Reply Brief Regarding Subpoena of Recordings and Documents

Reply Brief Filed by Attorneys for the President in the United States District Court for the District of Columbia. August 17, 1973

In The

UNITED STATES DISTRICT COURT

For The

DISTRICT OF COLUMBIA

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

REPLY BRIEF

We do not wish to reply at length to the 68-page submission of the Special Prosecutor nor to burden the Court by restating the arguments set out in our initial Brief in Opposition. Thus we content ourselves with calling the Court's attention to a few key points that must be borne in mind in appraising the Brief in Support.

I.

The Special Prosecutor asserts 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 has asserted 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 is that this conflict 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.

This theme recurs throughout the Brief in Support. It is stated most baldly in the topic sentence at page 54: "The Need of the Grand Jury for the Evidence in the Impartial Administration of Justice is Greater Than the Public Interest Served by Secrecy."

This notion that the extraction of the last ounce of flesh by the criminal process is the highest and most important purpose of government, and that courts have the power to impose this goal on the Chief Executive though he believes that to pursue it will harm other important governmental interests, is not the law.

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, as we pointed out in our initial submission, with regard to the identity of informers, *Roviaro* v. *United States,* 353 U.S. 53, 61 (1957), and information about electronic surveillance. *Alderman* v. *United States,* 394 U.S. 165, 184 (1969).

The treatment of these authorities in the Brief in Support is interesting. We are told, at 24, that "[c]learly * * * those decisions do not mark the limits of judicial power." As is true of most propositions that depend on such an adverb as "clearly" or "obviously," no authority is cited for the statement—and there is no such authority. 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 General 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,* 359 F.2d 234 (D.C. Cir. 1965), *cert. denied* 384 U.S. 906 (1966); *District of Columbia* v. *Buckley,* 128 F.2d 17 (D.C. Cir. 1942). It is well recognized elsewhere. 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.

If there be any authority for the proposition that the courts have power to determine that the requirements of justice make it necessary that a prosecution continue, though the Executive Branch has determined to the contrary on the basis of other governmental interests, we are unaware of it, the Special Prosecutor has not cited it, and it would be in the teeth of the authorities here cited.

Nor does it advance the argument in support of the subpoena to suggest that "to the extent" the Executive Branch may choose to have a prosecution dismissed rather than produce particular evidence, the choice "is committed by law to the Attorney General," not to the President. Brief in Support 27 n. 12.

> 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). Other cases, in expressing the same thought, refer to the Attorney General as "the hand of the president." *Ponzi* v. *Fessenden,* 258 U.S. 254, 262 (1922); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied* 381 U.S. 935 (1965). The Attorney General acts as 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). In the ordinary case a decision of that kind would be, in contemplation of law, the decision of the President and, if the matter were sufficiently grave, would be in fact the decision of the President.[1]

But even more important, once it is conceded, as it must be, that choices of this kind are left to the Executive Branch, and cannot be compelled by the courts, the fundamental premise of the Brief in Support fails. It does not expand "the limits of judicial power," Brief in Support 27, to argue that a particular choice is to be made at one or another level of the Executive Branch.

The Brief in Support suggests that it is "a false conflict to see the present controversy as a struggle between the powers of the Judiciary and the prerogatives of the President," and indicates that the authority of the grand jury is derived from the people themselves, rather than from a court. Brief in Support 44. The short answer is that this is not true.

> A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of the witness. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.

Brown v. *United States,* 359 U.S. 41, 49 (1959).

A grand jury is an arm of the court, and it does not have power, any more than does the court that convenes it, to decide that it is more important that a particular prosecution go forward than that other important governmental interests be protected.

> 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?
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> 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).

Surely the Special Prosecutor is being unduly gloomy when he suggests that his failure to obtain the tapes might require "termination of this grand jury investigation." Brief in Support 28. The grand jury investigation was in progress long before the existence of the tapes was known.[2] As we said in our initial submission, it is not the

[1] We are aware, of course, 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. In this case it will be for the Special Prosecutor to make the discretionary decisions about whom to prosecute and whether to comply with judicial requests for production of material in his hands. But the President has not delegated the nondelegable duty of making the discretionary decision whether to claim executive privilege for Presidential papers. That the President might invoke that privilege is apparent from the fact that the Special Prosecutor was authorized "to contest the assertion of 'Executive Privilege' * * *." 38 Fed. Reg. 14,688 (June 4, 1973).

[2] 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.)

President's view that refusal to produce these tapes will defeat prosecution of any who have betrayed his confidence by committing crimes. Brief in Opposition 24. There is much other evidence available to the grand jury, and it is far from obvious that, as hinted at Brief in Support 57–58, either the Jencks Act, 18 U.S.C. § 3500, or *Brady* v. *Maryland,* 373 U.S. 83 (1963), apply to material that, for Constitutional reasons, is unavailable to the prosecution. See the letter from Rep. Hebert, discussed at Brief in Opposition 9 n. 1.

But regardless of what events may prove to be the case on questions of the kind just mentioned, the controlling fact is that there is no power in the Judicial Branch to decide that the public interest requires a particular criminal investigation or prosecution to continue if the Executive Branch has determined that other governmental interests dictate to the contrary. When we said that the President has "the power and thus the privilege to withhold information," Brief in Opposition 3, we were not, as the Special Prosecutor mistakenly supposes, Brief in Support 40–42, referring to "physical power." We were referring instead to the fact that an important part of the "executive Power * * * vested in a President of the United States of America" is the power to decide whether he will sacrifice the confidentiality he deems essential to the proper functioning of that office in order to make possible a particular criminal prosecution. This is a power that resides in the Executive alone. No court has any power to make the choice that the Brief in Support asks.

II.

The Brief in Support draws comfort from cases in which lower courts have expressed an opinion on the validity of claims of executive privilege by lower officers in the Executive Branch, Brief in Support 22–32, though it fails to point to any such case in which production has been compelled if the officer concluded not to comply. It is then argued that the same principles apply to a request for production from the President, on the ground that "where the issue is the enforcement of a subpoena, what matters is whether the evidence is lawfully producible, and the office occupied by its possessor is of no decisive consequence." Brief in Support 37 n. 22.

This may be sound enough as applied to other officers, but it simply will not do as applied to the President of the United States. We merely refer to, without restating, our discussion of the authorities on this point at Brief in Opposition 16–19 and 29–31. The sharpest critics of executive privilege have, as we showed there, recognized the difference and realized that confidential discussions of the President himself in the course of carrying out his official duties enjoy the highest possible privilege from compelled disclosure and are a far cry from memoranda exchanged among officials much lower in the governmental hierarchy.

Despite intimations in the Brief in Support, we have not suggested and do not contend in any way that the President is above the law. What we have undertaken to assert and support is the proposition that the Office of the Presidency is treated differently under the law, that the Presidency has certain unique attributes, few in number but indispensable to its character and effective operations, and among these, perhaps more important than any other, is Presidential privacy—the right, indeed the absolute need, to be able to speak freely, to encourage others to speak freely, and thereby encourage confidence that the President and he alone has the absolute power to decide what may be disclosed to others.

The tapes at issue here are of conversations between the President and his close advisers. The tapes are subject to his sole control.[3] His claim that it is for him to determine whether it is in the public interest to produce them is called "extraordinary," Brief in Support 21, but that it is for the President to make this determination is supported by the decision of President Washington's cabinet and by a long line of opinions from Attorneys General, from 1865 to 1971, Brief in Opposition 13–15, none of which are mentioned by the Special Prosecutor. It is a simple fact of history that no President has ever been compelled to produce information if he thought the public interest would be harmed by doing so, and, as we have pointed out before, consistent practice has its own weighty claims in construing the Constitution. *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 472–473 (1915); *Inland Waterway Corp.* v. *Young,* 309 U.S. 517, 525 (1940); Brief in Opposition 12.

Against all of this the decision of the circuit court in *United States* v. *Burr,* 25 F. Cas. 30, No. 14,692d (C.C.D.Va. 1807), is a slim foundation for the proposition that the President "has an enforceable legal duty not to withhold material evidence from a grand jury." Brief in Support 13, 17–18. 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.

> 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.

[3] Possession of these recordings was not assumed by the President to thwart the efforts of the Special Prosecutor to compel their production. They have always been subject to the direction only of the President and under his sole control. Even if he had named some subordinate as custodian, demand for their production would have had to be made on the President rather than on a subordinate following directions from the President. *United States* ex rel. *Touhy* v. *Ragen,* 340 U.S. 462 (1951); *Boske* v. *Comingore,* 177 U.S. 459 (1900).

25 F. Cas. at 34 (emphasis supplied). At no point in this opinion was Chief Justice Marshall so bold as to assert that the court has the duty, or even the power, to compel obedience. In fact, the subpoena issued and President 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 for refusing to comply with a subpoena, he and he alone must state the reasons for noncompliance. History records no further action on the part of the court.

Though it is consoling to be given the assurance that "compliance with the subpoena will not interfere with or burden in any direct or material way the proper performance of the duties and responsibilities of the President or the Executive Office," Brief in Support 43, the President, who has occupied that great office for 4½ years, has reached a very different judgment. He has solemnly represented, both to this Court and to the country, that the confidentiality of his conversations in connection with his official duties is absolutely essential to the effective performance of his duties.[4]

We did not cite the Presidential Libraries Act, 44 U.S.C. §§ 2107, 2108, for any suggestion that the tapes are within its provisions—cf. Brief in Support 33 n. 16—but because of its recognition of the confidentiality that must surround Presidential papers. Since that Act was passed every gift of Presidential papers has specified that "materials containing statements made by or to" the President are to be kept "in confidence," and both President Eisenhower and President Johnson specifically stated in making their gifts that "the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency * * *." Brief in Opposition 17–18.

The President is on familiar ground in insisting that confidentiality is necessary to the performance of his duties. What is true of Presidential papers generally is particularly true of recordings or notes of Presidential conversations.

III.

Perhaps on the theory that it is tolerable for hard cases to make bad law if the law that they make is of very limited application, the Brief in Support is at pains to minimize the effect of a decision in this case. It presents "only a minimal threat" to the confidentiality of the Presidency "for surely there will be few occasions" in which there will be similar cause to call for Presidential papers. Brief in Support 53. The circumstances here are "virtually unique," they are "unlikely to recur," and grant of the motion "will establish no precedent for recurrent grand jury investigations." Brief in Support 57. This is a "unique case, which carries no inference of continuing or repeated disclosure of future conversations * * *." Brief in Support 58–59.

Any suggestion that this case is unique because high Presidential advisers are being investigated for possible criminal acts flies in the face of history. Teapot Dome is merely the most celebrated of a number of lamentable instances in which persons in high office betrayed their public trust.[5] It has been even more common for charges that are never 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. New York Times, Nov. 14, 1953, at 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 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. Is the grand jury to have access to that meeting to study it for possible antitrust violations? The President, in consultation with his highest advisers, determines that it is necessary to bomb enemy sanctuaries in a supposedly neu-

[4] It is, of course, true that to "the extent that the conversations do not concern the legitimate affairs of Government and the performance of the official duties and responsibilities of the President and his staff" they are not protected by executive privilege. Brief in Support 21. But surely it was part of the President's official duties to satisfy himself that justice had been fully done in the Watergate affair. That others may have made remarks to him in the course of his inquiries about this matter that were part of a conspiracy on their part to obstruct justice, or may have later perjured themselves about what they said in these conversations, does not alter the fact that the President's participation was pursuant to his duty to take care that the laws be faithfully executed.

[5] Although President Grant was not himself involved, his administration was replete with charges of wrongdoing. Vice President Colfax was implicated in the notorious Credit Mobilier affair. Grant's personal secretary was mixed up in a "whiskey ring" that defrauded the internal revenue. Secretary of War Belknap resigned to avoid impeachment for taking bribes in connection with Indian affairs. Others close to the White House were involved in the corrupt activities of the board of public works in the city of Washington. 10 Encyclopedia Brittanica 685 (1969 ed.); 22 *id.* 649.

tral 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. Thus 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.

IV.

In the final portion of the Brief in Support, it is argued that the privilege that would otherwise attach to these tapes has been waived because the President has allowed testimony and other public statements concerning these conversations. Brief in Support 60–67. The argument does not even arise unless the privilege exists in the first instance. A Constitutionally-based privilege, which exists only so that the President, like the officers of the other branches of government, can function effectively, hardly vanishes because, in Professor Black's phrase, "little mousetraps of 'waiver' are sprung." Letter of Professor Charles L. Black, Jr., Cong. Rec. E5320, E5323 (August 1, 1973).

The weakness of the position on this issue taken in the Brief in Support is most evident in its failure even to mention *United States* v. *Reynolds,* 345 U.S. 1 (1953). As we have already pointed out, Brief in Opposition 20–21, the offer by the government in that case to allow witnesses to give testimony about the facts was not 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. 345 U.S. at 11.

We do not share all of the views that Professor Alexander M. Bickel has recently expressed with regard to the present case, but his views on waiver state very forcefully an additional point that we endeavored to make in our initial submission, and to which also there is no response in the Brief in Support.

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

Bickel, *Wretched Tapes (cont.)*, New York Times, Aug. 15, 1973, at 33.

CONCLUSION

For the foregoing reasons, and those set out in the Brief in Opposition, the motion of the Special Prosecutor should be denied.

Respectfully submitted,

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August 17, 1973.

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

Equal Employment Opportunity Commission

Announcement of Intention To Nominate John H. Powell, Jr., To Be a Member and Chairman. August 17, 1973

The President today announced his intention to nominate John H. Powell, Jr., of Glen Echo Heights, Md., to be a member of the Equal Employment Opportunity Commission for the term expiring July 1, 1978. The President also announced that he would designate Mr. Powell as Chairman of the Commission upon his confirmation by the Senate. As both member and Chairman he will succeed William Hill Brown III, whose term has expired. Mr. Brown has been a member of the Commission since October 1968 and Chairman since May 1969.

Mr. Powell has been General Counsel of the United States Commission on Civil Rights since 1970. From 1966 to 1969 he was counsel for the Celanese Fibers Group of Celanese Corp., and from 1969 to 1970 he