tion, the litigation involved, of course, the claim of confidentiality of conversations between the President and his aides.

Private Access to Government Information.—Private parties may seek to obtain information from the government either to assist in defense to criminal charges brought by the government or in civil cases to use in either a plaintiff's or defendant's capacity in suits with the government or between private parties.[594] In criminal cases, a defendant is guaranteed compulsory process to obtain witnesses by the Sixth Amendment and by the due process clause is guaranteed access to relevant exculpatory information in the possession of the prosecution.[595] Generally speaking, when the prosecution is confronted with a judicial order to turn over to a defendant information that it does not wish to make available, the prosecution has the option of dropping the prosecution and thus avoiding disclosure.[596] But that alternative may not always be available; in the Watergate prosecution, only by revoking the authority of the Special Prosecutor and bringing the cases back into the confines of the Department of Justice could this possibility have been realized.[597]

In civil cases the government may invoke the state secrets privilege against revealing military or other secrets. In *United States v. Reynolds*,[598] a tort claim brought against the United States for com-

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in Government, Freedom of Information: Hearings Before the Senate Government Operations Subcommittee on Intergovernmental Relations, 93d Congress, 1st Sess. (1973), I:18 passim. For a strong argument that the doctrine lacks any constitutional or other legal basis, *see* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974). The book, however, precedes the Court decision in *Nixon*.

[594] There are also, of course, instances of claimed access for other purposes, for which the Freedom of Information Act, 80 Stat. 383 (1966), 5 U.S.C. § 552, provides generally for public access to governmental documents. In 522(b), however, nine types of information are exempted from coverage, several of which relate to the types as to which executive privilege has been asserted, such as matter classified pursuant to executive order, interagency or intra-agency memoranda or letters, and law enforcement investigatory files. *See, e.g.*, EPA v. Mink, 410 U.S. 73 (1973); FTC v. Grolier, Inc., 462 U.S. 19 (1983); CIA v. Sims, 471 U.S. 159 (1985); John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[595] *See* Brady v. Maryland, 373 U.S. 83 (1963), and Rule 16, Federal Rules of Criminal Procedure. The earliest judicial dispute involving what later became known as executive privilege arose in United States v. Burr, 25 F. Cas. 30 and 187 (C.C.D. Va. 1807), in which defendant sought certain exculpatory material from President Jefferson. Dispute continues with regard to the extent of presidential compliance, but it appears that the President was in substantial compliance with outstanding orders if not in full compliance.

[596] *E.g.*, Alderman v. United States, 394 U.S. 165 (1968).

[597] Thus, defendant in United States v. Ehrlichman, 376 F. Supp. 29 (D.D.C. 1974), was held entitled to access to material in the custody of the President wherein the President's decision to dismiss the prosecution would probably have been unavailing.

[598] 345 U.S. 1 (1953).