NYTimes MAY 28 1974 THE NEW YORK TIMES,

# Problem for Court in Taking Tapes Case

By WARREN WEAVER JR.
Special to The New York Times

WASHINGTON, May 27—The Supreme Court and particularly its Chief Justice, face difficult and politically explosive decisions in the request by the Watergate special prosecutor, Leon Jaworski, that the court take immediate jurisdiction of the dispute over President Nixon's refusal to surrender 64 White House tapes. The Court rule on the question, both procedural and substantive, whether the "imperative public importance" of bringing the Watergate conspirators to trial this year justifies bypassing an intermediate hearing for the President in the United States Court of Appeals for the District of Columbia.

**News Analysis**

Such authorization is rare, but there are some notable precedents to guide the Justices. Most recently, the high court agreed to hear similarly accelerated cases involving President Truman's seizure of the steel industry in 1952 and a threatened coal strike against Government operators in 1946.

But Chief Justice Warren E. Burger must resolve a question fro which Federal law, Supreme Court rules and judicial precedent offer no guidelines at all: whether he can properly sit on a case involving a key issue that may later prove controlling in a Senate impeachment trial of President Nixon.

### Question of Impartiality

For the Constitution states unequivocally that "when the President of the United States is tried, the Chief Justice shall preside." But could he be regarded as an impartia lpresiding officer if he had voted, only a few months earlier, on the validity of a major Presidential defense?

At the heart of last week's decision by Federal District Judge John J. Sirica and Mr. Jaworski's subsequent request for Supreme Court review is the question whether executive privilege, as defined and applied by the President, enables him to refuse to produce relevant information for pending criminal investigations.

If the House impeaches Mr. Nixon and he comes to trial in the Senate, it is highly likely, although not certain, that one charge against him will hinge on whether such refusal to supply the tape recordings can be justified by the invocation of executive privilege.

Although it may be difficult to apply within the framework of Watergate, the Supreme Court rule governing bypassing the Court of Appeals is at least available in writing, together with a record of a half-dozen times it has been applied.

### Degree of Importance

The high court can agree to review a case that is officially before the Court of Appeals but has not been decided there, rule 20 states, "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

When the Supreme Court agreed to take the steel seizure case on an accelerated basis in 1952, two Justices, Harold H. Burton and Felix Frankfurter, dissented, and their brief opinion indicates a possible rationale for members of the Burger court who may choose to vote against taking the tapes case now.

"The constitutional issue which is the subject of the appeal," Justice Burton wrote, "deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching it."

The problem that his prospective duties as the presiding officer at a Nixon trial in the Senate poses for Chief Justice Burger is a highly unusual one, even considering the relatively unchartered area of judicial disqualification.

### In a Connection

Ordinarily, judges decline to sit—in the formal legal term, "recuse"—on a given case because of some past or current connection, positive or negative, with the parties, their attorneys or the issues involved. Almost never is a judge required to look into the future and anticipate a conflict.

But, in normal judicial proceedings, a judge does not know until a relatively short time before a case comes up that he will be presiding. Chief Justice Burger has known ever since the first House member called for impeachment that he would be required to preside over any trial that resulted.

The Supreme Court rules do not make any provision for a Justice disqualifying himself in a case, although the practice has grown relatively common. And although there are no applicable rules, the Court has entertained upon occasion a motion requesting a Justice to disqualify himself. In a case involving Associate Justice William H. Rehnquist in 1972, the Court referred the motion to the individual Justice and he denied it himself.

Federal law requires only that a judge disqualify himself "in any case in which he has a substantial interest, has been of counsel, is or has been a material witness or is so related to or connected with any party or his attorney, as to render it improper, in his opinion, for him to sit."

Part of the problem is the element of uncertainty. The House Judiciary Committee may not vote a bill of impeachment; if it does, the full House may vote it down. If the House votes impeachment, President Nixon may obviate a Senate trial by resigning.

If any of these events occur, Chief Justice Burger would have been deprived of a potentially tie-breaking vote on a historic case because he anticipated a conflict situation that never arose.

If Mr. Burger sits on the tapes case, it would be virtually impossible for him to disqualify himself later as presiding officer at any impeachment trial, both because of the constitutional mandate and because all of his colleagues, having participated in the earlier decision, would be equally ineligible.