

Court Order Requiring Production of Recordings and Documents

Brief of Petitioner Filed by Attorneys for the President Requesting the U.S. Court of Appeals To Vacate Judge Sirica's Order. September 10, 1973.

TABLE OF CONTENTS

[EDITOR'S NOTE: Page numbers have been changed to reflect pagination in this printing.]	
List of Authorities	1100
Issues Presented for Review.....	1101
References to Parties and Rulings.....	1102
Statement of the Case.....	1102
Argument.....	1102
I. Introduction.....	1103
II. The Nature of the Presidency.....	1107
III. The Need for Confidentiality.....	1111
IV. Separation of Powers.....	1113
V. The Discretion of the President.....	1116
VI. The Criminal Nature of the Proceeding.....	1120
VII. The Inability to Issue Compulsory Process.....	1121
Conclusion.....	

LIST OF AUTHORITIES

CASES

* <i>Alderman v. United States</i> , 394 U.S. 165 (1969)	1115, 1117, 1119
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	1109, 1118
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	1116, 1120
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	1108
<i>Brown v. United States</i> , 359 U.S. 41 (1959)	1117
<i>Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena</i> , 40 F.R.D. 318, (D.D.C. 1966)	1107
<i>Confiscation Cases</i> , 7 Wall. (74 U.S.) 454 (1869)	1117
<i>Confiscation Cases</i> , 20 Wall. (87 U.S.) 92 (1873)	1118
<i>District of Columbia v. Buckley</i> , 128 F. 2d 17 (D.C. Cir. 1942)	1117
<i>Duncan v. Cammell, Laird & Co. [1942] A.C. 624</i>	1114
<i>Environmental Protection Agency v. Mink</i> , 410 U.S. 73 (1973)	1107
<i>Giles v. Maryland</i> , 386 U.S. 66 (1966)	1119
<i>In re Grand Jury January 1969</i> , 315 F. Supp. 662 (D. Md. 1970)	1117
<i>Gravel v. United States</i> , 408 U.S. 606 (1972)	1108, 1116
<i>Home Building & Loan Assn. v. Blaisdell</i> , 290 U.S. 398 (1934)	1107
<i>Humphrey's Executor v. United States</i> , 295 U.S. 602 (1935)	1111, 1112
<i>Inland Waterway Corp. v. Young</i> , 309 U.S. 517 (1940)	1114
* <i>Jencks v. United States</i> , 353 U.S. 657 (1957)	1117
<i>Kaiser Aluminum & Chemical Corp. v. United States</i> , 157 F. Supp. 939 (Ct. Cl. 1958)	1107
* <i>Kendall v. United States ex rel. Stokes</i> , 12 Pet. (37 U.S.) 524 (1838)	1104, 1107, 1121
<i>Kilbourn v. Thompson</i> , 103 U.S. 168 (1880)	1111
* <i>Marbury v. Madison</i> , 1 Cranch (5 U.S.) 137 (1803)	1104 1106, 1112, 1115, 1121
* <i>Mississippi v. Johnson</i> , 4 Wall. (71 U.S.) 475 (1867)	1104 1112, 1121

<i>Moore v. Illinois</i> , 408 U.S. 786 (1972)	1119
<i>Myers v. United States</i> , 272 U.S. 52 (1926)	1104, 1111, 1116
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971)	1101, 1108, 1110, 1113
<i>Nichols v. United States</i> , 460 F. 2d 671 (10th Cir. 1972)	1110
<i>Northern Securities Co. v. United States</i> , 193 U.S. 197 (1904)	1102
<i>O'Neill v. United States</i> , 70 F. Supp. 827 (E.D. Pa. 1948)	1121
<i>Ponzi v. Fessenden</i> , 258 U.S. 254 (1922)	1118
<i>Powell v. Katzenbach</i> , 359 F. 2d 234 (D.C. Cir. 1965)	1117
<i>Pugach v. Klein</i> , 193 F. Supp. 630 (S.D.N.Y. 1961)	1117
<i>Roviaro v. United States</i> , 353 U.S. 53 (1957)	1117
<i>Smith v. United States</i> , 375 F. 2d 243 (5th Cir. 1967)	1117, 1118
<i>Soucie v. David</i> , 448 F. 2d 1067 (D.C. Cir. 1971)	1108, 1109
<i>Statement of the Judges</i> , 14 F.R.D. 335 (N.D. Cal. 1953)	1108
<i>United States v. Burr</i> , 25 F. Cas. 30, No. 14, 692d (C.C.D.Va. 1807)	1120
<i>United States v. Burr</i> , 25 F. Cas. 187, No. 14, 694 (C.C.D.Va. 1807)	1120
* <i>United States v. Cox</i> , 342 F. 2d 167 (5th Cir. 1965)	
<i>United States v. Eley</i> , 335 F. Supp. 353 (N.D.Ga. 1972)	1119
<i>United States v. Escobedo</i> , 430 F. 2d 603 (7th Cir. 1970)	1118
<i>United States v. Klein</i> , 13 Wall. (80 U.S.) 128 (1872)	1111
<i>United States v. Midwest Oil Co.</i> , 236 U.S. 459 (1915)	1114
* <i>United States v. Reynolds</i> , 345 U.S. 1 (1953)	1114, 1121
<i>United States v. Skillman</i> , 442 F. 2d 542 (8th Cir. 1971)	1119
<i>United States v. Sopher</i> , 362 F. 2d 523 (7th Cir. 1966)	1118
<i>United States v. Woody</i> , 2 F. 2d 262 (D.Mont. 1924)	1117
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	1111, 1122
 CONSTITUTION, STATUTES AND RULES	
U.S. Constitution:	
Art. I, § 3, ¶ 7	1105
Art. I, § 6	1112
Art. II, § 2, ¶ 1	1105
Art. II, § 3	1105
5 U.S.C. § 552(b)(5)	1107
18 U.S.C. § 3500	1109, 1117, 1118
28 U.S.C. § 1651	1102
44 U.S.C. § 2107	1110
44 U.S.C. § 2108	1110
Fed. R. App. Proc.	1102
 MISCELLANEOUS	
<i>Annals of Congress</i> , Fourth Congress, First Session 761 (1796)	1108
<i>Annals of Congress</i> , Sixth Congress, 67 (1800)	1106
Berger, <i>Executive Privilege v. Congressional Inquiry</i> , 12 UCLA L.Rev. 1043 (1965)	1116, 1120
Berger, <i>Impeachment: The Constitutional Problems</i> (1973)	1105
3 Beveridge, <i>The Life of John Marshall</i> (1919)	1120
Bickel, <i>Wretched Tapes</i> . (cont.), N.Y. Times, August 15, 1973, p. 53	1114

	Page
Bishop, <i>The Executive's Right of Privacy: An Unresolved Constitutional Question</i> , 66 Yale L.J. 477 (1957)....	1110
Black, <i>Letter to the Editor</i> , N.Y. Times, September 6, 1973, p. 34.....	1113, 1115
*Black, <i>Mr. Nixon, the Tapes, and Common Sense</i> , N.Y. Times, Aug. 3, 1973, p. 31.....	1108, 1111
Brennan, <i>Working at Justice</i> , in <i>An Autobiography of the Supreme Court</i> 300 (Westin ed. 1963).....	1108
1 Bryce, <i>The American Commonwealth</i> (1889)....	1104, 1107
Carr, Bernstein, Morrison, Snyder, & McLean, <i>American Democracy in Theory and Practice</i> (1956)....	1110
Clark, N.Y. Times, Nov. 14, 1953.....	1108
Committee on Armed Services, U.S. Senate, <i>Military Cold War Escalation and Speech Review Policies</i> , 87th Congress, 2nd Sess., 512 (1962)....	1109
100 Cong. Rec. 6621 (1954).....	1113
108 Cong. Rec. 3626 (1962).....	1109
116 Cong. Rec. 37652 (1970).....	1109
Cong. Rec. S5856, S5857 (daily ed. April 11, 1972) ..	1109
Cong. Rec. E5320-E5322 (daily ed. August 1, 1973) ..	1111
Farrand, <i>Records of the Federal Convention of 1787</i> (rev. ed. 1966).....	1103-1108, 1111
<i>The Federalist</i> , (Modern Library ed. 1937)....	1104, 1105
38 Fed. Reg. 14,688 (June 4, 1973).....	1118
1 Ford, <i>Writings of Thomas Jefferson</i> (1892).....	1113
Ford, <i>Writings of Jefferson</i> (1899).....	1120
Forkosch, <i>Constitutional Law</i> (1963).....	1102
Fortas, <i>The Presidency As I Have Seen It</i> , in Hughes, <i>The Living Presidency</i> 335 (1973).....	1110
Frankfurter, <i>Mr. Justice Roberts</i> , 104 U.Pa. L.Rev. 311 (1955).....	1108
Hughes, <i>The Living Presidency</i> (1973).....	1104, 1108
McCormick, <i>Evidence</i> , 199 (2d ed. Cleary et al: 1972).....	1116
Miller & Sastri, <i>Secrecy and the Supreme Court: On The Need for Piercing the Red Velvet Curtain</i> , 22 Buff.L. Rev. 799 (1973).....	1108
4 Moore, <i>Federal Practice</i> ¶ 26.61 [5.-1] at 26-287 (2d ed. 1970).....	1121
New York Law Journal, August 23, 1973.....	1105
New York Times, Nov. 14, 1953.....	1108, 1119
11 Op. Atty. Gen. 137 (1865).....	1113
20 Op. Atty. Gen. 557 (1893).....	1113
25 Op. Atty. Gen. 326 (1905).....	1121
40 Op. Atty. Gen. 45 (1941).....	1113
<i>Public Papers of Presidents of the United States: Dwight D. Eisenhower</i> (1955 674 G.P.O. 1959).....	1110
Rogers, <i>The Right to Know Government Business From the Viewpoint of the Government Official</i> , 40 Marq.L.Rev. 83 (1956).....	1107
Rogers, <i>Constitutional Law: Papers of the Executive Branch</i> , 44 A.B.A.J. 941 (1958).....	1115
Rossiter, <i>The American Presidency</i> (1956) ..	1104, 1109
Schwartz, <i>Federal Criminal Jurisdiction and Prosecutors' Discretion</i> , 13 L. & Contemp. Prob. 64 (1948)....	1117
Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, <i>Executive Privilege: The Withholding of Information by the Executive</i> , 92nd Congress, 1st Sess. (1971).....	1113
Truman, <i>Truman Speaks</i> (1960).....	1104
1 Truman, <i>Memoirs</i> (1955).....	1109

	Page
Wiggins, <i>Government Operations and the Public's Right to Know</i> , 19 Fed. B.J. 62 (1959).....	1121
8 Wigmore, <i>Evidence</i> (McNaughton rev. 1961).....	1121

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

No. 73-1962

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

v.

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

and

ARCHIBALD COX, SPECIAL PROSECUTOR, WATERGATE
SPECIAL PROSECUTION FORCE, PARTY IN INTEREST.

BRIEF OF PETITIONER¹

ISSUES PRESENTED FOR REVIEW

(a) Whether the District Court has jurisdiction to review a decision by the President of the United States to withhold records of his private conversations with his closest advisers from a grand jury if he deems disclosure to be contrary to the public interest.

¹ In accordance with the option provided in the Clerk's letter of September 4th, we are filing a single self-contained Brief in support of our Petition, rather than relying on our papers in the District Court with some supplementary memorandum. (We are filing a separate response to the Special Prosecutor's Petition.) Thus it is not necessary for this Court to refer to the papers we filed in the District Court since so much of the arguments we made there as seem now presently relevant are incorporated in the present Brief.

We feel obliged to note publicly what we stated in our letter to the Clerk on August 31st when we were first informally advised by the Clerk that briefs would be due on September 10th and argument September 11th. We think that the schedule set by the Court has made it impossible for counsel to be as helpful to the Court as can properly be expected in a case of this importance. Despite the very short time allowed to us—we had told the Clerk we would need until September 14th—we have been able to prepare a self-contained Brief, rather than relying on the lower court papers, but the pressure of time makes it less than the best Brief that we could have done and less than the Court has a right to expect from counsel. We object equally to the fact that briefs are to be filed by both parties on the same day, rather than *seriatim* as is the usual practice, and that the parties will have no opportunity to address themselves in writing to the contentions of their opponents except in after-argument memoranda, to be filed by September 14th. This is an extraordinarily short period of time in which to prepare responsive papers, and in any event, argue now, brief later, has never been part of the tradition of American courts.

We repeat what we said in our letter of August 31st: "Wise deliberation requires a certain measure of deliberateness. As Chief Justice Burger observed in his dissent in *New York Times Co. v. United States*, 403 U.S. 713, 752 (1971): 'We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial function.'"

(b) Whether the District Court has the authority to enforce a subpoena against a President of the United States by ordering the information demanded by the subpoena produced for *in camera* inspection, when the President has interposed a valid and formal claim of executive privilege.

REFERENCES TO PARTIES AND RULINGS

All parties to this cause are set forth in the caption. This cause seeks review only of the opinion and order of the Honorable John J. Sirica, Chief Judge of the United States District Court for the District of Columbia in Misc. No. 47-73 on August 29, 1973. Copies of this opinion and order are attached to the Petition for Writ of Mandamus.

STATEMENT OF THE CASE.

This is a Petition, pursuant to Rule 21, Federal Rules of Appellate Procedure, requesting the Court to exercise its jurisdiction under 28 U.S.C. § 1651, the All Writs Act, and issue a Writ of Mandamus, to the Honorable John J. Sirica, Chief Judge of the United States District Court for the District of Columbia, directing the Honorable John J. Sirica to vacate his Order entered on the 29th day of August 1973 in the case of *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, or Any Subordinate Officer, Official, or Employee with Custody or Control of Certain Documents or Objects*, Misc. No. 47-73, in the United States District Court for the District of Columbia. By this Order the Honorable John J. Sirica, pursuant to petition of the Special Prosecutor, Watergate Special Prosecution Force, ordered production of certain tape recordings for *in camera* inspection by said Honorable John J. Sirica to determine whether such tape recordings or portions thereof should be presented as evidence to an incumbent grand jury of the United States District Court for the District of Columbia.

The proceedings below are detailed on pages 2 and 3 of the Opinion below. On July 23, 1973, at the direction of the Special Prosecutor, Watergate Special Prosecution Force, the Clerk of the United States District Court for the District of Columbia issued a subpoena duces tecum to Richard M. Nixon, or any subordinate officer whom he designates who has custody or control of certain documents or objects, directing him to produce certain specified documents or objects as evidence before an incumbent grand jury. Specifically, the subpoena directed the President to turn over to the grand jury tape recordings of meetings and telephone conversations between the President and several of his closest advisers in the period from June 20, 1972 to April 15, 1973, as well as several memoranda consisting of communications between the President's advisers.

On July 26, 1973, the President outlined his reasons for refusal to comply with those portions of the subpoena relating to tape recordings in a letter to the Honorable

John J. Sirica. Also on July 26, 1973, the Special Prosecutor filed his verified petition for an order directing Richard M. Nixon, or any subordinate officer whom he designates, to show cause why the specified documents or objects should not be produced in response to the subpoena. Pursuant to that petition, the Honorable John J. Sirica entered an order on July 26, 1973, directing Richard M. Nixon to show cause why the documents and objects demanded should not be provided pursuant to the subpoena and setting the matter for hearing on August 7, 1973.

On August 7, 1973, the President filed a Special Appearance and Brief in Opposition. On that same day, the court entered an order directing a reply by the Special Prosecutor on or before August 13, 1973, a further reply by the President on or before August 17, 1973, and setting the matter for oral argument on August 22, 1973.

Further briefs were filed in accordance with this schedule, and the District Court heard oral arguments at the designated time. Subsequently, on August 29, 1973, the District Court entered the order directing *in camera* inspection of the materials sought by the subpoenas. The order was stayed five days to enable the parties to perfect an appeal. Richard M. Nixon's petition for Writ of Mandamus was filed and served on September 5, 1973, within the time limits of this stay.

ARGUMENT

I. Introduction

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Holmes, J., dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904). This case is a classic illustration of the danger against which Justice Holmes warned.

The District Court, in a decision utterly without precedent, has held that it is for it, and not for the President, to decide whether the public interest requires that private Presidential conversations be kept confidential, and it has held that it may, by compulsory process, order the President to produce recordings of these conversations if the Court determines to do so.

As recently as a year ago such a ruling would have been unthinkable. The universal view of the legal community, as reflected in the literature, was that the courts lack power to substitute their judgment for that of the President on an issue of this kind and that they lack power to compel a President to make production. It was, quite literally, hornbook law that "confidential communications to and from the President are inviolate to a judicial request * * *." Forkosch, *Constitutional Law* 131 (1963).

The change in the climate of legal and popular opinion that has made a ruling such as that of the District Court possible is the result of Watergate. The hydraulic force arising out of that sordid and unhappy episode has led men of great distinction to suppose that the Constitution means something different today than it meant throughout all of our history and to contend that the need to exhaust every avenue of factual inquiry concerning Watergate ranks so high in our national priorities that it must be served, even if the cost is to impair markedly the ability of every President of the United States from this time forward to perform the Constitutional duties vested in him.

It is no exaggeration to say that the revelations of Watergate have so sharpened the public appetite for more revelations that the claim of a Presidential right and responsibility under the Constitution to maintain the confidentiality of Presidential conversations must run the gamut of a broadly held popular sentiment that the claim is probably unjust and is therefore presumably unsound. The President's assertion of a right to maintain this confidentiality, a right relied on by every President since George Washington, is likened to the absolute claim of kings. His stand on an important Constitutional principle is viewed in many places with suspicion or even hostility. Despite his unprecedented cooperation with the investigations by allowing his advisers to testify about relevant portions of the conversations in question, he stands accused in some quarters of obstructing rather than facilitating the investigations.

Our submission on this appeal must acknowledge this Watergate phenomenon since it is an operative factor, though it is one that courts, judging in calmness and not moved by the passions of the moment, should be expected to ignore. We conceive it to be our task to demonstrate that the decision below was reached by casting the Constitution in the mold of Watergate rather than by applying Constitutional practices and restraints to the facts of Watergate. It is our further responsibility to show that what may seem inevitably just in the heat and excitement of an unprecedented political scandal may prove inexorably corrosive to the principles and practices of a Constitution that must stand the test of a long and uncertain future and serve the needs of a changing culture and polity.

With all respect, the decision below did not harmlessly walk the "middle ground" between an overbroad claim of privilege and an excessive demand for discovery. We do not doubt at all but that this was the well-intentioned aim of the distinguished judge of the court below. But in result, the ruling below, in decisive terms, came down squarely on the side of breaching the wall of confidentiality of Presidential communications. If sustained, that decision will alter the nature of the American Presidency profoundly and irreparably. If sustained, it will

alter, equally irreparably, the delicate balance that has existed between three heretofore separate and co-equal branches of government.

The issue on this appeal is whether the District Court had the power to do this.

To put that issue in perspective we first consider the nature of the Presidency, the need for confidentiality in discharging the responsibilities of that office, and the separation of powers among the three branches of government, before turning to the specifics of how the court below erred.

II. The Nature of the Presidency

No issue occupied more of the attention of the Framers of the Constitution than did the creation of the Executive. The divergence of views between the large states and the small states on representation in the Legislative Branch may have been potentially more divisive, but the Great Compromise on that was reached at a comparatively early stage of the work of the Constitutional Convention. Questions about the Executive, on the other hand, occurred and recurred throughout the long summer in Philadelphia. As early as July 26, 1787, Colonel George Mason said, in the Convention debates: "In every Stage of the Question relative to the Executive, the difficulty of the subject and the diversity of the opinions concerning it have appeared." 2 Farrand, *Records of the Federal Convention of 1787* 118 (rev. ed. 1966) (hereafter "Farrand"). The difficulty and diversity persisted. After the Convention had brought its labors to a conclusion, James Madison wrote to Thomas Jefferson reporting on what had been accomplished. In that letter, on Oct. 24, 1787, Madison said: "The first of these objects, as respects the Executive, was peculiarly embarrassing. On the question whether it should consist of a single person, or a plurality of co-ordinate members, on the mode of appointment, on the duration in office, on the degree of power, on the re-eligibility, tedious and reiterated discussions took place." 3 Farrand 132.

Modern historians have traced the difficulties the Framers had before they ultimately came to create a strong Executive. They are well described by Clinton Rossiter:

The progress of the Convention toward this decision was labored and uncertain, however, and it often seemed that the hard lessons of the previous decade would be wasted on a majority of the delegates. Persistent voices were raised against almost every arrangement that eventually appeared in Article II, and Wilson and his colleagues were able to score their final success only after a series of debates, decisions, reconsiderations, references to committees, and private maneuvers that still leave the historian befuddled. I have followed the tortuous progress of the incipient Presidency through Madison's *Notes* four times, and I am still not sure how the champions of the strong executive won their smashing victory. It can be said for certain, however, that at least eight decisions on the structure and powers of the executive were taken at different stages of the proceedings, and that out of these arose the Presidency. Every one of these decisions, with one partial exception that history was shortly to remedy, was taken in favor of a strong executive.

Rossiter, *The American Presidency* 55 (1956).²

The result of these deliberations was to create an officer who is Chief of State, Chief Executive, Chief Diplomat, Commander in Chief, and Chief Legislator.³ *Id.* at 16. He is also, as the Supreme Court has recognized, more than any other officer of government the representative of all of the people. *Myers v. United States*, 272 U.S. 52, 123 (1926). The Presidency is "our one truly national political institution. *** It is a priceless symbol of our continuity and destiny as a people. Few nations have solved so simply and yet grandly the problem of finding and maintaining an office of state that embodies their majesty and reflects their character." Rossiter, *The American Presidency* 163 (1956).

It is because of the unique position that the Presidency has in our governmental scheme that it must carry with it unique attributes and that a President, while he holds that office, cannot be and is not treated by the law in the same fashion as a private citizen or even a lower officer in the Executive Branch. The District Court thought that decisions concerning lesser governmental officers can be applied interchangeably to the President and suggested, at page 10 of its Opinion, that our argument to the contrary "tends to set the White House apart as a fourth branch of government." But to recognize that there is a difference between the President, on the one hand, and the Secretary of State or a local postmaster on the other, is merely to observe a distinction that has been drawn at least since *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 165 (1803), and *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 610 (1838).

Because of the great role entrusted to the Presidency by the Constitution and because the President alone is representative of the whole country, there are important respects in which he is not treated by the law in the same fashion as are others. "Politically and symbolically, the President and the Republic are one—so closely tied that it is scarcely possible for either to gain and the other to lose, or for either to be wounded without the other being scarred." Hughes, *The Living Presidency* 85–86 (1973). The Supreme Court has said 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.

Myers v. United States, 272 U.S. 52, 123 (1926).

To argue, as we shall, that it is for the President to determine what the public interest permits by way of

² In view of that history, the statement of the District Court, at page 10 of its Opinion, that early in the Convention the delegates cautioned each other concerning the dangers of giving the Executive immoderate power—citing to the discussions of June 1, 1787—and that "this attitude persisted throughout the Convention ***," is of questionable accuracy.

³ Over the course of our history practice has entrusted other functions to the President, including that of Chief of Party. Truman, *Truman Speaks* 7 (1960); Rossiter, *The American Presidency* 16 (1956).

disclosure of his confidential conversations, and to further argue, as we shall, that the President is not subject to compulsory process from the courts, is not to suggest in the slightest that the President has the attributes of a king. The Framers had had personal experience with a king, and were greatly concerned that the Executive they were creating not be a poorly-disguised substitute for George III. The entire 69th *Federalist* is devoted to an analysis by Alexander Hamilton of the differences between a President and a king, and will not be quoted here since it demands reading in full. A similar differentiation is made in a letter from one of the members of the Convention, Pierce Butler, on May 5, 1788, to Weedon Butler. *3 Farrand* 301. The views of another Framer, Abraham Baldwin, were set out, with spellings and abbreviations appropriate to the age, in the diary of Ezra Stiles, reporting a conversation he had with Baldwin on Dec. 21, 1787.

As to a President, it appeared to the Opin. of Convention, that he shd be a Character respectable by the Nations as well as by the foederal Empire. To this End that as much Power shd be given him as could be consistently with guardg against all possibility of his ascending in a Tract of years or Ages to Despotism & absolute Monarch:—of which all were cautious. Nor did it appear that any Members in Convention had the least idea of insidiously layg the Founda of a future Monarchy like the European or Asiatic Monarchies either antient or modern. But were unanimously guarded & firm against every Thing of this ultimate Tendency. Accordinly they meant to give considerable Weight as Supreme Executive, but fixt him dependent on the States at large, and at all times impeachable.

3 Farrand 168.

A king rules by inheritance. The President holds office because 45 million of his fellow citizens voted to extend his term for four more years. As a famous student of the American system observed, "It used to be thought that hereditary monarchs were strong because they reigned by a right of their own, not derived from the people. A President is strong for the exactly opposite reason, because his rights come straight from the people." 1 Bryce, *The American Commonwealth* 62 (1889).

A king rules for life. A President holds office for not more than two terms. A king claims personal immunity from the process of the courts, while the special position of the President with regard to the courts attaches to the office, and not to the man. The President is in no sense above the law—but he is responsible to the law in a specific fashion that the Framers, with the utmost care, wrote into the Constitution. The matter was well put by Attorney General Stanbury in his argument in *Mississippi v. Johnson*, 4 Wall. (71 U.S.) 475, 484–485 (1867):

It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President. There is only one court or *quasi* court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according

to law, and that is not this tribunal but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.

The Framers of the Constitution were not starry-eyed dreamers. They were hard-headed men, who had fought a successful revolution. In the course of their deliberations they came ultimately to conclude that the success of their infant Republic was dependent on vesting great powers in a strong Executive. They knew perfectly well that these great powers might be abused, but they had confidence in the remedy they provided in case of any abuse.

A very revealing interchange took place on September 15th, only two days before the final adoption of the Constitution. Governor Randolph moved to except cases of treason from the power of the President, granted by Article II, § 2, ¶ 1, to pardon offenses against the United States. In support of his motion he argued:

The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments.

He was answered by James Wilson:

Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted.

Randolph's motion failed by a vote of eight states to two, with one divided. 2 *Farrand* 626-627.

A rather detailed discussion of the impeachment provisions of the Constitution is in order. This is not because we think that there is any ground on which President Nixon might be subject to impeachment. There is no such ground. He has been party to no crime. His discussion of Watergate with his advisers has at all times been in accordance with his constitutional duty, under Article II, § 3, to "take Care that the Laws be faithfully executed." But the understanding the Framers had about impeachment is central to their understanding of the role of the President and his relation to the laws.

The key provision is Article I, § 3, ¶ 7. It reads:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.⁴

There are three presently relevant things that should be noted about the debates in the Convention and the provision that resulted from them. First, it is as clear as

⁴ Except for punctuation and capitalization, this provision was finally adopted precisely as it had been recommended by the Committee on Detail on August 6th. In that report, it appeared as Article XI, § 5.

any Constitutional proposition can be that an incumbent President is not subject to criminal prosecution. He is amenable to the criminal laws, but only after he has been impeached and convicted, and thus stripped of his high office. The text of Article I, § 3, ¶ 7, points so explicitly in that direction that it hardly requires exposition, and the legislative history is wholly in accord. We have already quoted the remark of James Wilson that if the President himself be "a party to the guilt he can be impeached and prosecuted." 2 *Farrand* 626. And on September 4, in the recurring debate on whether impeachments should be tried by the Senate or by the Supreme Court, Gouverneur Morris said:

A conclusive reason for making the Senate instead of the Supreme Court the Judge of Impeachments, was that the latter was to try the President after the trial of the impeachment.

2 *Farrand* 500.

There is literally nothing in all of the records of the Convention to suggest that any delegate had any contrary view. This reading of the language in question was put forward twice by Hamilton in the *Federalist Papers*. In the 65th *Federalist* he wrote:

The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.

The Federalist, No. 65, at 426 (Modern Library ed. 1937).

He returns to the point in the 69th *Federalist*, and uses it there to illustrate an important distinction between a President and a king.

The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution.

The Federalist No. 69, at 446 (Modern Library ed. 1937).

So far as we are aware, this proposition has not been challenged by the Special Prosecutor or the District Court.⁵ It is relevant here because there seems to be a suggestion at pages 19-22 of the Opinion that an other-

⁵ There have been press reports that Raoul Berger, the author of a recent work on impeachment, takes a contrary position. New York Law Journal, August 23, 1973, p. 1. His book, however, supports the view we have expressed. He says that Article I, § 3, ¶ 7 "sharply separates removal from office from subsequent punishment after indictment * * *. Removal would enable the government to replace an unfit officer with a proper person, leaving 'punishment' to a later and separate proceeding, if indeed the impeachable offense were thus punishable." Berger, *Impeachment: The Constitutional Problems* 79 (1973). He later speaks of the "separation of removal from subsequent indictment and conviction" and of "the division they had instituted between impeachment and subsequent indictment." *Id.* at 85.

wise valid claim of privilege by the President would be overridden if the evidence sought would show that the President himself had been guilty of a crime. But if there were such evidence of crime against an incumbent President—and there is none in this case—it could not be relevant to the work of a grand jury or of the District Court because of the inability to indict a President prior to impeachment.

A second important theme that runs through the debates of the Convention is whether the President should be answerable, on an impeachment, to the courts or to the Senate. On June 13th the Committee of the Whole adopted a resolution offered by Messrs. Randolph and Madison to give the national Judiciary jurisdiction of "Impeachments of any national officers." 1 *Farrand* 224. On July 18th, however, the Convention itself voted unanimously to remove the language giving the courts jurisdiction of impeachments. 2 *Farrand* 39. This did not end the matter. The report of the Committee on Detail, on August 6th, would have given the Supreme Court original jurisdiction "in cases of Impeachment." 2 *Farrand* 186. A subsequent committee, however, recommended on September 4th that the trial of impeachments be by the Senate, 2 *Farrand* 493, and this was approved on September 8th by vote of nine states to two. 2 *Farrand* 547. See the report of the debate on this issue at 2 *Farrand* 551–553.

The significance of the foregoing history is that it is not mere chance or inadvertence that the President is made answerable to the Senate, sitting as a Court of Impeachment. The Framers repeatedly considered making him answerable to the Judiciary, and they twice rejected proposals to this effect.

Finally, it should be observed that there was no sentiment whatever in the Convention for providing restraints other than impeachment against a President. The argument went quite the other way. There was sentiment in the Convention that a President should not be subject even to impeachment and that it would be enough that he served for a limited term and would answer to the people if he chose to stand for reelection.

This point was extensively debated on July 20th, with the motion to strike out the impeachment provision offered by Charles Pinckney⁶ and Gouverneur Morris. 2 *Farrand*

⁶ That the motion should have been made by Pinckney, who observed that the President "ought not to be impeachable whilst in office," 2 *Farrand* 64, is of interest, in view of the weight the District Court gave, at pages 4 and 5 of its Opinion, to a speech Pinckney made in the Senate 13 years later. The District Court was quite understandably misled about the meaning of that speech by the ellipsis resorted to by the usually estimable Farrand in choosing excerpts of the speech to reprint. The privileges to which Pinckney was addressing himself in his speech on March 5, 1800, had nothing whatever to do with the kind of privilege at issue in this case. Pinckney was arguing against the proposition that the Senate could punish, as the English Parliament could do, a newspaper for critical remarks about the Senate, punishment that would have come without trial in a court and without a prior law defining the kinds of conduct that would be regarded as a breach of

rand 64–69. The arguments in favor of the Pinckney motion seem unpersuasive, and indeed during the course of the debate on it Morris admitted that the discussion had changed his mind. But the debate is interesting because those who opposed the Pinckney motion, and supported retention of impeachment, made it clear that this was the means by which they considered that the President was subject to law. Thus Colonel George Mason said:

No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors.

2 *Farrand* 65. And again Elbridge Gerry

urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped that maxim would never be adopted here that the chief Magistrate could do no wrong.

2 *Farrand* 66. By a vote of eight states to two the Pinckney motion was defeated and the Convention agreed that the Executive should be removable on impeachments. 2 *Farrand* 69. But it is only conviction in the Senate that leads to this result. On Sept. 14th the Convention rejected, by a vote of eight states to three, a proposal that an officer impeached by the House be suspended from office until tried and acquitted by the Senate. 2 *Farrand* 612–613.

This lengthy examination of the proceedings of the Constitutional Convention has established that the Framers deliberately chose to provide a strong Executive and they deliberately chose one particular means of guarding against abuse of the powers they entrusted to him. He is immune, unless and until he has been impeached, from the sanctions of the criminal law, impeachment is the device that ensures that he is not above justice, and trial of impeachments is left to the Senate and not to the courts.

Those principles have been understood by the Supreme Court. In the early and leading case of *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 165 (1803), the Court said:

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.

Congressional privilege. The full speech appears in *Annals of Congress*, Sixth Congress 67–83 (1800), and the particular excerpts quoted by the District Court are from pages 72 and 74. The three sentences that precede the statement, quoted by the District Court, that "[n]o privilege of this kind was intended for your Executive * * *" are as follows:

If a man meets him walking alone in the streets and insults him, or if one of ruffian manners should enter his house, and even abuse him there, has your President any privileges like these? Can he commit and imprison without a trial? No sir, he must resort to the laws for satisfaction, where the person charged with the outrage will be heard, and where each party will have justice done them, by men who ought to be so impartially summoned as that no undue bias will be found, when they come to decide.

Id. at 74.

Thirty-five years later, in *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 610 (1838), the Court said:

The executive power is vested in a President; and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power.¹

We are wholly mindful of weighty warnings against the view that "the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them * * *." *Home Building & Loan Assn. v. Blaisdell*. 290 U.S. 398, 443 (1934). But if the provisions of the Constitution that we have been discussing can fairly be said to have taken on new meaning with the passage of years, and with the emergence of new problems, surely any change must be in the direction of strengthening the independence of the Presidency, rather than creating new hobbles on it. Today, far more than in George Washington's time, the nature of our country and of the world insistently requires a President who is free to act as the public interest requires, within the framework created by the Constitution.

But for purposes of the present litigation we need not assert any increase in Presidential powers or Presidential independence. The relief we seek is required in view of powers every President has had since the inception of the Republic and in view of the degree of independence the Framers quite deliberately gave to that great officer.

III. The Need for Confidentiality

There has long been general recognition that high officers in every branch of government cannot function effectively unless they are able to preserve the confidentiality of their communications with their intimate advisers. In *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973), the Court quoted with approval the statement of Justice Reed, sitting by designation in the Court of Claims, in *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F.Supp. 939, 946 (Ct.Cl. 1958):

There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

Discussions of this kind are regarded as privileged "for the benefit of the public, not of executives who may happen to then hold office," *id.* at 944, since it is the public that is served when those who represent it are able to make important decisions with the wisdom that only open and

¹ See also the observations in 1 Bryce, *The American Commonwealth* 89 (1889):

The President is personally responsible for his acts, not indeed to Congress, but to the people, by whom he is chosen. No means exist of enforcing this responsibility, except by impeachment, but as his power lasts for four years only, and is much restricted, this is no serious evil.

frank discussion can provide. Judge Robinson has spelled out this point more fully:

This privilege, as do all evidentiary privileges, effects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and, on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate, and thus achieves an objective akin to those attained by other privileges more ancient and commonplace in character. Nowhere is the public interest more vitally involved than in the fidelity of the sovereign's decision- and policy-making resources.

Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-325 (D.D.C. 1966), *aff'd on the opinion below* 128 U.S. App. D.C. 10, 384 F. 2d 979, *cert. denied* 389 U.S. 952 (1967). See also 5 U.S.C. § 552(b)(5); Rogers, *The Right to Know Government Business From the Viewpoint of the Government Official*, 40 Marq. L. Rev. 83, 89 (1956).

The Framers understood perfectly well that enlightened decision-making requires the kind of frank and free discussion that can only be had when confidentiality is absolutely assured. On May 29, 1787, one of the first acts of the Constitutional Convention was the adoption of the following rule: "That nothing spoken in the House be printed, or otherwise published, or communicated without leave." 1 *Farrand* 15. On July 25th they agreed that the Committee on Detail could be provided with copies of the proceedings of the Convention, but defeated a motion that would have allowed delegates to the Convention to have copies of the resolutions that had thus far been agreed to. 2 *Farrand* 115. As one of their final acts, on September 17th they directed that all of the records of the Convention be turned over to George Washington, who had been President of the Convention. 2 *Farrand* 648. It was not until 1819, in response to a resolution of Congress adopted the preceding year, 3 Stat. 475 (1818), that the Journal of the Convention, a bare record of motions and votes that did not report the speeches of the delegates, was made public. The fullest record of the proceedings of the Convention is in Madison's *Notes*. As late as 1831, 44 years after the Convention, Madison thought it was not yet appropriate for those *Notes* to be made public, 3 *Farrand* 497, and they were not published until 1840, four years after his death. 1 *Farrand* xv.

Contemporaneous records reflect the great value the Framers attached to preserving the confidentiality of the Convention records. On June 6, 1787, shortly after the Convention opened, Madison wrote to Thomas Jefferson, and said:

It was thought expedient in order to secure unbiased discussion within doors, and to prevent misconceptions & misconstructions without, to establish some rules of caution which

will for no short time restrain even a confidential communication of our proceedings.

3 Farrand 35. In 1792, in response to anonymous charges about positions he supposedly had taken within the Convention, Alexander Hamilton said:

Had the deliberations been open while going on, the clamours of faction would have prevented any satisfactory result. Had they been afterwards disclosed, much food would have been afforded to inflammatory declamation. Propositions, made without due reflection, and perhaps abandoned by the proposers themselves on more mature reflection, would have been handles for a profusion of ill-natured accusation.

3 Farrand 368 (emphasis in original).

In 1796 President Washington, who had had custody of the records of the Convention, made reference to what the Journal of the Convention would show on one matter in the course of his message to the House of Representatives refusing to provide that body with information it had sought about the Jay Treaty. *Annals of Congress*, Fourth Congress, First Session 761 (1796). Madison immediately protested that it was improper for the President to breach the confidentiality of the Convention proceedings in this way, making his protest both in a letter to Jefferson on April 4, 1796, and in a speech two days later in the House of Representatives. *3 Farrand* 372. Many years later Madison told a visitor that he thought "no Constitution would ever have been adopted by the convention if the debates had been public."⁸ *3 Farrand* 479.

Similarly one may wonder whether the great decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), would have been unanimous if the conferences of the Justices with regard to it had not been held under conditions of absolute confidentiality? Would President Nixon's historic initiatives in bringing the Vietnam War to an honorable end and in opening channels of communication with the Peoples Republic of China have occurred if his discussions with his advisers that led up to these had not been within the seal of confidentiality that has always attached to Presidential conversations? Or, as a leading scholar has pertinently inquired, would the Civil Rights Act of 1964 ever have been enacted if President Johnson had not been able to talk in complete confidence with Senators and others? See Black, *Mr. Nixon, the Tapes, and Common Sense*, N.Y. Times, Aug. 3, 1973, p. 31.

This case concerns the ability of the President to enjoy confidentiality in carrying out his official duties. But this important privilege is not one that is available only to assist the functioning of the President, or the Executive Branch generally. As Judge Wilkey recently wrote, "the privilege against disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public busi-

⁸ President Madison thus anticipated the view of the most distinguished modern student of the Constitution, Paul Freund, who has said: "I sometimes wonder irreverently whether we would have had a Constitution at all if the Convention had been reported by daily columnists." Hughes, *The Living Presidency* 33 n. * (1973).

ness exists for the legislative and judicial branches as well as for the executive." *Soucie v. David*, 145 U.S.App.D.C. 144, 157, 448 F.2d 1067, 1080 (1971) (concurring opinion).

Although Professor Arthur Selwyn Miller and a collaborator have recently argued to the contrary, Miller Sastri, *Secrecy and the Supreme Court: On The Need for Piercing the Red Velvet Curtain*, 22 Buff. L. Rev. 799 (1973), it has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality. Justice Brennan has written that Supreme Court conferences are held in "absolute secrecy" for "obvious reasons." Brennan, *Working at Justice*, in *An Autobiography of the Supreme Court* 300 (Westin ed. 1963). Justice Frankfurter had said that the "secrecy that envelops the Court's work" is "essential to the effective functioning of the Court." Frankfurter, *Mr. Justice Roberts*, 104 U.Pa.L.Rev. 311, 313 (1955). And only two years ago Chief Justice Burger analogized the confidentiality of the Court to that of the Executive, and said:

No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

New York Times Co. v. United States, 403 U.S. 713, 752 n. 3 (1971).

The Judiciary works in conditions of confidentiality and it claims a privilege against giving testimony about the official conduct of judges. *Statement of the Judges*, 14 F.R.D. 335 (N.D.Cal. 1953). See also the letter of Justice Tom C. Clark, refusing to respond to a subpoena to appear before the House Un-American Activities Committee, on the ground that the "complete independence of the judiciary is necessary to the proper administration of justice." N.Y. Times, Nov. 14, 1953, p. 9.

A similar need for confidentiality, and an insistence that it cannot be breached by other branches of government, applies in the Legislative Branch. Neither a Member of Congress nor his legislative aides can be compelled to disclose communications between the Member and his aides relating to any legislative act of the Member. *Gravel v. United States*, 408 U.S. 606, 629 (1972). It is immaterial that these communications might show criminal acts. 408 U.S. at 615. These aspects of the *Gravel* decision reflect in large part acceptance by the Court of the arguments presented by Senator Ervin and seven other Senators on behalf of the Senate as amicus curiae in that case. As reprinted in the Congressional Record, the amicus brief argued in part:

To isolate a Senator so that he cannot call upon the advice, counsel and knowledge of his personal assistants is to stop him from functioning as an independent legislator. If an aide must fear that the advice he offers, the knowledge he has, and the assistance he gives to his Senator may be called into question by the Executive, then he is likely to refrain from acting

on those very occasions when the issues are the most controversial and when the Senator is most in need of assistance.

* * * * *

The Congressional privilege based upon an express Constitutional provision to encourage the free exchange of ideas and information can hardly be less extensive than the Executive privilege which has not express statutory or Constitutional basis and whose sole purpose is secrecy. Yet the Executive privilege has been extended to the activities of persons whose relationship to the President is far more remote than the relationship of an aide to a Senator.

The need for protecting the confidential relationships between the President and his aides, as the Government has asserted in defending the Executive privilege, is *pari passu* applicable to the need for protecting the relationship between Senators and their aides.* * *

Cong. Rec. S5856, S5857 (daily ed. April 11, 1972).

Again it is the long established practice of each House of Congress to regard its own private papers as privileged. No court subpoena is complied with by the Congress or its committees without a vote of the House concerned to turn over the documents. *Soucie v. David*, 145 U.S.App. D.C. 144, 158-159, 448 F.2d 1067, 1081-1082 (1971). This practice is insisted on in Congress even when the result may be to deny relevant evidence in a criminal proceeding either to the prosecution or to the accused person.⁹

Similarly when President Kennedy refused to disclose to a Senate subcommittee the names of Defense Department speech reviewers, the subcommittee, speaking through Senator Stennis, relied on the privilege of confidentiality Congress enjoys in upholding the President's claim of privilege:

We now come face to face and are in direct conflict with the established doctrine of separation of powers * * *.

I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the

⁹ See, e.g., 108 Cong. Rec. 3626 (1962), showing Senate adoption of a resolution permitting staff members and former staff members of a Senate Committee to appear and to testify in a criminal proceeding against James Hoffa but forbidding them from taking any documents or records in the custody of the Senate and from testifying about information that they gained while employed in the Senate. In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of Government, which it wishes to protect." *Id.* at 3627.

On July 16, 1970, counsel for 1st Lt. William L. Calley, Jr., moved in his court-martial proceeding for production of testimony concerning the My Lai incident that had been presented to a subcommittee of the House Committee on Armed Services in executive session. Lt. Calley claimed that this testimony would be exculpatory of him and would help him establish his defense in the court-martial. The subcommittee Chairman, Rep. F. Edward Hebert, refused to make the testimony available, advising defense counsel on July 17, 1970, that Congress is "an independent branch of the Government, separate from and equal to the Executive and Judicial branches," and that accordingly only Congress can direct the disclosure of legislative records. He concluded from this that the material requested by the defense was not within the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), nor subject to the requirements of the Jencks Act, 18 U.S.C. § 3500. Subsequently the military court issued a subpoena to the Clerk of the House of Representatives. The Speaker laid this before the House on November 17, 1970, 116 Cong. Rec. 37652 (1970), but to date the House has taken no action nor given any indication that it will supply the information sought.

Executive has made the Legislative Branch surrender records from its files—and I do not think either one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field.

Committee on Armed Services, U.S. Senate, *Military Cold War Escalation and Speech Review Policies*, 87th Congress, 2nd Sess., 512 (1962).

The considerations of public policy that required that the deliberations of the Constitutional Convention be held in confidence for half a century and that make it imperative that judges and Members of Congress be permitted to work under conditions of absolute confidentiality are particularly compelling when applied to Presidential communications with his advisers.

Inseparable from the modern Presidency, indeed essential to its effective operation, is a whole train of officers and offices that serve him as eyes, ears, arms, mouth, and brain.

Rossiter, *The American Presidency* 97 (1956). Nor is it only those who are part of his staff with whom the President must be able to talk. He must be able to confer with foreign leaders and with representatives of every element in American public. He must be free to look for advice to anyone whose advice he trusts, whether in or out of government. The late Dean Acheson and former Justice Abe Fortas are merely recent and conspicuous examples of persons who were consulted by Presidents on critical public issues at times that they held no public office. "The President is, as he should be, entirely free, * * * like all who preceded him, to take counsel with private citizens." *Id.* at 103.

For the Presidency to work effectively and for the President to get candid advice from those to whom he turns it is absolutely essential that he be able to protect the confidentiality of these communications. As stated by the President on July 6, 1973, in his letter to Senator Sam J. Ervin:

No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential.

This has been the position of every President in our history, and it has been specifically stated by President Nixon's immediate predecessors. Writing his memoirs in 1955, President Truman explained that he had found it necessary to omit certain material, and said: "Some of this material cannot be made available for many years, perhaps for many generations." 1 Truman, *Memoirs* x (1955). President Eisenhower stated the point with force on July 6, 1955, in connection with the Dixon-Yates controversy:

But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere little slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, and if they are, will wreck the Government.

There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.

Public Papers of Presidents of the United States: Dwight D. Eisenhower 1955 674 (1959).

Congress recognized the high degree of confidentiality that must attach to Presidential papers for many years when it enacted the Presidential Libraries Act of 1955, Pub. L. 84-373, 69 Stat. 695 (1955), now codified in 44 U.S.C. §§ 2107, 2108. That statute encourages Presidents to give their papers to a Presidential library, and provides that papers, documents, and other historical materials so given "are subject to restrictions as to their availability and use stated in writing by the donors or depositors * * *". The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf." 44 U.S.C. § 2108(c); *Nichols v. United States*, 460 F.2d 671 (10th Cir. 1972). Since that Act was passed the gifts of Presidential papers of Presidents Eisenhower, Kennedy, and Johnson have all specified that "materials containing statements made by or to" the President are to be kept "in confidence" and are to be held under seal and not revealed to anyone except the donors or archival personnel until "the passage of time or other circumstances no longer require such materials being kept under restriction." Letter of April 13, 1960, from President Dwight D. Eisenhower to the Administrator of General Services; Agreement of Feb. 25, 1965, between Mrs. Jacqueline B. Kennedy and the United States; Letter of Aug. 13, 1965, from President Lyndon B. Johnson to the Administrator of General Services. In addition, the letters from President Eisenhower and from President Johnson specifically prohibit disclosure to "public officials" and state, as the reason for these restrictions, that "the President of the United States is the recipient of many confidences from others, and * * * the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency * * *."

The need to preserve the confidentiality of the Oval Office has been recognized from without as well as by those who have borne the burdens of service there. What Justice Stewart, who was joined by Justice White, said in his concurring opinion in *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971), has great force:

And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. * * *

* * * [I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to pro-

tect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense. 403 U.S. at 728, 729-730.

Of course international relations and national defense have very special claims to secrecy, but the importance of the President being able to speak with his advisers "freely, frankly, and in confidence" is not confined to those matters. It is just as essential that the President be able to talk openly with his advisers about domestic issues as about military or foreign affairs. The wisdom that free discussion provides is as vital in fighting inflation, in choosing Supreme Court Justices, in deciding whether to veto a large spending bill, and in the myriad other important decisions that the President must make in his roles as Chief of State, Chief Executive, and Chief Legislator as it is when he is acting as Chief Diplomat or as Commander in Chief. Any other view would fragment the executive power vested in him and would assume that some of his Constitutional responsibilities are more important than others. It is true that the President has more substantive freedom to act in foreign and military affairs than he does in domestic affairs, but his need for candid advice is no different in the one situation and in the other.¹⁰

Former Justice Fortas, who advised President Johnson on both foreign and domestic matters, has said that a President must have "confidence that he can have advisers to whom he can trust his inmost thoughts. A President has to have this, just as a citizen can go to a doctor or a lawyer, a priest or a psychiatrist, to discuss his problems, without fear of disclosure of his confidences." Fortas, *The Presidency As I Have Seen It*, in Hughes, *The Living Presidency* 335 (1973).¹¹

¹⁰ There are serious weaknesses in the assumption, popular among liberals who happen at the moment not to be thinking about Senator McCarthy, that public policy ought to draw a sharp distinction between "military and diplomatic secrets" on the one hand and all other types of official information on the other, giving Congress free access to the latter. In the first place, the line is by no means easy to draw, even when the best of faith is used * * *. More fundamentally, however, the executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberations incidental to the making of policy decisions.

Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 Yale L. J. 477, 488 (1957).

¹¹ This need has been perceived also by political scientists.

Although some of President Truman's "cronies" were poorly equipped for this service, their indiscretions did not destroy a President's need for personal advisers. * * * There can be no doubt that men like House and Hopkins perform an essential function. Ideally, they are both intimates of the President and experts in public affairs. But perhaps their most significant contributions are made as presidential intimates. The President needs to discuss with a sympathetic person ideas and plans that are still in an amorphous state and to gain some respite from the cares of office by talking over trivial matters that interest him or by chatting about men of affairs, with the confidence that his remarks will not go beyond the room.

Carr, Bernstein, Morrison, Snyder, & McLean, *American Democracy in Theory and Practice* 609-610 (1956).

All that we have said on this point was succinctly put by a distinguished constitutional lawyer, Charles L. Black, Jr., who has recently observed that refusal to disclose communications of the kind involved in this litigation is not only the President's lawful privilege

but 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*, N.Y. Times, Aug. 3, 1973, p. 31. See also the fuller expression of Professor Black's view in Cong. Rec. E5320-E5322 (daily ed. August 1, 1973).

What we have said in this portion of the Brief is frequently put on the basis of separation of powers, and, as we shall discuss under Point IV, considerations of separation of powers are in the forefront in this case. Yet it is probable that the point we have made goes beyond the separation of powers arguments and rests on a proposition even more fundamental. Even though no separation of powers issue would be involved, we suggest that it would be as inadmissible for one federal court to inquire into discussions between a judge of another federal court and his law clerk as it would be if the inquiry were to come from a committee of Congress. Similarly we cannot conceive that one Congressional committee could require production of the private papers of another Congressional committee any more than a court could require these. What is really at stake is the ability of Constitutional officers of government to perform their duties under conditions that will make it possible for them to function to the best of their ability. For this goal to be achieved, the ability to preserve the confidentiality of communications with close advisers is absolutely essential.

IV. Separation of Powers

To the Framers of the Constitution, as Justice Frankfurter has observed, "the doctrine of separation of powers was not mere theory; it was a felt necessity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (concurring opinion). James Madison expressed the sentiment that pervaded the Convention when he said, on July 17, 1787: "If it be essential to the preservation of liberty that the Legis: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other." 2 *Farrand* 34. Of course, as noted at page 11 of the Opinion of the District Court, the Constitutional plan provides for much interaction among the three great branches of government. This is a part of the system of checks and balances that the Framers also thought essential, but these in-

stances of interaction are not inconsistent with the independence each branch must have in performing its appointed functions. Thus the President may veto Acts of Congress, and Congress may override that veto. They each have a role in the process that leads to making a law, but each branch acts independently when it performs its role. Neither can interfere with the other in that process, nor can the courts interfere with either one.

Thus Congress, in the exercise of its legislative powers, can make a law and this becomes the rule of decision that the courts must thereafter apply. 28 U.S.C. § 1652. But when Congress undertook to tell the courts what effect they should give in a pending case to a pardon previously granted by the President, it went too far. The Court rejected the notion that "the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it." *United States v. Klein*, 13 Wall. (80 U.S.) 128, 146 (1872). The action of Congress was doubly improper, the Court said, both because "Congress has inadvertently passed the limit which separates the legislative from the judicial power" and because the rule Congress had prescribed was one "impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." 13 Wall. at 147. "It is the intention of the Constitution," the Court said, as it has on so many other occasions, "that each of the great coordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others." *Ibid.* See also the famous exposition of this doctrine in *Kilbourn v. Thompson*, 103 U.S. 168, 190-191 (1880).

Chief Justice Taft, who was able to view these matters from the perspective of having headed two of the three branches of government, has made the classic statement of the rule of construction that must apply to preserve the independence of the separate branches of government except to the extent that the Constitution itself provides for their interaction. In *Myers v. United States*, 272 U.S. 52, 116 (1926), he wrote:

Montesquieu's view that the maintenance of independence, as between the legislative, the executive and the Judicial branches, was a security for the people had [the Framers'] full approval. Madison in the Convention, 2 *Farrand*, Records of the Federal Convention, 56. *Kendall v. United States*, 12 Pet. 524, 610, 9 L. Ed. 1181. Accordingly the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 *Annals of Congress*, 497. This rule of construction has been confirmed by this court in *Merriweather V. Garrett*, 102 U.S. 472, 515, 26 L. Ed. 197; *Kilbourn V. Thompson*, 103, U.S. 168, 190, 26 L. Ed. 377; *Mugler v. Kansas*, 123 U.S. 623, 662, 8 S. Ct. 273, 31 L. Ed. 205.

Although the specific holding of the *Myers* case was narrowed to some extent in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), that narrowing was

on a point that does not bear on the present issue. The later case was at pains to reaffirm the vigor with which the Constitutional separation of powers must be protected and preserved. A unanimous Court, speaking through Justice Sutherland, said:

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

295 U.S. at 629-630.

We submit, with all respect, that if the decision below were allowed to stand it could no longer fairly be contended that the President of the United States is "master in his own house." The confidences of that house would be open for disclosure to grand juries—and thus ultimately to defendants—whenever one of 400 district judges chose not to accept the President's claim of privilege.¹²

The President has solemnly and repeatedly declared that it is absolutely essential to the functioning of his office that his conversations be held confidential. If the decision below stands, it will be for the courts to decide whether they agree, and, if they see fit, to deny to the President the condition that he, like all of his predecessors, thinks indispensable to the performance of his Constitutional duties.

The President has assured the District Court that the conversations in question occurred pursuant to an exercise of his duty to "take Care that the Laws be faithfully executed." The District Court apparently recognizes that if this is true the tapes cannot be given to the grand jury. But while the District Court states, at page 21 of its Opinion, that "it is extremely reluctant to finally stand against a declaration of the President of the United States on any but the strongest possible evidence," it reserves for itself the right to weigh that evidence and to decide for itself whether the President has accurately described what he did. Though the President has taken an oath, no less than the judges, to preserve, protect, and defend the Constitution of the United States, the ruling below, should it be allowed to stand, would allow the Judicial Branch to decide whether the President has been faithful to that oath.

The District Court disclaimed, at page 10 n. 21 of its Opinion, any "attempt to dictate to or require an account of the President in the discretionary matters committed to him under Article II," saying that this "would truly be an instance of one branch pitting itself against another."

¹² At this writing defendants in a criminal case in the Northern District of Texas have moved to compel production of Presidential papers, and defendants in a criminal case in the Southern District of New York have sought to subpoena tapes of private Presidential conversations. These are in addition to a number of civil cases in which Presidential papers and tapes are being sought—and in at least one of which a court has ordered them produced.

Nevertheless, this is precisely what the District Court has done. We shall show under Point V that it has always been understood to be discretionary with the President to produce or withhold Presidential papers. The view of the District Court, that the production of evidence by the President is somehow "akin to a ministerial duty," would suggest that the President has no discretion in the matter at all.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

Mississippi v. Johnson, 4 Wall. 475, 498 (1867).¹³ The classic example of a ministerial duty was the delivery of the commission in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), a suit respecting "a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents * * *." 1 Cranch at 170. Surely the District Court cannot have meant to suggest that production of Presidential papers is a ministerial duty in the sense in which that term has been used in our law.

Nor would it assist analysis to suggest that what the District Court meant is that after it has determined, in its discretion, that particular evidence should be produced by the President, the President is then under a ministerial, non-discretionary duty to comply with that order. This would be purely question-begging, since throughout all of the cases the distinction between discretionary and ministerial duties, where it applies, has gone to the threshold question whether the act of the Executive is examinable by the courts at all, rather than to what the duty of the Executive would be if its act has been examined and found improper.

There is no way the decision below can be allowed to stand without doing very serious damage to the great principle of separation of powers. The "essential coequality" of the three branches, as the Court described it in *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935), would be ended, and we would have taken a long—and probably irreversible—step toward government by judiciary. Today it would be the Presidency that would be lessened and crippled in its ability to function. Tomorrow it would be Congress, for if Presidential privacy must yield to a judicial determination, it is difficult to think of any ground on which Congressional privacy could continue to stand.¹⁴ Surely this is far too high a price to pay for the atonement of Watergate.

¹³ Although lower officers can be required to perform ministerial duties, *Mississippi v. Johnson* specifically left open "whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law * * *." 4 Wall. at 498. That question has not been answered in any later authoritative decision.

¹⁴ Some measure of Congressional privacy would remain under the Speech or Debate Clause of Article I, § 6, but it is clear that Congress has long claimed a right of privacy, based on separation of powers, that goes far beyond what is protected by the Speech or Debate Clause. See the examples cited in note 9 at page 35 [W.C.P.D. p. 1109] above.

V. The Discretion of the President

Whatever may be the case with lower officers of government, who do not enjoy the special place in our Constitutional system of the President, as discussed in Point II of this Brief, it has always been understood, prior to the decision below in this case, that when Presidential papers are sought, it is the President alone who has discretion to determine whether the public interest permits their production, and that this discretion cannot be reviewed or overridden by a court or by Congress.

This precedent was established very early in our history, when a Congressional committee demanded that President Washington produce papers concerning the St. Clair expedition. The matter was considered by him in consultation with his cabinet, and their conclusion, as recorded by Thomas Jefferson, was that "the Executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion." 1 Ford, *Writings of Thomas Jefferson* 189-190 (1892).

Of course this is a great power, and one that must be exercised with circumspection. What Justice Stewart wrote of the power of the President to preserve secrecy in matters concerning international relations and national defense is true whenever the President must decide whether disclosure or nondisclosure best serves the public interest.

It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake.

New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (concurring opinion). But heretofore the settled practice has been that this awesome responsibility is one for the President, with his unique ability to perceive and to weigh all of the conflicting interests that may be involved, to exercise.¹⁵

As long ago as 1865 Attorney General Speed gave the following opinion:

Upon principles of public policy there are some kinds of evidence which the law excludes or dispenses with. Secrets of state, for instance, cannot be given in evidence, and those who are possessed of such secrets are not required to make disclosure of them. The official transactions between the heads of departments of the Government and their subordinate officers are, in general, treated as "privileged communications." The President of the United States, the heads of the great depart-

ments of the Government, and the Governors of the several States, it has been decided, are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient. These are familiar rules laid down by every author on the law of evidence.

11 Op. Atty. Gen. 137, 142-143 (1865). In 1893 Attorney General Olney ruled that it is for the President or head of the department having the legal custody of a paper and "not for the judge presiding at the trial," to determine whether "such general public interest forbids the production of an official record or paper in the courts * * *." 20 Op. Atty. Gen. 557, 558 (1893). In 1905 Attorney General Moody gave an opinion that the head of an Executive Department may properly decline to furnish official records of the department, or to give testimony in a court case, "whenever in your judgment the production of such papers or the giving of such testimony might prove prejudicial for any reason to the Government or to the public interest." 25 Op. Atty. Gen. 326, 331 (1905).

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

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

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

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

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

100 Cong. Rec. 6621 (1954).

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

The President's authority to withhold information is not an unbridled one, but it necessarily requires the exercise of his

¹⁵ The only solution that can get around all these difficulties is that of leaving to the President the decision as to which of his internal records are to be kept confidential. Like all powers (including, let us remind ourselves, the power of judges) this power may be sometimes abused. But if we are to form our law and practice on the assumption that the Presidents we elect are to be the sort of men who will often abuse this privilege, or claim in bad faith, then we might as well give up.

Black, *Letter to the Editor*, N. Y. Times, Sept. 6, 1973, p. 34.

judgment as to whether or not the disclosure of particular matters sought would be harmful to the national interest.

Id. at 431.

These consistent opinions over a long period of years by the highest legal officers in the Government cannot be lightly disregarded.¹⁶ Even more important is the fact that Presidents have always acted on the assumption that it is discretionary with them, and with them alone, to determine whether the public interest permits production of Presidential papers, and the other branches of Government have accepted this position. The fact that the litigation arising out of the Watergate investigations is the first time that a subpoena has been directed to force production of Presidential papers since Colonel Burr's abortive attempt to subpoena documents from President Jefferson is because it has been universally accepted that there is no power to compel the President in the exercise of his discretion. Uninterrupted usage continued from the early days of the Republic is weighty evidence of the proper construction of any clause of the Constitution. *Inland Waterway Corp. v. Young*, 309 U.S. 517, 525 (1940).

Both officers, lawmakers and citizens naturally adjust themselves to any long continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into regular practices. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of the statute or the exercise of a power, weight should be given to the usage itself—even when the validity of the practice is itself the subject of investigation.

United States v. Midwest Oil Co., 236 U.S. 459, 472–473 (1915).

Recognition of this discretion in the President is in no way inconsistent with *United States v. Reynolds*, 345 U.S. 1 (1953), or with its oft-quoted statement that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” 345 U.S. at 10. In *Reynolds* the United States argued for the English practice, as announced in *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, under which the courts cannot go behind an executive claim of privilege so long as it is proper in form. In England, if privilege is formally claimed, that is the end of the matter and litigants must do without the evidence that they seek. Under the rule adopted in *Reynolds*, the courts do have authority, in civil litigation, to determine whether a claim of privilege by a department head is justified. If they conclude that it is not, the United States must then choose between producing the evidence in question or having a finding made adverse to it on the issues to which the evidence relates. We shall pursue that point further in Point VII of this Brief. But the holding in *Reynolds* was that the District Court erred in ordering *in camera* examination of the documents in question. The

¹⁶ It is true that some of these have been addressed to Congressional demands for information from the Executive, but we submit that it is not true, as the District Court suggested at page 6 n. 12 of its Opinion, that “such opinions usually come in response to Congressional demands for information * * *.”

circumstances of the case, the Court reasoned, were in themselves enough to show that there was 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.

345 U.S. at 10.¹⁷

In the present case the District Court said, at page 22 of its Opinion, that “even an inspection *in camera* may constitute a compromise of privilege,” but thought that it would be “an extremely limited infraction.” But given the nature of the evidence sought here, the existence of the privilege is manifest, and the District Court erred in holding that any breach of the privilege, even by inspection *in camera*, is permissible.

We deal here, as we have emphasized, not with lower government officials but with the President of the United States. We are concerned, not with routine papers, but with tape recordings of the President's conversations with his most intimate advisers.

The reasons for preserving Presidential privacy, spelled out in Point III of this Brief, apply with special force when recordings or notes of Presidential conversations are sought. Recordings are the raw material of life. By their very nature they contain spontaneous, informal, tentative, and frequently pungent comments on a variety of subjects inextricably intertwined into one conversation. Disclosure of information allegedly relevant to this inquiry would mean disclosure as well of other information of a highly confidential nature relating to a wide range of matters not relevant to this inquiry. Some of these matters deal with sensitive issues of national security. Others go to the exercise by the President of his Constitutional duties on matters other than Watergate. The nature of informal, private conversations is such that it is not practicable to separate what is arguably relevant from what is clearly irrelevant. Once the totality of the confidential nature of the recordings is destroyed, no person could ever be assured that his own frank and candid comments to the President would not eventually be made public. No government can func-

¹⁷ *Reynolds* is relevant also on another issue that was argued in the District Court. It was claimed there that any privilege the President had was waived because the President has allowed participants in the conversations in question to testify about the conversations to the extent that their testimony is relevant to possible criminal conduct arising out of the Watergate affair and to the extent that national security is not involved. We have not discussed the waiver issue here, since the District Court did not rely at all on any concept of waiver. We merely note that in *Reynolds* the offer by the government to allow witnesses to give testimony about the facts was not regarded as a waiver of privilege with regard to documents containing statements by those witnesses but was expressly relied on by the Supreme Court as a reason for upholding the claim of privilege. See also the pointed statement on why there can be no waiver of executive privilege in Bickel, *Wretched Tapes (cont.)*, N.Y. Times, Aug. 15, 1973, at 53.

tion if its internal operations are to be subject to that kind of open scrutiny.¹⁸

We recognize that the District Court ruled, at page 22 of its Opinion, that if privileged and unprivileged evidence are so inextricably connected that separation becomes impossible, the whole must be privileged and no disclosure made to the grand jury. On the view we take of the matter, all of the recordings sought must be found to be privileged because the President, in his discretion, has determined that it is not in the public interest to allow any recordings of this kind to be produced in court. But even if the District Court should so rule, the vital principle of confidentiality would already have been broken because the District Court would have listened to the tapes. If there be any means by which the Special Prosecutor could obtain appellate review of an order that all of the tapes are privileged, the number of judges—and perhaps court attaches—who would have access to the tapes would be vastly increased, and the breach in the principle of confidentiality would be even greater.¹⁹

If the District Court should rule that any portion of the tapes is not privileged and turn that portion over to the grand jury, all confidentiality would be ended. Even if there were no leaks from the grand jury—and unhappily there have been such leaks in the past—if the grand jury is given access to the tapes then defendants, on demand, would be entitled to the whole tapes, from which not even the most sensitive national security matters could be excised. This follows inexorably from *Alderman v. United States*, 394 U.S. 165 (1969). There the United States conceded that all relevant portions of tapes must be turned over to defendants, even though national security matters would be disclosed, but it argued that the court should listen to the tapes *in camera* to excise irrelevant material. This, the Supreme Court ruled, could not be done.

¹⁸ See the remarks of Jenkin Lloyd Jones, formerly President of the American Society of Newspaper Editors, quoted in Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941, 942 (1958):

The Government of Athens was an absolute and complete democracy, with all deliberations carried on in a goldfish bowl of open debate. But Athens became smothered with oratory, paralyzed with demagoguery, and finally wound up with such an unstable mobocracy that nearly every able Athenian was banished from the land.

¹⁹ If the President must submit to a district judge the material for which confidentiality is claimed, then that judge's decision on the claim of privilege must (1) be final and unappealable (an absurd solution, given the numberousness of district judges, the differences of all sorts among them and the obvious inaptitude of the district judge's position and training to vouch him an expert in delicate judgments of statecraft or to make it right for him unreviewable to control the President of the United States) or (2) be fully appealable, which with all the good intentions in the world, must mean (given the number of hands through which the material must pass and the time that must elapse) that continued confidentiality would be deeply jeopardized and often if not always lost.

Black, *Letter to the Editor*, N.Y. Times, Sept. 6, 1973, p. 34.

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. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin of error to great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case.

394 U.S. at 182. The Court distinguished cases involving tapes of conversations from grand jury minutes and other situations in which *in camera* inspection has been held to be a permissible technique because 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. Just as *in camera* inspection of recordings of conversations is not permissible to determine to what extent the prosecution's case may have been tainted by an illegal surveillance, it is equally impermissible in determining what may be exculpatory of a defendant and relevant to his defense. Only a defendant, who has himself participated in the conversations, would be able to make that judgment.

When it is the President himself who has determined that the public interest will be harmed if the principle of confidentiality of his private conversations is compromised, it is not for any court to form a contrary judgment and to compromise that confidentiality, even to the extent of *in camera* inspection.

As long ago as *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), the Supreme Court disclaimed any judicial power to order "an intrusion into the secrets of the cabinet * * *." 1 Cranch at 170.²⁰ It is even less thinkable that a court should intrude into the privacy of the Oval Office.

This point is recognized even by those who take a very dim view of executive privilege generally. A leading contemporary critic is Raoul Berger, who has written a 156-page article setting out his controversial views on what he conceives to be the limited scope of the privilege. He draws very clearly, however, a distinction between discussions among the President and his close advisers and the more usual kinds of claim of executive privilege to which he is so strongly opposed.

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

²⁰ When Attorney General Lincoln was testifying in that great case, the Court ruled that "if he thought that anything was communicated to him in confidence he was not bound to disclose it * * *." 1 Cranch at 144.

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

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

The subpoena in this case, insofar as it seeks material that the President has not voluntarily produced, goes to the very heart of Presidential privacy, and thus of executive privilege. If recordings or notes of the President's most private conversations can be ordered produced, to a judge in the first instance and perhaps ultimately to a grand jury and to criminal defendants, no President will ever again be able to talk with his advisers with assurance that what they say will be kept in confidence. Such a result would do grave damage to the ability of any President to function. The President properly exercised the discretion that attaches to that office alone to refuse to make such a disclosure. Although Chief Justice Taft was speaking in a somewhat different context, what he said is fully applicable here:

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it.

Myers v. United States, 272 U.S. 52, 134 (1926).

VI. The Criminal Nature of the Proceeding

There are intimations in the Opinion of the District Court, particularly at pages 13 to 15, that the usual rules of executive privilege and of Presidential privacy are inapplicable here because the subpoena is from a grand jury, seeking evidence relevant to a criminal case.

This point was made more explicitly by the Special Prosecutor in his submission to the District Court. He asserted repeatedly that the grand jury will not be able to function as effectively as he would like unless it has access to the tapes in question. The President of the United States had argued, as he does here, that he, and his successors, will not be able to function effectively if the tapes are disclosed. The principal theme of the Brief in Support was that a conflict of this kind may appropriately be resolved by the judiciary and that it is more important that a grand jury have access to every possible bit of evidence and that indictments against wrongdoers contain every possible count than that the confidentiality that the President regards as indispensable to the performance of his Constitutional duties be preserved.²¹

²¹ See also the statement of the Special Prosecutor in his Petition for a Writ of Mandamus, at page 9, that "the need of the grand jury for the evidence in the impartial administration of justice is greater than the public interest served by secrecy."

Yet no case has ever held, and no suggestion has ever been made in legal literature, that an otherwise valid claim of executive privilege must give way because a grand jury is looking into charges of criminal conduct. Only last year the Supreme Court recognized that ordinarily a grand jury has the right to every man's evidence, but immediately qualified that statement by adding "except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

It may well be that statements made by other persons to the President at the meetings that are the subjects of the recordings were made by them pursuant to a conspiracy to obstruct justice, or that some of those other persons may subsequently have perjured themselves by their testimony about what occurred at the meetings. Executive privilege cannot be claimed to shield executive officers from prosecution for crime. *Gravel v. United States*, 408 U.S. 606, 627 (1972). It is precisely with that consideration in mind, and with a strong desire that the truth about Watergate be brought out, that the President has not asserted executive 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 national security. Recordings cannot be so confined and limited, 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.

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

It will not do to argue, as is done at pages 20–21 of the Opinion, that if the interest served by a privilege is abused or subverted, the claim of privilege fails. The privilege is the President's. That others may have abused his trust by criminal acts in their conversations with him or by subsequent perjury in testimony about those conversations is not an abuse or subversion of the interest in allowing privacy to the President and does not defeat the privilege. By way of analogy, the usual attorney-client privilege is denied to a client who seeks advice to aid him in carrying out an illegal or fraudulent scheme. McCormick, *Evidence* 199 (2d ed. Cleary et al. 1972). But suppose that a client

consults an attorney in good faith to obtain legitimate legal advice, but that unbeknownst to him the attorney plans to use the information he is acquiring about the client's affairs to embezzle funds from the client or otherwise to defraud him. Can it be doubted that the client could still validly claim the privilege if in some other proceeding the attorney is called and asked to testify about the private affairs of the client?

There can be no suggestion that the President might himself have been party to a criminal conspiracy and that he is subverting the privilege by using it to hide his own wrongdoing. In the first place, it is simply not true. In the second place, as we have spelled out in Point II of the Brief, neither the grand jury nor the court can proceed against an incumbent President for crime. If any President ever were to invoke executive privilege to prevent disclosure of criminal activities on his part, he would have to be convicted in a Court of Impeachment before this could be a legitimate concern of the Judicial Branch.

The President is keenly interested in having the truth of Watergate emerge and in having those who may have committed crimes dealt with appropriately by the law. But he also has determined that it is more important that the privacy of the Presidency be preserved than that every possible bit of evidence that might assist in criminal prosecutions be produced. The Judicial Branch is absolutely without power to reweigh that choice or to make a different resolution of it.

A court may think that a particularly grievous offender will go unpunished if the United States determines not to produce a Jencks Act statement—but the *Jencks* case itself, and the statute adopted in response to that case, 18 U.S.C. § 3500(d), make it unmistakably clear that the choice is for the Executive and not for the Court.

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

Jencks v. United States, 353 U.S. 657, 672 (1957). Precisely the same thing is true with regard to the identity of informers. *Roviaro v. United States*, 353 U.S. 53, 61 (1957). It is true also of information from electronic surveillance. *Alderman v. United States*, 394 U.S. 165, 184 (1969). The Court may tell the Executive that it is to produce, but if the Executive chooses not to do so, it is free to make that choice and the only power in the court is to dismiss the prosecution. "In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Roviaro v. United States*, 353 U.S. 53, 61 (1957).

These are merely special applications of the general principle that it is exclusively for the Executive Branch, and not for the courts, to decide whether other governmental interests outweigh the interest in a particular criminal prosecution. "The discretion of the Attorney Gen-

eral in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute." *Smith v. United States*, 375 F. 2d 243, 247 (5th Cir. 1967). That rule is recognized in this Circuit. *Powell v. Katzenbach*, 123 U.S. App. D.C. 250, 359 F. 2d 234 (1965), cert. denied 384 U.S. 906 (1966); *District of Columbia v. Buckley*, 75 U.S. App. D.C. 301, 128 F. 2d 17 (1942). It also is well recognized in other courts. E.g., *United States v. Cox*, 342 F. 2d 167 (5th Cir.), cert. denied 381 U.S. 935 (1965); *In re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970); *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); *United States v. Woody*, 2 F. 2d 262 (D. Mont. 1924); Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 L. & Contemp. Prob. 64 (1948).

These cases follow a rule that has been established at least since the *Confiscation Cases*, 7 Wall. (74 U.S.) 454 (1869). It was held there that the Attorney General, in his discretion, could dismiss, over the objection of informers entitled to fees, libels for the criminal condemnation of certain vessels, even though the statute authorizing such actions made it the duty of the President to see to it that property of the kind in question was seized and condemned.

The reasons for the rule were well stated by Judge Wisdom in his concurring opinion in *United States v. Cox*, 342 F. 2d 167, 193 (5th Cir.), cert. denied 381 U.S. 935 (1965):

* * * when, within the context of law-enforcement, national policy is involved, because of national security, conduct of foreign policy, or a conflict between two branches of government, the appropriate branch to decide the matter is the executive branch. The executive is charged with carrying out national policy on law-enforcement and, generally speaking, is informed on more levels than the more specialized judicial and legislative branches. In such a situation, a decision not to prosecute is analogous to the exercise of executive privilege. The executive's absolute and exclusive discretion to prosecute may be rationalized as an illustration of the doctrine of separation of powers, but it would have evolved without the doctrine and exists in countries that do not purport to accept this doctrine.

The court is absolutely powerless to require the Executive Branch to produce evidence, if the Executive has concluded that other governmental interests require that the evidence be kept in confidence, even though this may mean that a particular prosecution cannot continue. Nor does the grand jury, a mere appendage of the court, *Brown v. United States*, 359 U.S. 41, 49 (1959), have any such power.

All must be aware now that there are times when the interests of the nation require that a prosecution be foregone. These instances will most often be in the area of state secrets and national security. With stakes so high, the safety of our country, and hence the security of the world, ought not to be imperiled by leaving the important decision to a body having no definitive political responsibility. And it is hardly realistic to suggest, as do the dissenters, that these factors may be evaluated by the Grand Jury. What will be the course of their information? How extensive will it be? How close will a Grand Jury session approach a presidential cabinet meeting? How will essential government secrets be kept when disclosed to persons

none of whom as Grand Jurors will have been subjected to customary security clearance checks?

And even in less sensitive areas, the practical operation of the prosecutorial function makes imperative the need for executive determination. * * * The executive's purpose to effectuate specific policies thought to be of major importance would be frustrated or encumbered were a Grand Jury given the sole prerogative of determining when a prosecution is to be effectively commenced.

United States v. Cox, 342 F.2d 167, 182 (5th Cir.) (Brown, J., concurring), cert. denied 381 U.S. 935 (1965).

Ordinarily the choice whether to prosecute in the first instance, and whether to withhold evidence the court thinks should be produced, even though to do so requires dismissal of the action, is for the Attorney General, but the Attorney General acts as "the hand of the president." *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922). He is the agent of the President and a direction given by him must be regarded as a direction of the President. *Confiscation Cases*, 20 Wall. (87 U.S.) 92, 109 (1873).

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.

Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967).

We are aware that this is not the ordinary case. In his statement of April 30th the President delegated to the Attorney General "absolute authority to make all decisions bearing upon the prosecution of the Watergate case and related matters," and this authority has been redelegated by the Attorney General to the Special Prosecutor. It will be entirely for the Special Prosecutor to decide whom to prosecute. It will be for him to decide to whom to give immunity. It will be for him to decide whether to comply with requests from the court that he produce evidence that is in his hands or suffer the consequences of nonproduction.

We emphasize—because in the District Court the Special Prosecutor wholly missed the point of our submission on this phase of the case—that the President does not intend to interfere with the Special Prosecutor in any of the aspects described in the preceding paragraph. The President does not intend to force dismissal of any prosecution.

But the President has not delegated the nondelegable duty of making the discretionary decision whether to claim executive privilege for Presidential papers. This was explicitly recognized when the Special Prosecutor was appointed, and he was empowered by the Attorney General "to contest the assertion of 'Executive Privilege' * * *." 38 Fed. Reg. 14,688 (June 4, 1973). The President, and the President alone, must weigh such public interests as national security and the need for confidentiality in the work of the Presidency against the possibility

that refusal on the President's part may make the task of the Special Prosecutor more difficult, or even impossible, in some particular case. The authorities we have reviewed at length above, showing that decisions of this kind are always for the Executive Branch and not for the courts, demonstrate conclusively that there is no authority in the courts to overrule the President's resolution of those competing interests.

It is not the President's view that refusal to produce these tapes will in fact defeat or hamper prosecution of any who have betrayed the President's confidence by committing crimes. The grand jury investigation was in progress long before the existence of the tapes was known. Indeed Assistant Attorney General Petersen, who was in charge of the investigation prior to appointment of the Special Prosecutor, has testified that the case was "90 percent complete" when it was taken away from him and entrusted to the Special Prosecutor. (S. Tr. 7521.) There have been instances in which the Special Prosecutor has deposited under seal with the District Court evidence against certain persons before they testified to the Senate Select Committee, apparently in the belief that he had an adequate case against those persons at the time and that it should be sealed in order to show that none of the evidence was the fruit of testimony given to the Senate committee under cloak of immunity. The President has cooperated with the Special Prosecutor by making available documentary evidence for which executive privilege could have been claimed and by allowing all of those who participated in the conversations in question to give testimony about what was said insofar as it relates to possible criminal conduct arising out of the Watergate affair. One can understand the desire of the Special Prosecutor to hear the tapes, in order to be sure that he has not overlooked anything, but all prosecutors have to learn to live with the fact that they cannot have access to privileged evidence, much as they would like to have it.

There was a suggestion by the Special Prosecutor in the court below, though it was no more than a suggestion, that unless the tapes were produced some prosecutions would have to be dismissed under the *Jencks Act* or the rule in *Brady v. Maryland*, 373 U.S. 83 (1963). This is not the time to speak definitively to issues of that kind, or to argue at length about the consequences of refusal to produce tapes to persons not yet indicted who may or may not make demand for them. So we merely note in the margin our view that neither the *Jencks Act* nor the *Brady* rule apply to tape recordings that, for Constitutional reasons, are unavailable to the prosecution.²² See

²² With regard to the *Jencks Act*, it is held that the definition of "statement" is 18 U.S.C. § 3500 (a) applies only to a recorded recital of past occurrences by a prospective prosecution witness and does not apply to a contemporaneous recording of the events that give rise to the criminal charge. *United States v. Sopher*, 362 F. 2d 523, 525-526 (7th Cir.), cert. denied 385 U.S. 928 (1966). The *Sopher* case is followed in *United States v. Escobedo*, 430 F. 2d 603, 608

the similar expression of view in the letter from Rep. Hebert, discussed at page 36 [W.C.P.D. p. 1109] above. We point out, however, that if the tapes should be held to be not privileged, then the *Brady* rule would certainly apply, and, as discussed in the previous section of the Brief, the rule in *Alderman v. United States*, 394 U.S. 165, 184 (1969), would not permit the court to deny to the defendants portions of the tapes on the ground of national security nor on the ground of relevance.

There is no basis in reason or authority to make an inroad into executive privilege because evidence is sought for a criminal inquiry. Such an exception would create a precedent with broad and disastrous implications. The Special Prosecutor argued below that this case is unique because high Presidential advisers are being investigated for possible criminal acts. That suggestion flies in the face of history. Teapot Dome and the scandals that afflicted the Grant administration are merely the most celebrated of a number of lamentable instances in which persons in high office have betrayed their public trust. It has been even more common for charges that are ultimately not substantiated to be made against those at the highest levels of government. The well-known incident in which former President Truman and Justice Tom C. Clark refused to comply with subpoenas requiring them to appear before a House committee involved charges that, while Mr. Truman was President and Justice Clark was Attorney General, they had participated in knowingly promoting a proven Soviet spy to a position in which he would be better able to serve his foreign employers. N. Y. Times, Nov. 14, 1953, p. 1. There have been many similar charges of serious crimes against high officials throughout our history, and often there has been enough in support of the charge to establish probable cause for a subpoena, if the theory being advanced in this case were to be accepted.

Nor is it at all unique that conversations in the Oval Office itself might be material evidence in establishing that a crime did or did not occur, either with regard to public officials or with private citizens. A high constitutional officer is informed that he is under investigation by a grand jury. Quite properly he discusses this with

(7th Cir. 1970), and in *United States v. Skillman*, 422 F. 2d 542, 553-554 (8th Cir. 1971).

With regard to *Brady*, the duty it imposes applies to the immediate prosecutor and to

any other investigative agencies of the Government which have gathered information as part of the case of the prosecution against the accused who seeks disclosure. * * * Of course, the prosecutor has no duty to disclose information in the possession of governmental agencies which are not investigative arms of the prosecution and have not participated in the case, even if such information might be helpful to the accused.

United States v. Eley, 335 F. Supp. 353, 358 (N.D. Ga. 1972). Although this is the only decision that speaks directly to this question, it is consistent with the thrust in all of the *Brady*-line of cases that the evil is suppression by the prosecution of evidence known to it. See, e.g., *Moore v. Illinois*, 408 U.S. 786, 794 (1972); *Giles v. Maryland*, 386 U.S. 66, 96 (1966) (White, J., concurring).

the President. Are testimony, recordings, or notes about that conversation now to be subpoenaed by the grand jury making the investigation, on the theory that any incriminating remarks by the officer would be usable against him as admissions while if his remarks were exculpatory they might be a part of a conspiracy to obstruct justice? A group of businessmen visit the President to urge him to act in a particular way in some economic decision he must make. For all that appears, their proposals are perfectly innocent and the kind of argument, from conflicting interests on each side, that the President must have in order to act wisely. Is the grand jury to have access to the records of that meeting to study it to see if it represented concerted action in violation of the antitrust laws? The President, in consultation with his highest advisers, determines that it is necessary to bomb enemy sanctuaries in a supposedly neutral country adjacent to a battle area, but that for diplomatic reasons this bombing must be kept secret. Will those conversations go to a grand jury if it is subsequently claimed that a high official perjured himself in denying the bombing in testimony before a Congressional committee? Presidential advisers talk candidly with the President about possible persons for appointment to a vacant office. If a grand jury finds cause to believe that one of the advisers had accepted a bribe from the candidate he advocated, are the remarks of everyone in the room about that candidate and others to go to the grand jury? The possible examples are as numerous as the topics discussed in the President's presence.

We do not wish to press these examples too far. Of course it is true that in the vast majority of Presidential conversations there would never be anything said that could arguably be material evidence in a criminal investigation. But the inhibiting effect comes from the difficulty of a particular participant in a particular conversation being sure that this is true, unless he is certain that he knows the motivations of all of the other participants. Even that knowledge would be insufficient assurance if, as suggested in the final paragraph of page 18 of the Opinion, a Presidential conversation, though in itself free from any possible charge of criminality, becomes fair game for a grand jury if there should be reason to think that one of the participants in the conversation has subsequently perjured himself. The deterrence of a ruling that courts can compel disclosure of Presidential conversations would be very extensive, even though the actual instances in which disclosure would be ordered would be less frequent, though still hardly unique.

It is worth emphasizing, too, that if the decision below should be sustained, the confidentiality of Presidential papers and conversations would be at the mercy of 400 different federal judges—and conceivably of state judges as well. If one judge has the power to compel that evidence of this kind be produced for *in camera* examination, so does every judge. If it is established that there is no Presidential privilege, or that a court can overrule claims of

Presidential privilege, demands for Presidential papers will come not only from grand juries but also from defendants. Presidential privacy will be gone, even if the invasion of it seems to be narrowly limited to criminal cases.

VII. The Inability to Issue Compulsory Process

The District Court concluded, at page 6 of its Opinion, that it has authority to issue compulsory process to require the President of the United States to produce documents, although it recognized, at page 15, that this is a new question "with little in the way of precedent to guide the Court."

We have not questioned the power of the court to issue a subpoena to the President. So much was ruled—and no more than this was ruled—in *United States v. Burr*, 25 F.Cas. 30, 34, No. 14,692d (C.C.D.Va. 1807). The cautious reference to the *Burr* ruling in *Branzburg v. Hayes*, 408 U.S. 665, 688 n. 26 (1972), goes no further than to note that Chief Justice Marshall had "opined" that a subpoena might issue. For purposes of this litigation, we have accepted that proposition.

But, as the District Court recognized at page 8 n. 17 of its Opinion, there is "a distinction between issuing a subpoena to the President and commanding that he honor it." Chief Justice Marshall also took note of that distinction. The *Burr* subpoena was requested by the defense to obtain what was alleged to be exculpatory evidence. The court confined its inquiry to whether the subpoena should issue and not to whether the court could or would compel compliance. The Chief Justice said:

If, then, as it is admitted by the counsel for the United States, a subpoena may issue to the president, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer, to protect him from being harassed by vexations and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have been issued; not in any circumstance which is to precede their being issued.

25 F. Cas. at 34 (emphasis supplied). At no point in the opinion was Chief Justice Marshall so bold as to assert that the court had the power to compel obedience. He did, however, authorize the subpoena.

As best as can be determined through the veil of 166 years, President Jefferson never complied with the subpoena in the *Burr* case. A recent writer has asserted that "in fact he fully complied with the subpoena." Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. Rev. 1043, 1107 (1965) (emphasis in original). The author's footnote at that point, however, fails to support the statement in the text. It appears very doubtful that the assertion is correct.

Jefferson did transmit to the United States Attorney, George Hay, certain records from the offices of the Secretaries of the Army and Navy that were covered by the subpoena. This was done, however, in apparent ignorance of

the fact that the subpoena had issued, because his transmittal letter contains a well-stated argument why a subpoena should not issue. 9 Ford, *Writings of Jefferson* 56–57 (1899). Jefferson did not transmit a certain letter from General Wilkinson, which was specifically designated by the subpoena. It appears that Burr was forced to trial for treason without the benefit of the letter, for on the convening of his subsequent trial for misdemeanor in September of 1807 he again demanded that letter, as well as another letter from General Wilkinson to President Jefferson. A second subpoena was issued. Again, Jefferson declined to comply to the satisfaction of the defense, *United States v. Burr*, 25 F. Cas. 187, 190, No. 14,694 (C.C.D.Va. 1807). The court was cautious in its reaction, stating only that while a President may have sufficient reasons to comply with a subpoena, he and he alone must state the reasons for non-compliance.

If President Jefferson did fully comply with the subpoena, this is a fact unknown to Marshall's great biographer, Albert J. Beveridge. See 3 Beveridge, *The Life of John Marshall* 518–522 (1919). As is there shown, the letters called for had not been produced and Colonel Burr asserted that the President was in contempt of court. Jefferson was nervous about what Chief Justice Marshall might do, and threatened to use force against the execution of the process of the court. A subpoena *duces tecum* then issued against Hay, who had one of the letters Colonel Burr was seeking. Hay produced a part of the letter but refused to give passages that the President deemed confidential. The court then gave the opinion, cited in the preceding paragraph, saying that it is for the President and not someone acting for him to determine for himself what could be produced. In Beveridge's words:

A second subpoena *duces tecum* seems to have been issued against Jefferson, and he defiantly refused to "sanction a proceeding so preposterous," by "any notice" of it. And there this heated and dangerous controversy appears to have ended.

Id. at 522. At this point, Beveridge adds in a footnote:

For some reason the matter was not again pressed. Perhaps the favorable progress of the case relieved Burr's anxiety. It is possible that the "truce" so earnestly desired by Jefferson was arranged.

Id. at 522 n. 4.

Other historians have read the evidence in the same way as did Beveridge. Rossiter expresses doubts whether Jefferson was a great President but thinks that one of three things "to his lasting credit" was his "first declaration of presidential independence in his rejection of Marshall's subpoena in the Burr trial." Rossiter, *The American Presidency* 70 (1956). At another place Rossiter says:

Jefferson's rejection of Marshall's subpoena *duces tecum* in the Burr trial and Chase's opinion in *Mississippi v. Johnson* (1867), which spared Andrew Johnson the necessity of answering a writ of injunction, make clear that the judiciary has no power to enjoin or mandamus or even question the President.

Id. at 39.

The principle that the courts may not issue compulsory process to require production of Presidential powers rests

generally on the doctrine of separation of powers, fully discussed under Point IV of this Brief. Nothing in the *Burr* decisions is contrary to that, and it is strongly supported by *Mississippi v. Johnson*, 4 Wall. (71 U.S.) 475 (1867). The court there refused to entertain a bill seeking to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. In his argument in that case Attorney General Stanbery discussed *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), and *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524 (1838), and noted that the writs sought in those cases ran only against cabinet officers rather than against the President himself, a distinction that was clear in the earlier decisions themselves. Stanbery pointed out that if a cabinet officer could be imprisoned for contempt for disobedience of a court order, his duties could be performed by a deputy or a new member of the cabinet could be appointed. If, however, the President were to be imprisoned for contempt, he would be disabled from performing his constitutional duties, though he would still, in the absence of impeachment, retain the office. 4 Wall. at 489-490.

The Supreme Court denied leave to file the bill against the President. It did not decide whether the President, as distinguished from a cabinet officer, could be required by judicial process "to perform a purely ministerial act under a positive law," 4 Wall. at 498, but held that the duty of the President to see that the laws are faithfully executed "is in no just sense ministerial. It is purely executive and political." 4 Wall. at 499. It said:

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. * * *

4 Wall. at 500-501. Thus it concluded that "we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."

4 Wall. at 501.

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

The commentators have agreed. The then-Executive Editor of the Washington Post, an outspoken critic of executive privilege, says: "That the President himself enjoys practical immunity from the enforcement of legal process in wide areas must be acknowledged." Wiggins, *Government Operations and the Public's Right to Know*,

19 Fed. B.J. 62, 74 (1959). Wigmore suggests that the Executive may be under a testimonial duty to be a witness, but he regards this as a different question from whether compulsory process can issue to enforce that duty, and says: "That the enforcement of the duty is constitutionally impossible is still consistent with its existence." 8 Wigmore, *Evidence* § 2370 (McNaughton rev. 1961).

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

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

In the whole history of this country no court has ever compelled the Executive Branch to produce documents that the Executive Branch determined that it would not produce, nor has any officer of the Executive ever been held in contempt for refusal to produce. The Court lacks power to take either of these steps as against the Chief Executive.

Conclusion

The result for which we have argued is supported by such precedent as exists. It is supported by premises that are, and have always been, at the heart of our Constitutional system. It is supported by the unvarying practice

of 184 years. It is supported finally, and most importantly, by the consequences that would follow if any other result were to be reached.

The right of Presidential confidentiality is not a mystical prerogative. It is, rather, the raw essence of the Presidential process, the institutionalized recognition of the crucial role played by human personality in the negotiation, manipulation, and disposition of human affairs.

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

It is tempting to give way to the forces that have been set in motion by Watergate, to issue orders of a kind entirely without precedent in our history, and to alter settled principles of Constitutional government. A decision that it is for the Judiciary, rather than for the President, to decide how the Presidency is to function might be popular with those who do not count the long-term consequences. That cannot be a concern of this Court.

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 manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. * * *

The path of duty for this Court, it bears repetition, lies in the opposite direction.

Frankfurter, J., concurring in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594-595 (1952).

The relief prayed for in the Petition should be granted and the writ issued directing the District Court to vacate its order of August 29th.

Respectfully submitted,

LEONARD GARMENT
J. FRED BUZHARDT
CHARLES ALAN WRIGHT
DOUGLAS M. PARKER
ROBERT T. ANDREWS
THOMAS P. MARINIS, JR.
The White House,
Washington, D.C. 20500,
Attorneys for the President.

September 10, 1973.

CERTIFICATE OF SERVICE

I, Thomas P. Marinis, Jr., hereby certify that on the 10th day of September, 1973, I served the foregoing Brief of Petitioner by causing copies thereof to be hand-delivered to the offices of

The Honorable John J. Sirica
Room 2428
U.S. Courthouse
3rd and Constitution Ave., N.W.
Washington, D.C. 20001
Respondent
Archibald Cox
Special Prosecutor
Watergate Special Prosecution Force
1425 K. Street, N.W.
Washington, D.C. 20005
Party in Interest

THOMAS P. MARINIS, JR.

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

Administration of the Clean Air Act and the Federal Water Pollution Control Act

Executive Order 11738. September 10, 1973

PROVIDING FOR ADMINISTRATION OF THE CLEAN AIR ACT AND THE FEDERAL WATER POLLUTION CONTROL ACT WITH RESPECT TO FEDERAL CONTRACTS, GRANTS, OR LOANS

By virtue of the authority vested in me by the provisions of the Clean Air Act, as amended (42 U.S.C. 1857 et seq.), particularly section 306 of that Act as added by the Clean Air Amendments of 1970 (Public Law 91-604), and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), particularly section 508 of that Act as added by the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500), it is hereby ordered as follows:

SECTION 1. Policy. It is the policy of the Federal Government to improve and enhance environmental quality. In furtherance of that policy, the program prescribed in this Order is instituted to assure that each Federal agency empowered to enter into contracts for the procurement of goods, materials, or services and each Federal agency empowered to extend Federal assistance by way of grant, loan, or contract shall undertake such procurement and assistance activities in a manner that will result in effective