Response to Subpoena of Recordings and Documents

Brief in Opposition Filed by Attorneys for the President in the United States District Court for the District of Columbia. August 7, 1973

In The
UNITED STATES DISTRICT COURT
For The
DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA DUCES TECUM ISSUED TO RICHARD M. NIXON, OR ANY SUBORDINATE OFFICER, OFFICIAL, OR EMPLOYEE WITH CUSTODY OR CONTROL OF CERTAIN DOCUMENTS OR OBJECTS

Misc. No. 47–73

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On July 23, 1973, at the direction of the Special Prosecutor, Watergate Special Prosecution Force, the Clerk of the United States District Court for the District of Columbia issued a subpoena duces tecum to Richard M. Nixon, or any subordinate officer whom he designates who has custody or control of certain documents or objects, directing him to produce certain specified documents or objects as evidence before an incumbent grand jury. Specifically the subpoena directs the President to turn over to the grand jury tape recordings of meetings and telephone conversations between the President and several of his closest advisers in the period from June 20, 1972, to April 15, 1973, as well as several memoranda consisting of communications between the President's advisers. As noted in the Petition for an Order to Show Cause, "virtually all of the participants in the conversations which are the object of the Grand Jury's subpoena have already testified in one form or another about these conversations."

On July 26, 1973, the President outlined his reasons for refusal to comply with those portions of the subpoena relating to tape recordings in a letter to the Honorable John J. Sirica, Chief Judge of the United States District Court for the District of Columbia. That same letter expressed an intention to provide voluntarily the documentary evidence demanded by the subpoena. Also on July 26, 1973, the Special Prosecutor filed his verified Petition for an order directing Richard M. Nixon or any subordinate officer whom he designates to show cause why the specified documents or objects should not be produced in response to the subpoena. Pursuant to that Petition, this Court entered an order on July 26, 1973, directing Richard M. Nixon to show cause before the Court why the documents and objects demanded should not be provided pursuant to the subpoena and setting the matter for hearing on August 7, 1973.

SUMMARY OF ARGUMENT

The present proceeding, though a well-intentioned effort to obtain evidence for criminal prosecutions, represents a serious threat to the nature of the Presidency as it was created by the Constitution, as it has been sustained for 184 years, and as it exists today.

If the Special Prosecutor should be successful in the attempt to compel disclosure of recordings of Presidential conversations, the damage to the institution of the Presidency will be severe and irreparable. The character of that office will be fundamentally altered and the total structure of government—dependent as it is upon a separation of powers—will be impaired.

The consequence of an order to disclose recordings or notes would be that no longer could a President speak in confidence with his close advisers on any subject. The threat of potential disclosure of any and all conversations would make it virtually impossible for President Nixon or his successors in that great office to function. Beyond that, a holding that the President is personally subject to the orders of a court would effectively destroy the status of the Executive Branch as an equal and coordinate element of government.

There is no precedent that can be said to justify or permit such a result. On the contrary, it is clear that while courts and their grand juries have the power to seek evidence of all persons, including the President, the President has the power and thus the privilege to withhold information if he concludes that disclosure would be contrary to the public interest.

The breadth of this privilege is frequently debated. Whatever its boundaries it must obtain with respect to a President's private conversations with his advisers (as well as to private conversations by judges and legislators with their advisers). These conversations reflect advisory opinions, recommendations, and deliberations that are an essential part of the process by which Presidential decisions and policies are formulated. Presidential privacy must be protected, not for its own sake, but because of the paramount need for frank expression and discussion among the President and those consulted by him in the making of Presidential decisions.

The privilege with regard to recordings was not waived by the decision of the President, in the interest of having the truth about Watergate come out, to permit testimony about portions of those conversations by persons who participated in them. Testimony can be limited, as recordings cannot, to the particular area in which privilege is not being claimed. Nor does the privilege vanish because there are claims that some of the statements made to the President by others in these conversations may have been pursuant to a criminal conspiracy by those other persons.

That others may have acted in accordance with a criminal design does not alter the fact that the President's participation in these conversations was pursuant to his Constitutional duty to see that the laws are faithfully executed and that he is entitled to claim executive privilege to preserve the confidentiality of private conversations he held in carrying out that duty.

In the exercise of his discretion to claim executive privilege the President is answerable to the Nation but not to the courts. The courts, a co-equal but not a superior branch of government, are not free to probe the mental processes and the private confidences of the President and his advisers. To do so would be a clear violation of the Constitutional separation of powers. Under that doctrine the Judicial Branch lacks power to compel the President to produce information that he has determined is not in the public interest to disclose.

The issue here is starkly simple: will the Presidency be allowed to continue to function?

ARGUMENT

I. Introductory Statement

The extent to which the Executive Branch has a power or privilege to withhold documents or testimony from the other two branches of government has been correctly described as "one of the most difficult, delicate and significant problems arising under our system." Rogers, *Constitutional Law: The Papers of the Executive Branch,* 44 A.B.A.J. 941, 1012 (1958). There are few authoritative judicial decisions on the matter but this is because the other branches of government have respected claims of privilege by the Executive Branch and have recognized the inappropriateness of seeking resolution in the courts of controversies between branches of government.

Although there have been repeated clashes between Presidents and Congress over the issue from 1796 on, there is no judicial decision whatever on controversies of that kind. See *Soucie* v. *David,* 448 F.2d 1067, 1071 n. 9 (D.C. Cir. 1971). There are decisions on the privilege as it exists against the courts, but these decisions tend to be cautious, Hardin, *Executive Privilege in the Federal Courts,* 71 Yale L.J. 879 (1962), and to be resolved on the narrowest possible grounds. E.g., *United States* ex rel. *Touhy* v. *Ragen,* 340 U.S. 462, 467 (1951); *United States* v. *Reynolds,* 345 U.S. 1, 6 (1953). Though there is a fairly substantial literature on the question, it is more argumentative than authoritative.

The question is still further clouded by the tendency of all those who have spoken on this question to lump together questions that may require separate answers. Thus courts and writers have not always been careful to distinguish between the President himself, the heads of departments, and subordinates within the executive departments. Nor is it always recognized that the scope of the privilege may be one question, who is to judge of its existence a second question, and whether a decision adverse to the executive could be enforced a third question.

This case, however, does not require a sweeping analysis of the privilege and all of its ramifications. Rather the court is faced with the narrow question of its application to the President of the United States in his most confidential conversations with his intimate advisers. On this question judicial precedents are almost nonexistent. One fact does stand out. No court has ever attempted to enforce a subpoena directed at the President of the United States. No President—and, for that matter, no department head—has ever been held in contempt for refusal to produce information, either to the courts or to Congress, that the President has determined must be withheld in the public interest. Quite commonly Presidents have voluntarily made available information for which a claim of privilege could have been made. That happens very often—and has happened and is happening in this case. But practice throughout our history shows no exception to the rule that the President cannot be forced to disclose information that he thinks it would damage the public interest to disclose.

We do not question the power of the court to issue a subpoena to the President. In *United States* v. *Burr,* 25 F.Cas. 30, 34, No. 14,692d (C.C.D.Va. 1807), Chief Justice Marshall, sitting at circuit, ruled that a subpoena might issue, though he immediately recognized that "difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen * * *." A subsequent Attorney General has ruled that a subpoena may be directed against the President to produce a paper, though the courts would be without power to enforce their process should the President refuse. 25 Op. Atty. Gen. 326, 330–331 (1905). The cautious reference to the *Burr* ruling in *Branzburg* v. *Hayes,* 408 U.S. 665, 688 n. 26 (1972), goes no further than to note that Chief Justice Marshall had "opined" that a subpoena might issue. For present purposes, we accept that proposition.

But the power to seek information from the Executive Branch does not impose on the Executive any concurrent obligation to disclose that information. Rather the responsibility of a President to disclose information to a grand jury and to the courts is limited by the Constitutional doctrine of separation of powers. The classic statement of that doctrine is contained in the opinion of the Supreme Court in *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880), where the Court said:

> It is believed to be one of the chief points of the American system of written constitutional law, that all 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.

103 U.S. at 190–191. The Court continued:

> In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of the departments cannot be exercised by another.
>
> It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forebearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made * * *.

103 U.S. at 191.

This concept of separation of powers, which was recognized by the Supreme Court as early as 1803 in *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137 (1803), caused Chief Justice Marshall, in the *Burr* case, to qualify his remarks about subpoenaing the President. He said:

> In no case of this kind would a court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and so obvious that all must acknowledge them.

United States v. *Burr,* 25 F. Cas. 187, 191–192, No. 14,694 (C.C.D. Va. 1807).

To insist on the doctrine of separation of powers is by no means to suggest that the President is above the law. This is not the case. The President is accountable under the law, but only in the manner prescribed in the Constitution. The distinction was drawn vividly by Attorney General Stanbery in his argument in *Mississippi* v. *Johnson,* 4 Wall. (71 U.S.) 475, 484–485 (1867):

> It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President. There is only one court or quasi court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.

See the similar statement of position by Alexander Hamilton in *Federalist* No. 69.

Nor is the privilege derived from the doctrine of separation of powers one that is available only to protect the President, or the Executive Branch generally, from the other two branches of government. Each branch of government has claimed, and rightly so, a privilege to do its own business in its own way, without coercion from other branches of government. No other branch of government can compel disclosure of what judges of a court say to each other when the court is in conference. No other branch can require disclosure of discussions about legislative business between a Congressman and his aide. Cf. *Gravel* v. *United States,* 408 U.S. 606 (1972). 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 (D.C. Cir. 1971) (concurring opinion). The Congress has always claimed a privilege for its own private papers. No court subpoena is complied with by the Congress or its committees without a vote of the house concerned to turn over the documents. 448 F.2d at 1081–1082.[1] The Judiciary claims a similar privilege against giving testimony about the official conduct of judges, *Statement of the Judges,* 14 F.R.D. 335 (N.D.Cal 1953); cf. *Fayerweather* v. *Ritch,* 195 U.S. 276, 306–307 (1904). See also the letter of Justice Tom C. Clark, dated November 14, 1953, 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."

All branches of government benefit from the independence secured to them by the Constitutional separation of powers. All America has benefited from the sturdy insistence of all three of the branches, over the years, on preserving that independence.

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[1] 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 by 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 presented to a subcommittee of the House Committee on Armed Services in executive session. 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 and 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 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 and given no indication that it will supply the information sought.

II. The President Has The Power to Withhold Information If He Deems Disclosure To Be Contrary To The Public Interest

Executive privilege has been aptly described as "a phase of release from requirements common to private citizens or organizations. It is granted by custom or statute for the benefit of the public, not of executives who may happen to then hold office." *Kaiser Aluminum & Chemical* v. *United States,* 157 F. Supp. 939, 944 (Ct. Cl. 1958) (per Reed, J.) It is a concept essential to the discharge of highly important executive responsibilities. *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966). Whatever uncertainty there may be about the outer boundaries of executive privilege, discussions by the President in his official capacity are at the very heart of the concept.

This follows logically from the President's broad inherent powers under the Constitution. These broad powers were recognized very early in the decision in *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137 (1803). There Chief Justice Marshall, speaking for the Court, stated:

> 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 application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

1 Cranch at 165–166.

This principle was restated 35 years later in *Kendall* v. *United States* ex. rel. *Stokes,* 12 Pet. (37 U.S.)524, 610 (1838), where the Court said:

> The executive power is vested in a President; and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power.

A. *Privilege against Demands by Congress.* The privilege asserted here derives from the same Constitutional source as, and closely parallels, the executive privilege that has consistently and successfully been asserted in response to Congressional attempts to require production by the Executive Branch.

This long-standing privilege of the executive to refuse Congressional demands does not require extended discussion. From the administration of Washington to the present, Presidents have repeatedly asserted the privilege, and, when forced to a showdown, Congress has consistently yielded. Corwin, *The President: Office and Powers, 1787–1957* 113 (4th rev. ed. 1957). A recent instance was the refusal of President Kennedy 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 Congress, 2nd Sess., 338, 369–370, 508–509, 725, 730–731 and 1826 (1962). The Senate Subcommittee, speaking through Senator Stennis, conceded:

> We now come face to face and are in direct conflict with the established doctrine of separation of powers * * *.
>
> I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files—and I do not think either one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field.

Id. at 512.

Reference to the unbroken record of successful assertions of privilege in practice is particularly significant to the doctrine of separation of powers. Uninterrupted usage continued from the early days of the Constitution is weighty evidence of the proper construction of any clause of the Constitution.

> 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 regular practices. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of the statute or the exercise of a power, weight should 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).

This is especially important because the doctrine of separation of powers is not stated in express words in the Constitution and because the functioning of our government depends largely upon limits on the power of each branch derived from practical adjustments based on a fair regard by each for the rights of the others. "Even Constitutional power, when the text is doubtful, may be established by usage." *Inland Waterway Corp.* v. *Young,* 309 U.S. 517, 525 (1940).

B. *Scope of the Privilege.* It is well settled that the privilege applies to information relating to national security. *United States* v. *Reynolds,* 345 U.S. 1, 10 (1953). Similarly, it has been applied to information relating to diplomatic affairs. *New York Times* v. *United States,* 403 U.S. 713, 728 (1971) (Stewart, J. concurring).

But the privilege is not confined to specific kinds of subject matters nor, as discussed in the next part of this brief, to particular kinds of communications. Reason dictates a much broader concept, that the privilege extends to all of the executive power vested in the President by Article II and that it reaches any information that the President determines cannot be disclosed consistent with

the public interest and the proper performance of his Constitutional duties. The touchstone for a broad concept is provided by President Washington and his cabinet, who concluded that "the Executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion." 1 Ford, *Writings of Thomas Jefferson* 189–190 (1892).

This broad concept of executive privilege has been acted upon by many subsequent Presidents and has been stated by many Attorneys General. Thus, Attorney General Speed gave the following opinion in 1865:

> Upon principles of public policy there are some kinds of evidence which the law excludes or dispenses with. Secrets of state, for instance, cannot be given in evidence, and those who are possessed of such secrets are not required to make disclosure of them. The official transactions between the heads of departments of the Government and their subordinate officers are, in general, treated as "privileged communications." The President of the United States, the heads of the great departments of the Government, and the Governors of the several States, it has been decided, are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient. These are familiar rules laid down by every author on the law of evidence.

11 Op. Atty. Gen. 137, 142–143 (1865). In 1877 Attorney General Devens took the view that production cannot be required of correspondence between the Commissioner of Internal Revenue and a United States attorney if production would be prejudicial to the public interests. 15 Op. Atty. Gen. 378 (1877). In 1893 Attorney General Olney gave the opinion that it is for the President or head of the department having the legal custody of a paper, and "not for the judge presiding at the trial," to determine whether "such general public interest forbids the production of an official record or paper in the courts * * *." 20 Op. Atty. Gen. 557, 558 (1893). In 1905 Attorney General Moody ruled that the head of an Executive Department may properly decline to furnish official records of the department, or to give testimony in a court case, "whenever in your judgment the production of such papers or the giving of such testimony might prove prejudicial for any reason to the Government or to the public interest." 25 Op. Atty. Gen. 326, 331 (1905).

An opinion in 1941 by Attorney General (later Justice) Jackson was directed to investigative reports but rested on a broader principle:

> The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine.

40 Op. Atty. Gen. 45, 49 (1941).

President Eisenhower's famous letter of May 17, 1954, directing that persons employed in the executive branch were not to testify before a Congressional committee on matters occurring within the executive branch, was supported by a memorandum of Attorney General Brownell, which said in part:

> Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest; they will not interfere with the exercise of that discretion, and that Congress has not the power, as one of the three great branches of the Government, to subject the executive branch to its will any more than the executive branch may impose its unrestrained will upon the Congress.

100 Cong. Rec. 6621 (1954).

More recently Assistant Attorney General (now Justice) Rehnquist made a statement in 1971 to the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee in which he asserted that the privilege of the President to withhold information "the disclosure of which he feels would impair the proper exercise of his constitutional obligations" is "firmly rooted in history and precedent." Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, *Executive Privilege: The Withholding of Information by the Executive,* U.S. Senate, 92nd Cong. 1st Sess., at 429 (1971). He continued:

> The President's authority to withhold information is not an unbridled one, but it necessarily requires the exercise of his judgment as to whether or not the disclosure of particular matters sought would be harmful to the national interest.

Id. at 431.

C. *Confidential Intra-Governmental Communications.* The "public interest" standard is admittedly broad and defies precise definition. Nevertheless, it is clear that it applies to confidential intra-governmental communications. Thus, the court in *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena,* 40 F.R. D. 318 (D.D.C. 1966), *aff'd on the opinion below* 384 F. 2d 979 (D.C. Cir.), *cert. denied* 389 U.S. 952 (1967) stated:

> While it is agreed that the [executive] privilege extends to all military and diplomatic secrets, its recognition is not confined to data qualifying as such. Whatever its boundaries as to other types of claims not involving state secrets, it is well established that the privilege obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.

40 F.R.D. at 324. The court continued:

> 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 responsibilty 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 policy-making resources.

40 F.R.D. at 324–325.

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

Earlier Presidents throughout our history have taken a similar position. The principle was well stated by President Eisenhower on July 6, 1956, 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 it—if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position there is 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.

See also *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 945–946 (Ct.Cl. 1958) (per Reed, J.); 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).

A distinguished constitutional lawyer has recently observed that refusal to disclose communications of this kind is not only the President's lawful privilege

> but his duty as well, for it is a measure necessary to the protection of the proper conduct of his office, not only by him but, much more importantly, by his successors for all time to come.
>
> * * * 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,* The New York Times, Aug. 3, 1973, p. 31. See also the fuller expression of Professor Black's view in Cong. Rec. E5320–E5322 (August 1, 1973).

The wise men who wrote the Constitution of the United States surely would have agreed. On May 29, 1787, as one of their first acts at the Constitutional Convention, they adopted a resolution that their deliberations were to be kept secret. 1 Farrand, *The Records of the Federal Convention of 1787* 15 (1966 ed.). They knew that wise decision-making requires the kind of frank discussion for which confidentiality is essential.

The unique status of Presidential papers, that they are the property of the President and that they often require the highest degree of confidentiality for many years, was recognized by Congress in 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). The gifts of the papers of Presidents Kennedy and Johnson, for example, both provide that "materials containing statements made by or to" the President "in confidence" 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." 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.[2]

These reasons apply with special force when recordings of Presidential conversations are sought. Recordings are the raw material of life. By their very nature they contain spontaneous, informal, tentative, and frequently pungent comments on a variety of subjects inextricably intertwined into one conversation. Disclosure of information allegedly relevant to this inquiry would mean disclosure as well as other information of a highly confidential nature relating to a wide range of matters not relevant to this inquiry. Some of these matters deal with sensitive issues of national security. Others go to the exercise by the President of his Constitutional duties on matters other than Watergate. The nature of informal, private conversations is such that it is not practicable to separate what is arguably relevant from what is clearly irrelevant. Once the totality of the confidential nature of the recordings is destroyed, no person could ever be assured that his own frank and candid comments to the President would not eventually be made public. Nor should this Court be misled by the seemingly modest request to hear recordings of a few

[2] The letter from President Johnson specifically prohibits disclosure to "public officials." It states, 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 * * *." In both respects this is identical with what President Eisenhower said in giving his papers to the United States. Letter of April 13, 1960, from President Dwight D. Eisenhower to the Administrator of General Services.

conversations. These conversations could not be properly understood without listening also to many other conversations, and once the principle were established that the most confidential records of the Presidency can be ordered produced for a grand jury, the present subpoena would be only the first installment of requests for many more of the President's most confidential conversations. No government can function if its internal operations are to be subject to that kind of open scrutiny.

This point is recognized by even those who take a hostile view of executive privilege. Fifteen years ago Representative Meader made a slashing attack on what he called "a non-existent, imaginary so-called Executive privilege." 104 Cong. Rec. 3853 (1958). After stating his argument against executive privilege generally, however, he said: "The foregoing reasoning, of course, does not apply to the important constitutional powers of the President, his power to execute the laws, his powers as Commander-in-Chief of the Armed Forces, and his power to conduct diplomatic relations." *Id.* at 3851. A leading contemporary critic of executive privilege is Professor Raoul Berger, who has written a 156-page article setting out his controversial views on the limited scope of the privilege. He recognizes very clearly, however, that discussions between the President and his close advisers stand on a very different footing from the more usual kinds of claim of executive privilege to which he is so strongly opposed.

> President Jackson's refusal to reveal a statement he made *to his Cabinet* is a remote analogy, because such confidential communications—what Marshall labelled "secrets of the cabinet"—are poles apart from an unlimited discretion to withhold any document or communications between the several million subordinate employees in the interest of "administrative efficiency."

Berger, *Executive Privilege* v. *Congressional Inquiry,* 12 UCLA L. Rev. 1043, 1289–1290 (1965) (emphasis in original). Again at 1331 he says:

> "Judicial deliberations" are better compared to conferences between the President and a Cabinet member, for which a privilege was recognized in *Marbury* v. *Madison* or Presidential communications with other high military or civil officers, which at least one congressional committee recognized. But it is far-fetched to compare the conferences of two lowly subordinates, or of subordinate with a lower echelon chief, with consultation between a judge and his immediate aide or the President with a department head.

D. *Privilege Not Waived.* It seems to be suggested in paragraph 9 of the Petition for an Order to Show Cause that any claim of executive privilege has been waived with regard to this investigation by the grand jury. This suggestion will not withstand analysis. In his statement of May 22nd, appended to and referred to in the Petition, the President said that "executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up." It is one thing to permit testimony on a specific subject, for testimony can be confined to information that relates to that particular subject and can avoid reaching extraneous material, the disclosure of which is contrary to the public interest. With these recordings, as has been indicated, that is not possible.

Indeed, the short answer to any claim of waiver with regard to the materials now sought may be found in *United States* v. *Reynolds,* 345 U.S. 1 (1953). In that case the United States refused to produce an Air Force investigation report of an airplane crash as well as written statements by the survivors of the crash. It offered to allow the survivors to give depositions and to testify as to all matters except those of a "classified nature." The Supreme Court sustained the claim of privilege with regard to the documents sought. The offer to allow the witnesses to testify, far from being a waiver of privilege as to the documents, was expressly relied on by the Supreme Court as a reason for upholding the claim of privilege. 345 U.S. at 11.

To apply a waiver notion to executive privilege would be self-defeating, for a President then could not disclose any information without risk that this might be construed as a waiver with regard to other information that, in the public interest, he feels cannot be disclosed. The practice under which Presidents volunteer a great deal of information, because it is in the public interest to do so, would come to an end if the President thus jeopardized the confidentiality of things that cannot be disclosed.

Nor is there any waiver because the President has permitted a few of these tapes to be heard by a very few people. Whenever the President has confidential information, he is free to disclose it to those persons, in and out of government, in whom he has confidence and from whom he seeks advice.

E. *Charges of Criminal Conduct.* Executive privilege does not vanish because the grand jury is looking into charges of criminal conduct. No case so holds. There is no body of practice to this effect. Many of the celebrated instances in the past in which Presidents have refused to produce information in their custody have involved charges of criminal misconduct. It is true that the instances in the past have been refusals to give the material to Congress, but the Presidential privilege to withhold confidential information where the public interest so requires stems from the Constitutional separation of powers. There is nothing in Constitutional theory to suggest that the Chief Executive is separate from the Legislative Branch but inferior to the Judicial Branch. Only last year in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), the Supreme Court, in recognizing that ordinarily a grand jury has the right to every man's evidence, immediately qualified that by adding "except for those persons protected by a constitutional, common-law, or statutory privilege." 408 U.S. at 688.

In this connection it is worth quoting in part what the Special Prosecutor said in his letter of July 18, 1973, to J. Fred Buzhardt, Esq., in support of his request for the tapes that are now the object of a subpoena.

> First, the request is part of an investigation into serious criminal misconduct—the obstruction of justice. The tapes are material and important evidence—quite apart from anything they show about the involvement or non-involvement of the President—because the conversations recorded in all probability deal with the activities of other persons under investigation. Indeed, it is not implausible to suppose that the reports to the President on these occasions may themselves have been made pursuant to a conspiracy and as part of a cover-up.

In that passage the Special Prosecutor quite properly bases his request on his claimed need for the tapes "quite apart from anything they show about the involvement or non-involvement of the President." If there were any question of Presidential involvement in the crimes the Special Prosecutor is investigating—and the President's statements have categorically denied any such involvement—this would not be within the jurisdiction of this Court, the Special Prosecutor, or the grand jury. The President of the United States is, as we have pointed out in the Introductory Statement, not above the law. He is liable to prosecution and punishment in the ordinary course of law for crimes he has committed but only after he has been impeached, convicted, and removed from office. U.S. Const., art. I, § 3; *Federalist* No. 69 (Hamilton); *Kendall* v. *United States* ex rel. *Stokes,* 12 Pet. (37 U.S.) 524, 610 (1838).

It may well be, as the Special Prosecutor suggests, that statements made by other persons to the President at the meetings for which the recordings have been subpoenaed were made by them pursuant to a conspiracy to obstruct justice. Executive privilege cannot be claimed to shield executive officers from prosecution for crime. *Gravel* v. *United States,* 408 U.S. 606, 627 (1972). Similarly, it can "never be justified as a means of covering mistakes, avoiding embarrassment, or for political, personal or pecuniary reasons." Rogers, *Constitutional Law: The Papers of the Executive Branch,* 44 A.B.A.J. 941 (1958). It is precisely with these considerations in mind that the President has not asserted executive privilege with regard to testimony about possible criminal conduct or discussions of possible criminal conduct.

But although remarks made by others in conversations with the President may arguably be part of a criminal plan on their part, the President's participation in these conversations was in accordance with his Constitutional duty to see that the laws are faithfully executed. It is the President, not those who may be subject to indictment by this grand jury, who is claiming executive privilege. He is doing so, not to protect those others, but to protect the right of himself and his successors to preserve the confidentiality of discussions in which they participate in the course of their Constitutional duties, and thus ultimately to protect the right of the American people to informed and vigorous leadership from their President of a sort for which confidentiality is an essential prerequisite.

Executive privilege would be meaningless if it were to give way whenever there is reason to suspect that disclosure might reveal criminal acts. It is possible to conceive of circumstances in which discussions of sensitive foreign affairs matters or of the most highly classified military secrets might include remarks that would arguably show criminal conduct by a Presidential adviser. It is unthinkable that discussions of that kind could be produced to a grand jury, a petit jury, or to the public, even though the alternative may be to make a successful prosecution impossible. But it is not only in the realm of national security that it must be for the President to decide what the public interest permits to be disclosed. It is just as important that the President be able to talk frankly with his advisers about domestic issues as about military or foreign affairs. 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. He—and he alone—must weigh the interest in prosecuting a wrongdoer against the interest in keeping all Presidential conversations confidential.

That choices of this kind must be made is so well accepted that it is surprising that there should be an argument to the contrary. In many contexts in the criminal law the United States will be told that it should make available information in its possession. In these situations, however, the United States is given a choice. Either it must produce the needed information—whether it be a Jencks Act statement, the name of an informer, or information on electronic surveillance—or suffer the consequences to the prosecution, which may well include its dismissal.

> The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.

Jencks v. *United States,* 353 U.S. 657, 672 (1957). Accord: *Roviaro* v. *United States,* 353 U.S. 53, 60–61 (1957); *Alderman* v. *United States,* 394 U.S. 165, 184 (1969); 18 U.S.C. § 3500 (d).

It is not the President's view that refusal to produce these tapes will defeat prosecution of any who have betrayed his confidence by committing crimes. It is his expectation that the other evidence available to the Special Prosecutor, together with testimony from witnesses with regard to whom the President has not claimed executive privilege and documentary evidence that the President has been and will be making available to the Special Prosecutor, will suffice to convict any lawbreakers. But the President has concluded that even if he should be mistaken about this in some particular case, the public interest in a conviction, important though it is, must yield to

the public interest in preserving the confidentiality of the President's office.

That is a decision that only the President can make. It is not for the trial judge. Indeed, in the passage just quoted from the *Jencks* case the Supreme Court stated explicitly that the burden of that choice is "not to be shifted to the trial judge." It is not a choice for the prosecutor. In the ordinary case it is a choice that would have to be made by senior government officials. When Presidential papers are involved, it is a choice that must be made by the President himself.

The President has concluded that it would be detrimental to the public interest to make available to the Special Prosecutor and the grand jury the recordings sought as item 1 of the subpoena. That decision by the President is in itself sufficient cause for this Court to proceed no further to seek to compel production of those records.

III. This Court Lacks the Power To Compel Production of the Recordings

There is no case in which the courts have actually compelled the executive to disclose information when the executive thinks it would be detrimental to the public interest to do so, nor is there any case in which the courts have undertaken to hold the President or a department head in contempt for failure to make a disclosure. Admittedly, some courts have claimed the power to decide for themselves whether executive privilege has been appropriately claimed and to weigh for themselves whether the harm to the national interest from disclosure is outweighed by the need of litigants for the information, but no court has compelled production of the information itself if the Executive Branch disagrees with the court's ruling on that issue. Other sanctions may be imposed. Production of executive documents cannot be required.

Although it was a civil case, *United States* v. *Reynolds,* 345 U.S. 1 (1953), is instructive. That was a suit under the Tort Claims Act for the death of three civilians in the crash of a B–29 while it was testing secret electronic equipment. The United States, through the Secretary of the Air Force, made a formal claim of privilege against being required to produce during discovery the Air Force's official accident investigation report and the statements of surviving crew members. The United States asserted that the aircraft in question was engaged in a highly secret mission of the Air Force, and thus invoked the executive privilege for military secrets, which, as the Supreme Court said, is recognized "by the most outspoken critics of governmental claims to privilege." 345 U.S. at 7.

Although the Court in *Reynolds* was unwilling to hold that a claim that military secrets would otherwise be revealed is conclusive on the courts, 345 U.S. at 9–10, it outlined the balancing process that must be followed before a court should call for production or even call for *in camera* inspection. If, from all the circumstances of the case, the claim of privilege is sufficiently strong, "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. at 10. In considering the claim of privilege, there must be a balancing of the litigant's need for the information against the public interest in keeping it confidential. "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." 345 U.S. at 11. In the particular case before it, the Court held that it was obvious from the circumstances that there was a reasonable danger that the accident investigation report would contain references to the secret electronic devices while the plaintiffs' need for the information was slight, since the United States had agreed to allow the surviving crew members to give testimony and plaintiffs might be able to prove negligence through that testimony. Under these circumstances the Court ruled that the claim of privilege should have been upheld without more and that the district court erred in imposing a sanction against the United States for its refusal to produce the documents for *in camera* inspection.

The principles announced in *Reynolds* have been applied by the lower courts to all claims of executive privilege, whether dealing with military secrets or with other kinds of information. See *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd on the opinion below* 384 F. 2d 979 (D.C. Cir.), *cert. denied* 389 U.S. 952 (1967); 8 Wright & Miller, *Federal Practice and Procedure: Civil* 170–172 (1970). The courts have been circumspect in substituting their judgment for that of the executive officer, or in calling for *in camera* inspection. There are cases in which they have ruled in favor of production, *id.* at 169 n. 23, but none of those cases involve a Presidential claim of the privilege with its obvious special considerations. And, at the risk of repetition, it is worth repeating that in no case has a court used compulsory process or the contempt power to require production of information that the court thinks ought to be produced, either for the parties or for the court *in camera*. Refusal to comply with a court's decision that information ought to be produced has other adverse consequences to the government's position in the litigation but the information itself remains confidential if the executive determines that the public interest requires this resolution.

Although there may be instances where court scrutiny is appropriate, a different question is presented in cases involving intragovernmental confidential communications. Here the privilege takes on a virtual immunity from inquiry. The judiciary, the courts declare, is not author-

ized "to probe the mental processes" of an executive or an administrative office. *Morgan* v. *United States,* 304 U.S. 1, 18 (1938). This rule forecloses investigation into the methods by which a decision was reached, *United States* v. *Morgan,* 313 U.S. 409, 422 (1941), the matters considered, *Fayerweather* v. *Ritch,* 195 U.S. 276, 306–307 (1904), the contributing influences, *Chicago, B & O Ry. Co.* v. *Babcock,* 204 U.S. 585, 593 (1907), or the role played by the work of others, *Kaiser Aluminum & Chem. Corp.* v. *United States,* 157 F. Supp. 939, 946–947 (1958) (per Reed, J.)—results demanded by exigencies of the most imperative character. No judge could tolerate inquisition into the elements making up his decision—indeed "public examination of a judge would be destructive of the judicial responsibility"—and by the same doctrine "the integrity of the administrative process must be equally respected." *United States* v. *Morgan,* 313 U.S. 409, 422 (1941). Equally sound reasons dictate that a protection no less extensive be afforded the processes by which a President's responsibility for decision-making and policy formulation, legal or otherwise, are discharged.

In the present case, there is no showing whatever of necessity for production of the recordings except for the conclusory statement in the Petition for an Order to Show Cause that the recordings "are relevant and important evidence in the Grand Jury's investigation." Here, as in the *Reynolds* case, testimony of those who participated in these meetings has been made available, because of the President's disclaimer of executive privilege with regard to testimony by his aides concerning possible criminal conduct or discussions of possible criminal conduct in the matters presently under investigation. Much other evidence, both documentary and testimonial, is available to the Special Prosecutor, including a significant amount of material furnished him by the President. Doubtless the Special Prosecutor would like to have the recordings to test their consistency with testimony now being given by participants in the conversations that were recorded. Doubtless the plaintiffs in *Reynolds* would have liked to have had the contemporaneous statements of the survivors of the crash, as well as the report of the Air Force investigation, to test their consistency with the testimony later made available from the survivors. That was not enough to justify even *in camera* inspection in *Reynolds.* It is not enough here, particularly when the circumstances here show that the recordings involved are of confidential conversations with the President of the United States, material raising the strongest possible claim of privilege.

Whatever may be the case with a department head, as in the *Reynolds* case, it is not appropriate for the courts to purport to weigh a claim of privilege by the President himself. Since the courts are without power to compel compliance with a decision overruling a claim of privilege by the President, any consideration by the courts would be a meaningless issue.

> By the constitution of the United States, the President is invested with certain important 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.

Marbury v. *Madison,* 1 Cranch (5 U.S.) 137, 165 (1803). Again in *Kendall* v. *United States* ex rel. *Stokes,* 12 Pet. (37 U.S.) 524 (1838), the Court distinguished between requiring a department head to do a purely ministerial act and requiring the President to act in a matter within his discretion. It said of the President, at 610, that "as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."

The issue was squarely presented in *Mississippi* v. *Johnson,* 4 Wall. (71 U.S.) 475 (1867). The Court there refused to entertain a bill seeking to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. In his argument in that case Attorney General Stanbery discussed the *Marbury* and *Kendall* cases and noted that the writs sought in those cases ran only against cabinet officers rather than against the President himself. He pointed out that if a cabinet officer could be imprisoned for contempt for disobedience of a court order, his duties could be performed by a deputy or a new member of the cabinet could be appointed. If, however, the President were to be imprisoned for contempt, he would be disabled from performing his constitutional duties, though he would still, in the absence of impeachment, retain the office. 4 Wall. at 489–490.

The Supreme Court ruled that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties." 4 Wall. at 501. As one of the reasons for this conclusion, it had noted: "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." 4 Wall. at 500–501. At another point it said:

> An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

4 Wall. at 499.

In the light of these precedents Attorney General Moody was clearly right when he ruled that "it seems clear that while a subpoena may be directed against the President to produce a paper, or for some other purpose, in case of his refusal to obey the subpoena, the courts would be without power to enforce process." 25 Op. Atty. Gen. 326, 330–331 (1905).

The commentators have agreed. The then-Executive Editor of the Washington Post, an outspoken critic of executive privilege, says: "That the President himself enjoys practical immunity from the enforcement of legal process in wide areas must be acknowledged." Wiggins,

Government Operations and the Public's Right to Know, 19 Fed. B.J. 62, 74 (1959). See also 8 Wigmore, *Evidence,* § 2370 (McNaughton rev. 1961), suggesting that the executive may be under a testimonial duty to be a witness. He regards this as a different question from whether compulsory process can issue to enforce that duty and says: "That the enforcement of the duty is constitutionally impossible is still consistent with its existence."

This is not to suggest that the courts are powerless in the face of executive refusals. In civil litigation to which the United States is a party, sanctions other than contempt are available for failure to produce material that the court thinks not privileged. Thus in *O'Neill* v. *United States,* 79 F. Supp. 827, 830 (E.D. Pa. 1948), the court recognized that because of "the separateness and mutual independence of the three coordinate branches of the government," compulsory process or contempt against the Attorney General would be barred, but held that under Civil Rule 37 other sanctions could be imposed that might cause procedural disadvantages to the United States or even cause it to lose its case. Indeed, this was the sanction applied by the lower courts in the *Reynolds* case itself, and it would have been the appropriate sanction had not the Supreme Court determined that the claim of privilege was so compelling that it was error to order *in camera* inspection. Both the District Court and the Court of Appeals had held that the appropriate sanction, after the government refused to comply with a court order to produce documents for *in camera* inspection, was to rule that the facts on negligence would be taken as established in plaintiffs' favor. See *United States* v. *Reynolds,* 345 U.S. 1, 5 (1953). Even with regard to department heads the courts can neither compel production of documents nor punish the department head for contempt. 8 Wigmore, *Evidence* § 2379, at 815 (McNaughton rev. 1961); 4 Moore, *Federal Practice* par. 26.61 [5. -1], at 26–287 (2d ed. 1970). The immunity of the President from compulsory process is even clearer than that attaching to department heads.

As has been pointed out earlier in this brief, the practice in criminal litigation is similar. The court may require the government to choose between producing documents or damaging its chances for a successful prosecution, but the court cannot require that the documents be produced nor can it even require that they be submitted for *in camera* inspection.

The motion of the Special Prosecutor asks the Court to compel the President of the United States to produce material that he has determined that the public interest requires be kept confidential. It thus asks the Court to substitute its judgment for that of the President on a matter entrusted to the President by the Constitution, and calls for the Court to issue an order of a sort that the Judicial Branch lacks power to enter against the President of the United States.

CONCLUSION

The result for which we have argued is supported by such precedent as exists. It is supported by premises that are, and have always been, at the heart of our Constitutional system. It is supported by the unvarying practice of 184 years. It is supported finally, and most importantly, by the consequences that would follow if any other result were to be reached.

Were it to be held, on whatever ground, that there is any circumstance under which the President can be compelled to produce recordings or notes of his private conversations, from that moment on it would be simply impossible for any President of the United States to function. The creative interplay of open and spontaneous discussion is essential in making wise choices on grave and important issues. A President would be helpless if he and his advisers could not talk freely, if they were required always to guard their words against the possibility that next month or next year those words might be made public. The issue in this case is nothing less than the continued existence of the Presidency as a functioning institution.

For all of the foregoing reasons, the motion of the Special Prosecutor should be denied.

Respectfully submitted,

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August 7, 1973.

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

President's Committee on Mental Retardation

Announcement of Appointment of Seven Members of the Committee. August 7, 1973

The President today announced the appointment of seven persons as members of the President's Committee on Mental Retardation for terms expiring May 11, 1976. They are:

N. LORRAINE BEEBE, of Dearborn, Mich., director of the Office of Consumer Affairs, State of Michigan, and member, Michigan Association for Emotionally Disturbed Children, Lansing, Mich. Mrs. Beebe is being reappointed.

THOMAS J. MESKILL, Governor of Connecticut. He succeeds Jean Rockefeller, whose term has expired.