more stable flow of funds into mortgage markets without the need for Government intervention. All of these measures are important and merit prompt action.

While the initiatives announced today are aimed at providing increased money in the mortgage market, I would point out that in addition to these proposals, I have already authorized or requested budget authority from the Congress for 418,000 units of subsidized housing for low-income families. Some 290,000 of these units are for new construction, and the remainder are for leasing of existing housing units.

These are positive steps, but the best long-range solution to the housing problem is to conquer the inflation problem. Inflation picks at the pocketbook for other items; it leaves less to save for a downpayment on better housing or for higher monthly payments for better housing.

Inflation increases the cost of the housing itself, as higher prices for money, for land, for labor, for building materials, push up the cost of each housing unit.

That is why the most important steps which we can take to assure a healthy housing industry and more possibilities for home ownership are those which tend to lower the rate of inflation and raise real income.

United States Ambassador to the State of Qatar

Announcement of Intention To Nominate Robert P. Paganelli. May 10, 1974

The President today announced his intention to nominate Robert P. Paganelli, of Albion, N.Y., to be Ambassador to the State of Qatar. He will succeed William A. Stoltzfus, Jr., who will continue to serve as Ambassador to Kuwait.

Mr. Paganelli has served since 1971 as Political Officer in Rome, and from 1968 to 1971 he was a Political-Economic Officer, then Personnel Officer in the Department of State. After serving as an Economic Officer in Baghdad (1962–63) and Beirut (1963–65), he was a Political Officer in Damascus (1965–67) and in Amman (1967–68).

He was born on November 3, 1931, in New York, N.Y. Mr. Paganelli received his B.A. degree from Hamilton College in 1957 after serving in the U.S. Air Force from 1951 to 1954. He joined the Foreign Service in 1958 and served as an Intelligence Research Specialist. During 1959–60, he took Arabic language and area training in Beirut, and from 1960 to 1962 was a general officer in Basra. Mr. Paganelli received the Meritorious Honor Award in 1966 and speaks fluent Arabic and Italian.

Mr. Paganelli is married to the former Donna Smith. They have two daughters.

Subpoena of Presidential Tapes by Senate Select Committee on Presidential Campaign Activities

Memorandum Filed by Attorneys for the President in Response to the Committee's Memorandum. May 10, 1974

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

(No. 74–1258)

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, SUING IN ITS OWN NAME AND IN THE NAME OF THE UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR., HERMAN E. TALMADGE, DANIEL K. INOUYE, JOSEPH M. MONTOYA, EDWARD J. GURNEY, AND LOWELL P. WEICKER, JR., AS UNITED STATES SENATORS WHO ARE MEMBERS OF THE SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, APPELLANTS

v.

RICHARD M. NIXON, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STATES, APPELLEE

MEMORANDUM OF APPELLEE IN RESPONSE TO APPELLANTS' MEMORANDUM OF MAY 6TH

At page 3 of its Supplemental Memorandum in Response to this Court's Order of May 2, 1974,[1] the Committee states that "it is absolutely essential that the Committee, in order to meet [its] responsibilities, be provided with a complete and accurate account of these conversations. This can be accomplished only by the provision of the actual tapes or verified copies thereof to the Committee." This statement not only contradicts prior statements of some Committee members and its counsel [2] but documents the Committee's improper insistence in attempting to perform law enforcement and guilt adjudicating functions, itself. Such proposed activity clearly exceeds its constitutional authority, and properly falls within the jurisdiction of the Special Prosecutor and the Committee on the Judiciary, United States House of Representatives.

Nevertheless, the response to this statement is starkly simple: the Committee has been provided with a complete

[1] Hereinafter referred to as "Memorandum in Response."

[2] See footnote 16, on pp. 28–30, of Appellee's Brief in this Court.

and accurate account of all Watergate-related portions of privileged Presidential conversations sought by its subpoena. Thus it can hardly be reasonably contended with any degree of sincerity that the Committee is being unduly frustrated in carrying out its informing function. This is especially highlighted by the fact that the transcripts supplement the information the Committee already has, consisting of approximately ten thousand pages of public testimony, and undoubtedly many additional pages of non-public testimony taken in Executive Session. It must be remembered that much of this testimony was supplied by Presidential aides and advisors. And, of course, that testimony was available only because the President waived privilege, both executive and attorney-client, permitting his aides to testify.

It is now beyond question that any additional type of information that the tapes could provide relates only to guilt or innocence and to the credibility of witnesses, if they could provide that. A most important point to be noted in this regard is that where the five tapes in question have been requested for proper governmental functions—the judicial determination of criminal conduct or the removal of executive officers via impeachment for grave crimes—the President has submitted them to the appropriate forums, the Special Prosecutor and the House Judiciary Committee.

However, the Committee insists upon performing law enforcement and guilt adjudicating functions, activity that clearly exceeds its constitutional authority and represents an unwarranted, unconstitutional usurping of functions expressly assigned by our Constitution, excepting impeachment proceedings, to the Executive and the Judiciary. See *Watkins* v. *United States,* 354 U.S. 178, 187 (1957); *Quinn* v. *United States,* 349 U.S. 155, 161 (1955); *Kilbourn* v. *Thompson,* 103 U.S. 168, 192 (1880). Thus it is patently obvious that any legitimate need that the Committee sought to fulfill by the subpoena in question here has been completely satisfied.

Counsel for the Appellee take the strongest possible exception to the tone and substance of a gratuitous statement found in the Committee's Memorandum in Response. At page 3 of the Memorandum in Response, Counsel for the Committee allege that the "transcripts . . . are suspect." This charge cannot be supported by the personal knowledge of the Committee as evidenced by the very existence of this appeal. The argument must therefore be predicated on considerations of convenience and expediency. Minor inaccuracies indeed may exist but there is no suggestion that the transcripts are substantively inaccurate.[3] We can only assume by this charge that the Committee's counsel believe that the transcripts of the tapes sought herein are, in some way, not an accurate description of the taped conversations. The President has provided the Special Prosecutor and the whole House Judiciary Committee with full access to the five taped conversations sought by this Committee and no such charge has been made by them. It defies credulity for the Committee's counsel to suggest that the President would not provide the best possible transcription and at the same time furnish the House Judiciary Committee and the Special Prosecutor the same actual tapes from which the transcripts in question were made.

On April 29, 1974, the President, in a speech to the Nation, emphasized that his unprecedented disclosure of over 1,200 pages of privileged, private conversations represented the whole Watergate story. The President stated:

> They include all the relevant portions of all of the subpoenaed conversations that were recorded—that is, all portions that relate to the question of what I knew about Watergate or the cover-up, and what I did about it. They also include transcripts of other conversations which were not subpoenaed, but which have a significant bearing on the question of Presidential actions with regard to Watergate.
>
> * * * * *
>
> As far as what the President personally knew and did with regard to Watergate and the cover-up is concerned, these materials—together with those already made available—will tell it all.

Thus it should be clear that the Select Committee has been provided by the President with all Watergate-related material concerning the President's conversations.

At page 3 of its Memorandum in Response, the Committee attempts to bolster its specious argument that "the edited versions provided the public are neither complete nor accurate," by stating, "at the end of the edited version of the September 15 conversation the following entry appears: 'Note (Further conversation following unrelated to Watergate).' " The Committee then continues to argue that it needs that subsequent portion of the conversation to complete its investigation. What the Committee fails to realize is that the District Court in a previous case specifically dealt with the September 15, 1972, tape in question. Concerning this very same taped conversation, the District Court held:

> The claim of privilege, which related to the latter portion of the recorded conversation, is sustained in full for the reason that the privileged portion consists of discussions with and advice from the President's senior assistant and his counsel on matters relating to the President's conduct of his official duties, and contains nothing related to Watergate or anything connected therewith. *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, Order (D.D.C. Dec. 19, 1973) at p. 3.

There the District Court actually scrutinized *in camera* the tape that the Committee now only speculates it might need. The District Court clearly found the material unrelated to Watergate matters. In light of this finding, the

[3] It is reported in the *New York Times,* May 9, 1974, p. 32, col. 3 that Mr. John Doar, Special Counsel to the House Judiciary Committee, "emphasized that he was not saying there were 'gross inaccuracies or distortions' in the President's transcripts." It should be remembered that the Committee's only source for its assertion concerning the alleged inaccuracy of the transcripts is a press report of a statement allegedly made by Mr. Doar.

Committee's argument on completeness and accuracy is contradicted by the facts and thus totally lacking in merit.

In any event, the Committee has no legitimate legislative need for the actual tapes. In order to prohibit an act it is not necessary to know whether an individual has, in fact, done the act. Rather we ask whether the action in question is of a kind that should be prohibited. In applying this principle, the Committee's legislative task is simple: to draft general standards, not to find specific instances of guilt. This last function the Constitution has delegated to the Judicial Branch. As emphasized by Chief Justice Warren, speaking for the majority, in *Quinn* v. *United States,* 349 U.S. 155, 161 (1955):

> Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary.

The Committee's real concern and sole responsibility is, in the words of Senate Resolution 60 of the 93rd Congress, which established the Committee (J.A. 12):

> [t]o determine whether in its judgment any occurrence which may be revealed by the investigation and study indicate the necessity or desirability of enactment of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen.

At page 4 of its Memorandum in Response the Committee asserts "that the entire tape recording of [the February 28] conversation was given the Special Prosecutor and the House Judiciary Committee by the President without any claim that parts of the conversation were not related to their inquiries." However, the Committee's position is not analogous to that of the grand jury or the House Judiciary Committee for it has failed to show it has a compelling need or that it is functioning as a quasi-judicial forum with a constitutional responsibility to adjudicate questions of guilt or innocence.

As a practical matter, disclosure to the Special Prosecutor for grand jury use, with its traditional secrecy, and to the House Judiciary Committee, which has established guidelines for maintaining confidentiality, and has yet to breach those guidelines, is fundamentally and substantially different from disclosure to the Select Committee [4] or the public at large. In this regard, this Court in *Nixon* v. *Sirica,* —— U.S. App. D.C. ——, 487 F. 2d 700 (1973), stated:

> We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch. 487 F. 2d at 715.

It would be anomalous indeed if surrender of the actual tapes to the grand jury, because of its unique and compelling need, and voluntary disclosure of them to the House Judiciary Committee, with its important constitutional role, were now to make them, as the Committee contends, fair game for the whole world.

It is also interesting to note that once again the Committee, in seeking "actual tapes or verified copies," (see p. 3 of Memorandum in Response) is now seeking relief which it not only did not seek in District Court, but specifically disclaimed to this Court in oral argument by asserting the Committee's willingness to accept copies. It now appears that "verification" has become the essence of the Committee's need, rather than the substance of the material itself, which was zealously sought in all earlier stages of this litigation. If, in fact, this is the Committee's new position then the subpoena should be directed to the party with the actual tapes.

At page 2 of its Memorandum in Response the Committee contends that it must "obtain these tapes so that it could fulfill its Constitutional duty to inform the public of the extent of corruption in the executive branch." What the Committee continually fails to perceive is that its informing function must be incident to a valid legislative purpose. In this regard the Supreme Court in *Watkins* v. *United States,* 354 U.S. 178 (1957), affirmed that:

> No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible. 354 U.S. at 187.

And, likewise, the Committee cannot legitimatize an improper purpose no matter how many times it utters spurious incantations about an unqualified informing function. As was stated by the Supreme Court in *Watkins* v. *United States,* 354 U.S. 178 (1956), "We have no doubt that there is no Congressional power to expose for the sake of exposure." 345 U.S. at 200. If exposure "for the sake of exposure" were constitutionally permissible, then the mere assertion of a Congressional caprice to obtain any information would nullify any claims of individual privacy, executive privilege or judicial confidentiality, thereby emasculating the Fourth Amendment and the Separation of Powers. Clearly, this position is untenable.

With the very hard and historic decision made by the President to bare the innermost workings of the Executive's decision making process to the American public by publishing the transcripts, the Committee has everything it could possibly need from the White House to fulfill its informing function by recommending curative legislation. All the factual material concerning the President's discussions with his aides, of the events commonly called Watergate, are presented in the published transcripts. All the facts needed to draft any possible type of corrective campaign legislation are now available to the Committee.

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[4] In this regard this Court may take judicial notice of the most recent leak concerning a draft of the final report prepared by the staff of the Committee. See e.g., *The Washington Post,* May 9, 1974, P. A10, Col. 1. In this particular article it was reported:

> A memo from chief committee counsel Samuel Dash to the committee members emphasizes that "this rough draft is part of the final report and is a staff draft—not the committee report until the committee approves it."
>
> Dash also emphasized in his memo the need for "very careful security of the draft submitted to you" because of the embarrassment to the committee if the draft report leaked.

The tapes themselves will add nothing to the Committee's ability to draft any such legislation. This was recognized by the District Court Judge when he found "[t]he five tapes at issue are sought principally for the light that they might shed on the President's own alleged involvement in the Watergate coverup." (J.A. 168). Again we must remind the Committee that since its legislative function is not to adjudicate guilt or innocence, it is no longer open to serious question that the actual tapes are not needed for the Committee to perform its legislative function. Moreover, the Committee cannot pervert its legitimate power of inquiry in aid of legislation into a tenuous need for the tapes by some bizarre convolution of logic.

Also, it should be emphasized that the District Court correctly distinguished the functions of this Committee, that of the House Judiciary Committee, and the Special Prosecutor when it stated:

> [C]ongressional demands, if they be forthcoming, for tapes in the furtherance of the more juridical constitutional process of impeachment would present wholly different considerations.
>
> * * * * *
>
> "[A]llegations involving the President" are among those specifically assigned to the Special Prosecutor for investigation and, if appropriate, for prosecution. (J.A. 168).

That the Committee's purported need for the tapes to fulfill its informing function is more imagined and factitious than real and compelling is further evidenced by the fact that the proper forums for determining the credibility of witnesses and ultimately the guilt or innocence of individuals have the subpoenaed tapes, and will undoubtedly use them in carrying out their respective tasks. Thus, even if there were any substance to the Committee's claim in this regard, it should be recognized that the public will be informed to an even greater extent during the course of trials prosecuted by the Special Prosecutor and the impeachment proceeding conducted by the House Judiciary Committee. The Committee recognized this fact when in its Motion for Expedited Briefing and Argument Schedule and Suggestion For Hearing En Banc filed in this Court on October 23, 1973, it stated the absence of a Special Prosecutor made:

> [A]ll the more urgent a ruling in this case that would assist in exposing all aspects of the Watergate affair to public view . . . (pp. 5–6).

Because the Committee premised much of its informing function on the absence of a Special Prosecutor, it necessarily follows that this is now no longer a valid basis for the Committee's asserted need. This is especially true in light of the fact that the House Judiciary Committee, which also has the subpoenaed tapes, is now actively functioning.

Since there has been no legitimate legislative need shown by the Committee for the material, which this Court has affirmed to be "presumptively privileged," *Nixon* v. *Sirica,* 487 F. 2d 700, 717 (1973), the President's claim of privilege should not even be reviewed by the Court. For as this Court recently said in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 149 U.S. App. D.C. 385, 463 F. 2d 788 (1971):

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

This is fully in accord with the holding of the United States Supreme Court in *United States* v. *Reynolds,* 345 U.S. 1(1953), where the Court stated:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori,* where necessity is dubious, a formal claim of privilege . . . will have to prevail. 354 U.S. at 11.

Clearly the Committee does not need the tapes to complete its legislative task now that it has the transcripts. *Prior* to the disclosure of the transcripts the District Court found, "[i]t has not been demonstrated to the Court's satisfaction that the Committee has a pressing need for the subpoenaed tapes . . ." (J.A. 166) It goes without saying that the Committee's lack of need is now even more obvious. In light of the recent disclosure of the transcripts by the President and of the constitutional limitations on the Committee's power to investigate in aid of legislation and the constitutional role of the House Judiciary Committee, this Court has even more reason to affirm the court below than it had when the decision was made. *C.I.R.* v. *Belridge Oil Co.,* 267 F. 2d 29, 295 (9th Cir. 1959); *Continental Can Co.* v. *Horton,* 250 F. 2d 637, 645 (8th Cir. 1957).

If this Court determines that the transcripts of the relevant portions of the subpoenaed tapes furnished to the Committee substantially satisfy and adequately fulfill the Committee's needs, as we submit they do, this Court may find the issue moot. This would be consistent with the long line of cases, beginning in *Hayburn's Case,* 2 Dall, (1 U.S.) 409 (1792), holding that the federal courts may not give advisory opinions. As Chief Justice Warren wrote for the Court, "it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Flast* v. *Cohen,* 392 U.S. 83, 96 (1968). Moreover, the Supreme Court has held that "moot questions require no answer." *Missouri, Kansas, & Texas R Co.* v. *Ferris,* 179 U.S. 602, 606 (1900). The rationale for this holding is that mootness is a jurisdictional question because the Court "is not empowered to decide moot questions or abstract propositions," *United States* v. *Alaska SS. Co.,* 253 U.S. 113, 116 (1920), quoting *California* v. *San Pablo & Tulare R. Co.,* 149 U.S. 308 (1893).

The inability of the Federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends on the existence of a case on controversy." See, e.g., *Powell* v. *McCormack*, 395 U.S. 487, 496, n. 7 (1969); *Sibron* v. *New York*, 392 U.S. 40, 50, (1968); and *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306, n. 3 (1964). This principle was recently reaffirmed in *DeFunis* v. *Odegaard*, Slip. Op. No. 73-235 (Sup. Ct., April 23, 1974) at p. 3. Since the Committee's need has been fulfilled, there is no longer a real and substantial controversy before this Court. It is true here, as in *Hall* v. *Beals*, 396 U.S. 45, 48 (1969), and *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 415 (1972), that "[t]he case has * * * lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." Accordingly, this appeal should be dismissed because of mootness.

CONCLUSION

Since the District Court properly dismissed this suit finding that the Committee had failed in demonstrating a pressing need for the subpoenaed tapes, without even addressing the issue of compliance, in the light of subsequent events the District Court judgment is certainly not clearly erroneous and should be affirmed or, in the alternative, this appeal should be dismissed because of mootness.

Respectfully submitted,

JAMES D. ST. CLAIR
MICHAEL A. STERLACCI
JEROME J. MURPHY
LOREN A. SMITH
CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Attorneys for the President
The White House
Washington, D.C. 20500
Telephone No. 456-1414

Of Counsel
JOHN J. CHESTER

CERTIFICATE OF SERVICE

I, James D. St. Clair, do hereby certify that on May 10, 1974, I served copies of the attached Memorandum of Appellee in Response to Appellants' Memorandum of May 6th by causing copies thereof to be hand delivered to the offices of Appellant's counsel, and upon amici Special Prosecutor and the Attorney General by having copies hand delivered to their respective offices.

JAMES D. ST. CLAIR

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

Digest of Other White House Announcements

Following is a listing of items of general interest which were announced to the press during the period covered by this issue but which are not carried elsewhere in the issue. Appointments requiring Senate approval are not included since they appear in the list of nominations submitted to the Senate below.

May 3

Following an appearance at the Arizona Coliseum, Phoenix, Ariz., the President attended a reception at the home of Senator Barry Goldwater.

May 4

The President left Phoenix to attend the opening of Expo '74 in Spokane, Wash. Following the opening ceremonies, the President attended a reception in the art gallery at the Washington State Pavilion. He then returned to Washington, D.C.

The White House announced that the President has completed his personal review of the general court-martial case of *United States* v. *Calley* and has decided that no action on the case by the President is necessary or appropriate.

May 6

The President announced the designation of a delegation to represent him at inaugural ceremonies for Daniel Oduber Quirof as President of Costa Rica in San Jose from May 7 to 10. The members of the delegation are:

SENATOR LAWTON CHILES, of Florida—Personal Representative of the President, with the rank of Special Ambassador—head of the delegation

REPRESENTATIVE MANUEL LUJAN, JR., of New Mexico—Personal Representative of the President, with the rank of Special Ambassador

LYLE LANE, U.S. Chargé d'Affaires in Costa Rica—Representative of the President, with the rank of Special Ambassador

The President today accepted, with deep personal regret, the resignation of Stephen A. Wakefield as Assistant Secretary of the Interior for Energy and Minerals.

The President transmitted to the Congress the 1973 annual report of the St. Lawrence Seaway Development Corporation.

Secretary of Labor Peter J. Brennan and Under Secretary Richard F. Schubert met with the President at the White House. Topics discussed at their meeting included: manpower and summer youth programs and Administration proposals in the areas of pension reform and extended unemployment insurance benefits.

The President today acknowledged the retirement of John Morgan Davis as a United States District Judge for the Eastern District of Pennsylvania, effective today.

The President today accepted, with special gratitude for his contributions to the Nation, the resignation of