Johnny Horizon '76 Clean Up America Month

Proclamation 4246. September 19, 1973

By the President of the United States of America
a Proclamation

While the Federal Government pursues its national responsibility to prevent pollution of our air, water and land resources, no contribution to a better environment can match the exercise of individual responsibility. We must recognize that environmental improvement and protection require the commitment and positive action of each and every American.

We can have clean air, clean water, beautiful, open forests and shores, but all these will not improve our environment if our immediate surroundings are cluttered and degraded. Our most precious environment is the area in which we live—our city streets and rural towns. Environmental awareness goes far beyond the improvement of what we commonly refer to as our natural resources.

The spirit with which we work to enhance our lives must be one of: "I'll help, too." To dramatize this spirit, the Congress has by House Joint Resolution 695, 93rd Congress, designated the period of September 15 to October 15, 1973 as "Johnny Horizon '76 Clean Up America Month" and requested the President to issue a proclamation calling for observance of this month.

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, do hereby proclaim "Clean Up America Month," and ask our Nation's attention to the Johnny Horizon '76 environmental awareness and action program for America's 200th birthday and related Bicentennial activities. I urge representatives of business, industry, labor, government, civic groups and other citizens to join together to demonstrate the significant results that can be realized when Americans translate their concerns into affirmative action. I further urge neighborhood and community cleanups, beautification programs, resource recovery and education programs, anti-litter campaigns, energy and wildlife conservation efforts and other worthwhile activities.

IN WITNESS WHEREOF, I have hereunto set my hand this nineteenth day of September, in the year of our Lord nineteen hundred seventy-three, and of the Independence of the United States of America the one hundred ninety-eighth.

RICHARD NIXON

[Filed with the Office of the Federal Register, 9:43 a.m., September 20, 1973]

Minimum Wage Bill

White House Statement on the Sustaining by the House of Representatives of the President's Veto of H.R. 7935. September 19, 1973

The President is gratified by the action of the House of Representatives in sustaining his veto of the bill to raise the minimum wage. As he stated in his veto message, this bill would have been inflationary and would have penalized the workers who can least afford it by jeopardizing employment opportunities for low wage earners and the unemployed, especially nonstudent teenagers.

The President wishes to commend the House for this responsible action, which was made possible by the courageous votes of many Members to sustain the veto in spite of intense pressure exerted upon them in the opposite direction.

It is now up to the Congress to replace the vetoed bill this year with a new bill which will bring the minimum wage in line with the increased cost of living while doing so in a way that helps to check inflation and that protects jobs for low-income workers. President Nixon reaffirms his pledge to cooperate fully with the House and Senate to achieve speedy passage of this urgently needed legislation.

NOTE: The statement was made available by the White House Press Office. It was not issued in the form of a White House press release.

Reply Brief Regarding Court Order Requiring Production of Recordings and Documents

Reply Brief Filed by Attorneys for the President in the United States Court of Appeals for the District of Columbia Circuit. September 19, 1973

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73–1962
No. 73–1967

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

v.

THE HONORABLE JOHN J. SIRICA, UNITED STATES DISTRICT JUDGE, RESPONDENT,

and

UNITED STATES OF AMERICA, PETITIONER,

v.

THE HONORABLE JOHN J. SIRICA, UNITED STATES DISTRICT JUDGE, RESPONDENT,

Reply Brief of Richard M. Nixon

In accordance with the Court's order of September 11, the President of the United States files this Reply Brief in support of his Petition for a Writ of Mandamus and in opposition to the Special Prosecutor's Petition for a Writ of Mandamus.[1] As a matter of convenience, we first will set out the reasons why the Special Prosecutor is not entitled to the review he seeks here before discussing the merits of the case.

I. THE SPECIAL PROSECUTOR'S REQUEST FOR REVIEW

The Special Prosecutor is in error in contending that this Court has jurisdiction, either on the Petition for Mandamus he initially filed or in connection with the Notice of Appeal he filed after oral argument, to consider his contention that the District Court did not go far enough in granting him the relief he sought.

It is convenient to dispose first of the suggestion at page 5 n. 1 of the Reply Memorandum for the United States [2] that appeal at his instance may lie from the District Court's order, though in fairness we must note that the Special Prosecutor apparently makes this suggestion only because of the statement by the District Judge, in his answer to the Petition for Writ of Mandamus and again, through his counsel, at the oral argument (Tr. 97–98), that the order of August 29th was a final order appealable as of right. We submit that the District Judge is in error in thinking that he had entered an appealable order.

It is quite obvious that the President could not have appealed from the August 29th order. The Special Prosecutor admitted this, in paragraph 2(b) of his Answer to our Petition for Mandamus, and this is the square holding of *United States* v. *Ryan,* 402 U.S. 530 (1971). It must be equally clear, however, that the order is not appealable at the instance of the Special Prosecutor.

The Special Prosecutor suggests (Reply Memorandum 5 n. 1) that the order may be appealable under 28 U.S.C. § 1291, 28 U.S.C. § 1292(a)(1), or 18 U.S.C. § 3731. We deal with these seriatim.

28 U.S.C. § 1291 provides no basis for an appeal by the Special Prosecutor.

> The United States can appeal in a criminal case only if the right of appeal is specially given by statute. Being a general grant of jurisdiction, § 1291 does not authorize the Government to appeal in a criminal case.

9 Moore & Ward, *Federal Practice* ¶ 110.04, at 96 (1969). Quite aside from that fatal barrier, § 1291 is confined to "final judgments", and the decision of the District Judge that he cannot yet determine whether all or any part of the tapes in question should go to the grand jury possesses none of the indicia of finality.

Nor is appeal available under 28 U.S.C. § 1292(a)(1), allowing appeal from the grant or denial of an injunction. This basis for appeal was expressly rejected in *United States* v. *Ryan,* 402 U.S. 330, 334 (1971), under circumstances in which a stronger argument for a § 1292(a)(1) appeal could have been made than is available here.

Finally, no appeal will lie under 18 U.S.C. § 3731, even as amended in 1968 and 1971. Some word of historical background will help to put the present version of that statute in perspective. For most of our history it had been the law that the United States had no right of appeal under any circumstances in a criminal case. *United States* v. *Sanges,* 144 U.S. 310 (1892). The Criminal Appeals Act of 1907, 34 Stat. 1246, was intended to correct that situation, and that act, as it has been amended from time to time, is now 18 U.S.C. § 3731.

The statute was always strictly construed, in accordance with the strong policy that "appeals by the Government in criminal cases are something unusual, exceptional, not favored." *Carroll* v. *United States,* 354 U.S. 394, 400 (1957); *Will* v. *United States,* 389 U.S. 90, 96 (1967). As the Court said in the *Will* case:

> Congress clearly contemplated when it placed drastic limits upon the Government's right of review in criminal cases that it would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions. This Court cannot and will not grant the Government a right of review which Congress has chosen to withhold.

389 U.S. at 97 n. 5.

A particularly glaring omission in the Criminal Appeals Act as it formerly stood was that there was no way whatever for the United States to obtain review of an order of a District Court granting a motion to suppress illegally-obtained evidence, even though the Government might have no case without the evidence and even though District Courts might well err in trying to apply the complex body of doctrine that has developed under the Fourth Amendment. Accordingly, in 1968 Congress amended § 3731 to give the United States a right of appeal, under defined circumstances, from the grant of suppression motions 82 Stat. 237. The statute was a wise and a helpful one. 3 Wright, *Federal Practice and Procedure: Criminal* 141 (1969); 9 Moore & Ward, *Federal Practice* ¶ 110.19[7] (1969). Even so, the statute, pro-

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[1] To a limited extent this Reply Brief duplicates things that Counsel for the President said at oral argument September 11th. We have done this where we have thought it would be helpful to the Court to have those expressions as a part of a coherent Brief rather than being required to piece together the Reply Brief and the Transcript of Argument.

Because it requires considerable time to have a brief such as this typed in final form and duplicated, it is impossible to judge, at the time this is being written, whether any fruitful result will come from discussions among the parties as suggested in the Court's memorandum of September 13th. Counsel for the parties will be meeting for that purpose and a report will be made to the Court by September 20th.

[2] The document filed originally by the Special Prosecutor in the District Court is here referred to as Brief in Support, his initial brief in this Court as Supplemental Brief, and his post-argument submissions as Reply Memorandum.

viding as it did a carefully defined and limited right of appeal in criminal cases, was not a retreat from the general policy that appeals by the Government in criminal cases are not favored. "Instead, it is a limited exception to it, and as such is to be narrowly construed." *United States* v. *Greely,* 134 U.S.App.D.C. 196, 198, 413 F.2d 1103, 1105 (1969).

But the difficulties with the Criminal Appeals Act went far beyond its failure, until 1968, to allow for review of suppression orders. There was great uncertainty about what orders were appealable and what were not, particularly in view of the archaic terminology of the statute. There was frequent uncertainty about whether appeal would lie to the Supreme Court or to the Court of Appeals, and direct appeal to the Supreme Court was as unsatisfactory in that context as in every other. These defects in the statute led the Supreme Court to describe it bluntly as "a failure." *United States* v. *Sisson,* 399 U.S. 267, 307 (1970). These were the problems to which Congress addressed itself in 1970. See S. Rep. No. 91–1296, 91st Cong., 2d Sess. (1970). The only change proposed with regard to the 1968 provision allowing appeal of suppression orders was to make it clear that this applied to a suppression order at a probation revocation hearing. *Id.* at 2, 12–13. The bill was passed unanimously—and almost without discussion—by the Senate, 116 Cong. Rec. 35658–35660 (1970), and later that same day appended as an amendment to the Omnibus Crime Control Act of 1970, *id.* at 35742, in which form—with a modification in conference not presently relevant—it was enacted into law. 84 Stat. 1890.

It is quite true that in the present form the statute says that it "shall be liberally construed to effectuate its purposes." That language is hardly license to entertain an appeal in a case not within the statutory language or the purposes for which the statute was adopted and more recently amended. The order of August 29th is not one dismissing an indictment or information and does not come within the first paragraph of § 3731. It is not an order "suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding" and thus is not within the second paragraph of the statute. The District Court has neither suppressed nor excluded anything. It has held only that it does not yet have sufficient information to rule on a claim of privilege with regard to material covered by a subpoena.

Even if the District Court were ultimately to sustain in full the President's claim of privilege, it is far from clear that an appeal would lie at the instance of the Special Prosecutor. One court, fully mindful of the 1971 amendment and of its statement that it is to be liberally construed "to effectuate its purposes," has said that "the legislative intent was to allow the Government to appeal from any order of the District Court suppressing evidence and ordering the return of seized property except those orders made during trial on an indictment or information." *United States* v. *Calandra,* 455 F.2d 750, 752 (6th Cir. 1972). That is, we think, a fair description of the history and purpose of the amended statute. There is not the slightest indication that Congress intended so drastic a change in federal practice as to authorize an appeal by the United States whenever a District Court sustains a claim of privilege by a witness testifying, other than at trial, or by a witness subpoenaed to produce documents. Nor is it likely that Congress would have reversed the historic tradition and made Government appeals in criminal cases a routine, commonplace matter without debate or division among its members.

But if, as we have seen, the Special Prosecutor cannot appeal this wholly interlocutory ruling by the District Court, neither can he obtain review by mandamus. The expansion of the right of appeal, in carefully defined circumstances, by the 1968 and 1971 amendments of 18 U.S.C. § 3731 does not affect the restrictions on the extraordinary writ of mandamus announced in *Will* v. *United States,* 389 U.S. 90 (1967). Judge Friendly has recently written that "we are well aware that mandamus may not be employed to circumvent the limitations of the Criminal Appeals Act." *United States* v. *Weinstein,* 452 F. 2d 704, 712 (2d Cir. 1971), *cert. denied* 406 U.S. 917 (1972).

The cases relied on by the Special Prosecutor in support of mandamus are not in point. He twice refers (Reply Memorandum 1, 3) to *Donnelly* v. *Parker,* —— U.S. App. D.C. ——, —— F. 2d ——, No. 73–1259 (August 21, 1973), without noting that that was a civil case in which mandamus was *refused.* The Fourth Circuit decision cited at Reply Memorandum 2 not only was decided long before the *Will* case announced a more restrictive view about mandamus but also was a ruling on a definite action by a District Court, while in this case the District Judge has ruled only that he is not yet in a position to determine whether the Special Prosecutor should be given the material he seeks. *United States* v. *United States District Court for the Eastern District of Michigan,* 444 F. 2d 651, 655–656 (6th Cir. 1971), *affirmed* 407 U.S. 297 (1972), cited at Reply Memorandum 3, was an instance in which the Government's case would have been dismissed if it had not been able to obtain review by mandamus. Thus it is quite consistent with the statement in *Will* that

> this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal.

389 U.S. at 98. Finally, *Schlagenhauf* v. *Holder,* 379 U.S. 104, 111 (1964), quoted extensively at Reply Memorandum 7, held only that since one of two issues presented on mandamus was appropriate for review by that means, it was proper for the court, in a civil case, to pass as well, "under these special circumstances," on the other issue. It is not authority for holding that where one party to a criminal case has a clear right to review

on mandamus, the other party may also have review by mandamus of issues of a very different kind.

The Court should dismiss the Special Prosecutor's appeal and refuse to entertain his Petition for Mandamus.

II. THE PRIVILEGE EXISTS

It is common ground among the parties and the District Court that there is a privilege of some kind in order to protect the Presidency. We divide on the nature of the privilege. The Special Prosecutor and counsel for the District Judge treat the matter as if this were a mere evidentiary privilege. It is an evidentiary privilege of course—but it is also much more than that. It is a privilege that in all of its aspects stems from the Constitution. As was developed both at oral argument (Tr. 27–28) and in our initial brief, (Brief for Petitioner 44–45), the privilege stems both from considerations of separation of powers and, wholly apart from that, from the need for Constitutional officers in every branch of government to be able to work in privacy and to communicate with their aides and those with whom they work with assurance of confidentiality. The distinction between a purely evidentiary privilege and a privilege of Constitutional dimension has often been recognized. This Court's decision in *Soucie* v. *David,* 145 U.S.App.D.C. 144, 148, 448 F.2d 1067, 1071 (1971), is a recent and familiar example. The Court there passed on the issues that were then before it, but noted that a claim of executive privilege would pose "[s]erious constitutional questions" that might have to be faced on remand if the Government chose to invoke that privilege.

Nor is it true that the President has made only a "generalized claim of privilege," (Supplemental Brief 36; cf. Brief in Support 2), and has failed to particularize any need for preserving confidentiality. In Paragraph 4 of the President's Special Appearance in response to the Order to Show Cause, he incorporated by reference, to establish that "the disclosure of the information sought by the subpoena is contrary to the public interest," his letter of July 23rd to the Honorable Sam J. Ervin, Jr. (App. 28.)[3] That letter spells out in detail why production of tape recordings would be inconsistent with the public interest:

> The fact is that the tapes would not finally settle the central issues before your Committee. Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. However, as in any verbatim recording of informal conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways. Furthermore, there are inseparably interspersed in them a great many very frank and very private comments, on a wide range of issues and individuals, wholly extraneous to the Committee's inquiry. Even more important, the tapes could be accurately understood or interpreted 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 totally unrelated to Watergate, and highly confidential in nature. They are the clearest possible example of why Presidential documents must be kept confidential.

What we have here is a claim by the President of the United States of a constitutional privilege that he, for reasons he has fully described, has concluded it would not be in the public interest to produce. The description the Special Prosecutor has given of the nature of the conversations of which he seeks recordings (Brief in Support 5–10) merely accentuates the fact that these were private, highly confidential conversations, held by the President in the course of his official duties. Thus while counsel for the President stands on the answers he gave to the hypothetical questions posed at argument by Judge Leventhal and Judge Wright (Tr. 22–25), they are hypothetical questions that bear no resemblance to any issue pending before this Court. It is established here that the information sought relates in its entirety to private conversations in connection with the President's official duties.

Thus here, as in *Reynolds,* what is known to the Court is enough to show that there is a reasonable danger—and indeed much more than merely a reasonable danger—that compulsion of the evidence would expose matters that in the national interest should not be divulged.

> When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

United States v. *Reynolds,* 345 U.S. 1, 10 (1953). This is analogous also, as the Court expressly recognized in *Reynolds,* to the practice when the Constitutional privilege against self-incrimination is claimed. The court may not inquire, even *in camera,* what the answer to the question would be. Instead it must merely judge in the light of the setting in which the question is asked whether there is any reasonable possibility that the question might be a link in a chain that would incriminate the witness, and leave it to the good faith of the witness to decide whether a truthful answer would in fact be incriminating or exculpatory. *Malloy* v. *Hogan,* 378 U.S. 1, 12 (1964); *Hoffman* v. *United States,* 341 U.S. 479, 486–487 (1951).

III. THE ARGUMENTS AGAINST THE PRIVILEGE

Four different theories have been advanced by the Special Prosecutor for overruling the President's claim of privilege in this case. All of them are unsound—as we shall show by taking them up seriatim.

A. Waiver

Since the District Court did not rely at all on any contention that the President had waived his privilege, we did

[3] The letter is erroneously characterized at one point as being from Mr. Wright. (App. 31.) It was in fact from the President himself, as appears where its text is set out. (App. 12–14.)

not discuss it in our initial submission, except to point out in a footnote that the claim of waiver is decisively refuted by *Reynolds* v. *United States,* 345 U.S. 1, 11 (1953), where the offer by the United States to allow testimony on the issue, rather than being a waiver, was expressly relied on as a reason for upholding the claim of privilege. (Brief of Petitioner 60 n. 17.)

We still think that that is all that need be said on the subject, but since the Special Prosecutor did make a passing reference to it in his submission to this Court (Supplemental Brief 32–35), we quote the forceful observation of Alexander Bickel on this aspect of the matter:

> 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.)*, N. Y. Times, August 15, 1973, p. 33.

B. Privilege Yields to Need

In his submission to this Court, the Special Prosecutor said that "the executive privilege based on the general interest in encouraging candid discussions is conditional and can be outweighed by the demonstration of countervailing need for particular information." (Supplemental Brief 22–23). Again at a later place he said: "Once a competing public interest is found adequate to outweigh the interests on which that presumptive privilege is based—as in the present case—the communications become unprivileged to the extent necessary to satisfy the predominant public interest." (Supplemental Brief 31.)

This claim, that Presidential privacy must go whenever any need for evidence from the President is found to outweigh the interest in confidentiality, would be so absolutely destructive of the functioning of the Presidency that we found it difficult to believe that the Special Prosecutor meant what his words so clearly seemed to say. In discussing this contention at oral argument counsel for the President felt it necessary to state that he hoped we were not doing the Special Prosecutor "an injustice" by this reading of his brief, and repeated later that "if I have misread him, I am sure he will advise the Court * * *." (Tr. 12.) Apparently we did not misread the Special Prosecutor, for neither at oral argument nor in his post-argument submission has he challenged this reading of his brief, and the second of the propositions he stated, in response to a question from Judge Mackinnon, seemed expressly to affirm his willingness to rely on a theory this broad. Even on the assumption that a conversation between the President and his counsel involved no criminal participation by the parties to the conversation, the Special Prosecutor still thought that a recording of the conversation would be subject to subpoena, saying: "We have also argued on the fact that the prima facie showing is strong, and the need for evidence is so great that as a matter of a more eclectic balancing the evidence should be made available." (Tr. 48–49.)

Perhaps this simple balance of need for evidence against a generalized interest in confidentiality may be appropriate at lower levels of Government, but surely it cannot be the law as applied to the enormously compelling interest in protecting the confidentiality of the highest officer in Government.

C. Evidence for Criminal Cases

A more limited version of the Special Prosecutor's theory is the Presidential privacy must yield if conversations in the President's office are needed for purposes of criminal law enforcement. The "generalized interest" in confidentiality, the Special Prosecutor asserts, "is not so great as to foreclose exceptions where there is a greater public need for the evidence in the administration of criminal justice." (Supplemental Brief 20.) We see no need to further refute that theory by repeating what we have already said in our initial submission. (Brief for Petitioner 72–77.) As the authorities mustered there show, it has uniformly been held that neither the courts nor a grand jury have any power whatever to decide that enforcement of the criminal law outweighs other governmental interests. This is true not only where state secrets are concerned but also in "less sensitive areas," *United States* v. *Cox,* 342 F. 2d 167, 182 (5th Cir.) (Brown, J. concurring), *cert. denied* 381 U.S. 935 (1965), in which "other confidential information," not involving state secrets, would have to be disclosed. *Jencks* v. *United States,* 353 U.S. 657, 672 (1957).

We emphasize that there are many circumstances, wholly aside from matters of military secrets or foreign relations, that may persuade the Executive that in a particular instance other public interests outweigh enforcement of the criminal law. Suppose, for example, that the Attorney General believes he has sufficient evidence to justify indicting leading members of the opposing party for conspiracy to destroy the campaign files of a member of the President's party who is standing for reelection. If there were any doubts or weaknesses whatever in the evidence to this effect, we submit that a responsible President might well conclude that a prosecution in an election year of a charge of this nature might give the appearance of being for partisan reasons and that in the public interest it is essential that the Justice Department be above any possible suspicion of partisanship. Under those circumstances, a President could direct that no prosecution be brought. No court could compel the bringing of the prosecution nor could any grand jury compel production by the President of the evidence turned over to him by the Attorney General.

A real life instance of this occurred in *United States* v. *Cox,* 342 F.2d 167 (5th Cir.), *cert. denied* 381 U.S. 935 (1965), where it was held that a United States District Judge cannot force prosecution of what he regarded as perjury where a prosecution would have interfered with the enforcement of civil rights in the South.

To abandon these precedents, to hold that it is for the courts rather than the President to balance the importance of criminal law enforcement against other valid governmental interests, including the interest in protecting the confidentiality of the Presidency, would truly be to cast the Constitution in the mold of Watergate rather than applying Constitutional practices and restraints to the facts of Watergate.

D. Abuse of the Privilege

The most limited theory of all, but the one on which the District Judge seems to have relied and on which the Special Prosecutor places heavy reliance, is that the privilege that would otherwise be the President's vanishes if the relation between the President and his advisers was abused by criminal design—or by subsequent perjurious testimony—by any of those who took part in the conversations.

Although some confusion developed about the matter at oral argument (Tr. 92–96), we believe that at the conclusion of the colloquy just cited counsel for the District Judge accepted the reading of the District Court's opinion that had seemed obvious to us (Tr. 106–107), and that the District Court did indeed rule that if, after examination of the tapes, he concluded that there was no criminal involvement on the part of the President, and that the President's participation in these conversations was in all respects pursuant to his Constitutional duty to "take Care that the Laws be faithfully executed," the Court would then hold the recordings privileged in their entirety. (App. 115–116.)

The Special Prosecutor has made it plain that he does not accept this view. He stated flatly to the Court that his case does not depend upon a prima facie showing of criminal involvement of the President. (Tr. 66.) This cannot be. The holder of a privilege does not lose that privilege because some other person has abused the privileged relation so long as the holder himself has not acted improperly. We discussed that in our initial submission (Brief for Petitioner 70–71) and at oral argument (Tr. 17–18). Neither at argument nor in his post-argument submission has the Special Prosecutor challenged that proposition. Instead he has sought to argue that the President is not the holder of the privilege and that the privilege is one in the public interest. (Tr. 67.) But while the privilege exists because it serves the public interest, it is the President's privilege. He, and he alone, must determine when it will be claimed. Chief Justice Marshall's statement on that point in *United States* v. *Burr,* 25 F.Cas. 187, No. 14, 694 (C.C.D.Va. 1807), is decisive:

> The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on his mind, not on the mind of others, which must be respected by the court. They must therefore be approved by himself, and not be the mere suggestions of another for him.

25 F. Cas. at 192.[4]

The Presidential privilege is far different from the policy involved in *Clark* v. *United States,* 289 U.S. 1 (1933), on which the Special Prosecutor relies so heavily. It may well be doubted whether the rule found inapplicable in *Clark* is a rule of privilege at all. It is treated as a rule of competency, rather than of privilege, in Rule 606(b) of the proposed Federal Rules of Evidence. In any event, it is a rule that goes to the jury as an entity and is not subject to waiver by an individual juror. It is wholly unlike the privilege that attaches to the President and is exercisable only by him.

But though the District Judge was generally right in holding that the claim of privilege must be sustained if the President did not himself abuse the privileged relation, he was in error in holding that he must hear the recordings in order to determine whether this was the case. He was required to accept the solemn assurance of the President about his role in these matters.

As we have already pointed out, this is the practice when the privilege against self-incrimination is invoked. If the court is satisfied from the implications of the question, in the setting in which it is asked, that a responsive answer might be incriminating, "the claim of the privilege will be accepted without requiring further disclosure." *United States* v. *Reynolds,* 345 U.S. 1, 9 (1953). The court cannot insist on an answer unless it is perfectly clear that there is no basis for a claim of the privilege. *Hoffman* v. *United States,* 341 U.S. 479, 488 (1951); *Counselman* v. *Hitchcock,* 142 U.S. 547, 580 (1892).

This is the practice in dealing with Acts of Congress. The signatures of the Speaker of the House and the President of the Senate on the enrolled bill are regarded as conclusive and the courts cannot go behind those to see if, in fact, constitutional provisions about the adoption of legislation were followed by the Congress. This rule was announced in *Field* v. *Clark,* 143 U.S. 649 (1892), and has been followed and applied many times since. E.g., *Har-*

[4] At oral argument Judge Wilkey referred to a letter furnished by President Jefferson in the *Burr* case in which Jefferson deleted certain portions which he felt needed to be confidential. He also referred to a representation as to what, in summary, the President had deleted and why. The letter to which Judge Wilkey referred is the second letter mentioned on page 86 of Brief of Petitioner. Jefferson in fact transmitted a copy of the letter "omitting only certain passages." With the letter was a certificate explaining that the omitted portions were "passages entirely confidential, given for my information in the discharge of my executive functions, and which my duties and the public interest forbid me to make public. I have therefore given above a correct copy of those parts which I ought to permit to be made public." 9 Ford, *Writings of Thomas Jefferson* 63–64 (1889). On September 9, 1807, Hay delivered this letter with enclosures to the court. 25 F. Cas. at 192–193. There the matter appears to have rested.

wood v. *Wentworth,* 162 U.S. 547 (1896); *Twin City Nat. Bank of New Brighton* v. *Nebecker,* 167 U.S. 196 (1897); *Flint* v. *Stone Tracy Co.,* 220 U.S. 107 (1911). It was based, the *Field* case said, on "[t]he respect due to co-equal and independent departments * * *." 143 U.S. at 672. No less respect is due to the statement of the President of the United States.

But there is another, and more fundamental, reason why it cannot be for the court to listen to the tapes *in camera* to satisfy itself that the President's involvement in these conversations was wholly innocent and in accord with his Constitutional duties. To allow the tapes to be heard by the judge for this purpose presupposes the possibility that in some future case a judge might conclude that some future President has been party to a crime and that his claim of privilege must be overruled. To allow a court, which has no jurisdiction to indict or to try an incumbent President, to conclude that a President has committed a crime, merely as an incident to an evidentiary ruling, would be wholly intolerable. The President would stand condemned in the eyes of the nation without any of the safeguards that even the humblest citizen enjoys before he may be branded as a criminal. The Framers deliberately rejected a proposal that a President impeached by the House of Representatives be suspended until tried by the Senate and acquitted. 2 *Farrand* 612–613. Surely they would have turned down out of hand a procedure by which a single District Judge, in an *exparte* and *in camera* proceeding, could brand a President as a criminal, as a man whose word cannot be accepted, and thus effectively destroy a President's power to govern.

All four of the theories that have been advanced in this case as reasons for overriding the President's claim of privilege are unsound and should be rejected by this Court.

IV. DISCLOSURE TO DEFENDANTS

If the District Court should listen to the tapes *in camera*—and we, like Judge Sirica's counsel, understand this to mean by the District Judge alone, without counsel being present—and should sustain the privilege in its entirety, the damage to Presidential confidentiality would be minimal, but it would still be damage of a serious nature. If one District Judge can listen to recordings of Presidential conversations, or examine notes or memoranda about them, all 400 District Judges could claim precisely the same power. As we have already pointed out, there are at least two other criminal cases and a number of civil cases in which private Presidential materials of this kind are being sought at this moment. (Brief for Petitioner 49 n. 12.) Unless this Court upholds the President's claim of privilege, many more such demands, in courts throughout the country, are certain to follow. Presidential confidentiality then would be, at best, at the mercy of 400 judges.

But if the claim of privilege is upheld, either as a matter of law, as we think it should be, or as a matter of fact, after *in camera* examination, at least this will mean that these highly confidential materials will not be available to defendants in criminal cases. With respect, we submit that the Special Prosecutor was wholly wrong when he argued that "I don't think that making the evidence, or parts of it available to the Grand Jury will affect that question one way or the other." (Tr. 45.) The Special Prosecutor referred to *United States* v. *Deutsch,* 475 F.2d 55 (5th Cir. 1973). That case held that under the *Brady* rule the prosecution cannot withhold a Post Office file to which it could have had access.

> The government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files. In fact it did not even deny access, but only present possession without even an attempt to remedy the deficiency.

475 F.2d at 57. If the President's claim of privilege is upheld in this case, and the Special Prosecutor is unable to turn over to defendants on demand recordings of Presidential conversations, no one can suggest that this will be because he has not made "an attempt to remedy the deficiency."

Judge Wilkey pursued the point when he suggested that a prosecution would not have to be dismissed if a defendant were not able to obtain evidence from a witness who had asserted his Constitutional privilege under the Fifth Amendment. The Special Prosecutor said that he hopes that that would be the result "[b]ut I have to recognize, and I think this Court should recognize, that under Deutsch, the case I suggested, that that may not be the case * * *." (Tr. 47.)

The argument does not work. There was no issue of any kind in the *Deutsch* case about privileged evidence. The *Brady* rule itself is in terms of evidence available to the prosecution, and undoubtedly extends as well to evidence in the possession of other investigative agencies. *United States* v. *Bryant,* 439 F.2d 642, 650 (1971); *United States* v. *Eley,* 335 F. Supp. 353, 358 (N.D.Ga. 1972). Neither *Brady* nor any of its progeny, however, suggest that the rule there announced applies to evidence that is constitutionally privileged. Indeed courts regularly and routinely try codefendants 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 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 1972 Supp.).

But the matter is far different if any part of the tapes should be held not privileged and turned over to the grand jury or made available to the Special Prosecutor. The Special Prosecutor's efforts, both in oral argument (Tr. 42–47) and in his post-argument submission (Reply Memorandum 9–17), to distinguish *Alderman* v. *United States,* 394 U.S. 165 (1969), are unpersuasive.

It is of course true that *Alderman* was a case of illegal electronic surveillance and that the tapes there were

sought to see if the prosecution's case at trial were in any measure fruit of the poisoned tree. It is equally true that tapes need not be examined, for that purpose, if the surveillance was not unlawful. *Giordano* v. *United States,* 394 U.S. 310 (1969). It is also true that to seek tapes for that particular purpose one must have standing to contest the Fourth Amendment violation, and the Court may make a preliminary determination of the standing question, just as it may of illegality. *Taglianetti* v. *United States,* 394 U.S. 316 (1969).

But so long as the Confrontation and the Compulsory Process Clauses of the Sixth Amendment stand, a criminal defendant's access to evidence cannot be limited to material needed to show a Fourth Amendment taint. A defendant is entitled to all relevant, not privileged, evidence that may tend to establish his defense—and this is a right that long antedated *Brady* v. *Maryland,* 373 U.S. 83 (1963).[5] A defendant is also entitled to any evidence, not privileged, that may be useful in impeaching the credibility of witnesses against him. *Giglio* v. *United States,* 405 U.S. 150 (1972). The thrust of *Alderman* is not limited to the particular circumstance of illegal surveillance. *Alderman* rests on the nature of the material in question, verbatim recordings of private conversations. The Court was at pains to distinguish its holding there, that *in camera* examination is not permissible either to delete national security material or to excise irrelevancies, from other situations in which "*in camera* procedures have been found acceptable to some extent" on the ground of "the volume of the material to be examined and the complexity and difficulty of the judgments involved * * *." 394 U.S. at 182 n. 14. It quoted with approval in that same footnote its remarks in *Dennis* v. *United States,* 384 U.S. 855, 874–875 (1966), that it is "not realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities."

The key to *Alderman* is in the portion of the opinion Judge Wilkey read (Tr. 43) at oral argument:

> An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances.

394 U.S. at 182. Should the President's conversations be held not privileged, the task will be too complex, and the margin for error too great, to allow a judge or a Special Prosecutor to decide what in the recordings may be useful to a defendant. And *Alderman* holds very specifically—as indeed the Government there conceded—"that this disclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would prefer dismissal of the case to the disclosure of the information." 394 U.S. at 181. The repeated suggestion (Brief in Support 47 n. 34, Reply Memorandum 15) that material dealing with military secrets of foreign policy might be excised is incorrect as a matter of law.

Finally, the Special Prosecutor was clearly wrong in arguing that only the participants in a particular conversation would be entitled to listen to the recording of that conversation (Reply Memorandum 13–14). That was the ruling in the Fourth Amendment setting in which *Alderman* was decided. Where the issue is solely whether the defendants Fourth Amendment rights were violated, it is logical to limit the disclosure to conversations in which he participated but that logic has no application where disclosure is sought—and required—for broader purposes. If for example, a conversation between the President and X sheds light on what Y knew, or is inconsistent with what X now says about Y, it would seem that the *Brady* rule would require that the government turn that recording as well over to Y.

> In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact.

Dennis v. *United States,* 384 U.S. 855, 873 (1966).

Unless the privilege is sustained here, these recordings will have to be made available to potential defendants and they may well be introduced by the defendants at trial. No element of confidentiality would remain.

V. COMPELLING COMPLIANCE

The final portion of the Special Prosecutor's post-argument submission is directed to urging the Court to call for the production of these tapes "by compulsory order." (Reply Memorandum 18–19.) For the most part, we stand on what we have already said about the inability of a court to issue compulsory process to a President to require him to produce material he holds. (Brief for Petitioner 84–92.)[6] The Special Prosecutor has yet to point out a case in which a court has claimed such a power as against the President. The extensive discussion (Supplemental Brief 10–13) of *Land* v. *Dollar,* 89 U.S. App.D.C. 38, 190 F.2d 623 (1951), *vacated as moot* 344 U.S. 806 (1952), does not advance the argument.

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[5] * * * [I]t is the law in this circuit that the due process requirement applies to all evidence which "might have led the jury to entertain a reasonable doubt about [defendants'] guilt" and that this test is to be applied generously to the accused when there is "substantial room for doubt" as to what effect disclosure might have had.

United States v. *Bryant,* 439 F. 2d 642, 648 (1971).

[6] Contrary to the suggestion of counsel for the District Judge (Tr. 92), we have never challenged the authority of the court to issue the subpoena in the first instance. We distinguish between issuance of a subpoena, as was held proper in the *Burr* case, and compelling compliance with it. The District Court accepted that distinction. (App. 104 n. 17.)

In the first place, "the time honored, invariable practice in the Federal system" when a case becomes moot is to vacate the decision below "so that it will spawn no legal consequences." *Lebus* v. *Seafarers' Intl. Union,* 398 F.2d 281, 283 (5th Cir. 1968). That statement of the practice is fully supported by many Supreme Court cases, including *United States* v. *Munsingwear, Inc.,* 340 U.S. 36, 39–41 (1950); *Duke Power Co.* v. *Greenwood County,* 299 U.S. 259, 267 (1936). In the second place, there is a considerable distinction between a case like *Land,* assuming it had any authoritativeness, or even such a concededly authoritative case as *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), and the present case. Leaving aside the fact that the President was not himself a party to those earlier cases, there is a difference between, on the one hand, restraining a high officer from going beyond his Constitutional authority by taking property of private citizens, and, on the other hand, compelling him to act affirmatively in a matter that has always been regarded as within the scope of his official discretion.

Our opponents do not tire of quoting the statement in *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 177 (1803), that it is "the province and duty of the judicial department to say what the law is," but they fail to come to grips with the following statement from that same historic decision:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. * * *
>
> * * * [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. * * * The acts of such an officer, as an officer, can never be examinable by the courts.

1 Cranch at 165. Nor do they see fit to discuss the remark in *Marbury* in which the Court disclaimed any judicial power to order "an intrusion into the secrets of the cabinet * * *," 1 Cranch at 170, nor to take notice of the fact that in *Marbury* the Court expressly ruled with regard to Attorney General Lincoln that "if he thought that anything was communicated to him in confidence he was not bound to disclose it * * *." 1 Cranch at 144.[7]

The Court is asked to hold the President subject to compulsory process despite his categorical representation to the Court below and to this Court that to do so would subject his office to serious embarrassment and harm. That step should not be taken. To do so would inflict unprecedented injury not only to the Office of the Presidency but also to the spirit of accommodation upon which the functioning of our Constitutional system, at its highest reaches, critically depends.

The President has acted in this spirit. He has made executive testimony and privileged documents available. Recognizing the unique character of Watergate, he authorized the appointment of a special prosecutor and permitted the vesting of wide discretion in him. But he has not delegated to the Special Prosecutor, and will not abrogate, his Constitutional duties and prerogatives. That would move beyond accommodation to irresponsibility.

The circumstances of this case do not require or justify such a result.[8]

It should be remembered that the constitutional crisis that the press professes to see in this case is not of the President's making. He issued no subpoenas. He went to unprecedented lengths in making relevant testimony and documents available to assist those inquiring into Watergate. It was the insistence of the Special Prosecutor and the Senate committee for still more, and their determination to press that insistence to a court test, that has brought this case here. This Court can fully perform its function by saying what it understands the law to be and leaving it to the President, who "is accountable only to his country in his political character and to his own conscience," to determine how to comply with the spirit of the Court's decision.

VI. THE NATURE OF THE PRESIDENCY

We will not repeat what we have previously said about the unique attributes of the Presidency of the United States, or of the essentiality to the work of that office that confidentiality be protected.[9] (Brief for Petitioner

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[7] Careful students of the Presidency have not overlooked the significance of this:

> The last phase of presidential prerogative to receive attention here, one that has been recently much in the public eye, stems also from the "take-care" clause. The reference is to the President's right to protect official confidences between himself and his subordinates from undue judicial and congressional curiosity. The leading case on the subject is still *Marbury* v. *Madison.* In the course of the argument the Attorney General, pointing out that he was acting as Secretary of State at the time of the transaction involved, hinted that "he felt himself bound to maintain the rights of the executive" and that he ought not to answer concerning "any facts which came officially to his knowledge while acting as Secretary of State." The Chief Justice, though of the opinion that nothing confidential was in fact involved, conceded none the less that "If he [the Attorney General] thought that anything was communicated to him in confidence he ought not to answer concerning it."

Corwin & Koenig, *The Presidency Today* 52–53 (1956).

[8] The reference to contempt in the Freedom of Information Act, 5 U.S.C. § 552(a)(3), hardly justifies the reliance put on it by the Special Prosecutor. (Reply Memorandum 18 n. 6) This is not an FOIA action. There is grave doubt whether the President is subject to that statute. See *Soucie* v. *David,* 145 U.S.App.D.C. 144, 150 n. 17, 448 F.2d 1067, 1073 n. 17 (1971). In any event, that sanction, so far as we know, has not been used in FOIA litigation, and if it were sought to use it against the President, we would view it as unconstitutional.

[9] We commend to the Court the views of the Department of Justice expressed in the brief recently filed with this Court in *Nader* v. *Butz,* No. 73–1935, and suggest that that brief will be helpful to the Court in this matter. It treats directly with the issue of Presidential confidentiality and contains insights and authorities additional to those presented by the parties to this litigation.

10–45). But we recognize that lawyers for a party are not disinterested and that our views may be colored by the demands of advocacy—even though the conception we have put forward is the one that has been held by everyone who has ever served in that great office.

Thus we close by quoting from a distinguished constitutional scholar who is disinterested, who does not represent any of the parties to this dispute, and who is not allied with the President either politically or ideologically. On September 12, 1973, the morning after oral argument in this case, the following appeared as a letter to the Editor of the Washington Post from Charles L. Black, Jr., Luce Professor of Jurisprudence at the Yale Law School. We quote it in its entirety:

JUDGE SIRICA'S RULING AND THE PRESIDENCY

I have in several places taken positions defensive of the presidency in the current "tapes" controversy. These positions have seemed to stir such anger that I want to explain what I see as being fundamentally at stake.

Underlying all technical discussion, one thing is starkly plain. If what we were concerned with were sheer competence to make wisely the critical decision on confidentiality, there could be no slightest doubt that the President is far more competent than any judge or judges can be to decide what degree of confidentiality, as to internal White House communications, best serves the national interest—including preeminently, the strong national interest in the effective and dignified conduct of the presidency. The rule that will prevail, if Judge Sirica's decision stands, will have nothing to do with the relevant competence, expertness, or knowledge of context, for there can be no question where these things reside, and they do not reside in district judges. Judge Sirica's rule makes sense only if bad faith is something so often to be found in our presidents that we must, in order to avoid its effect, commit the decision on confidentiality of any given material to a less competent and informed authority than the President, accepting the harm that must sometimes result from this as a lesser evil than the harm to be feared from presidential bad faith.

It is this, above all, that makes the Sirica decision so degrading to presidential office. If the decision stands then we will in future follow a procedure whose unavoidably visible meaning is that we deeply distrust the good faith of our presidents.

The presidency, through history, has not deserved that slur, and there is no reason to think it will in future. If, on solid evidence, any one president can at any time be shown to deserve it, then he should be impeached and removed, instead of our devising procedures fitted only for presidents who do not merit trust. If we are so corrupted that we must fear habitually electing such people, then we cannot expect to have trustworthy judges or trustworthy congressmen and senators either.

The institution of the presidency has done much for the United States. In the person of Washington, it was a nucleus of honor around which a nation could form. Without it, we would in all probability not even have fought the Civil War, let alone won it. In the hands of Franklin Roosevelt, it led us not far enough, but at least a good way, toward social justice. Harry Truman used it to bridge us over from war to our new world responsibility. Even in less masterful hands, such as those of Dwight Eisenhower, the office has been a power on the whole for good.

No substitute offers itself for the American presidency, either domestically or in the world. It will be easier to tear down than to build back. I hope our courts, moving without hurry, will determine at last not to degrade this office.

The spirit so eloquently put by Professor Black is the one that must inform decision in this case. To tear down the office of the American Presidency is too high a price to pay even for Watergate. The Special Prosecutor has spoken repeatedly of the overriding importance of "preserving the integrity of the Executive Office of the President * * *." (Supplemental Brief 22; Tr. 33, 74.) The importance of that can be gainsaid by no one, and the efforts of the Special Prosecutor against any who broke the laws will be of great value toward that end, but ultimately the Constitution of the United States has vested this great responsibility in the President of the United States, and he is determined to preserve the integrity of the Executive Office in a fashion that will not damage irreparably the ability of the Executive Office to function.

CONCLUSION

For all of the reasons we have stated, in our initial submission, at oral argument, and in the present Reply Brief, the District Court's Order of August 29th should be vacated.

Respectfully submitted,

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September 19, 1973.

CERTIFICATE OF SERVICE

I, Thomas P. Marinis, Jr., hereby certify that on the 19th day of September, 1973, I served the foregoing Brief of Petitioner by causing copies thereof to be hand-delivered to the offices of

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