# Excerpts From Oral Arguments by Jaworski and St. Clair Before Supreme Court

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*WASHINGTON, July 8 — Following are excerpts from the oral argument before the Supreme Court by Leon Jaworski, Watergate special prosecutor and James D. St. Clair, President Nixon's counsel in the cases of United States of America v. Richard M. Nixon et al and Richard M. Nixon v. United States of America. The unofficial stenographic transcript did not identify the Justices asking questions. Their names have been provived, wherever possible, from news reporters' notes. Where there is uncertainty, the names have been omitted.*

## JAWORSKI ARGUMENT

On March 1 last, a United States District Court grand jury sitting here, returned an indictment against seven defendants charging various offenses, including among them a conspiracy to defraud the United States, and also to obstruct justice.

John Mitchell, one of the defendants, was a former Attorney General of the United States, and also chairman of the Committee to Re-Elect the President. Another, H. R. Haldeman, was the President's chief of staff, another, John Ehrlichman, was Assistant to the President for Domestic Affairs, the others were either on the President's staff or held responsible positions on the re-election committee.

In the course of its deliberations, the grand jury voted unanimously with 19 members concurring, that the course of events in the formation and continuation of a conspiracy was such that President Nixon, among a number of others, should be identified as an unindicted co-conspirator in the bill of particulars to be filed in connection with the pre-trial proceedings.

It was a well-kept secret until it became necessary to reveal it as a result of the President's motion to quash the subpoena, as I will indicate subsequently in my argument.

Now, to obtain additional evidence, which the special prosection has good reason to believe is in the possession of and under the control of the President, and which it is believed by the special prosecutor is quite important to the development of the Government's proof in the trial in United States vs. Mitchell et al, the special prosecutor, on behalf of the United States, moved for a subpoena duces tecum. And it is the subpoena here in question.

The District Court ordered the subpoena to issue, returnable on May 2.

Now, on April 30 the President released to the public and submitted to the House Judiciary Committee 1,216 pages [of] edited transcripts of 43 conversations dealing with Watergate. Portions of 20 of the subpoenaed conversations were included among the 43. Then on May 1, [he] by his counsel, filed a special appearance, a formal claim of privilege and a motion to quash the subpoena.

Now, for the United States to conduct a full and appropriate hearing [on] a motion to quash the subpoena, it became necessary to reveal the grand jury's finding regarding the President. And this was first done by the special prosecutor calling on the chief of staff, Gen. Alexander Haig, and the President's counsel, Mr. St. Clair, and advising them of what had occurred two-and-a-half months prior. And then on the following morning advising Judge Sirica of what had occurred, in camera, and pointing out the necessity of this being used in connection with the arguments on a motion to quash because of their relevance and the necessity of these matters being made a part of the proceedings.

Now, the special prosecutor joined counsel for the President in urging that the matter be heard in camera, which was done. Three of the defendants had joined the special prosecutor in moving for the subpoena. All of the defendants, at the time of argument in camera to Judge Sirica, opposed the motion to quash.

QUESTION: I don't see the relevancy of the fact that the grand jury indicated the President as co-conspirator to the legal issue as to the duty to deliver pursuant to the subpoena that you are asking for.

MR. JAWORSKI: The only relevance, Mr. Justice, lies in it being necessary to show, under rule 17(c), that there is some relevance to the material that we seek to subpoena.

QUESTION: 17(C) presupposes the subpoena against the party. The President is not a party. He is not a defendant in one of these cases.

JAWORSKI: That is correct sir. But it was also felt that it would be necessary, in order to provide all of the links in the conspiracy, to show that the President was named as an unindicted co-conspirator. It became very important, Mr. Justice, for us to have that as a part of the proceedings so that we could use the various links in the testimony so as to show that the conversations were such as to make one admissible as against a co-conspirator.

STEWART: You would be here, Mr. Jaworski, whether or not the President had been named as an indicted co-conspirator. That simply gives you another string to your bow—isn't that about it?

JAWORSKI: It is true that it admits some evidence that would otherwise not be admissible.

STEWARD: Right. But even had the President not been named, you would still have subpoenaed at least part of this material.

JAWORSKI: There is no question about that.

QUESTION: No one yet has ever suggested that during a criminal trial, a conspiracy trial, and some evidence is offered of an out-of-court statement, of someone who is alleged to be a co-conspirator, that it is enough for the prosecution to then show that the grand jury had named him a co-conspirator.

JAWORSKI: No.

And we don't so contend. In other words, this was in connection with showing that we have the right to this evidence.

QUESTION: I understand that.

JAWORSKI: Yes, sir.

QUESTION: But you do not suggest that that is all you need to show is that it?

JAWORSKI: No, sir, of course not.

WHITE: You don't suggest that the grand jury finding is binding on the court or not?

JAWORSKI: I do suggest that it makes a prima facie case.

BRENNAN: You don't suggest that your right to this evidence depends upon the President having been named as an unindicted co-conspirator.

JOWARSKI: No sir.

BRENNAN: And so for the purposes of our decision, we can just lay that fact aside, could we?

JAWORSKI: Yes. Primarily, it was in order to show a reason for the grand jury's action. There is also before this Court a motion to expunge the act of a grand jury in naming the President as an unindicted co-conspirator. And I was trying to lay before the court the entire situation that warranted that action.

POWELL: Mr. Jaworski, as I understand your brief, you go beyond what you have addressed so far. I think you say that the mere fact that the President was named as an unindicted co-conspirator forecloses his claim of privilege.

JAWORSKI: We certainly make that as one of the points which I intend to discuss at a later point.

POWELL: That reduces him in and of itself to the status of any other person accused of a crime?

JAWORSKI: I don't say that it forecloses. What I think we suggests is that it does present a situation here that should not make the application of executive privilege appropriate. We do say that.

MARSHALL: But only prima facie.

JAWORSKI: Prima facie —that is correct. But when you get to the matter, Mr. Justice Powell, of balancing interests, we do feel that that particular situation is a factor that is important. And this is why we lay stress on it.

The Court's order, of course, was to deliver the originals of all subpoenaed items, as well as an index and an analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30.

Now, this case presents for review the action of the lower court.

Now, may I, before I get to the jurisdictional points, briefly state what we consider to be a bird's eye view of this case.

Now enmeshed in almost 500 pages of briefs, when boiled down, this case really presents one fundamental issue: Who is to be the arbiter of what the Constitution says? Basically this is not a novel question—although the factual situation involved is, of course, unprecedented.

There are corollary questions, to be sure. But in the end after the rounds have been made, we return to face these glaring facts that I want to briefly review for a final answer.

In refusing to produce the evidence sought by a subpoena duces tecum in the criminal trial of the seven defendants—among them former chief aides and devotees, the President invokes the provisions of the Constitution.

His counsel's brief is replete with references to the Constitution as justifying his position. And in his public statements, as we all know, the President has embraced the Constitution as offering his support for his refusal to supply the subpoenaed tapes.

Now, 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, then the President, of course, is free to pursue his course of erroneous interpretations. What then becomes of our constitutional form of government?

So when counsel for the President in his brief states that this case goes to the heart of our basic constitutional system, we agree. Because in our view, this nation's constitutional form of government is in serious jeopardy if the President, any President, is to say that the Constitution means what he says it does, and that there is no one, not even the Supreme Court, to tell him otherwise.

QUESTION: Mr. Jaworski, the President went to a court. He went to the District Court with his notion to quash. And then he filed a cross-petition here. He is asking the Court to say that his position is correct as a matter of law, is he not?

JAWORSKI: He is saying his position is correct because he interprets the Constitution that way.

STEWART: Right. He is submitting his position to the Court and asking us to agree with it. He went first to the District Court and he has petitioned in this court. He has himself invoked the judicial process, and he has submitted to it.

JAWORSKI: Well, that is not entirely correct, Mr. Justice.

STEWART: Didn't he file a a motion to quash the subpoenas in the District Court of the United States?

JAWORSKI: Sir, he has also taken the position that we have no standing in this Court to have this issue heard.

STEWART: As a matter of law—he is making that argument to a court: that as a matter of constitutional law he is correct.

JAWORSKI: So that of course this court could then not pass upon the constitutional question of how he interprets the Constitution, were correct. But I—

QUESTION: As a matter of law—his position is that he is the sole judge. And he is asking this Court to agree with that proposition, as a matter of constitutional law.

JAWORSKI: What I am saying is that if he is the sole judge, and if he is to be considered the sole judge, and he is in error in his interpretation, then he goes on being in error in his interpretation.

STEWART: Then this court will tell him so. That is what this case is about, isn't it?

JAWORSKI: Well, that is what I think the case is about, yes, sir.

BURGER: He is submitting himself to the judicial process in the same sense that you are, is that not so, Mr. Jaworski?

JAWORSKI: Well, I can't—

BURGER: You take one position and he takes another.

JAWORSKI: Well, Mr. Chief Justice, in my view, frankly, it is a position where he says the Constitution says this, "and nobody is going to tell me what the Constitution says." Because up to this point he says that he and he alone is the proper one to interpret the Constitution. Now, there is no way to escape that. Because the briefs definitely point that out, time after time.

QUESTION: I think this matter may be one of semantics. Each of you is taking a diferent position on the basic question, and each of you is submitting for a decision to this Court.

JAWORSKI: That may be, sir.

DOUGLAS: Well, we start with a Constitution that does not contain the words "executive privilege."

JAWORSKI: That is right, sir.

DOUGLAS: So why don't we go on from there?

BURGER: Perhaps we can further narrow the area if, as I take it from your briefs, you do emphasize there is no claim here of typical military secrets, or diplomatic secrets, or what in the Burr case were referred to as state secrets. None of those things are in this case, is that right?

JAWORSKI: "That is correct, sir. And we do point to the authorities to show that there is a difference in the situation here. I do think that is proper, as much as I regret to have to do it, to point out that the President's interpretation of what his action should be in this particular set of circumstances is one that really requires judicial intervention perhaps more so than a normal one would.

I think that we realize that there is at stake the matter of the supplying of evidence that relates to two former close aides and devotees. I think we are aware of the fact that the President has publicly stated that he believed that these two aides of his, Mr. Haldeman, and Mr. Ehrlichman, would come out all right in the end. Added to that the fact that the President has a sensitivity of his own involvement, is also a matter that calls for the exercise of the question to which Mr. Justice Douglas alluded as one that is somewhat unusual.

Turning now to jurisdsiction—before the Court are the two questions of statutory jurisdiction the Court directed the parties to brief and argue.

We are standing upon not only the matter that this is an appeal that properly had been in the Court of Appeals, and for that reason has been moved up here properly under 1254.1. We also say that the Court has jurisdiction over the petition and cross-petition under 1254.1 because they present for review all questions raised by the petition—by the President's petition for writ of mandamus. And then we also say that in addition to that the All Writs Act gives this Court the jurisdiction to proceed.

**The Intra-Executive Issue**

Now, I would like to pass to the intra-executive dispute.

We say that the contention that there is an intra-executive dispute and for that reason this Court cannot pass upon these questions is not sound.

Before discussing the cases, however, I think it would be appropriate for us to undertake to place this in the right prospective.

Let me say first that we stand upon two bases: first, that actually the orders that were entered creating the Office of the Special Prosecutor and delineating his authority, even the original order at the time that my predecessor was acting as special prosecutor, had the force and effect of law.

We also point to the fact that the arrangement made with the Acting Attorney General, which the Acting Attorney General points to, with respect to the matter of independence having been discussed by him with the President — thus meaning that the President himself had approved the setting up of this particular office, and the rights and the responsibilities that it has under the charter.

One of the express duties that is delegated to the special prosecutor is that he shall have full authority for investigating and prosecuting — allegations involving the President. And the delegation of authority expressly states in particular the special prosecutor shall have full authority to determine whether or not to contest the assertion of executive privilege, or any other testimony or privilege.

Now, in the instance of my appointment, unlike the appointment that had been made prior thereto, there was an amended order, and it referred to assurances given by the President to the Attorney General that the President will not exercise his constitutional powers to effect the discharge of the special prosecutor, or to limit the independence that he is hereby given.

And that he will not be removed from his duties except for extraordinary improprieties on his part, and without the President first consulting the majority and minority leaders and the chairman and ranking minority members of the judiciary committees of the Senate and House of Representatives.

QUESTION: I take it when you make reference to this, you are in effect suggesting that your position is certainly different than if a United States Attorney were prosecuting the case.

JAWORSKI: That is correct, sir. I think we have what might be termed a quasi-independent status.

QUESTION: Mr. Jaworski, quasi-independent in the sense of an agency?

JAWORSKI: Yes, sir. For instance, the Controller of the Currency—he has a status somewhat similar to that. And we know that there are suits brought between the Department of Justice and the Controller.

Now, I should say that it is interesting when the case of Nixon v. Sirica was before the Court of Appeals, Prof. Charles Alan Wright, who was then arguing that case, argued with respect to the particular office of the special prosecutor: "Now, in this instance we have a division of function within the executive in that my friend Mr. Cox"—referring to Archibald Cox—"has been given absolute independence. It is for him to decide whom he will seek to indict."

But the President's present counsel in his motion to quash, as he does here—is contending to the Court that the President has the right to determine who, when and with what information individuals shall be prosecuted.

QUESTION: Well, Nixon against Sirica was different in that the parties there were the grand jury—represented, to be sure, by the special prosecutor—the grand jury, which is an adjunct of the judicial branch of government, on the one hand—and the Chief Executive, on the other. And here, now that an indictment has been returned, the two parties are both members of the executive branch.

JAWORSKI: Yes, sir, that is correct. But I don't think it is a distinction as to the substance. I don't think the description to which I pointed as to the independent status of the independent executor whould be any different in the Sirica case than it would be in this case.

QUESTION: No — you are if anything more independent than Mr. Cox was under the regulations.

JAWORSKI: That is correct, sir.

QUESTION: But that doesn't really go to the question that I am raising.

JAWORSKI: Yes, sir. I realize that. Now, May I, however, indicate just what did transpire with respect to how this order was interpreted by the President's Acting Attorney General, and also by the Attorney General-designate, and also by the President himself, and by the President's chief of staff, General Haig.

[Acting Attorney General Robert H.] Bork, in hearings at a time when Congress was pressing the bill of an independent special prosecutor, testified that "although it is anticipated that Mr. Jaworski will receive cooperation from

the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that he has the power to use judicial processes to pursue evidence if disagreements should develop."

Then he further said: "I understand and it is clear to me that Mr. Jaworski can go to court and test out any refusal to produce documents on the grounds of confidentiality." And Attorney General Saxbe, then a designate, who was also present at the time that this matter was discussed, and at the time that I accepted the responsibilities, testified that I had the right to contest an assertion of executive privilege and stated that I can go to court at any time to determine that.

Now, the President himself in announcing the appointment of a new independent prosecutor, stated to the nation that he had no greater interest than to see that the new special prosecutor had the cooperation from the executive branch and the independence that he needs to bring about that conclusion of the Watergate investigation.

The President's chief of staff at the time that this appointment was accepted—and this is a part of the record, because a letter was written at the request of Senator Hugh Scott.

I [was] assured to the right to judicial process by him after he had reviewed the matter with the President and came and told me that I would have the right to take the President to court, and that these were the key words in this arrangement, and that the right would not be questioned.

Thus, to argue, as has been done in these briefs, that the separation of powers precludes the courts from entertaining this action because it is the exclusive prerogative of the executive branch, not the judiciary, to determine whom to prosecute, on what charges, and with what evidence, we think misses the point.

What has evolved is a prosecutorial force with certain exclusive responsibilities. And this is why I say that to some degree it could be described as a quasi-independent agency.

**Right to Court Action**

Now I want to make it clear that the President at no point of course delegated to the special prosecutor the exclusive right to pass on the question of executive privilege or any other privilege—attorney-client privilege, or any other testimonial privilege. What we are merely saying is that we have the clear right to test it in this court. And this is on what we stand.

Passing to the merits, we would say if there is any one principle of law that Marbury vs. Madison decides is that it is up to the Court to say what the law is. And this Court, of course, through the years has reaffirmed, consistently applied that rule.

It is done in a number of cases—in Powell vs. McCormack, in the Youngstown steel seizure case, in Doe vs. McMillan, and a footnote, I think a very important one, appears in that opinion when Mr. Justice White pointed out that "while an inquiry such as involved in the present case, because it involves two coordinate branches of government, must necessarily have separation of power implications, the separation of powers doctrine has not prevented this Court from reviewing acts of Congress, even when, it is pointed out, the executive branch is also involved."

Now, there are a number of cases that speak to that. I think one of the cases that perhaps went into greater detail, and also points out quite distinguishing features, is the Gravel case; whereas in the Gravel case the Court did hold that it was appropriate to go into certain matters where privilege has been exercised on the part of a Senator on behalf of his aide.

There are two things that I believe clearly help us in that decision, and also other decisions as far as the questions here involved. One is that the speech or debate clause is in the Constitution; it is written in there. And this is what was invoked. I don't find anything written in the Constitution, and nothing has been pointed, that is a writing in the Constitution that relates to the right of the exercise of executive privilege on the part of the President.

Another very important thing that is pointed out in that case is that it did involve an examination into wrong-doing on the part of those who were seeking to invoke the privilege.

BRENNAN: Is the term "executive privilege" an ancient one?

JAWORSKI: It has been used over a period of time, but it is not one that I find any basis for in the Constitution.

QUESTION: Are you now arguing that there is no such things as executive privilege?

JAWORSKI: No, sir.

QUESTION: You think if anything it's a common law privelege? Is that your point?

JAWORSKI: Yes, sir. And it has been traditionally recognized and appropriately so in a number of cases as we see it. We do not think it is an appropriate one in this case. But we certainly do not for a moment feel that it has any constitutional base.

BURGER: In Scheuer v. Rhodes I thought we held that there is a common law privilege in the executives dealing at the state level, but that it is a qualified privelege, is that not so?

JAWORSKI: Yes, Mr. Chief Justice, that is exactly the point. This Court has examined a number of situations. And in some situations, where military secrets were involved, or national secrets of great importance, the Court has taken a good close look, and has upheld privilege.

QUESTION: When you say it has taken a good, close look—without looking at the evidence sometimes; taken a good close look at the claim and the basis of the claim, is that what you mean?

JAWORSKI: That is what I mean, yes, sir.

QUESTION: Didn't this Court say that it did have constitutional overtones?

JAWORSKI: Yes, sir, but it certainly has never placed it in the Constitution so far as I am aware of.

QUESTION: That was in Kaiser Aluminum and Chemical Corporation case in the Court of Claims that phrase was used?

JAWORSKI: Yes, sir.

POWELL: Is it your view that there are no influences to be derived from the doctrine of separation of powers?

JAWORSKI: What I am saying is that the separation of powers doctrine, as was pointed out in the Doe v. McMillan case, has not been permitted to stand in the way of this Court examining it from a standpoint or whether the executive privilege should be permitted or not.

QUESTION: In Reynolds the Court ended up treating the assertion of privilege there as an evidentiary privilege but it did allude to the fact that there was a constitutional question, and it said he Court wasn't reaching it.

JAWORSKI: On the issue of executive privilege, I should point out here, it is a very narrow one. And that is whether the President, in a pending prosecution, can withhold material evidence from the Court, merely on his assertion that the evidence involves confidential communications.

The heart of Marshall's opinion was justly summarized by the Court of Appeals in the Nixon v. Sirica case, in a tapes case, that we have talked about. "The Court was to show respect for the President's reason, but the ultimate decision remained with the court." And we are not suggesting for a moment here that the matter of executive privilege should not be looked into. But if the courts are the ultimate interpreters of the Constitution and can restrain Congress to operate within constitutional bonds, they certainly shouldn't be empowered any less to measure Presidential claims of constitutional powers.

I wanted briefly to make mention of the question that had been raised by counsel for the President that involves a motion to expunge the findings of the grand jury's action that the President is to be named as an unindicted co-conspirator along with a number of others when the pre-trial proceedings are gone into and a bill of particulars is being filed.

And I say that the grand jury's finding, painful as it is, must be considered as being valid and sufficient to show continuation of the particular conspiracy that was charged.

BURGER: Well, is that the the issue, Mr. Jaworski, or is the issue whether there can be a collateral attack?

JAWORSKI: That is also another issue. But I merely wnated to point out that I believe that this Court would not go into the grand jury's findings.

STEWART: Except part of the grounds on which you rest in subpeoenaing this material is thef cat that the President has himself been named as a con-conspirator, an unindicted one. That's true, isn't it? And the response to that is that the President cannot constitutionally be named as an unindicted co-conspirator.

JAWORSKI: "I don't think it is a matter that, very frankly has any particular basis to it, because I don't see how this court could be asked to substitute its judgment for that of a grand jury.

STEWART: Well, that is something quite different again—whether or not there was sufficent evidence before the grand jury to justify the grand jury in naming the President. That is quite different, and, as the chief justice suggested, a collateral issue.

JAWORSKI: That is right.

DOUGLAS: I thought the heart of this case was the rights of defendants in a criminal trial to that evidence. It may be exculpatory and free them of all liability.

JAWORSKI: Well, certainly it is true that this material, as we have pointed out in our communications to the President, may well involve exculpatory matters, and time and again pointed out we wanted them simply because we felt that there were matters that needed to be developed in connection with the prosecution, but that they could well contain exculpatory matter.

BURGER: The Brady question really lurks just in the background, does it not? That is, if you get information, whatever you get will be available to any defendant who can make a showing.

JAWORSKI: Correct, sir.

STEWART: And the question of whether or not the fendants, under the Brady doctrine, are entitled to subpoena information and material that is not now in your possession but is in the possession of the President, was an issue that was left undecided by the District Court.

JAWORSKI: That is correct, sir.

## St. Clair Argument

My learned brother has approached this case, I think, from the traditional point of view—namely, this is an attempt by a special prosecutor to obtain what he thinks is desirable evidence in a criminal prosecution that he has the responsibility for. Not once, however, have I heard him mention what I think is really involved, at least in significant part, and that is the co-pendency of impeachment proceedings before the House of Representatives, and the realistic fusion that has taken place with respect to these two proceedings, and the promise of continued fusion. It is improper in our view that this case should be heard in the context it is now being heard.

QUESTION: It is a political question here, and it was a political question in the District Court.

ST. CLAIR: Exactly. And therefore it is a nonjusticiable issue in this and in the

District Court.

QUESTION: Your position is thatthe issuance of a subpoena duces tecum is not a justiciable issue.

ST. CLAIR: In this context at this time, sir. What has happened is this.

As you know, on Feb. 24 a grand jury secretly named the President among others as an unindicted co-conspirator. That fact was not made known. On March 1 an indictment was returned against a number of the President's chief aides. Coincident with that, and in an open courtroom, the assistant prosecutor—special prosecutor, handed up to the judge a bag, together with a sealed letter, requesting that this material be sent over to the House of Representatives. The President took no position regarding that proposal, because he considered it to be probably appropriate, under the belief that there was nothing accusatory in that material.

Judge Sirica himself reviewed the material, found nothing accusatory, and said it would therefore be quite appropriate to send this material to the House of Representatives—not realizing and not knowing that the special prosecutor had previously obtained a secret charge against the President and others, which was definitely accusatory.

BURGER: Are you suggesting that there was some duty on the part of the special prosecutor to disclose to the district qudge that there was this secret indicment before the judge passed on whether

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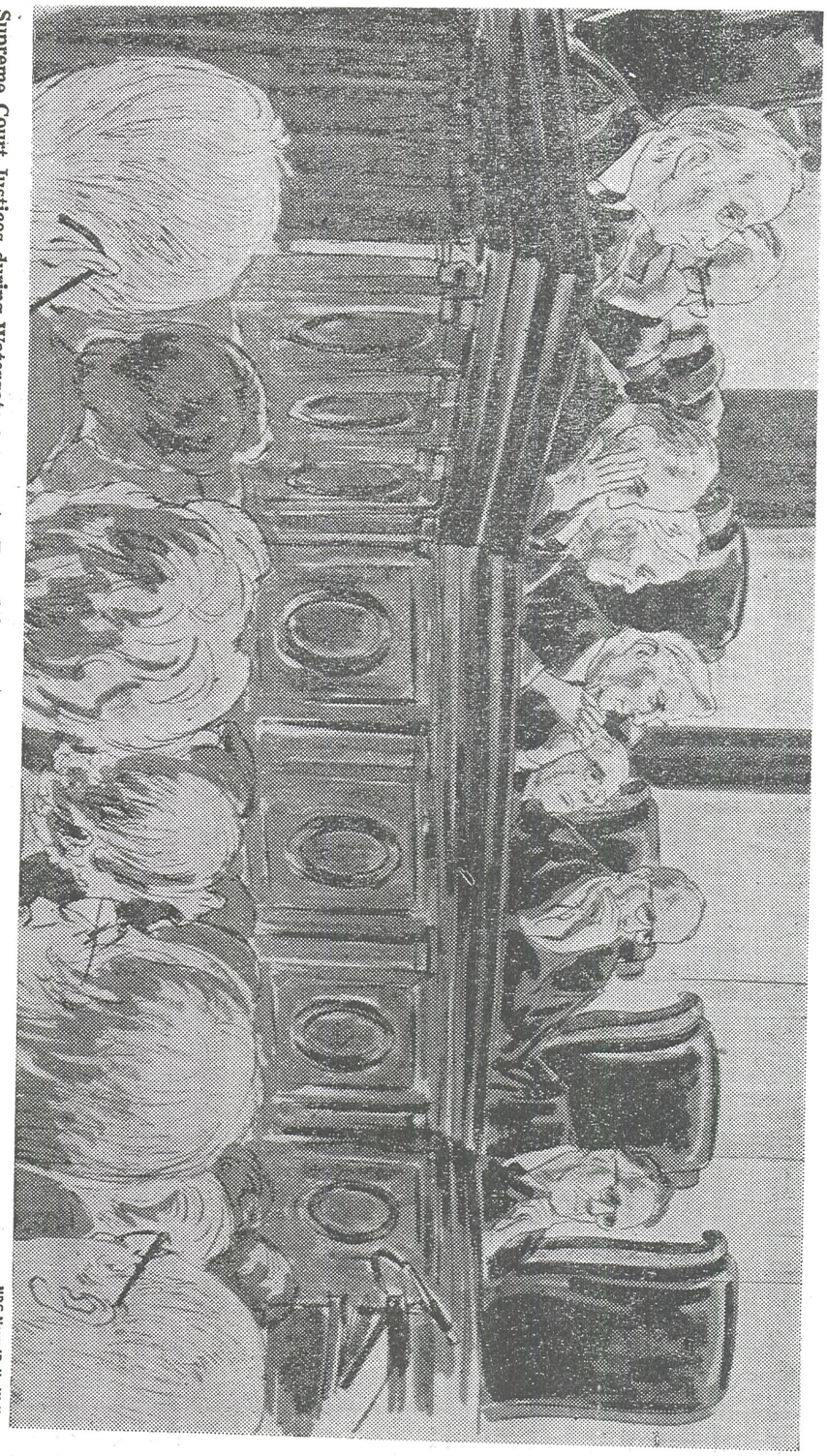

**Supreme Court Justices during Watergate arguments. From left: Lewis F. Powell Jr.; Thurgood Marshall; Potter Stewart; William O. Douglas; Chief Justice Warren E. Burger; William J. Brennan Jr.; Byron R. White and Harry A. Blackmun. William H. Rehnquist is not sitting in the case.**

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the material should be sent to the House?

ST. CLAIR: I think it would have been quite appropriate, because the judge's decision was based on the proposition there was nothing accusatory; naming him as a co-conspirator does anything but impair the President's position before the House of Representatives. That should in my judgment have been made known to the judge. I don't know what he would have done under those circumstances.

Now, my brother says in his brief that this material he now seeks of course will be available to the House committee and will be used to determine whether or not the President should be impeached. So this fusion is going t ocontinue. And under the Constitution, only the legislature has the right to conduct impeachment proceedings.

The courts have been, from the history involved and from the language of the provisions, excluded from that function. And yet the special prosecutor is drawing the Court into those proceedings, inevitably, and inexorably.

No one could stand here and argue with any candor that a decision of this Court would have no impact whatso ever on the pending inquiry before the House of Representatives concerning the impeachment of the President.

STEWART: Well, how far does your point go? Let's assume that murder took place on the streets of Washington of which the President happened to be one of the very few eyewitnesses. And somebody was indicted for that murder. And the President was subpoenaed as a witness. Would you say he canot be subpoenaed now, because there is an impeachment inquiry on and the courts absolutely have to stop dead in their tracks from doing their ordinary pudicial business?

ST. CLAIR: I would not say that. I don't think he could be necessarily subpoenaed. I don't think the President is subject to the process of the Court unless he so determines he would give evidence.

STEWART: You are saying that the courts have to stop dead in their tracks from doing their ordinary business in any matter involving even tangentially the President of the United States if, as and when a committee of the House of Representatives is investigating impeachment.

ST. CLAIR: No, Justice Stewart, I am not. I say it should not go forward at this time, because the subject matter being inquired before the House committee is exactly the same subject matter being involved in this argument — namely, should the President produce the tapes.

QUESTION: What in those tapes involves the impeachment proceedings? I don't know fhat is in the tapes. I assume you do.

ST. CLAIR: No, I don't.

QUESTION: You don't know, either. Well, how do you know that they are subject to executive privilege?

ST. CLAIR: Well, I do know that there is a preliminary showing that they are conversations between the President and his close aides.

QUESTION: Regardless of what it is.

ST. CLAIR: Regardless of what it is.

BURGER: Mr. St. Clair, going back to this murder witness situation, if the President, any President, witnessed an automobile accident, was the sole wieness, or a murder, as Mr. Justice Stewart suggested, you are not indicating that his testimony, his evidence would not be available to the Court, but merely that he cannot be subpoenaed, but might give it by deposition, as several Presidents have in the past.

ST. CLAIR: I say the President should decide as a political matter what should be made available to the House. That the Court ought not to be drawn into that decision.

QUESTION: And that's final. Nobody can do anything about it.

ST. CLAIR: The House takes a different view. The Hhouse has subpoenaed, something in the neighborhood o 145 tapes. And that is a political decision.

QUESTION: So that the House can get them, the President can get them, and the only people I know that cannot get them is the courts.

ST. CLAIR: The President has not honored any of the subpoenas other than the first one issued by the Houe. So that there is a dispute in the House now between the President and the Committee on the Judiciary. It is essentially a political dispute. It is a dispute that this Court ought not be drawn into.

BRENNAN: You have not convinced me that we are drawn into it by deciding this case. How are we drawn into the impeachment proceedings by deciding this case?

ST. CLAIR: The impact of a decision in this case undeniably, Mr. Justice Brennan, in my view, will not be overooked.

BRENNAN: Any decision of this court has ripples.

DOUGLAS: But as I said before the beneficiaries here are six defendants being tried for criminal charges. And what the President has may free them completely. Is that true? Theoretically?

ST. CLAIR: But I do not believe it is before this Court at this the. What is before this Court is a prosecutor's demand for evidence. And I direct my remarks for a moment to that problem. He says that in effect we have no right to be here, that we have delegated the who, the when, and with what issues to him. We have delegated the who and the when, and pursuant to that he has indicted a number of people. And he has indicted them at such time as he thought appropriate. But even he contends that we did not delegate to him what Presidential conversations would be used as evidence. That was reserved. And he concedes that he is the fact. And that is what is at issue here. Not when and who is to be indicted, but what Presidential communications are going to be used as evidence. And that the issue is in this case.

### The Right to Challenge

ST. CLAIR: Now, my brother says I have no right to even challenge his right to be here. And I would like to deal with that.

This is, as we have pointed out in our brief, essentially an executive department matter. Whatever may have been the arrangements between the branches of the executive with respect to evidentiary matter—and in fact there were no arrangements regarding evidentiary matters—it is not the function of the Court to direct or rule what evidence will be presented to it by the executive in the executive's duty of prosecuting.

If this was a United States Attorney, this case would not be here, of course. It is here only because certain things were delegated to the special prosecutor. But the special prosecutor was not delegated the right to tell the President what of his conversations are going to be made available as evidence.

QUESTION: If the United States Attorney brings a prosecution, and in the course of that prosecution he subpoenas material in the custody of the President, what happens?

S8. CLAIR: The President says to the Attorney General, "I am not going to produce this material."

QUESTION: No. It's the United States Attorney subpoenaing it under your hypothetical case.

ST. CLAIR: In my view the President would instruct the Attorney General to instruct the United States Attorney to withdraw his motion.

QUESTION: And the United States Attorney says, "I'm not going to do that because I am sworn to uphold justice."

ST. CLAIR: Then you would have a new United States Attorney. Well, I'm being a little facetious.

QUESTION: I'm being serious, because I think—

ST. CLAIR: I think the United States Attorney, with all respect, would and should be removed from that case.

QUESTION: By whom?

ST. CLAIR: The executive power of the Government is not vested in the United States Attorney. It is vested on one man and that man is the President of the United States.

QUESTIONS: By statute it is vested—law enforcement is vested in the Attorney General.

ST. CLAIR: Yes. But that statute which my brother cites in his brief does not deprive, nor could it deprive, the President of his constitutional authority to be the chief law enforcement officer. He shall take care to see that the laws are enforced. The executive power is vested in him, in one man. And the Attorney General is nothing but a surrogate for the President of the United States.

QUESTION: Your argument is a very good one as a matter of political science, and it would be a very fine one as a matter of constitutional and probably statutory law except hasn't your client dealt himself out of that argument by what has been done in the creation of the special prosecutor? You have just pointed out that the special prosecutor is quite different from the United States Attorney.

ST. CLAIR: Right. Perhaps with respect to everything except—the President did not delegate to the special prosecutor the right to tell him whether or not his confidential communications should be made available as evidence.

The right to order the President to give up confidential communications. That was not delegated.

A special prosecutor, with the power that my brother suggests he has, is a constitutional anomaly. We have only three branches, not three-and-a-third or three-and- a-half or four. There is only one executive branch. And the executive power is vested in a President. Now if for political reasons the President wants to dole out some of those powers, he may do so, and has done in this case. But he cannot vest jurisdiction in a court that otherwise the court would not have. Nor should the court accept jurisdiction.

## Rebuttal argument of Philip A. Lacovara, esq., on behalf of the United States

We have never argued, and of course there would be no basis for arguing, that the mere grand jury finding, whether on the face of the indictment or in the grand jury's minutes, that the President or any of the other 18 unindicted co-conspirators were members of this conspiracy would itself be enough at trial to warrant the judge's admission of extra-judicial statements given by those co-conspirators.

We are not making that contention here. The issue arises because a motion to quash a subpoena was filed prior to trial. And the basis for that motion was a claim of executive privilege, a governmental privilege that exists for the benefit of legitimate governmental processes.

We countered that this President, as difficult as it was to say this—not because of the evidence but because of the inherent awkwardness of it—this President is not in a position to claim this public privilege, for the reason that a prima facie showing can be made that these conversations were not in pursuance of legitimate governmental processes or the lawful deliberation of the public's business. These conversations, as we showed in our 49-page appendix, and as the grand jury alleged, were in furtherance of a criminal conspiracy to defraud the United States and obstruct justice.

We did not rely, even before Judge Sirica, and we do not rely here, merely on the fact that the grand jury made this determination. We do submit that for purposes of a pre-trial consideration of a subpoena that is challenged on grounds of executive privilege, we are not confronted with the need that we will be confronted with a trial, which we fully intend to discharge, of showing by evidence to the trial judge that the President and the other co-conspirators were members of the co-conspiracy.

POWELL: Mr. Lacovara,, let's back up a minute. Do you concede that an incumbent President of the United States could not be indicted and tried for a crime?

LACOVARA: No ir.

POWELL: You do not. Do you think he could be?

LACOVARA: We have not expressed a position on that, Mr. Justice Powell.

POWELL: Let's assume for the moment that he could not be. Would you still argue that the grand jury had hte power or the right, and if so by virtue of what?

LACOVARA: Yes,. we—

POWELL: To name his as an unindicted co-conspirator.

LACOVARA: The issue of Preidential indictability does not determine the issue which an incumbent President can be named as an unindicted co-conspirator by a grand jury.

We have shown in our brief why even persons who do have some constitutional immunity — and counsel argues that implicity under the framework of the Constitution, the President should have an implicit immunity from prosecution—even such persons can be and frequently are named by grand juries as unindicted co-conspirators.

The practical arguments that may militate in favor of a judicial recognition of some unique immunity for the President alone—not for circuit judges, not for Supreme Court Justices, not for members of Congress, but the President alone it may be held at some later date is immune from prosecution— but that by no means suggests the answer to the question here. And the grand jury elected not to test that issue.

POWELL—The thing that I was wondering about is that there is only one President, and executive power is vested in him. And I do wonder whether or not the precedents you set with respect to other people would vest the authority in a grand jury, either on its own motion or because of what some prosecutor suggested, while the President is in office, to name him as an unindicted co-conspirator. With grand juries sitting all over the United States, and occasionally you find a politically motivated prosecutor — that's a rather far-reaching power, if it exists.

LACOVARA: It is, Mr. Justice, and there is no doubt about it. We are conscious of the delicacy of the issue. We have suggested ,however, that although there is some conceivable opportunity for abuse, our judicial system, our democratic system is based on several fundamental propositions, one of which is that grand juries usually are not malicious. Even prosecutors cannot be assumed to be malicious. We also assume, as this Court regularly holds in First Amendment cases dealing with public officials, that we have a resilient society where people can be trusted to sort out truth from falsehoods. We have a robust debate.

I submit to you, sir, that just as in this case a grand jury would not lightly accuse the President of a crime, so, too, the fear that, perhaps without basis, some grand jury somewhere might maliciously accuse a President of a crime is not necessarily a compelling reason for saying that a grand jury has no power to do that. I think the system may be vibrant enough to deal with that. And Ithink the inherent dignity of the President office of any incumbent provides him with a notable check against being defeated, or as my colleague says, impeached by the action of a grand jury.

Thsi is perhaps the most notorious event, notorious case in recent times. When the grand jury's action was disclosed, I venture to say that although it was a difficult time for all concerned, including the prosecutors as well as other counsel and the country — the President has not been displaced from office, he still is President, he still functions in accordance with his Constitutional powers.

BRENNAN: Mr. Lacovara, you have only a very few minutes. Are you going to address Mr. St. Clair's opening argument that the pendency of the House Judiciary impeachment inquiry either should lead the Court to conclude that this whole business before us is a nonjusticiable matter, therefore, necessarily, that Judge Sirica's order should be quashed. Or, in any event, that because of the possible effect of a decision on the issue presented, upon the impeachment inquiry, that the Court should stay its hand.

LACOVARA: That was to be my last point, sir, and I will make it right now.

The notion that because there is concurrently under way an impeachment inquiry before the House of Representatives, that somehow makes this a nonjusticiable political question is, we think, a remarkable notion which is not supported by sound contitutional law or by any of the decisions of this Court, and, indeed, I submit that to the extent that the Court has discretion in the matter, and although this Court has now been given discretionary certiorari power, district courts have no such option, it would not even be a wise exercise of discretion for this Court to stay its hand.

This case before the Court is not a request for an opinion between two Congressional committees as to who has jurisdiction over a particular bill. It's not even a request for a dispute between Cabinet officers, or the President and a Cabinet officer, over what proper executive policy ought to be.

This is a criminal proceeding, a Federal criminal case against six defendants. A subpoena has been issued to obtain evidence for use at the trial, which is scheduled to begin on Sept. 9.

The Court cannot escape the fact that this is a trial of tremendous national importance, but a trial that was brought to head without regard to the impeachment inquiry. This is an independent, separate constitutional process that is under way, and a traditional, ordinary, prosaic remedy —, a subpoena — has been utilized to obtain evidence for that trial.

There is some debate about whether the evidence is critical to our prosection. I noted in JUSTICE REHNGUIST'S opinion a few weeks ago, in Michigan v. Tucker, 5-5 he echoed, or presaged, perhaps, the same point that JUDGE SIRICA made, that it's really the obligation of the prosection to present all of the material evidence for the jury, for the fact-finder to pass upon.

That's what this case invloves.