487 F.2d 700

United States Court of Appeals,

District of Columbia Circuit.

Richard M. Nixon, President of the United States

v.

The Honorable John J. Sirica, United States District Judge, Respondent and Archibald Cox, Special Prosecutor, Watergate Special Prosecution Force, Party in Interest.

United States of America, Petitioner

v.

The Honorable John J. Sirica, Chief Judge, United States District Court for the District of Columbia, Respondent and Richard M. Nixon, President of the United States, Party in Interest.

In re Grand Jury Proceedings.

Nos. 73-1962, 73-1967, and 73-1989.

Argued September 11, 1973.

Decided October 12, 1973.

As amended October 12 and October 25, 1973.

Before Bazelon, Chief Judge, and Wright, McGowan, Leventhal, Robinson, MacKinnon, and Wilkey, Circuit Judges, sitting en banc.

**[\*704]** PER CURIAM:

This controversy concerns an order of the District Court for the District of Columbia entered on August 29, 1973, by Chief Judge John J. Sirica as a means of enforcing a grand jury subpoena *duces tecum* issued to and served on President Richard M. Nixon. The order commands the President, or any subordinate official, to produce certain items identified in the subpoena so that the Court can determine, by *in camera* inspection, whether the items are exempted from disclosure by evidentiary privilege.[[1]](#footnote-1)

Both the President and Special Prosecutor Archibald Cox, acting on behalf of the grand jury empanelled by the District Court in June, 1972,[[2]](#footnote-2) challenge the legality of this order. All members of this Court agree that the District Court had, and this Court has, jurisdiction to consider the President’s claim of privilege.[[3]](#footnote-3) The majority of the Court approves the District Court’s order, as clarified and modified in part, and otherwise denies the relief requested.

I.

We deem it essential to emphasize the narrow contours of the problem that compels the Court to address the issues raised by this case. The central question before us is, in essence, whether the President may, in his sole discretion, withhold from a grand jury evidence in his possession that is relevant to the grand jury’s investigations. It is our duty to respond to this question, but we limit our decision strictly to that required by the precise and entirely unique circumstances of the case.

On July 23 of this year, Special Prosecutor Cox caused to be issued a subpoena *duces tecum* directed to the President.[[4]](#footnote-4) The subpoena called upon the President to produce before the grand jury certain documents and objects in his possession–specifically, tape recordings of certain identified meetings and telephone conversations that had **[\*705]** taken place between the President and his advisers in the period from June 20, 1972 to April 15, 1973.[[5]](#footnote-5) In a letter dated July 25, 1973, addressed to the Chief Judge of the District Court, the President declined to produce the subpoenaed recordings. The President informed the Court that he had concluded “that it would be inconsistent with the public interest and with the Constitutional position of the Presidency to make available recordings of meetings and telephone conversations in which [he] was a participant. . . .”[[6]](#footnote-6)

On July 26, at the instruction of the grand jury, the Special Prosecutor applied to the District Court for an order requiring production of the evidence. Having determined by poll in open court the grand jury’s desire for the evidence, the District Judge ordered the President, or any appropriate subordinate official, to show cause “why the documents and objects described in [the subpoena] should not be produced . . ..” On August 7, in answer to the order, the President filed a Special Appearance and Brief in Opposition, stating that the letter of July 25 constituted a “valid and formal claim of executive privilege” and that, therefore, the District Court “lack[ed] jurisdiction to enter an enforceable order compelling compliance with the subpoena. . .”[[7]](#footnote-7)

The District Court then allowed the Special Prosecutor to submit a memorandum in response to that of the President and in support of the Court’s order. This memorandum contains a particularized showing of the grand jury’s need for each of the several subpoenaed tapes[[8]](#footnote-8)—a need that the District Court subsequently and, we think, correctly termed “well-documented and imposing.”[[9]](#footnote-9)

The strength and particularity of this showing were made possible by a unique intermeshing of events unlikely soon, if ever, to recur. The President had previously declared his intention to decline to assert any privilege with respect to testimony by his present and former aides, whether before the grand jury or the Select Committee of the Senate on Presidential Campaign Activities, concerning what has come to be known as the “Watergate” affair.[[10]](#footnote-10) As a result, detailed testimony by these aides before the Senate Committee enabled the Special Prosecutor to show a significant likelihood that there existed conspiracies among persons other than those already convicted of the Watergate break-in and wiretapping, not only to commit those offenses, but to conceal the identities of the persons involved. Moreover, the Special Prosecutor was able to show from the public testimony that important evidence relevant to the existence and scope of the purported conspiracy was contained in statements made by the President’s advisers during certain conversations that took place in his office. Most importantly, perhaps, significant inconsistencies in the sworn testimony of these advisers relating to the content of the conversations raised a distinct possibility that perjury had been committed before the Committee and, perhaps, before the grand jury itself.

Thus, the Special Prosecutor was able to show that the tape recordings of the disputed conversations–conversations specifically identified as to time, place, **[\*706]** and content–were each directly relevant to the grand jury’s task. Indeed, the Memorandum demonstrates, particularly with respect to the possible perjury offenses, that the subpoenaed recordings contain evidence critical to the grand jury’s decisions as to whether and whom to indict.

On August 29th, the Chief Judge of the District Court entered the order at issue in this case. In the accompanying opinion, 360 F.Supp. 1, he rejected the President’s challenge to the Court’s jurisdiction and to its authority to enter orders necessary to the enforcement of the subpoena. The President, petitioner in No. 73-1962, asks this Court for a writ of mandamus commanding the District Court to vacate its August 29th order. In No. 73-1967, the United States, through the Special Prosecutor and on behalf of the grand jury, petitions for a writ commanding the District Court to order full and immediate disclosure of the tapes to the grand jury and, in the alternative, for instructions to govern any in camera inspection that takes place. The United States has, in addition, filed an appeal from the order below.[[11]](#footnote-11)

Because of the public interest in their prompt resolution, we consolidated the cases and ordered briefing on an expedited schedule. For the reasons stated herein, we decline to command the District Court to vacate its order, and dismiss both the petition and appeal of the United States. We direct, however, that the District Court modify its order in certain respects, and that it conduct further proceedings in this case in a manner consistent with the criteria and procedures defined in this opinion.

II.

In their petitions for relief, both the President and the Special Prosecutor invoke this court’s statutory authority to issue “all writs necessary or appropriate in aid of” its jurisdiction.[[12]](#footnote-12) As the Supreme Court has noted, the peremptory writ of mandamus, one of the group authorized by the All Writs Act, “has traditionally been used in the federal courts only ‘to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”’[[13]](#footnote-13) And although jurisdiction, for purposes of the writ, need not be defined in its narrow, technical sense, “it is clear that only exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.”[[14]](#footnote-14) Beyond these considerations, the writ may not be used as a substitute for an appeal, nor to subvert the general congressional policy against appeals from interlocutory orders,[[15]](#footnote-15) a policy that is particularly strong in criminal cases.[[16]](#footnote-16)

With these general parameters in mind, we turn first to the President’s petition, which seeks to accommodate a well settled limitation on direct appeals challenging subpoenas. As recently restated by the Supreme Court, ordinarily “one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so **[\*707]** and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey.”[[17]](#footnote-17) Contrary to the argument of the respondent Chief Judge, we see no basis for broadly differentiating an order to produce evidence for an *in camera* inspection to determine whether it is privileged from disclosure to a grand jury.

From the viewpoint of mandamus, however, the central question that the President raises–whether the District Court exceeded its authority in ordering an in camera inspection of the tapes–is essentially jurisdictional.[[18]](#footnote-18) It is, too, a jurisdictional problem of “first impression” involving a “basic, undecided question.”[[19]](#footnote-19) And if indeed the only avenue of direct appellate review open to the President requires that he first disobey the court’s order, appeal seems to be “a clearly inadequate remedy.”[[20]](#footnote-20) These circumstances, we think, warrant the exercise, at the instance of the President, of our review power under the All Writs Act,[[21]](#footnote-21) particularly in light of the great public interest in prompt resolution of the issues that his petition presents.[[22]](#footnote-22)

We find the Special Prosecutor’s petition much more problematic.[[23]](#footnote-23) The Supreme Court “has never approved the use of the writ to review”–at the instance of the Government–“an interlocutory procedural order in a criminal case which did not have the effect of a dismissal.”[[24]](#footnote-24) And while the Court has not decided “under what circumstances, if any, such a use of mandamus would be appropriate,”[[25]](#footnote-25) we have grave doubt that it would be appropriate in this case. It is by no means clear that a writ directing the District Court to dispense with in camera inspection and order immediate production to the grand jury could fairly be characterized as aiding this court’s jurisdiction, however nontechnically jurisdiction might be defined.

Moreover, any resolution of the President’s petition necessitates consideration of the validity of the projected in camera inspection–the object of the Special Prosecutor’s sole objection–and of the **[\*708]** need for instructions governing any such inspection–the subject of his sole request in the alternative. In Schlagenhauf v. Holder,[[26]](#footnote-26) the Supreme Court sustained the inherent power of the courts of appeals in special circumstances to review by mandamus a “basic, undecided question,”[[27]](#footnote-27) and “to settle new and important problems.”[[28]](#footnote-28) Although one of the problems raised in that case would not normally have justified an exercise of mandamus authority, the Court recognized the propriety of avoiding piecemeal litigation by resolving all issues arising out of the same set of operative facts.[[29]](#footnote-29) Surely the extraordinary importance of the issues that the Special Prosecutor tenders demands no less.

Mandamus is generally withheld when relief is available in another manner.[[30]](#footnote-30) Our review of the President’s contentions will necessarily subsume the Special Prosecutor’s present concerns. Since we do not consider the question of jurisdiction of his petition essential to a full disposition of this consolidated proceeding, we exercise our discretion[[31]](#footnote-31) to dismiss the petition without deciding it.

III.

We turn, then, to the merits of the President’s petition. Counsel for the President contend on two grounds that Judge Sirica lacked jurisdiction to order submission of the tapes for inspection. Counsel argue, first, that, so long as he remains in office, the President is absolutely immune from the compulsory process of a court; and, second, that Executive privilege is absolute with respect to presidential communications, so that disclosure is at the sole discretion of the President. This immunity and this absolute privilege are said to arise from the doctrine of separation of powers and by implication from the Constitution itself. It is conceded that neither the immunity nor the privilege is express in the Constitution.

A.

It is clear that the want of physical power to enforce its judgments does not prevent a court from deciding an otherwise justiciable case.[[32]](#footnote-32) Nevertheless, if it is true that the President is legally immune from court process, this case is at an end. The judiciary will not, indeed cannot, indulge in rendering an opinion to which the President has no legal duty to conform. We must, therefore, determine whether the President is legally bound to comply with an order enforcing a subpoena.[[33]](#footnote-33)

We note first that courts have assumed that they have the power to enter mandatory orders to Executive officials to compel production of evidence.[[34]](#footnote-34) \***[709]** While a claim of an absolute Executive immunity may not have been raised directly before these courts, there is no indication that they entertained any doubts of their power. Only last term in Environmental Protection Agency v. Mink,[[35]](#footnote-35) the Supreme Court stated that a District Court “may order” in camera inspections of certain materials to determine whether they must be disclosed to the public pursuant to the Freedom of Information Act.[[36]](#footnote-36)

The courts’ assumption of legal power to compel production of evidence within the possession of the Executive surely stands on firm footing. Youngstown Sheet & Tube Co. v. Sawyer,[[37]](#footnote-37) in which an injunction running against the Secretary of Commerce was affirmed, is only the most celebrated instance of the issuance of compulsory process against Executive officials. See, e.g., United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (affirming an order requiring the Government to make full disclosure of illegally wiretapped conversations); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1828) (issuing a mandamus to Postmaster General, commanding him fully to comply with an act of Congress); State Highway Commission v. Volpe, 479 F.2d 1099 (8th Cir. 1973) (enjoining the Secretary of Transportation).

It is true that, because the President has taken personal custody of the tapes and is thus himself a party to the present action, these cases can be formally distinguished. As Judge Sirica noted, however, to rule that this case turns on such a distinction would be to exalt the form of Youngstown Sheet & Tube over its substance, Justice Black, writing for the Youngstown majority, made it clear that the Court understood its affirmance effectively to restrain the President. There is not the slightest hint in any of the Youngstown opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party.[[38]](#footnote-38) If Youngstown still stands, it must stand for the case where the President has himself taken possession and control of the property unconstitutionally seized, and the injunction would be framed accordingly. The practice of judicial review would be rendered capricious–and very likely impotent–if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own. This is not to say that the President should lightly be named as a party defendant. As a matter of comity, courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President. Here, unfortunately, the court’s order must run directly to the President, because he has taken the unusual step of assuming personal custody of the Government property sought by the subpoena.

The President also attempts to distinguish United States v. Burr,[[39]](#footnote-39) in which Chief Justice Marshall squarely ruled that a subpoena may be directed to the President. It is true that Burr recognized a distinction between the issuance of a subpoena and the ordering of compliance with that subpoena, but the distinction did not concern judicial power or jurisdiction. A subpoena *duces tecum* is an order to produce documents or to show cause why they need not be **[\*710]** produced. An order to comply does not make the subpoena more compulsory; it simply maintains its original force. The Chief Justice’s words merit close attention. His statement:

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[,]

is immediately followed by the statement:

The guard, furnished to this high officer, to protect him from being harassed by *vexatious and unnecessary* subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued.[[40]](#footnote-40)

The clear implication is that the President’s special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance. This implication is borne out by a later opinion by the great Chief Justice in the same case. When President Jefferson did not fully respond to the subpoena issued to him, Colonel Burr inquired why the President should not comply. The Chief Justice’s answer should put to rest any argument that he felt the President absolutely immune from orders of compliance:

The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives *may be* such as to restrain the court from enforcing its production. \* \* \* I can readily conceive that the president might receive a letter which it would be improper to exhibit in public \* \* \*. The occasion for *demanding* it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be *insisted* on. \* \* \* Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view.[[41]](#footnote-41)

A compliance order was, for Marshall, distinct from an order to show cause simply because compliance was not to be ordered before weighing the President’s particular reasons for wishing the subpoenaed documents to remain secret. The court was to show respect for the President in weighing those reasons, but the ultimate decision remained with the court.[[42]](#footnote-42)

Thus, to find the President immune from judicial process, we must read out of Burr and Youngstown the underlying principles that the eminent jurists in **[\*711]** each case thought they were establishing. The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight. James Madison raised the question of Executive privileges during the Constitutional Convention,[[43]](#footnote-43) and Senators and Representatives enjoy an express, if limited, immunity from arrest, and an express privilege from inquiry concerning “Speech and Debate” on the floors of Congress.[[44]](#footnote-44) Lacking textual support, counsel for the President nonetheless would have us infer immunity from the President’s political mandate, or from his vulnerability to impeachment, or from his broad discretionary powers. These are invitations to refashion the Constitution, and we reject them.

Though the President is elected by nationwide ballot, and is often said to represent all the people,[[45]](#footnote-45) he does not embody the nation’s sovereignty.[[46]](#footnote-46) He is not above the law’s commands: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law . . ..”[[47]](#footnote-47) Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen.

Nor does the Impeachment Clause imply immunity from routine court process.[[48]](#footnote-48) While the President argues that the Clause means that impeachability precludes criminal prosecution of an incumbent, we see no need to explore this question except to note its irrelevance to the case before us. The order entered below, and approved here in modified form, is not a form of criminal process. Nor does it compete with the impeachment device by working a constructive removal of the President from office. The subpoena names in the alternate “any subordinate officer,” and the tasks of compliance may obviously be delegated in whole or in part so as not to interfere with the President’s official responsibilities.[[49]](#footnote-49) By contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the President of the routine legal obligations that confine all citizens. That the Impeachment Clause may qualify the court’s power to sanction non-compliance with judicial orders is immaterial. Whatever the qualifications, they were equally present in Youngstown: Commerce Secretary Sawyer, the defendant there, was an impeachable “civil officer,”[[50]](#footnote-50) but the injunction against him was nonetheless affirmed. The legality of judicial orders should not be **[\*712]** confused with the legal consequences of their breach; for the courts in this country always assume that their orders will be obeyed, especially when addressed to responsible government officials. Indeed, the President has, in this case, expressly abjured the course of setting himself above the law.

Finally, the President reminds us that the landmark decisions recognizing judicial power to mandamus Executive compliance with “ministerial” duties also acknowledged that the Executive Branch enjoys an unreviewable discretion in many areas of “political” or “executive” administration.[[51]](#footnote-51) While true, this is irrelevant to the issue of presidential immunity from judicial process. The discretionary-ministerial distinction concerns the nature of the act or omission under review, not the official title of the defendant.[[52]](#footnote-52) No case holds that an act is discretionary merely because the President is the actor.[[53]](#footnote-53) If the Constitution or the laws of evidence confer upon the President the absolute discretion to withhold material subpoenaed by a grand jury, then of course we would vacate, rather than approve with modification, the order entered below. However, this would be because the order touched upon matters within the President’s sole discretion, not because the President is immune from process generally. We thus turn to an examination of the President’s claim of an absolute discretion to withhold evidence from a grand jury.

B.

There is, as the Supreme Court has said, a “longstanding principle” that the grand jury “has a right to every man’s evidence” except that “protected by a constitutional, common law, or statutory privilege.”[[54]](#footnote-54) The President **[\*713]** concedes the validity of this principle. He concedes that he, like every other citizen, is under a legal duty to produce relevant, non-privileged evidence when called upon to do so.[[55]](#footnote-55) The President contends, however, that whenever, in response to a grand jury subpoena, he interposes a formal claim of privilege, that claim without more disables the courts from inquiring by any means into whether the privilege is applicable to the subpoenaed evidence. The President agrees that, in theory, the privilege attached to his office has limits; for example, he explicitly states that it “cannot be claimed to shield executive officers from prosecution for crime.”[[56]](#footnote-56) Nonetheless, he argues that it is his responsibility, and his alone, to determine whether particular information falls beyond the scope of the privilege. In effect, then, the President claims that, at least with respect to conversations with his advisers, the privilege is absolute, since he, rather than the courts, has final authority to decide whether it applies in the circumstances.

We of course acknowledge the longstanding judicial recognition of Executive privilege. Courts have appreciated that the public interest in maintaining the secrecy of military and diplomatic plans may override private interests in litigation.[[57]](#footnote-57) They have further responded to Executive pleas to protect from the light of litigation “intra-governmental documents reflecting \* \* \* deliberations comprising part of a process by which governmental decisions and policies are formulated.”[[58]](#footnote-58) In so doing, the Judiciary has been sensitive to the considerations upon which the President seems to rest his claim of absolute privilege: the candor of Executive aides and functionaries would be impaired if they were persistently worried that their advice and deliberations were later to be made public.[[59]](#footnote-59) However, counsel for the President can point to no case in which a court has accepted the Executive’s mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the documents. To the contrary, the courts have repeatedly asserted that the applicability of the privilege is in the end for them and not the Executive to decide.[[60]](#footnote-60) They have, moreover, **[\*714]** frequently ordered in camera inspection of documents for which a privilege was asserted in order to determine the privilege’s applicability.[[61]](#footnote-61)

It is true, as counsel for the President stress, that Presidents and Attorneys General have often said that the President’s final and absolute assertion of Executive privilege is conclusive on the courts.[[62]](#footnote-62) The Supreme Court in United States v. Reynolds, however, went a long way toward putting this view to rest. The Reynolds Court, considering a claim based on military secrets, strongly asserted: “The court itself must determine whether the circumstances are appropriate for the claim of privilege;”[[63]](#footnote-63) “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”[[64]](#footnote-64) It is true that, somewhat inconsistently with this sweeping language, the Court formally reserved decision on the Government’s claim that the Executive has an absolute discretion constitutionally founded in separation of powers to withhold documents.[[65]](#footnote-65) However, last term in Committee for Nuclear Responsibility, Inc. v. Seaborg,[[66]](#footnote-66) we confronted directly a claim of absolute privilege and rejected it: “Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will.”[[67]](#footnote-67)

We adhere to the Seaborg decision. To do otherwise would be effectively to ignore the clear words of Marbury v. Madison,[[68]](#footnote-68) that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”[[69]](#footnote-69)

Seaborg is not only consistent with, but dictated by, separation of powers doctrine. Whenever a privilege is asserted, even one expressed in the Constitution, such as the Speech and Debate privilege, it is the courts that determine the validity of the assertion and **[\*715]** the scope of the privilege.[[70]](#footnote-70) That the privilege is being asserted by the President against a grand jury subpoena does not make the task of resolving the conflicting claims any less judicial in nature. Throughout our history, there have frequently been conflicts between independent organs of the federal government, as well as between the state and federal governments. When such conflicts arise in justiciable cases, our constitutional system provides a means for resolving them–one Supreme Court. To leave the proper scope and application of Executive privilege to the President’s sole discretion would represent a mixing, rather than a separation, of Executive and Judicial functions. A breach in the separation of powers must be explicitly authorized by the Constitution,[[71]](#footnote-71) or be shown necessary to the harmonious operation of “workable government.”[[72]](#footnote-72) Neither condition is met here. The Constitution mentions no Executive privileges, much less any absolute Executive privileges. Nor is an absolute privilege required for workable government. We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch. But this is an argument for recognizing Executive privilege and for according it great weight, not for making the Executive the judge of its own privilege.

If the claim of absolute privilege was recognized, its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and their representatives, including Congress, the courts as well as grand juries, state governments, state officials and all state subdivisions. The Freedom of Information Act could become nothing more than a legislative statement of unenforceable rights. Support for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers.[[73]](#footnote-73)

**[\*716]** Any contention of the President that records of his personal conversations are not covered by the Seaborg holding must be rejected. As our prior discussion of United States v. Burr makes clear, Chief Justice Marshall’s position supports this proposition. At issue in Burr was a subpoena to President Jefferson to produce private letters sent to him–communications whose status must be considered equal to that of private oral conversations. We follow the Chief Justice and hold today that, although the views of the Chief Executive on whether his Executive privilege should obtain are properly given the greatest weight and deference, they cannot be conclusive.

IV.

The President’s privilege cannot, therefore, be deemed absolute. We think the Burr case makes clear that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case.[[74]](#footnote-74) We direct our attention, however, solely to the circumstances here. With the possible exception of material on one tape, the President does not assert that the subpoenaed items involve military or state secrets;[[75]](#footnote-75) nor is the asserted privilege directed to the particular kinds of information that the tapes contain. Instead, the President asserts that the tapes **[\*717]** should be deemed privileged because of the great public interest in maintaining the confidentiality of conversations that take place in the President’s performance of his official duties. This privilege, intended to protect the effectiveness of the executive decision-making process, is analogous to that between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and their law clerks;[[76]](#footnote-76) and similar to that contained in the fifth exemption to the Freedom of Information Act.[[77]](#footnote-77)

We recognize this great public interest, and agree with the District Court that such conversations are presumptively privileged.[[78]](#footnote-78) But we think that this presumption of privilege premised on the public interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case. The function of the grand jury, mandated by the Fifth Amendment for the institution of federal criminal prosecutions for capital or other serious crimes, is not only to indict persons when there is probable cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist.[[79]](#footnote-79) As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function–evidence for which no effective substitute is available. The grand jury here is not engaged in a general fishing expedition, nor does it seek in any way to investigate the wisdom of the President’s discharge of his discretionary duties. On the contrary, the grand jury seeks evidence that may well be conclusive to its decisions in on-going investigations that are entirely within the proper scope of its authority. In these circumstances, what we said in Committee for Nuclear Responsibility v. Seaborg becomes, we think, particularly appropriate:

But no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.[[80]](#footnote-80)

Our conclusion that the general confidentiality privilege must recede before the grand jury’s showing of need, is established by the unique circumstances that made this showing possible. In his public statement of May 22, 1973, the President said: “Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up.”[[81]](#footnote-81) We think that this statement and its consequences may properly be considered as at least one factor in striking the balance in this case. Indeed, it affects the weight we give to factors on both sides of the scale. On the one hand, the President’s action presumably reflects a judgment by him that the interest in the confidentiality of White House discussions in general is outweighed by such matters as the public interest, stressed by the Special Prosecutor, in the integrity of **[\*718]** the level of the Executive Branch closest to the President, and the public interest in the integrity of the electoral process–an interest stressed in such cases as Civil Service Commission v. National Association of Letter Carriers[[82]](#footnote-82) and United States v. United Automobile Workers.[[83]](#footnote-83) Although this judgment in no way controls our decision, we think it supports our estimation of the great public interest that attaches to the effective functioning of the present grand jury. As Burr makes clear, the courts approach their function by considering the President’s reasons and determinations concerning confidentiality.

At the same time, the public testimony given consequent to the President’s decision substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate. The simple fact is that the conversations are no longer confidential. Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony.[[84]](#footnote-84) There is no “constitutional right to rely on possible flaws in the [witness’s] memory. \* \* \* [N]o other argument can justify excluding an accurate version of a conversation that the [witness] could testify to from memory.”[[85]](#footnote-85) In short, we see no justification, on confidentiality grounds, for depriving the grand jury of the best evidence of the conversations available.[[86]](#footnote-86)

The District Court stated that, in determining the applicability of privilege, it was not controlled by the President’s assurance that the conversations in question occurred pursuant to an exercise of his constitutional duty to “take care that the laws be faithfully executed.” The District Court further stated that while the President’s claim would not be rejected on any but the strongest possible evidence, the Court was unable to decide the question of privilege without inspecting the tapes.[[87]](#footnote-87) This passage of the District Court’s opinion is not entirely clear. If, however, the District Judge meant that rejection of the claim of privilege requires a finding that the President was not engaged in the performance of his constitutional duty, we cannot agree. We emphasize that the grand jury’s showing of need in no sense relied on any evidence that the President was involved in, or even aware of, any alleged criminal activity. We freely assume, for purposes of this opinion, that the President was engaged in performance of his constitutional duty. Nonetheless, we hold that the District Court may order disclosure of all portions of the tapes relevant to matters within the proper scope of the grand jury’s investigations, unless the Court judges that the public interest served by nondisclosure of particular statements or information outweighs the need for that information demonstrated by the grand jury.

V.

The question remains whether, in the circumstances of this case, the District **[\*719]** Court was correct in ordering the tapes produced for in camera inspection, so that it could determine whether and to what extent the privilege was properly claimed. Since the question of privilege must be resolved by the Court, there must be devised some procedure or series of procedures that will, at once, allow resolution of the question and, at the same time, not harm the interests that the privilege is intended to protect.

Two days after oral argument, this Court issued a Memorandum calling on the parties and counsel to hold conversations toward the objective of avoiding a needless constitutional adjudication. Counsel reported that their sincere efforts had not been fruitful.[[88]](#footnote-88) It is our hope that our action in providing what has become an unavoidable constitutional ruling, and in approving, as modified, the order of the District Court, will be followed by maximum cooperation among the parties. Perhaps the President will find it possible to reach some agreement with the Special Prosecutor as to what portions of the subpoenaed evidence are necessary to the grand jury’s task.

Should our hope prove unavailing, we think that in camera inspection is a necessary and appropriate method of protecting the grand jury’s interest in securing relevant evidence. The exception that we have delineated to the President’s confidentiality privilege depends entirely on the grand jury’s showing that the evidence is directly relevant to its decisions. The residual problem of this case derives from the possibility that there are elements of the subpoenaed recordings that do not lie within the range of the exception that we have defined.

This may be due, in part, to the fact that parts of the tape recordings do not relate to Watergate matters at all. What is apparently more stressed by the President’s counsel is that there are items in the tape recordings that should be held confidential yet are inextricably interspersed with the portions that relate to Watergate. They say, concerning the President’s decision to permit testimony about possible criminal conduct or discussions thereof, that

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 the recordings would do serious damage to Presidential privacy and to the ability of that office to function.[[89]](#footnote-89)

The argument is not confined to matters of national security, for the underlying importance of preserving candor of discussion and Presidential privacy pertains to all conversations that involve discussion or making of policy, ordinary domestic policies as well as matters of national security, and even to personal discussion with friends and advisers on seemingly trivial matters.[[90]](#footnote-90) Concerning the inextricability problem, the President’s counsel say:

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. \* \* \* The nature of informal, private conversations is such that it is not practical to separate what is arguably relevant from what is clearly irrelevant.[[91]](#footnote-91)

The “inextricable intermingling” issue may be potentially significant. The District Court correctly discerned that in camera inspection is permissible, even though it involved what the President’s counsel agree is a “limited infraction” of confidentiality, in order to determine whether there is inextricable intermingling. **[\*720]** In EPA v. Mink, the Supreme Court declared that in camera inspection was an appropriate means of determining whether and to what extent documents sought in litigation were disclosable as factual information even though the Government argued that the documents “submitted directly to the President by top-level Government officials” were, by their very nature, a blending of factual presentation and policy recommendations that are necessarily “inextricably intertwined with policymaking processes.”[[92]](#footnote-92) The Supreme Court stated that it had no reason to believe that the District Judge directed to make in camera inspection “would go beyond the limits of the remand and in any way compromise the confidentiality of deliberative information.” The Court acknowledged that “the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even [in camera].” Yet the Court stated: “Plainly, in some situations, in camera inspection will be necessary and appropriate.”[[93]](#footnote-93) It further noted: “A representative document of those sought may be selected for in camera inspection.” And it suggested that the agency may disclose portions of the contested documents and attempt to show, by circumstances, “that the excised portions constitute the barebones of protected matter.”[[94]](#footnote-94)

In this case, the line of permissible disclosure is different from that in Mink, since even policy and decisional discussions are disclosable if they relate to Watergate and the alleged coverup. But Mink confirms that courts appropriately examine a disputed item in camera, even though this necessarily involves a limited intrusion upon what ultimately may be held confidential, where it appears with reasonable clarity that some access is appropriate, and in camera inspection is needed to determine what should and what should not be revealed.[[95]](#footnote-95)

*Mink* noted that the case might proceed by the Government’s disclosing portions of the contested documents,[[96]](#footnote-96) and also noted an instance in which the “United States offered to file ‘an abstract of factual information’ contained in the contested documents (FBI reports).”[[97]](#footnote-97) We think that the District Judge and counsel can illuminate the key issue of what is “inextricable” by cultivating the partial excision and “factual abstract” approaches noted in *Mink*.

The District Court contemplated that “privileged portions may be excised so that only unprivileged matter goes before the grand jury.” Even in a case of such intermingling as, for example, comment on Watergate matters that is “pungent,” once counsel, or the District Judge, has listened to the tape recording of a conversation, he has an ability to present only its relevant portions, much like a bystander who heard the conversation and is called to testify. He may give the grand jury portions relevant to Watergate, by using excerpts in part and summaries in part, in such a way as not to divulge aspects that reflect the pungency of candor or are otherwise entitled to confidential treatment. It is not so long ago that appellate courts routinely decided cases without an exact transcript, but on an order of the trial judge settling what was given as evidence.

VI.

We contemplate a procedure in the District Court, following the issuance of our mandate, that follows the path delineated **[\*721****]** in *Reynolds, Mink,* and by this Court in Vaughn v. Rosen.[[98]](#footnote-98) With the rejection of his all-embracing claim of prerogative, the President will have an opportunity to present more particular claims of privilege, if accompanied by an analysis in manageable segments.

Without compromising the confidentiality of the information, the analysis should contain descriptions specific enough to identify the basis of the particular claim or claims.

1. In so far as the President makes a claim that certain material may not be disclosed because the subject matter relates to national defense or foreign relations, he may decline to transmit that portion of the material and ask the District Court to reconsider whether in camera inspection of the material is necessary. The Special Prosecutor is entitled to inspect the claim and showing and may be heard thereon, in chambers. If the judge sustains the privilege, the text of the government’s statement will be preserved in the Court’s record under seal.

2. The President will present to the District Court all other items covered by the order, with specification of which segments he believes may be disclosed and which not. This can be accomplished by itemizing and indexing the material, and correlating indexed items with particular claims of privilege.[[99]](#footnote-99) On request of either counsel, the District Court shall hold a hearing in chambers on the claims. Thereafter the Court shall itself inspect the disputed items.

Given the nature of the inquiry that this inspection involves, the District Court may give the Special Prosecutor access to the material for the limited purpose of aiding the Court in determining the relevance of the material to the grand jury’s investigations. Counsels’ arguments directed to the specifics of the portions of material in dispute may help the District Court immeasurably in making its difficult and necessarily detailed decisions. Moreover, the preliminary indexing will have eliminated any danger of disclosing peculiarly sensitive national security matters. And, here, any concern over confidentiality is minimized by the Attorney General’s designation of a distinguished and reflective counsel as Special Prosecutor. If, however, the Court decides to allow access to the Special Prosecutor, it should, upon request, stay its action in order to allow sufficient time for application for a stay to this Court.

Following the *in camera* hearing and inspection, the District Court may determine as to any items (a) to allow the particular claim of privilege in full; (b) to order disclosure to the grand jury of all or a segment of the item or items; or, when segmentation is impossible, (c) to fashion a complete statement for the grand jury of those portions of an item that bear on possible criminality. The District Court shall provide a reasonable stay to allow the President an opportunity to appeal.[[100]](#footnote-100) In case of an appeal to this Court of an order either allowing or refusing disclosure, this Court will provide for sealed records and confidentiality in presentation.

**[\*722]** VII.

We end, as we began, by emphasizing the extraordinary nature of this case. We have attempted to decide no more than the problem before us–a problem that takes its unique shape from the grand jury’s compelling showing of need.[[101]](#footnote-101) The procedures we have provided require thorough deliberation by the District Court before even this need may be satisfied. Opportunity for appeal, on a sealed record, is assured.

We cannot, therefore, agree with the assertion of the President that the District Court’s order threatens “the continued existence of the Presidency as a functioning institution.”[[102]](#footnote-102) As we view the case, the order represents an unusual and limited requirement that the President produce material evidence. We think this required by law, and by the rule that even the Chief Executive is subject to the mandate of the law when he has no valid claim of privilege.

The petition and appeal of the United States are dismissed. The President’s petition is denied, except in so far as we direct the District Court to modify its order and to conduct further proceedings in a manner not inconsistent with this opinion.

The issuance of our mandate is stayed for five days to permit the seeking of Supreme Court review of the issues with which we have dealt in making our decision.

So ordered.

**[\*723]**

APPENDIX I

MEMORANDUM AND REPLIES

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

[Filed Sep. 13, 1973, United States Court of Appeals for the

District of Columbia Circuit, Hugh E. Kline, Clerk]

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

NO. 73-1967

UNITED STATES OF AMERICA, Petitioner

V.

The Honorable JOHN J. SIRICA, Chief Judge, United States

District Court for the District of Columbia, Respondent

AND

RICHARD M. NIXON, President of the United States,

Party in Interest

Before BAZELON, Chief Judge, and WRIGHT, McGOWAN, LEVENTHAL, ROBINSON, MacKINNON, and WILKEY, Circuit Judges.

From the able exposition by counsel in the unusually full oral argument allowed by the Court in this case, it appeared to the Court that the issues dividing the parties might be susceptible of resolution by procedures other than those set forth in either District Judge Sirica’s opinion or the briefs of the parties. The Court has been, and is, conscious of the public importance of this matter and the public interest in the earliest possible resolution of it.

The doctrine under which courts seek resolution of a controversy without a **[\*724]** constitutional ruling is particularly applicable here. The possibility of a resolution of this controversy without the need for a constitutional ruling is enhanced by the stature and character of the two counsel charged with representation of each side in this cause, and by the circumstance that each was selected for his position, directly or indirectly, by the Chief Executive himself.

Whereas Judge Sirica contemplated an in camera examination of the subpoenaed tapes, which would have necessitated the presence of the Judiciary, we contemplate an examination of the tapes by the Chief Executive or his delegate, assisted by both his own counsel, Professor Wright, and the Special Prosecutor, Professor Cox.

We say this without intimating a decision on any question of jurisdiction or privilege advanced by any party. Apart from noting that the likelihood of successful settlement along the lines indicated contemplates a voluntary submission of such portions of the tapes to the two counsel as satisfies them, we do not presume to prescribe the details of how the Chief Executive will work with the two counsel.

This procedure may permit the different approaches of the parties to converge. The President has maintained that he alone should decide what is necessarily privileged and should not be furnished the grand jury. The Special Prosecutor has maintained that he should have the opportunity of examining the material and asserting its relevance and importance to the grand jury investigation. If the President and the Special Prosecutor agree as to the material needed for the grand jury’s functioning, the national interest will be served. At the same time, neither the President nor the Special Prosecutor would in any way have surrendered or subverted the principles for which they have contended.

If, after the most diligent efforts of all three concerned, there appear to be matters the President deems privileged and the Special Prosecutor believes necessary and not privileged, then this Court will discharge its duty of determining the controversy with the knowledge that it has not hesitated to explore the possibility of avoiding constitutional adjudication. Even if this were to occur, the issues remaining for resolution might be substantially narrowed and clarified.

We have issued this Memorandum without interrupting the schedule for post-argument memoranda by the parties. The overriding public interest in this case demands our best and most expeditious efforts in the meantime. The Court asks that it be advised, by both counsel, no later than September 20, 1973, whether the approach indicated in this memorandum has been fruitful.

The Clerk is directed to transmit this Memorandum to all parties to the instant proceedings and to file it in the record.

**[\*725]** THE WHITE HOUSE

WASHINGTON

20 September 1973

[Filed Sep. 20, 1973, United States Court of Appeals

for the District of Columbia Circuit

Hugh E. Kline, Clerk]

Mr. Hugh E. Kline

Clerk

United States Court of Appeals

Washington, D. C. 20001

*In re Grand Jury Subpoena, Nos. 73-1962, 73-1967*

Dear Mr. Kline:

This is to advise you that counsel in the above-entitled matter have had lengthy meetings, pursuant to the suggestion in the Court’s memorandum of September 13th. Mr. Cox and Mr. Buzhardt met on September 17th and 18th and today Mr. Cox and Mr. Lacovara of his office met with Mr. Buzhardt, Mr. Garment, and myself. I regret to advise the Court that these sincere efforts were not fruitful.

All participants in these conversations have agreed that we shall say nothing about them except to make this report to the Court.

I understand that Mr. Cox will similarly advise you of these meetings and of their unsuccessful outcome.

Respectfully,

/s/ Charles Alan Wright

CHARLES ALAN WRIGHT

An Attorney for the President

cc: Honorable Archibald Cox

**[\*726]** WATERGATE SPECIAL PROSECUTION FORCE

United States Department of Justice

1425 K Street, N.W.

Washington, D. C. 20005

September 20, 1973

[Filed Sep. 20, 1973, United States Court of Appeals

for the District of Columbia Circuit

Hugh E. Kline, Clerk]

Hon. Hugh E. Kline

Clerk, United States Court of

Appeals for the District of

Columbia Circuit

Washington, D. C.

Re: *Nixon v. Sirica et al*. (Nos. 73-1962, 73-1967)

Dear Mr. Kline:

This is to advise you that counsel in the above entitled matter have had lengthy meetings pursuant to the suggestion in the Court’s memorandum of September 13. Mr. Buzhardt and I met on September 17 and 18 and today Mr. Lacovara of my office and I met with Messrs. Wright, Buzhardt, and Garment. I regret to advise the Court that these sincere efforts were not fruitful.

All participants in these conversations have agreed that we shall say nothing about them except to make this report to the Court.

I understand that Mr. Wright will similarly advise you of these meetings and of their unsuccessful outcome.

Sincerely,

/s/ Archibald Cox

ARCHIBALD COX

Special Prosecutor

cc: Hon. John J. Sirica

Charles Alan Wright, Esq.

APPENDIX II

In a “Memorandum in Support of an Order to Produce Documents or Objects in Response to the Subpoena” (pp. 5-10), filed with the court below on August 13, 1973, the Special Prosecutor provided the following description of the nine communications, tapes of which are sought by the grand jury. (The transcript references throughout are to the transcript of the hearings of the Senate Select Committee on Presidential Campaign Activities.)

1. *Meeting of June 20, 1972*. Respondent met with John D. Ehrlichman and H. R. Haldeman in his Old Executive Office Building (OEOB) office on June 20, 1972, from 10:30 a. m. until approximately 12:45 p. m. There is every reason to infer that the meeting included discussion of the Watergate incident. The break-in had occurred on June 17–just three days earlier. Dean did not return to Washington until June 18 (S. Tr. 2166). Mitchell, Haldeman and LaRue had also been out of town and **[\*727]** did not return until late on June 19 (S. Tr. 3305, 3307, 6195). Early on the morning of June 20, Haldeman, Ehrlichman, Mitchell, Dean and Attorney General Kleindienst met in the White House. This was their first opportunity for full discussion of how to handle the Watergate incident, and Ehrlichman has testified that Watergate was indeed the primary subject of the meeting (S. Tr. 5923-5924). From there, Ehrlichman and then Haldeman went to see the President. The inference that they reported on Watergate and may well have received instructions, is almost irresistible. The inference is confirmed by Ehrlichman’s public testimony that the discussion with respondent included both Watergate and government wiretapping (S. Tr. 5924-25). The contemporary evidence of that meeting should show the extent of the knowledge of the illegal activity by the participants or any effort to conceal the truth from the respondent.

2. *Telephone call of June 20, 1972*. Respondent and John Mitchell, the director of respondent’s campaign for re-election, spoke by telephone from 6:08 to 6:12 p. m. on June 20, 1972. Mitchell has testified that the sole subject was the Watergate break-in and investigation (S. Tr. 3407-08). This apparently was the first direct contact after the break-in between respondent and Mitchell, so that what Mitchell reported may be highly material. Indeed, although Mitchell already may have been briefed at this time by Robert C. Mardian and LaRue about Liddy’s involvement in the break-in (S. Tr. 3629-32, 4590, 4595), Mitchell maintains that he told the President that only the five arrested at Watergate–not including Liddy–were involved. (S. Tr. 3407-08, 3632). Evidence of this conversation with a man who had no public office at the time and was concerned solely with respondent’s political interests will either tend to confirm Mitchell’s version or show a more candid report to respondent.

3. *Meeting of June 30, 1972*. Respondent met with Mitchell and Haldeman for an hour and 15 minutes in his EOB office, apparently the first meeting between respondent and Mitchell since June 17, 1972. The topic of conversation, according to Mitchell, was his impending resignation as Chairman of the Committee for the Re-Election of the President (S. Tr. 3442-43), which in fact was announced the next day. This is a meeting most of which almost surely did not involve any official duties of the President. It also strains credulity to suppose that Watergate and how Watergate affected Mitchell and the campaign were not topics of conversation. The records of the meeting are clearly the most direct evidence of the knowledge and intentions of the participants as of a date shortly after the grand jury began its investigation.

4. *Meeting of September 15, 1972*. On September 15, 1972, the grand jury returned an indictment charging seven individuals with conspiracy and other offenses relating to the break-in. Respondent met the same day with Dean and Haldeman in his Oval Office from 5:27 to 6:17 p. m. Both Dean and Haldeman have given lengthy but contradictory accounts of what was said (S. Tr. 2229-33, 6090-93).

According to Dean, the purpose of the meeting was to brief respondent on the status of the investigation and related matters. Dean said that respondent then congratulated him on the “good job” he had done and was pleased that the case had “stopped with Liddy.” Dean said that he then told respondent that all he had been able to do was “contain” the case and “assist in keeping it out of the White House.” (S. Tr. 2230.) If this testimony is corroborated, it will tend to establish that a conspiracy to obstruct justice reached the highest level of government.

Haldeman, after reviewing a tape recording of the meeting, has agreed that there was discussion of the Watergate indictments, of the civil cases arising **[\*728]** out of the break-in, of the possibility of a continuing grand jury investigation, of internal policies at the Committee for the Re-Election of the President, and of other matters. He denies, however, that respondent congratulated Dean on Dean’s efforts to thwart the investigation. (S. Tr. 6090-93, 6456.)

If Haldeman’s innocuous version of the meeting can be sustained, it is because the meeting only involved an innocent discussion of political interests. The question of Dean’s perjury would then arise. Resolution of this conflict between two of the three persons present and an accurate knowledge of plans or admissions made on this occasion would be of obvious aid to the grand jury’s investigation.

5. *Meeting of March 13, 1973*. Respondent again met with Dean and Haldeman on March 13, 1973, from 12:42 to 2:00 p. m. Dean testified at length about the meeting. (S. Tr. 2323-2325.) Haldeman gave evidence that he has no independent recollection of what was said (S. Tr. 6100).[[103]](#footnote-103)\*

The White House briefing for the Senate Committee suggests that the meeting related primarily to Watergate and that respondent asked Dean for a report on the involvement of Haldeman and others.[[104]](#footnote-104)\*\* Dean, on the other hand, testified that respondent told Dean that respondent had approved executive clemency for defendant Hunt and that there would be no problem about raising $1 million to buy all defendants’ silence (S. Tr. 2324). Unquestionably, confirmation of Dean’s testimony would aid the grand jury in determining the existence, membership, and scope of a cover-up conspiracy. Conclusive disproof, on the other hand, would raise a question of perjury by Dean before the Senate Committee, a matter directly within the grand jury’s jurisdiction.

6, 7. *Meetings of March 21, 1973*. On March 21, 1973, respondent met with Dean and Haldeman from 10:12 to 11:55 a. m. and with Dean, Haldeman, Ehrlichman and Ronald Ziegler from 5:20 to 6:01 p. m. (Not all parties were present all of the time.)

Both Dean and Haldeman (who reviewed the recording of the morning meeting) have testified extensively about that meeting (S. Tr. 2329-34, 6112-15, 6273-95, 6394-6400), and it is also discussed in the White House briefing for the Senate Committee. All accounts confirm that the sole subject was the Watergate break-in and wiretapping and the subsequent cover-up. All agree that Dean talked about a “cancer” affecting the Presidency and revealed a theory of the cover-up and the possible liability of White House and Committee officials, including Magruder, Mitchell, Strachan, Colson, Ehrlichman, Haldeman, and himself. (S. Tr. 2330-31, 6112-15, 6286-94, 6640-41.) All agree that there was discussion of Hunt’s threat to expose his “seamy” work for the White House unless he received a considerable sum of money. Haldeman testified that it was at this meeting that respondent indicated that $1 million easily could be raised; according to Haldeman however, respondent went on to say that it would not be right to pay the money. This discrepancy, which can be resolved by a contemporary recording, is manifestly significant.

Haldeman, Ehrlichman and Dean each have testified about the afternoon meeting as well, and the White House briefing gives a separate account. Again, the sole topic of conversation was Watergate. The participants discussed the **[\*729]** possibility of present and former White House officials, as well as employees of the Committee, testifying before the grand jury. (S. Tr. 2334-35, 5650, 5710, 6118.) Dean has testified that it was clear to him after this meeting that the cover-up would continue (S. Tr. 2335). Evidence of this meeting is pertinent to determining the existence of a cover-up, its thrust, and its membership.

8. *Meeting of March 22, 1973*. Respondent met with Dean, Ehrlichman, Haldeman and Mitchell from 2:00 p. m. to 3:43 p. m. on March 22, 1973. (Mitchell, of course, was a private citizen at this time.) Dean, Mitchell, Ehrlichman, and Haldeman each have testified that the meeting centered in general on Watergate and in particular on the problems that would be presented by the upcoming Senate Select Committee hearings (S. Tr. 2337-40, 3413-15, 5720, 5128, 6119-22). This meeting was apparently concerned, at least in major part, with political assessments and operations, not exclusively with establishing “government” policy, and is likely to reveal the knowledge and motives of the participants.

9. *Meeting of April 15, 1973*. Respondent met with Dean from 9:17 to 10:12 p. m. on April 15, 1973. Dean has testified in detail about the substance of this hour-long conversation, allegedly telling respondent of his meetings with the United States Attorney’s Office. Dean also testified that respondent said that he had been “joking” when respondent approved raising $1 million for the Watergate defendants and acknowledged that he had been “foolish” to discuss executive clemency with Charles Colson. (S. Tr. 2371-75.) If true and accurate, this testimony would indicate an important dimension to the cover-up conspiracy. If false and misleading, a perjurious injustice has been done for which the grand jury can return an indictment.

1. The District Court’s order is reproduced here in its entirety:

   This matter having come before the Court on motion of the Watergate Special Prosecutor made on behalf of the June 1972 grand jury of this district for an order to show cause, and the Court being advised in the premises, it is by the Court this 29th day of August, 1973, for the reasons stated in the attached opinion,

   *Ordered* that respondent, President Richard M. Nixon, or any subordinate officer, official or employee with custody or control of the documents or objects listed in the grand jury subpoena *duces tecum* of July 23, 1973, served on respondent in this district, is hereby commanded to produce forthwith for the Court’s examination in camera, the subpoenaed documents or objects which have not heretofore been produced to the grand jury; and it is

   *Further Ordered* that the ruling herein be stayed for a period of five days in which time respondent may perfect an appeal from the ruling; and it is

   *Further Ordered* that should respondent appeal from the ruling herein, the above stay will be extended indefinitely pending the completion of such appeal or appeals. [↑](#footnote-ref-1)
2. By Order of the Attorney General No. 517-73, 38 Fed.Reg. 14, 688 (June 4, 1973), the Special Prosecutor is designated as the attorney for the United States to conduct proceedings before the grand jury investigating the unauthorized entry into the Democratic National Committee Headquarters and related offenses. He is specifically authorized “to contest the assertion of ‘executive privilege.”’ *See also* Hearings before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 159, 180-81 (1973). The Special Prosecutor, as Attorney for the United States, appears in this Court and the court below as counsel to the grand jury and an officer of the court. [↑](#footnote-ref-2)
3. This, of course, does not signify agreement on the scope of the President’s privilege, the proper content of any judgment by the Court, or the District Court’s constitutional authority to issue an order to the President. Circuit Judges MacKinnon and Wilkey concur in part II of the Court’s opinion and otherwise dissent for the reasons stated in their separate opinions. [↑](#footnote-ref-3)
4. The subpoena, issued by the clerk under seal of the District Court pursuant to F.R.Crim.P. 17(a) and (c), was addressed to the President or “any subordinate officer, official or employee with custody or control” of the documents and objects specified in the attached schedule. [↑](#footnote-ref-4)
5. For the Special Prosecutor’s explanation of the relevance of those discussions, see Appendix II, *infra*. The subpoena also required production of two memoranda that had been written by and sent to certain of the President’s advisers. The President has complied with the subpoena in so far as it concerned these items. [↑](#footnote-ref-5)
6. Appendix to the Supplemental Brief for the United States (Special Prosecutor), at 30-31. [↑](#footnote-ref-6)
7. Special Appearance at ¶¶ 3 and 6, In re Grand Jury Subpoena Duces Tecum to Nixon, 360 F.Supp. 1 (D.C.D.C.1973). [↑](#footnote-ref-7)
8. Memorandum in Support at 3-11, *id*. [↑](#footnote-ref-8)
9. In re Subpoena to Nixon, supra note 7, 360 F.Supp. at 11. [↑](#footnote-ref-9)
10. See text at note 81, *infra*. [↑](#footnote-ref-10)
11. No. 73-1989. [↑](#footnote-ref-11)
12. “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a) (1970). [↑](#footnote-ref-12)
13. Will v. United States, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305 (1967), quoting Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). For a full discussion of the general rules governing our authority to issue the writ, *see* Donnelly v. Parker, 158 U.S.App.D.C. \_\_\_\_, \_\_\_\_, \_\_\_\_, 486 F.2d 402, 405, 407-410 (1973). [↑](#footnote-ref-13)
14. Will v. United States, *supra* note 13, 389 U.S. at 95, 88 S.Ct. at 273, quoting De Beers Consol. Mines v. United States, 325 U.S. 212, 217, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945). [↑](#footnote-ref-14)
15. Parr v. United States, 351 U.S. 513, 520-521, 76 S.Ct. 912, 100 L.Ed. 1377 (1956). [↑](#footnote-ref-15)
16. Will v. United States, *supra* note 13, 389 U.S. at 96-98, 88 S.Ct. 269. [↑](#footnote-ref-16)
17. United States v. Ryan, 402 U.S. 530, 532, 91 S.Ct. 1580, 1581, 29 L.Ed.2d 85 (1971). *See also* Cobbledick v. United States, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940). *But see* Carr v. Monroe Mfg. Co., 431 F.2d 384 (5th Cir. 1970). [↑](#footnote-ref-17)
18. Compare Schlagenhauf v. Holder, 379 U.S. 104, 110-111, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). [↑](#footnote-ref-18)
19. *Id*. [↑](#footnote-ref-19)
20. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 385, 74 S.Ct. 145, 98 L.Ed. 106 (1953), quoting Ex parte Fahey, 332 U.S. 258, 260, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947). [↑](#footnote-ref-20)
21. In so concluding, we do not discard the direct appeal as an alternative basis for review in the particular situation before us. The final-order doctrine, as a normal prerequisite to a federal appeal, is not a barrier where it operates to leave the suitor “powerless to avert the mischief of the order.” Perlman v. United States, 247 U.S. 7, 13, 38 S.Ct. 417, 419, 62 L.Ed. 950 (1918). In the case of the President, contempt of a judicial order–even for the purpose of enabling a constitutional test of the order–would be a course unseemly at best. To safeguard against any possible miscarriage of justice, we make known our view that our jurisdiction exists by way of appeal if for any reason the President’s application is not properly before us on the jurisdictional predicate he invokes. [↑](#footnote-ref-21)
22. *See* United States v. United States District Court, 444 F.2d 651, 655-656 (6th Cir. 1971), aff’d, 407 U.S. 297, 301, n.3, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). [↑](#footnote-ref-22)
23. We think it clear, in any event, that the District Court’s August 29th order is unappealable at the instance of the Special Prosecutor, either under 28 U.S.C. § 1291 or § 1292 (1970). In addition, since the order in no way finally decides that any of the subpoenaed material must be denied the grand jury, it cannot be deemed an order “suppressing or excluding evidence,” or otherwise within the contemplation of the Criminal Appeals Act, 18 U.S.C. § 3731 (1970). *But see* note 100, *infra*. [↑](#footnote-ref-23)
24. Will v. United States, *supra* note 13, 389 U.S. at 98, 88 S.Ct. at 275. [↑](#footnote-ref-24)
25. *Id*. [↑](#footnote-ref-25)
26. *Supra* note 18. [↑](#footnote-ref-26)
27. *Supra* note 18, 379 U.S. at 110, 85 S.Ct. 234. [↑](#footnote-ref-27)
28. *Id*. at 111, 85 S.Ct. at 239. [↑](#footnote-ref-28)
29. *Id*. [↑](#footnote-ref-29)
30. *See* Ex parte Republic of Peru, 318 U.S. 578, 584, 63 S.Ct. 793, 87 L.Ed. 1014 (1943). [↑](#footnote-ref-30)
31. *See, e.g.*, Ex parte Skinner & Eddy Corp., 265 U.S. 86, 95-96, 44 S.Ct. 446, 68 L.Ed. 912 (1924). [↑](#footnote-ref-31)
32. Glidden v. Zdanok, 370 U.S. 530, 568-571, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); Baker v. Carr, 369 U.S. 186, 208-237, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). See also South Dakota v. North Carolina, 192 U.S. 286, 318-321, 24 S.Ct. 269, 48 L.Ed. 448 (1904); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 461-462, 20 S.Ct. 168, 44 L.Ed.223 (1898). [↑](#footnote-ref-32)
33. If the judiciary’s want of de facto power to enforce its judgment has any relevance, it is that the third branch of government, posing little physical threat to coordinate branches, need not hesitate to reject sweeping claims to legal immunity by those coordinate branches. *See* United States v. Lee, 106 U.S. (16 Otto) 196, 223, 1 S.Ct. 240, 27 L.Ed. 171 (1882). [↑](#footnote-ref-33)
34. *See, e.g.*, United States ex rel. Touhy v. Ragen, 340 U.S. 462, 465-466, 472, 71 S.Ct. 416, 95 L.Ed. 417 (1951) (Frankfurter, J., concurring); Westinghouse Electric Corp. v. City of Burlington, Vermont, 122 U.S.App.D.C. 65, 351 F.2d 762 (1965); Boeing Airplane Co. v. Coggeshall, 108 U.S.App.D.C. 106, 280 F.2d 654 (1960). [↑](#footnote-ref-34)
35. 410 U.S. 73, 93, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). [↑](#footnote-ref-35)
36. *See* text at notes 92-97 *infra*. [↑](#footnote-ref-36)
37. 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). [↑](#footnote-ref-37)
38. In Land v. Dollar, 89 U.S.App.D.C. 38, 190 F.2d 623 (1951), vacated as moot, 344 U.S. 806, 73 S.Ct. 7, 97 L.Ed. 628 (1952), as well, it was clear that the court realized that its order countered the executive will of the President. The *Land* court acknowledged that the President had directed the cabinet officials to disregard the initial judicial decision. *Id*. at 54, 190 F.2d at 639. [↑](#footnote-ref-38)
39. 25 Fed.Cas. p. 30 (Case No. 14,692d) (1807). [↑](#footnote-ref-39)
40. *Id.* at 34. (Emphasis supplied.) [↑](#footnote-ref-40)
41. United States v. Burr, 25 Fed.Cas. pp. 187, 190, 191-192 (Case No. 14,694) (1807). (Emphases supplied.) [↑](#footnote-ref-41)
42. In 1818, several years after the Burr case, a subpoena was also issued to President James Monroe. It summoned the President to appear as a defense witness in the court martial of Dr. William Burton, naming a specific date and time. A copy of the summons is in Attorney General’s Papers: Letters received from State Department, Record Group 60, National Archives Building. Attorney General Wirt advised Monroe, through Secretary of State John Quincy Adams, that a subpoena could “properly be awarded to the President of the United States,” but suggested that the President indicate on the return that his official duties precluded a personal appearance at the court martial. William Wirt to John Quincy Adams, Jan 13, 1818, Records of the Office of the Judge Advocate General (Navy), Record Group 125, (Records of General Courts Martial and Courts of Inquiry, Microcopy M-272, case 282), National Archives Building. In conformance with this advice, Monroe wrote on the back of the summons that he would “be ready and willing to communicate, in the form of a deposition any information I may possess, relating to the subject matter in question.” President James Monroe to George M. Dallas, Jan. 21, 1818, id. Subsequently, President Monroe did in fact submit answers to the interrogatories forwarded to him by the court. President James Monroe to George M. Dallas, Feb. 14, 1818, *id*. [↑](#footnote-ref-42)
43. II Farrand, The Records of the Federal Convention of 1787, 502-503 (1967). [↑](#footnote-ref-43)
44. U.S.Const., art. I, § 6, ¶ 1. [↑](#footnote-ref-44)
45. Myers v. United States, 272 U.S. 52, 123, 47 S.Ct. 21, 71 L.Ed. 160 (1926). [↑](#footnote-ref-45)
46. *See, e.g.*, United States v. Burr, *supra* note 39, 25 Fed.Cas. at 34. [↑](#footnote-ref-46)
47. Youngstown Sheet & Tube Co. v. Sawyer, *supra* note 37, 343 U.S. at 655, 72 S.Ct. at 880 (1952) (Jackson, J., concurring). [↑](#footnote-ref-47)
48. U.S.Const., art. I, § 3, ¶ 7:

    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. [↑](#footnote-ref-48)
49. On this point, too, Chief Justice Marshall was instructive:

    If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting.

    United States v. Burr, *supra* note 39, 25 Fed.Cas. at 34. [↑](#footnote-ref-49)
50. Because impeachment is available against all “civil Officers of the United States,” not merely against the President, U.S.Const. art. II, § 4, it is difficult to understand how any immunities peculiar to the President can emanate by implication from the fact of impeachability. [↑](#footnote-ref-50)
51. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165, 2 L.Ed. 60 (1803); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 610, 9 L.Ed. 1181 (1838). [↑](#footnote-ref-51)
52. [T]he question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

    Marbury v. Madison, *supra* note 51, 5 U.S. (1 Cranch) at 165.

    The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of any executive character; but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control.

    Kendall v. United States ex rel. Stokes, supra note 51, 37 U.S. (12 Pet.) at 610. (Emphasis supplied.) [↑](#footnote-ref-52)
53. In this regard, the President’s reliance on Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 18 L.Ed. 437 (1866), is misplaced. In that case, the State of Mississippi sought to enjoin President Johnson from enforcing the Reconstruction Acts. Though Attorney General Stanbery argued that the President was immune from judicial process, the Court declined to found its decision on this ground, choosing instead to deny the bill of injunction as an attempt to coerce a discretionary, as opposed to ministerial, act of the Executive. The Attorney General rehearsed many of the arguments made by the President in this case, claiming that the President’s dignity as Chief of State placed him above the reach of routine judicial process and that the President was subject only to that law which might be fashioned in a court of impeachment. *Id.* at 484. We deem it significant that the Supreme Court declined to ratify these views. *Compare* Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 18 L.Ed. 721 (1867), where the Court declined jurisdiction of a similar bill of injunction even though sub-presidential Executive Branch officials were named as defendants. [↑](#footnote-ref-53)
54. Branzburg v. Hayes, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972). We reject the contention, pressed by counsel for the President, that the Executive’s prosecutorial discretion implies an unreviewable power to withhold evidence relevant to a grand jury’s criminal investigation. The federal grand jury is a constitutional fixture in its own right, legally independent of the Executive. *See* United States v. Johnson, 319 U.S. 503, 510, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943). A grand jury may, with the aid of judicial process, Brown v. United States, 359 U.S. 41, 49-50, 79 S.Ct. 539, 3 L.Ed.2d 609 (1959), call witnesses and demand evidence without the Executive’s impetus. Hale v. Henkel, 201 U.S. 43, 60-65, 26 S.Ct. 370, 50 L.Ed. 652 (1906). If the grand jury were a legal appendage of the Executive, it could hardly serve its historic functions as a shield for the innocent and a sword against corruption in high places. In his eloquent affirmation of unfettered prosecutorial discretion in United States v. Cox, 342 F.2d 167, 189 (5th Cir.), cert. denied, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965), Judge Wisdom recognized the grand jury’s independent and “plenary power to inquire, to summon and interrogate witnesses, and to present either findings and a report or an accusation in open court by presentment.” As a practical, as opposed to legal matter, the Executive may, of course, cripple a grand jury investigation by denying staff assistance to the jury. And the Executive may refuse to sign an indictment, thus precluding prosecution and, presumably, effecting a permanent sealing of the grand jury minutes. United States v. Cox, *supra*. These choices remain open to the President. But it is he who must exercise them. The court will not assume that burden by eviscerating the grand jury’s independent legal authority. [↑](#footnote-ref-54)
55. Brief of Petitioner Nixon at 84; Reply Brief of Petitioner, Nixon at 30 n.6. [↑](#footnote-ref-55)
56. Brief of Petitioner Nixon at 69, citing Gravel v. United States, 408 U.S. 606, 627, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). [↑](#footnote-ref-56)
57. Totten v. United States, 92 U.S. 105, 23 L.Ed. 605 (1875); United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953); United States v. Burr, *supra* note 39. [↑](#footnote-ref-57)
58. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.C.D.C.1966), aff’d on opinion below, 128 U.S.App.D.C. 10, 384 F.2d 979, cert. denied, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967). [↑](#footnote-ref-58)
59. *See, e.g., id*. 40 F.R.D. at 329-335; Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. 939, 141 Ct.Cl. 38 (1958). [↑](#footnote-ref-59)
60. *See, e.g.*, United States v. Reynolds, supra note 57; Olson Rug Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961); Timken Roller Bearing Co. v. United States, 38 F.R.D. 57 (N.D.Ohio 1964); United States v. Procter & Gamble Co., 25 F.R.D. 485 (D.N.J.1960); Kaiser Aluminim & Chemical Corp. v. United States, supra note 59; *see also* the cases cited at 8 C. Wright & A. Miller, Federal Practice & Procedure 167-173 (1970). Despite our peculiar constitutional tradition of judicial review, American law is not in fact unusual in subjecting claims of Executive privilege to court scrutiny. Indeed, no common law country follows the rule, urged by the President in this case, that mere executive assertions of privilege are conclusive on the courts. In Conway v. Rimmer, [1968] 1 All E.R. 874, the House of Lords explicitly reversed its long held view, as expressed in Duncan v. Cammell Laird & Co., [1842] 1 All E.R. 587, that executive privilege is absolute. Conway held that proper adjudication of a privilege claim may require in camera inspection of documents over which the privilege is asserted. [1968] 1 All E.R. at 888 (opinion of Lord Reid), and 896 (opinion of Lord Morris of Borth-y-Gest). Similar recognition of judicial power to scrutinize claims of privilege may be found in almost every common law jurisdiction. *See, e.g.*, Robinson v. South Australia (No. 2), [1931] All E.R. 333 (P.C.); Gagnon v. Quebec Securities Comm’n, [1965] 50 D.L.R.2d 329 (1964); Bruce v. Waldron, [1963] Vict.L.R. 3; Corbett v. Social Security Comm’n, [1962] N.Z.L.R. 878; Amar Chand Butail v. Union of India, [1965] 1 India S.Ct. 243. [↑](#footnote-ref-60)
61. In Environmental Protection Agency v. Mink, *supra* note 35, the Supreme Court relied on cases in which claims of Executive privilege were reviewed by the court, often in camera, in interpreting how the judiciary should apply the intragovernmental communication exemption to the public disclosure mandate of the Freedom of Information Act. *Id*. at 88 & cases cited at notes 14 & 15. [↑](#footnote-ref-61)
62. *See, e.g.*, 40 Op.Atty.Gen. 45, 49 (1941) (Attorney General Jackson); 100 Cong.Rec. 6621 (1954) (President Eisenhower). [↑](#footnote-ref-62)
63. *Supra* note 57, 345 U.S. at 8, 73 S.Ct. at 532. [↑](#footnote-ref-63)
64. *Id*. at 9-10, 73 S.Ct. at 533. [↑](#footnote-ref-64)
65. *Id*. at 6 & note 9, 73 S.Ct. 528. [↑](#footnote-ref-65)
66. 149 U.S.App.D.C. 385, 463 F.2d 788 (1971). [↑](#footnote-ref-66)
67. *Id*. at 390, 463 F.2d at 793. [↑](#footnote-ref-67)
68. *Supra* note 51, 5 U.S. (1 Cranch) at 157. [↑](#footnote-ref-68)
69. The purpose of the explicit constitutional privilege against self-incrimination, like that of Executive privilege, is defeated by too much judicial inquiry into the legitimacy of its use, *see* United States v. Reynolds, *supra* note 57, 345 U.S. at 3-9, 73 S.Ct. 528, but the courts have never held the mere invocation of the privilege to be sufficient to free the invoker from questioning. The judge must first determine whether the privilege is properly invoked. *See, e.g.*, Hoffman v. United States, 341 U.S. 479, 486-487, 71 S.Ct. 814, 95 L.Ed. 1118 (1951). [↑](#footnote-ref-69)
70. The Supreme Court has repeatedly made clear that it is for the courts to determine the reach of the Speech and Debate Clause, U.S.Const. Art. I, § 6, ¶ 1. *See, e.g.*, Gravel v. United States, supra note 56; United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972); United States v. Johnson, *supra* note 54. Indeed, very close judicial review is needed to determine whether the activities concerning which questioning or prosecution is sought are:

    integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

    Gravel v. United States, *supra* note 56, 408 U.S. at 625, 92 S.Ct. at 2627. If separation of powers doctrine countenances such a close review of assertions of an express constitutional privilege, the doctrine must also comprehend judicial scrutiny of assertions of Executive privilege, which is at most implicit in the Constitution. Gravel deals on its facts only with an assertion of privilege by an individual legislator. As collective bodies, the Houses of Congress have frequently made unilateral declarations of an absolute privilege to withhold documents in their custody from court process. *See, e.g.*, Senate Resolution, Oct. 4, 1972, 92nd Cong., 2d Sess. These claims have never been pressed to a judicial resolution, and we have no occasion here to decide them. It is sufficient to note that they rest on a footing different from the President’s claim of absolute privilege in this case. The President’s claim has been previously litigated, and repudiated, in United States v. Burr, *supra* note 39. Further, Congress’ claims draw upon two express constitutional privileges unavailable to the President, the aforementioned Speech and Debate Clause, and the Secrecy Clause in Art. I, § 5, ¶ 3. Even so, we note that Gravel states that the scope of the Speech and Debate privilege cannot be unilaterally “established by the Legislative Branch,” Gravel v. United States, *supra*, 408 U.S. at 624 n. 15, 92 S.Ct. 2614. [↑](#footnote-ref-70)
71. *See* Myers v. United States, 272 U.S. 52, 116, 47 S.Ct. 21, 71 L.Ed. 160 (1926). [↑](#footnote-ref-71)
72. *See* Youngstown Sheet & Tube Co. v. Sawyer, *supra* note 37, 343 U.S. at 635, 72 S.Ct. 863 (Jackson, J., concurring). [↑](#footnote-ref-72)
73. The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. Myers v. United States, *supra* note 71, 272 U.S. at 293, 47 S.Ct. at 85. (Brandeis, J., dissenting). [↑](#footnote-ref-73)
74. Chief Justice Marshall wrote two opinions concerning the production of the letters. In the first of these opinions, the Chief Justice ruled that a subpoena to produce the letters could be issued to the President and that the Chief Justice himself would consider and weigh any specific objections interposed by the President that the letters contained matter “which ought not to be disclosed.” United States v. Burr, *supra* note 39, 25 Fed.Cas. at 37; *see* page 710 *supra*. Statements of the Chief Justice in the first Burr opinion suggest that he contemplated that he would actually inspect the letters in camera.

    If it contain matter not essential to the defense, and the disclosure be unpleasant to the executive, it certainly ought not to be disclosed. This is a point which will appear on the return. \* \* \* If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return.

    United States v. Burr, *supra* note 39, at 37. The United States Attorney Hay seems to have read the Chief Justice’s first opinion to contemplate inspection by the court. As Judge Wilkey notes in his dissent, after Burr had renewed his request for the letters, Hay offered to submit them to the court for copying of “those parts which had relation to the cause.” Hay further expressed his willingness to transmit the letters to Burr’s counsel so that they could form their own opinions on what portions should be kept confidential from Burr and the public. Hay anticipated that differences between the opinions of Burr’s counsel and himself would be arbitrated by the court. United States v. Burr, *supra* note 41, 25 Fed.Cas. at 190. The prosecution in the Burr case thus seems to have read Chief Justice Marshall’s first opinion to support a procedure analogous to in camera inspection by Judge Sirica and Special Prosecutor Cox.

    It was only after Burr’s counsel rejected Hay’s position and demanded direct submission of the entire letters to Burr himself that Marshall found it necessary to issue his second opinion. In this opinion the Chief Justice addressed the remaining question of whether the President should be ordered to release the letters directly to Burr or whether the court should first inspect the documents to screen out privileged portions. Marshall made clear that before frustrating Burr’s efforts to obtain the letters, the court would have to balance the opposing interests:

    The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused.

    *Id*. at 192. [↑](#footnote-ref-74)
75. *See* United States v. Reynolds, *supra* note 57. [↑](#footnote-ref-75)
76. Soucie v. David, 145 U.S.App.D.C. 144, 158, 448 F.2d 1067, 1081 (1971) (Wilkey, J., concurring). [↑](#footnote-ref-76)
77. 5 U.S.C. § 552(b)(5) (1970); *see* Environmental Protection Agency v. Mink, *supra* note 35. [↑](#footnote-ref-77)
78. *See* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, *supra* note 58, 40 F.R.D. at 324-325. [↑](#footnote-ref-78)
79. *E.g.*, Branzburg v. Hayes, *supra* note 54, 408 U.S. at 687-688, 92 S.Ct. 2646. [↑](#footnote-ref-79)
80. *Supra* note 66, 149 U.S.App.D.C. at 391, 463 F.2d at 794. (per curiam); *see* Gravel v. United States, *supra* note 56, 408 U.S. at 627, 92 S.Ct. 2614. [↑](#footnote-ref-80)
81. Statement by the President, May 22, 1973, quoted in Appendix to the Brief for the United States (Special Prosecutor), at 14, 24. [↑](#footnote-ref-81)
82. 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). [↑](#footnote-ref-82)
83. 352 U.S. 567, 575, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957). [↑](#footnote-ref-83)
84. Lopez v. United States, 373 U.S. 427, 437-440, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); Osborn v. United States, 385 U.S. 323, 326-331, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966). [↑](#footnote-ref-84)
85. Lopez v. United States, *supra* note 84, 373 U.S. at 439, 83 S.Ct. at 1388. [↑](#footnote-ref-85)
86. Where, as here, a conversation attended by the President, Mr. Dean and Mr. Haldeman has been the subject of divergent accounts by Mr. Dean and by Mr. Haldeman, without any restriction by the President on their testifying on the ground of confidentiality, there is no objection to presentation by the tape recorder of that part of the conversation that relates to Watergate, any more than to testimony on this point by another witness who had perfect auditory memory. [↑](#footnote-ref-86)
87. In re Subpoena to Nixon, *supra* note 7, 360 F.Supp. at 21-22. [↑](#footnote-ref-87)
88. The Memorandum and replies of counsel are set forth in Appendix I, *infra*. [↑](#footnote-ref-88)
89. Brief of Petitioner Nixon at 69. [↑](#footnote-ref-89)
90. *Id*. at 41-43. [↑](#footnote-ref-90)
91. *Id*. at 61. [↑](#footnote-ref-91)
92. *Supra* note 35, 410 U.S. at 92, 93 S.Ct. at 838. [↑](#footnote-ref-92)
93. *Id*. at 93, 93 S.Ct. at 839. [↑](#footnote-ref-93)
94. *Id*. [↑](#footnote-ref-94)
95. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, *supra* note 58, 40 F.R.D. at 331. [↑](#footnote-ref-95)
96. *Supra* note 35, 410 U.S. at 93, 93 S.Ct. 827. [↑](#footnote-ref-96)
97. *Id*. at 88, 93 S.Ct. at 836, citing United States v. Cotton Valley Comm., 9 F.R.D. 719, 720 (W.D.La.1949), aff’d by equally divided court, 339 U.S. 940, 70 S.Ct. 793, 94 L.Ed. 1356 (1950). [↑](#footnote-ref-97)
98. 157 U.S.App.D.C. \_\_\_\_, 484 F.2d 820 (1973). [↑](#footnote-ref-98)
99. *See id*. at \_\_\_\_, 484 F.2d at 828. [↑](#footnote-ref-99)
100. Since the subpoenaed recordings will already have been submitted to the District Court, the opportunity to test the court’s ruling in contempt proceedings would be foreclosed. And any ruling adverse to the Special Prosecutor would clearly be a pretrial “decision or order . . . suppressing or excluding evidence . . . in a criminal proceeding . . ..” Thus the District Court’s rulings on particularized claims would be appealable by the President as final judgments under 28 U.S.C. § 1291 (1970), and by the Special Prosecutor under 18 U.S.C. § 3731 (1970). *See* United States v. Ryan, 402 U.S. 530, 533, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971); Perlman v. United States, 247 U.S. 7, 12-13, 38 S.Ct. 417, 62 L.Ed. 950 (1918); United States v. Calandra, 455 F.2d 750, 751-753 (6th Cir. 1972). [↑](#footnote-ref-100)
101. Judge Wilkey, in dissent, adheres to the abstract in his discussion of who has the right to decide; he makes no reference to the facts before us framing that issue. John Marshall addressed it in the context of President Jefferson’s decision to reveal the contents of a private letter to the extent of characterizing it, in a message to Congress, as containing overwhelming evidence of Burr’s treason. So here, we must deal with that issue not in a void but against the background of a decision by the President, made and announced before the existence of the tapes was publicly known, to permit participants in private conversations with him to testify publicly as to what was said about Watergate and its aftermath. That decision–and the resulting testimony containing conflicts as to both fact and inference–has made it possible for the Special Prosecutor to make a powerful showing of the relevance and importance of the tapes to the grand jury’s discharge of its responsibilities. What the courts are now called upon primarily to decide, as distinct from what the President has already decided with respect to the relative importance of preserving the confidentiality of these particular conversations, is how to reconcile the need of the United States, by its grand jury, with the legitimate interest of the President in not disclosing those portions of the tapes that may deal with unrelated matters. [↑](#footnote-ref-101)
102. Brief of Petitioner Nixon at 94. [↑](#footnote-ref-102)
103. \* It is interesting that Haldeman, who had reviewed recordings of other meetings, did not review the recording of this meeting in view of the serious nature of the allegations by Dean. [↑](#footnote-ref-103)
104. \*\* *New York Times*, June 21, 1973, p. 28 (notes of Minority Counsel of Senate Select Committee of oral briefing by Counsel to the President). [↑](#footnote-ref-104)