

## Sec. 2—Powers, Duties of the President    Cl. 2—Treaties and Appointment of Officers

***Prosecutorial and Grand Jury Access to Presidential Documents.***—Rarely will there be situations when federal prosecutors or grand juries seek information under the control of the President, since he has ultimate direction of federal prosecuting agencies, but the Watergate Special Prosecutor, being in a unique legal situation, was held able to take the President to court to enforce subpoenas for tape recordings of presidential conversations and other documents relating to the commission of criminal actions.<sup>602</sup> While holding that the subpoenas were valid and should be obeyed, the Supreme Court recognized the constitutional status of executive privilege, insofar as the assertion of that privilege relates to presidential conversations and indirectly to other areas as well.

Presidential communications, the Court said, have “a presumptive privilege.” “The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.” The operation of government is furthered by the protection accorded communications between high government officials and those who advise and assist them in the performance of their duties. “A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.” The separation of powers basis derives from the conferral upon each of the branches of the Federal Government of powers to be exercised by each of them in great measure independent of the other branches. The confidentiality of presidential conversations flows then from the effectuation of enumerated powers.<sup>603</sup>

However, the Court continued, the privilege is not absolute. The federal courts have the power to construe and delineate claims arising under express and implied powers. Deference is owed the constitutional decisions of the other branches, but it is the function of the courts to exercise the judicial power, “to say what the law is.” The Judicial Branch has the obligation to do justice in criminal prosecutions, which involves the employment of an adversary system of criminal justice in which all the probative facts, save those clearly

<sup>602</sup> *United States v. Nixon*, 418 U.S. 683, 692–97 (1974).

<sup>603</sup> 418 U.S. at 707–08. Presumably, the opinion recognizes a similar power in the federal courts to preserve the confidentiality of judicial deliberations, *cf.* *New York Times Co. v. United States*, 403 U.S. 713, 752 n.3 (1971) (Chief Justice Burger dissenting), and in each house of Congress to treat many of its papers and documents as privileged. *Cf.* *Soucie v. David*, 448 F.2d 1067, 1080, 1081–1982 (C.A.D.C. 1971) (Judge Wilkey concurring); *Military Cold War Escalation and Speech Review Policies: Hearings Before the Senate Committee on Armed Services*, 87th Congress, 2d Sess. (1962), 512 (Senator Stennis). *See* *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976); *United States v. Ehrlichman*, 389 F. Supp. 95 (D.D.C. 1974).