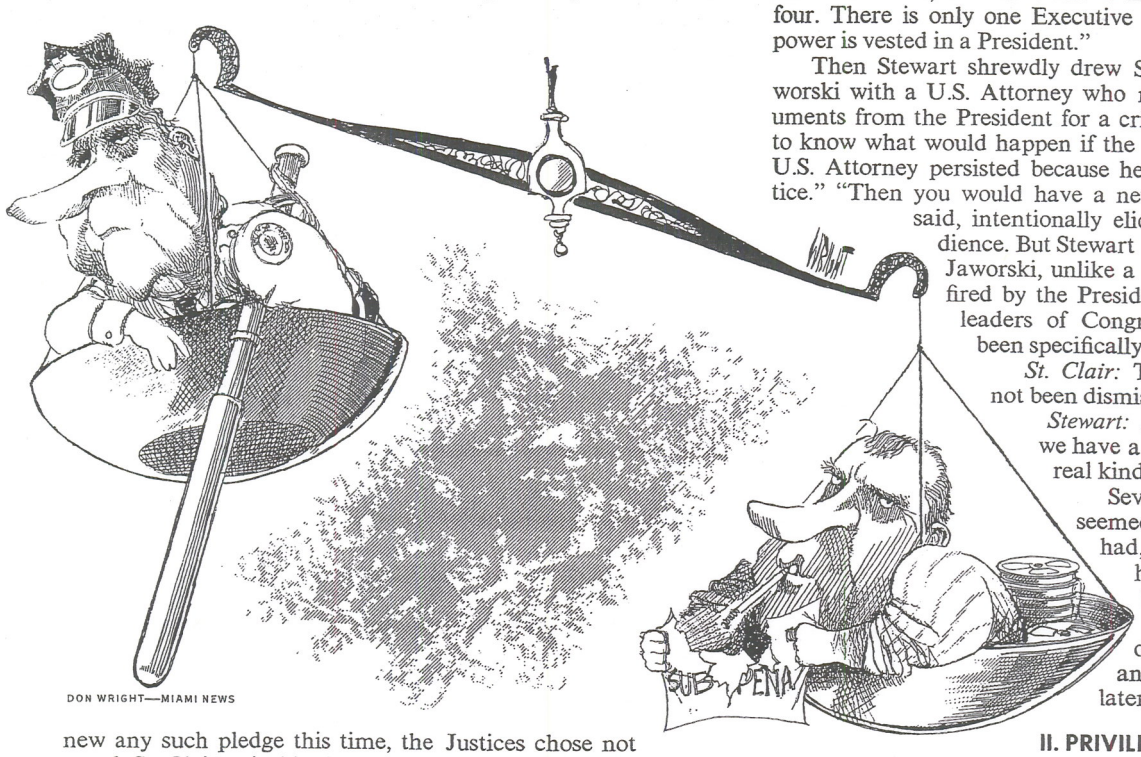
Making his first appearance before the high court, St. Clair proved more assured and forceful than Jaworski. He folded his hands at ease on the lectern, waved his dark-rimmed glasses to emphasize an argument. Brilliantly maneuvering to make the best of a case that many constitutional experts consider untenable, he nevertheless was cornered by deft questioning into revealing the unreasonable limits of the President's privilege claims. Yet he repeatedly drove home his central theme: "The President is not above the law. Nor does he contend that he is. What he does contend is that as President the law can be applied to him in only one way, and that is by impeachment." But a decision against Nixon would inevitably affect impeachment, St. Clair warned the court, and that is a political "thicket" into which the Justices should not intrude.

Finally, appearing in rebuttal to complete Jaworski's case, his diminutive (5 ft. 6 in.) chief counsel, Philip Lacovara, 30, proved most professionally proficient of the three. Speaking quickly and precisely without notes, he rescued Jaworski from technical pitfalls and calmly challenged the Chief Justice on his

interpretation of legal precedents. He urged the court not to shy away from a decision that might have profound political implications nor to shun its duty to decide a basic constitutional issue. He asked the Justices to "fully, explicitly, decisively—and definitively—uphold Judge Sirica's decision."

Lacovara's use of the term "definitively" was a subtle reminder that the President had once pledged to obey a "definitive" decision of the Supreme Court in the original tapes fight waged by Jaworski's predecessor Archibald Cox. After Nixon had Cox fired for seeking this evidence, the political furor that followed forced the President to drop his planned appeal to the Supreme Court. Instead he yielded to an appeals court ruling that he surrender the first group of recordings. At that time Nixon's constitutional consultant, Charles Alan Wright, assured Judge Sirica, "This President does not defy the law. He will comply in full with the orders of this court." To Wright's embarrassment, two of the nine subpoenaed tapes then turned out to be "nonexistent" and a third contained the celebrated 18½-minute buzz-filled erasure.

Though Nixon and his aides have pointedly refused to renew any such pledge this time, the Justices chose not to ask St. Clair pointblank whether Nixon would comply. St. Clair adroitly sidestepped whenever the question seemed imminent. Yet the subject became tantalizingly relevant when several Justices objected to Jaworski's charge that Nixon was setting himself up as the sole judge of the Constitution. As Justice Stewart said of the President: "He is submitting his position to the Court and asking us to agree with it." Jaworski was hardly in a position to say that Nixon might not comply, but Justice Marshall later invited St. Clair to clarify the matter.



DON WRIGHT—MIAMI NEWS

Marshall: You are still leaving it up to this court to decide?

St. Clair: Yes, in a sense.

Marshall: In what sense?

St. Clair: In the sense that this court has the obligation to determine the law. The President also has an obligation to carry out his constitutional duties.

Marshall: Well, do you agree that [Executive privilege] is what is before this court, and you are submitting it to this court for decision?

St. Clair: This is being submitted to this court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution.

Technically, of course, the question of compliance was not before the court. The Justices, operating on the longstanding presumption of acquiescence to their rulings, were properly more interested in the fundamental legal issues. They showed their interest by barraging the three attorneys with nearly 350 questions. Since the heaviest burden rested on St. Clair to prove the Sirica order invalid, the most provocative questions were aimed at the President's lawyer. In the process, St. Clair sometimes seemed trapped in the illogic of his position. His major claims:

I. THE COURT LACKS JURISDICTION

The President is the nation's chief law-enforcement official with final authority over whom to prosecute and with what evidence, St. Clair argued. Hence the Special Prosecutor is a subordinate member of the Executive Branch. The courts simply have no authority to intervene in such an "intra-branch" dispute between these two officials. Referring to Jaworski as "my brother"—a courtroom courtesy—St. Clair belittled the Special Prosecutor's claim that he had been granted independent authority having the force of law by both the President and the Attorney General in the prosecution of Watergate crimes. "A Special Prosecutor with the power that my brother suggests he has is a constitutional anomaly," St. Clair claimed. "We have only three branches, not three and a third, or three and a half, or four. There is only one Executive Branch. And the Executive power is vested in a President."

Then Stewart shrewdly drew St. Clair into comparing Jaworski with a U.S. Attorney who might seek confidential documents from the President for a criminal trial. Stewart wanted to know what would happen if the President disagreed and the U.S. Attorney persisted because he was "sworn to uphold justice." "Then you would have a new U.S. Attorney," St. Clair said, intentionally eliciting a laugh from the audience. But Stewart forced St. Clair to admit that Jaworski, unlike a U.S. Attorney, could not be fired by the President without the approval of leaders of Congress—a condition that had been specifically prescribed by Nixon.

St. Clair: That is correct. And he has not been dismissed. Nor is he likely to be.

Stewart: And until and unless he is, we have a case in controversy of a very real kind.

Several other Justices also seemed to agree that the President had, as Stewart put it, "dealt himself out" of the intra-branch argument by increasing the independence of the office of Special Prosecutor and by relinquishing the unilateral power to fire Jaworski.

II. PRIVILEGE IS ABSOLUTE

St. Clair contended that the Constitution grants the President, at least as an implied power, an unqualified right to maintain the confidentiality of his conversations with his advisers. Only he can decide which conversations he will make public, and the courts cannot challenge that decision. It is a political decision and, if abused, the only remedy is impeachment. Burger and White wondered if the subpoenaed conversations did not at least have to deal with official duties, and St. Clair agreed. Powell then elicited the catch-22 kind of circuitous reasoning that characterizes much of the St. Clair argument.

Powell: What public interest is there in preserving secrecy with respect to a criminal conspiracy?

St. Clair: The answer, sir, is that a criminal conspiracy is criminal only after it's proven to be criminal.

Powell: What is the public interest in keeping that secret?

St. Clair: To avail the President, if your honor please, of a free and untrammeled source of information.

Marshall attacked the point by posing a hypothetical conversation involving the sale of a judgeship. Should the President be entitled to confidentiality?

St. Clair: Absolutely ... The remedy is that he should be impeached.

Marshall: How are you going to impeach him if you don't know about it? You're on the prongs of a dilemma, huh? [When St. Clair demurred, Marshall pushed on.] If you know the Pres-

MEMBERS OF THE U.S. SUPREME COURT (LEFT) ATTENDING FUNERAL LAST WEEK OF FORMER CHIEF JUSTICE EARL WARREN DAVID KENNERLY

ident is doing something wrong, you can impeach him. But the only way you can find out is this way, so you don't impeach him. You lose me some place along there.

St. Clair: Human experience has not demonstrated that's a fact. Very few things forever are hidden.

III. JAWORSKI HAS INSUFFICIENT NEED

St. Clair argued that Jaworski has not demonstrated a need for the subpoenaed conversations sufficient to overrule the President's presumed privilege. Procedural rules place a burden upon Jaworski to specify his reason for wanting each tape; he did so in a 49-page memo to Judge Sirica. Lacovara contended that since Sirica had found the explanations satisfactory, the Justices could only involve themselves in the question if they believed Sirica had abused his discretion. "This Prosecutor [Jaworski] has a plethora of information," countered St. Clair. "He says he wants to try the case with all the evidence. Nobody tries any case with all the evidence. You would be buried in minutiae." Later, St. Clair accused Jaworski of really wanting the tapes to aid in the impeachment inquiry and not for the trial.

Marshall asked how St. Clair could be certain that the subpoenaed tapes should be protected by privilege when the President's lawyer readily admitted that he had not heard them himself. St. Clair claimed that it was enough to know that they were conversations between the President and his advisers. White wanted to know how Jaworski could be expected to specify what the conversations involved.

White: He's never listened to the tapes. He doesn't know precisely what's on them. You would say that he could never subpoena a tape unless he had already gotten it.

St. Clair: That's right . . . There must be a specific showing of relevance and admissibility . . . That's his problem, not mine.

IV. NIXON CANNOT BE NAMED A CO-CONSPIRATOR

Though several Justices seemed to think that the matter was largely irrelevant to their main decision, St. Clair drew relatively few objections to his contention that the Watergate grand jury did not have the right to name Nixon as an unindicted co-conspirator in the cover-up case. "For the purposes of our decision, we can just lay that fact aside," Justice Brennan observed. But St. Clair claimed that it had already prejudiced the impeachment inquiry against Nixon and that he had been unfairly reduced to "an 85% President."

In apparent agreement with St. Clair, Powell observed, "With grand juries sitting all over the United States, and occasionally you find a politically motivated prosecutor—that's a rather far-reaching power, if it exists." Stewart, on the other hand, did not accept the St. Clair argument that if a grand jury lacks the power to indict a sitting President, it cannot name him as an unindicted co-conspirator either: "I should think you could run the argument the other way, saying that since the President cannot be indicted, then all that can happen to him is that he can be named as an unindicted co-conspirator."

Yet it was the possible effect the Supreme Court case might have on the impeachment that obviously most concerned St. Clair. Reversing their normal roles of worrying about the ultimate impact of a decision rather than the narrow legal question before the court, the more liberal Justices this time seemed to dismiss impeachment as of no concern in this case. Declared Brennan: "You have not convinced me that we are drawn into it by deciding this case. How are we drawn into the impeachment proceedings by deciding this case?"

St. Clair: The impact of a decision in this case undeniably, in my view . . . will not be overlooked.

Brennan: Any decision of this court has ripples.

When the surprisingly low-key debate ended, some court experts professed disappointment that the arguments had not been as sophisticated or deeply probing, on the part of either the Justices or the attorneys, as the occasion demanded. To most laymen, however, the legal subtleties were not important. Mobbed by photographers and spectators on emerging from the hearing, Jaworski was confronted by loud applause and a shouted, highly unprofessional accolade: "Dynamite job, Leon!" St. Clair, smiling broadly and radiating confidence, was surrounded by a smaller but enthusiastic crowd.

The Justices retreated to their private conference room to begin the hard work of constructing a decision—one for which the present court will be long remembered. During Warren Burger's five years as Chief Justice, the court has seemed unable to establish a firm identity or to move with consistent direction. The Burger bench contrasts sharply with its activist predecessor, and the difference was being vividly recalled last week because of the death of former Chief Justice Earl Warren (*see* THE LAW).

The four Nixon appointees have given the court a more conservative tone. That was to be expected; Candidate Nixon in 1968 promised to appoint "strict constructionists." But the Burger Court has also on occasion seemed so indecisive as to leave confusion in the wake of crucial opinions. When it ruled against capital punishment—an emotional issue that even the Warren Court had avoided—the vote was 5 to 4 and each Justice wrote a separate opinion. Partly as a result, half the states have drafted new statutes (still untested) reviving the death penalty.

Last year the court gave local jurisdictions the right to apply their own standards in determining what is illegally obscene. But this year it unanimously overturned one such local ruling while upholding another. Now the way is open for an endless string of smut cases to be appealed to the Supreme Court. In school desegregation disputes, the court has seemed ambivalent, particularly on the question of busing. After one decision that appeared to encourage busing, Burger issued an unusual "memorandum" suggesting that lower courts were misreading the ruling.

On some important occasions, of course, the court has left no doubt about where it stands. It has struck down state laws barring abortion, for instance, and extended the guarantee of counsel to persons accused of misdemeanors that carry a jail term (previously the guarantee was for felony defendants only). The court unanimously rejected the Administration's claim of authority to install wiretaps without warrants in domestic national-security investigations.

Part of the reason for the zigzag effect is that Burger has been less adept than Warren was in building consensus—or even promoting amity—among the nine jurists. Stories about bickering behind the bench have been surfacing regularly. Promoting harmony would not be easy for any Chief Justice now because of the court's delicate ideological balance. There are three

consistent conservatives (Burger, Blackmun, Rehnquist), three liberals (Douglas, Brennan, Marshall) and three swing men who are often unpredictable (White, Stewart, Powell).

Privately Burger insists that the court has ended a long period of transition from the Warren era. "We're moving straight down the road, holding to our course," he has said. "Just because we refuse to extend a rule further, some people say we're backing away from progress made by the Warren Court. That is simply not true. In some cases, the Warren Court went too far. Now we're coming out of that phase."

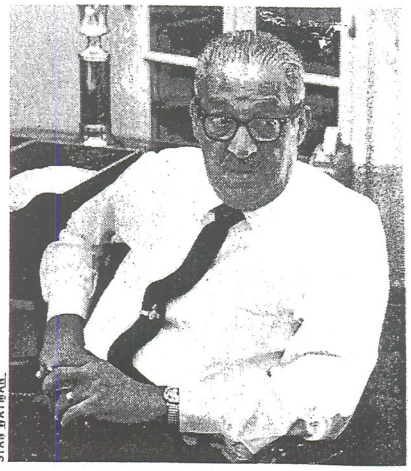
Any court, of course, can be difficult to handicap on a given case. Despite the predictions of experts, despite the hints expressed in last week's hearing, no one could be completely certain how any of the eight Justices would fall. Yet each Justice has a record that law professors and others continually consult in trying to assess how he may rule in a specific case. TIME Correspondent David Beckwith, a lawyer himself, has surveyed such experts and offered this shorthand guide to the eight Justices as they forge their portentous decision:

WARREN E. BURGER, 66, a Republican appointed by Nixon in 1969, believes so strongly in public figures' right to confidentiality that he has often said that "interviewing a judge's clerk is like bugging his phone." Thinks that many newsmen are biased against him personally and against Republicans in general. As an Assistant Attorney General in 1953, argued that the Supreme Court had no authority to review the President's hiring and firing power (the court disagreed). As an appeals judge and as Chief Justice, has generally been a law-and-order man with a narrow view of the judiciary's right to innovate, but has reacted angrily to arbitrary decisions by Executive agencies. Likes Nixon personally and is said to have held up last year's decision quashing state anti-abortion laws for a couple of weeks to avoid embarrassing the President during the inauguration period. Voted for the abortion decision despite strong personal reservations, apparently because his vote would not have changed the result and he felt that the Chief Justice should not undermine the majority on such a controversial issue. He seemed to be on the fence, but is the man considered most likely to vote for Nixon—on the ground that the court should not decide the case since it is a political question.

HARRY A. BLACKMUN, 65, a Republican appointed by Nixon in 1970. Called one of the Minnesota Twins because he and Burger agree on most decisions and because the two jurists were childhood friends in St. Paul. Shy, slow in his work, and still somewhat intimidated by the pace and pressure of the high court. Personally sensitive to violations of confidentiality, but also favors giving prosecutors the tools they need. Has castigated the "pall of Watergate" with its "unusual doings in high places." His essentially strict-constructionist sense of judicial power often outweighs personal sense of what is right; a foe of the death penalty, but voted to uphold its constitutionality. Appeared to be sharing the fence with Burger, and while the Twins might lean toward Nixon, they were probably reluctant to stand alone.

LEWIS F. POWELL JR., 66, a Democrat who joined the court in 1972, is one of the least predictable of the eight and the most flexible of the Nixon appointees. A gracious, old-school Virginia gentleman, easily shocked by wrongdoing of all kinds; before last year's restrictive decision on pornography, reportedly favored a liberal ruling on First Amendment grounds, then switched after viewing reams of hard-core smut. Just before joining the court, was on record as pooh-poohing fears about Government wiretapping, then wrote the sharply worded decision rejecting the Nixon-Mitchell claim that the Government should be able to bug suspected domestic-security risks without first obtaining a court order. Universally regarded as a key vote that Nixon must have, but appeared incredulous during the oral arguments when St. Clair asserted that Executive privilege covers even the discussion of a criminal conspiracy. Was considered to be leaning slightly toward Jaworski.

JUSTICES THURGOOD MARSHALL (TOP), WILLIAM DOUGLAS & LEWIS POWELL (BELOW) & BYRON WHITE (BOTTOM)



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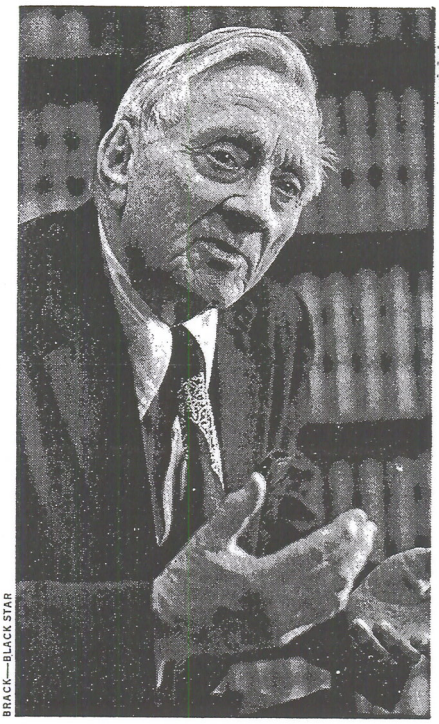

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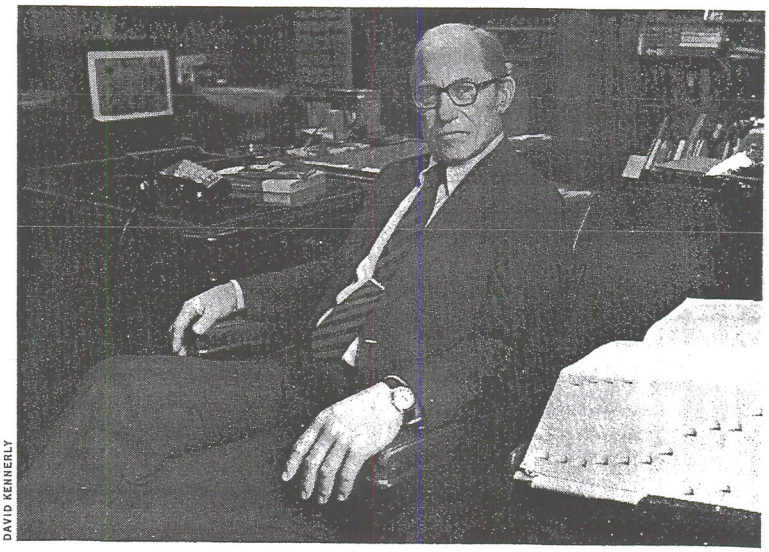

DAVID KENNERLY

BYRON R. WHITE, 57, a Democrat appointed by John Kennedy in 1962, has become a pivotal vote who often sides with the conservatives to form a narrow majority. Least predictable man on the court, criticized by some scholars for failing to develop a clear legal philosophy despite twelve years on the bench . . . Nonetheless said to have the quickest mind on the court. Though firm in supporting desegregation and antitrust enforcement, experience as No. 2 man in the Kennedy Justice Department made him a strong advocate of prosecutors' authority. Also supports an active Federal Government and Executive power, when authorized by Congress. In this case congressional protection of the Special Prosecutor's independence may be the key to White's stand. Like Powell, appeared to be leaning toward Jaworski.