

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 1593-73

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, SUING IN ITS OWN NAME AND IN THE NAME OF THE UNITED STATES,

and

SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.; HERMAN E. TALMADGE; DANIEL K. INOUYE; JOSEPH M. MONTOYA; EDWARD J. GURNEY; AND LOWELL P. WEICKER, JR., AS UNITED STATES SENATORS WHO ARE MEMBERS OF THE SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, PLAINTIFFS

v.

RICHARD M. NIXON, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STATES, DEFENDANT

RESPONSE TO PLAINTIFFS' MEMORANDUM ON REMAND

This action was originally filed by plaintiffs on August 9, 1973. Richard M. Nixon answered on August 29, 1973, and plaintiffs immediately filed a motion for summary judgment. The matter was fully briefed and submitted to this Court, Chief Judge John J. Sirica presiding, on October 4, 1973. After full consideration, the Court dismissed plaintiffs' complaint and this action for failure to allege a statutory grant of subject matter jurisdiction. The Court properly failed to rule on the other issues raised by Richard M. Nixon's answer, most importantly on whether Richard M. Nixon, as President of the United States, has a right under the Constitution to withhold information from the Congress when he determines the disclosure to be contrary to the public interest.

This Court's order was entered on October 17, 1973. Plaintiffs immediately filed notice of appeal and, at least initially, sought to have the matter treated expeditiously by the Court of Appeals. Plaintiffs subsequently withdrew their request for expeditious treatment in order to pursue the alternative course of seeking legislation to cure the jurisdictional defect of their original complaint. This legislation was subsequently passed in the form of Public Law 93-190.

On December 28, 1973, the Court of Appeals remanded this case to this Court "for further proceedings in light of Public Law 93-190 to be codified as 28 U.S.C. § 1364." On January 7, 1974, plaintiffs amended their complaint to include a jurisdictional allegation under Public Law 93-190. This remand and the amendment to

plaintiffs' complaint places this matter before the court on plaintiffs' motion for summary judgment.

The decision of this Court on October 17 is the law of the case and establishes that jurisdiction is lacking under any of the bases relied on in the original complaint. The amended complaint adds a further claim of jurisdiction under Public Law 93-190. We have very serious doubts about the constitutionality of that statute. Although Congress has broad powers over the jurisdiction of the United States courts, it cannot make a political question justiciable nor can it alter the constitutional separation of powers. Those doubts about the constitutionality of the statute, however, relate so closely to our arguments on the merits that we shall develop them in that context and assume *arguendo* that this Court has jurisdiction of the subject matter under Public Law 93-190 if the case is justiciable at all.

I. INTRODUCTORY STATEMENT

By their motion for summary judgment, plaintiffs ask this Court to enter an order in the nature of a declaratory judgment pursuant to 28 U.S.C. § 2201 that two subpoenas duces tecum issued and served on the President must be complied with notwithstanding the fact that the President has interposed a claim of privilege as to materials covered by the subpoenas.

As we have stated in previous submissions, the President does not question the right and duty of the Congress to conduct investigations and he does not seek to thwart the investigation of the Senate Select Committee by refusing to comply with the subpoenas in question. In his letter of July 6, 1973, to the Chairman of the Committee, the President stated that he respected the responsibilities of the Committee and indicated that he was willing to cooperate with it within the bounds of the constitutional rights and powers of the Presidency. There has in fact been considerable cooperation on behalf of the President with the Committee's investigation. All of this cooperation, however, has been voluntary and it is the view of the President that it should remain voluntary if our constitutional traditions are to remain intact. It is for this reason, and this reason alone, that the President continues to resist the efforts of the Senate Select Committee to coerce disclosure of information the President deems contrary to the public interest.

The constitutional traditions to which the President refers have been well described by Professor Corwin in his detailed analysis of the Presidency.

In the many years that have rolled by since Jefferson's presidency there have been many hundreds of congressional investigations. But I know of no instance in which a head of a department has testified before a congressional committee in response to a subpoena or been held in contempt for refusal to testify. All appearances by these high officials seem to have been voluntary.

Corwin, *The President: Office and Powers 1787-1957* 113 (4th rev. ed. 1957). He restates his view at page 116:

In short, no one questions, or can question, the constitutional right of the houses to inform themselves through committees of inquiry on subjects that fall within their legislative competence and to hold in contempt recalcitrant witnesses before such committees, and undoubtedly the question of employee loyalty is such a subject. On the other hand, this prerogative of Congress has always been regarded as limited by the right of the President to have his subordinates refuse to testify either in court or before a committee of Congress concerning matters of confidence between them and himself. Are, then, communications to the President or to officials authorized by him to receive them concerning the loyalty of federal executive personnel such matters of confidence? The question must undoubtedly be answered in the affirmative.

The Committee violated this time-honored tradition when it issued the subpoenas in the face of the President's full explanation on July 23, 1973, of the reasons why he had determined that it would not be in the public interest to disclose the information that the Committee had requested.

Now the Committee urges this Court to violate another time-honored constitutional tradition—that is, to embroil the Judiciary in what is essentially a confrontation between the Executive and Legislative Branches of this Government.

As our original submission reflects, the defects in plaintiffs' complaint were several. Plaintiffs have attempted to cure the most basic defect, the want of a statutory grant of jurisdiction, by reliance on Public Law 93-190. Public Law 93-190 is not, however, the end of plaintiffs' jurisdictional problems.

Article III, § 2 of the Constitution allows a federal court to act only in cases and controversies. By this terminology, the Constitution means an "actual controversy" of a justiciable nature. The classic statement of this constitutional requirement is by Chief Justice Hughes in *Aetna Life Insurance Company of Hartford, Connecticut v. Haworth*, 300 U.S. 227 (1937).

A "controversy" in this sense must be one that is appropriate for judicial determination. * * * A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. * * * The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. * * * And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required.

300 U.S. at 240-241. Although the massive generalities of the *Aetna* case are quoted and requoted in later decisions, they are something less than a sure guide to decision. "The considerations, while catholic, are not concrete." *McCall v. Borough of Fox Chapel*, 438 F.2d 213, 215 (3rd

Cir. 1971). A better perception was stated for the Court by Justice Murphy in a later case.

The difference between an abstract question and a "controversy" * * * is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

The President does not suggest that there is no controversy between the Committee and his office. He does suggest, however, that the controversy that exists, involving as it does a confrontation between two separate and co-equal branches of this Government, is inappropriate for judicial resolution by way of declaratory judgment. Resolution by this method would require this Court to interject itself between these two branches—a role courts have understandably gone to great lengths to avoid. In the words of Justice Douglas, "the federal courts do not sit as an ombudsman refereeing disputes between the other two branches." *Gravel v. United States*, 408 U.S. 606, 640 (1972) (Douglas, J. Dissenting).

II. THIS MATTER DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III, § 2, OF THE CONSTITUTION

The *deus ex machina* of Public Law 93-190, upon which plaintiffs rely to overcome the jurisdictional obstacles to this unprecedented action, cannot be invoked to render this suit a justiciable controversy; for 28 U.S.C. § 1364 is merely a statutory grant of jurisdiction, and, thus, satisfies only one of the jurisdictional requirements set down by the Supreme Court in *Powell v. McCormick*, 395 U.S. 486, 512-513 (1969).

In *Baker v. Carr* * * * we noted that a federal district court lacks jurisdiction over the subject matter (1) if the cause does not "arise under" the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of Art. III); or (2) if it is not a "case or controversy" within the meaning of that phrase in Art. III; or (3) if the cause is not one described by any jurisdictional statute.

The Supreme Court in *Powell* had reference to the discussion of subject matter jurisdiction in *Baker v. Carr*, 369 U.S. 186, 198-199 (1962). This principle has been recently reaffirmed by the District of Columbia Circuit in *United States Servicemen's Fund v. Eastland* (No. 24,279 August 30, 1973).

As the quotation from *Powell* indicates, entry into the federal court is like opening a safe deposit box, where two separate keys are required. For the federal courtroom door, the two essential keys are that the case be within the judicial power of the United States, as defined in Article III, § 2, of the Constitution, *Hodgson v. Bowerbank*, 5 Cranch (9 U.S.) 303 (1809), and that it be within a statutory grant of jurisdiction by the Congress, *Cary v. Curtis*, 3

How. (44 U.S.) 236, 245 (1845). See Wright, *Federal Courts* §§ 8, 10 (2d ed. 1970). Public Law 93-190 satisfies only this second requirement. To be properly in court they must also, to use the words of Senator Baker, "place a justiciable issue before the courts" (S. Tr. 5502) Hearings Before the Select Committee on Presidential Campaign Activities of the U.S. Senate, 93rd Congress, 1st Sess., bk. 7, at 2660 (1972). This they have failed to do.

The concept of justiciability as it has evolved through our constitutional history is well-described by the Supreme Court in *Flast v. Cohen*, 392 U.S. 83 (1968).

The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to answer that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that "(j)usticiability is * * * not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures * * *" *Poe v. Ullman*, 367 U.S. 497, 508 (1961).

392 U.S. at 94-95 (footnotes omitted).

This matter raises problems of justiciability, primarily because it calls for adjudication of a political question.

In *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 164-166 (1803), Chief Justice Marshall expressed the view that the courts will not entertain political questions even though such questions may involve actual controversies. This rule was found to have particular force with regard to the Office of President.

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

1 Cranch at 165-166.

Since that early statement by Justice Marshall in *Marbury v. Madison*, the courts have struggled to establish criteria that would enable them to identify and uniformly deal with political questions. Such criteria have been elusive. In *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939), the Court noted that a political question may be identified by evaluating "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination * * *."

It was not until *Baker v. Carr*, supra, however, that the Court finally succeeded in isolating and articulating a workable set of criteria for identifying an issue that presents a political question. The Court said:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

It is submitted that this matter, involving as it does a request by the Legislative Branch that this Court overrule a formal and legitimate invocation of executive privilege, poses a nonjusticiable political question of such magnitude that literally every single formulation or criterion established in *Baker v. Carr* is inextricably a part of the issue presented.

Plaintiffs, however, have chosen to ignore *Baker v. Carr*, insisting only that there exists no "textually demonstrable constitutional commitment" of executive privilege to the President. Despite this bald contention, it is clear that the Constitution does embody such a "textually demonstrable" commitment. Indeed, Professor Dash has stated that the plaintiffs "don't question the executive privilege power of the President,"¹ but only challenge what they consider to be an abuse in its invocation.² Such a concession to the Constitutional basis for executive

¹ Transcript of Proceedings October 4, 1973 at 68 (hereinafter "Transcript").

² This "abuse," as articulated by Professor Dash, is that this is an "assertion of executive privilege where the President personally is involved. In that particular case he is using executive privilege as a shield for his self-protection rather than protection of the presidency or executive privilege." (Transcript at 68). Such a distinction or "abuse" is no longer even an arguable position since the President has disclosed to the grand jury the tapes which are the subject of this suit. This is not to say, however, that the President now or ever has conceded that his formal and personal invocation of executive privilege is reviewable by the courts. The disclosure of the tapes to the grand jury, however, is a forceful refutation of the charge that the President is attempting to "hide behind" a claim of executive privilege.

privilege is significant and is clearly mandated by the provisions of Article II, §§ 1, 2 and 3.³

Equally significant is the curious refusal by the plaintiffs even to consider the applicability of the other five indicia of a political question articulated in *Baker v. Carr*.

This failure undoubtedly results from plaintiffs' misplaced reliance on the decision of the United States Court of Appeals for the District of Columbia in *Nixon v. Sirica* (Nos. 73-1962, 73-1967, 73-1989, Oct. 12, 1973). Admittedly, the Court of Appeals held the courts have the power to review a claim of Presidential privilege over matters subpoenaed by a grand jury. The Court of Appeals went to great lengths to emphasize "the narrow contours of the problem" with which it was faced and the fact that the decision was strictly limited to the "entirely unique circumstances of the case." Indeed, the exception promulgated there depends entirely upon "the grand jury showing that the evidence is directly relevant to its decisions."

Grand juries have traditionally been viewed as arms of the courts and courts are uniquely qualified to pass judgment on the needs of a grand jury. That was not the issue before the Court of Appeals in *Nixon v. Sirica*. Rather the issue was whether in determining the needs of the grand jury a court could compel the President of the United States to produce evidence he claimed was privileged for *in camera* inspection.

The Court of Appeals found that in these unique circumstances the courts had such a power and to protect the integrity of the grand jury were bound to exercise it. This finding, however, does not, as plaintiffs appear to suggest, impose a similar obligation on this Court. For here the circumstances are quite different. The Committee has made the political decision, albeit under color of law, to make an unprecedented demand on the President. The President has considered the demand and made the political determination that compliance would be contrary to the public interest. The Committee has asked this

Court to referee this dispute and to do so the Court must substitute its political judgment for both that of the President and the Committee and determine which of two co-equal branches of government should prevail.

The Court should decline this invitation. Acceptance could require this Court to substitute its judgment for that of the President in an area over which the President historically has exclusive and unreviewable power—the invocation of executive privilege against the Congress. Such a privilege, inherent as it is in the constitutional grant of executive power, is a matter for Presidential judgment alone. The standards and circumstances that mandate its use are a function of Presidential judgment. Such judgments cannot be second-guessed and overruled at the caprice of the Senate Committee. Nor can they be evaluated and reviewed by any discernible criteria traditionally utilized by the courts in resolving constitutional disputes between individuals.⁴

The cases cited by the Committee in its Motion for Summary Judgment are not even remotely similar to the instant case, involving as they do controversies resolvable by judicial interpretation of a statute or the Constitution. Cf. *Powell v. McCormick*, 395 U.S. 486 (1969); *United States v. Lovett*, 328 U.S. 303 (1946); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). These were all cases in which the court was adjudicating, as courts traditionally do, a claim of individual rights. This is a compelling indicia of a political question as articulated in *Baker v. Carr*.

The matter of executive privilege against congressional demands, involving as it does subtle and exclusively Presidential judgments, is an area of decision-making where there are "considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice." *Ware v. Hylton*, 3 Dall. (3 U.S.) 199, 260 (1796). It is this very "lack of judicially discoverable and manageable standards" for resolving the issue that further highlights the nonjusticiability of the question. It is respectfully submitted that this obvious absence of standards for review of the President's invocation of privilege is apparent upon

³ The textually demonstrable commitments are contained in the § 1 grant of "executive power" solely to the President; and § 2 grant to the President of the right to require, free from any Senate review, advice from his principal executive officers; and the § 3 charges that the President deliver a State of the Union message and "take care that the laws be faithfully executed."

In addition, these explicit grants of power carry other powers along with them. The Supreme Court has stated:

It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the Constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

Anderson v. Dunn, 6 Wheat (19 U.S.), 204, 225-226 (1821).

⁴ This distinction has been repeatedly noted by commentators, e.g., Douglas, *Anatomy of Liberty* 77 (1963); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. Pitts. L. Rev. 755, 776 (1959). A very recent commentator puts it this way: "The status of the party asserting the claim is obviously critical, as is the status of the entity against whom the claim is pressed. Putting aside all the difficulties involved in suing the President, *eo nomine*, there is an obvious difference between a claim by a coordinate branch and a claim by a private person that the allegedly unconstitutional usurpation also has caused him tangible injury. Apart from the greater ability of Congress to protect its jurisdiction by political means, it seems incongruous for Congress to request the courts to determine the extent and adequacy of congressional support of presidential action in an area of concurrent power." Erchnmeyer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 Ore. L. Rev. 211, 232 (1973).

analysis of the court's task in any *in camera* proceeding. As Professor Black so clearly explains,

The reason for maintenance of confidentiality may not, and sometimes will not, appear on the face of the submitted material but may lie in its context, outside the record. The President, in attempting to persuade the judge of the necessity for confidentiality, would thus often be forced to reveal more and more material beyond what had been subpoenaed, with no assurance that any of this material would remain confidential.

Black, *Letter to the Editor*, N.Y. Times, September 6, 1973, p. 34.

Thus the Court is asked to make an initial policy determination that the President has improperly or mistakenly invoked executive privilege against the Congress. Such a determination by a court is constitutionally impermissible and violates the most basic tenets of the separation of powers. Moreover it is a determination beyond judicial abilities since the Court simply cannot substitute its judgment for that of the President. The impossibility of judicial resolution is underscored by the ancillary problem of the absence of standards for resolving the question. The teachings of *Baker v. Carr* are clear and compelling and require recognition of these indicia of nonjusticiability.

In *Powell v. McCormick*, *supra* at, 548-549 (1969), the Court determined that it could resolve the question presented without creating "a potentially embarrassing confrontation between coordinate branches" of the government because the resolution of the question of Representative Powell's right to be seated in Congress required no more than that the Court exercise its traditional role as interpreter of the Constitution. The decision required an interpretation of Congressional powers under Article 1, § 5, the type of interpretative function traditionally the responsibility of the Judicial Branch. The instant case cannot be so easily resolved. Contrary to the facts in *Powell*, there is no dispute in this case as to the President's constitutional power to invoke executive privilege. Many courts have so held and the Senate Committee itself recognizes the existence of an executive privilege. The Senate Committee, however, asks this Court to rule that the Legislative Branch has the responsibility and power to review the propriety of executive utilization of the privilege.

Such a legislative power does not exist, and for this Court to hold to the contrary would be the most patent expression of "lack of respect due a coordinate branch of government." Again, the teachings of *Baker v. Carr* apply and the true nature of the political question presented is made manifest.

In *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F. 2d 788, 792 (D.C. Cir. 1971), a case upon which the Committee relies, the court clearly recognized that the government has an interest in avoiding disclosure of documents "which reflect intra-executive advisory opinions and recommendations whose confidentiality contributes substantially to the effectiveness of government decision-making processes." In *Seaborg*, the court considered only a claim of privilege by an "executive depart-

ment or agency" and thus, despite the Committee's view that it controls here, *Seaborg* cannot be read as authoritative on the issue of a direct, personal claim of privilege by the Chief Executive.

It is submitted that the question before this Court poses the dilemma inherent in any nonjusticiable political question. The Court is being asked to resolve a direct clash of power between two branches of government. To resolve the confrontation the Court must necessarily declare that one power is greater than its counterpart and thus violate the very essence of separation of powers among the co-equal branches. Nothing could more clearly demonstrate "lack of respect due a coordinate branch of government," and nothing could more explicitly demonstrate the nonjusticiable nature of the present matter.

The Presidential decision to invoke executive privilege is by definition a political decision. It is a function of the President's position as Chief Executive. It involves, as we have demonstrated, a complex blend of policy, perspective, and knowledge uniquely within the province of the President and Executive Branch. Neither the courts nor Congress can vouchsafe themselves the elements of knowledge and perspective necessary to examine and review such a decision. If the exclusive executive power conferred upon the President in Article II is to remain a meaningful constitutional allocation, neither the Court nor Congress can look behind this political decision already made by the President.

The Senate Committee invites this Court to create a constitutional confrontation destructive of the separation of powers. It is submitted, with respect, that such an invitation must be declined. The atmosphere of constitutional confrontation must be dissolved by this Court's "unquestioning adherence to the political decision already made." The unusual need for such adherence is further indicative of the nonjusticiable nature of the question presented.

It is submitted that this Committee's challenge to the invocation of executive privilege is merely the first such challenge that will occur if this Court issues the judgment requested. Recent events make it clear that the plaintiffs seek a favorable ruling in order to open the door to a wholesale invasion of executive confidentiality. On October 4, 1973, Professor Dash stated that:

We are not, as I have indicated, asking for any ruling by this Court that the President doesn't have executive privilege. He certainly does. We are saying that in a particular situation where we have identified the tapes by the tape, by the minutes of the conversation, where we already have by testimony indicated what was talked about during that period of time, and that we have made a *prima facie* case * * * of possible criminality on the part of the President, that executive privilege clearly cannot be stated here.

Transcript at 25. It is obvious that plaintiffs are no longer content to confine themselves to a narrow, well-defined challenge to executive privilege. Indeed, the three most recent subpoenas calling for Presidential documents

present requests so broad, so unprecedented, as to make impossible the formulation of any "judicially discoverable standards for resolving" a claim of executive privilege. The inevitable result will be this Court's participation with the Committee in what could become, in the words of the Court of Appeals, "wholesale public access to Executive deliberations and documents" that "would cripple the Executive as a co-equal branch." *Nixon v. Sirica*, *supra* at 26-27.

For these reasons, as well as the existence of all other indicia of a political question that adhere in this matter, the Court must hold the matter before it to be non-justiciable.

III. PLAINTIFFS HAVE EXCEEDED THEIR LEGISLATIVE AUTHORITY UNDER THE CONSTITUTION

A. Constitutional Limits

The power of the Congress to conduct investigations is inherent in the legislative process and is broad. Congress cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. Therefore the power of inquiry is a necessary and appropriate attribute of the power to legislate. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). However, this power of inquiry is not unlimited. *Watkins v. United States*, 354 U.S. 178, 187 (1956); *United States v. Rumely* 345 U.S. 41, 58 (1953) (Douglas, J., concurring); *Marshall v. Gordon*, 243 U.S. 521 (1917); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

The Senate Select Committee has asserted a broad mandate to "get to the bottom of widespread but incompletely substantiated suspicions of wrongdoing at the highest executive levels." Memorandum in Support of Motion for Summary Judgment (hereinafter "Memo.") at 15. In this action the movants have subpoenaed tape recordings and other materials in an effort to resolve the conflicting testimony adduced at the Senate hearings and thus determine "the precise extent of malfeasance in the executive branch." Memo. at 16. This inquiry is not germane to the Committee's *legislative* purpose, and indeed constitutes a usurpation of those duties exclusively vested in the Executive and the Judiciary.

The Senate Select Committee was established to investigate and study the extent to which illegal, improper, or unethical activities existed in the Presidential election of 1972 and related events, and to "determine whether in its judgment any occurrences * * * revealed * * * indicate the necessity or desirability of the enactment of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." S. Res. 60, 93rd Congress, 1st Sess. (1973). Accordingly, the Committee's mandate was to identify illegal, improper, or unethical activities and recommend corrective legislation, not to resolve the conflicts in the evidence and adjudicate questions of guilt or innocence.

Such an inquiry is not germane to the Committee's legislative purpose, and is outside its charge. Clearly the movants can honor their legislative mandate without access to the tapes.⁵ However, Congress is not a law enforcement or trial agency.

These are functions of the Executive and Judicial departments of the government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Here the Senate Committee has indicated that it needs the subpoenaed materials so

⁵ It should be noted that at least two members of the Committee, although joining in the present action, have acknowledged that production of the tapes is not essential to the legislative functions of the Committee. The Washington Post of September 10, 1973, p. A2, reported the following statement by Senator Daniel K. Inouye:

"I think we can proceed and file an adequate report without the tapes," said Inouye, a member of the Senate Watergate Committee.

"As far as I am concerned personally," he said on NBC's "Meet the Press" program, "this is where the difference between a legislative proceeding and a judicial proceeding comes in. If this were a criminal matter, I would say that the tapes are absolutely necessary and essential. But in our case I think we can proceed and file an adequate report without the tapes."

He was asked, "You personally don't care then who is telling the truth?"

"Because it is not our business to decide the guilt or innocence of any party this is my view." Inouye responded.

Senator Inouye was further asked, "Doesn't it matter to you in your final report whether you established who is telling the truth?"

He responded, "I said this was my personal view and this makes a difference between a legislative investigation and a criminal case. In a criminal case it would be absolutely essential. I would say the tapes be made available. But for the purpose of this committee I am certain the Committee report can be made."

Senator Gurney stated the following views when he was interviewed on Capitol Cloak Room on Sept. 16, 1973:

"Senator, if we can turn to the question of presidential tapes, do you think they are essential to the investigation that the Senate is conducting?"

"SENATOR GURNEY. No. No, I don't. What is our duty anyway? Our duty of course was to charter . . .", there are certain word unintelligible—"to look into facts and circumstances of Watergate that the presidential election of 1972, I should say, and report to the Senate and recommend legislation we thought was necessary in order to improve our political campaigns. Now getting the presidential tapes really has nothing to do with that charter at all. It does have something to do with who said what, on what day the President met with John Dean or somebody else and it really doesn't have anything to do with what our charter is or interfere with our ability to make recommendations to the Senate to improve campaigns."

"MISS STAHL. Well, then you think you can fully write your final report without the tapes, is that correct?"

"SENATOR GURNEY. We can, indeed."

"MR. STRASSER. This testimony would relate to what is commonly called the cover-up. Are you saying this is not part of the Committee's jurisdiction?"

"SENATOR GURNEY. In answer to the previous question, of course that was did we need the tapes in order to write our report I said no, we didn't. The tapes would shed light on the Watergate affair, that is true, but that is really not what our charter is and that is to write our report and make recommendations to the Senate."

See Transcript at 4-6.

that it can determine whether perjury has been committed. See footnote, Plaintiffs' Memorandum on Remand at 22. Determining whether a crime has been committed manifestly is outside the constitutional powers enumerated for the Congress. If the Committee has received conflicting testimony that it believes may involve perjury, the matter should be referred to the Department of Justice for appropriate legal action under the provisions of the criminal code (18 U.S.C. §§ 1621–1623). Unfortunately, the Committee insists upon performing these law enforcement and guilt adjudicating functions itself, activity that clearly exceeds its constitutional authority.

In a similar situation the Supreme Court in *Kilbourn v. Thompson*, 103 U.S. 168 (1880), determined that the House of Representatives had exceeded its authority in directing one of its committees to investigate the circumstances surrounding the bankruptcy of Jay Cooke and Company, in which the United States had deposited funds. The committee became particularly interested in a private real estate pool that was part of the financial structure and jailed Kilbourn for refusing to answer certain questions about the pool and to produce certain books and papers. The Court found that the subject matter of the inquiry was "in its nature clearly judicial," 103 U.S. at 192, not legislative, and the House was exceeding the limit of its own constitutional authority.⁶ Accordingly the committee had no lawful authority to require Kilbourn to testify as a witness or produce papers.

It is unquestionably the duty of all citizens to cooperate with Congress in its efforts to obtain the facts needed for intelligent legislative action and all citizens unremitting obligation to respond to subpoenas. However, this duty adheres only with respect to matters within the province of proper investigation. *Watkins v. United States*, 354 U.S. 178, 187–188 (1956). Here this Committee is acting in excess of the power conferred on Congress by the Constitution.

The fundamental holding of *Kilbourn* was not impaired by the subsequent cases of *McGrain v. Daugherty*, 273 U.S. 135 (1927), and *Sinclair v. United States*, 279 U.S. 263 (1929), so heavily relied upon the Committee. In both cases the Supreme Court expressly acknowledged the requirements that congressional inquiries be related

⁶ The Court in *Kilbourn v. Thompson*, observed that:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

102 U.S. at 190–191.

to a proper legislative purpose. In *McGrain*, the Supreme Court found that an inquiry into the conduct of the office of Attorney General reflected legitimate legislative concerns and upheld a subpoena of the brother of the former Attorney General. Pointing out that the office of Attorney General was "subject to regulation by Congressional legislation," and that the "only legitimate object the Senate could have in ordering the investigation was to aid it in legislating," the Court concluded that, in view of the subject matter, it would presume that legislation was the real object of the investigation. 273 U.S. at 178. Similarly, in *Sinclair*, the Court found that an inquiry into oil leases was properly related to congressional authority over public lands and rejected, on the basis of the record, the factual argument that the investigation was not in aid of legislation.

The Supreme Court has quite understandably and wisely sought to avoid the constitutional trauma inherent in a holding that Congress had exceeded its authority. But *Kilbourn*, and the concept that a legislative purpose is an indispensable prerequisite for a valid inquiry, are the framework in which the Court has found other grounds for declining to enforce congressional subpoenas. Subsequent cases have indicated that the "presumption" indulged by the Court in *McGrain* may be overcome if the connection with a proper legislative purpose becomes too tenuous. And the Supreme Court has shown particular concern where congressional inquiries have threatened to encroach upon other important constitutional rights. See *Watkins v. United States*, *supra*; *United States v. Rumely*, 345 U.S. 41 (1953).

In *United States v. Rumely*, 345 U.S. 41 (1953), where it was argued that the inquiry trespassed upon the First Amendment, the Court said:

Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits.

345 U.S. at 46. The Court went on to hold that questions put to the defendant exceeded the bounds of the resolution by the House of Representatives creating the committee—notwithstanding the subsequent ratification of the committee's action by the House.

In *Watkins v. United States*, 354 U.S. 178 (1957), the Supreme Court affirmed that:

No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.

354 U.S. at 187. The Court cited *Kilbourn* for the proposition that an investigation unrelated to legislative purpose would be "beyond the powers conferred upon the Congress in the Constitution" and *Rumely* for the proposition that "the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights." 354 U.S. at 198. The Court held that the House Resolution in

question was so broad that the defendant could not fairly determine whether the questions put to him were pertinent to the committee's inquiry.

In this case, as in *Rumely* and *Watkins*, there is a collision between the congressional pursuit of information and an important Constitutional right. In *Rumely* and *Watkins* the Supreme Court was concerned with the impact of congressional investigations upon First Amendment freedoms. Here the investigation directly challenges the Presidency. The importance of confidentiality to the Office of the President, and the implications of seeking to impose judicial control upon the conduct of that office, are treated elsewhere in this memorandum. Certainly the preservation of the ability of Presidents to function is no less crucial to our Constitutional system than the vindication of First Amendment rights.

Watkins is important too for the flat and famous statement in which the Court said: "We have no doubt that there is no congressional power to expose for the sake of exposure." 345 U.S. at 200.⁷ Of course the Senate is authorized to investigate campaign practices to see if legislation is needed in that area. But every time a member of the Committee speaks of the importance of "who said what to whom" or "what the President knew and when," and everytime the plaintiffs' briefwriters harp, as they do so repeatedly, on "the President's own possible criminality," Supplementary Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 2, they make it manifest that what they are interested in here is "to expose for the sake of exposure."

The plaintiffs can take no comfort in the ruling in *Nixon v. Sirica*, because a careful reading of that decision reveals that the court emphasized the "narrow contours of the problem" and the fact that the decision was limited to the "entirely unique circumstances of the case." *Nixon v. Sirica* supra at 4. Indeed, the exception to the principle of executive privilege carved out there depends entirely upon "the grand jury showing that the evidence is directly relevant to its decisions." *Nixon v. Sirica*, supra at 34. Obviously, if a grand jury is considering indicting for perjury when contradictory statements were made by different persons, it must ascertain who was not truthful in order to indict the proper person. It could be argued that the grand jury may have been completely precluded from returning any perjury indictments if it did not have access to the tapes.

The Senate Committee does not find itself in an analogous situation. Its primary function—the proposing of legislation—is not completely precluded because there is

some conflict in the testimony given before the Committee. However, it is argued that the subpoenas in question (and supposedly the most recent subpoenas that demand access to hundreds of tapes, documents, notes, memoranda, etc.) must be complied with in order that the Congress' "informing function" can be accomplished.

It is submitted that the Committee has not been unduly frustrated in carrying out its informing function. The President has permitted many of his closest aides and advisors to give public testimony without claiming privilege. The Committee has had voluminous documents submitted as evidence. There are about 10,000 pages of testimony that have been given under oath. The Special Prosecutor has taken guilty pleas in a number of instances and advises that further indictments will be forthcoming. The story of Watergate is unfolding, but it should do so in an orderly manner. As the President stated in his letter of January 4, 1974, to the Chairman of the Senate Select Committee:

As you are aware, substantial numbers of materials have been provided to the Office of the Special Prosecutor for possible use with grand juries. With respect to whatever portions of the materials covered by your subpoena may be relevant to matters now subject to grand jury investigation, and potentially, criminal trials, disclosures to you, and through you to the public, could seriously impair the ability of the Office of the Special Prosecutor to complete its investigations and successfully prosecute the criminal cases which may arise from the grand juries.

There are strong reasons why the most private conversations and documents of the President should not be disclosed. If any of these items should be released to any extent, at least it should be under the auspices of the grand jury and its traditional cloak of secrecy. The public disclosure of conversations and memoranda that were always intended to be private has a tendency to degrade and ridicule the Presidency by transforming heretofore private and personal discussions into cocktail party entertainment.

IV. THE PRESIDENT HAS THE POWER TO WITHHOLD INFORMATION FROM CONGRESS THE DISCLOSURE OF WHICH HE DETERMINES TO BE CONTRARY TO THE PUBLIC INTEREST

Plaintiffs' reliance on the Court of Appeals decision in *Nixon v. Sirica* to support its contention that Congress may force disclosure of the President's confidential conversations and documents is not only misplaced, but is significantly demonstrative of the extraordinary request it makes of the Court. Plaintiffs admit that *Nixon v. Sirica* was decided in the context of a grand jury subpoena. They recognize that the President has already disclosed to the grand jury the evidence at issue here. Nevertheless these plaintiffs accuse Richard M. Nixon of suppressing evidence and ask this Court to rule that a congressional committee may completely disregard a claim of executive privilege by purporting to investigate "executive wrongdoing." Such an accusation is irresponsible. Such a claim of power is historically and constitutionally unsupportable.

⁷ In *Watkins* the Court also pointed with envy to England, where investigations of this kind are entrusted to royal commissions, removed from the turbulent forces of politics and partisan considerations. "Seldom, if ever, have these commissions been given the authority to compel the testimony of witnesses or the production of documents." Nevertheless, they have, as the Court noted, enjoyed "success in fulfilling their fact-finding missions without resort to coercive tactics * * *." 354 U.S. at 191-192.

As the Court of Appeals clearly stated in its opinion in *Nixon v. Sirica*, "We recognize this great public interest, and agree with the District Court that such conversations are presumptively privileged." *Id.* at 30.

The President has refused disclosure to this Committee because he has determined that such disclosure would be contrary to the public interest. The President, even more so than the members of this Congressional Committee, is the elected representative of all people. Therefore, the President owes a duty to the people to maintain the constitutional integrity of the office he occupies.

Whenever any branch of the Government exceeds the limits of the grant made to it by the Constitution, it, to that extent, ceases to represent the people and assumes arbitrary power. Defense by the Executive of his Constitutional powers becomes, in very truth, therefore, defense of popular rights—defense of power which the people granted to him. It was in that sense that President Cleveland spoke of his duty to the people not to relinquish any of the powers of his great office. It was in that sense that President Buchanan stated the people have 'rights and prerogatives' in the execution of his office by the President which every President is under a duty to see 'shall never be violated in his person' but 'pass to his successors unimpaired by the adoption of a dangerous precedent.' In maintaining his rights against a trespassing Congress, the President defends not himself but popular Government; he represents not himself but the People.

Warren, *Presidential Declarations of Independence*, 10 Bos. U. L. Rev. 1, 35 (1930).

Maintenance of executive confidentiality as provided by the constitutional separation of powers has been recognized by this Court in its opinion in Misc. No. 47-73, Opinion at 5, 7-8; and by the Court of Appeals in *Nixon v. Sirica*, *supra* at 30.

We reassert the importance of that principle here,⁸ but before dealing with it in detail it is necessary to discuss the basis for plaintiffs' claim of the right to information and the basis for the President's refusal to furnish it.

A. Basis for Executive Privilege.

Plaintiffs refer in a previously submitted "Historical Appendix" to a series of instances where Presidents and their aides have cooperated with Congressional requests for information. Their analysis includes instances where either testimony or documents were furnished to Congress by the Executive on a voluntary basis. Although

plaintiffs' uses of history must be relied on with the utmost caution,⁹ it is of course true that this President, like all of his predecessors, has often made voluntary disclosures of information sought by Congress. Plaintiffs have not cited any authority, either historical or legal, for the proposition that a President can be compelled to furnish information to the Congress. There is good reason for this. There is no such authority.

There are, however, many instances where Presidents have refused to furnish information to Congress and, in each case, the refusal has been accepted.

The frequently exercised, long-standing freedom of the Executive to refuse demands by Congress for the production of documents does not require extended discussion.¹⁰ Under the Continental Congress, the relationship between Legislature and Executive had been modeled on the British system. The executive departments were, in effect, answerable to the Legislature, and could be called on for an

⁸ In their original papers, including the "Historical Appendix," plaintiffs' sole reliance for history is on an article by Raoul Berger, which they cite 15 times. Professor Berger is a reputable scholar and a provocative analyst but he is not always accurate in his statement of history. Thus at page 5 of the "Historical Appendix" plaintiffs cite the Berger article for the proposition that President Jefferson "fully complied" with the subpoena issued against him in the *Burr* litigation. This is simply not true. The facts are fully developed by Judge Wilkey at pages 41-55 of his dissent in *Nixon v. Sirica*. They show that ultimately Jefferson sent a copy of the letter with a certificate reciting that he had omitted "some passages entirely confidential, given for my information in the discharge of my executive functions, and which my duties and the public interest forbid me to make public." 9 Ford, *Writings of Thomas Jefferson* 64 (1898). See also 3 Beveridge, *Life of John Marshall* 518-522 (1919).

Again in a footnote at page 24 of their original brief, plaintiffs cite the Berger article for the following proposition: "President Jackson, for example, refused to produce documents relating to wrongdoing by a former executive official, but only on the ground that the congressional investigation was being conducted *in camera*, thus depriving the individual in question of an opportunity for public vindication." President Jackson's message of February 10, 1835, referred to by plaintiffs, appears at 3 Richardson, *Messages and Papers of the Presidents, 1789-1897* 132 (1897). The latter occupies three printed pages. The bulk of it discusses the fact that the demand encroaches on the constitutional powers of the Executive and that if Congress does not like what the President is doing it should impeach him. After a lengthy discussion of this point there are two sentences in which Jackson refers to the fact that the papers would be considered in executive session. Following that he states again his original objection to the demand. Thus the statement by plaintiffs that he refused compliance only on the ground that the hearing was being conducted *in camera* is a gross distortion of the historical fact.

¹⁰ It seems ironic indeed that the plaintiffs suggest on one hand that their investigation has been "emasculated" by Presidential refusals to disclose information and on the other hand urge that the extent of Presidential disclosure constitutes a waiver. Both arguments are equally unsupported. The President voluntarily has allowed unprecedented access to the testimony and memoranda of top assistants. However such cooperation hardly amounts to a waiver of all executive privilege. *United States v. Reynolds*, 345 U.S. 1, 11 (1953) holds specifically to the contrary. As Alexander Bickel has decisively observed, "Far from being waived, the privilege, it seems to me, is as much exercised when information is released as when it is withheld." Bickel, *Wretched Tapes (cont.)*, N. Y. Times, August 15, p. 33.

accounting. A resolution of the Continental Congress creating the Department of Foreign Affairs, whose head was appointed by and held office at the pleasure of Congress, provided:

That the books, records and other papers of the United States, that relate to this department be committed to his custody, to which, and all other papers of his office, any member of Congress shall have access: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress.

This was completely changed by the Constitution in establishing the three independent branches. See Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. Bar J. 319, 328-330 (1949).

Since then there has arisen an often asserted, much discussed, and well recognized privilege of the President to deny Congress access to documents whenever either the President or the head of a department has deemed it in the public interest to do so. From the administration of Washington to the present, Presidents have repeatedly asserted the privilege, and, when forced to a showdown, Congress has always yielded and ceased to press its demands.¹¹ A recent instance was the refusal of President

¹¹ The following is a partial list of examples of successful assertions of the privilege, comprising partly assertions by the President and partly assertions by department heads:

President	Date	Type of information refused
Washington.....	1796	Instructions to U.S. Minister concerning Jay Treaty.
Jefferson.....	1807	Confidential information and letters relating to Burr's conspiracy.
Monroe.....	1825	Documents relating to conduct of naval officers.
Jackson.....	1833	Copy of paper read by President to heads of Departments relating to removal of bank deposits.
	1835	Copies of charges against removed public official. List of all appointments made without Senate's consent between 1829 and 1836, and those receiving salaries without holding office.
Tyler.....	1842	Names of members of 26th and 27th Congress who have applied for office.
	1843	Colonel Hitchcock's report to the War Department dealing with alleged frauds practiced on Indians, and his views of personal characters of Indian delegates.
Polk.....	1846	Evidence of payments made through State Department on President's certificates, by prior administration.
Fillmore.....	1852	Official information concerning proposition made by King of Sandwich Islands to transfer to U.S.
Buchanan.....	1860	Message to Protest to House against Resolution to investigate attempts by Executive to influence legislation.
Lincoln.....	1861	Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.
Grant.....	1876	Information concerning executive acts performed away from Capitol.
Hayes.....	1877	Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as Collector of Port of New York.
Cleveland.....	1886	Documents relating to suspension and removal of 650 Federal officials.
Theodore Roosevelt....	1909	Attorney General's reasons for failure to prosecute U.S. Steel Corporation. Documents of Bureau of Corporations, Department of Commerce.
Coolidge.....	1924	List of companies in which Secretary of Treasury Mellon was interested.
Hoover.....	1930	Telegrams and letters leading up to London Naval Treaty.
	1932	Testimony and documents concerning investigation made in Treasury Department.
Franklin D. Roosevelt...	1941	Federal Bureau of Investigation reports.
	1943	Director, Bureau of Budget, refused to testify and to produce files.
	1943	Chairman, Federal Communications Comm., and Board of War Communications refused records.
	1943	General Counsel, Federal Communications Commission, refused to produce records.
	1943	Secretaries of War and Navy refused to furnish documents, and permission for Army and Naval officers to testify.
	1944	J. Edgar Hoover refused to give testimony and to produce President's directive.
Truman.....	1945	Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee, but the President's directive did not include any files or written material.
	1947	Civil Service Commission records concerning applicants for positions.

See Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. Bar J. 103, 147 (1949).

More recent examples are described in Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 29 Geo. Wash. L. Rev. 623 (part 1) and 827 (part 2) (1961). See also Younger, *Congressional Investigations: A Study in the Separation of Powers*, 20 Univ. Pitt. L. Rev. 755 (1959).

Truman to turn over to the House Committee on Un-American Activities files relating to the federal employee loyalty program. Directive of March 13, 1948, 13 Fed. Reg. 1359 (1948).

President Truman was persistent in his refusals to the House Committee on Un-American Activities. In 1953, after he left the White House, he refused to honor a subpoena of the Committee that he appear and give testimony on charges that he and then Attorney General Tom C. Clark knowingly promoted an enemy agent. President Truman stated:

I am carrying out the provisions of the Constitution of the United States; and am following a long line of precedents, commencing with George Washington himself in 1796. Since his day, Presidents Jefferson, Monroe, Jackson, Tyler, Polk, Fillmore, Buchanan, Lincoln, Grant, Hayes, Cleveland, Theodore Roosevelt, Coolidge, Hoover, and Franklin D. Roosevelt have declined to respond to subpoenas or demands for information of various kinds from Congress.
* * *

The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

N.Y. Times, November 13, 1953, p. 13. Following receipt of the strongly worded letter from President Truman, the committee declined to press the matter further.

Reference to this unbroken record of successful assertions of privilege in practice is particularly significant in illustrating the constitutionally implied separation of powers. In the construction of any clause of the Constitution uninterrupted usage continuing from the early days of the Constitution would be of great weight.

Both Officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915); *United States v. MacDaniel*, 7 Pet. (7 U.S.) 1, 13-14 (1833). Here, moreover, because the doctrine of separation of powers is not contained in express language in the Constitution, *Ex parte Grossman*, 267 U.S. 87, 119 (1925), and because the functioning of our Government depends so largely upon limits on the powers of each branch derived from practical adjustments based on a fair regard by each for the necessities of the others, we think that the historic usage is especially meaningful. "Even constitutional power, when the text is doubtful, may be established by usage." *Inland Waterways Corp. v. Young*, 309 U.S. 517, 525 (1940). In the *Pocket Veto Case*, 279 U.S. 655 (1929), the Court reviewed the legality of a Presidential pocket veto of a bill that would have

allowed certain Indian tribes to sue in the Court of Claims. In upholding the President's exercise of that power the Court stated:

The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.

279 U.S. at 688-689.

These successful executive assertions of privilege against Congress have frequently been acknowledged by Congress itself. A typical example of this Congressional acknowledgment occurred during the Senate hearings on President Truman's dismissal of General MacArthur. *Military Situation in the Far East*, Hearings before the Committee on Armed Services and the Committee on Foreign Relations, U.S. Senate, 82nd Cong., 1st Sess. (1951), at 763, 765. General Omar Bradley was questioned about a meeting with the President, George Marshall, and Dean Acheson. Gen. Bradley replied, "Senator, at that time I was in a position of a confidential advisor to the President. I do not feel at liberty to publicize what any of us said at that time." Chairman Richard Russell was quick to recognize the necessity for such confidentiality and upheld the claim of privilege stating:

I know that in my opinion any conversation with respect to any of my actions that I might have, any conference I might have with my administrative assistant in my office I think should be protected, and it is my own view, and I so rule, that any matter that transpired in the private conversation between the President and the Chief of Staff as to detail can be protected by the witness if he so desires, and if General Bradley relies upon that relationship, so far as the Chair is concerned, though I regret very much that the issue was raised and I am compelled to pass on it, I would rule that he be protected.

Hearings at 765. The Chairman's decision upholding the claim of privilege subsequently was ratified after extensive debate for several days by a Committee vote of 18-8. Hearings at 872. See also, e.g. H. Rep. No. 1595, 80th Cong., 2nd Sess., (1948) at 2-3, 7. Even in the heat of contest members of Congress have recognized the wisdom of acceding to the constitutional principles here asserted by the President.

During the administration of President Hayes, for example, the House Judiciary Committee, under the chairmanship of Benjamin F. Butler, pointed out that all resolutions directed to the President relating to the production of records properly would contain the clause "if in his judgment not inconsistent with the public interest." H. Rep. No. 141, 45th Cong., 3rd Sess., (1879), at 3. And the Committee continued, *Id.* at 3 and 4:

* * * whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem

that this must be so. The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.

The decision as to whether there should be compliance with a particular request was the Executive's, the committee stated:

Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interests.

There are many other instances of Congressional recognition of the executive privilege, vis-a-vis Congress, including one which gave rise to a great congressional debate, occupying the Senate for almost two weeks, during President Cleveland's first administration. 17 Cong. Rec. 2211-2814 (1886). See Sen. Misc. Doc., Vol. 7, 52d Cong., 2d Sess. (1886), at 235-243; 8 Richardson, *Messages and Papers of the Presidents* 375-383 (1886); 17 Cong. Rec. 4095 (1886). In the course of this debate many past examples of executive refusals to produce papers demanded by Congress were discussed. See, e.g., 17 Cong. Rec. 2622-2623 (1886).¹²

A more recent instance was the congressional reaction to President Kennedy's refusal to disclose the names of Defense Department speech reviewers. Committee on Armed Services, U.S. Senate, *Military Cold War Escalation and Speech Review Policies*, 87th Cong., 2d Sess. (1962), at 338, 369-370, 508-509, 725, 730-731. The Senate Subcommittee, speaking through Senator Stennis, conceded:

We now come face to face and are in direct conflict with the established doctrine of separation of powers * * *

I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files—and I do not think either one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field.

Id. at 512.

During the hearings on the nomination of the Honorable Abe Fortas to be Chief Justice of the United States, Senator Ervin began to question the nominee about his participation in discussions with President Johnson that led to an order sending federal troops into Detroit. Senator Ervin then said, however: "I will not insist upon your answer, because it is a prerogative of communications in the executive branch of the Government." Hearings before the Committee on the Judiciary, U.S. Senate, *Nomi-*

nations of Abe Fortas and Homer Thornberry, 90th Cong., 2d Sess. (1968), at 124. The question was not answered. At a later point, in response to a different question from Senator Ervin, Justice Fortas answered:

Senator, I will not go into any conversations, either to affirm them or to deny them, that I have had with the President. I ask you please to understand that, and please to excuse me. I know how easy it is to say no, the President did not say something to me. But the question is "What did he say?" would follow, and so on. I must ask you to indulge me to this extent. I have endeavored Senator, and Mr. Chairman, to err, if I erred, on the side of frankness and candor with this committee. But I think that it is my duty to observe certain limits, and one of those limits is any conversation, either affirmation or denial, that I may have had with the President of the United States.

Id. at 167-168. Later in the hearings, Senator McClellan said to the nominee:

I am not quarrelling with your position that you cannot say and do not want to say what conversations you may have had with the President. I respect that position if you wish to take it.

Id. at 225. At no point in the hearings did any Senator disagree with these views of Senator Ervin, Justice Fortas, and Senator McClellan.

During the hearings before the Senate Judiciary Committee relating to the nomination of Mr. Richard G. Kleindienst as Attorney General, Mr. Peter Flanigan, Special Assistant to the President, was invited to appear and testify about ITT matters. The Counsel to the President responded by pointing out that under the doctrine of separation of powers and long established historical precedents, members of the President's immediate staff do not appear and testify before congressional committees with respect to the performance of their duties. Thereafter, the Senate Judiciary Committee adopted a resolution on April 18, 1972, in which it was agreed that Mr. Flanigan "is not required to testify to any knowledge based on confidential communications between him and the President or between him and other aides of the President." Thereafter, a Presidential Assistant appeared and testified to the matters agreed to. Hearings before the Committee on the Judiciary, U.S. Senate, *Nomination of Richard G. Kleindienst, of Arizona, to be Attorney General*. 92nd Cong., 2d Sess. (1972), at 1630-1631.

B. The Need for Confidentiality.

There has long been general recognition that high officers in every branch of government cannot function effectively unless they are able to preserve the confidentiality of their communications with their intimate advisers. This recognition extends even to plaintiffs in this case. Professor Dash has stated that "We are not, as I have indicated, asking for any ruling by this Court that the President doesn't have Executive Privilege. He certainly does." Transcript at 25. Professor Dash also advised this Court that:

Senator Ervin, Chairman of the Committee, has frequently stated that he concurs and agrees there *must be* an Executive Privilege where the President *must be* in a position to be able to withhold certain materials in order to preserve confidentiality. (emphasis supplied)

¹² This debate ended with the approval by the Senate, in a vote on party lines, of resolutions condemning the President and the Attorney General. No result came from the resolutions. See 17 Cong. Rec. 2813-2814 (1886).

Transcript at 11. Such a recognition by plaintiffs is no more than awareness of both the practical necessity and judicial approbation of executive confidentiality.

In *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973), the Court quoted with approval the statement of Justice Reed, sitting by designation in the Court of Claims, in *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958):

There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

Discussions of this kind are regarded as privileged “for the benefit of the public, not of executives who may happen to then hold office,” *Id.* at 944, since it is the public that is served when those who represent it are able to make important decisions with the wisdom that only open and frank discussion can provide. Judge Robinson has spelled out this point more fully:

This privilege, as do all evidentiary privileges, affects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and, on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate, and thus achieves an objective akin to those attained by other privileges more ancient and commonplace in character. Nowhere is the public interest more vitally involved than in the fidelity of the sovereign’s decision and policymaking resources.

Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-325 (D.D.C. 1966), affirmed on the opinion below 384 F. 2d 979, cert. denied 389 U.S. 952 (1967). See also 5 U.S.C. § 522(b)(5); Rogers, *The Right to Know Government Business From the Viewpoint of the Government Official*, 40 Marq.L.Rev. 83, 89 (1956).

This case concerns the ability of the President to enjoy confidentiality in carrying out his official duties. But this important privilege is not one that is available only to assist the functioning of the President, or the Executive Branch generally. As Judge Wilkey recently wrote, “the privilege against disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the executive.” *Soucie v. David*, 448 F.2d 1067, 1080 (1971) (concurring opinion).

Although Professor Arthur Selwyn Miller and a collaborator have recently argued to the contrary, Miller & Sastri, *Secrecy and the Supreme Court: On The Need for piercing the Red Velvet Curtain*, 22 Buff. L. Rev. 799 (1973), it has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality.

Justice Brennan has written that Supreme Court conferences are held in “absolute secrecy” for “obvious reasons.” Brennan, *Working at Justice*, in *An Autobiography of the Supreme Court* 300 (Westin ed. 1963). Justice Frankfurter had said that the “secrecy that envelops the Court’s work” is “essential to the effective functioning of the Court.” Frankfurter, *Mr. Justice Roberts*, 104 U.Pa. L. Rev. 311, 313 (1955). And only two years ago Chief Justice Burger analogized the confidentiality of the Court to that of the Executive, and said:

No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

New York Times Co. v. United States, 403 U.S. 713, 752 n. 3 (1971) (Burger, C. J. dissenting). In the recent contempt proceeding arising out of the trial of the Chicago Seven, Judge Gignoux refused to allow the defense even to call as a witness a person who had been law clerk to Judge Hoffman at the time of the original trial, on the ground that everything that a law clerk knows about his judge is privileged.

The Judiciary works in conditions of confidentiality and it claims a privilege against giving testimony about the official conduct of judges. *Statement of the Judges*, 14 F.R.D. 335 (N.D.Cal. 1953). See also the letter of Justice Tom C. Clark, refusing to respond to a subpoena to appear before the House Un-American Activities Committee, on the ground that the “complete independence of the judiciary is necessary to the proper administration of justice.” N.Y. Times, Nov. 14, 1953, p. 9.

A similar need for confidentiality, and an insistence that it cannot be breached by other branches of government, applies in the Legislative Branch. Neither a member of Congress nor his legislative aides can be compelled to disclose communications between the member and his aides relating to any legislative act of the member. *Gravel v. United States*, 408 U.S. 606, 629 (1972). It is immaterial that these communications might show criminal acts. 408 U.S. at 615. These aspects of the *Gravel* decision reflect in large part acceptance by the Court of the arguments presented by Senator Ervin and seven other Senators on behalf of the Senate as *amicus curiae* in that case. As reprinted in the Congressional Record, the *amicus* brief argued in part:

To isolate a Senator so that he cannot call upon the advice, counsel and knowledge of his personal assistants is to stop him from functioning as an independent legislator. If an aide must fear that the advice he offers, the knowledge he has, and the assistance he gives to his Senator may be called into question by the Executive, then he is likely to refrain from acting on those very occasions when the issues are the most controversial and when the Senator is most in need of assistance.

* * * * *

The Congressional privilege based upon an express Constitutional provision to encourage the free exchange of ideas and information can hardly be less extensive than the Executive privilege which has not express statutory or Constitutional basis and whose sole purpose is secrecy. Yet the Executive privilege has been extended to the activities of persons whose relationship to the President is far more remote than the relationship of an aide to a Senator.

The need for protecting the confidential relationships between the President and his aides, as the Government has asserted in defending the Executive privilege, is *pari passu* applicable to the need for protecting the relationship between Senators and their aides.

Cong. Rec. S5856, S5857 (daily ed. April 11, 1972).

Again it is the long established practice of each House of Congress to regard its own private papers as privileged. No court subpoena is complied with by the Congress or its committees without a vote of the House concerned to turn over the documents. *Soucie v. David*, 448 F. 2d 1067, 1081-1082 (1971). This practice is insisted on in Congress even when the result may be to deny relevant evidence in a criminal proceeding either to the prosecution or to the accused person.¹³

Plaintiffs nonetheless argue that neither Congressmen nor grand or petit jurors enjoy privilege to "suppress evidence relating to official misconduct." Memorandum on Remand at 26-27. This argument and its reliance on *United States v. Gravel*, *supra*, *United States v. Brewster*, 408 U.S. 501, 521 (1972), and *Clark v. United States*, 289 U.S. 1 (1933), simply is not applicable to this case. None of the cases cited by plaintiffs, including *Gravel*, *Brewster*, and *Clark*, involve congressional requests for evidence. They all were cases in which a grand jury investigation of alleged misconduct overcame historically

recognized claims of confidentiality. Those decisions were based, as was the decision in *Nixon v. Sirica*, on the traditional role of the grand jury in investigating criminal activity. Here all evidence being sought by this committee has been delivered voluntarily to the grand jury by the President. There is no "suppression of evidence" by the President. There is no frustration of any law enforcement activity or judicial proceeding. There is, however, a determination by the President that these plaintiffs not be allowed to undercut the independence and integrity of the executive branch.

These plaintiffs cannot claim to require these confidential materials in order to indict or accuse guilty persons. That is the role of a grand jury, and properly so, since it is incomprehensible that formal claims of executive privilege would be overruled each time a congressional committee decided to investigate imagined "executive wrongdoing".

These considerations of public policy are particularly compelling when applied to Presidential communications with his advisers.

Inseparable from the modern Presidency, indeed essential to its effective operation, is a whole train of officers and offices that serve him as eyes, ears, arms, mouth, and brain.

Rossiter, *The American Presidency* 97 (1956). Nor is it only those who are part of his staff with whom the President must be able to talk. He must be able to confer with foreign leaders and with representatives of every element in American public. He must be free to look for advice to anyone whose advice he trusts, whether in or out of government. The late Dean Acheson and former Justice Abe Fortas are merely recent and conspicuous examples of persons who were consulted by Presidents on critical public issues at times that they held no public office. "The President is, as he should be, entirely free, * * * like all who preceded him, to take counsel with private citizens." *Id.* at 103.

For the Presidency to work effectively and for the President to get candid advice from those to whom he turns it is absolutely essential that he be able to protect the confidentiality of these communications. As stated by the President on July 6, 1973, in his letter to Senator Sam J. Ervin:

No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential.

This has been the position of every President in our history, and it has been specifically stated by President Nixon's immediate predecessors. Writing his memoirs in 1955, President Truman explained that he had found it necessary to omit certain material, and said: "Some of this material cannot be made available for many years, perhaps for many generations." 1 Truman, *Memoirs* x

¹³ See, e.g., 108 Cong. Rec. 3626 (1962), showing Senate adoption of a resolution permitting staff members and former staff members of a Senate Committee to appear and to testify in a criminal proceeding against James Hoffa but forbidding them from taking any documents or records in the custody of the Senate and from testifying about information that they gained while employed in the Senate. In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of Government, which it wishes to protect." *Id.* at 3627.

On July 16, 1970, counsel for 1st Lt. William L. Calley, Jr., moved in his court-martial proceeding for production of testimony concerning the My Lai incident that had been presented to a subcommittee of the House Committee on Armed Services in executive session. Lt. Calley claimed that this testimony would be exculpatory of him and would help him establish his defense in the court-martial. The subcommittee Chairman, Rep. F. Edward Hébert, refused to make the testimony available, advising defense counsel on July 17, 1970, that Congress is "an independent branch of the Government, separate from but equal to the Executive and Judicial branches," and that accordingly only Congress can direct the disclosure of legislative records. He concluded from this that the material requested by the defense was not within the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), nor subject to the requirements of the Jencks Act, 18 U.S.C. § 3500. Subsequently the military court issued a subpoena to the Clerk of the House of Representatives. The Speaker laid this before the House on November 17, 1970, 116 Cong. Rec. 37652 (1970), but to date the House has taken no action nor given any indication that it will supply the information sought.

(1955).¹⁴ President Eisenhower stated the point with force on July 6, 1955, in connection with the Dixon-Yates controversy:

But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere little slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, and if they are, will wreck the Government.

There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.

Public Papers of Presidents of the United States: Dwight D. Eisenhower 1955, 674 (1959).

Congress itself recognized the high degree of confidentiality that must attach to Presidential papers for many years when it enacted the Presidential Libraries Act of 1955, Pub. L. 84-373, 69 Stat. 695 (1955), now codified in 44 U.S.C. §§ 2107, 2108. That statute encourages Presidents to give their papers to a Presidential library, and provides that papers, documents, and other historical materials so given "are subject to restrictions as to their availability and use stated in writing by the donors or depositors * * *." The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf." 44 U.S.C. § 2108(c); *Nichols v. United States*, 460 F.2d 671 (10th Cir. 1972). Since that Act was passed the gifts of Presidential papers of Presidents Eisenhower, Kennedy, and Johnson have all specified that "materials containing statements made by or to" the President are to be kept "in confidence" and are to be held under seal and not revealed to anyone except the donors or archival personnel until "the passage of time or other circumstances no longer require such materials being kept under restriction." Letter of April 13, 1960, from President Dwight D. Eisenhower to the Administrator of General Services; Agreement of Feb. 25, 1965, between

¹⁴ President Truman's strong feelings concerning the necessity for confidentiality were discussed by his daughter in a recent biography:

Lately some historians have criticized Dad because he has refused to open his confidential files. But Dad is not acting out of selfish motives. From the day he left office he was conscious that he still had heavy responsibilities as an ex-president. During his White House years a president gets advice from hundreds of people. He wants it to be good advice. He wants men to say exactly what they think, to tell exactly what they know about a situation or a subject. A President can only get this kind of honesty if the man who is giving the advice knows what he says is absolutely confidential, and will not be published for a reasonable number of years after the president leaves the White House.

Truman, *Harry S. Truman* 562 (1973).

Mrs. Jacqueline B. Kennedy and the United States; Letter of Aug. 13, 1965, from President Lyndon B. Johnson to the Administrator of General Services. In addition, the letters from President Eisenhower and from President Johnson specifically prohibit disclosure to "public officials" and state, as the reason for these restrictions, that "the President of the United States is the recipient of many confidences from others, and * * * the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency * * *."

The need to preserve the confidentiality of the Oval Office has been recognized from without as well as by those who have borne the burdens of service there. What Justice Stewart, who was joined by Justice White, said in his concurring opinion in *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971), has great force:

And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. * * *

* * * [I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

403 U.S. at 728, 729-730.

Other justices of the Supreme Court have expressed their views on congressional assaults on Presidential confidentiality. Justice Douglas has written: "In defending himself against investigation by Congress every President has acted rightfully. In refusing to be investigated by Congress he defends popular sovereignty and the separation of powers." Douglas, *Anatomy of Liberty* 72 (1963). Justice Douglas also is cognizant of the long tradition of Presidential refusals to yield congressional demands for information:

Each President—from Washington to Kennedy—has deemed it to be in his prerogative not to disclose certain information to the legislative branch. Taft defended that principle, saying a President can keep information confidential 'if he does not deem the disclosure of such information prudent or in the public interest.' Certainly much information must be kept secret; at least, the President might so believe. Defense items, the operations of diplomatic missions, the communications with our embassies or legations—these are sensitive matters. Moreover, employees of the executive branch are in a chain of command leading up to the President. If any of them can be summoned and interrogated as to how he advised his superior, what memoranda he wrote, what conversation he has had, a disruptive influence would be injected into the executive branch. Then the employee would look to Congress and not have undivided loyalty to his superior in the executive branch.

Douglas at 74-75.

Prior to his appointment to the Court Justice Rehnquist was an Assistant Attorney General in the Department of Justice. As head of the Department's Office of Legal Counsel he spoke out strongly in support of the necessity

for Presidential confidentiality before the Senate Judiciary Committee:

Finally, in the area of Executive decisionmaking, it has been generally recognized that the President must be free to receive from his advisers absolutely impartial and disinterested advice, and that those advisers may well tend to hedge or blur the substance of their opinions if they feel that they will shortly be second-guessed by Congress, by the press, or by the public at large, or that the President might be embarrassed if he had to explain why he did not follow their recommendations. Again, the aim is not for secrecy of the end product—the ultimate Presidential decision is and ought to be a subject of the fullest discussion and debate, for which the President must assume undivided responsibility. But few would doubt that the Presidential decision will be a sounder one if the President is able to call upon his advisers for completely candid and frequently conflicting advice with respect to a given question.

Executive Privilege: The Withholding of Information by the Executive, Hearing before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 92nd Congress, 1st Session (1971) at 424-25.

Of course international relations and national defense have very special claims to secrecy, but the importance of the President being able to speak with his advisers "freely, frankly, and in confidence" is not confined to those matters. It is just as essential that the President be able to talk openly with his advisers about domestic issues as about military or foreign affairs. The wisdom that free discussion provides is as vital in fighting inflation, in choosing Supreme Court Justices, in deciding whether to veto a large spending bill, and in the myriad other important decisions that the President must make in his roles as Chief of State, Chief Executive, and Chief Legislator as it is when he is acting as Chief Diplomat or as Commander-in-Chief. Any other view would fragment the executive power vested in him and would assume that some of his constitutional responsibilities are more important than others. It is true that the President has more substantive freedom to act in foreign and military affairs than he does in domestic affairs, but his need for candid advice is no different in the one situation than in the other.¹⁵

Former Justice Fortas, who advised President Johnson on both foreign and domestic matters, has said that

¹⁵ There are serious weaknesses in the assumption, popular among liberals who happen at the moment not to be thinking about Senator McCarthy, that public policy ought to draw a sharp distinction between "military and diplomatic secrets" on the one hand and all other types of official information on the other, giving Congress free access to the latter. In the first place, the line is by no means easy to draw, even when the best of faith is used * * *. More fundamentally, however, the executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberations incidental to the making of policy decisions.

Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 Yale L.J. 477, 488 (1957).

a President must have "confidence that he can have advisers to whom he can trust his inmost thoughts. A President has to have this, just as a citizen can go to a doctor or a lawyer, a priest or a psychiatrist, to discuss his problems, without fear of disclosure of his confidences." Fortas, *The Presidency As I have Seen It*, In Hughes, *The Living Presidency* 335 (1973).¹⁶

All that we have said on this point was succinctly put by a distinguished constitutional lawyer, Charles L. Black, Jr., who has recently observed that refusal to disclose communications of the kind involved in this litigation is not only the President's lawful privilege, but

It is hard for me to see how any person of common sense could think that those consultative and decisional processes that are the essence of the Presidency could be carried on to any good effect, if every participant spoke or wrote in continual awareness that at any moment any Congressional committee, or any prosecutor working with a grand jury, could at will command the production of the verbatim record of every word written or spoken.

Black, *Mr. Nixon, the Tapes and Common Sense*, N.Y. Times, Aug. 3, 1973, p. 31. See also the fuller expression of Professor Black's view in Cong. Rec. E5320-E5322 (daily ed. August 1, 1973).

What we have said in this portion of the brief is frequently put on the basis of separation of powers. Yet it is probable that the point we have made goes beyond the separation of powers arguments and rests on a proposition even more fundamental. Even though no separation of powers issue would be involved, we suggest that it would be as inappropriate for one federal court to inquire into discussions between a judge of another federal court and his law clerk as it would be if the inquiry were to come from a committee of Congress. Similarly, we cannot conceive that one congressional committee could require production of the private papers of another congressional committee any more than a court could require these. What is really at stake is the ability of constitutional officers of government to perform their duties under conditions that will make it possible for them to function to the best of their ability. For this goal to be achieved, the ability to preserve the confidentiality of communications with close advisers is absolutely essential.

¹⁶ This need has been perceived also by political scientists.

Although some of President Truman's "cronies" were poorly equipped for this service, their indiscretions did not destroy a President's need for personal adviser's * * *. There can be no doubt that men like House and Hopkins perform an essential function. Ideally, they are both intimates of the President and experts in public affairs. But perhaps their most significant contributions are made as presidential intimates. The President needs to discuss with a sympathetic person ideas and plans that are still in an amorphous state and to gain some respite from the cares of office by talking over trivial matters that interest him or by chatting about men of affairs, with the confidence that his remarks will not go beyond the room.

Carr, Bernstein, Morrison, Snyder, & McLean, *American Democracy in Theory and Practice* 609-610 (1956).

CONCLUSION

This litigation places the Judiciary in the unfortunate posture of being requested to settle a dispute between two of the coordinate branches of government. As set forth previously, it has been shown that this is a classic example of a political question, which is clearly inappropriate for judicial resolution. For this reason the case should be dismissed, because the subject matter is non-justiciable.

Furthermore, the plaintiffs have asserted that the subpoenaed material is needed to determine whether perjury has been committed. Pursuing this objective is more the proper role of the Executive and Judicial branches than the Legislative, because it is between the former two that the law enforcement function of the Constitution is divided.

Finally, in response to the subpoenas of the Senate Committee, the President has interposed a valid claim of executive privilege. It is obvious that the President must be able to seek advice freely from his advisors in order to function satisfactorily. He must know that they can speak freely to him without fear of being summoned before some tribunal and forced to detail their conversations with him.

For all of the foregoing reasons, judgment should be entered on behalf of the President.

Respectfully submitted,

J. FRED BUZHARDT
 JAMES D. ST. CLAIR
 CHARLES ALAN WRIGHT
 ROBERT T. ANDREWS
 THOMAS P. MARINIS, JR.
Attorneys for the President
 The White House
 Washington, D.C. 20500
 Telephone No. 456-1414

Of Counsel

RICHARD A. HAUSER
 K. GREGORY HAYNES
 GEORGE P. WILLIAMS

CERTIFICATE OF SERVICE

I, James St. Clair, hereby certify that on this 17th day of January, 1974, I have served the foregoing Amended Answer and Response to Plaintiffs' Memorandum on Remand on counsel for the plaintiffs by causing copies thereof to be hand-delivered to the office of

Samuel Dash
 Chief Counsel
 Senate Select Committee on Presidential Campaign Activities
 United States Senate
 Washington, D.C. 20510

JAMES ST. CLAIR

NOTE: Copies of the documents were made available by the White House Press Office.

Egyptian-Israeli Agreement on Disengagement and Separation of Military Forces

The President's Remarks on Radio and Television Announcing Conclusion of the Agreement.

January 17, 1974

Ladies and gentlemen, I have an announcement that I am sure will be welcome news, not only to all Americans, but to people all over the world. The announcement has to do with the Mideast, and it is being made simultaneously at 3 o'clock Washington time in Cairo and in Jerusalem, as well as in Washington.

The announcement is as follows: "In accordance with the decision of the Geneva Conference, the Governments of Egypt and Israel, with the assistance of the Government of the United States, have reached agreement on the disengagement and separation of their military forces. The agreement is scheduled to be signed by the Chiefs of Staff of Egypt and Israel at noon Egypt-Israel time, Friday, January 18, at Kilometer 101 on the Cairo-Suez Road. The Commander of the United Nations Emergency Force, General Siilasvuo, has been asked by the parties to witness the signing."

A brief statement with regard to this announcement, I think, is in order.

First, congratulations should go to President Sadat, to Prime Minister Meir, and their colleagues, for the very constructive spirit they have shown in reaching an agreement on the very difficult issues involved which made this announcement possible.

Also, we in the United States can be proud of the role that our Government has played, and particularly the role that has been played by Secretary Kissinger and his colleagues, in working to bring the parties together so that an agreement could be reached, which we have just read.

The other point that I would make is with regard to the significance of the agreement. In the past generation there have been, as we know, four wars in the Mideast, followed by uneasy truces. This, I would say, is the first significant step toward a permanent peace in the Mideast. I do not underestimate, by making the statement that I have just made, the difficulties that lie ahead in settling the differences that must be settled before a permanent peace is reached, not only here but between the other countries involved. But this is a very significant step reached directly as a result of negotiations between the two parties and, therefore, has, it seems to me, a great deal of meaning to all of us here in this country and around the world who recognize the importance of having peace in this part of the world.

The other point that I would make is with regard to the role of the United States. Our role has been one of