Supreme Court Case

Reply Brief Filed by Attorneys for the President. July 1, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1766 and 73-1834

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

INTRODUCTION

The vitally important considerations that must control decision of this case, and that require reversal of the district court, were expressed in the opinion of Chief Justice Chase, for a unanimous Court, in *Mississippi* v. *Johnson,* 4 Wall. (71 U.S.) 475, 500-501 (1867).

> The Congress is the Legislative Department of the government; the President is the Executive Department. Neither can be restrained in its action by the Judicial Department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.
>
> The impropriety of such interference will be clearly seen upon consideration of its possible consequences.
>
> Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the Executive and Legislative Departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public wonder of an atempt by this court to arrest proceedings in that court? These questions answer themselves.

It will not do to say, as the Special Prosecutor does, that "the President is the *head* of the Executive Branch. . . ." (S.P.Br. 79) (emphasis in original).[1] Instead, as the Court said in *Johnson,* "the President is the Executive Department." Or, as Chief Justice Taft, also speaking for a unanimous Court, said in *Ex parte Grossman,* 267 U.S. 87, 120 (1925): "The executive power is vested in a President."

Johnson is important also for its recognition of the utter impropriety of this Court becoming involved in the constitutional process of impeachment. Surely this Court can judicially notice the fact that proceedings are underway in the House Judiciary Committee looking to possible impeachment of the President. The late Thomas Reed Powell is said to have defined the legal mind as a mind that can think of one of two things that are inescapably interrelated without thinking about the other. Only those who would accept this cynical view of the legal process would suppose that this case and the investigation in the Judiciary Committee are wholly unrelated, or that this Court can render a decision in this case without that decision having a heavy impact, one way or the other, in the impeachment process that is so clearly committed exclusively to the House and the Senate.

We shall contend, as we did in our initial brief, that, as it was so powerfully put by Judge Wilkey in his dissent in *Nixon* v. *Sirica,* 487 F. 2d 700, 763-799 (D.C. Cir. 1973), the critical issue is "Who Decides?", and that this Court should affirm the proposition, not seriously challenged for the first 184 years of our constitutional history, that it is for the Chief Executive,

[1] "Pres. Br." refers to the President's brief filed with this Court on June 21, 1974. "S.P. Br." refers to the Special Prosecutor's brief filed on the same date. "P.S.A." refers to the President's Sealed Appendix. These references are followed by appropriate pagination.

not for the judicial branch, to decide when the public interest permits disclosure of Presidential discussions.

> It was and is the President's right to make that decision initially, and it is the American people who will be the judge as to whether the President has made the right decision, i.e., whether it is or is not in the public interest that the papers (tapes) in question be furnished or retained. If his decision is made on visibly sound grounds, the people will approve the action of the Executive as being in the public interest. If the decision is not visibly on sound grounds of national public interest, in political terms the decision may be ruinous for the President, but it is his to make. The grand design has worked; the separate, independent Branch remains in charge of and responsible for its own papers, processes and decisions, not to a second or third Branch, but it remains *responsible* to the American people. (487 F. 2d at 797) (emphasis in original).

The central point at issue here is not whether the President's judgment in this particular instance is right or wrong, but that it is his judgment. In exercising the discretion vested in him, and in him alone, the President may make a mistaken assessment of what best serves the public interest—but courts also on occasion make mistakes. The President in this exercise of discretion may make a decision that is unpopular—but if so he must suffer the political consequences. The President may even take such action that would constitute a high crime or misdemeanor, but to quote again from Chief Justice Taft in *Ex parte Grossman,* 267 U.S. 87, 121 (1925): "Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President."

These are the themes we will develop in the balance of this Reply Brief.[2]

I. THE SPECIAL PROSECUTOR HAS FAILED TO ESTABLISH ANY BASIS FOR THE JURISDICTION OF THE DISTRICT COURT

In our initial submission we argued that the courts lack jurisdiction over an internal dispute of a co-equal branch of government (Pres. Br. 27–44) and that such an intra-branch dispute is preeminently a political question and outside the scope of Article III. (Pres. Br. 44–48).

Primarily, the Special Prosecutor appears to allege jurisdiction on two grounds: (1) that this is not an intra-branch dispute, for in all criminal proceedings, the Attorney General does not represent the executive branch but rather the United States as a sovereign entity; and (2) even if the Special Prosecutor is an inseparable part of the executive branch, the delegation of authority and independence given to him by Acting Attorney General Bork is, in itself, sufficient to create jurisdiction in this matter. (S.P. Br. 24–47). As we now show however, both arguments fail to withstand analysis.

In an attempt to negate the intra-executive nature of this dispute, the Special Prosecutor repeatedly asserts that he, as the alter ego of the Attorney General, does not represent the President or the executive branch in a criminal proceeding but rather the United States as a distinct sovereign entity. (S.P. Br. 27–29).[3] Such an argument is without merit for there is no sovereign entity distinct from the three recognized branches of the government. Nor, as a practical matter, is the Attorney General unique in his capacity to act in the name of the United States, for most, if not all federal actions are performed in the name of "the United States," the ultimate symbol of this nation's sovereignty. To suggest that a governmental action is not a judicial, executive or legislative action, simply because it is taken in the name of the United States, is to confuse the basic symbol of the government with the functional divisions of its authority. The term

[2] Having already submitted a 137-page brief, we regret burdening the Court with so lengthy a reply. We have endeavored so far as possible to avoid repetition, and do not, by failing to renew all of the points made in our initial brief, withdraw any of those. But the case is both important and unique, and because of the briefing schedule ordered by the Court this is the first opportunity we have had to respond to the arguments of the petitioner.

We agree with the statement of the Special Prosecutor (Supplemental Brief, June 21, 1974 at 5) that the application of *Brady* v. *Maryland*, 373 U.S. 83 (1963) to privileged materials not in the prosecutor's possession is not properly before this Court. See Sup. Ct. Rule 23(1)(c); *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 324–325 (1972); *Namet* v. *United States*, 373 U.S. 179, 190 (1963); *Mazer* v. *Stein*, 347 U.S. 201, 206 n. 5 (1954); see generally R. Stern & E. Gressman, *Supreme Court Practice* 297–298 (4th ed. 1969).

[3] This argument is premised upon 28 U.S.C. 516 which provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

"United States" does not refer to a separate entity but is a composite description of the three independent and co-equal branches of the government. Within their respective roles, each coordinate branch acts in the name of the United States. Thus, it is of no distinguishing consequence that the Attorney General or the Special Prosecutor invokes the name of the United States in conducting a criminal prosecution. Nor does this invocation divest the Attorney General or the Special Prosecutor of their status as subordinate officers within the executive branch of government.[4]

To accept the Special Prosecutor's position that there is, in essence, an independent branch of the government known as the United States, would make meaningless the delegation of authority and balance of power existing between the three branches, and destroy the tripartite form of government established by the Framers. It would create an additional fourth branch of the government with its own independently derived authority, entitled to its own representation in court and responsible to none of the other branches. Such a proposition is without logical or constitutional merit.

Alternatively, by tracing the statutory authority of the Attorney General, the Special Prosecutor at pp. 27–29, 35–36, 40–42 of his Brief appears to be suggesting to this Court that there may be some legislative basis for his authority akin to a legislative regulatory agency,[5] which would nullify the claim that the present dispute is intra-executive in nature. He summarizes his position as follows: in discharging his responsibilities, "the Special Prosecutor does not act as a mere agent-at-will of the President. He enjoys an independent authority derived from constitutional delegations of authority by the Congress to the Attorney General and from the Attorney General to him . . ." (S.P. Br. 34).

We do not contest the Special Prosecutor's assertion that his authority is derived from the Attorney General, but it is precisely this derivation of authority that conclusively establishes the executive nature of the office he holds. The Attorney General can only delegate to a subordinate officer the same authority and status he himself possesses. Thus, even as the alter ego of the Attorney General in a particular matter, the Special Prosecutor is necessarily vested with the same executive status, and no more. To assert that either the Attorney General, an executive cabinet member, or any subordinate officer within the Department of Justice, acts in a legislative or even quasi-legislative capacity when conducting a criminal prosecution is so contrary to the settled law as not to warrant further comment. It remains only to be said that all executive departments exist with some statutory basis, but this does not in anyway alter the exclusively executive nature of their duties and responsibilities. As we pointed out at the beginning, "the President is the Executive Department." The Attorney General is but "the hand of the President." *Ponzi* v. *Fessenden,* 358 U.S. 254, 262 (1922). He is the agent of the President, and any direction given by him is but a direction by the President. *Confiscation Cases,* 7 Wall. (74 U.S.) 454 (1869). Article II, section 3, imposes on the President the duty to "take Care that the Laws be faithfully executed," and though the President ordinarily acts through the Attorney General and his subordinates, they are acting for the President, not for the legislative branch.[6] Con-

[4] The Special Prosecutor's assertion that he acts not "in the President's name or at his behest" (S.P. Br. 34) is effectively negated in his own statement of facts where he acknowledges that on October 26, 1973, the President announced that a new Special Prosecutor would be appointed and emphasized that he, the President, had no greater interest than seeing that the Special Prosecutor has the independence he needs to prosecute the guilty and clear the innocent. (S.P. Br. 10)

[5] *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 (1949). This case has been fully discussed by us (Pres. Br. 37–38) and that discussion is equally applicable to *Secretary of Agriculture* v. *United States*, 350 U.S. 163 (1956), which also involves a suit by an executive department against the Interstate Commerce Commission.

[6] In *Runkle* v. *United States*, 122 U.S. 543, 557 (1886), this Court stated:

> There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *United States* v. *Eliason*, 16 Pet. 291, 302; *Confiscation Cases*, 20 Wall. 92, 109; *United States* v. *Farden*, 99 U.S. 10, 19; *Wolsey* v. *Chapman*, 101 U.S. 755, 769.

In addition, the Court of Appeals for the Fifth Circuit in *Smith* v. *United States*, 375 F. 2d 243, 246 (5th Cir. 1967) stated:

> The President of the United States is charged in Article 2, Section 3, of the Constitution with the duty to "take care that the laws be faithfully executed. . ." The Attorney General is the President's surrogate in the prosecution of all offenses against the United States.

sequently, the Special Prosecutor, like the Attorney General, must be considered an executive officer engaged in the exclusive performance of an executive function, namely the prosecution of individuals charged with criminal activities. Thus, neither under the legislative theory nor the sovereign entity theory proposed by the Special Prosecutor has he demonstrated that the present dispute is anything more than an intra-executive dispute beyond the jurisdiction of the district court.[7]

Finally, the Special Prosecutor alleges that the delegation of authority to him by Acting Attorney General Bork, combined with the repeated assurances that he would be free to carry out his responsibilities, confers jurisdiction upon the court to resolve the instant dispute.[8] Such an argument fails for three fundamental reasons. First, the Judiciary has never had jurisdiction to review or determine what evidence the executive branch shall or shall not use in the furtherance of its own case in a criminal proceeding. See, e.g., *United States* v. *Cox,* 342 F. 2d 167 (5th Cir), *cert. denied,* 381 U.S. 935 (1965). The responsibility for making this determination has always been within the executive branch, and includes the power to balance and determine what confidential governmental materials would, if disclosed, be detrimental to the public interest. A decision by the executive branch not to use a particular document, even one which tends to support its own burden of proof in a criminal prosecution, has not been and is not a proper subject for judicial review. (Pres. Br. 39–41).

Second, such a decision is exclusively within the duties and responsibilities delegated by the Constitution to the Chief Executive, for he alone was vested with the obligation to see "that the Laws be faithfully executed." U.S. Const. Article II, section 3. Unless the President has delegated his authority to a subordinate officer, the President's decision in such matters is final, and an improper subject for judicial review.[9]

Third, there has been no delegation of this responsibility by the President to the Attorney General or the Special Prosecutor in the instant case.[10] Nor has the Attorney General attempted to delegate this authority to the Special Prosecutor.[11] This conclusion is fully supported by the brief filed by the Special Prosecutor before this Court, for there is a notable absence of any claim by the Special Prosecutor that he was, in fact, delegated the President's responsibility to weigh the public interest in determining what presidential material shall or shall not be used in this proceeding. Since this responsibility was retained by the President, there can be no basis for a claim that the President acted beyond the scope of his constitutional authority in determining not to use certain presidential material in this case. In so doing, as Professor Bickel pointed out, he is simply "exercising the lawful powers of his office, which he may do until removed upon impeachment and conviction." *New York Times,* June 3, 1974, p. 30. Because this decision is clearly within the prosecutorial discretion vested in the executive branch, and in particular in the Chief Executive, the district court is without jurisdiction to review this determination.

The district court's lack of jurisdiction was not altered, as the Special Prosecutor suggests, merely because he may "determine whether or not to contest the assertions of executive privilege or any other testimonial privilege." 38 Fed. Reg. 30, 738 (1973). In this suit, the Special Prosecutor is merely asking this

[7] The Special Prosecutor erroneously cites this Court's decision in *Sampson* v. *Murray,* 414 U.S. 904 (1974), for the proposition that the district court has jurisdiction to intervene in an intra-branch dispute. That case is however totally inapplicable for it involved a suit by a private citizen against the United States Civil Service Commission alleging that the individual had been erroneously discharged from federal employment.

[8] The Special Prosecutor correctly asserts, at some length, that a federal regulation has the force and effect of law and is therefore binding upon the parties. *Accardi* v. *Shaughnessy,* 347 U.S. 260, 266–267 (1954). However, by raising the question of the jurisdictional basis for the district court's action, Counsel for the President cannot be said to be acting in violation of the Special Prosecutor's rights under 38 Fed. Reg. 30, 738 (1973), nor interfering with the independence granted to the Special Prosecutor to carry out those responsibilities delegated to him, for both parties are under an independent obligation to this Court to discuss the jurisdictional aspects of the present proceeding.

[9] There is no merit to either the contention that the President is without authority to direct or control the actions of a subordinate officer or that his control is limited to his ability to discharge an executive employee. (S.P. Br. 35). Even the authority relied upon by the Special Prosecutor, 2 Op. Att'y Gen. 483 (1831) acknowledges the President's right to direct the actions of a subordinate officer.

> Upon the whole, I consider the district attorney as under the control and direction of the President, in the institution and prosecution of suits in the name and on behalf of the United States; and that it is within the legitimate power of the President to direct him to institute or to discontinue a pending suit, and to point out to him his duty, whenever the interest of the United States is directly or indirectly concerned. 2 Op. Att'y Gen. 487 (1831).

[10] See Pres. Br. 29 n. 14.

[11] See Pres. Br. 43 n. 31.

Court to determine whether the Chief Executive was correct in determining that certain executive materials should not, in the public interest, be used to further this prosecution. However, neither the President, the Attorney General, or the Special Prosecutor, by agreement or otherwise, can foist upon the courts the executive branch's own responsibility for determining the advisability of using certain executive materials in the furtherance of its own case. Nor, through judicial review, can the executive branch compel the court to resolve or determine the wisdom of a discretionary decision made by the Chief Executive when it is within the bounds of his constitutional authority. Therefore, not even through the mechanism of a lesser official like the Special Prosecutor, can the executive or the legislative branch confer jurisdiction upon the courts to review any discretionary determinations, solely within their respective spheres. In this regard, even the Special Prosecutor is forced to concede that neither "the President nor the Department of Justice could confer jurisdiction on the courts when such jurisdiction is constitutionally impermissible." (S.P. Br. 42). In all circumstances it is constitutionally impermissible for a district court to review a decision by the executive branch, especially the Chief Executive, that it will not use a particular document even to the benefit of its own case. Accordingly, the Special Prosecutor has failed to establish any basis for the district court's jurisdiction to intervene in this intra-branch dispute for the purpose of reviewing a prosecutorial decision made by the Chief Executive in the course of a criminal proceeding.[12]

II. A CONSTITUTIONAL ASSERTION OF A PRESIDENTIAL PRIVILEGE IS NOT REVIEWABLE BY THIS COURT

We deem it important to emphasize three points: (1) The issue at stake is presidential privilege, founded in the Constitution, relating to conversations of the President with his closest advisers, not the concept of executive privilege as it may be generally applicable to persons in the executive branch and under other circumstances; (2) The resolution of this issue lies in an analysis of the design of our government as a whole and its development, including but not limited to that of judicial precedents[13] (Pres. Br. 54–68); and (3) We repeat: "Significantly, the precise issue of the 'absoluteness' of executive privilege, as applied to presidential communications, has never been squarely confronted and definitely resolved by this Court." (Pres. Br. 51). To the extent there exists relevant judicial precedent, it supports the President's position. (Pres. Br. 74–82).

Because of the nature of the privilege asserted by the President, the bald statement of the Special Prosecutor that ". . . this Court has squarely rejected the claim that the Executive has absolute, unreviewable discretion to withhold documents from the courts" (S.P. Br. 18) is unsound. The mainstay of the Special Prosecutor's position, *United States* v. *Reynolds,* 345 U.S. 1 (1953), sustained, without the necessity of judicial inspection, a claim of privilege made on national security grounds by the Secretary of the Air Force.[14] Regardless of what principles may be extracted from that case, one thing is clear: the Court did not decide any constitutional issues. In summarizing *Reynolds,* (S.P. Br. 54), the Special Prosecutor omitted the language of Chief Justice Vinson, which reveals the true nature of the case:

> Both positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision. . . .
> . . . Since Rule 34 compels production only of matters 'not privileged,' the essential question is whether there was a valid claim of privilege under the Rule. . . . We think it should be clear that the term 'not privileged' as used in Rule 34, refers to 'privileges' as that term is understood in the law of evidence. (345 U.S. at 6).

[12] We find no necessity to repeat our position as to the power of the Court to entertain and determine a political question. (Pres. Br. 44–48). However, there is one point that must be emphasized. Since *Mississippi* v. *Johnson,* 4 Wall. (71 U.S.) 475 (1867), this Court has correctly been reluctant to intervene in political questions involving discretionary decisions that are properly the sole prerogative of a coordinate branch of government. No dispute could more clearly entangle this Court in a "political question" than the present dispute, which unquestionably affects the ongoing impeachment inquiry, and thus would be an intrusion by the Judiciary on the Legislature as well as the Executive. Only last week the Court refused to "distort the role of the Judiciary in its relationship to the Executive and the Legislature. . . ." *Schlesinger* v. *Reservists Committee to Stop the War,* — U.S. —, No. 72–1188, Slip Op. p. 19 (June 25, 1974).

[13] See Winter, *Watergate and The Law* 54–55 (American Enterprise Institute for Public Policy Research 1974)

[14] It should also be noted that the Court felt the necessity for the evidence sought was dubious. 345 U.S. at 11. In circumstances strikingly similar to those of the present case, it was noted that the Government had offered to make available, for testimony, the flight crew whose written statements were a prime object of the plaintiffs' discovery motions.

With the exception of *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,*[15] 463 F. 2d 788 (D.C. Cir. 1971), the other cases relied upon by the Special Prosecutor are for the same reason not relevant to this Court's disposition of the present dispute.

Roviaro v. *United States,* 353 U.S. 53 (1957), turned on the nature of the "informer's privilege," a government privilege arising out of an interest in effective law enforcement. *Carr* v. *Monroe Manufacturing Company,* 431 F. 2d 384 (5th Cir. 1970), a racial discrimination case against private and state defendants, dealt with an absolute privilege claim based on a state statute.[16] *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939 (Ct. Cl. 1958), a breach of contract case, involved a claim of executive privilege by the Administrator of the General Services Administration. In language echoing that of this Court in *Reynolds,* the court defined the privilege claimed solely in terms of the law of evidence, with its foundation in custom or statute.[17] The *Seaborg* case involved an attempt by environmentalists to enjoin the explosion of a nuclear underground test by the Atomic Energy Commission. In response to discovery efforts to ascertain whether the requirements of the National Environmental Policy Act had been met, the government, through five agency heads, asserted a claim of executive privilege based on constitutional grounds. That claim was summarily rejected by the court of appeals without reference to any judicial precedent or historical analysis.[18] That fact, coupled with the realization that presidential communications were not involved, deprives the holding of that case from exerting any meaningful influence on the precisely-drawn issue which is before this Court.

Our position, contrary to that apparently assumed by the Special Prosecutor (S.P. Br. 49–50), is not at odds with this Court's decision in *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). The touchstone of that holding was that President Truman's action in directing the seizure of the steel mills was not supported by any statutory or constitutional provision or concept; it exceeded all express and inherent power of the Presidency. In contrast, President Nixon's action, i.e., his assertion of executive privilege, is based squarely on the Constitution.[19] All the foregoing cases are examples where the Judiciary has reviewed, in varying degrees, claims of privilege exerted by lesser officers in the executive branch of government. Although, as we have shown, they are readily distinguishable from the case at bar, we recognize that a court will necessarily be confronted with similar issues and must review and determine them. In fulfilling its duty to resolve all the issues before it, a court, at times, must exercise its authority in a manner consistent with competing interests, e.g. a claim of privilege against self-incrimination.[20] However, in this case the court's duty and authority of review is complete when it determines that the President of the United States has asserted privilege.

Environmental Protection Agency v. *Mink,* 410 U.S. 73 (1973), deserves comment because of the Special Prosecutor's allusion to it. There the controversy centered around the government's asserted right of nondisclosure of certain documents under a provision of the Freedom of Information Act, a statute exempting from disclosure non-factual intra-agency advisory material. This Court fashioned a method of examination whereby the trial court could separate factual data from exempt material.[21] In remanding the case, in

[15] In *Seaborg*, the court stated that in *United States* v. *Reynolds*, *supra*, the issue of executive privilege based, on the constitutional doctrine of separation of powers, had been noted, but not decided. 463 F. 2d at 793.

[16] The court utilized *Reynolds*, as an analogy, to buttress its decision against absolute privilege. 431 F. 2d at 388.

[17] In *Kaiser*, the court held, without judicial review of the documents requested, that no production was required.

[18] 463 F. 2d at 793. Three of the judges of the United States Court of Appeals for the District of Columbia Circuit who were part of the majority in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973) comprised the unanimous Court *Seaborg*.

[19] See *Soucie* v. *David*, 448 F. 2d 1067, 1071 n. 9 (D.C. Cir. 1971); (Pres. Br. 49–50). We call the Court's attention to S.P. Br. 57 n. 43, where the Special Prosecutor notes Professor Wright's summary of commentators' skeptical attitude toward the belief that executive privilege is rooted in the Constitution. This Court should be aware of the actual setting of that observation. Professor Wright, in the text, was discussing governmental privileges covered by the proposed Rules of Evidence. He observed: "There [in the proposed rules] is no mention of the general executive privilege and it is to be abolished except to whatever extent it may be *required by the Constitution.* 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2019 at 175 (1970) (emphasis added). The footnote that elaborates that textural statement and that encompasses the language cited by the Special Prosecutor has the following remark as its initial thrust:

> The Supreme Court has said that the claim of an executive privilege has "constitutional overtones." *U.S.* v. *Reynolds*, 1953, 73 S. Ct. 528, 531, 345 U.S. 1, 6, * * *

[20] See discussion in *United States* v. *Reynolds*, 345 U.S. 1, 8–9 (1953).

[21] It also held that certain documents could not be subjected to any "in camera" inspection. 410 U.S. at 81–85. As to documents concerned with national defense, Justices Marshall and Brennan felt the need for secrecy was a decision solely for the Executive. 410 U.S. at 99–100.

part thereby reversing the decision of the court of appeals for the plaintiffs, this Court held that "in camera inspection" was not automatic since the agency may be able to show, by affidavit, that the items sought are, in fact, exempt. 410 U.S. at 93. The Special Prosecutor has attempted to utilize this case for the proposition that "the constitutional separation of powers does not give the Executive any constitutional immunity from judicial orders for the production of evidence." (S.P. Br. 61). In this regard, Justice Stewart at the outset of his concurring opinion noted that no constitutional claim was involved, and there was no issue regarding the nature or scope of executive privilege. 410 U.S. at 94. The second point to be noted in the *Mink* case is that no one was compelled to do anything. The Court did not discuss what might legally occur if the claim of privilege was ultimately rejected and noted the difficulty in analogizing Freedom of Information Act cases to ordinary litigation because of the non-availability of the option to dismiss or strike a defense which exists in the latter.

Lastly, *United States* ex rel. *Touhy* v. *Ragen*, 340 U.S. 462 (1951), has been cited in support of the Special Prosecutor's contention that the Judiciary has the power to compel production of evidence from the executive. (S.P. Br. 63). This case, once again, involved a decision in which the production of documents was not ordered. This Court upheld the validity of a Department of Justice regulation, which constituted the basis for the FBI agent's refusal to comply with a subpoena *duces tecum*. In the holding, this Court specifically stated:

> Petitioner challenges the validity of the issue of the order under a legal doctrine which makes the head of a department rather than a court the determinator of the admissibility of evidence. In support of his argument that the Executive should not invade the Judicial sphere, petitioner cites Wigmore, Evidence (3 ed.), § 2379, and *Marbury* v. *Madison*, 1 Cranch 137. *But under this record we are concerned only with the validity of Order No. 3229.* The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling. (340 U.S. at 468–469) (emphasis added).

Immediately following his reference to *Ragen*, the Special Prosecutor quotes (S.P. Br. 63) certain language from a work of Professor Wright in an attempt to emphasize his contention concerning the judicial power of enforcement in this case. The entire text of the partially quoted statement of Professor Wright now follows:

> In private litigation refusal of a government officer to comply with a court order overruling a claim of executive privilege and ordering disclosure could lead to conviction of contempt,[22] but there is a natural reluctance to invoke this sanction and the extraordinary writs of mandamus and prohibition have been held available to review contempt citations. If the government is a party, the court may penalize it for its failure to comply with a disclosure order by invoking any of the sanctions set forth in Rule 37(b)(2). In this way the court can achieve fairness in the case before it without actually compelling production of the information that the government is determined to keep confidential. 8 Wright and Miller, *Federal Practice and Procedure: Civil*, § 2019, at 172–173 (1970).

When holdings, as opposed to random language, command our attention, it becomes evident that such judicial precedent as does exist in fact supports the President's concept of executive privilege rather than that urged by the Special Prosecutor.

The Special Prosecutor cites *Conway* v. *Rimmer*, [1968] 1 All E.R. 874, in support of his argument that the Executive cannot be given unreviewable discretion in these matters. (S.P. Br. 56 n. 41). *Conway*, far from supporting the Special Prosecutor's view, is in fact wholly consistent with the position we are advancing. It is true that in *Conway* the House of Lords overruled what had been the English rule that a claim of privilege, no matter how routine or unimportant the document, is binding on the courts. Their Lordships, however, were at great pains to distinguish the kind of low-level routine papers there involved from papers at the highest level of government. Every one of the speeches drew this distinction and made it clear that when high-level documents, of the sort we have in the present case, are sought, the court must accept the Executive's claim of privilege without further inquiry. Thus in the principal speech Lord Reid said that "there are certain classes of documents which ought

[22] The Special Prosecutor's recitation of Professor Wright's language ends here.

not to be disclosed whatever their content may be." He then referred to "cabinet minutes and the like" as an example of a class of documents that ought not to be disclosed until they "are only of historical interest." [1968] 1 All E.R. at 888. Lord Hodson instanced "cabinet minutes, despatches from ambassadors abroad and minutes of discussions between heads of departments" as among those that are absolutely protected by a claim of Crown privilege. [1968] 1 All E.R. at 902, and see also his remark at 905. Lord Pearce said:

> Obviously, production would never be ordered of fairly wide classes of documents at a high level. To take an extreme case, production would never be ordered of cabinet correspondence, letters or reports on appointments to offices of importance and the like; but why should the same yardstick apply to trivial documents and correspondence with or within a ministry. [1968] 1 All E.R. at 910.

The observation of Lord Upjohn was in a similar vein:

> No doubt there are many cases in which documents by their very nature fall into a class which requires protection such as, only by way of example, cabinet papers, foreign office despatches, the security of the State, high-level inter-departmental minutes and correspondence, and documents pertaining to the general administration of the naval, military and air force services. . . . So, too, high-level inter-departmental communications, to take, only as an example on establishment matters, the promotion or transfer of reasonably high-level personnel in the service of the Crown; but no catalogue can reasonably be compiled. The reason for this privilege is that it would be quite wrong and entirely inimical to the proper functioning of the public service if the public were to learn of these high-level communications, however innocent of prejudice to the State the actual contents of any particular document might be; that is obvious. [1968] 1 All E.R. at 914–915.

Only Lord Morris of Borth-Y-Gest did not attempt to specify particular kinds of documents that are absolutely privileged, but he too noted that "[i]n many cases it will be plain that documents are within a class of documents which by their very nature ought not to be disclosed." [1968] 1 All E.R. at 901.

This recognition that there are some kinds of documents on which the decision of the Executive must be final, and not subject to review by the courts, is wholly consistent with what was held in *United States* v. *Reynolds,* 345 U.S. 1, 10 (1953), and indeed the *Reynolds* opinion was quoted in the principal speech in *Conway* of Lord Reid. [1968] 1 All E.R. at 887. It is consistent also with this Court's disclaimer in *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 170 (1803) of any judicial power to order "an intrusion into the secrets of the cabinet. . . ."

The distinction insisted upon so vigorously by all of the judges in *Conway* is the distinction that should control here. Decisions concerning material in the lower echelons of government or material of a routine, everyday nature, are not in point. The subpoena here in issue calls for recordings and notes of conversations between the President of the United States and his closest advisers.

We referred in our initial brief to "[t]he velocity with which the confidentiality of presidential communications has eroded. . . ." (Pres. Br. 133). Demands for presidential recordings or papers or even for presidential testimony have come from judges and defendants all over the country, both state and federal.[23] In his letter of July 23, 1973, to Senator Ervin, the President observed that "the tapes could be accurately understood only by reference to an enormous number of other documents and tapes, so that to open them at all would begin an endless process of disclosure and explanation of private Presidential records. . . ." The accuracy of that observation is now a matter of common knowledge. Initially Special Prosecutor Cox subpoenaed tapes and notes of nine conversations. His successor has been furnished all existing material covering those conversations and the President has voluntarily given Special Prosecutor Jaworski tapes of many other conversations. Now the Special Prosecutor seeks to require production of 64 more conversations. Should he be successful in that attempt, only a very foolhardy person would dare to predict that this would be the end of the matter and that the demand for private presidential material would not continue to grow insatiably.

All that we have said on this point was succinctly put by a distinguished constitutional lawyer, Charles

[23] See Pres. Br. 68 n. 51.

L. Black, Jr., who has observed that refusal to disclose communications of the kind involved in this litigation 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" *New York Times,* August 3, 1973, page 31.[24]

Although the Presidency will survive if the lower court's decision is allowed to stand, it will be different from the office contemplated by the Framers and occupied by Presidents, from George Washington through today.

III. THE CONSTITUTIONAL PRIVILEGE HAS NOT BEEN WAIVED

The Special Prosecutor purports to offer the Court an easy solution to the hard problems of this case when he says:

> the Court must use its process to acquire all relevant evidence to lay before the jury. In the present context it can do so with the least consequences for confidentiality of other matters and future deliberations of the Executive Branch by ruling that there has been a waiver with respect to this entire affair. (S.P. Br. 123).

The Court is offered three theories on which the Special Prosecutor thinks a holding of waiver can be justified. These are the President's statement of May 22, 1973, authorizing his aides to testify about Watergate-related matters (S.P. Br. 119), the President's release to the public of transcripts from 43 Watergate-related Presidential conversations (S.P. Br. 119),[25] and the fact that H. R. Haldeman has been permitted to hear tapes of selected conversations (S.P. Br. 122). Neither singly nor together do any of these waive the President's privilege not to disclose other conversations that are still confidential.

It is of course a truism that ordinary evidentiary privileges can be waived, as the cases discussed by the Special Prosecutor indicate. (S.P. Br. 117–121). But the separation-of-powers notions that underlie what is commonly referred to as "executive privilege" are such that ordinary common law notions of waiver are wholly inapplicable here. The privilege refers to the power of the President to decide whether or not the public interest permits disclosure of particular information. Because the President determines that the public interest permits making public certain information or because he determines that it is in the public interest to disclose other information to those persons in and out of government in whom he has confidence and from whom he seeks advice, he is not thereby precluded from determining that still other information must, in the public interest, be kept in confidence. The matter was well put by Professor Alexander Bickel:

> Again, the issue is not whether the President has waived his privilege to keep the tapes secret. To the extent that it exists and with respect to matter that it covers, I do not see how the privilege can be waived. Naturally, if a document or a tape is no longer confidential because it has been made public, it would be nonsense to claim that it is privileged, and nobody would trouble to subpoena it either, since it would be available.
>
> But nature and reason of the privilege are rather to repose in the President and in him alone the subjective judgment whether to maintain privacy or release information—and which, and how much, and when, and to whom. Far from being waived, the privilege, it seems to me, is as much exercised when information is released as when it is withheld. Bickel, "Wretched Tapes (cont.)," *New York Times,* August 15, 1973, p. 33.

A consitutionally-based privilege, which exists only so that the President, like the courts and like Congress,

[24] See the fuller expression of Professor Black's view in Cong. Rec. E5320–E5322 (daily ed. August 1, 1973); see also Carr, Bernstein, Morrison, Snyder, & McLean, *American Democracy in Theory and Practice* 609–610 (1956); Winter, *Watergate and The Law* 55 (American Enterprise Institute for Public Policy Research 1974).

[25] The President stated in his Formal Claim of Privilege (J.A. 48a) that he advanced no claim of privilege with respect to those portions of 20 tape recorded conversations for which transcripts have been made public. Accordingly, those portions of the 20 tapes are not at issue in this case as the President has no objection to judicial authentication.

can function effectively hardly vanishes because, in Professor Black's phrase, "little mousetraps of 'waiver' are sprung." Letter of Prof. Charles L. Black, Jr., Cong. Rec. E5320, E5323 (daily ed. August 1, 1973).

Nor is there any merit in the argument that by allowing his aides to testify on Watergate matters, the President waived privilege as to tape recordings. There is an inherent distinction between testimonial evidence and tape recorded conversations. This distinction is emphasized and evidenced by the very existence of the present dispute. It should be obvious—and the published transcripts that have been released vividly confirm—that 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. It is precisely with that distinction in mind, and with a strong desire that the truth about Watergate be brought out, that the President has not aserted a presidential privilege with regard to *testimony* about possible criminal conduct or discussions of possible criminal conduct. But testimony can be confined to the relevant portions of the conversations and can be limited to matters that do not endanger other privileged matters. Recordings cannot be so confined and limited, *Alderman* v. *United States,* 394 U.S. 165, 182 (1969), and thus the President has concluded that to produce recordings would do serious damage to presidential privacy and to the ability of that office to function effectively.

The distinction between testimonial evidence and other forms of tangible evidence is not only recognized by the executive branch, as there is a common congresssional practice in waiving congressional privilege and authorizing oral testimony by congressional staff members in court, but refusing to permit submission of related tangible material. See *Nixon* v. *Sirica,* 487 F. 2d 700, 772 (D.C. Cir. 1973) (Wilkey, J., dissenting), citing *United States* v. *Brewster,* 408 U.S. 501 (1972), and 118 Cong. Rec. S. 16,766, 92nd Cong. 2d Sess. (October 4, 1972) See also S. Res. 338, 120 Cong. Rec. 4973, 93rd Cong., 2d Sess. (daily ed., June 12, 1974).

The distinction has been recognized also in this Court. Indeed the short answer to the Special Prosecutor's 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. Similarly, the court of appeals in *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* No. 74–1258 (D.C. Cir., May 23, 1974), regarded an identical waiver argument, offered by the plaintiffs in that case, as so lacking in substance that it did not merit discussion in the opinion.

Finally, there is much weight in a point made by Judge MacKinnon in his dissent in *Nixon* v. *Sirica,* 487 F. 2d 700, 758–759 (D.C. Cir. 1973). He wrote:

> There has been no waiver. This conclusion rests upon three factors: the strict standards applied to privileges of this nature to determine waiver; the distinction between oral testimony and tape recordings; and, most important, considerations of public policy that argue persuasively for a privilege that permits the Chief Executive to disclose information on topics of national concern without that which properly ought to be withheld in the public interest.

Like Judge MacKinnon, we think that the most important of these points is the one last stated. Plainly the country is best served when there is the maximum disclosure possible from the Executive, consistent with the requirements of the public interest. This President, like his predecessors, has always acted on that principle. Disclosure has been the rule and claim of privilege the rare exception. But if this Court were to accept the Special Prosecutor's beguiling suggestion that this case can be decided on a narrow ground of waiver, the inevitable long-term consequence must be less disclosure, not more, since Presidents will be reluctant to make public even those things that can be released without harm to the public interest, if by doing so they may be held to have waived their constitutional privilege to withhold related information that the nation's interests require be kept confidential.

IV. THE SPECIAL NATURE OF THE PRESIDENCY

The Special Prosecutor states an obvious and important truth when he reminds us that "in our system

even the President is under the law." (S.P. Br. 68) (emphasis in original). A fundamental error that permeates his brief, however, is his failure to recognize the extraordinary nature of the Presidency in our system and that the Framers, who fully understood this, provided an extraordinary mechanism for making a President subject to the law.

The President is not merely an individual, to be treated in the same way as any other person who has information that may be relevant in a criminal prosecution. He is not, as the Special Prosecutor erroneously suggests, merely "the *head* of the Executive Branch." (S.P. Br. 79) (emphasis in original). Instead, as we pointed out at the beginning of this brief, it was announced by this Court more than a century ago, and since reiterated, that "the President is the Executive Department." *Mississippi* v. *Johnson,* 4 Wall. (71 U.S.) 475, 500 (1867). So much is apparent from the Constitution itself. Article II begins with the simple but sweeping declaration: "The executive Power shall be vested in *a* President of the United Statese of America" (emphasis added). In addition, the President, as this Court has recognized, is, more than any other officer of government the representative of all of the people. *Myers* v. *United States,* 272 U.S. 52, 123 (1926). Chief Justice Taft went on to say that

> as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

It was no mere happenstance that all executive power was vested in a single person, the President. This was a subject of recurring debate at the Constitutional Convention. Suggestions of a multi-member Executive were repeatedly pressed and as repeatedly rejected. It was seen, as Dr. Franklin said, as "a point of great importance." 1 *Farrand* 65.

In this respect the Executive differs from the other two great branches of government. The legislative power is vested by Article I in "a Congress of the United States," divided into two bodies and composed now of 535 members. The judicial power is, by Article III, spread among the nine Justices of this Court and the hundreds of judges of the inferior courts that Congress has seen fit to ordain and establish. But one person, and one person alone, is entrusted by Article II with the awesome task of exercising the executive power of the United States. "The President is the Executive Department." This difference, as we shall develop below, has important consequences. It serves to distinguish many of the cases relied on by the Special Prosecutor, involving as they do individual members of the legislative and judicial branches. Specifically, the particular position the President occupies in our constitutional scheme means that the courts cannot issue compulsory process to compel him to exercise powers entrusted to him in a certain way, that, so long as he is President, he is not subject to criminal process, and that, as a logical corollary, he may not, while President, be named as an unindicted co-conspirator.

Of course, as we have already pointed out (Pres. Br. 52 n. 45), the Framers did not want a king, and Hamilton devoted all of the 69th *Federalist* to demonstrating that the Presidency, as created in the Constitution, bore no resemblance to the monarchy from which the colonists had successfully rebelled. The term of the President is limited to four years. The legislative branch controls the national purse strings, the war power, and the general policy direction of government. The President is given only a limited veto, subject to being overridden, over legislative acts. He is given no role whatever in the process of constitutional amendment. Finally, and most important for present purposes, the President may be removed from office by conviction on impeachment, and after he has left office, either through expiration of his term or by conviction on impeachment, he is subject to prosecution for crimes that he may have committed.

We have already developed in detail the process by which the impeachment provisions of the Constitution took form. (Pres. Br. 95–104). The language of Article I, section 3, clause 4, can hardly be read in any other way than that indictment of a President can only follow his conviction on impeachment. This was certainly the understanding of the delegates at Philadelphia, of the contemporary expositors of the Constitution, and of students of constitutional law from 1787 until today.

There is nothing in *United States* v. *Isaacs,* 493 F. 2d 1124 (7th Cir. 1974), *cert. denied* —— U.S. ——, (June 17, 1974), that is contrary to what we have just said. A judge of a court of appeals is not the judicial branch. He is a part of that branch, but the Judiciary

can function uninterrupted during those rare occasions when a single judge is forced to stand trial on a criminal charge. The Presidency cannot function if the President is preoccupied with the defense of a criminal case, and the thought of a President exercising his great powers from a jail cell boggles the mind.[26]

The President, as we have noted, *is* the Executive Department. If he could be enjoined, restrained, indicted, arrested, or ordered by judges, grand juries, or marshals, these individuals would have the power to control the executive branch. This would nullify the separation of powers and the co-equality of the Executive.

The conclusion that the President is not subject to indictment while in office is consistent also with a proper ordering of government. When this principal national leader, elected by all of the people, is to be removed, it is proper that the removal be considered and accomplished only by a body that, like the President, is politically representative of the whole Nation. Impeachment is a process designed to deal with the problem of criminal conduct by the President and yet still preserve the majoritarian character of the Republic. Criminal indictments or judicial orders cannot provide the tools to remove or limit a whole branch of government, and were not contemplated by the Founders for such a purpose. Only the branch of government that represents the people who elected the President, the legislative branch, can take actions that will in any way remove or tend to remove a President from office. This is the function of Congress, not of a grand jury.

For reasons that we have already fully developed (Pres. Br. 107–115), it follows *a fortiori* from the non-indictability of an incumbent President that he cannot be named as an unindicted co-conspirator, and that the action of the grand jury in this case must be ordered expunged. The ability of a President to function is severely crippled if a grand jury, an official part of the judicial branch, can make a finding that a President has been party to a criminal conspiracy and make this in a form that does not allow that finding to be reviewed or contested and disproved.[27] To allow this would be a mockery of due process and would deny to Presidents of the United States even those minimal protections that the Constitution extends to prison inmates subject to disciplinary proceedings. *Wolff* v. *McDonnell,* —— U.S. ——, No. 73–679 (June 26, 1974).

If the grand jury had before it evidence, competent or otherwise, *United States* v. *Calandra,* 414 U.S. 338 (1974), that led it to think that the President had been party to a crime, its only permissible course of action was to transmit that evidence to the House Judiciary Committee, rather than to make a gratuitous, defamatory, and legally impermissible accusation against the President.

Presumably the Special Prosecutor advised the grand jury to make this finding, and did so with the thought that it would strengthen his hand in litigation such as the present case (P.S.A. 8). If the President could be considered a co-conspirator, then all of his statements would arguably come within the exception to the hearsay rule and would meet the requirement of Rule 17(c) that subpoenaed material must be evidentiary in nature. In addition, this impermissible finding is relied on by the Special Prosecutor for his argument (S.P. Br. 90–102) that executive privilege vanishes if there is a *prima facie* showing of criminality. But even if the grand jury were empowered to make this finding—and as a matter of law it cannot—we have already shown that an allegation of criminal activity does not overcome the assertion of presidential privilege (Pres. Br. 82–86), and that a grand jury finding, based as it is only on a showing of probable cause, falls far short of the *prima facie* showing of criminality that is required to defeat even the usual evidentiary privileges. (Pres. Br. 115–122.)[28]

[26] It is also worthwhile noting that at the Convention the discussion of impeachment was wholly in terms of a remedy against the President. Berger, *Impeachment: The Constitutional Problems* 100 (1973). The inclusion in Article II, section 4, of the "Vice President, and all Civil Officers of the United States" was made without discussion in the closing hours of the Convention. 2 *Farrand* 575.

[27] And to suggest that the naming of a President as a criminal co-conspirator, even if unindicted, is not an "impeachment" of the President is, we submit, to play games with common words and common sense.

[28] The cases relied on by the Special Prosecutor (S.P. Br. 98) are not to the contrary. Such cases as *Ex parte United States,* 287 U.S. 241, 250 (1932), *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 599 (1950), and the others cited stand only for the proposition that a grand jury indictment conclusively establishes that there is probable cause to hold the person named for trial. They do not hold that the grand jury's action is an evidentiary showing of a *prima facie* case.

Again the Special Prosecutor is not helped by *United States* v. *Aldridge,* 484 F. 2d 655, 658 (7th Cir. 1973); *United States* v. *Bob,* 106 F. 2d 37 (2d Cir. 1939), *cert. denied,* 308 U.S. 589

The Special Prosecutor makes the surprising suggestion that the President enjoys no privileges or immunities.

> One might infer quite plausibly from the specific grant of official privileges to Congress that no other constitutional immunity from normal legal obligations was intended for government officials or papers. (S.P. Br. 77).

But it is quite clear that the privileges given to individual members of the legislative branch by Article I, section 6, were given them for a specific and well-understood purpose. This was to protect the legislators "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary . . ." *United States* v. *Johnson,* 383 U.S. 169, 179 (1966). It was "designed to assure a co-equal branch of government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States,* 408 U.S. 606, 616 (1972).

The Executive needed no protection from himself. As chief of state, chief executive, commander-in-chief, and chief prosecutor, he had no need to fear intimidation by a hostile executive or prosecution by an unfriendly executive. In addition, he was protected further by the elaborate procedure for impeachment, and by his immunity from criminal process until he had been convicted on impeachment. Thus the Constitution says nothing about immunities of the Executive comparable to what it says about members of the legislative branch because to have done so would have been to guard against an evil that could never come to pass.

Even members of the executive branch do have to fear damage actions brought by private citizens, and this Court has not been slow to read into the Constitution an implied immunity to protect the Executive in this situation. The leading case is *Spalding* v. *Vilas,* 161 U.S. 583 (1896), frequently relied on in this Court and always with approval. E.g., *Barr* v. *Matteo,* 360 U.S. 564, 570 (1959);[29] *Scheuer* v. *Rhodes,* 413 U.S. 919, 927 n. 8 (1974).

The Special Prosecutor would have the Court believe that the discretion about production of documents, which it has always been recognized that Presidents have, shrinks to a mere ministerial duty to produce what is demanded whenever a court disagrees with the Chief Executive's assessment of what the public interest requires. The argument seems little more than a play on words, intended to avoid the decisions, from *Marbury* on, that the courts may compel ministerial acts but that they cannot interfere with discretionary decisions of high executive officers.

Nothing could be clearer than that the decision to disclose or to withhold the most intimate conversations of the President with his chief advisers involves the gravest and most far-reaching possible considerations of public policy. Who can say what the long term, or even short term, public effects of the President's decision to make public transcripts of tapes of his conversations about Watergate will be? It was a difficult and monumental decision, and no man living can predict with assurance how ultimately the history of this country, and indeed of the world, may be influenced by it. It was a discretionary decision in the most important sense, and it is nonsense to call such a disclosure

(1940); or the other cases he cites with regard to attorney-client privilege. In those cases the privilege was held to vanish only after the government by proof at trial, had made a *prima facie* showing of criminal involvement.

Finally, the Special Prosecutor's heavy reliance on *Clark* v. *United States,* 289 U.S. 1 (1933) (S.P. Br. 95–97, 100–101, 108–109), is misplaced. Quite aside from the very different nature of the "privilege," or, more properly, rule of competency, there in issue, Justice Cardozo was quick to point out that "[i]t would be absurd to say that the privilege could be got rid of merely by making a charge of fraud," 289 U.S. at 15, and that "there must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in." 289 U.S. at 14.

[29] In the *Barr* case this Court relied heavily, in discussing immunity for executive officers, on the well-known opinion of Judge Learned Hand in *Gregoire* v. *Biddle,* 177 F. 2d 579 (2d Cir. 1949), where judicial immunity was at issue. Several of Judge Hand's insights in that case are applicable here. Thus he says:

> it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him . . . (177 F. 2d at 581).

Again Judge Hand observed that "[t]here must indeed be means of punishing public officers who have been truant to their duties . . ." 177 F. 2d at 581. But the Constitution provides three sanctions against a truant President. He is subject to the political sanction of being defeated for reelection and to the legal sanctions of conviction on impeachment and of criminal punishment after he has been removed from office.

"ministerial" merely because the final action of disclosure can be accomplished by a messenger.

A presidential decision to release the confidential tapes or written memoranda of his meetings with his advisers involves the same basic discretion as his initial decision to make such records. Surely neither the courts nor Congress could require Presidents to make such recordings on the ground that they would then be available should there be charges of misconduct against aides to some future President.

This case must be viewed in the light that the President is the executive branch, co-equal to the multi-membered legislative and judicial branches. If that co-equality is to be preserved, the President cannot be subject to the vagaries of a grand jury nor deprived of his power to control disclosure of his most confidential communications. If he misuses his great powers, he must be proceeded against by the remedy that the Constitution has provided.

V. THE SPECIAL PROSECUTOR HAS NOT DEMONSTRATED A UNIQUE AND COMPELLING NEED FOR THIS MATERIAL

The Special Procecutor makes the casual suggestion that "[t]here is a compelling public interest in trying the conspiracy charged in *United States* v. *Mitchell,* et al., upon all relevant and material evidence." (S.P. Br. 107). Doubtless every prosecutor in history has thought the same thing. The genius of the law, happily, has rejected that course, and in this case the Special Prosecutor's suggestion begs every important question before the Court. A prosecutor has the right to every man's evidence "except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg* v. *Hayes,* 408 U.S. 665, 688 (1972). If, as we have argued, the materials at issue are subject to a valid privilege, based both on the Constitution and on the common law, the Special Prosecutor may not have them, no matter how relevant or material he thinks they may be, any more than he could require the defendants in this case to produce relevant and material evidence based on what they told their attorneys or based on confidential communications with their wives.

Our argument, of course, has been that the great question is, as Judge Wilkey put it, "Who Decides?", and that the answer to that question is that the President decides. But even if we are wrong on that, and the courts play a limited role under unusual circumstances, as held by the majority in *Nixon* v. *Sirica,* 487 F. 2d 700 (D.C. Cir. 1973), the showing made by the Special Prosecutor falls far short of the requirements that the court of appeals announced in that case. The court there used the terms "critical," 487 F. 2d at 706, "peculiarly necessary," 487 F. 2d at 717, and evidence "for which no effective substitute is available," 487 F. 2d at 717, to describe the grand jury's need for the tapes there under subpoena. We predicted in our initial submission that the Special Prosecutor could make no similarly compelling showing in this case (Pres. Br. 86–95), and his brief has confirmed that fact. There is not one statement in the Special Prosecutor's Brief that suggests or even implies that if he is unable to obtain the material sought, the prosecution of this case will not be successful.[30]

The Special Prosecutor claims "that the 'unique' circumstances which led to the rejection of the President's claim of privilege in the context of a grand jury investigation have continued applicability." (S.P. Br. 107–108) He, of course, finds it convenient to ignore other salient portions of the opinion in *Nixon* v. *Sirica* that are adverse to his position. It must be remembered that the court of appeals went to great lengths in that case to limit its holding "strictly to that required by the precise and entirely unique circumstances of the case," 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 show of need." 487 F. 2d at 722.

The Special Prosecutor cites *Committee for Nuclear Responsibility* v. *Seaborg,* 463 F. 2d 788 (D.C. Cir. 1971), to illustrate the possible consequences of not overcoming a privilege. (S.P. Br. 108). For "[o]therwise the head of an executive department would have the power on his own say-so to cover up *all* evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." 463 F. 2d at 794. (emphasis added).

[30] It is significant that on June 3, 1974, Charles W. Colson pleaded guilty to the felony of obstructing justice, 18 U.S.C. § 1503, in the case of *United States* v. *Ehrlichman, et al.,* (D.D.C. Cr. No. 74–116) and subsequently all other charges against him were dismissed. Thus, assuming *arguendo* the Special Prosecutor does have a need for the subpoenaed items, the fact that Colson is no longer a defendant, certainly diminishes considerably, if not obviates completely, any need the Special Prosecutor may have ever had for subpoenaed items numbered: 1, 4, 5, 6, 13 and 17.

But such a consequence is obviously not possible in our present situation [31] where the President has already permitted his closest aides and advisors to give public and grand jury testimony. In addition, voluminous documents and materials have been submitted to the Special Prosecutor, to the congressional committees investigating Watergate, and to the public at large. As a result, grand jury indictments have been returned, and a number of convictions have already been obtained. There can be no valid assertion that if the privilege is not overcome in the present case, the consequences stated in *Seaborg* would result. The *Seaborg* case, rather than supplying reasons for overcoming the privilege in this case, illustrates the absence of any reason for doing so.

We have previously argued that the Special Prosecutor has failed to satisfy the requirements of Criminal Rule 17(c) for subpoenaed material. (Pres. Br. 122–133). We continue to believe that. Although in general we do not disagree with the propositions of law advanced by the Special Prosecutor on this issue,[32] we take serious issue with his application of the law to the facts of this case, and particularly to his attempt, implicit in his discussion of the facts, to shift the burden on the issue of relevancy to the President. The Special Prosecutor is seeking the materials. He must show that the documents are evidentiary and relevant. It is not for the President to prove that they are not.

[31] This fact is conceded by the Special Prosecutor, who in order to support his waiver theory freely admits that the President has "authorized voluminous testimony and other statements concerning Watergate-related discussions and his recent release of 1216 pages of transcript . . ." (S.P. Br. 116–117), and that "there has been extensive testimony in several forums concerning the substance of the recorded conversations now sought for use at the trial in *United States* v. *Mitchell, et al.*". (S.P. Br. 118–119).

[32] We do take issue with the suggestion that the subpoena upheld in *Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (1951), was much less particular than the subpoena in the present case. (S.P. Br. 126). The subpoena in *Bowman* was specifically limited to the documents, books, records, and objects "which were either presented to the grand jury or would be offered as evidence at trial." 341 U.S. at 217. This was a much more particularized showing of relevance and admissibility than the Special Prosecutor has made.

His reference to *United States* v. *Carter*, 15 F.R.D. 367, 371 (D.D.C. 1954), for the proposition that Rule 17(c) reaches materials useful for impeachment (S.P. Br. 128) is misleading, since that case, and many others we have cited (Pres. Br. 130), hold that impeachment materials cannot be obtained in advance of trial and one must wait to see if the person in question actually testifies.

But even if there is enough in the Special Prosecutor's conclusory statements to turn the color of legal litmus paper with regard to Rule 17(c), in its application to ordinary documents, he has failed to show the critical and compelling need that is required to overcome a claim of presidential privilege even under what we think to be the too permissive standard of *Nixon* v. *Sirica*.

CONCLUSION

Two years of Watergate have left their mark on America. Apart from its impact on the lives of the many men and women involved in the events, Watergate will affect practices, attitudes, and values in our political life in ways that are diverse and lasting and, it is to be hoped, for the good. Without the passage of another law or the imposition of another sentence Watergate will have wrought a great change in American life. But the processes of the law that have been set in motion by that set of events must run their course. What remains to be seen is whether the tides that surge about Watergate will alter the relationship among the branches of government; whether, in short, the complex and sensitive balance of our constitutional structure will be impaired.

Our last word is therefore essentially a neutral one. In choosing this closing note we do not abandon our expectations for success or our conviction that we are right. We simply recognize that there has been enough argument about the powers and privileges of particular individuals who happen to occupy high office in the three branches and exercise their authority temporarily and in a representative capacity. For in the final analysis it is the Constitution we are all analyzing, arguing, expounding, and, in a sense of mutuality, undertaking to protect for the long life of the Nation.

In this setting the terminal question is: What decision best defends the constitutional structure of American government? What decision lifts the resolution of this case above the passions of this moment in history and safeguards the strengths and intergrity of the Constitution against the exigencies of an unknown and unknowable future? There is no doubt about the power, indeed the responsibility, of the Court to answer justiciable questions that are appropriately posed about the meaning of the Constitution. Nor, in our submission, is there any question but that the central idea of the Constitution is the distribution of power among the separate branches and the resolution of

controversy and disagreement by accommodation rather than confrontation. A constitution is a way of governing, not a set of codified specifications for the resolution of disputes among the sovereign branches. There are blank spaces on the constitutional canvas that must be left untouched if the Constitution is to bear the same creative relation to our future that it has to our past.

In our briefs, we and the Special Prosecutor have cited *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), to support conflicting arguments. We quote the opening words of Mr. Justice Frankfurter's concurring opinion, confident in the knowledge that they reflect beliefs we and the Special Prosecutor hold in common:

> Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims.
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> Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. An English observer of our scene has acutely described it: 'At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start.' *The Economist,* May 10, 1952, p. 370.
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> The path of duty for this Court, it bears repetition, lies in the opposite direction. (343 U.S. at 593–594).

Respectfully submitted,

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