

Court Hears Water

By John P. MacKenzie
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President Nixon's lawyer told the Supreme Court yesterday that enforcing the Watergate conspiracy case subpoena for White House tape recordings would make Mr. Nixon the weakest of Presidents and hobble his defense against impeachment.

Attorney James D. St. Clair argued that the judiciary should avoid "political questions" related to Watergate and, if necessary, stay its hand in pending criminal cases until impeachment runs its course.

But his opponent in the day's courtroom drama, Watergate Special Prosecutor Leon Jaworski, flatly denied that there is any constitutional basis for the President's claims of executive privilege and said the courts must act in the face of a presidential threat to "our form of constitutional government."

And Jaworski's legal aide, Philip A. Lacovara, urged the justices to lay aside political worries and "fully, explicitly and definitively" uphold U.S. District Court Judge John J. Sirica's order to produce tapes that allegedly

incriminate former Nixon associates who face trial in the Watergate cover-up.

These exchanges highlighted a three-hour hearing in the high court's chamber, packed with lawyers, Watergate defendants, and spectators fortunate enough to obtain seats for the historic cases titled "United States vs. Nixon" and "Nixon vs. United States."

The audience was not disappointed. Although counsel spent much time wading through technical matters of court jurisdiction and procedure, they also engaged in sharp debate as

gate Tapes Case

the justices, not indicating how they will rule, challenged and tested their legal arguments.

At issue is who has the right—the courts or Mr. Nixon—to decide whether the President must yield evidence of 64 White House conversations Jaworski says he needs for the September trial of John N. Mitchell, H. R. (Bob) Haldeman, John D. Ehrlichman and other alleged cover-up conspirators. Also under review is the grand jury's right to name Mr. Nixon as a member of the alleged conspiracy.

"The President is not above the law,"

said St. Clair, but he added, "We contend that the law applies to him in only one way."

That way, he said is through the impeachment process now under way. He said the courts would be "drawn into" that process and would interfere with it by enforcing the subpoena with all its implications for the pending inquiry in the House of Representatives.

In addition, said St. Clair, a court order to produce the tapes would diminish Mr. Nixon's authority despite his election by voters who expected he would have "the powers of any other

President. Mr. Nixon would be an 85 per cent President, not a 100 per cent President."

Asked by Justice William O. Douglas whether he was advising delay of "all the criminal trials" being prosecuted by Jaworski, St. Clair replied that "it would not be the first time" such a thing had happened. That course is "clearly indicated," he added.

Jaworski denied that any claim of presidential privilege had ever been held immune from judicial review.

"The President may be right in how

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he reads the Constitution" as supporting his claim of privilege, Jaworski said. "But he may also be wrong. And if he is wrong, who is there to tell him so? And if there is no one, then the President of course is free to pursue his course of erroneous interpretations. What then becomes of our constitutional form of government?"

Justice Potter Stewart and Chief Justice Warren E. Burger said the President was indicating obedience to the law by submitting the subpoena issue to the courts. Jaworski replied that Mr. Nixon was asking the courts to rule that "nobody can tell me what the Constitution says" and that "he and he alone is the proper one to interpret the Constitution."

St. Clair, once again leaving wide open what his client will do if the ruling goes against him, said the case was fully before the courts "in a sense."

"In what sense?" Justice Thurgood Marshall demanded. St. Clair replied, "In the sense that this court has the obligation to determine the law . . . This is being submitted to this court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution."

Across the Capitol grounds jammed with spectators lined up in hopes of hearing the arguments, Senate leaders cautioned against presidential defiance of an adverse ruling.

"I think any citizen would obey any decision of the Supreme Court. It's a duty," said Majority Leader Mike Mansfield (D-Mont.). "My view is that if it is a clear order to the President to make certain disclosures, he could not afford to defy it," said Minority Leader Hugh Scott (R-Pa.).

Few observers were confidently predicting a clear-cut ruling for either side on the basis of the questions from

the bench. But it appeared that the President's side was falling far short of capturing the needed five votes to overturn Judge Sirica's decision in Jaworski's favor.

Justice William H. Rehnquist, a recent close associate of former Attorney General Mitchell, did not participate yesterday. St. Clair needs five votes because a 4-to-4 tie would sustain Sirica.

One of those critical justices, Potter Stewart, indicated little interest in St. Clair's contention that Jaworski, as a lower member of the executive branch, lacks the legal standing and the courts lack the power to test the executive privilege issues.

"Hasn't your client been dealt out of that argument by what has been done in the creation of the special prosecutor?" asked Stewart.

St. Clair replied that despite extensive delegations of power to Jaworski, Mr. Nixon had not delegated all his authority in the area of criminal prosecutions. He did not give Jaworski "the right to order the President to give up confidential communications," he said.

Stewart shot back: "Not the unfettered right to get it, but the right to go to court and ask a court to decide whether or not he is entitled to it."

In a tribute to the tenacity of St. Clair, Stewart told the Boston lawyer, "You are living testimony to the fact that [the President] did not give up his right to defend his position in court."

Another key justice, Byron R. White, indicated doubts about St. Clair's argument that the special prosecutor had not demonstrated sufficient need for the evidence.

At one point St. Clair told White that the prosecutor could not meet his burden of showing that the tapes would be relevant and admissible at the trial because "he doesn't know what's in there."

Said White: "Mr. St. Clair, you can't put an impossible task on someone . . . He's never listened to the tapes. He doesn't know precisely what's on them. You would say that he could never subpoena a tape unless he had already gotten it."

"As a prosecutor, that's right," St. Clair said.

Another key member of the court, Justice Lewis F. Powell Jr., questioned whether any presidential privilege extended so far as to protect criminal conversations.

Calling the issue "fundamental to me," Powell asked St. Clair, "What public interest is there in preserving secrecy with respect to a criminal conspiracy?"

St. Clair said such a conspiracy had yet to be proven. But Powell said it could be shown in various ways, such as through confessions of codefendants, in advance of trial.

Justice Powell also voiced doubts about the special prosecutor's position, suggesting that the power to brand the President as a conspirator was "far-reaching" and subject to abuse by politically-motivated prosecutors.

Lacovara responded that the nation's legal and democratic system was "resilient" and "should be vibrant enough" to withstand fears of abuse. Such fears, he said, were no reason to say there is no power to deal with a "notorious" case involving the President's closest aides.

Jaworski and Lacovara rejected St. Clair's argument that the President is not subject to the ordinary criminal process, including even indictment while in office. "The grand jury elected not to test that issue," Lacovara said, and the court need not decide it in determining the validity the jury's 19-to-0 vote to link Mr. Nixon in the conspiracy.



Watergate Special Prosecutor Leon Jaworski waves as he and aide Philip A. Lacovara leave the Supreme Court after presenting oral arguments.

Associated Press

The prosecutors said the courts should not go beyond the grand jury's finding that a conspiracy existed and Mr. Nixon was part of it. They said the courts need only be persuaded, as Judge Sirica was in this case, that there was a connection between the alleged conspiracy and the evidence sought.

Justice William J. Brennan Jr. questioned the basis for St. Clair's warning against being "drawn into" the ongoing impeachment proceedings.

St. Clair said the "impact of a decision in this case. . . will not be overlooked" in the House. "Any decision of this court has ripples," Brennan snapped.

Justice Douglas, a longstanding foe of executive secrecy, repeatedly stressed that the six remaining con-

spiracy defendants (former White House aide Charles W. Colson has pleaded guilty) have a stake in the production of evidence that might exonerate them. St. Clair said that question of exculpatory evidence was not before the high court and several justices indicated agreement with St. Clair on that point.

Douglas also signified agreement with Jaworski that executive privilege was not based on the Constitution. Jaworski said courts may recognize it—but on the basis of judicially developed rules preserving confidentiality in certain government affairs and not on any specific constitutional right.

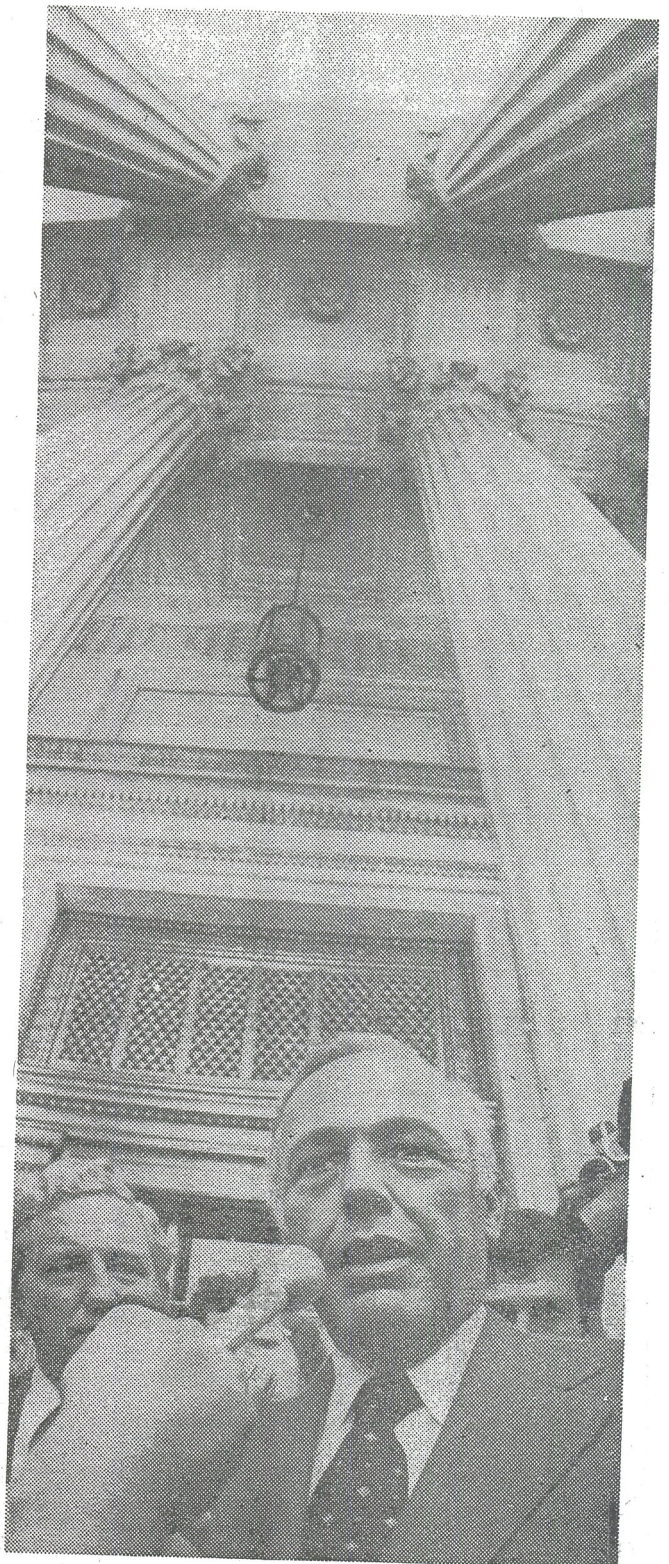
Burger's questioning did not reveal his leanings in the case, nor did the court indicate how long it would take to announce its judgment. The prose-

cutors said even an affirmation of Judge Sirica would lead to prolonged pretrial sifting of the tapes.

Spectators, led by dozens who waited two days for seats reserved for the public, filled every corner of the ornate chamber.

By coincidence, Assistant Attorney General Henry E. Petersen, a controversial figure in the Watergate investigation, was seated next to William Dixon, the House Judiciary Committee staff member whose memoranda on the White House tapes were recently leaked to the press.

And next to Mrs. Jaworski in the audience was Haldeman, the former Nixon chief of staff and current conspiracy defendant. Mrs. Jaworski said later she had not known who was sitting beside her.



Associated Press

Nixon lawyer James D. St. Clair talks to reporters.