

Council of Economic Advisers

*Announcement of Intention To Nominate
William John Fellner To Be a Member.
September 24, 1973*

The President today announced his intention to nominate William John Fellner, of New Haven, Conn., to be a member of the Council of Economic Advisers. He will succeed Marina von Neumann Whitman, who was a member from March 1, 1972, until August 1, 1973.

Dr. Fellner has been Sterling professor of economics emeritus at Yale University since July 1973, after serving as Sterling professor of economics from 1959 to 1973. He was named professor of economics at Yale in 1952 and served as chairman of the department of economics from 1962 to 1964. Dr. Fellner is currently resident scholar at the American Enterprise Institute, from which he will take a leave of absence. He began his teaching career at the University of California at Berkeley in 1939 and became a full professor in 1947. He was a visiting member of the faculty at Harvard University during 1950-51 and was Alfred Marshall lecturer at the University of Cambridge, England, during 1957-58.

He was born in Budapest, Hungary, on May 31, 1905, and became a U.S. citizen in 1944. He studied at the University of Budapest, the Swiss Federal Institute of Technology in Zurich, and the University of Berlin, from which he received his Ph. D. in 1929. From 1929 to 1938, he was a partner in a family manufacturing enterprise in Hungary.

Dr. Fellner has served as a consultant to the Department of the Treasury at various times during the past 25 years, as president of the American Economic Association in 1969, and as a member of the OEEC Committee of International Experts on Rising Prices, Paris, 1959-60. He has also been a member of the organizing committee of the balance of payments conferences of academic economists and Central Bank-Treasury officials called the Bellagio Group. Dr. Fellner is the author of a number of books, including "Monetary Policies and Full Employment" (1946), "Competition Among the Few" (1949), "Trends and Cycles in Economic Activity" (1955), "Probability and Profit" (1965), and "New Look at Inflation," which he co-authored with three other scholars at the American Enterprise Institute and which is scheduled to be published in the near future.

In the past few years, Dr. Fellner's work in economic theory has been concerned mainly with productivity trends, and his work in economic policy has been in the areas of the inflation-unemployment problem and international economic reform.

Court Proceedings: Senate Select Committee on Presidential Campaign Activities

Brief Filed by Attorneys for the President in Opposition to the Committee's Motion for Summary Judgment. September 24, 1973

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

BRIEF OF RICHARD M. NIXON IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on plaintiffs' Motion for Summary Judgment. As pointed out previously in the President's Motion for an Enlargement of Time to Respond, this Motion for Summary Judgment was filed within hours after the filing of the President's Answer to plaintiffs' Complaint and apparently without regard to certain of the allegations in that Answer upon which the plaintiffs have the burden. Subsequently, plaintiffs responded with a Supplemental Memorandum addressing these allegations. As a result, the matter is now ripe for adjudication. This Brief will deal with all the issues raised by the pleadings and by the plaintiffs in the order that we feel will be most helpful to the Court for resolution of this unprecedented and important matter.

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 by him, notwithstanding the fact that the President has interposed a claim of privilege as to the materials covered by the subpoenas.

At the outset we should point out that 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. Nor does he object to the legitimate aspects of this particular investigation.¹ In his letter to the Chairman of the Committee on July 6, 1973, 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 in 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 and inviolate.

This tradition has been well-described by Professor Corwin in his detailed analysis of the office 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 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 the 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 hold that the President can be subjected to compulsory process by the Judiciary. Again, Professor Corwin's comments are appropriate. Subsequent to his discussion of *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), he states:

¹ See Part VI below.

In addition to his duty to the laws, a supplemental basis of the President's power to do this is the principle of his own immunity to judicial process.

Id. at 112. Corwin is referring to Attorney General Lincoln's objecting to answering certain questions, the answers to which would have involved disclosure of confidential information.

Despite the importance of these two grave issues, and despite the respective rights of the parties, this Court must first determine whether a civil action for declaratory judgment is the proper method for their resolution and whether the plaintiffs are properly in Court. By our submission, they are not.

Plaintiffs seek to invoke the jurisdiction of the Court by way of the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. Before dealing with the specifics as to why they cannot make use of that Act, a few comments on its history may be helpful to the Court. Article III, § 2, of the Constitution allows a federal court to act only in cases and controversies. Prior to 1933, the Supreme Court had grave doubts about whether an action for a declaratory judgment was a "case or controversy" within the jurisdiction of the federal courts. See, e.g., *Liberty Warehouse Co. v. Grannis*, 273 U.S. 73 (1927); *Willing v. Chicago Auditorium Association*, 277 U.S. 274 (1928). In 1933, the Supreme Court resolved its doubts. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249 (1933). This was followed immediately in 1934 by the adoption of the Declaratory Judgment Act, now 28 U.S.C. §§ 2201, 2202.

There are three things of importance to note with regard to the Act. First, and of critical importance in this matter, is that the Act and Civil Rule 57, which sets forth the procedures for its operation, are not jurisdictional. They are procedural only, *Aetna Life Insurance Co. of Hartford, Connecticut v. Haworth*, 300 U.S. 227, 240 (1937), and do not constitute an enlargement of the jurisdiction of the federal courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Thus there must be an independent basis for jurisdiction, under statutes equally applicable to actions for coercive relief, before a federal court may entertain a declaratory judgment action. See, e.g., *Continental Bank and Trust Co. v. Martin*, 303 F.2d 214 (D.C.Cir. 1962).

Second, it must be established that there is an "actual controversy" of a justiciable nature as both the Constitution and the statute require. The classic statement of the Constitutional and statutory requirement in this respect is by Chief Justice Hughes in *Aetna Life Insurance Company of Hartford, Connecticut v. Haworth*.

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." *McCahill 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" contemplated by the Declaratory Judgment Act 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).

Finally, the Supreme Court has indicated a special reluctance to have important issues of public law—and particularly those that are of Constitutional dimension—resolved by declaratory judgments. "Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment." *Eccles v. Peoples Bank of Lakewood Village, California*, 333 U.S. 426, 434 (1948). See also *Askew v. Hargrave*, 401 U.S. 476 (1971); *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 243 (1952); *Dickson, Declaratory Remedies and Constitutional Change*, 24 Vand.L.Rev. 257, 286-287 (1971).

Viewed in the light of these three critical requirements, it will be demonstrated that plaintiffs' attempt to utilize the Declaratory Judgment Act to resolve this matter is misconceived.

II. JURISDICTION IS A THRESHOLD QUESTION

It is fundamental that the threshold question in every case is whether the district court has jurisdiction. *Roberston v. Harris*, 393 F.2d 123, 124 (8th Cir. 1968); *Berkowitz v. Philadelphia Chewing Gum Corp.*, 303 F.2d 585, 588 (3d Cir. 1962); *Underwood v. Maloney*, 256 F.2d 334, 340 (3d Cir.), cert. denied 358 U.S. 864 (1958). The party invoking a court's jurisdiction has the affirmative duty to allege jurisdiction; and if the allegations are properly controverted, he has the burden of establishing such allegations. As put by the Court in

McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936):

They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.

See also *Gibbs v. Buck*, 307 U.S. 66 (1939); *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936).

The importance of these principles is underscored by the fact that courts have recognized their own duty to see that their jurisdiction is not exceeded. Thus, the United States Supreme Court has frequently raised and decided jurisdictional questions on its own motion. See, e.g., *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *Louisville & Nashville R.R. v. Motley*, 211 U.S. 149 (1908).

By his Answer, the President has controverted each of the plaintiff's jurisdictional allegations. Thus controverted, the jurisdictional allegations become the primary questions before the Court. As was said in *Bell v. Hood*, 327 U.S. 678, 682 (1946):

Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the Court has assumed jurisdiction over the controversy.

See also *Opelika Nursing Home, Inc. v. Richardson*, 448 F.2d 658 (5th Cir. 1971). There the Fifth Circuit stated:

Federal jurisdiction is not so ambidextrous as to permit a district court to dismiss a suit for want of jurisdiction with one hand and to decide the merits with the other. A federal district court concluding lack of jurisdiction should apply its brakes, cease and desist the proceedings, and shun advisory opinions. To do otherwise would be in defiance of its jurisdictional fealty. Therefore, viewing *Bell's* a priori requirement of finding jurisdiction before rendering a final decision on the merits as one of the high commands of our jurisprudential system, we conclude that the court below, once it held that it had no jurisdiction, should have immediately dismissed the action.

448 F.2d at 667.

Before discussing the specific defects in plaintiff's statutory jurisdictional allegations, it is appropriate to dispose of their suggestion that they may invoke the jurisdiction of this Court directly under Article III, § 2 of the Constitution. (Supp. Memo. 22-24).² We call the

² All of the cases to which plaintiffs refer for this proposition are cases brought by the United States. There is an independent statutory base for these cases in 28 U.S.C. § 1345. As we shall demonstrate, this is not a case brought by the United States because plaintiffs are not authorized to bring suit on behalf of the United States. See pp. 27-30 [W.C.P.D. p. 1182-1183] below.

Court's attention to the following statement 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*, — F.2d — (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). In this case the plaintiffs lack either key. We shall discuss first the Constitutional barrier to jurisdiction over the case before pointing out why they are not within any of the statutory grants of jurisdiction.

III. THIS MATTER DOES NOT PRESENT A JUSTICIALE CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III, SEC. 2, OF THE CONSTITUTION

In making the motion authorizing this suit, Senator Baker of Tennessee implored the Committee staff to place a justiciable issue before the courts. (S.Tr. 5502). We respectfully submit that they have failed to do so.

The suggestion that the proper manner to resolve the heretofore unresolved question of executive privilege as it applies to Congress by way of a declaratory judgment is not novel. See Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. Rev. 1044, 1287-1289 (1965). The suggestion, however, flies in the face of the role of the courts in our Constitutional system of government. For this is, quite simply, a dispute between the Congress and the President, and to use the words of Justice Douglas, "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).

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 "contro-

versies." 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. Ulman*, 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 evasive. 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*, 369 U.S. 186 (1962), 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 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.

This matter involves a "textually demonstrable constitutional commitment of the issue to a coordinate branch." The doctrine of executive privilege has precisely identifiable constitutional sources. The power herein asserted by the President is conferred by the provisions of Article II, §§ 1, 2, and 3.

The § 1 grant of "executive power" solely to the President is the most obvious and demonstrable source for the heretofore unchallenged right of the President to invoke executive privilege whenever the President deems it appropriate. Such an exercise of executive power is entirely consistent with the unbroken tradition of executive independence from legislative and judicial interference. As the Court noted in *Myers v. United States*, 272 U.S. 52 (1926):

Montesquieu's view that the maintenance of independence as between the legislative, executive and the Judicial branches was a security for the people had their [the Framers'] full approval * * *. Accordingly the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.

272 U.S. at 116.

That the President's right to invoke executive privilege is a unique and unreviewable exercise of the executive power is apparent when examined in the context of §§ 2 and 3.

The first paragraph of § 2 expressly grants to the President the right to require, in writing, the opinions of his principal executive officers on any subject. It is this clear constitutional commitment to the President of the right to request and receive advice from his closest advisers which Justice Jackson characterized as an enumerated

executive power that "would seem to be inherent in the Executive if anything is." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 641 n. 9 (1952) (concurring opinion). Equally significant is the fact that this "inherent" power to seek and receive advice is among those grants of power in § 2 that is conferred on the President exclusive of any review by the Senate or House. In this respect, it is a Constitutional power as exclusive to the President as his untrammeled power to grant pardons. *Ex parte Garland*, 4 Wall. (1 U.S.) 333, 340 (1866). It furnishes the clear and compelling basis for the doctrine of executive privilege, a doctrine that not even the Senate Committee would deny exists.

What the Senate Committee does not comprehend, although obvious to the Founding Fathers, is that the power to seek and receive advice would be a useless and empty power if the President could not keep his own counsel, free from the review or scrutiny of the courts or the Congress. The very manner in which this inherent § 2 grant was made independent of Congressional interference bears witness to the intent of the Framers of the Constitution to preserve inviolate the confidentiality of the Executive Branch.

Whenever the essential confidentiality is threatened, as it is here, the Constitutional power to seek and receive advice becomes meaningless. That this clause granting to the President the power to require advice and opinions from his advisers would be meaningless without the contingent right to safeguard the confidentiality of those communications should be beyond dispute. As Justice Jackson noted in his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952):

* * * because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by doctrinaire textualism.

343 U.S. at 640.

Section 3 of Article II contains two further "textually demonstrable" commitments of the issue at stake in this case to the President. The President, by that section, is charged "from time to time [to] give to the Congress Information of the State of the Union * * *." This vests in the President, not in the subpoena power of a Senate Committee, the power to determine when and what information he will provide to Congress.⁸ The same

⁸ As former President Taft put it:

The President is required by the Constitution from time to time to give to Congress information on the state of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient, but this does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem the disclosure of such information prudent or in the public interest.

Taft, *Our Chief Magistrate and His Powers* 129 (1916).

section imposes on the President the duty to "take Care that the Laws be faithfully executed." As the President has clearly and forcefully maintained, the meetings and the conversations that the Senate Committee seeks to make public were participated in by the President pursuant to this Constitutional mandate. The performance of this executive duty cannot be brought under legal compulsion. *Mississippi v. Johnson*, 4 Wall. (71 U.S.) 475 (1866).

It is possible that any or all of these great powers may be abused, but for this the Constitution has provided its own remedy. As a unanimous Court, speaking through Chief Justice Taft, said of a similar power in *Ex parte Grossman*, 267 U.S. 87 (1925):

Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it * * *.

Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.

267 U.S. at 121.

The Senate Committee in reality is asking this Court to substitute its judgment for that of the President in an area over which the President has exclusive and unreviewable power—the invocation of executive privilege. Such a privilege, inherent as we have demonstrated 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 judgments. 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. 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). Thus by virtue of its request that the Court substitute its judgment for the President's, the Committee would force this Court to make "an initial policy determination of a kind clearly for nonjudicial discretion." This is a compelling indicia of a political question articulated in *Baker v. Carr*.

Even if this Court could somehow acquire the perspective of the Executive Branch and its chief officer, which is the perspective from which an invocation of executive privilege is made, the separation of powers inherent in our Constitutional scheme would preclude any review of that initial policy decision. The President's reasons for invoking his privilege in this case have been explained clearly to the Senate Committee. Those reasons are firmly anchored in rights and duties exclusively Presidential. They are a direct function of the President's

duties to preserve the atmosphere of confidentiality so essential to the proper performance of the Executive's decision-making powers and to safeguard from general disclosure matters of national security. It is submitted that in this former duty, just as in the area of the conduct of foreign relations, the President is "accountable in the exercise of (his) discretion only to the people of this country." *Drinan v. Nixon*, ____ F. Supp. ____ (Civil No. 73-1424-T, D. Mass., Aug. 8, 1973).

The matter of executive privilege, 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 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. 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*, 395 U.S. 486, 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 it. 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* obtain 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 decisionmaking processes." In *Seaborg*, the court considered only a claim of privilege by an "executive department 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.

What the Senate Committee requests here is for the Court to order the President to give up materials that the President claims are privileged. No court has ever done so. "The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained." *Mississippi v. Johnson*, 4 Wall. (71 U.S.) 475, 500 (1866).

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. In this situation *Mississippi v. Johnson* is again instructive.

If the President refused obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government?

4 Wall. at 500-501. This case presents the same danger present in *Mississippi v. Johnson*, for if the Court denies the President's right to invoke executive privilege and orders production, there is no power to compel it. Nothing could more clearly demonstrate "lack of respect due to 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 the province of the President and the 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.

Should this Court even consider issuance of the mandate requested by the Senate Committee, there should be an immediate recognition of its effect. If this Court declares in the instant controversy that Congress has the power to ask a court to review a direct, personal Presidential invocation of executive privilege, the trend is established for such declarations by all 400 district court judges. *Baker v. Carr* held that the potential for "embarrassment from multifarious pronouncements" on a single controversy is, in and of itself, reason for the judiciary to avoid resolution of a question and to declare that question nonjusticiable.

It is submitted that this Committee's challenge to the invocation of executive privilege is merely the first such challenge to executive power and confidentiality that will occur if this Court issues the judgment requested. For this reason, as well as existence of all the other indicia of a political question that adhere in this matter, the Court must hold the matter before it to be nonjusticiable.

IV. THIS CASE DOES NOT COME WITHIN ANY STATUTORY GRANT OF SUBJECT-MATTER JURISDICTION

In paragraphs 6 to 9 of the Complaint, the Senate Committee seeks to invoke four different and wholly independent statutes as basis for jurisdiction of this case. But there is no strength in numbers, and invocation of four inapplicable statutes does not redeem the failure to cite even one statute that does apply.

A. 28 U.S.C. § 1331

28 U.S.C. § 1331 grants to the district courts jurisdiction over all "civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." We agree that this is a "federal question" in the sense that, if it is justiciable at all, it does raise an issue of the respective rights of the Presi-

dent and Congress and of the power of the courts to mediate between them. We do, however, take issue with the bald assertion in paragraph 6 of the Complaint that the "matter in controversy" exceeds the sum of \$10,000, exclusive of costs, nor do we think that the failure to show how this is so in the Complaint has been remedied by the discussion in the Supplemental Memorandum or the Affidavit of Senator Ervin appended thereto.

From the earliest days of the Republic, the jurisdiction of the federal courts has depended, with regard to most classes of cases, upon a certain minimum amount in controversy. Since 1958, the amount has been \$10,000, exclusive of interest and costs. This is not a technicality, but a jurisdictional prerequisite. See *United States v. Sayward*, 160 U.S. 493, 497 (1895); *Fishback v. Western Union Telegraph Co.*, 161 U.S. 96 (1896); *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68, 73 (1900). As stated in *Giancana v. Johnson*, 335 F.2d 366, 368 (7th Cir. 1964);

Courts may not treat as a mere technicality the jurisdictional amount essential to the "federal question" jurisdiction, even in this case where there is an allegedly unwarranted invasion of . . . privacy. The showing of that essential is not a mere matter of form, but is a necessary element. Congress in § 1331 expressed the "federal question" jurisdiction in plain words. The district courts and suitors are bound by the words expressed. Congress could have withheld the jurisdiction entirely, as it did from 1789 to 1875. Or it could have given jurisdiction over suits arising "under the constitution, laws or treaties of the U.S." simply. But it limited the jurisdiction by including the element of the sum or value of the matter in controversy, and the congressional will is that unless that sum or value is shown there is no "federal question" presented and no jurisdiction.

The Fourth Circuit addressed this issue in *McGraw v. Farrow*, 472 F.2d 952, (4th Cir. 1973), stating:

The plaintiffs complain, however, that dismissal of their federal action on jurisdictional grounds will leave them remediless, since state courts are closed to them in actions against federal officials. * * * But whether there is a state remedy or not provides no warrant for the courts to extend "federal question" jurisdiction beyond the limits fixed by Congress. The authority "to control lower federal court jurisdiction" is specifically vested in Congress under Article III of the Constitution. Accordingly, in determining the boundaries of "federal question" jurisdiction, courts must look to the Congressional enactment fixing that jurisdiction, not to the Constitution, remembering as Justice Frankfurter bluntly put it in *Romero v. International Term. Co.* (1959) 358 U.S. 354, 379, 79 S.Ct. 468, 484, 3 L.Ed.2d 368 that in such inquiry "[I]t is a statute, not a Constitution, we are expounding." Actually, from 1789 to 1875 federal courts exercised no "federal question" jurisdiction, and this was true whether there was a state remedy available or not, simply because there was no statutory authority for such jurisdiction. And when Congress did provide statutory authority for just jurisdiction, ". . . it limited the jurisdiction by including the element of the sum or value of the matter in controversy, . . ." and this limitation as to amount in controversy "is not a mere matter of form, but is a necessary element."

472 F.2d at 955 (footnotes omitted).

For jurisdiction to lie under 28 U.S.C. § 1331, the right or thing in controversy must be capable of valuation in monetary terms. As put by the court in *Kheel v. Port of New York Authority*, 457 F.2d 46, (2d Cir. 1972):

The federal courts cannot take cognizance under section 1331 of cases in which the rights are not capable of valuation in monetary terms. And the jurisdictional test is applicable to that amount that flows directly and with a fair degree of probability from the litigation, not from collateral or speculative sources.

457 F.2d at 49.

The rule that a claim not measurable in dollars and cents fails to meet the jurisdictional test of amount in controversy was announced as early as *Barry v. Mercein*, 5 How. (46 U.S.) 103 (1847), and has been frequently reiterated and applied by lower courts, e.g., *McGraw v. Farrow*, 472 F. 2d 952, 954 (4th Cir. 1973); *Goldsmith v. Sutherland*, 426 F. 2d 1395, 1397 (6th Cir.), cert. denied 400 U.S. 960 (1970); *Rapoport v. Rapoport*, 416 F. 2d 41, 43 (9th Cir. 1969), cert. denied 397 U.S. 915 (1970); 1 Moore, *Federal Practice* ¶ 0.92[5] (2d ed. 1960); 1 Barron & Holtzoff, *Federal Practice and Procedure* § 24, at 107-108 (Wright ed. 1960).

The suggestion, based on the affidavit of Senator Ervin, that hearing the tapes is worth more than \$10,000 to the Committee because, if it is denied access to them, it will cost the Committee more than \$10,000 to obtain the information it needs in other ways, is irrelevant in determining whether the requisite amount is in controversy, as the total inappropriateness of the only cases cited in that portion of the argument (Supp. Memo. 17) demonstrate. Those cases hold only that in a challenge to a regulatory statute or order the cost of complying with the statute or order is the amount in controversy, a proposition that no one would deny. But it is the "value of the object" of the suit that measures what it is in controversy, *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black (67 U.S.) 485 (1862), and the object of this suit is production of the tapes. Plaintiffs have cited no case in which the cost of achieving the object by alternative means if the suit fails has been regarded as the amount in controversy—and they have not done so because there is no such case. Instead, the law is well settled that side effects of a decision, even when they clearly will result from stare decisis or collateral estoppel, will not be considered. E.g., *Town of Elgin v. Marshall*, 106 U.S. 578 (1882); *Healy v. Ratta* 292 U.S. 263 (1934).⁴

⁴ For interesting recent applications of these rules, see *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966) cert. denied 387 U.S. 907 (1967), and *Kola v. Breier*, 312 F. Supp. 19 (E.D. Wis. 1970). In the first of these cases the amount in controversy was held insufficient in a suit to prevent a state from asserting jurisdiction over an Indian reservation, even though if the plaintiff tribe lost the suit it would no longer get federal payments for law enforcement over the reservation. In the *Kola* case the court dismissed a suit for a declaration that a newspaper was not obscene, holding that it could not take into account the claim by the newspaper that, absent such a declaration, a state prosecution for obscenity would cause it to lose more than \$10,000 in advertising and sales.

The suggestion (Supp. Memo. 19) that the tapes have a monetary value to the President in excess of \$10,000 does not need to be dignified with a response.

It is true that a divided panel of the Third Circuit, *Spock v. David*, 469 F. 2d 1047 (3d Cir. 1972), and a very few district court cases (Supp. Memo. 18) have held that Constitutional rights are an exception to the principle that a claim not measurable in dollars fails to meet the statutory requirement—and have apparently assumed that all Constitutional rights, or at least those based on the Constitutional provisions involved in those cases, are worth in excess of \$10,000. Much could be said for rewriting the statute to remove the amount-in-controversy requirement in cases in which Constitutional rights are asserted against federal officers, but Congress, though it has had legislation to this effect pending several times, has failed to do so.

The notion that it is for the courts to fill in a jurisdictional gap that they wish Congress had not created has been rejected by the majority of the courts. E.g., *Goldsmith v. Sutherland*, 426 F. 2d 1395 (6th Cir.), cert. denied 400 U.S. 960 (1970). The Fourth Circuit, which had before it the opinion of the divided Third Circuit, expressly refused to follow it. It dismissed, for want of the requisite amount, a suit asserting First Amendment rights, and said: "Though a few decisions have held contrariwise, a like conclusion has been reached in a majority of the decisions of Circuit Courts of Appeals." *McGaw v. Farrow*, 472 F. 2d 952, 954 (4th Cir. 1973). And it added the useful reminder that if this is indeed an unfortunate gap in federal jurisdiction, "it can only be filled in by Congress and not by judicial legislation." 472 F. 2d at 955.

The Fourth Circuit is clearly right when it observes that the rule it applied is not only the majority rule—indeed the almost-universal rule—but that it seems to have been reaffirmed very recently by the Supreme Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). *Lynch* held that personal rights as well as property rights may be enforced against state officials under 28 U.S.C. § 1343, which requires no amount in controversy, but it specifically noted that in suits against federal officials, which lie only under § 1331 rather than § 1343, "it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction." 405 U.S. at 547. See also *Oestreich v. Selective Service System Local Board No. 11*, 393 U.S. 233, 239 (1968).

Since the right asserted by the Senate here is not capable of being valued in money, this suit cannot lie under 28 U.S.C. § 1331.

B. 28 U.S.C. § 1345

Plaintiffs also seek to invoke jurisdiction under 28 U.S.C. § 1345. That statute provides:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

In order for suit to be maintained under § 1345, plaintiffs must demonstrate that this suit was "commenced by

the United States" or that it was commenced by an "agency or officer thereof expressly authorized to sue by Act of Congress." This plaintiffs have failed to do.

It is clear that this suit was not "commenced by the United States." The authority for conducting and supervising litigation in which the United States is a party, or is interested, is reserved to officers of the Department of Justice under the direction of the Attorney General, 28 U.S.C. § 516, and is specifically delegated to the United States Attorney for the district in which the action arose, 28 U.S.C. § 547(2). This requirement was recognized by the Supreme Court as early as 1868 in the *Confiscation Cases*, 7 Wall. (74 U.S.) 454, 457 (1868), where the court stated that the

settled rule is that those courts [district and circuit courts] will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney * * *.

Consequently, this suit, if maintainable at all under 28 U.S.C. § 1345, must be brought in the name of the United States and by the United States Attorney for the District of Columbia. Neither of these requirements have been met here.

Moreover, it is equally clear that this action was not commenced by an "agency or officer thereof expressly authorized to sue by Act of Congress." For purposes of § 1345, the term "agency" is defined in 28 U.S.C. § 451 to include

any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest * * *.

It is instructive to note that in the 1948 revision of the Judicial Code, the Reviser's Note to § 1345 says, in part:

Word 'agency' was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions. (See definitive section 451 of this title.)

Thus, it was expressly contemplated that § 451 would control in interpreting § 1345. See also ALI, *Study of the Division of Jurisdiction between State and Federal Courts*, 256 (Off. Dr. 1969). "Agency" is also defined under the Administrative Procedure Act, 5 U.S.C. § 551(1)(a), and the Congress is specifically excluded from that definition.

The only arguable authority for maintaining this suit under § 1345 is S. Res. 262, 70th Cong. 1st Sess. (1928). That resolution provides in part:

any committee of the Senate is hereby authorized to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers invested in it or the duties imposed upon it by the Constitution, resolution of the Senate, or other law.

As plaintiffs note, this resolution was adopted because of the decision in *Reed v. County Commissioners*, 277 U.S. 376 (1928), which held that a resolution creating

a special Senate Committee to investigate certain election activities and conferring on it "all powers of procedure with respect to the subject matter" of the resolution did not give the committee authority to bring suit. 277 U.S. at 389. The plaintiffs in *Reed* had argued that jurisdiction existed under 28 U.S.C. § 41 (the predecessor of 28 U.S.C. § 1345) which provided that district courts had original jurisdiction "of all suits of a civil nature, at common law or in equity, brought by the United States, or by an officer thereof authorized by law to sue * * *." After the plaintiffs' contention was rejected in *Reed*, the Senate sought to prevent such a result in the future by adopting Senate Resolution 262, which purports to authorize committees to bring suit.

Whether a Senate resolution could constitute sufficient authorization to sue is questionable under *Reed*, since that opinion contains dicta to the effect that the Senate acting alone may not be able to give that authority. 277 U.S. at 388. But any doubt that may have existed under the *Reed* holding was laid to rest by the enactment of 28 U.S.C. § 1345, which specifically requires express authorization by an Act of Congress.⁵ In view of this more recent expression of legislative intent, it is clear that Senate Resolution 262—which is surely not an "Act of Congress"—is insufficient.

The two cases cited by plaintiffs arising out of activities of the Committee on Banking and Currency (Supp. Memo. 21) are not authority to the contrary since no jurisdictional issue was raised or noticed by the courts. And the cases for the proposition that the government may sue to protect a wide variety of national interests (Supp. Memo. 22–23) are wholly off point. Those cases go to the standing of the United States to assert claims of particular kinds. There was no problem of jurisdiction in any of them, since suit was by the United States, and jurisdiction was granted by § 1345 or its predecessor.

Simply stated, plaintiffs are not empowered by Act of Congress to sue and cannot invoke the jurisdiction of this Court under 28 U.S.C. § 1345.

C. 28 U.S.C. § 1361

Plaintiffs claim jurisdiction under 28 U.S.C. § 1361, which grants "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the President." In support of their jurisdictional allegation, plaintiffs allege in paragraph 19 of the Complaint that the President's refusal to produce the materials sought by the subpoenas was "in breach of his legal duty to respond to and to comply with such subpoenas." The

⁵ Plaintiffs' construction of the President's Third Defense is in error. We do not suggest that the Senate must have permission of the House to sue. Rather our argument is that if the Senate, or one of its Committees, is permitted to institute a suit, it must find some statutory basis for jurisdiction, and this particular jurisdictional statute requires an "Act of Congress."

Complaint is devoid of any other facts defining the nature of the duty allegedly owed the plaintiffs.

The purpose of 28 U.S.C. § 1361 was to facilitate review by federal courts of administrative actions, not to create new causes of action against the United States Government. 2 U.S. Code Cong. & Adm. News 2785 (1962). Thus for jurisdiction to lie under 28 U.S.C. § 1361, plaintiffs must demonstrate that the traditional criteria for a mandamus proceeding have been satisfied.⁶ *McGaw v. Farrow*, 472 F.2d 952, 956 (4th Cir. 1973). *In Prairie Band of Potawatomi Tribe of Indians v. Udall*, 355 F.2d 364, 367 (10th Cir.), cert. denied 385 U.S. 831 (1966), it was stated that

Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory. *Huddleston v. Dwyer*, 10 Cir. 145 F.2d 311. The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed 809.

See also *McGaw v. Farrow*, 472 F.2d 952, 956 (4th Cir. 1973); *Jarrett v. Resor*, 426 F.2d 213, 216 (9th Cir. 1970); *United States v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969); *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969).

Plaintiffs admit, as they must, that for jurisdiction to lie under 28 U.S.C. § 1361, they must show that the President owes a ministerial duty to the Senate Select Committee to furnish the evidence in question (Supp. Memo. 24–25). In support of this proposition they place sole reliance on the holding in this Court in the related case that the President's duty to turn over evidence to a grand jury was ministerial in nature.

We would first point out that we disagree with this holding by the Court in the grand jury proceeding, which is presently on appeal. In addition, it will be demonstrated in Point VII that disclosure by the President to Congress is discretionary with the President, based on his view of what the public interest permits. The suggestion that he is under a ministerial duty, enforceable by mandamus, to disclose to Congress anything and everything a committee may demand is wholly without precedent in our history, and has been authoritatively refuted many times. Surely it cannot be contended that this imaginary duty is "so plainly prescribed as to be free from doubt."

The reliance on *Watkins v. United States*, 354 U.S. 178, 187 (1957), and *United States v. Bryan*, 339 U.S. 323, 331–332 (1950), is misplaced. (Supp. Memo. 2–7). These cases do not support the proposition that a Congressional committee has the status of a grand jury. In

⁶ It is no mere happenstance that the statute uses the phrase "in the nature of mandamus." This language was added at the insistence of the Department of Justice, and finally agreed to by those who were pressing for the legislation only because they feared a veto if those words were deleted. See Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review*, 53 Geo.L.J. 19, 21–23 (1964). Thus, the restriction of the statute to traditional concepts of mandamus was quite deliberate.

fact, *Watkins* clearly states that Congress is not a "law enforcement or trial agency."

D. 5 U.S.C. § 701

As their fourth and final basis for federal jurisdiction, plaintiffs rely upon the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., claiming to have suffered a "legal wrong" as the result of Presidential action for which no adequate review proceeding is otherwise available. Section 702 of the Act provides that

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

"The terms used in this section are terms of art," *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir.), cert. denied 350 U.S. 884 (1955) and since the essential elements of judicial review—"agency action" and a "legal wrong"—are lacking here, the plaintiffs are not entitled to judicial review and their jurisdictional claim under the Administrative Procedure Act must fail.

Not even under the most contorted interpretation of the Administrative Procedure Act could the President's refusal to produce the items sought by the subpoenas be considered "agency action," the essence of which is adjudication and rule-making. Professor Davis has suggested that when the President, a governor, or a municipal governing body exercises a power of adjudication or rule-making, he or it is to that extent an administrative agency, 1 Davis, *Administrative Law Treatise*, § 1.01 at 1-2 (1958), but plaintiffs' reliance on *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F.Supp. 737, 761 (D.D.C. 1971) for the proposition that the President is an "agency" under the facts of this case is clearly misplaced.⁷ "Rule-making" means "agency process for formulating, amending, or repealing a rule" and "[a]djuration" means "agency process for the formulation of an order." 5 U.S.C. § 551(5), (7). Plaintiffs have not alleged any conduct on the part of the President that would fall into either category; moreover, the definition of "agency action"— "the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or the failure to act," 5 U.S.C. § 551(13)—would preclude such a conclusion.

⁷ The extravagant reading the Senate Committee gives to the *Amalgamated Meat Cutters* case (Supp. Memo. 26-27) overlooks the express statement by the court in that case that "we need not consider whether an action for judicial review can be brought against the President *eo nomine*." 337 F.Supp. at 761. It overlooks also *Soucie v. David*, 448 F.2d 1067, 1073 n. 17 (D.C. Cir. 1971), in which the Court of Appeals for the District of Columbia Circuit expressly left open whether the President is subject to the Administrative Procedure Act. Aside from the general principle, discussed at pp. 46-49 [W.C.P.D. p. 1188-1189] below, that statutory language that does not refer in terms to the President should not be held to apply to him, it is hard to imagine that a statute that excludes from its operations even the governments of the territories and the Mayor of the District of Columbia should be held to have included, in its bland and neutral language, the President of the United States.

Judicial review under the Administrative Procedure Act is limited to persons who have suffered a legal wrong. Legal wrong "means that something more than mere adverse personal effect must be shown—that is, that the adverse effect must be an illegal effect," S. Rep. No. 752, 79th Cong., 1st Sess. (1945) at p. 26, and the legal wrong must be one that the courts and statutes have recognized as constituting a ground for judicial review. *Attorney General's Manual on the Administrative Procedure Act* 96 (1947). As stated in *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir.), cert. denied 350 U.S. 884 (1955), judicial review is provided for the benefit of those "whose legal rights have been violated." The plaintiffs have not pointed to any legal right that has been violated and that would entitle them to judicial review.

Moreover, it is widely held that the Administrative Procedure Act is not an independent basis for federal jurisdiction. See, e.g., *Arizona State Dept. of Public Welfare v. Dept. of Health, Education, and Welfare*, 449 F.2d 456, 464 (9th Cir. 1971), cert. denied 405 U.S. 919 (1972); *Zimmerman v. United States Government*, 422 F.2d 326, 330-331 (3d Cir.), cert. denied 399 U.S. 911 (1970); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967); *Chournos v. United States*, 335 F.2d 918, 919 (10th Cir. 1964); *Local 542, International Union of Operating Engineers v. N.L.R.B.*, 328 F.2d 850, 854 (3d Cir.), cert. denied 379 U.S. 826 (1964); *Ove Gustavsson Contracting Co. v. Floete*, 278 F.2d 912, 914 (2d Cir.), cert. denied 364 U.S. 894 (1960).

That is the rule repeatedly followed in this Circuit, and for an excellent reason. Section 10(b) of the Administrative Procedure Act—now 5 U.S.C. § 703—allows suit in "any court of competent jurisdiction" and thus, as the Court of Appeals very early said, "can therefore hardly be argued to extend the jurisdiction of any court to cases not otherwise within its competence." *Almour v. Pace*, 193 F.2d 699, 701 n. 5 (D.C. Cir. 1951). Again in *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 932-933 (D.C. Cir.), cert. denied 350 U.S. 884 (1955), the Court of Appeals said:

Section 10(b) of the Administrative Procedure Act does not help appellants. The reference in that section to "any court of competent jurisdiction" does not of itself establish the jurisdiction of the Federal courts over an action not otherwise cognizable by them.

To the same effect, see *Pan American World Airways, Inc. v. C.A.B.*, 392 F.2d 483, 494 (D.C. Cir. 1968).⁸

⁸ There is no Supreme Court decision to the contrary. Although Justice Brennan, in his concurring opinion in *Rusk v. Cort*, 369 U.S. 367, 380 (1962), makes a passing reference to the Declaratory Judgment Act and the Administrative Procedure Act as "general grants of jurisdiction," he must have intended some other nuance of the term "jurisdiction," since it is well established that the Declaratory Judgment Act is not a grant of jurisdiction. *Zimmerman v. United States*, 422 F.2d 326, 331 n. 7 (3d Cir.), cert. denied 399 U.S. 911 (1970).

Thus the Administrative Procedure Act serves the plaintiffs no better than do §§ 1331, 1345, or 1361 of the Judicial Code. The simple fact is that Congress has never empowered the district courts to hear a suit of the kind plaintiffs are bringing.

V. THIS COURT LACKS IN PERSONAM JURISDICTION

Plaintiffs allege in paragraph 5 of the Complaint that Richard M. Nixon is sued in both his official and individual capacity, but it is clear from the remaining allegations in the Complaint that the acts complained of—the refusal to comply with the subpoenas—were acts performed in his official capacity as President of the United States.

A suggestion that a President of the United States may be sued, either officially or individually, to remedy official discretionary acts raises, of course, a fundamental question of separation of powers. Much has been said about separation of powers in the “political question” discussion in Part III of the brief and will not be repeated here. It is sufficient to touch briefly on the question to show that courts have viewed the separation of powers as a barrier to jurisdiction over the person of the President.

The recent case of *National Association of Internal Revenue Employees v. Nixon*, 349 F.Supp. 18 (D.D.C. 1972), appeal docketed No. 72-1929, D.C. Cir., is the most recent example of a case where a court dismissed an action against the President on the basis of separation of powers. The court stated:

The fundamental doctrine of separation-of-powers dictates this result, and it has been settled since the case of *State of Mississippi v. Johnson*, 4 Wall. (71 U.S.) 475 (1866). In that case the Supreme Court commented on the impropriety of judicial interference with executive functions as follows:

The impropriety of such interference will be clearly seen upon considerations of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. 71 U.S. at 501.

349 F.Supp. at 21-22.

The court also relied on *Trimble v. Johnston*, 173 F.Supp. 651 (D.D.C. 1959), where Judge Holtzoff noted:

It is no part of the judicial function to supervise or control the business of the executive or legislative departments of the Government. Otherwise the judiciary, instead of being one of the three co-ordinate branches, would be supreme over the other two. We would then have a government by the courts, instead of by the Congress and the President. Manifestly the Founding Fathers did not contemplate such a result.

173 F.Supp. at 653. See also *Reese v. Nixon*, 347 F.Supp. 314, 316 (C.D. Cal. 1972); *San Francisco Redevelopment Agency v. Nixon*, 329 F.Supp. 672 (N.D. Cal. 1971).

Two courts have entertained the thought that a suit may be brought against the President. See *Meyers v.*

Nixon, 339 F.Supp. 1388, 1399 (S.D.N.Y. 1972); *Atlee v. Nixon*, 336 F.Supp. 790, 791 (E.D.Pa. 1972). In both cases, the courts found other grounds for decision, and despite their dicta, which is not persuasive, they are not authority for plaintiffs in this case.

The suit is against the President of the United States, not against some lower government officer. As former President—and later Chief Justice—Taft wrote:

The Supreme Court seems to make a broad distinction between issuing process against the President and against his subordinates under laws requiring the specific performance of a definite act. I cannot think that the Court would ever issue a mandamus to compel the President to perform even an act purely ministerial, though it has often issued such a writ against one of his subordinates. The Supreme Court has a number of times intimated that the President's office is of such a high character, that officially he is beyond the compulsory process of the Court.

Taft, *Our Chief Magistrate and His Powers* 132 (1916).

VI. PLAINTIFFS HAVE EXCEEDED THEIR LEGISLATIVE AUTHORITY UNDER BOTH THE CONSTITUTION AND THEIR ENABLING RESOLUTION

The nature of the assault upon the Presidency by the Senate Select Committee and the gravity of the Constitutional confrontation that it has provoked require this Court to examine carefully the authority of the Committee. That authority must be closely measured against both the Constitutional limitations of the legislative branch and limitations found in the delegation of authority to the Committee by the Senate.

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.” (Memo. 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. 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.⁹

Most significantly the Senate Select Committee has conducted, and in this action is endeavoring to continue to conduct, a criminal investigation and trial. The Committee is seeking to ferret out all the facts, resolve all the conflicts in the evidence, and determine the guilt or innocence of all the alleged participants. The Committee has apparently conceived its primary mission as one of determining culpability on the part of the President. "What did the President know and when did he know it?" See, e.g., S. Tr. 2096, 3999. This theme runs throughout the Committee's hearing and legal papers. Thus it has been stated:

Unfortunately, the involvement or noninvolvement of the President himself in that congeries of criminal activities falling under the general rubric of "Watergate" is very much an integral part of the present investigation. That fact is perhaps best epitomized by the persistent inquiry of Senator Baker—"What did the President know and when did he know it?" John Wesley Dean, III, in his sworn testimony before the Select Committee, has accused the President of complicity in serious crimes. If Dean be believed the President may be guilty of several crimes, including obstruction of a criminal investigation * * * misprision of a felony * * * conspiracy to commit an offense or to defraud the United States * * * and unlawfully influencing a witness * * *. And Dean's charges are consistent with other evidence in the record that bears on the question of presidential involvement (there is, of course, also evidence in

⁹ It should be noted that at least one member of the Committee, although joining in the present action, has 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 of 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."

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

"It is not our business to decide the guilt or innocence of any part," Inouye responded.

the record that would exonerate the defendant President of such charges). In such circumstances, the Committee would be derelict if it did not proceed to further examination of the President's complicity or lack thereof, no matter how distasteful that task may be. (Memo. 3).

[T]he Committee's request, unlike that of the Special Prosecutor, focuses on the President's own possible criminality. (Supp. Memo. 2).

For example, with the Dean-Presidential tapes in hand, it would be much easier to determine the extent of Presidential involvement in the Watergate affair. (Affidavit of Senator Sam J. Ervin, Jr., p. 3).

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. The investigation conducted by the Committee is in excess of the power conferred on Congress by the Constitution and the movants have no lawful authority to subpoena the tapes.

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 a 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.¹⁰ 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 the Committee is acting in

¹⁰ The Court in *Kilbourn v. Thompson*, 103 U.S. 168 (1880) 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.

103 U.S. at 190-191.

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 by the Committee. In both cases the Supreme Court expressly acknowledged the requirements that Congressional inquiries be related 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*, 354 U.S. 178 (1956); *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. Investiga-

tions 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 brief. 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 200.¹¹ 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 Committee's briefwriters harp, as they do so repeatedly, on "the President's own possible criminality" (Supp. Memo. 2), they make it manifest that what they are interested in here is "to expose for the sake of exposure."

B. The Enabling Resolution

Quite aside from the fact that the Senate Committee has exceeded its legislative authority, it has also exceeded the bounds of Senate Resolution 60. There is no language in Senate Resolution 60 that can fairly be read as authorizing the issuance of a subpoena to the President.

The Select Committee contends that the President was encompassed within the authorization to subpoena an "officer" of the executive branch. (Supp. Memo. 10). However, since no committee of Congress has ever sub-

¹¹ 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.

poenaed a President, could any member of the Senate suppose that a grant of general subpoena power was intended to authorize this wholly unprecedented action? As Professor Charles L. Black stated:

Perhaps a lexicographically programmed computer might print out the judgment that the President is an "officer" or "employee" of the executive branch. But that is not the way we construe statutes. Is it not perfectly plain that such language is entirely inapt, as a matter of usage, to designate the President of the United States.

Cong. Rec. E5321 (daily ed. Aug. 1, 1973).

There are three points here that merit attention, and that converge to indicate that Senate Resolution 60 cannot be read as authorizing a subpoena to the President of the United States.

First, it is well established in the context of legislative investigations that the authority of the investigating committee is to be construed in a way that will avoid Constitutional questions if this is possible. *United States v. Rumely*, 345 U.S. 41 (1953).

Second, when Constitutional rights are at stake, the legislative body that authorized the inquiry must make it unmistakably clear that it wants the particular information that is being sought. *Watkins v. United States*, 354 U.S. 178 (1957), is again much in point:

Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need.

* * * * *

The reason no court can make this critical judgment is that the House of Representatives itself has never made it. Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures.

354 U.S. at 205, 206.

That was the point also of Chief Justice Warren's opinion in the companion case of *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). The New Hampshire Legislature had set up the Attorney General as a one-man committee of the legislature to investigate subversion, under a very broad and vague resolution.

The Attorney General has been given such a sweeping and uncertain mandate that it is his decision which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it cannot be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated.

354 U.S. at 253.

Finally, there is a settled and sensible rule in construing general language, which was articulated by the Court in *United States v. United Mine Workers of America*, 330 U.S. 258 (1947).¹² The Court there held that the gen-

¹² For other applications of the proposition so well stated in the *Mine Workers* case, see: *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960); *Leiter Minerals v. United States*, 352 U.S. 220, 224-226 (1957); *United States v. Wittek*, 337 U.S. 346, 358-359 (1949); *United States v. Wyoming*, 331 U.S. 440, 449 (1947); *United States v. Stevenson*, 215 U.S. 190 (1909); *United States v.*

eral language of the Norris-LaGuardia Act did not apply when an injunction was sought by the United States, since the statute did not in terms apply to suits by the United States. Chief Justice Vinson said for the Court, at 272-273:

There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. It has been stated, in cases in which there were extraneous and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute, that this rule was a rule of construction only. Though that may be true, the rule has been invoked successfully in cases so closely similar to the present one, and the statement of the rule in those cases has been so explicit, that we are inclined to give it much weight here.

(footnotes omitted).

We are not suggesting that the President is a sovereign, but his unique position in our Constitutional system is such that a similar principle surely should apply, and a Senate resolution should not be construed to deprive the President of a privilege he has always had without explicit language to that effect in the resolution.¹³

Given the long history in which neither House of Congress has ever subpoenaed a President of the United States, it is beyond belief that any member of the Senate, when voting to authorize the Select Committee to direct subpoenas to an "officer," had any thought that he was voting to empower the Committee to take the unprecedented and unauthorized action that has led to the present litigation.

This point is merely further emphasized by the failure of the Committee to follow the procedure provided by Resolution 60 in the event of noncompliance with a subpoena. In such a case, § 3(a)(6) of the Resolution specifically authorizes the Committee to make appropriate recommendations to the full Senate. The Committee attempts to characterize that section as merely providing a "wholly discretionary option" to the Committee. (Supp. Memo. 12). Once again, the comments of Professor Black are instructive as to the significance of § 3(a)(6):

Does not this language (at the very least when applied to such an utterly unique and politically charged question as a "willful failure or refusal" of the President himself) designate the

American Bell Telephone Co., 159 U.S. 548, 553-555 (1895); *Lewis v. United States*, 92 U.S. 618, 622 (1875); *United States v. Herron*, 20 Wall. (87 U.S.) 251, 263 (1873); *Dollar Savings Bank v. United States*, 19 Wall. (86 U.S.) 227, 238-239 (1873).

¹³ In *Dollar Savings Bank v. United States*, 19 Wall. (86 U.S.) 227, 239 (1873) the Supreme Court stated:

It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised * * * affect not him in the least, if they may tend to restrain or diminish any of his rights and interests * * * The rule thus settled respecting the British Crown is equally applicable to this government * * * It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does * * * into the principles of the British Constitution.

exclusive procedure to be followed by the Committee? Is it not reasonable to infer from it a *direction* by the Senate that the matter of possible contempt be brought back to the whole Senate, for resolution upon action? Is the expressed power to "make recommendations" not an implied exclusion of independent action by the Committee?

Cong. Rec. E5321 (daily ed. Aug. 1, 1973) (emphasis in original).

Heretofore no committee of Congress has asked the courts to enforce a subpoena for it. Section 3(a)(6) of S. Res. 60 indicates that the Senate contemplated that usual procedures would be followed, and that the Senate itself would be advised, if there were a question of non-compliance with a subpoena, rather than that the Committee would go off on a frolic and detour of its own. Here, as in *Reed v. County Commissioners*, 277 U.S. 376 (1928):

In the absence of some definite indication of that purpose, the Senate may not reasonably be held to have intended to depart from its established usage.

Authority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose.

277 U.S. at 389.

The Committee lacks authority to bring this suit, both because it is an attempt to expose for the sake of exposure, and thus beyond the legitimate legislative functions of the Committee, and because the Senate has not authorized the Committee to subpoena or to sue a President.

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

Plaintiffs have asked this Court to enforce subpoenas purportedly issued to obtain information they claim is relevant to their investigation. The President has refused on the ground that he has determined disclosure would be contrary to the public interest. His stated reason is the importance of maintaining confidential communications between the President and his closest advisers. This Court has recognized the importance of this confidentiality in its opinion in Misc. No. 47-73. Opinion at 5 & n. 8. We reassert the importance of that principle here,¹⁴ but before dealing with it in detail it is necessary to discuss the basis for plaintiffs' claim for the right to inform-

¹⁴ As his Ninth Defense to plaintiffs' Complaint, the President asserted that the subpoena attached as Exhibit D to plaintiffs' Complaint was so unreasonably broad and oppressive as to make compliance impossible. This should be obvious from the face of the subpoena itself. It specifies no time period and demands a wide variety of records relating to 25 persons on a number of different subjects. Compliance would require a complete review of virtually all records in the White House. If the Court dismisses this matter for want of jurisdiction or sustains the President's claim of privilege, there will be no need to pursue this issue. However, if it would be helpful to the Court in reaching its decision appropriate affidavits will be filed to sustain the President's position on this issue.

mation and the basis for the President's refusal to furnish it.

A. Basis for Executive Privilege

Plaintiffs refer in their "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. We do not doubt the accuracy of the analysis, but wish only to point out that it is confined to voluntary disclosures. 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.¹⁵

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.¹⁶ 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 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

¹⁵ The only legal authorities upon which plaintiffs rely are demands for information in connection with legal proceedings. There the considerations are quite different, as this Court has recognized in its opinion in Misc. No. 47-73. Opinion at 6 n. 11. See also the quotation from Professor Corwin set out at p. 3 [W.C.P.D. p. 1175] above.

¹⁶ The Senate Committee suggests that the President has somehow waived the privilege he now invokes by virtue of allowing his aides to testify and by permitting H. R. Haldeman to review several of the tapes. (Memo. 28-33). Such a suggestion hardly merits comment beyond the observation that *United States v. Reynolds*, 345 U.S. 1, 11 (1953) specifically holds to the contrary. The Committee's feeble attempt to distinguish that case (Motion for Summary Judgement at 31-32) is unpersuasive. 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, 1973, p. 33.

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.¹⁷ A recent instance was the refusal of President 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).

¹⁷ 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.
Tyler -----	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 Islands 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.

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

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,

President	Date	Type of information refused
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.
Calvin 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).

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).

These successful executive assertions of privilege against Congress have frequently been acknowledged by Congress itself. See, e.g., H. Rep. No. 1595, 80th Cong., 2d 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.

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, *Mes-*

sages 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).¹⁸

Particularly illuminating is Congress's reaction to the President's Directive of March 13, 1948, Fed. Reg. 1359 (1948), relating to the loyalty program. At that time, a joint resolution was introduced, H.J. Res. 342, 80th Cong., 2d Sess. (1948) purporting to direct all executive departments and agencies to make available to Congressional committees any information deemed necessary to the committees for the performance of their work.

The resolution was opposed on the ground that it was unconstitutional. A strong minority report was filed in the House, which stated in part:

The majority report recognizes that this issue between the executive and the legislative branch is not a new one, but has been raised periodically over the entire history of our Government and without regard to the political affiliations of the respective Presidents or the political complexions of the Congresses whose authority in this regard the Presidents challenged. There can be no disputing this fact. There have been made from time to time over the period of our country's history requests and demands upon the executive branch of our Government by the Congress or its committees seeking information, to reveal which, in the opinion of the executive branch, would have been inconsistent with its duties in this regard. On such occasions the executive branch, as a matter of history, as a matter of tradition, and as a matter of constitutional prerogative, has declined to comply with such requests or demands. Over the years, President after President has asserted his prerogative in this respect. By now it is well established that under our tripartite form of government neither the legislative nor the judicial branches may question the Executive with respect to matters within his province and as to which he, the Executive, determines that response to the questions would be contrary to the public interest.

H. Rep. No. 1595, 80th Cong., 2d Sess. (1948), at 7. The resolution was ultimately passed by the House but died in the Senate Committee on Expenditures in the Executive Departments.

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.

¹⁸ 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).

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, *Nominations 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. 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, effects 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. § 552(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).

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.¹⁹

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

¹⁹ 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 Hebert, 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.

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 (1955). 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 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.

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.²⁰

²⁰ 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

Former Justice Fortas, who advised President Johnson on both foreign and domestic matters, has said that 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).²¹

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 inadmissible 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

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).

²¹ 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).

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.

VIII. CONCLUSION

One noteworthy characteristic of the plaintiffs' argument is its candor. Few words are minced in delineating the central purpose of this proceeding: to discover evidence from the President's records, indeed from his own private conversations, that might establish Presidential complicity in the commission of serious crimes. Objections to legislative inquiry into the innocence or guilt of individuals are formidable in any case. There is, we submit, a categorical bar to compulsory process designed to elicit evidence of criminal conduct on the part of the President of the United States, for he is answerable in only one Constitutional proceeding. That proceeding requires the deliberate action of the whole Congress under the Impeachment Clause, not the filing of a discretionary suit by a Select Committee of the Senate under a general enabling resolution.

In the related litigation to compel production of certain of the Presidential recordings, the argument of the Special Prosecutor and the relief granted by this Court both acknowledged and were at pains in attempting to preserve the right of confidentiality upon which the functioning of the Presidency crucially depends. We do not believe the decision in that case can stand because we do not believe the President's responsibility and power to make Presidential judgments can be vested in the Judiciary, no matter how limited or verbally hedged the infringement of power may be.

This case, however, involves much greater steps toward dissolution of the lines that separate the co-equal branches of our Constitutional system. It is a commentary on the infectious spirit of Watergate that the pending action, deriving whatever strength it has from this Court's earlier decision, threatens such a rapid reduction in an historically protected area of Presidential power. The most damaging of the consequences that we warn against in the related litigation would be, quite literally, upon us if the relief sought by the plaintiffs in this case were to be granted and sustained.

But if the plaintiffs' arguments are a commentary on the spirit of Watergate, the limits on this proceeding are a commentary on the inherent wisdom of the rules governing the jurisdiction of federal courts. For as previously noted by the Court, the question of jurisdiction is indeed "a most important question in this case." (Tr. Hearing of Sept. 6, 1973, p. 11) And as shown by this submission the plaintiffs must overcome a number of jurisdictional

objections if they are to obtain the requested relief. They must establish:

- (a) That the matter is a justiciable case or controversy and not essentially a political question;
- (b) That the claim falls within a specific statutory grant of subject matter jurisdiction;
- (c) That the court has *in personam* jurisdiction over the President;
- (d) That the Committee is performing a valid legislative function in subpoenaing tape recordings of confidential Presidential conversations; and
- (e) That the Committee is not exceeding the scope of its authority under Senate Resolution 60.

It is obvious, but bears emphasis, that the failure of plaintiffs to meet any one of these jurisdictional objections is fatal to their claim. Far from discharging the cumulative burden of answering each and every one of these objections, plaintiffs have failed to satisfactorily answer any of them.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas P. Marinis, Jr., hereby certify that on the 24th day of September, 1973, copies of the foregoing Brief in Opposition to Plaintiffs' Motion for Summary Judgment were hand-delivered to the office of

Samuel Dash, Esq.
Chief Counsel
Senate Select Committee
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United States Senate
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NOTE: Copies of the brief were made available by the White House Press Office.

Railroad Retirement Board

Announcement of Intention To Nominate Wythe D. Quarles, Jr., for Reappointment as a Member. September 25, 1973

The President today announced his intention to nominate Wythe D. Quarles, Jr., of Alexandria, Va., for reappointment as a member of the Railroad Retirement Board for the 5-year term expiring August 28, 1978.

Mr. Quarles has served as a member of the Railroad Retirement Board since June 22, 1971. From 1966 to 1971, he was vice chairman of the National Railway Labor Conference in Washington, D.C. Earlier, he was director of labor relations for the Atlantic Coastline Railroad Co., Jacksonville, Fla., and then assistant vice president for personnel and labor relations.

He was born in Richmond, Va., on February 13, 1916. Mr. Quarles attended the University of North Carolina. He worked in several positions with railroads, including engineman, fireman instructor, and road foreman for engines, before assuming administrative responsibilities. Mr. Quarles is married to the former Kathleen Strickland and is the father of three children.

The Railroad Retirement Board was created by the Railroad Retirement Act of 1935 to administer a retirement system for the payment of retirement and disability annuities to railroad employees and their beneficiaries, and a correlated unemployment insurance-employment service system for paying unemployment and sickness benefits and securing the reemployment of unemployed railroad employees.

The Board is composed of three members serving terms of 5 years. One member is appointed from recommendations by representatives of employees, one is appointed from recommendations by representatives of carriers, and one is appointed at large and may have no interest in any employer or organization of employees. Mr. Quarles is the representative of the carriers, Neil P. Speirs represents employees, and James L. Cowen is the member at large. The member at large automatically serves as Chairman.

Investigation of Charges Against the Vice President

Statement by the President. September 25, 1973

I held a discussion with the Vice President this morning about the charges that have been made against him in the course of an investigation being conducted in Baltimore under the direction of the United States Attorney for Maryland.