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The Nixon Case

By William V. Shannon

WASHINGTON, July 5—The cases coming up in the Supreme Court on Monday are of enormous interest. Some novel constitutional questions are to be explored, and the Court's decisions may indirectly affect President Nixon's continuance in office. Yet for all the historic ambience of these cases, there can hardly be much suspense about their probable outcome.

On intellectual merit, the brief to be argued by James D. St. Clair, the President's Watergate counsel, is so weak and that of Leon Jaworski, the special prosecutor, is so strong that it would be astonishing if the Court ruled in the President's favor.

In the case of U.S. v. Richard M. Nixon, the special prosecutor is asking the Court to order the President to make available 64 additional White House tapes for possible use as evidence in the trial of several former Administration officials. Those individuals—H. R. Haldeman, John D. Ehrlichman, John N. Mitchell and others—are accused of obstructing justice and, in the case of some of them, committing perjury to conceal the extent of White House involvement in the original Watergate burglary.

U.S. District Judge John J. Sirica ruled on May 20 that the President had to surrender those tapes. It is that ruling that the Supreme Court will now review.

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At the same time that the grand judy indicted these former officials, it also listed several other individuals as unindicted co-conspirators. One of them was Mr. Nixon, whom the grand jury described as "a member of the conspiracy to defraud the United States and to obstruct justice."

In the companion case that the Supreme Court will also hear on Monday, the President is asking that his name be stricken from the indictment.

There are four issues before the Court. The first is whether Mr. Jaworski has legal standing to sue the President at all since he is a member of the executive branch and is, therefore, nominally a subordinate of the President. This is a tenuous question.

Normally, a subordinate official in the executive branch such as an Assistant Attorney General would never institute legal action against a President. But the justices of the Supreme Court live in the real world. They know that Mr. Jaworski is not to be confused with an ordinary officer of the Justice Department. He and the President are, as he stated in his belief, "adverse parties in the truest sense." Only if the Court wishes to evade the substantive questions would it base its ruling on the jurisdictional issue.

The second question is whether a President can withhold evidence in a criminal case by asserting executive privilege. The obvious, inescapable answer is that he cannot. Executive privilege is not a constitutional command. It is a matter of comity between the diferent branches of Government.

Naturally, a President is entitled to some reasonable degree of privacy in counseling with his advisers. But he does not stand above or outside the reach of the law. If a court commands him to produce material evidence, it is his duty to do so. If the President believes that producing such evidence would jeopardize the military safety of the country or endanger some vital public interest, he can submit the evidence in secret to the trial judge and let him make the determination. That was the course that Mr. Nixon finally followed in the original tapes case last year, and it is the procedure the courts have ordered in other "executive privilege" cases.

Whether a President can be named as an unindicted co-conspirator is a fascinating theoretical question which has never been decided. Usually it has been thought that a President should not be indicted because the preparation of his defense and attendance at his trial would take too much time away from the performance of his public duties. However, to be listed as an unindicted co-conspirator, though it is embarrassing, does not impose those practical burdens. For that reason, there would seem to be no obstacle t a grand jury exercising its authority to that extent.

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Finally, can a court enforce a subpoena against a President who refuses to make evidence available? Mr. St. Clair argues that such subpoenas are inherently unenforceable.

"If he [the President] could be enjoined, restrained, indicted, arrested or ordered by judges, grand juries, or marshals, these individuals would have the power to control the executive branch. This would nullify the separation of powers and the coequality of the Executive."

But, again, reality intrudes upon this fantasied danger. Justices of the Supreme Court know that judges and juries have great respect for the office of the Presidency and that attempts to harass a President by legal actions are usually promptly quashed. It required the persistent criminal conspiracy to cover up the truth about Watergate to force these extraordinary cases before the Supreme Court. Having decided to consider them, the Court is unlikely to stultify the judicial branch by ruling that Mr. Nixon can be the sole judge of the evidence in a criminal trial or that he is totally immune from judicial process.