for the limited purpose of moving this Court to quash the subpoena duces tecum issued by this Court's order dated April 18, 1974, permitting production and inspection of certain materials and made returnable before this Court on May 2, 1974. For the reasons set forth in the Memorandum filed in support of this Motion, we respectfully request that this Court enter an order quashing the subpoena in all respects.

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal no. 74–110
UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, ET AL., DEFENDANTS.

FORMAL CLAIM OF PRIVILEGE

I, Richard Nixon, President of the United States, hereby represent to the Court that, except as noted hereafter, the materials covered by the subpoena issued April 18, 1974, to the extent that they exist, are within the constitutional privilege of the President to refuse to disclose confidential information when disclosure would be contrary to the public interest.

Portions of twenty of the conversations described in the subpoena have been made public and no claim of privilege is advanced with regard to those Watergate-related portions of those conversations. These are items 9, 11, 15, 16, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31 of the subpoena.

The other items sought are confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce. Thus I must respectfully claim privilege with regard to them to the extent that they may have been recorded, or that there may be memoranda, papers, transcripts, or other writings relating to them.

Respectfully submitted,

RICHARD NIXON
President of the United States

MAY 1, 1974

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 74–110
UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, ET. AL., DEFENDANTS.

MEMORANDUM IN SUPPORT OF THE PRESIDENT'S MOTION TO QUASH SUBPOENA DUCES TECUM

STATEMENT OF THE CASE

On April 16, 1974, the Special Prosecutor, Leon Jaworski, moved this Court for an order pursuant to Rule 17(c), Federal Rules of Criminal Procedure, directing the issuance of a subpoena for the production and inspection of certain materials by Richard M. Nixon, President of the United States. This material relates to confidential communications of the President. Subsequently defendants Charles W. Colson and Robert C. Mardian joined in this motion. On April 18, 1974 this Court ordered that the subpoena calling for 46 enumerated items [1] be issued and made returnable on May 2, 1974. It is this subpoena that the President moves this Court to quash in its entirety.

INTRODUCTION

We note at the outset that we continue to believe that it is for the President of the United States, rather than for a court, to decide when the public interest requires that he exercise his constitutional privilege to refuse to produce information. We also continue to believe that a President is not subject to compulsory process from a court. We recognize that at the present stage of this case these contentions are foreclosed by the decision in *Nixon* v. *Sirica*, —— U.S. App. D.C. ——, 487 F.2d 700 (1973). Thus we do not now press these points, but mention them here in order that they may be preserved should it be necessary for this case to reach a court in which *Nixon* v. *Sirica* is not a controlling precedent.

In truth, it should be possible to decide the present matter without reference to the contentions noted in the

[1] An analysis of these 46 enumerated items reveals that 64 recorded conversations are sought by the subpoena. Attached is a copy of the Schedule of Documents and Objects to be produced by or on Behalf of Richard M. Nixon designating those items involved here for which transcripts of Watergate related materials have subsequently been made available to the general public by the President on April 29, 1974.

preceding paragraph, for there are other independent reasons why the subpoena now in issue should be quashed. We shall show that the subpoena for the material sought goes beyond the purview of Criminal Rule 17(c) and, in particular, that the Special Prosecutor has failed to make the showing of relevancy and admissibility as to each of the requested items that is required before that rule can be used to obtain even the most mundane, non-privileged materials. For this reason alone, the subpoena must be quashed in its entirety. In addition, the Special Prosecutor has failed to make the much more rigorous showing that *Nixon* v. *Sirica* teaches must be made before a court can order a President to produce matters that the court of appeals has said are "presumptively privileged." 487 F.2d at 717.

ARGUMENT

I. *The subpoena must be quashed for failing to comply with the requirements of Rule 17(c).*

A. *Relevancy and Admissibility.*

The Special Prosecutor sought this subpoena pursuant to Criminal Rule 17(c), which provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Upon analysis, it is clear that the present subpoena fails to meet the criteria for obtaining production and inspection of documents under Rule 17(c). The leading Supreme Court case discussing Rule 17(c) is *Bowman Dairy Co.* v. *United States,* 341 U.S. 214 (1951). In *Bowman,* the court plainly emphasized that "Rule 17(c) was not intended to provide an additional means of discovery." 341 U.S. at 220. On the contrary, its application was specifically limited only to production of "evidentiary" material. 341 U.S. at 219. In this regard the Court stated, "[I]n short, any document or other material *admissible as evidence,* . . . is subject to subpoena." 341 U.S. at 221 (emphasis added). By utilizing this admissible evidence standard in applying Rule 17(c), the Court rejected a conclusory request by the defendants for materials that "are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants . . .," 341 U.S. at 221, a request remarkably similar to the case at bar. In so doing, the Court considered such a "catch-all" request as invalid for it was "not intended to produce evidentiary materials but [was] merely a fishing expedition to see what may turn up." 341 U.S. at 221.

That all subpoenaed materials under Rule 17(c) must be both evidentiary in nature and relevant is uniformly required by the courts, which have recognized that Rule 17(c) is subject to abuse by parties seeking additional pretrial discovery. Consequently, courts have developed criteria that the party seeking a pretrial subpoena must meet before compliance will be ordered. In *United States* v. *Iozia,* 13 F.R.D. 335 (S.D.N.Y. 1952), Judge Weinfeld formulated the following criteria, which have been frequently cited by other courts:

> (1) That the documents are *evidentiary* and *relevant;*
> (2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;
> (3) That the defendant cannot properly prepare for trial without such production, and inspection in advance of trial and failure to obtain such inspection may tend reasonably to delay the trial;
> (4) That the application is made in good faith and is *not intended as a general fishing expedition.* 13 F.R.D. at 338 (emphasis added).[2]

As to the burden of establishing the validity of a subpoena duces tecum, controlling case law recognizes that it is incumbent upon the party seeking disclosure to set forth each request with sufficient specificity to establish that each document is both "relevant" and "admissible," and that the other *Iozia* criteria are met. *United States* v. *Palermo,* 21 F.R.D. 11, 13 (S.D.N.Y. 1957). In this regard the court in *United States* v. *Winkler,* 17 F.R.D. 213 (D. Rhode Island, 1955), held:

> The right of a defendant to the production and inspection of documents and objects prior to trial under Rule 17(c) is not absolute but *that upon objection thereto good cause for such production and inspection must be first shown by the party seeking the same.* 17 F.R.D. at 215 (emphasis added).

Similarly, in *Iozia,* where the defendant sought a subpoena, the court held that "there must be a showing of good cause to entitle the defendant to production and inspection of documents under Rule 17(c)." 13 F.R.D. at 338. "Good cause" as defined by the *Iozia* court requires a showing by the defendant [3] that all four of the well-accepted criteria set out above have been met. In the absence of such a showing that the material has met the established criteria and "would be admissible in evidence or relevant at trial," a motion to quash must be granted. See *United States* v. *Winkler,* 17 F.R.D. at 218.

In examining the request filed by the Special Prosecutor here, it is patently obvious that the request fails to meet the *Iozia* criteria, particularly, "(1) that the documents are evidentiary and relevant, . . . and (4) that

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[2] This case has been prominently cited in numerous decisions. See for example, *United States* v. *Bearden,* 423 F.2d 805, 810 n.4, (2d Cir.), *cert. denied,* 400 U.S. 836 (1970); *United States* v. *Garrison,* 168 F. Supp. 622 (E.D. Wis. 1958); *United States* v. *Duncan,* 22 F.R.D. 28 (E.D.N.Y. 1958).

[3] That the provisions of Rule 17(c) are applicable to the government as well as to a defendant is not open to serious challenge. See *United States* v. *Gross,* 24 F.R.D. 138 (S.D.N.Y. 1959).

the application . . . is not intended as a general fishing expedition." 13 F.R.D. at 338.

In reviewing the justification for the request that the Special Prosecutor advanced both in his affidavit and memorandum in support, it is apparent that he is unable to meet the *Iozia* criteria and has conceded, in effect, that he is on a fishing expedition seeking unknown evidence. At p. 2 of this affidavit, the Special Prosecutor requests 64 Presidential conversations on the bald assertion "that each of these materials *contains or is likely to contain* evidence that will be relevant to the trial of this case." (emphasis added). Again at p. 2 of his memorandum in support, the Special Prosecutor, in a bare unsupported allegation, states: "*In all probability, many of the subpoenaed items* will contain evidence which will be relevant and material to the trial, . . ." (emphasis added). Thus, it is evident that the Special Prosecutor is unable to make the necessary showing that *each* of the requested 64 items is evidentiary. A general allegation that some or a majority of the material sought may be relevant or admissible is not sufficient under *Iozia* to establish that all requested items *"are evidentiary and relevant."* 13 F.R.D. at 338. (emphasis added).

Moreover, even the general assertion made by the Special Prosecutor that some of the materials may be relevant is devoid of any accompanying factual support. As such, it is a bare allegation seeking discovery. It has been firmly established in criminal cases that in seeking discovery, the requirement of a showing of materiality and admissibility is not satisfied "by a mere conclusory allegation that the requested information is material" to the preparation of a case. *United States* v. *Condor,* 423 F. 2d 904 (6th Cir. 1970). Nor is it sufficient to make a "bare allegation that the requested information would be material in the preparation of the defense." 423 F. 2d at 910.

From the Special Prosecutor's statements that the requested materials are "likely to contain evidence" and "in all probability" may contain evidence, it is readily apparent that he is attempting to seek evidence not already known. As this Court definitively stated in *United States* v. *Frank,* 23 F.R.D. 145 (D.D.C. 1959), Rule 17(c) "does not permit blunderbuss inspection of the government's evidence *in an attempt to learn something not known, it is not a discovery provision."* 23 F.R.D. at 147 (emphasis added). This same concept was reaffirmed by the court in *United States* v. *Gross,* 24 F.R.D. 138 (S.D.N.Y. 1959), when it stated "the government [cannot] use Rule 17(c) *to obtain leads as to the existence of additional documentary evidence* or seek information relating to the defendant's case." 24 F.R.D. at 141 (emphasis added). Any request designed merely to disclose additional evidence not already known has properly been termed a "fishing expedition," which will not be countenanced under this rule. *Bowman Dairy Co.* v. *United States,* 341 U.S. at 222. There can be no doubt that the Special Prosecutor is attempting to use Rule 17(c), contrary to established case law, to obtain additional evidence not already known.

It is important to emphasize that there is an essential distinction between disclosure in civil and criminal actions, for as the court in quashing a subpoena in *United States* v. *Maryland & Virginia Milk Producers Inc.,* 9 F.R.D. 509 (D.D.C. 1949) stated:

> In this case the proposed subpoena duces tecum is not intended to be used to secure evidence to be introduced at the trial, but is intended to be employed as a broad discovery . . .
>
> * * * * *
>
> It is well settled that *in a criminal case, unlike a civil action, such a right of broad discovery does not exist* . . . 9 F.R.D. at 510 (emphasis added).

In this regard it is interesting to note that contrary to the more limited criminal discovery provisions applicable here, the Special Prosecutor's request in this instance is very similar in both substance and tone to the broader civil discovery provisions of Rule 26 of the Federal Rules of Civil Procedure.[4]

Additionally, it has been judicially recognized that the test to be met by one seeking material must be met at the time that the items are sought, and the mere "probability" that the items may later become relevant is of no consequence. The court in *United States* v. *Marchisio,* 344 F.2d 653 (2d Cir. 1965), stated: "Unlike the rule in civil actions, a subpoena duces tecum in a criminal action is not intended for the purpose of discovery; the documents sought must at that time meet the tests of relevancy and admissibility." 344 F.2d at 669. See also *United States* v. *Murray,* 297 F.2d 812, 821–22 (2d Cir. 1962); *United States* v. *Palermo,* 21 F.R.D. 11, 13 (S.D.N.Y. 1957).

Absolutely no attempt has been made by the Special Prosecutor to establish either the admissibility or relevancy of *any* of the requested items, other than the conclusory allegation that the requested materials may be relevant. Even a cursory examination of the materials sought reveals that certain requested conversations on their face appear to be inadmissible in a criminal prosecution. For example, the recorded conversations between President Richard M. Nixon and Mr. John Dean, neither of whom are named parties in the current proceeding, can only be categorized as inadmissible hearsay.[5]

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[4] Rule 26, F.R.C.P. provides, in part:

> *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, *not privileged,* which is relevant to the subject matter involved in the pending action. . . It is not ground for objection that the information sought will be inadmissible at the trial *if the information sought appears reasonably calculated to lead to the discovery of admissible evidence* (emphasis added).

[5] See for example, requested items numbered 8, 9, and 11.

Therefore we submit that the Special Prosecutor has failed to make the requisite showing that each of the requested items *is* "evidentiary and relevant" and that his application "is not intended as a general fishing expedition" for materials not previously known. Accordingly, under the standards set out in the *Bowman Dairy Co.* and *Iozia* cases and their progeny, this subpoena must be quashed.

B. *Privilege Generally.*

Even if an evidentiary showing had been made as to each of the requested items, the Special Prosecutor has failed to demonstrate the compelling need necessary to overcome the privileged nature of the materials. Although a party seeking production of material pursuant to Rule 17(c) may establish that the requested items are both relevant and evidentiary, a subpoena will not issue if the requested material is subject to a valid claim of privilege. In *Mackey* v. *United States,* 122 U.S. App. D.C. 97, 351 F.2d 794 (1965), this circuit acknowledged the defense of "privilege" and held that "the government may be required to produce documents in its possession unless it makes a valid claim of privilege." Courts have long recognized that the public interest in maintaining state secrets of a diplomatic or military nature will override the interests in continuing litigation. See e.g., *Totten* v. *United States,* 92 U.S. 105, 107 (1875); *United States* v. *Reynolds,* 345 U.S. 1, 11 (1953). The judiciary has also responded to Executive pleas to protect "intra-governmental documents reflecting * * * deliberations comprising part of a process by which governmental decisions and policies are formulated." *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, 128 U.S. App. D.C. 10, 384 F.2d 979, *cert. denied* 389 U.S. 952 (1967); *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 946, 141 Ct. Cl. 38 (1958).

Similarly in *Continental Oil Co.* v. *United States,* 330 F. 2d 347 (9th Cir. 1964), the existence of a valid claim of attorney-client privilege as to the various documents requested by a grand jury, was sufficient alone to quash a subpoena duces tecum. See also *United States* v. *White,* 322 U.S. 694, 699 (1944) (privilege against self-incrimination), *United States* v. *Jacobs,* 322 F. Supp. 1299 (C.D. Cal. 1971) (attorney-client privilege); and *United States* v. *Judson,* 322 F. 2d 460 (9th Cir. 1963) (privilege against self-incrimination). Moreover, if even a portion of a requested document is subject to a valid claim of confidentiality, the privileged portions should nevertheless not be subject to disclosure by subpoena. *United States* v. *Borltek,* 119 F. Supp. 425, 426 (M.D. Pa. 1954).

C. *Applicability of Executive Privilege.*

The same rationale is equally applicable to a valid claim of Executive privilege. In *Nixon* v. *Sirica,* — U.S. App. D.C. —, 487 F. 2d 700 (1973), this circuit expressly "acknowledge[d] the longstanding judicial recognition of Executive privilege" 487 F. 2d at 713, and agreed with this Court that the conversations involved here are "presumptively privileged" 487 F. 2d at 717. The court did note that the presumption of privilege premised on the public interest in confidentiality may "fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." *Id.* Simple logic dictates however, that if a presumption is not to be merely illusory, then a certain quantum of evidence is needed to overcome it. In this regard, the court stated that a claim of Executive privilege is entitled to "great weight" 487 F. 2d at 715. Thus the quantum of evidence necessary to overcome the privilege must be even greater. It must at least be "uniquely powerful" since the court's holding in *Nixon* v. *Sirica* was premised on "a particularized showing of the grand jury's need for each of the several subpoenaed tapes," a need that both this Court, 360 F. Supp. at 11 n. 7, and the majority of the court of appeals called "well documented and imposing" 487 F. 2d at 705.

It is important to recognize that the decision of the majority of the court of appeals in *Nixon* v. *Sirica* was based on the unique need of the grand jury, and not that of a prosecutor in a post-indictment setting. Indeed, the special function of the grand jury was the predicate for the court's finding that the "presumption of privilege premised on the public interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." 487 F.2d at 717. The Court said:

> The function of the grand jury mandated by the Fifth Amendment for the institution of federal criminal prosecutions for capital or other serious crimes, is not only to indict persons when there is probable cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist. As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function—evidence for which no effective substitute is available. 487 F.2d at 717.

The court of appeals continually reaffirmed this limitation of its holding by speaking in terms of the grand jury's access and emphasizing that "we limit our decision strictly to that required by the precise and entirely unique circumstances of the case." 487 F.2d at 704. See also 487 F.2d at 722.

The fundamental distinction between a grand jury's need for evidence and that of a prosecutor in a post-indictment setting is significant here. The Special Prosecutor's position in requesting information for trial is not analogous to, and indeed is essentially different from, that of a grand jury seeking "evidence critical to [its] decision as to whether and whom to indict." 487 F.2d at 706. By the very nature of the grand jury's function, the scope of

its need for evidence is much broader than that of a prosecutor in a post-indictment setting. The standards of relevancy and materiality are thus necessarily much narrower in a trial setting than that of a grand jury investigation. This undisputed fact was recognized in *Schwimmer* v. *United States,* 232 F.2d 855 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956) when the court stated, "[R]elevance and materiality necessarily are terms of broader content in their use as to a grand jury investigation than in their use as to the evidence of a trial." 232 F.2d at 862. The rationale for having this stricter standard at the trial stage was explained by the court in *In Re Grand Jury Subpoena Duces Tecum,* 203 F. Supp. 575 (S.D.N.Y. 1961). "[B]ecause the grand jury may have to develop evidence for the first time, the requirements of relevance and materiality are certainly less strict on a grand jury investigation than at trial." 203 F. Supp. at 579.

In *Nixon* v. *Sirica,* the Special Prosecutor was able to show that the nine tapes he requested "were each directly relevant to the grand jury's task" and that they contained "evidence critical to the grand jury's decision as to whether and whom to indict." 487 F.2d at 706. The court of appeals further noted that "[t]he strength and particularity of this showing were made possible by a unique intermeshing of events unlikely soon, if ever, to recur" 487 F.2d at 705, and specifically acknowledged that "we have attempted to decide no more than the problem before us—a problem that takes its unique shape from the grand jury's compelling showing of need." 487 F.2d at 722.

No such descriptions can be used to justify the Special Prosecutor's need in this case. There has been no allegation that the requested materials are essential or even necessary to the trial. Nor has there been any attempt to demonstrate what relevant and admissible evidence is lacking that the tapes will fulfill. For all that is known, the material sought, to the extent that it may exist, may not contain any relevant evidence or the evidence it may contain may be wholly cumulative of matters that can be otherwise proved. In addition a large volume of evidence, both documentary and testimonial, is available to the Special Prosecutor, including a very significant amount of material furnished him by the President.[6]

We submit that the public interest that would be served by the disclosure to a grand jury is substantially more compelling than it is in a post-indictment situation, and thus the presumption of privilege must now be accorded even greater weight than at the earlier stage. This conclusion is further enhanced by the fact that the Special Prosecutor signed the indictment returned by the grand jury in this case, which indeed could not have been returned without his assent. *United States* v. *Cox,* 342 F. 2d 167 (5th Cir. 1964), *cert. denied,* 381 U.S. 935 (1965). Therefore, the Special Prosecutor must have been satisfied that the evidence then available to him was enough to make a prima facie showing of guilt against the persons who were indicted. Thus the need for additional incriminating evidence, even if the items presently sought were in fact evidentiary, can at best only be classified as merely cumulative or corroborative—certainly not vital or particularly necessary.

Accordingly, the burden of showing such a need in this case because of its post-indictment context is not only legally greater, but also factually more difficult than in *Nixon* v. *Sirica.* In this case the Special Prosecutor has not only failed to make a "well documented and imposing" showing of need as he did in *Nixon,* but he has failed to make any showing at all. Thus in this instance there has been no unique need demonstrated necessary to overcome the presumption of privilege.

D. *Balancing Test.*

The Court of Appeals in *Nixon* v. *Sirica,* in deciding whether to quash a grand jury subpoena duces tecum, indicated that "the application of executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." 487 F. 2d at 716. The court also acknowledged "[t]hat the President's special interests may warrant a careful judicial screening of subpoenas . . . ," 487 F.2d at 710, and if this "judicial screening" is to be meaningful, it must occur before a court engages in the balancing process. The court of appeals recognized this when it quoted with approval, 487 F.2d at 710, the statement of Chief Justice Marshall in *United States* v. *Burr,* 25 F. Cas. 187 (No. 14, 694) (C.C.D. Va. 1807):

> The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives *may be* such as to restrain the court from enforcing its production. * * * I can readily conceive that the president might receive a letter which it would be improper to exhibit in public * * *. The occasion for *demanding* it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be *insisted* on. 25 F. Cas. at 191–192 (emphasis in the original).

Other cases also clearly demonstrate that in order for a court to balance countervailing public interests, the party seeking disclosure must make a threshold showing of compelling need or "uniquely powerful" need. In *United States* v. *Reynolds,* 345 U.S. 1 (1953), a case relied upon in *Nixon* v. *Sirica,* the Supreme Court stated:

[6] We bring to the Court's attention the fact that subsequent to the issuance of this subpoena, the President has made available voluminous transcripts of numerous privileged conversations regarding Watergate-related matters to both the Special Prosecutor and the general public. We believe this submission may now require the Special Prosecutor to reassess his need.

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. 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. *A fortiori,* where necessity is dubious, a formal claim of privilege . . . will have to prevail. 345 U.S. at 11.

At another point in *Reynolds* the Supreme Court stated:

> [W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. *Id.*

Clearly the Court in *Reynolds* was admonishing lower courts to avoid considering the merits of a claim of privilege (i.e. balancing) until a threshold showing of need was convincingly demonstrated. The very fact that, in *Reynolds,* the Supreme Court would not "automatically require a complete disclosure to the judge" proves that a threshold need must be shown before the balancing test is even applicable.

This point is further illustrated by *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 149 U.S. App. D.C. 385, 463 F.2d 788 (1971). There this circuit held:

> Of course, the party seeking discovery must make a preliminary showing of necessity to warrant even *in camera* disclosure, . . . 149 U.S. App. D.C. at 389. 463 F.2d at 792.

Certainly, this well-documented principle supports the proposition that before a court can even engage in balancing, the party seeking disclosure must show a compelling need to overcome a presumption of privilege. Since that showing has not been made in this case, it is unnecessary for this court to engage in a balancing process.

Consequently, it is clear that the Special Prosecutor has failed to make the requisite showing of compelling need necessary to activate the balancing test. Nor has he made a sufficient showing to establish that each of the requested materials is relevant and admissible and that it is not an attempt to discover additional evidence not already known. Therefore under well-established case law, the subpoena must be quashed in all respects.

II. *The production of materials not available to the prosecution is not required by the Brady rule.*

As an additional ground for seeking disclosure of the requested materials, the Special Prosecutor asserts that these materials are necessary to fulfill his obligation under *Brady* v. *Maryland,* 373 U.S. 83 (1963).[7] This is also a justification asserted by the defendants, Charles W. Colson and Robert C. Mardian, who have moved for production of the same materials. The rule in *Brady* does not apply here for two distinct reasons. First, *Brady* applies only to material in the hands of the prosecutor or the investigative agency involved in the case. Second, neither the Sixth Amendment nor *Brady* requires the production of materials that are in the possession of the President of the United States for which Executive privilege has been invoked. Such disclosure is not warranted by the policy behind the rule and represents a major and very critical departure from existing case law.

The Supreme Court's decision in *Brady* evolved from prior case law in which the Court held that the suppression of exculpatory evidence in the prosecutor's control resulted in a denial of the accused's Sixth Amendment rights. See e.g., *Mooney* v. *Holohan,* 294 U.S. 103, 112 (1935), and *Pyle* v. *Kansas,* 317 U.S. 213, 215–216 (1942). The Court's holding in *Brady,* based on the particular facts presented therein, has been construed by numerous courts. In *Brady,* the defendant and his companion were charged with first degree murder. Prior to trial, Brady's attorney had requested that the prosecutor produce the companion's extra-judicial statements. The prosecutor provided these statements with the exception of the statement by Brady's companion admitting to the murder. In light of the gross inequities resulting from the prosecutor's suppression in this particular instance, the Court held "that the *suppression* by the *prosecution* of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87 (emphasis added).

However, in extending this principle to other factual situations, it has been judicially recognized that disclosure is subject to specified limitations. As the court noted in *United States* v. *Ruggiero,* 472 F.2d 599 (2d Cir.), *cert. denied* 412 U.S. 939 (1973):

> [T]he purpose of the *Brady* rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him. 472 F.2d at 604.

In this regard it is significant to note that neither *Brady* nor any of its progeny have held that disclosure of constitutionally privileged material is required. It is beyond question that under the Sixth Amendment a defendant is entitled only to a fair trial not a perfect trial. Even the unavailability of otherwise exculpatory evidence, regardless of whether documentary or testimonial in nature, will not necessarily result in a denial of due process or the dismissal of the case. For example, a defendant will not normally be held to have been denied his Sixth Amendment right because a witness is beyond the territorial reach of the court's process. *United States* v. *Greco,* 298 F.2d 247 (2d Cir.), *cert. denied* 369 U.S. 820 (1962).

[7] Under *Brady* a defendant is entitled to all relevant, non-privileged, evidence that may tend to establish his defense—and this is a right that long antedated *Brady.* A defendant is also entitled to any non-privileged evidence that may be useful in impeaching the credibility of witnesses against him. *Giglio* v. *United States,* 405 U.S. 150 (1972).

See *Maguire* v. *United States,* 396 F.2d 327 (9th Cir.), *cert. denied* 393 U.S. 1099 (1968); cf. *Barber* v. *Page,* 390 U.S. 719 (1968). Nor is a trial unfair when a key defense witness dies prior to trial. *United States* v. *Rhodes,* 398 F.2d 655 (7th Cir. 1968), *cert. denied* 394 U.S. 962 (1969).[8] And courts regularly and routinely try co-defendants jointly despite claims that, if there were a severance, defendant B, who feels obliged to exercise his constitutional privilege not to testify in his own case, would give exculpatory testimony favorable to defendant A if there were separate trials. See the cases cited in 1 Wright, Federal Practice and Procedure: Criminal § 225, at nn. 81–83 (1969 and 1973 Supp.). Thus in each of the above situations a fair trial was obtainable despite the absence of possible exculpatory evidence.

The duty of disclosure imposed on the prosecutor by *Brady* applies only to non-privileged evidence in his possession and does not encompass material that is constitutionally unavailable to him. In a recent analysis of the prosecutor's duty under *Brady,* Justice White in his concurring opinion in *Giles* v. *Maryland,* 386 U.S. 66 (1967), defined the *Brady* requirement by stating:

> [I]n the end, any allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense. 386 U.S. at 96.

This was reconfirmed by the Supreme Court, as a whole, in *Moore* v. *Illinois,* 408 U.S. 786, 794 (1972) where the Court recognized that:

> [T]he heart of the holding in *Brady* is the prosecution's supression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is *material* either to guilt or to punishment. 408 U.S. at 794 (emphasis added).

Moreover, the duty *Brady* imposes is limited only to the immediate prosecutor and to any other investigative agency of the Government that has gathered information relating to the particular case. As to the obligation of a prosecutor to affirmatively seek and disclose possible exculpatory material from other governmental sources it has been held:

> Of course, the prosecutor has no duty to disclose information in the possession of governmental agencies which are not investigative arms of the prosecution and have not participated in the case, even if such information might be helpful to the accused. *United States* v. *Eley,* 335 F. Supp. 353, 358 (N.D. Ga. 1972).

This principle was also recognized in this Circuit, in *United States* v. *Bryant,* 142 U.S. App. D.C. 132, 439 F. 2d 642 (1971). Although initially discussing in *dicta,* a broad interpretation of *Brady,* the court ultimately limited its holding to only materials obtained by the investigative agency involved. It stated:

> [T]he duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies. Rule 16 and the Jencks Act refer, respectively, to evidence gathered by "the government" and by "the United States," not simply that held by the prosecution. *Brady* did speak of "suppression by the prosecution," but in this context prosecution is certainly broad enough to include investigation. In any event, we are confident that the Supreme Court would extend its holding to suppression by investigative agencies. Such suppression must be regulated if the disclosure requirement is to be a strong safeguard; if only the prosecutor were under the command of *Brady.* The right to a fair trial would depend on the uncertain and uncontrolled decisions of Government investigators. 439 F. 2d at 650.

In this regard Justice Fortas in his concurring opinion in *Giles* v. *Maryland,* 386 U.S. 67 (1967) while purporting to formulate a broad duty of disclosure for the prosecution, nevertheless recognized the narrow scope of the duty owed to the accused. He said:

> If [the prosecution] has in its exclusive possession specific concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense—regardless of whether it relates to testimony which the State has caused to be given at the trial—the State is obligated to bring it to the attention of the court and the defense. 386 U.S. at 100.

This is consistent with the principle advanced by the post *Brady*-line of cases that acknowledge that the evil to be avoided is suppression by the prosecution of evidence known to the prosecution. See for example, *Moore* v. *Illinois,* 408 U.S. 786, 794 (1972).

Closely analogous to the present situation is *Ross* v. *Texas,* 474 F.2d 1150, 1153 (5th Cir.), *cert. denied* 414 U.S. 850 (1973), where the defendants attempted to have their conviction overturned because allegedly exculpatory police reports not in the possession of the prosecution had not been made available to them. The court, in refusing to reverse the conviction, stated "it is of the utmost significance that neither the prosecutor nor any of his assistants were in possession of the police report or were even aware of its existence." The court emphasized that any other conclusion would place upon

> the prosecutor's shoulders the added burden of discovering all such evidence even though buried somewhere in the files of any one of numerous other state bureaus or agencies. In view of the unrealistic rigorousness of such an obligation with all of its ramifications, we think that a judicial requirement of disclosure in the circumstances here present is not commanded by the due process clause. While we are committed to the principle that the truth must be pursued diligently and in good faith, the rule urged upon us would require near perfection in this endeavor. The advocated requirement would not strike a proper balance in a judicial system that must accommodate many competing values and interests in addition to those of the defendant. 474 F.2d at 1153.

[8] The Seventh Circuit has indicated a possible reluctance to even turn over to the accused another's pre-sentence report containing allegedly exculpatory impeachable material because disclosure of the report may be contrary to the public interest. *United States* v. *Greathouse,* 484 F.2d 805, 807 (7th Cir. 1973). Similarly, the prosecutor is not required to offer immunity to prospective witnesses whose testimony would be relevant and arguably favorable to the accused. *Earl* v. *United States,* 124 U.S. App. D.C. 77, 361 F.2d 531, 534 (1966), *cert. denied* 388 U.S. 921 (1967).

Thus if this Court chooses to ignore this standard and holds to the contrary, we submit that it will be an open-ended invitation for all defendants to control the President's time by requiring that he search through the voluminous records of the Executive branch whenever an individual makes a naked assertion that exculpatory material might possibly exist. Plainly, such requests are both burdensome and oppressive. Moreover, the precedent set by such action would affect not only the President and the Executive Office, but also the Legislative and Judicial branches as well.

Although, as we have shown, a President is under no obligation to produce material within his possession in this instance, the President has in the past demonstrated a willingness to consider a defendant's need for access to such material. For example, in both *United States* v. *Mitchell, et. al.,* Cr. No. 74–110 (S.D.N.Y. 1974) and *United States* v. *Chapin,* Cr. No. 990–73 (D.D.C. 1974), the President has voluntarily turned over privileged material. Thus, in the event that a defendant's request for access to privileged material is supported by a particularized showing of materiality and usefulness with respect to specific, concrete evidence, the President would be willing to consider whether a defendant's need for access outweighs the public interest in maintaining confidentiality. Should an affirmative determination be made, any exculpatory material will be turned over to the Special Prosecutor.

We submit that there is no basis in reason or precedent to impair the effective functioning of the Office of the Presidency by requiring that privileged material, traditionally unavailable to the prosecution, now be produced for public disclosure in a criminal trial. Such an exception would create a precedent with broad and disastrous implications. An accused's Sixth Amendment rights are fully protected when the prosecution has given the accused all the exculpatory non-privileged evidence known to be in its possession. *Brady* does not require the production of privileged material constitutionally unavailable to the prosecutor.

Lastly, we submit that the *Brady* rule, which affords the defendant a Sixth Amendment guarantee to exculpatory non-privileged evidence known to the prosecution, provides no justification for the Special Prosecutor's purported attempt to gain access to privileged Presidential Communications through the exercise of that same constitutional right. His request in this context is a transparent attempt to obtain material otherwise not available to him, because of his inability to satisfy the requirements of Rule 17(c) and *Nixon* v. *Sirica.* Such an invitation to this Court to engage in an unwarranted expansion of the *Brady* rule must be rejected.

CONCLUSION

For the foregoing reasons, we respectfully request that the subpoena duces tecum be quashed in all respects.

Respectfully submitted,

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May 1, 1974

APPENDIX

SCHEDULE OF DOCUMENTS AND OBJECTS TO BE PRODUCED BY OR ON BEHALF OF RICHARD M. NIXON*

All tapes and other electronic and/or mechanical recordings or reproductions, and any memoranda, papers, transcripts, and other writings, relating to:

1. (a) Meeting on June 20, 1972, between the President and Charles W. Colson from 2:20 to 3:30 p.m. in the President's Executive Office Building Office ("EOB"); (b) telephone conversation on June 20, 1972, between the President and Mr. Colson from 8:04 to 8:21 p.m. (placed from the EOB); and (c) telephone conversation between the President and Mr. Colson from 11:33 p.m. on June 20, 1972, to 12:05 a.m. on June 21, 1972 (placed from residence portion of the White House).
2. Three meetings on June 23, 1972, between the President and H. R. Haldeman from 10:04 to 10:39 a.m., from 1:04 to 1:13 p.m., and from 2:20 to 2:45 p.m. According to information furnished by the White House, the first meeting occurred in the Oval Office, and the third, in the EOB, with Ronald Ziegler in both cases present for part of the time. According to Mr. Haldeman's logs, the second meeting occurred in the Oval Office.
3. Meeting on the morning of November 15, 1972, among or between Messrs. Haldeman, John Ehrlichman, and John W. Dean, III in the President's office at Camp David.
4. Meeting and telephone conversation on January 5, 1973, between the President and Mr. Colson from 12:02 to 1:02 p.m. in the EOB and from 7:38 to 7:58 p.m. (placed from Camp David) respectively.
5. Meeting or telephone conversation in or about late January 1973 between the President and Mr. Colson in which E. Howard Hunt, Jr. was discussed.
6. Meetings between the President and Mr. Colson in the Oval Office on February 13, 1973, from 9:48 to 10:52 a.m. and on February 14, 1973, from 10:13 to 10:49 a.m. respectively.
7. Meeting on or about February 20, 1973, between the President and Mr. Haldeman in which Jeb Stuart Magruder was discussed.

*An asterisk will be used to denote those items which have subsequently been made available by transcript to the general public by the President on April 29, 1974.

8. Meeting on February 27, 1973, between the President and Mr. Dean from 3:55 to 4:20 p.m. in the Oval Office.
*9. Meeting on March 17, 1973, between the President and Mr. Dean from 1:25 to 2:10 p.m. in the Oval Office.
10. Meetings on March 20, 1973, between the President and Mr. Haldeman from 10:47 a.m. to 12:10 p.m. (with Mr. Ehrlichman present from 11:40 a.m. on) and from 6:00 to 7:10 p.m. According to Mr. Haldeman's logs, these meetings occurred in the Oval Office.
*11. Telephone conversation on March 20, 1973, between the President and Mr. Dean from 7:29 to 7:43 p.m.
12. Meeting on March 21, 1973, between the President and Mr. Ehrlichman from 9:15 to 10:12 a.m. in the Oval Office.
13. Telephone conversation on March 21, 1973, between the President and Mr. Colson from 7:53 to 8:24 p.m.
14. Meeting on March 22, 1973, between the President and Mr. Haldeman from 9:11 to 10:35 a.m. According to Mr. Haldeman's logs, this meeting occurred in the EOB.
*15. Meeting on March 27, 1973, between the President and Mr. Ehrlichman from 11:10 a.m. to 1:30 p.m., with Mr. Haldeman present from 11:35 a.m. on. Mr. Ziegler and Stephen B. Bull were also present for parts of the time. According to Mr. Haldeman's logs, this meeting occurred in the EOB.
*16. Meeting on March 30, 1973, between the President and Mr. Ehrlichman from 12:02 to 12:18 p.m. Mr. Ziegler may also have been present.
17. Telephone conversation on April 12, 1973, between the President and Mr. Colson from 7:31 to 7:48 p.m. (placed from residence portion of the White House).
*18. Meeting on April 14, 1973, between the President and Mr. Ehrlichman from 8:55 to 11:31 a.m. in the EOB, with Mr. Haldeman present from 9:00 to 11:30 a.m.
*19. Meeting on April 14, 1973, between the President and Mr. Haldeman from 1:55 to 2:13 p.m. in the Oval Office.
*20. Meetings on April 14, 1973, among or between the President and Messrs. Ehrlichman and Haldeman from 2:24 to 3:55 p.m. and from 5:15 to 6:45 p.m. on the Oval Office and the EOB respectively.
*21. Telephone conversation on April 14, 1973, between the President and Mr. Haldeman from 11:02 to 11:16 p.m. (placed from residence portion of the White House).
*22. Telephone conversation on April 14, 1973, between the President and Mr. Ehrlichman from 11:22 to 11:53 p.m. (placed from residence portion of the White House).
*23. Meeting on April 15, 1973, between the President and Mr. Ehrlichman from 10:35 to 11:15 a.m. (time approximate) in the Oval Office.
*24. Telephone conversation on April 15, 1973, between the President and Mr. Haldeman from 3:27 to 3:44 p.m. (placed from the EOB).
25. Telephone conversation on April 16, 1973, between the President and Mr. Haldeman from 12:08 to 12:23 a.m. (placed from residence portion of the White House).
26. Telephone conversation on April 16, 1973, between the President and Mr. Ehrlichman from 8:18 to 8:22 a.m. and from 9:27 to 9:49 p.m. (placed from and received in residence portion of the White House respectively).
*27. Meetings on April 16, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 9:50 to 9:59 a.m. and from 10:50 to 11:04 a.m., both in the Oval Office.
*28. Meeting on April 16, 1973, between the President and Mr. Haldeman from noon to 12:31 p.m. in the Oval Office.
*29. Meeting on April 16, 1973, between the President and Mr. Ehrlichman from 3:27 to 4:02 p.m. in the EOB. Mr. Ziegler was present from 3:35 p.m. on.
*30. Meeting on April 17, 1973, between the President and Mr. Haldeman from 9:47 to 9:59 a.m. in the Oval Office.
*31. Three meetings on April 17, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 12:35 to 2:20 p.m. in the Oval Office (with Mr. Ziegler present for part of the time), from 3:50 to 4:35 p.m. in the Oval Office, and from 5:50 to 7:14 p.m. in the EOB (with then Secretary William P. Rogers present for part of the time).
32. Telephone conversation on April 18, 1973, between the President and Mr. Haldeman from 12:05 to 12:20 a.m. (placed from residence portion of the White House).
33. Meeting on April 18, 1973, between the President and Mr. Ehrlichman from 3:05 to 3:23 p.m. in the Oval Office.
34. Meeting on April 18, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 6:30 to 8:05 p.m. in Aspen Lodge, Camp David.
35. Meeting on April 19, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 9:31 to 10:12 a.m. in the Oval Office.
36. Meetings on April 19, 1973, between the President and Mr. Ehrlichman from 1:03 to 1:30 p.m. and from 5:15 to 5:45 p.m. in the Oval Office and the EOB respectively.
37. Telephone conversation on April 19, 1973, between the President and Mr. Haldeman from 9:37 to 9:53 p.m. (placed from the EOB).
38. Telephone conversation on April 19, 1973, between the President and Mr. Ehrlichman from 10:54 to 11:04 p.m. (received in residence portion of the White House).
39. Meetings on April 20, 1973, between the President and Mr. Haldeman from 8:15 to 8:39 a.m. and from 11:07 to 11:23 a.m., both in the Oval Office.
40. Meeting on April 20, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 12:16 to 12:34 p.m. in the Oval Office.
41. Meetings on April 25, 1973, among or between the President and Messrs. Haldeman and Ehrlichman from 11:06 a.m. to 1:55 p.m. According to Mr. Haldeman's logs, this meeting occurred in the EOB.
42. Meeting on April 25, 1973, between the President and Mr. Haldeman from 4:40 to 5:35 p.m. According to Mr. Haldeman's logs, this meeting occurred in the EOB.
43. Telephone conversations on April 25, 1973, between the President and Mr. Haldeman from 6:57 to 7:14 p.m. and from 7:46 to 7:53 p.m.
44. Telephone conversations on April 25, 1973, between the President and Mr. Ehrlichman from 7:17 to 7:19 p.m. and from 7:25 to 7:39 p.m.
45. Meetings on April 26, 1973, between the President and Mr. Haldeman from 8:55 to 10:24 a.m. and from 3:59 to 9:03 p.m., the latter with Mr. Ehrlichman present from 5:57 to 7:14 p.m. Messrs. Bull and Ziegler were also present at the second meeting for parts of the time. According to Mr. Haldeman's logs, the first meeting occurred in the Oval Office, and the second, in the EOB.
46. Telephone conversations on June 4, 1973, between the President and Mr. Haldeman from 10:05 to 10:20 p.m. and from 10:21 to 10:22 p.m. (both placed from residence portion of the White House).

*An asterisk will be used to denote those items which have subsequently been made available by transcript to the general public by the President on April 29, 1974.

UNIED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 74–110

UNITED STATES OF AMERICA
v.
JOHN N. MITCHELL, ET. AL., DEFENDANTS.

ORDER

Upon consideration of the President's Motion to Quash the subpoena that was issued on the 18th day of April, 1974, requiring the production and inspection of certain

materials made returnable before the Court on May 2, 1974, in the above-styled case, and the pleadings filed herein, and the Court having determined that the President's Motion to Quash should be granted, it is hereby this ____ day of May, 1974,

ORDERED that the aforementioned subpoena be and it hereby is quashed.

JOHN J. SIRICA
United States District Judge

CERTIFICATE OF SERVICE

I, James D. St. Clair, hereby certify that on the 1st day of May, 1974, I have caused to be served a copy of the foregoing Special Appearance and Motion to Quash, Formal Claim of Privilege, Memorandum of Law, and proposed Order on the counsel of record at the following addresses:

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

United States Ambassador to Zaire

Announcement of Intention To Nominate Deane R. Hinton. May 2, 1974

The President today announced his intention to nominate Deane R. Hinton, of Chicago, Ill., to be Ambassador to Zaire. He will succeed Sheldon B. Vance, who is now Special Advisor to the Secretary of State and Coordinator for International Narcotics Matters.

Mr. Hinton, a career Foreign Service officer, has served since 1971 with the Council on Internationl Economic Policy first as Assistant Director and then as Deputy Executive Director. From 1969 to 1971, he was Director of the USAID Mission and Counselor for Economic Affairs in Santiago, and from 1967 to 1969 he held the same positions in Guatemala. From 1963 to 1967, he was Director of the Office of Political-Economic Affairs in the Bureau of European Affairs. He is fluent in French and Spanish.

He was born on March 12, 1923, Fort Missoula, Mont. Mr. Hinton received his A.B. degree in 1943 from the University of Chicago and served from 1943 to 1945 as an officer in the U.S. Army. He entered Government service in 1946 as Chief of Political Section, Damascus, and from 1949 to 1951 he was Principal Officer in Mombasa. During 1951–52, he studied economics at the Fletcher School of Law and Diplomacy and Harvard University under the auspices of the Foreign Service Institute.

From 1952 to 1955, Mr. Hinton was an International Finance Officer in Paris, and from 1955 to 1958 he was Chief, West Europe Branch, then Chief, Regional European Branch, Bureau of Intelligence. From 1958 to 1961, he was International Finance Officer with the U.S. Mission to the European Communities in Brussels. After attending the National War College during 1961–62, he was Chief of the Commodity Programming Division, Bureau of Economic Affairs, from 1962 to 1963.

Mr. Hinton is married to the former Miren de Aretxabala. They reside in Bethesda, Md.

United States Ambassador to the Sultanate of Oman

Announcement of Intention To Nominate William D. Wolle. May 2, 1974

The President today announced his intention to nominate William D. Wolle, of Sioux City, Iowa, to be Ambassador to the Sultanate of Oman. He will succeed William A. Stoltzfus, who will remain Ambassador to Kuwait.

Mr. Wolle, a career Foreign Service officer, has served since 1972 as Commercial Officer in Nairobi. From 1965