WXPost JUL 7 1974

High Court to Hear Tape Case Monday

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The Supreme Court holds a rare and historic session Monday on a test of President Nixon's power to withhold evidence the Watergate special prosecutor says will prove a criminal conspiracy at the highest levels of government —including the presidency itself.

Only the high court justices now can settle the major legal question: who decides when the President disagrees with his specially designated prosecutor over executive privilege.

"The President decides," says presidential counsel James D. St. Clair. "The validity of such a claim must be resolved by the courts," says Watergate Special Prosecutor Leon Jaworski.

Another fundamental question has been raised by a belated White House legal challenge to Jaworski's authority: is the American system flexible enough to allow prosecutions that reach into the White House when its elected occupant asserts the role of "chief of state, chief executive, commander-in-chief and chief prosecutor?"

A full house, limited only by the design of the court's ornate hearing room and the justices' insistence on decorum, has been guaranteed since the court agreed six weeks ago to extend its term and conduct an accelerated review of U.S. District Court Judge John J. Sirica's ruling against the President. In the high court's entire history there are only a few precedents for a summer hearing and for bypassing the U.S. Court of Appeals.

Only a few hundred lawyers, members of Congress, newsmen and other spectators —some of whom had to win a lottery to gain a seat in the courtroom—will be able to hear Jaworski, claiming to represent the sovereign power of the United States, compete for the court's vote with St. Clair, who claims that President Nixon "is the executive branch" of government.

But the decision, which could be rendered within days or weeks, will be heard round the world, especially if it resolves issues of basic govern-

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mental power and major strategic questions that hover over the House impeachment inquiry.

The case has received the title, "United States of America, v. Richard M. Nixon, President of the United States et al." The reverse caption, Nixon v. United States, applies to Mr. Nixon's effort to expunge a grand jury's vote of 19 to 0 to name him an unindicted co-conspirator in the Watergate cover-up conspiracy case set for trial in September.

Sometimes forgotten in the legal power struggle is the importance of the immediate prize — acces to tape recordings and documents of 64 White House conversations involving President Nixon, his trusted political lieutenants and, allegedly, the cover-up.

The conversations range from those held three days after the June 17, 1972, burglary of Democratic National Committee headquarters n the Watergate ffice complex through the March 21, 1973, talks about secret money ror a burglary defendant who had pleaded guilty, to April 26, 1973, when the President may have discussed the significance of the tapes with his closest aide, conspiracy defendant H. R. (Bob) Haldeman.

Other voices overheard on microphones hidden in the Oval Office, Mr. Nixon's quarters in the Executive Office Building and his Camp David office are those of defendants John N. Mitchell, the former Attorney General, John D. Ehrlichman, second-ranking White House aide before Watergate, and Charles W. Colson, whose guilty plea to another charge has transferred his status to that of a potential prosecution witness.

The voices of former White House counsel John W. Dean III, press secretary Ronald L. Ziegler and special assistant Stephen B. Bull also should be on the tapes, according to Jaworski's trial subpoena, which is part of the published record on file with the Supreme Court. Not yet in the public file are documents setting forth Jaworski's reasons for contending that the conversations are incriminating.

If the conversations are indeed incriminating and if, as the grand jury found, Mr. Nixon was "a member of the conspiracy to defraud the United States and to obstruct justice," the tapes also are highly relevant to the impeachment proceeding.

Keenly aware of this, St. Clair has charged in his legal brief that Jaworski's office is serving as a mere "conduit" for the House Judiciary Committee, which hasn't been able to get White House compliance with numerous subpoenas of its own. Previously the President agreed to let the committee have whatever Jaworski had, and he posed no objection to a large transfer of grand jury evidence last spring to the committee.

But even if Jaworski wins the high court case, the subpoenaed material could not be available to the committee before it plans to start to vote on proposed articles of impeachment. Under Sirica's ruling, Jaworski would not see the evidence until after the judge screens it for sensitive and irrelevant material, which could take weeks.

Also lurking in the case are the consequences on impeachment of a ruling for Jaworski followed by noncompliance by the President. Many believe White House defiance—which Mr. Nixon has not ruled out—would trigger a new impeachment charge. More litigation over Sirica's sifting of the evidence, another likely possibility, could threaten the Sept. 9 trial date.

It was the President's initial defiance of an earlier Sirica order—one Mr. Nixon declined to appeal to the Supreme Court last October—that helped spark the impeachment drive and laid the foundation for the current dispute over Jaworski's legal status.

Attorney General Elliot L. Richardson and Deputy Attorney General William D. Ruckelshaus resigned last October before the President could find a Justice Department official, Solicitor General Robert H. Bork, who was willing to fire then-Special Prosecutor Archibald Cox for insisting on the right to enforce the earlier subpoena in the courts.

Jaworski was installed under Justice Department regulations, which, according to a court ruling, have the force of law, guaranteeing him independence, White House co-operation and the authority to take Mr. Nixon to court over executive privilege.

St. Clair now says that no arrangement could give the courts the power to decide a dispute between Mr. Nixon, the nation's "chief prosecutor" as well as military commander, and an underling in the executive branch like the special prosecutor.

Jaworski complained to the Senate Judicairy Committee, a part-time watchdog over the special prosecutor, that the last-minute legal argument was a breach of faith that would make a "mockery" of his function. St. Clair contends he has the professional duty to raise any serious legal argument that helps his client.

Outside experts are treating the argument seriously but most of the academic commentary has supported Jaworski. Two Yale law professors, Lee A. Albert and Larry G. Simon, contend in a forthcoming Columbia Law Review article that only by exercising his power to fire Jaworski—and risking the political consequences—could Mr. Nixon deprive the prosecutor of the legal standing he needs in court.

The legal reality, the professors argue, is that Jaworski is duly appointed under regulations giving him legal rights and job security. To rule out Jaworski's demand for evidence because he might be fired, they contend, "would transform the President's unexecuted wishes into law."

Another Yale law teacher, Alexander M. Bickel, has criticized the White House for apparently violating a political pledge of authority and independence for Jaworski but argued that the issue goes so close to the question of the courts' jurisdiction that there might be a serious defect in the litigation even if the Nixon defense team had not raised it.

This jurisdictional issue is a threshhold matter the justices may want to discuss before moving to the merits of the case. How seriously they treat it in their questions from the bench could be the first clue to the result.

On the merits—Mr. Nixon's protest against being named a co-conspirator and his claim of absolute, unreviewable executive privilege—the White House faces an uphill battle. Ironically, Mr. Nixon's biggest obstacles could prove to be the recent rulings of the "Burger court," to which he has named four justices.

Jaworski's brief is lavish in citing some Burger court rulings that the White House briefs mention only in passing.

Nixon appointee Lewis F. Powell Jr. is quoted frequently, along with "swing" vote Justice Byron R. White, for opinions reaffirming "the longstanding principle that the public has a right to every man's evidence."

And a decision delivered by Chief Justice Warren E. Burger rejecting the express

privilege of congressional immunity by former Sen. Daniel Brewster (D-Md.) is cited as proving that executive privilege, which is not expressly spelled out in the Constitution, is an even weaker shield against demands for evidence.

Unfortunately for Mr. Nixon, one of his appointees who helped produce the rulings against constitutional privileges (including newsmen's defenses to grand jury subpoenas), is also a strong supporter of executive privilege, but he will not participate in the case. Justice William H. Rehnquist, spokesman for the administration's executive privilege before going on the bench, has disqualified himself because of former close ties to Mitchell.

That means that only four votes are needed to uphold Sirica, though perhaps only a clear majority could produce a "definitive" ruling. Many legal experts are speculating that even Burger, the most likely Nixon supporter remaining in the case, could be swept along in a majority ruling enforcing the subpoena.

Even if nothing came of it and the court washed the case out on some procedural ground, Monday's encounter would be momentous. Jaworski and St. Clair, though not renowned in the special field of appellate advocacy, are canny and experienced courtroom fighters. The court, never a stranger to controversy, has cleared most of its docket and should be prepared for sharp questioning.

No matter how the questions are worded, they will not necessarily betray a justice's ultimate vote or his reasoning. The justices will withdraw behind the heavy maroon curtain without announcing the result. When the result is announced, whatever it is, the first answer to the question "who decides?" will be that the Supreme Court decides.