

Tough Time for Decision

Some See Top Court Tapes Ruling Deciding Nixon Impeachment Fate

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WASHINGTON — The Supreme Court could hardly have picked a tougher time to step into the Watergate tapes dispute.

By agreeing to rule promptly on whether President Nixon must surrender 64 tape recordings to Special Prosecutor Leon Jaworski, the Justices are tackling the crucial question of executive privilege without the lower court guidance they'd prefer.

They'll be resolving it in the midst of a sensitive impeachment inquiry which, though separate from Mr. Jaworski's case, almost certainly will be affected by the high court's decision, expected in July.

Some legal scholars even believe Mr. Nixon's ultimate impeachment fate may hinge on the ruling.

And the Justices will be acting in the face of growing public distrust of governmental institutions. That's a particular burden for this court, dominated by Mr. Nixon's own appointees and perceived by many as a politically sensitive panel. (One of the appointees, Justice William H. Rehnquist, didn't participate in the court's agreement to decide the case, presumably because he previously held a high Justice Department post in the Nixon administration.)

Despite the problems, the Supreme Court on Friday granted Mr. Jaworski's request to shortcut the judicial process. This case normally would be before the federal appeals court for a review of Federal District Judge John Sirica's order that Mr. Nixon hand over the tapes, which Mr. Jaworski says he needs to try seven of Mr. Nixon's former aides indicted for obstructing justice after the Watergate break-in. But Mr. Jaworski argued in seeking immediate Supreme Court review that this would delay the cover-up trial until the spring of 1975.

More Than Simple Legal Terms

That the Justices took the case suggests they view it in more than just simple legal terms. Many legal scholars felt Mr. Jaworski's rationale wasn't strong enough to overcome the high court's traditional reluctance to skip the appeals court step and resolve disputes on a hurry-up basis. Nevertheless, the court agreed to hear the case on an expedited schedule, with oral arguments set for July 8, some three weeks beyond the date the court was scheduled to break for the summer.

As is its custom, the Supreme Court didn't say which Justices voted to review the case (it takes four votes to obtain high court review), nor why they took the action. But constitutional experts, such as Yale University's Louis H. Pollak, believe the court was worried about being "perceived as going off for the summer, leaving over national business" until October, when the

next court term begins. Philip B. Kurland of the University of Chicago sees it as "a political, rather than a legal decision."

No matter how the court ultimately rules, its decision will generate some side effects that the Justices mightn't intend, but probably can't escape. If the court orders Mr. Nixon to give up the tapes, for example, then the President must decide whether he believes executive privilege of confidentiality permits him to refuse to comply. If he does refuse, it probably will lead to an impeachment charge. If he complies, it probably will encourage the judiciary committee to issue its own subpoena for taped materials the panel says it needs as part of its impeachment inquiry.

Conversely, President Nixon could be "home free," Mr. Kurland believes, if the Supreme Court holds that the Chief Executive can withhold the tapes under a claim of executive privilege. For one thing, it probably would encourage more support for Mr. Nixon from wavering House Republicans. At the least, it would delay the impeachment proceedings, by further stiffening the President's resistance to any House committee demands for information.

Narrow Their Ruling

Almost certainly, the Justices will be looking for a way to narrow their ruling, so as to avoid seriously handicapping either side in future cases of executive privilege. The likeliest way is to hold that the President simply has waived his privilege in this case by permitting widespread public disclosure of Watergate-related conversations that have produced evidence of wrongdoing. Or the court could avoid the privilege question completely, holding that this is an intra-Executive Branch squabble (since Mr. Jaworski was appointed by the President) over which the courts haven't any jurisdiction.

Arguing against too narrow a ruling is the high court's awareness of how the government is viewed by the public these days. "For the court to come up with a legalistic decision avoiding the heart of the issue might reinforce the public's skepticism," says Vincent A. Blasi, a constitutional law professor at Michigan University. "It would be one more example of a government institution that isn't responsive."

While all the Justices must feel pressure, there's an added burden on the three Nixon appointees who apparently will participate in the case: Chief Justice Warren Burger and Justices Lewis F. Powell Jr. and Harry Blackmun. For if the court splits in a way that leaves all three favoring the President, public skepticism is almost inevitable. "In a curious way," says Mr. Pollak of Yale, "it would take great strength on their part to decide the case in the President's favor."