SFChronicle JUL 9 1974

Nixon's Power Argued Before Supreme Court

Historic 3-Hour Debate

Washington

President Nixon's attorney told an extraordinary session of the Supreme Court yesterday that it cannot force the President to disclose Watergate conversations, even if they demonstrate criminal acts.

James D. St. Clair argued that only the Congress, through impeachment, has the power to bring criminal charges against Mr. Nixon.

The judiciary, he said, must keep out of that process.

St. Clair and special prosecutor Leon Jaworski fought for exactly three hours over the President's power before eight justices and a packed courtroom at the historic session.

Said Jaworski: "The President may be right in how he reads the Constitution. But he may also be wrong.

"And if he is wrong, who is there to tell him so? And if there is no one . . . what's then to become of our constitutional form of government?

It was the first time, in a case titled "The United States of America vs. Richard M. Nixon," that the Watergate scandal had reached the nation's highest court.

In three hours of debate, Jaworski cast the argument in the narrow terms of a prosecutor seeking vital evidence for trial, while St. Clair put it in the broad scope of impeachment proceedings with political overtones.

At the end of the hearing, the justices reserved decision and gave no indication when they will decide the two cases and their key questions: Must Mr. Nixon obey a lower court order to give up tape recordings and other records of 64 presidential conversations, and did the Watergate grand jury

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have the right to name Mr. Nixon as an unindicted co-conspirator in the Watergate coverup?

Jaworski has subpoenaed the tapes as evidence in the coverup trial of six former White House aides, including Mr. Nixon's two closest advisers, H. R. Haldeman and John D. Ehrlichman. U. S. District Judge John J. Sirica has ordered the President to turn over the tapes for his private inspection to determine what should be provided the prosecutor for the trial beginning September 9.

In the course of the argument, St. Clair declared that no court can force Mr. Nixon to give up records of presidential communications, even if a crime is involved.

Justice Lewis F. Powell Jr., one of three Nixon appointees hearing the case, noted that the purpose of privilege is to guarantee the President candid advice from his associates.

The justice queried, "What public interest is there in preserving the secrecy about a criminal conspiracy ?"

St. Clair replied, "A criminal conspiracy is criminal only after it has been proven. We're not at that point yet . . . You should not destroy the privilege in anticipation of later criminality which may not come to pass."

St. Clair said the President must preserve the confidentiality of his office so he may receive "free and untrammeled information" about, for example, the selection of judicial nominees.

Justice Thurgood Marshall asked whether St. Clair would claim executive privilege protects the records of a hypothetical bribery deal between the President and a judicial nominee.

"I would think that could not be released," St. Clair said, adding that a President could be impeached for such wrongdoing.

"How are you going to impeach him if you don't know about it?" Marshall retorted.

The President's attorney did not directly reply, and that ended the exchange.

All of the eight, black-robed justices asked questions of St. Clair and Jaworski.

The courtroom's only vacant seat was the high black armchair assigned to Justice William H. Rehnquist. He removed himself from the case, presumably because he held a policy-making Justice Department job during Mr. Nixon's first term.

Chairs in the aisle stretched the mahagony-and-marble hearing room's normal capacity to more than 300 seats accommodating lawyers, newsmen and members of the public.

Some waited in line through the weekend to insure seats. Haldeman was one of the spectators.

In rebuttal to St. Clair's argument, Jaworski's associate, Philip A. Lacovara, asserted, "A prima facie showing can be made that these conversations were not in the lawful conduct of public business, but in furtherance of a criminal conspiracy to defraud the United States and obstruct justice."

The subpoenaed conversations took place during three days of April, 1973, when the Watergate coverup was unraveling.

Defining the case as "a criminal proceeding against six defendants," Lacovara said, "It's really the obligation of the prosecutors to present all available evidence."

St. Clair devoted much of his time to the argument that the court has no right to intervene while the impeachment inquiry is proceeding.

"The special prosecutor is drawing this court into that proceeding inevitably and inexorably," St. Clair stated. "No one could stand here and argue with any candor" that the court's decision would have no impact on impeachment, he added.

Justice Potter Stewart, noting the prosecutor's attempts to prepare evidence for the coverup trial, asked, "You are saying that cannot go forward because of some tangential fact . . . going on in another branch of government?"

St. Clair replied: "I say the President should decide, as a political matter, what should be made available to the House. The court should not be drawn into it."

If the tapes are turned over to the court, St. Clair said, they presumably would reach the House Judiciary Committee.

Marshall asked whether the White House has made an effort to screen the subpoenaed tapes for national

security material unrelated to the Watergate case.

St. Clair said no, except for the 20 conversations included in transcripts edited and made public by the White House.

"You don't think a subpoena duces tecum is sufficient reason to try?" Marshall retorted. "You just ignored it, didn't you!"

St. Clair said that the subpoena was not ignored and that Mr. Nixon responded by fighting it in court.

The President's lawyer further argued that the dispute is an internal matter within the executive branch and beyond the authority of the courts to decide.

That is so, he said, because the prosecutor is an official of the executive branch, subordinate to the President.

"Your argument is very good," Stewart commented. Then, in a reference to Mr. Nixon's guarantee of independence for the prosecutor's investigation, Stewart asked: "But hasn't your client dealt himself out of that argument?"

St. Clair said Mr. Nixon never promised Jaworski freedom to decide which presidential conversations should be turned over for evidence.

"The special prosecutor is a constitutional anomaly. We have only three branches, not three and a half or four," St. Clair said.

"The only thing my brother can do is argue about it and that's what he's doing here today."

Urging the court to order Sirica to erase the grand jury's listing of Mr. Nixon as a co-conspirator, St. Clair argued that the Constitution grants a President immunity from criminal proceedings except through impeachment.

Associated Press

UPI Telephoto

PHILIP A. LACOVARA AND LEON JAWORSKI
Watergate prosecutors argued the case for the United States

JAMES D. ST. CLAIR
The President's lawyer