HOUSE OF REPRESENTATIVES—*Wednesday, July 3, 1974*

The House met at 12 o'clock noon.

The Chaplain, Rev. Edward G. Latch, D.D., offered the following prayer:

Blessed is the nation whose God is the Lord.—Psalms 33: 12.

Eternal God, stir Thou our minds and stimulate our hearts with a high sense of patriotism as we approach the Fourth of July. May all that this day symbolizes renew our faith in freedom, our devotion to democracy, and redouble our efforts to keep a government of the people, by the people, and for the people truly alive in our world.

Grant that we may highly resolve on this great day to dedicate ourselves anew to the task of ushering in an era when good will shall live in the hearts of a free people, justice shall be the light to guide their feet, and peace shall be the goal of humankind: to the glory of Thy holy name and the good of our Nation and of all mankind. Amen.

THE JOURNAL

The SPEAKER. The Chair has examined the Journal of the last day's proceedings and announces to the House his approval thereof.

Without objection, the Journal stands approved.

There was no objection.

AUTHORIZING SPEAKER TO ACCEPT RESIGNATIONS AND MAKE APPOINTMENTS AUTHORIZED BY LAW OR BY THE HOUSE

Mr. BRADEMAS. Mr. Speaker, I ask unanimous consent that notwithstanding any adjournment of the House until July 9, 1974, the Speaker be authorized to accept resignations and to appoint commissions, boards, and committees authorized by law or by the House.

CONFERENCE REPORT TO ACCOMPANY S. 3203, AMENDING NATIONAL LABOR RELATIONS ACT

Mr. THOMPSON of New Jersey submitted the following conference report and statement on the bill (S. 3203) to amend the National Labor Relations Act to extend its coverage and protection to employees of nonprofit hospitals, and for other purposes:

CONFERENCE REPORT (H. REPT. No. 93–1175)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3203) to amend the National Labor Relations Act to extend its coverage and protection to employees of nonprofit hospitals, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows: In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That (a) section 2(2) of the National Labor Relations Act is amended by striking out "or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual.".

(b) Section 2 of such Act is amended by adding at the end thereof the following new subsection:

"(14) The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.".

(c) The last sentence of section 8(d) of each Act is amended by striking out the words "the sixty-day" and inserting in lieu thereof "any notice" and by inserting before the words "shall lose" a comma and the following: "or who engages in any strike within the appropriate period specified in subsection (g) of this section.".

(d)(1) The first paragraph of section 8(d) of each Act is amended by adding at the end thereof the following new sentence: "Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

"(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

"(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

"(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute."

(e) Section 8 of such Act is amended by adding at the end thereof the following new subsection.

"(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties."

SEC. 2. Title II of the Labor Management Relations Act, 1947, is amended by adding at the end thereof the following new section:

"CONCILIATION OF LABOR DISPUTES IN THE HEALTH CARE INDUSTRY

"SEC. 213. (a) If, in the opinion of the Director of the Federal Mediation and Conciliation Service a threatened or actual strike or lockout affecting a health care institution will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned, the Director may further assist in the resolution of the impasse by establising within 30 days after the notice to the Federal Mediation and Conciliation Service under clause (A) of the last sentence of section 8(d) (which is required by clause (3) of such section 8(d)), or within 10 days after the notice under clause (B), an impartial Board of Inquiry to investigate the issues involved in the dispute and to make a written report thereon to the parties within fifteen (15) days after the establishment of such a Board. The written report shall contain the findings of fact together with the Board's recommendations for settling the dispute, with the objective of achieving a prompt, peaceful and just settlement of the dispute. Each such Board shall be composed of such number of individuals as the Director may deem desirable. No member appointed under this section shall have any interest or involvement in the health care institutions or the employee organizations involved in the dispute.

(b)(1) Members of any board established under this section who are otherwise employed by the Federal Government shall serve without compensation but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in carrying out its duties under this section.

(2) Members of any board established under this section who are not subject to paragraph (1) shall receive compensation at a rate prescribed by the Director but not to exceed the daily rate prescribed for GS–18 of the General Schedule under section 5332 of title 5, United States Code, including travel for each day they are engaged in the performance of their duties under this section and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

(c) After the establishment of a board under subsection (a) of this section and for 15 days after any such board has issued the report, no change in the status quo in effect prior to the expiration of the contract in the case of negotiations for a contract renewal, or in effect prior to the time of the impasse in the case of an initial bargaining negotiation, except by agreement, shall be made by the parties to the controversy.

(d) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

SEC. 3. The National Labor Relations Act is amended by adding immediately after Section 18 thereof the following new section:

"INDIVIDUALS WITH RELIGIOUS CONVICTIONS

"SEC. 19. Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.

SEC. 4. The amendments made by this Act

shall become effective on the thirtieth day after its date of enactment.

And the House agree to the same.

CARL D. PERKINS,
FRANK THOMPSON, Jr.,
WILLIAM D. FORD,
W. L. CLAY,
ALBERT H. QUIE,
JOHN M. ASHBROOK,
Managers on the Part of the House.

HARRISON WILLIAMS,
JENNINGS RANDOLPH,
CLAIBORNE PELL,
GAYLORD NELSON,
THOMAS F. EAGLETON,
HAROLD E. HUGHES,
W. D. HATHAWAY,
ALAN CRANSTON,
J. JAVITS,
RICHARD S. SCHWEIKER,
ROBT. TAFT, Jr.,
ROBERT STAFFORD,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3203) to amend the National Labor Relations Act to extend its coverage and protection to employees of nonprofit hospitals, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

BASIC PURPOSE OF THE SENATE BILL AND THE HOUSE AMENDMENT

Both Senate bill and the House amendment amended the National Labor Relations Act to remove the exemption for employees of nonprofit hospitals. Both the Senate bill and the House amendment establishes additional mediation and conciliation procedures for employees of all health care institutions including requirement, for mandatory mediation and that a 10-day notice of any strike or picketing be given to a health care institution.

The language of the House amendment is identical to the Senate bill except in the following two respects:

INDIVIDUALS WITH RELIGIOUS CONVICTIONS

Subsection (g) of the first section of the House amendment amended the Act by adding at the end thereof a new section 19 (relating to individuals with religious convictions). The new section 19 provided that employees of health care institutions who object to joining or financially supporting labor organizations on religious grounds shall not be required to do so as a condition of employment. The Senate receded with a clarifying amendment under which, in recognition of the special humanitarian character of health care institutions, an employee may be required to make payments to a nonreligious charitable fund in lieu of periodic dues and initiation fees designated from among at least three funds pursuant to the collective bargaining agreement between the employer and the labor organization, or if the labor-management agreement fails to make such designation, to any nonreligious charitable fund selected by the employee.

MEDIATION, CONCILIATION AND BOARD OF INQUIRY

Subsection (f) of the first section of the House amendment amended title II of the Labor Management Relations Act, 1947, by adding at the end thereof a new section 213 (relating to conciliation of labor disputes in the health care industry; interruptions). This section proposed that in the event a labor dispute between a health care institution and its employees is not settled and the Director of the Federal Mediation and Conciliation Service determined that the dispute threatened substantially to interrupt the delivery of health care, he would create a Board of Inquiry to investigate and report with respect to such dispute. For a period of 30 days pending the Board of Inquiry report and for an additional 30 days thereafter the parties would be required to maintain the status quo. The Senate bill contained no comparable provisions.

The Senate receded with an amendment under which in the event that the labor dispute by the health care institution and its employees is not settled and the Director of the FMCS determines that the dispute substantially threatens to interrupt health care in the affected locality the Director may create a Board of Inquiry to investigate and report with respect to such dispute. The Board must be appointed within 30 days after the FMCS is notified of the intention of either or both of the parties to terminate the contract as required under section 8(d) of the NLRA, as amended by this legislation, or 10 days after the FMCS is notified in the case of an initial contract. The report of the Board of Inquiry will be issued within 15 days of its appointment and the parties to the dispute are required to maintain the status quo for 15 days after the issuance of the Board's report. The Board's report shall contain findings of fact, together with the Board's public recommendations for the settlement of the dispute. The notification as provided in section 8(g) of the National Labor Relations Act may be given on or after the commencement of the final 10 days of the conciliation period.

The Conferees intend that the appointment of a Board of Inquiry shall not operate to interrupt mediation by the FMCS which is made mandatory under other provisions of this legislation, and that the service will pursue these parallel procedures to bring about a fair, prompt and just settlement of any dispute. The Conferees further intend that the Board of Inquiry, in formulating its recommendations for settlement of a dispute shall take into account all those factors normally considered by similar tribunals in formulating recommendations for the settlement of labor disputes.

The Committee, in adding special mediation and conciliation procedures, including the Board of Inquiry, for the health care industry, recognizes the need for continuity of health services during labor-management disputes and that the labor organizations representing health care workers have publicly pledged their best efforts to persuade their affiliates voluntarily to avoid work stoppages through acceptance of arbitration in the event of an impasse in negotiations. Under these new procedures, it is anticipated that, in the event of such an impasse, the findings of fact and recommendations of the Board of Inquiry would provide the framework of the arbitrator's decision.

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ROBERT T. STAFFORD,
Managers on the Part of the Senate.

WHAT IS RIGHT ABOUT AMERICA

(Mr. ROUSSELOT asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. ROUSSELOT. Mr. Speaker, as we approach our Nation's 198th Birthday, which the people across this great hand will celebrate tomorrow, I am proud that visiting with us today are two different groups from my district who represent what is right with America. The Azusa Pacific College International Ensemble today had the opportunity to sing on the steps of the House of Representatives and express the concept of what is good about America. Dr. Sawtell, who heads this group, has done a good job in making sure that the good aspects of America are taught at Azusa Pacific College and not just what is wrong.

I am also proud that we have members of the 4–H Club here today, Miss Priscilla Reynaud from Lancaster among them, to discuss with our Government officials many aspects of our society. Of course, they are active participants in making sure that the future of agriculture presents a good picture of what is in store for us in the next 200 years of our society.

Mr. Speaker, we can all be proud that as we approach our 200th anniversary there are those among us who are talking sincerely about the good things in America rather than just those things they believe to be wrong.

HOLLOW GESTURE OF HOUSE BEING IN SESSION

(Mr. KETCHUM asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. KETCHUM. Mr. Speaker, I note that we have an abridged version of the annual Fourth of July recess this year, since the leadership feels the press of business is too great. Looking at the calendar for today, I cannot help but feel that the claim that the House is staying in session to deal with the Nation's problems is a bit excessive.

I am sure that not one Member of the House would object to remaining in Washington to handle the mass of legislation that the leadership has not as yet brought before us. I do, however, find it objectionable to stay in session with no business merely as an attempt to bolster confidence. I add to that the frustrations of having a 2-hour session 1 day, and re-

maining until the early hours of the morning the next. Certainly this indicates poor planning on someone's part.

When we ask ourselves why the public esteem of the Congress is so low, I think that we ought to consider little ploys such as this. We would be far better off if this House actually got to work instead of making hollow gestures.

VETERANS VISITING NATIONAL CAPITAL

(Mr. RIEGLE asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. RIEGLE. Mr. Speaker, I take the floor to respond to the remarks of my colleague, the gentleman from Indiana, who spoke earlier about the gathering of veterans here in the Nation's Capital.

I just want to say for the record that the right of petition for redress of grievances is a basic one in the United States. I do not think we have done very well as a nation by our veterans. I think that is true with respect to the needs of the Vietnam veterans particularly.

To suggest that, in any way, they are not welcome, is not right. It seems to me that with an executive branch presently occupied with foreign affairs and showing very little concern or understanding of the problems of veterans; with a Congress that has done some things but needs to do more, that the veterans have a legitimate complaint.

The fact that the veterans feel the need to come and state their case, I think, is appropriate. I certainly, for one, wish they would not have to do it this way, but if they cannot get action any other way, I can understand it. When we ask a young man to go off and give his time, interrupt his schooling, perhaps lose arms or legs and the lives of his friends in Southeast Asia, I think the least we can do is to listen to what they have to say.

VETERANS ON THE MALL

(Mr. PATMAN asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. PATMAN. Mr. Speaker, I dislike hearing anyone being denied, or of someone attempting to deny them, the right of coming to the Nation's Capitol and expressing interest in anything in the U.S. Congress which they want to express interest in and which they think will be helpful to the country.

I was here when the veterans march was on consisting of 20,000 veterans, and I can say truthfully that Washington never had less crime and fewer disorders in the city of Washington then, when those veterans were here. They organized their own part of town and had their own policemen, and the city had practically no crime. They had no problems of any kind. They did well, and because they were working for something that was for themselves, which they had a right to do, does not make any difference.

Mr. Speaker, these veterans received about $21 each per month when I was in World War I. When the insurance was paid at $6.50 and the other expenses, by the time a soldier got to the pay table at the end of the month, although he had his hat in his hand or his cap in his hand to pull off the money that was due at the end of the month, a large percentage of them did not rake off any money into their caps or their hats because they had nothing coming to them.

A good and grateful Congress acknowledged that it owed them something, and they issued to them adjusted compensation certificates. The average value was $1,015 each.

I happened to be the author of the bill introduced to pay them in cash. The Secretary of the Treasury, Mr. Andrew Mellon, had postponed the payment for 20 years; that is, not pay them for 20 years. When I got 218 Members to come here and sign a petition to the Speaker of the House that we wanted the bill taken up, it was taken up.

The bill was passed. It went to the Senate, which passed it. It went to the President and it was vetoed. The veto was overridden, so one day, the next June 15, the veterans were notified to go to the bank of their choice and get their money in cash, or they could leave it there and get interest on it.

That was the largest payment, I believe, that was ever made in one lump sum for a large number. It was $3,700,000,000 which was paid out that day and which helped the country more than anything in the world.

I was denounced for causing inflation, or attempting to cause inflation, but instead of being inflationary, it was just the other way. Veterans got their money; they spent it, and so the people who attacked me for it were not successful in proving that I was inflationary or in trying to cause inflation. The big bankers really tried to destroy me as a Member of Congress; they had a selfish interest.

The veterans were here just seeking an opportunity to present their case to the Congress of the United States, and they presented it well. They had just as much right to be here as lobbyists in the Mayflower Hotel or in the other hotels in the city, but the big bankers and big interest lobbyists were not thrown out as were the veterans here, who were unmercifully run out of Washington.

That was a sad day and a horrible day in the history and memory of the people of the United States and the veterans in particular. These veterans represented the finest and best of our citizenship. They helped to build our country in time of peril and offered their lives and many of them gave their lives for the cause of their country in time of war. I am sorry for that, and I am glad to welcome the veterans here, or any other group who comes here for a good cause.

Mr. ROUSSELOT. Mr. Speaker, will the gentleman yield

Mr. PATMAN. I yield to the gentleman from California.

Mr. ROUSSELOT. Mr. Speaker, is it not true that our Committee on Veterans' Affairs, under the leadership of the gentleman from Texas (Mr. TEAGUE) and the gentleman from South Carolina (Mr. DORN), has in fact done a good job in making sure our veterans have total and adequate benefits, and in making sure that their petitions have been adequately received, and that it really is not necessary for them to speak on the Mall to prove that point?

Mr. PATMAN. Mr. Speaker, I wish to say that the Members the gentleman has mentioned, the distinguished gentleman from Texas, Mr. TEAGUE and the other distinguished gentleman from South Carolina, the Honorable WILLIAM JENNINGS BRYAN DORN, are good, sincere and able statesman in this Congress. I wish them great success, and I am sure they will accord adequate consideration and justice toward the veterans.

A LUCRATIVE WEEK FOR FOREIGN NATIONS

(Mr. GROSS asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. GROSS. Mr. Speaker, for an assortment of foreigners, the past week has been one of the most lucrative in all history.

President Nixon, continuing his junkets abroad, gave Israel $500 million, and a $2 million gift helicopter went to Egypt. Previously he had given Israel and Egypt each a nuclear reactor.

Not to be left out in the cold, Iran will get two nuclear reactors from the Nixon bag of gifts. We have not been told how many hundreds of millions these atomic plants will cost American taxpayers.

Not to be outdone in the gift department, the House, less than 24 hours ago, voted to give additional assorted foreigners $1.5 billion worth of 50-year interest-free loans—loans so soft they will never be repaid.

Tomorrow there will be the 198th observance of the beginning of this once-proud Republic whose wise founders warned of the perils of foreign entanglements.

Will tomorrow's observance be crowned with the announcement that more of this debt-ridden Republic and the substance of its people has been given away?

IS IMPEACHMENT THE GLUE THAT HOLDS CONGRESS TOGETHER?—435 MEMBERS SCORE 100 PERCENT ON AGH VOTING RATING FOR UNPRECEDENTED NINTH YEAR

(Mr. REES asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. REES. Mr. Speaker, I have today issued the following press release:

IS IMPEACHMENT THE GLUE THAT HOLDS CONGRESS TOGETHER?—435 MEMBERS SCORE 100 PERCENT IN AGH VOTING RATING FOR UNPRECEDENTED NINTH YEAR

With a note of undisguised pride, and utter bewilderment, Congressman Thomas M. Rees,

Democrat of California, anounced that for an unprecedented 9th year all 435 Members of the House of Representatives scored 100% in the "Americans for Good Habits" (AGH) Congressional voting rating.

"In past years," stated Rees, "the poll was published at least ten months after the congressional session began. It took this long to find enough important unanimity votes with which to rate Congress. In 1974, though, AGH found unanimity before the July 4th recess—another first in the AGH poll's dignified existence. Could this mean that, contrary to Congress's critics, impeachment has been unifying rather than tearing Congress apart?"

While not suggesting that Congress adopt a policy of impeaching presidents in order to achieve unity, Rees did emphasize that, although the Establishment press and the President kept intimating Congress was too wrapped up with impeachment to be effective, it is obvious in light of the early July 4th unity results of the 1974 AGH rating that Congress is sailing the ship of state straight and true through the rocks and shoals of Administration confusion.

While violent partisanship might rage in other places, Congress continues with dedicated zeal to demonstrate its togetherness on such important issues as child adoption in the District of Columbia, Coast Guard appropriations, veterans, the blind, disasters, and selling property to Wake Forest University.

Rees began the AGH rating system in 1966, his first year in office, when he found that all he did when he was home campaigning was explain why and how he was rated on all the voting rating systems which inundate Washington.

"I never did have a chance to discuss the issues," he stated as he explained the purpose of AGH at a dramatic press conference which electrified Washington's normally cynical press corps. "I spent all my time during the campaign trying to explain the reason behind the crazy fluctuations in my ratings—from 0% (ACA—Americans for Constitutional Action) to 95% (ADA—Americans for Democratic Action)."

Rees concluded that all other rating systems were designed to be divisive, that they tore asunder the overwhelming feeling of contentment, goodwill, and togetherness that permeates the congressional chambers. He contended that ACA, ADA, and COPE deliberately chose the wrong issues to rate the performance of congressmen. It was time to AGH to come to the rescue—"The rating system with a heart," the rating system designed to accentuate the positive.

This year the AGH rating covers key issues carefully chosen by the editorial board. The measures used to evaluate members of the House on the AGH rating system were:

H.R. 11238: To provide for an improved system of child adoption in the District of Columbia, 350–0.

H.R. 12503: Amending the Controlled Substances Act providing for the registration of practitioners conducting narcotic treatment programs, 375–0.

H.R. 12341: Amending the Foreign Service Buildings Act, 1926, to authorizise the sale of a property in Venice to Wake Forest University, 402–0.

H.J. Res. 941: Supplemental appropriation for the Veterans Administration for fiscal year 1974, 390–0.

S. 3062: Disaster Relief Act Amendments. On agreeing to the Conference report, 392–0.

H.R. 14117: Increasing the rates of compensation for disabled veterans and the survivors, 396–0.

H. Res. 1112: To provide for consideration of H.R. 14592, the Military Procurement Authorization for fiscal year 1975, 298–0.

H.R. 12628: Increasing the rates of vocational rehabilitation, educational assistance, and special training allowances paid to eligible veterans and making improvements in the educational assistance programs, 382–0.

H.R. 11143: Providing the authorization for fiscal 1974 and succeeding fiscal year for the Committee for Purchase of Products and Services of the Blind and Other Severely Handicapped, 308–0.

H. Con. Res. 271: Expressing the sense of Congress with respect to the missing in action in Southeast Asia, 273–0.

H.R. 13595: To authorize appropriations for the Coast Guard for fiscal year 1975, amended, 365–0.

H.J. Res. 1061: Making further urgent supplemental appropriations for the fiscal year ending June 30, 1974, for the Veterans' Administration, 337–0.

S. 3458: To amend the Agriculture and Consumer Protection Act of 1973 and the Food Stamp Act of 1964; agreeing to the conference report and clearing the measure for the President, 325–0.

VETERANS' BENEFITS

(Mr. WYLIE asked and was given permission to address the House for 1 minute, to revise and extend his remarks and include extraneous matter.)

Mr. WYLIE. Mr. Speaker, some concern, obviously based on misunderstanding, has been expressed about the progress being made in increasing benefits for veterans in education and training. Under the leadership of Chairman DORN, Congressman TEAGUE, and Congressman JOHN HAMMERSCHMIDT, the House has been pressing for action on this subject.

On February 19, the House passed, by a vote of 382 to 0, a veterans education and training bill which would provide $1.1 billion per year additional benefits for veterans in school. Unfortunately, the Senate delayed acting on this legislation, and it was not until June 19 that the Senate acted on the House bill. The day following the action of the Senate, Chairman DORN addressed a letter to the chairman of the Senate Veterans' Affairs Committee and offered to accept 22 of the 28 Senate amendments. He offered to accept four additional Senate amendments with minor modification, and asked the Senate to recede on two amendments. The proposal by Chairman DORN would have struck an even compromise on the differences in cost of the two bills. The House bill would provide benefits of $1.9 billion, and in addition $200 million in loans. The compromise proposal offered by Chairman DORN would provide additional benefits of $1.5 billion.

Included in the compromise proposal was an offer to agree to the 18 percent rate increase included in the Senate bill.

The chairman of the Senate Veterans Affairs Committee, by letter, rejected Chairman DORN's proposal, and the conferees had their first meeting on June 26. The House conferees' offer was reiterated; however, the Senate showed no disposition to recede from any of its 28 amendments.

The House has been very conscious of the delay in enacting these benefits. Both Chairman DORN and Congressman TEAGUE have pointed out that failure on the part of the other body to act is costing the veterans more than $50 million a month. We are still anxious to achieve enactment of this legislation at the earliest possible time. We have made a most reasonable offer to the Senate, and if the other body would see fit to accept the offer, this legislation could be on the President's desk in a few days.

On the other hand, I think it is quite unreasonable to expect the House to agree to all 28 amendments, particularly in view of the fact that many of these amendments are strongly opposed by the administration and the Veterans' Administration warns that the provision for partial tuition payment is so poorly drafted and would raise so many serious administrative problems, that it would probably throw the VA into chaos this fall when the peak enrollment period arrives.

Mr. Speaker, the House passed the education and training bill on February 19. With a little cooperation we can achieve agreement immediately. The delay that has occured certainly is not the result of House inaction.

WE MUST PHASE OUT STRIP MINING

The SPEAKER. Under a previous order of the House, the gentleman from West Virginia (Mr. HECHLER) is recognized for 60 minutes.

Mr. HECHLER of West Virginia. Mr. Speaker, it is inevitable that strip mining of coal will be abolished, if only because by the end of this century in most areas the Nation's strippable reserves of coal will be completely exhausted. Therefore, it makes sense to phase out strip mining in an orderly fashion, as is done in my bill, H.R. 15000.

HOW MUCH COAL WILL WE NEED?

We are now producing about 600 million tons of coal per year, of which about 10 percent is being exported. Critics of H.R. 15000 have pointed out that about 50 percent of current coal production is strip mined, and that abolition of strip mining would create a severe energy crisis.

Three years ago, when I first introduced and testified on legislation to abolish strip mining, horrified critics in the coal industry and elsewhere declared: "You are going to bring strip mining to a grinding halt overnight; that is irresponsible, since so much of our Nation's coal is strip mined." At the time, I carefully pointed out that it was highly unlikely that the legislation would be enacted in 1 day, and in any case the supplies and reserves of deep minable coal so far exceeded the strippable coal that from the standpoint of energy alone it was vital to put more emphasis on underground mining. Instead, the coal industry, with encouragement by Federal and State authorities, proceeded to close down many of their deep mines and continued the headlong rush toward increasing strip mining.

In charting the course which this Nation should take toward strip-mined coal, it is extremely important to assess what are the actual reserves and resources of coal, the quality and sulfur content of that coal, and how it is to be mined and transported to serve our energy demands.

The most recent objective analysis of coal reserves and resources was published by the Senate Committee on Interior and Insular Affairs in 1973, and entitled

"Factors Affecting the Use of Coal in Present and Future Energy Markets." This document comprises an independent study from official sources. Based on estimates of the U.S. Geological Survey—

The total coal resources of the United States amount to more than three trillion tons. Of these total coal resources, some 50 percent, or 1.5 trillion tons of bituminous coal and lignite, are considered to be recoverable reserves (i.e., minable under current economic conditions with present technology, or technology that may be available in the foreseeable future.) At current levels of output and recovery, these reserves can be expected to last more than 500 years.

RATIO OF DEEP TO STRIPPABLE RESERVES

The U.S. Bureau of Mines has estimated that approximately 45 billion tons of this are strippable. The ratio of the deep minable reserves to the strippable reserves, according to these figures, would seem to indicate that there is over 30 times as much deep minable coal as there is strippable coal.

I prefer to rely on the far more conservative statistics supplied by the U.S. Bureau of Mines, which indicate that of the 1.5 trillion tons, we should really pare that down to the very bare minimum of what we know we can recover economically with presently available technology.

The U.S. Bureau of Mines sets the figure of deep minable coal at about 356 billion tons, as against 45 billion tons of strippable coal. This is an extremely conservative analysis of the amount of underground coal this Nation possesses, but even using the most conservative figures you can see that the ratio is about 8 to 1 in terms of the larger supply of deep minable coal.

One of the first questions which naturally arises—how much of this coal is low-sulfur coal? You hear a lot of uninformed comment today from those who imagine that we only strip mine because deep mining produces coal with a lot of sulfur and a lot of smoke. You also hear a lot of comment that we had better open up the western coal fields of Wyoming, Montana, Colorado, and New Mexico for some quick and unregulated strip mining, because all that coal out there is low sulfur.

What are the facts?

Again, using the most conservative U.S. Bureau of Mines estimates, here are the actual statistics on availability and geographic location of both deep minable and strippable coal, as well as the sulfur content:

ECONOMICALLY RECOVERABLE COAL RESERVES USING PRESENT TECHNOLOGY

[In billions of tons]

	Deep-minable	Strippable
All reserves:		
Appalachia	67.6	5.1
Midwest	49.8	7.3
West	238.3	32.6
Total, United States	355.7	45.0
Low-sulfur reserves:		
Appalachia	18.6	1.8
Midwest	.2	0
West	202.7	29.9
Total, United States	221.5	31.7

Note: Library of Congress had indicated that 11,500,000,000 of the 45,000,000,000 tons of strippable coal can also be deep-mined.

SEVEN TIMES AS MUCH DEEP AS STRIPPABLE LOW-SULFUR COAL

What conclusions can be drawn from these statistics?

First. Quoting the Senate report—

It is obvious that the sheer physical availability of coal will not be a limiting factor in its use as a fuel in the next few decades.

Second. Most of the midwestern coal in Illinois, west Kentucky, Missouri, and Ohio is high sulfur, with sulfur content of more than 2 percent. This would seem to limit the usefulness of the strippable coal in the Midwest.

Third. The huge bulk of low-sulfur reserves of coal are in the Western States of Montana, Wyoming, and New Mexico, yet there is also a large supply of low-sulfur reserves in West Virginia, Kentucky, and other States of the eastern Appalachian coal fields. In addition, western coal has a much lower Btu content, which means that western coal emits more sulfur per million Btu's.

Fourth. In both the huge western coalfields and the Appalachian area, the amount of low-sulfur coal which is deep-minable exceeds the surface minable coal by a total ratio of over 7 to 1.

Therefore, if the decision were made solely on the issue of how much deep minable versus strippable coal we have, it is my conclusion that we ought to shift our concentration away from strip mining toward deep mining. After all, we are concerned with the availability of total resources. If we continue to strip mine at the increasing rate which current trends indicate, the reserves of strip minable coal will be exhausted, perhaps by the end of this century.

The demands on strippable coal will shoot up even more by the decade of the 1980's, when the technology for coal gasification and liquefaction is perfected. At that point, when the reserves of strippable coal run out, the radical shift over to deep mining will impose drastic dislocations on our economy in terms of capital, machinery and equipment, trained manpower, and the other complex factors necessary to make the abrupt transition.

WHY NOT STOCKPILE STRIPPABLE COAL IN PLACE?

As an alternative, because strip minable coal is so valuable and essential in meeting the energy crisis, it would be preferable to stockpile the strippable coal in place and undisturbed below the surface. Then, if the need arises after the seams of deep minable coal are exhausted, the Nation could quickly turn to strip mining to meet energy needs without the economic dislocations caused by a shift in the other direction from strip mining to deep mining.

PEOPLE

Human beings are a resource.

Although inflation has probably increased the value of all the chemicals in the human body, nobody has effectively quantified the human suffering caused by strip mining. To be sure, there have been very strong contentions that without strip mining, coal and electricity would be priced out of the market and those in poverty-ridden areas would be deprived of the burden-lifting advantages of electricity and appliances. It has also been contended that without strip mining there would ensue brownouts and blackouts, cold homes in the winter, widespread and disastrous effects on jobs and people. These contentions have never been scientifically measured, or the alternatives of deep mining and other forms of energy considered.

All I want to do here today is to raise the issue among my colleagues. I am not here to contend that the people of West Virginia, Kentucky, Montana, and Wyoming deserve to be treated any differently than the people in the rest of the Nation. I just want to be sure that when you listen to the stories about blackouts and brownouts and say you have to continue strip mining, just listen also to people like Mrs. Bige Richie of Knott County, Ky., whose baby's grave was ruthlessly violated, the casket thrown over the hill and piled over with boulders and dirt by a strip mining company. It is about time that the Congress listen to Mrs. Harvey Kincaid of Fayette County, W. Va., whose home and property were invaded by the silt, sediment, polluted water, and boulders from a strip mine. So she and her family had to move several miles away, only to have the same strip mining company start the same destructive process all over again above their new home.

Lots of people ask: Why do those who are damaged not go to court and collect if their property is affected? The Kincaids did go to court and were awarded $10,000 after a lengthy and expensive legal process. But a great deal of the damage is rather subtle and difficult to prove, like the hundreds of West Virginians who are gradually finding that their water wells are getting filled with brackish, metallic, and ill-smelling water—frequently some miles downstream from where the strip miners are operating.

RECENT EXAMPLES

And while Congress haggles over weak regulatory legislation, the human suffering continues. In 1974 alone, here are some examples of what's happening in the coal fields:

January 3, 1974: Slate Creek, Buchanan County, Va.—Families evacuated just before avalanche destroys home of J. R. Mullins.

March 1974: Large rocks and boulders from blasts at Dickinson County, Va., strip mine fly completely over a mountain and into resident's yard on the other side.

April 1974: 72-year-old woman killed when boulder from strip mine crashes through her house and hits her in bed.—Accident occurred while her husband was at the strip mine pleading for operator to be more careful—Buchanan County, Va.

May 1974: 121 residents of Odd, W. Va., area petition State department of natural resources for protection against blasting from strip mine which has cracked walls and foundations, broken windows, and disrupted wells. Also protected destruction of several family cemeteries by the strippers.

The community whose jobs and prosperity depend on the coal industry is slow to speak out against the damages caused

by strip mining. Some of the residents of Odd, who have protested the blasting, still refuse to publicly oppose strip mining—they are willing to let the stripping continue in spite of the damage if they are compensated.

HUMAN DAMAGE CAUSED BY STRIP MINING

How do you measure human suffering? Most of the scientific studies of the effects of strip mining deal with highly impersonal, almost heartlessly neutral factors. We know, for example, that the U.S. Geological Survey made a painstakingly thorough 10-year study entitled "Influences of Strip Mining on the Hydrologic Environment of Parts of Beaver Creek Basin, Ky.," published in 1970. The study made the startling conclusion that 30,000 tons of silt per square mile were discharged from a strip mined area in eastern Kentucky, while close by in a timbered valley where there was no strip mining only 27.9 tons per square mile annually were discharged. Scientific studies like that abound, but who speaks for the human beings who live in these valleys? The strip miners tell me that the people ought to move out so they can get on with their business, and when they are talking with the people they blame the people for causing their own problems by throwing trash in the streams.

One such study was completed in June 1973, at the University of Tennessee. It is entitled "Benefit/Cost Approach to Decision Making: The Dilemma With Coal Production," by F. Schmidt-Bleek and J. R. Moore. This study made over a 10-year period from 1962–72, surveyed all floods occurring in Ohio, Tennessee, and Virginia. Comparing the flood damages in 122 counties, of which 51 counties had strip mining at the time of flooding, the study found the level of damages in strip mined counties approximately double the level in those counties which did not have strip mining.

An October 1973 study, entitled "Strip Mining Increases Flood Potential of Mountain Watersheds," by Willie Curtis of the Forest Service, offers further evidence of how strip mining increases flooding. In examining numerous small watersheds in eastern Kentucky, Curtis found that the "peak flow rates increased by a factor of 3 to 5 after surface mining" along the streams. He also found that the rate at which flood peaks moved downstream was greatly increased in watersheds where strip mining had occurred. Clearly, people living in strip-mined areas can expect more floods, greater damage, and less time to escape.

In Farmington, W. Va., the conscience of the Nation was aroused as a result of the death of 78 coal miners in the explosion which occurred on November 20, 1968. As a result, Congress responded to the disaster and enacted the very tough, Federal Coal Mine Health and Safety Act of 1969, which the coal industry insists is driving the price of coal upward. Strip mining is a slow disaster: It is continuous, without the single, searing flash of blinding light to arouse the Congress and the Nation. This is best illustrated by what happened in the 17-mile valley called Buffalo Creek in my congressional district. For years, I have been attempting to call attention to the serious damage to people's homes, property, and water supply from the strip mines high above Buffalo Creek. To be sure, a 76-year-old man from Amherstdale, W. Va., was trapped in some mud which came down from a strip mine, and when they found him the next morning he was dead. But that was only one life. Then the troubles caused by strip mines in Buffalo Creek were forgotten on the morning of February 26, 1972, when water behind a coal waste pile broke through and swept a 30-foot wall of water down the valley, killing 125 people. The people forgot about the strip mines when they were engulfed by a tragedy of that magnitude.

ALL HUMAN BEINGS ARE CREATED EQUAL

I am not suggesting that the problems of the urban electricity user are more important or less important than those of the Appalachian housewife, or the rancher in Montana who finds his land threatened. All I am saying is that this Congress should weigh the fact that all human beings are created equal and energy is a program which is a very human one involving all types of people.

I would also plead, Mr. Speaker, to keep your options open. I do not believe that unchallengable conclusions or rigorously factual information necessarily emanate from those who have a clear economic stake in the results. Why should the Congress accept what the National Coal Association tells us is essential for the prosperity and well-being of this Nation? I trust that due consideration will also be given to those human beings who are affected adversely by strip mining, and whose lives are being ruined by what is happening to their land and water supply.

TIMETABLE ON ABOLITION OF STRIP MINING

The reason we are so dependent on strip-mined coal today is that the Nation failed to plan 10 years ago for today's energy needs. This is to say that the Committee on Science and Astronautics should have created the Subcommittee on Energy in 1963 instead of 1973, and comparable high-level attention should have been focused on energy requirements by the executive branch. If strip-mining of coal had been banned 10 or 20 years ago, we would still be producing the same amount of coal from the underground mines of the Nation. It will be contended that the price per ton of coal would then be higher, yet I say it realistically should be higher. The present price of strip-mined coal conceals the actual social costs of this form of mining, and in effect society is subsidizing the profits of the strip mining industry by enabling the industry to destroy the soil and water.

Prof. William H. Miernyk, Benedum Professor of Economics and director of the Regional Research Institute of West Virginia University, testified on March 15, 1973, before the Senate Committee on Interior and Insular Affairs:

Clearly, if surface mining were to be abolished tomorrow the Nation would be faced with a severe energy crisis. But even those who advocate complete abolition of surface mining, such as Congressman Ken Hechler from my state, would allow for an adequate period of adjustment.

What is an adequate period of adjustment?

THE SHIFT TO DEEP MINING IS INEVITABLE

The changeover from strip mining to deep mining, as stipulated in legislation which I have introduced, would occur within 6 months where the stripping is done on relatively steep slopes—"contour stripping" where the slope exceeds 20 degrees—and within 18 months where "area stripping" occurs where the slope is less than 20 degrees. In addition, in those Western areas like Four Corners and the Black Mesa where the annual stripping production of individual mines exceeds 500,000 tons, an additional, graduated 3-year extension is provided so that the supply of coal to Southwest utilities is not precipitously affected.

Here is how the timetable will work under the phasing-out proposal which I am supporting:

PHASEOUT TIMETABLE AND SHIFT TO DEEP MINING—1973 PRODUCTION FIGURES

	Million short tons
Total U.S. coal production	591
Total U.S. strip and auger production	289
Contour strip production (20° or steeper)	74
Area strip production (east of Mississippi, less than 20° slopes)	160
Western strip production	55

REPLACEMENT SCHEDULE

	Plus 6 mo	Plus 18 mo	Plus 54 mo
Quantity to be replaced	74	160	55
Sources for replacement:			
1. Cutoff of coal exports (except to Canada)	37	----------	----------
2. Adding 6th day to existing deep mines	42	----------	----------
3. Utilizing unused deep-mine capacity (existing)	----------	100–137	----------
4. Reopening recently closed deep mines	----------	15–20	----------
4. Introduction of long-wall technology	----------	15	30
6. Opening new deep mines	----------	20–35	80–120

In 1973, the total strip and auger coal production amounted to 289.5 million tons. Of this 289 million tons, 74 million tons, about one-fourth, was produced in the steep slope areas of Appalachia—over 20 degrees. This figure is based on the Council on Environmental Quality study and factors in the 7-percent decrease in Appalachian production which occurred between 1971 and 1972. One hundred and fifty-one million tons were produced in Appalachia and the Midwest on slopes less than 20 degrees. Western strip mines were responsible for 64 million tons of 1973 production, with 55 million of the 64 million being produced on large strip mines of greater than 500,000 tons annual capacity. In terms of the phaseout then, the scenario is as follows: In 6 months, 74 million tons of strip production will be lost; in 18 months all of the nonsteep slope eastern and midwestern production will be lost—151 million tons—along with 9 million tons of western strip production coming from small mines—less than 500,000 tons annually. The final step in the phaseout will be the elimination of 55

million tons produced by large Western strip mines, over a 4½-year period. This longer time frame is designed to allow the Western deep-mining industry, now in its infancy, to develop gradually as a replacement for Western strip mines. Western deep mines, located primarily in Utah, Colorado, and New Mexico, produced just 10 million tons in 1973.

How will deep mining pick up the slack, replace this lost strip production? In the first 6 months, during which steep slope strip mining is gradually being reduced, the shift to deep mining would not be accomplished by opening new mines which, of course, takes more than 6 months. Instead, coal exports to nations other than Canada would be cut off. We presently ship more than 50 million tons of our best quality, high BTU, low-sulfur coal to foreign nations. This coal is primarily metallurgical coal, ideal for producing steel. Some of it is now being used also for producing clean electric power.

Ninety percent of export tonnage is produced in underground mines, 75 percent of the total comes from my home State of West Virginia. A cutoff on exports to nations other than Canada would free approximately 37 million tons of deep mined coal to replace the strip production lost by the contour mining phaseout. The domestic steel industry and several large utilities publicly support the cutoff of exports.

The second source for additional deep mined production would be to add a sixth working day at existing underground mines. The Bureau of Mines recently estimated that 42 million tons of additional underground production could be generated by adding a sixth day with no change in the number of shifts.

UTILIZING UNUSED DEEP MINE CAPACITY

The 18-month phaseout deadline will require the replacement of 160 million tons. The sources for this tonnage are shown in the table above. The major source is the utilization of existing unused capacity in present deep mines. Using U.S. Bureau of Mines figures, if you worked all deep mines on a 3-shift, 5-day-a-week basis instead of the present rate, this would produce 137 million additional tons of underground coal per year. According to Tom Bethell, research director of the United Mine Workers, a figure of 100 million tons would be a more realistic target allowing for downtime and engineering difficulties. From a safety standpoint, there do not appear to be any problems. Steve Liming, former acting safety director for the United Mine Workers of America, has noted that there are already quite a few mines which are operating three shifts per day with no unusual safety problems.

Mr. Liming indicated that the chief need in such speeded-up operations is for sufficient mechanics and electricians to make repairs quickly when mining machinery breaks down. In the interim or pending receipt of new machinery, crews can always be shifted to the type of jobs which are necessary but not immediate, that is, preparing new sections for further mining, or shifting to another area to work on an idle section.

Mr. Liming also added that recruiting new miners is becoming less and less of a problem, and cited the large number of returning Vietnam veterans who are making very good miners with many others eager to go into the mines when needed.

Between 1970 and 1972, 1,575 underground mines closed down. According to Bureau of Mines survey, 752 of these mines closed for reasons other than exhaustion of their coal reserves. These mines had an annual production of 28,940,000 tons in their last year of operation—in many cases the production level for the last year understates the annual capacity of the mine since some closed production levels far below the normal full year production level.

Reopening the 50 largest mines would result in annual production of nearly 14 million tons. With the advent of the energy crisis, many coal companies have already announced plans to reopen previously closed mines. According to the United Mine Workers Research Department, Consolidation Coal, Island Creek, and Pittston all have announced and are in the process of reopening previously closed deep mines. UMWA Research Director Tom Bethell indicated that a projection of 15–20 million tons production from these mines by the end of 1975 would be a good conservative estimate.

EXPANSION OF LONGWALL MINING

A third source of additional deep mine production is the expansion of the use of longwall mining equipment. Longwall mining means removing the coal by a cutting machine which travels from one end of the coal face to the other, biting several feet into the coal seam with heavy steel cutting picks. This is in contrast to the current method of tunneling in with machines like the continuous miner which attacks the face directly at a 90-degree angle.

According to rough preliminary estimates by the Research Department of the UMWA, the introduction of longwall equipment and techniques could expand deep mining production by 15 million tons by the end of 1975. Longwall has been gaining popularity in recent years in this contry and is presently responsible for about 2½ percent of annual U.S. production. One of West Virginia's leading producers. Eastern Associated, introduced six new longwall machines in 1973. Company officials predicted that these machines would increase production by 2½ million tons annually. In a recent study, the Bureau of Mines projected longwall annual production of 85 million tons by 1985.

Longwall mining is both safer and more efficient in terms of the percentage of the coal reserve recovered. A row of hydraulically operated steel roof supports—like gigantic jacks—move forward with the cutting machine and the conveyor belt as the coal is sliced from the seam. These jacks virtually eliminate the No. 1 cause of fatalities in conventional deep mining: roof falls.

The annual report of the Kentucky Division of Reclamation for 1972 pointed out that—

> Longwall mining is a much safer method . . . Savings are made in the areas of roof support, ventilation and rock-dusting which can amount to more than 50 cents a ton.

While the longwall equipment is expensive, it offers 85- to 95-percent recovery in contrast to the 57-percent characteristics of the conventional forms of mining.

Longwall mining accounts for 92 percent of the underground coal production in Great Britain, but is only used now in approximately 45 mines in the United States.

OPENING NEW DEEP MINES

The final source of additional deep mine production is, of course, the opening of new deep mines. Large amounts of capital investment are now being committed to the opening of new mines, both deep and strip. According to the United Mine Workers, new mines scheduled to be in full production by the end of 1975 will have annual capacity of 35–50 million tons; 20–25 million tons will be in new deep mines. The leadtime for opening a new deep mine was once listed as 3 to 5 years, but with the sudden leap in demand for coal and more importantly in the spot market price for coal, leadtimes for deep mines have shortened considerably. Thus, at a minimum we can expect 20–35 million tons of new deep-mined production by the end of 1975 and probably more.

Over the 4½-year period during which large Western strip mines will be operating, we can expect a major effort toward opening new deep mines and bringing them to full production. Once the industry realizes that strip mining will be abolished, the capital will flow toward new deep mines. The estimate of 80 to 120 million tons is on the conservative side according to the UMW, but any estimate for this must be considered to be conjectural.

DEEP MINING WESTERN SEAMS OF COAL

It has been contended by the strong advocates of strip mining in the West that it would be impossible to deep mine the very thick seams of coal which are plentiful in western States.

At present, underground mining being carried out in Utah in the Kaiparowitz field is in thick seams of up to 30 feet. Conventional techniques are used, and the coal is mined on several levels. Experience in India, Czechoslovakia, and Germany indicate that there is no major problem with deep mining very large seams. In Czechoslovakia, both longwall and room and pillar methods are used to mine these large seams on several levels. The primary method is room and pillar using continuous mine equipment. The mining of a thick seam can be done in either ascending or descending order by mining 6-foot sections at a time. These methods prove out to be safer than small seam mining.

Contrary to the propaganda of the western strippers, the Department of Interior has also indicated support for the viability of western deep mining. In its recent publication, "Energy Research Program of the U.S. Department of the Interior," the Department considered two strategies for the major expansion of

coal production as part of Project Independence. The first strategy involved maximum reliance on western strip mining; the second involved an expansion of strip and deep production in both the East and the West, Interior concluded that—

> We have to rely on underground mining to a large extent, both in the East and in the West.

The Department stated that reliance on strip mining—strategy 1—"would cause rapid regional, social, and economic changes and exhaust a very high portion of reported surface reserves in both the East and West by the year 2000, threatening rapid decline in surface mine development after the turn of the century." The study projected western deep mine production of more than 200 million tons annually by 2000.

AVAILABILITY OF MINERS

The shift from strip mining to deep mining will require a substantial number of additional underground miners. Deep mining commonly requires 2½ to 4 times the number of workers employed in strip mines to produce the same tonnage. It is true that some strip miners displaced by the phaseout may switch to deep mining but by and large strip miners are construction workers and highly skilled heavy equipment operators. They are far more likely to move into highway construction and housing jobs. What then is the outlook for recruiting new deep miners? A recent Bureau of Mines study carried out by the Institute for Research on Human Resources at Penn State provides considerable insight on this question. The study entitled "The Demand for and Supply of Manpower in the Bituminous Coal Industry for the Years 1985 and 2000," concludes that in the period 1975–2000 "the probability of shortages—of labor—is very remote." The study estimated that labor supply for 1975 would be 184,739 miners. In addition the study identified a supply of 54,868 "potential miners" for 1975. The potential miners category includes "persons who were miners at some time prior to 1970 but were employed as nonminers during 1970, as well as other persons who might choose employment in the coal mining industry if working conditions were sufficiently better than those of the next best alternative." The combined labor pool for 1975 would thus be 239,607 miners, 107,808 men were employed in underground mines in 1970, the most recent year for which comprehensive employment statistics are available. Phasing out strip mining and replacing the lost tonnage completely with deep-mined coal could, at its most severe impact, require double the present numbr of deep miners. The available labor pool for 1975 would be more than adequate to cover this demand.

The energy crisis has also spurred new interest among students in pursuing careers in mining engineering. Schools of mines show sharply increasing enrollments. Last year's crop of graduates was "the largest since 1955" according to Engineering and Mining Journal. And this year's is even larger.

LEADTIMES FOR OBTAINING MINES AND OBTAINING EQUIPMENT

It is often assumed that new strip mines can be opened much faster than new deep mines. However, according to research conducted by the Library of Congress, this is not the case. The Library study cites strip mine leadtimes of 4 to 5 years as compared with 2 to 4 years for new deep mines. Backlogs of orders for the giant shovels and draglines—which are manufactured by only two companies in the United States: Marion Power Shovel and Bucyrus Erie—and the time required to assemble the equipment once the parts are delivered to the minesite were listed as major factors in the long strip mine leadtimes.

This change in leadtimes has also been shown in announcements for new mines opening in West Virginia and eastern Kentucky. More than a dozen major new deep mines have been announced in the last few months; all are slated to reach full production by 1976 at the latest, some indicating partial production will begin immediately. Similar announcements for strip mines have not been forthcoming, probably because of the difficulty of obtaining equipment.

No such equipment problem seems to face deep mine operators. A Library of Congress survey found that deep mining equipment leadtimes ranged from a few months up to 1 year depending on whether or not the equipment was custom made. Joy Manufacturing Co., the leading underground mining equipment manufacturer, listed 5- to 6-month delivery times. In a recent letter to me, Joy President Jim Wilcock stated:

> I think we are doing pretty well in accommodating our customers in what they want.

From this survey, it appears that equipment companies could provide the necessary equipment to make the shift from strip mining to deep mining. The energy demands have already led to stepped-up equipment production.

COST OF OPENING NEW UNDERGROUND MINES

The time required and the cost involved for the development of a new deep mine vary widely because of the number of factors involved. The major factors are depth of the coal seam, thickness of the seam, uniformity, and quality of the seam, roof characteristics, and amount of methane gas likely to be liberated during mining. Depth of the seam determines whether the mine will be a drift, slope or shaft mine.

Initial capital investment costs differ substantially for different ranks of coal and for annual production capacity. Recent Bureau of Mines studies of costs for hypothetical mines are difficult to compare because studies of strip and deep mines were conducted in different years and are thus based on fixed costs of significant difference. Inflation in the coal industry, particularly in the last year, has been incredible. The selling price of coal has risen tremendously in the last 6 months. However, certain general principles can be gleaned from these dated studies. Initial capital investment for large deep and strip mines are virtually identical—in some cases, initial capital investment is actually lower for the same-sized deep mine. This surprising fact can be explained by the knowledge that deep mining is labor-intensive while strip mining is primarily capital-intensive. For example, capital investment for a 1 million ton annual production, 72-inch seam eastern bituminous strip mine run $12,727,500. For the same size eastern bituminous deep mine, the investment figure is $12,540,000. For a 3 million ton, 72-inch seam eastern bituminous strip mine, the initial capital investment figure is $28,005,000 in contrast to the same-sized eastern deep mine figure of $29,711,000. Given the fact that the Bureau's study of strip costs is based on 1969 prices whereas the study of deep costs is based on 1971 prices, it is clear that deep mines do require less initial capital investment. Of course, the advantage enjoyed by strip mining comes from the fact that operating costs per year are much lower for strip mines—output per man-day on strip mines is three times that of deep mines.

The fact that initial capital investment is lower for new deep mines than for new strip mines has important implications for the question of availability of capital for a shift to deep mining after stripping has been abolished. Clearly, the money slated for the development of the huge western strip mines could easily be shifted to cover the capital requirements of new deep mines. This would be true as well for strip mines planned in other areas. Moreover, banning strip mining would shift demand to the extensive deep mine coal reserves. It is a time-tested fact that capital will flow wherever a sound rate of return can be expected. The costs cited in the Bureau of Mines study all assumed a 12-percent annual return—more than enough to encourage development of new deep mines. Given the high projected future demand for coal, the expected annual return would become higher and long-term utility contracts would become available. Hence investment in deep mines will become very attractive.

The coal industry itself could be expected to come up with major amounts of capital investment. We must remember that 12 of the 15 largest coal producers are subsidiaries of larger conglomerates—primarily oil and steel companies. The 1972 profits picture for the coal companies and their parent corporations was outstanding; 1972 profit levels ranged from a low of $2.6 million registered by North American Coal to a high of $28 million chalked up by Pittston. The parent corporations did even better with Gulf Oil, the parent of Pittsburg and Midway, racking up an amazing $447 million in profits; Continental Oil—Consol—$170 million. United States Steel $156 million and Bethlehem Steel $134 million. In addition, all of the subsidiaries showed increases in profits in the first quarter of 1973. The profits picture leaves no doubt that the capital is readily available for a shift to deep mining.

Nor is there a lack of expertise for this shift either on the management level or

the operations level. Of the 15 largest coal producers, 14 operate underground mines—only Utah International is purely a strip mining outfit. A ban would simply mean that these major producers would expand their deep mine operations.

WESTERN COAL AND THE EAST-WEST SHIFT

Western strippable coal, of which there is an ample supply of 29.9 billion tons of the low-sulfur variety, is a very attractive market. The huge coal seams, the cheapness of the land, the shallow extracting by gigantic machines combine to place the FOB mine price in the $2 to $5 per ton range—a fantastic bargain.

In another section of my testimony, I shall analyze in depth the issue of reclamation of strip mined lands in the West as contrasted with an Appalachian region.

For the moment, let us examine the quality and attractiveness of western strippable coal. Unfortunately, western strippable coal has a much lower Btu level and high ash and water content. This was discovered when the TVA purchased a large quantity of western coal for its Johnsonville, Tenn., plant. On November 12, 1972, the TVA issued a public statement that the high water content of the western coal "has shown major operating problems in addition to the very high transportation cost involved." In short, the large amount of water in western stripped coal gummed up the TVA boilers, and henceforth they contracted for coal shipped from underground mines in Indiana. Most eastern plants are also equipped to burn low-water content coal, so this problem is likely to recur if massive shipments are contemplated.

STRIPPERS ARE STREAKING WESTWARD

However, major utilities such as American Electric Power, and major oil companies and energy conglomerates like Exxon are rushing into the West to grab up all available strippable reserves. What motivates this new coal rush? If this coal is low quality, why the tremendous interest? Western coal offers several attractions to these corporations. First, strip mining in the West requires few workers and generally does not require the operator to deal with unions. Output per man-day far exceeds anything achived in the East, deep or strip. Second, western mining offers huge blocks of contiguous coal reserves. In the East, ownership of reserves is diverse; it is difficult to line up large blocks of reserves. Third, most western seams are quite thick compared with eastern coal seams; 75–100-foot seams are relatively common. This means that acreage disturbed for a given amount of production is far less, and reclamation cost is thus less of a factor. Further, overburden tends to be shallow and overburden ratios are very favorable. Fourth, western railroads are in far better shape than their brothers in the East. This makes transportation reliable, though expensive. Finally, the demand for low-sulfur coal resulting from implementation of the Clean Air Act makes western coal desirable because its relatively low-sulfur content.

The sulfur level of western coal deserves closer scrutiny. As mentioned, western coal contains large amounts of water, up to 10 times the moisture content of eastern coal. Drying the coal for use in eastern boilers reduces the mass and thereby increases the percentage of sulfur content above acceptable levels. Moreover, given its low Btu value it takes 1½ to 2 tons of western coal to produce the same amount of heat generated by 1 ton of eastern coal. Yet massive plans have been drawn for the shipment of western coal to eastern markets. Both American Electric Power and Amax have announced plans to ship western coal to plants as far east as West Virginia. Rail transportation cost is high, but given today's sharply increasing coal prices, not high enough to price western coal out of eastern markets. A recent Bureau of Mines study cited unit train costs of $0.004–$0.005 per ton per mile which translates into $10 and up transport cost to eastern markets. However, many public service commissions allow direct passthrough to the consumer of any transport costs for fuels.

A new study by Michael Rieber of the University of Illinois at Urbana entitled "Low Sulfur Coal: A Revision of Reserve and Supply Estimates," points out that on a heat content basis, 55 percent of the recoverable low-sulfur reserves are located east of the Mississippi, primarily in West Virginia. What then is the key factor in the western coal rush? While the issue is complex, it appears the key factor is the control of large blocks of reserves. This control allows the holder the opportunity to sign long-term contracts and guarantee substantial return on his investment. Moreover, these large blocks are both ideal and necessary for the construction of large-scale energy conversion complexes—that is, coal gasification, coal liquefaction, and mine-mouth powerplants.

IMPLICATIONS OF THE EAST–WEST SHIFT

A major shift to the West will have a disastrous effect on the eastern coal industry. Bureau of Mines and Interior Department studies project serious negative impacts for the eastern industry if western stripping escalates sharply. The Bureau stated in a recent study:

> In the event of a major move of coal mining to the West, employment (mining) in all Eastern states should decline, with Pennsylvania and West Virginia experiencing the largest declines.

Interior also pointed to the disastrous effect of a boom-bust economy in the West. The traditional ranch life style will be shoved aside by an industrial boom that will peter out after the turn of the century. The tremendous impact on existing communities will be unprecedented. At the same time, industry will be moving away from Appalachia and the Midwest. As the energy conversion facilities develop, support industries will also develop. Trailer camps and honky tonks will replace the wide-open spaces. Phasing out strip mining is the only way to arrest this development and its consequences.

STRIP MINING AND REGIONAL ECONOMIC DEVELOPMENT

The East-West shift issue points to a basic area often ignored in the debate on the pros and cons of strip mining: Strip mining's relation to regional economic development. Prof. William Miernyk, director of the Regional Research Institute at West Virginia University, in a definitive study entitled: "Environmental Management and Regional Economic Development," has established that "the environmental damage from strip mining may undermine the entire regional economic development effort." Miernyk points out that in the case of Appalachia, the Appalachian Highway Development System is designed to open up possibilities for tourism and light industry as well as facilitating transportation of timber and coal. Miernyk concluded:

> The continued expansion of strip mining could easily offset the developmental impact of the Appalachian Highway System.

This analysis clearly has application in other areas threatened by strip mining. Few industries are likely to relocate in areas with contaminated water supplies, continual dangers of flooding, and blighted landscapes.

A recent study entitled: "Opportunity Costs of Land Use: The Case of Coal Surface Mining" by Robert Spore, an economist at the Oak Ridge National Laboratory, underlines Miernyk's conclusions. The study found that the value of strip mining all the coal along the Big South Fork of the Cumberland River in eastern Kentucky and Tennessee would total $13,906,000 while the recreational value of this area totaled $42,620,000. In short, the costs in terms of lost opportunities for recreation and tourism would be more than three times the value of all the coal in the area. All of this economic and recreational benefit to the people would be lost forever if stripping were permitted. This pattern of lost opportunities is already the rule in some parts of Appalachia—only abolition will stem the tide.

Dr. Robert Smith of the West Virginia University School of Forestry in testimony before the Senate Interior Committee last March, pointed out how strip mining is ruining the hardwood timber industry in Appalachia. Smith stated that strip mining—

> So disrupts the environment that it appears impossible for any forest regrowth in the foreseeable future. The rich sites are either destroyed directly by strip mining or else they receive the brunt of overburden and siltation from the stripping at higher elevations.

In short, strip mining is totally incompatible with timber, tourism, and industrial development. It is crucial to note that deep mining is quite compatible with these alternate land uses, while at the same time offering more plentiful supply of coal.

The situation in the West adds still another lost alternate land use to this equation.

Given the poor possibilities of reclamation in the West and the tremendous danger to ground and surface water sup-

plies—which I shall discuss in more detail shortly—the lands of the West will no longer be useful as grazing land once they have been stripped. This will have a major and oft-overlooked effect on the Nation's supply of beef and grain. North Dakota, for example, ranks first in the Nation in the production of spring wheat, durum wheat, and barley, yet if strip mining is permitted it will mean the loss of between 10 and 20 percent of the State's grain production. At a time of growing worldwide food shortages, we must ask whether we can afford to strip these lands—especially when the coal could be mined through underground methods without sacrificing the productive value of this land.

RECLAMATION IN GREAT BRITAIN AND GERMANY

There have been many studies of reclamation in Germany and in Great Britain, where strip-mined coal constitutes less than 10 percent of the total coal production, in contrast to over 50 percent in the United States. There are some clear-cut differences between the land use ethics of Great Britain and Germany, where long and careful public planning precedes any attempt at strip mining—the pell-mell rush to strip which occurs in this country is unknown in Europe.

Under our cowboy capitalist approach to mining, we have placed heavy emphasis on how you extract the minerals from the ground in the quickest and cheapest fashion. Coming from a State which specializes in extractive industry. I regret we also have had a few extractive politicians, as in Maryland, who took out more than they put in, with very little reclamation, but that is another story. Throughout the mining industry, "reclamation" has become a recent craze, but it is sharply different in outlook than in Great Britain and Germany where true reclamation means reforestation and a thorough and intelligent restoration of the land. All too often esthetics are the ruling yardstick of reclamation success in this country.

The extensive study, "Surface Mining and Land Reclamation in Germany," by E. A. Nephew of the Oak Ridge National Laboratory indicates that costs of reclamation in Germany amount to between $3,000 and $4,500 per acre, while in Great Britain they may run as high as $7,179 per acre but average out close to $4,000 an acre. The cost per ton ranged from 63 cents to $4.24/ton and averaged $1.35/ton for all British reclamation efforts. The topsoil and subsoil is carefully segregated, and later replaced, and rehabilitation of the land by experts in agriculture and forestry may take as long as 5 years following the mining operation.

DISMAL RECORD OF RECLAMATION IN UNITED STATES

The record for reclamation in this country is a dismal one. This is not due entirely to the lack of effort on the part of those operators and specialists charged with reclamation. There are a number of very serious problems with reclamation in this country which are not encountered in Germany and Great Britain. The critical environmental variables for reclamation are slope, sulfur content of coal and shales, acid-alkali balance in spoils, amount of rainfall, depth and thickness of the coal seam, and amount and quality of the topsoil. In Appalachia, the combination of steep slopes, pyritic shales, heavy rainfall, and thin topsoil combine to create monumental problems of erosion, sedimentation, landslides, and acid drainage. The relatively flat, acid-free lands of Germany and Britain present no such difficulties.

Dr. Robert L. Smith, professor of wildlife biology, Division of Forestry, West Virginia University, recently stated:

"In the southern mountains, it is obvious anyone who views strip mine reclamation that reclamation is not successful, nor is the land being restored. It is impossible to put the excavated material back and to re-establish any semblance of previous ecological conditions." Dr. Smith points out that hydroseeding and heavy fertilization can produce some vegetation, but this is generally short-lived. He states that "on no slopes can grass stabilize the soil." Reforestation is not even attempted on the steep slopes.

WEST VIRGINIA RECLAMATION

A great deal of the land in West Virginia and central Appalachia consists of steep slopes, heavy rainfall, thin topsoil, with acid from pyritic shales more serious in northern than southern West Virginia. The Stanford Research Institute was commissioned to study strip mining by the West Virginia State Legislature, and this study did not recommend abolition but pointed out some significant facts. Analyzing the 248,078 acres of land "disturbed" by strip mining as of October 1971, the report estimated that only 69,648—slightly over a quarter of the acreage—had achieved 75 percent vegetative cover. Even more significantly, the study indicated that if the acreage which had not achieved 75-percent vegetative cover, 60 percent had at one time been reclaimed to this standard either by the operator, the U.S. Soil Conservation Service or the reclamation fund maintained by the State. This means that nearly two-thirds of all reclamation in West Virginia has failed to maintain itself. This means that of the most barren lands which lack 75 percent vegetative cover, 6 out of every 10 acres had once been "officially reclaimed" but backslid into barren lands.

In its final report to the State legislature, the Stanford Research Institute grimly concluded the following about the cost of reclamation in West Virginia:

Returns for such expenditures have been disappointing in the past, as reclamation work has not eliminated environmental effects of surface mining from most areas.

It was further concluded that so-called reclaimed land still held the danger of landslides, and yielded "from 400 to 600 tons of sediment per acre of spoil bank—annually." It was calculated that each new year of strip mine production in West Virginia adds 6 to 10 million tons of new sedimentation into the State's streams and rivers.

The study concluded:

By 1980, the cumulative effect of leaching could yield roughly 3 million tons of dissolved solids from spoil banks.

Two recent studies underline the mammoth reclamation problems presented by mining in the mountains. A 1973 Senate study, "Factors Affecting the Use of Coal in Present and Future Energy Markets," pointed to the serious continuing problem of landslides on steep slopes and repeated violations of State regulations. Citing experience in eastern Kentucky, the Senate study stated:

For all types of mountain strip mining, more than one third of the inspections revealed major violations including, for instance: exceeding bench width, operating off permit area, dumping excessive material over the outslope, and lack of drainage controls.

The following table and comment also appear in the Senate study:

TABLE 7.—PERCENTAGE OF OFFICIAL STATE INSPECTIONS IN WHICH ONE OR MORE VIOLATIONS FOUND AND RECORDED IN EASTERN KENTUCKY STRIP MINE OPERATIONS, 1971

Mining method:	*Percentage of inspections*
Conventional contour	43
Slope reduction	50
Parallel slope fill	34
Head of hollow fill	49
Pit storage of spoil	41
Mountaintop removal	47
Mountain auger	42

The significance of this is further emphasized when it is recognized that most damages from such violations cannot be remedied; the operator usually agrees to stop activities which are in violation and to avoid such practices in the future. This evidence reinforces the concept that certain surface mining practices cannot be regulated satisfactorily, and in these instances, the best answer is to prohibit those specific activities.

A second study, "Design of Surface Mining Systems in Eastern Kentucky," carried out by Mathematica, Inc., for the Appalachian Regional Commission, found landslides and sedimentation to be continuing major problems in mountain mining. Mathematica stated: "Landslides are still a widespread problem in eastern Kentucky."

The study also found that revegetation was not adequate to control sedimentation. Sedimentation was particularly heavy during ongoing operations; vegetation had little effect until the third year of plantings. Use of silt dams was suggested as a possible solution but Kentucky Natural Resources personnel indicated that such dams often created more problems than they solved. Construction of the dams caused "substantial environmental disturbance," and the dams presented a safety and environmental hazard, particularly once maintenance by the operator ended at the completion of reclamation. In short, a technological fix to the landslide and sedimentation problems has not been fully developed. Combining the technical problems of reclamation with the myriad enforcement problems—amply documented by the Mathematica study—one must conclude that real reclamation in the fullest and permament sense is not possible in the mountains.

ACID DRAINAGE PROBLEMS

In flatter areas, vegetation can be partially successful and could be a step in the process back to forestation. However, the basic problem with flatland reclamation in the East and the Midwest remains that of controlling acid drainage

and the leaching of toxic materials. Dr. Moid Ahmad of Ohio University, an eminent hydrologist, has shown conclusively, that so long as acid-causing pyrites are present in the overburden, no reclamation procedures can successfully stop acid drainage. Vegetation in no way insures an end to the acid drainage problem. A 1970 study conducted by Dr. Sutton of the Ohio Department of Natural Resources entitled, "Reclamation of Toxic Coal Mine Spoil Banks" has found that even the heavy use of fertilizers was ineffective in neutralizing acidity. Lime applied at a rate of 42 tons per acre was ineffective. Unless the acid can be eliminated, vegetation will decline and reclamation will be reversed thus creating a new orphaned land, complete with all the original environmental problems of unreclaimed land.

A 1971 Case Western Reserve University study entitled, "Ecological Effects of Strip Mining: A Comparative Study of Natural and Reclaimed Watershed" compared two watersheds in Belmont County in southeastern Ohio, one of which had not been stripped, the other which had been stripped and reclaimed in 1968 by the Hanna Coal Co. The report states:

The water draining from the mined and reclaimed watershed is highly acidic, having an average pH of 3.5. In contrast, the water draining from the natural system is neutral or slightly alkatine, having an average pH of 7.9. . . . In the affected system, Fe (iron) was found in concentrations greater than 400 times that found in the natural system, SO_4 (sulfate) averaged 56 times that of the natural system, K (potassium) 2.8 times, Ca (calcium) nine times, Mg (magnesium) 30 times, Mn (manganese) over 1,320 times, and Al (aluminum) was found to be over 3,000 times that of the natural system. These large amounts of ions produced high concentrations of dissolved solids. Average dissolved solids of the affected systems were 90 times that of the natural system.

CHEMICALS RELEASED BY STRIP MINING

The report drew the following conclusions:

1. Three years after reclamation one finds that the affected area cannot support plant or animal life.

2. Geologic formations high in sandstone must be reclaimed by better methods or should not be strip-mined at all.

3. The acid condition produced by strip-mining releases amounts of minerals and nutrients which are toxic to plant-life.

4. The highly dissolved chemical load entering Piedmont Lake from the affected area is rapidly increasing the eutrophication processes in the lake, and thus it is altering and destroying lake habitats.

HIGH COST OF "RECLAMATION"

In short, good reclamation like that found in Germany can only be accomplished on flat areas free of pyritic and other acid-causing materials. And, this can only be accomplished through careful, comprehensive land-use planning, strict performance standards for the reclamation process, full public access to the planning process, a continuing program for revegetation and forestation over a 5- to 10-year period after completion of initial reclamation efforts, and above all a major commitment of money in the neighborhood of $4,000 per acre such as the Europeans have put forth.

Nephew sums up the German approach philosophically:

Probably the most compelling reason for farmland restoration, however, is the prevailing conviction that to allow valuable soil to be irrevocably destroyed by a strictly temporary land use—mining—would present extreme folly.

RECLAMATION IN PENNSYLVANIA

The Pennsylvania law and the Pennsylvania reclamation methods have been widely touted as the solution to the Nation's strip mining and reclamation problems. The slopes are not as steep in Pennsylvania as in West Virginia. Even though the State law requires backfillings of strip-mined areas to their original contour and enforcement of the strip mining laws seems to be more stringent than most States, reclamation has been largely a failure in dealing with the problem of acid pollution from strip mining spoils.

A study completed by the Pennsylvania State University College of Earth and Mineral Sciences shows that a majority of strip mines in seams surrounded by highly acid shales discharge acid water in excess of the State water quality standards, regardless of the method of reclamation employed—50 to 67 percent of such strip mines which were regraded to original contour failed to meet water quality standards; 71 to 94 percent of such strip mines which were partially regraded failed to meet water quality standards.

THE BLOCK CUT TECHNIQUE OF STRIP MINING

Pennsylvania has introduced a new form of stripping known as the "block cut," which is designed to restore the mined land to its original contour by dumping the first cut on the downslope and then dumping subsequent cuts into the hole created by the first cut. This technique involves the segregation of the topsoil and the burial of the most toxic and acid producing strata in an effort to minimize their adverse effect. Reclamation is attempted concurrent with the mining operation.

The major advantage offered by the block-cut technique is that it can eliminate a majority of the downslope spoil dumping, thus cutting down on landslides. However, the first cut is still placed on the downslope and this cut must be quite large to allow space for the equipment to operate. Dumping of the first cut creates a large spoil bank which is subject to the monumental problems of landslides, erosion, and heavy sedimentation.

It should be recognized that the block cut is basically an earth-moving technique. As such, it cannot overcome the very serious problems of slippage, acid drainage and the leaching of toxic materials. While it can reduce general erosion and sedimentation, it does not eliminate these problems nor does it insure revegetation. It has never been proven feasible in the steep-slope areas of central Appalachia—only on the shorter, more gentle slopes of Pennsylvania has it been at all successful. Although a modified block cut has been attempted by Hobet Mining Co., in my congressional district—Mingo County—it is done while retaining the high wall. In fact, both coal operators and State officials have indicated that the block-cut method is too expensive in the steep mountains of West Virginia. At best, the block cut is an improvement over other reclamation techniques, but it falls far short of being a solution to the problems of reclamation.

RECLAMATION OF WESTERN STRIPPED LAND

The western lands are characterized by very thin topsoil, low rainfall, alkali and sodic spoils—no acid-producing materials—and the general scarcity of water. This has led many to the false conclusion that without much rainfall or acid-producing material, and fairly level land, strip mining in the West does not face the gigantic problems of reclamation confronted in Appalachia.

Dr. Robert Curry, assistant professor of geology at the University of Montana, testified before the Senate Committee on Interior and Insular Affairs that—

The ground surface, once disturbed in the West, cannot recover to its present state of succession or vegetation without extremely long periods of geologic time—many times longer than we might expect man to inhabit the earth.

He added:

In the West, unless precious water is imported and the sites are watered on the order of 200 to 2,000 years to simulate the naturally wetter conditions during the soil-forming periods, reclamation to the point of self-sustenance is impossible . . . When one considers the rising costs of water and fertilizer, and the rising values of sustained water quality, I estimate that ultimate costs of reclamation in the West are 10 to 100 times as great as those on steep, contour-stripped lands in the southeast.

I will now quote the final statement of Professor Curry in which he took a swipe at me, demonstrating that reclamation of strip-mined land in the Western States is far more serious than in my Appalachia:

The oft-spoken threat that Colorado, Wyoming and Montana coal areas will become another Appalachia, as Representative Hechler said the other day, is, I believe, a deceptive statement because the situation in the Western States is, in fact, somewhat worse from the standpoint of reclamation alternatives, economic base, potential losses of water and land value.

NATIONAL ACADEMY OF SCIENCES STUDY

"Rehabilitation Potential of Western Coal Lands" is a landmark study prepared under the auspices of the National Academy of Sciences. This study underlines the danger of launching a big coal rush to strip mine western lands. It also indicates the very real threat which coal gasification plants will pose to the limited water supply in these western areas. Plans have been rushed forward to combine massive strip mining with giant coal gasification plants in the West.

The National Academy of Sciences study concludes:

1. "Pertinent data for rehabilitating mined land are virtually nonexistent. The necessary research has barely begun."

2. "Because water requirements are a major problem in western areas, water consumption and related on and off site environmental impacts that would result from conversion of coal by gasification, liquefaction or its use

for electricity generation could far exceed the impacts from coal mining alone. . . . not enough water exists for large-scale conversion of coal to other energy forms. The potential environmental and social impacts of the use of this water for large-scale energy conversion projects would exceed by far the anticipated impact of mining alone. We recommend that alternate locations be considered for energy conversion facilities and that adequate evaluations be made of the options (including rehabilitation) for the various local uses of the available water."

3. "The time required for this process of succession to heal the scars of a severe disturbance in desert and sage brush foothill areas may be decades and even centuries. Even when the best of proven techniques are applied in such desert areas, the potential for approaching the conditions and values of the original ecosystems is low."

4. (In foothill zone of the Rocky Mountains), "Steep slopes, south and west exposures and infertile soils can present insurmountable rehabilitation problems even when the best methods are diligently followed."

5. (With respect to desert areas, broad valley basins and local areas among low hills, ridges and mesas), "The probability for successfully rehabilitating such areas is extremely low . . . Disturbing such areas for surface mining of coal amounts to sacrificing such values permanently for an economic award."

6. "The chances of approaching the original ecosystem are only moderate even on the best of sites and there is no probability of complete restoration anywhere."

7. "For much of the western coal region, the rates of erosion are among the highest in the nation, and soil is commonly lost through erosion and flash flooding."

8. "Surface mining activities may disrupt ground water flow patterns and interrupt traditional sources of water supply."

WATER—THE KEY VARIABLE IN THE WEST

In evaluating reclamation in the West, it is crucial to examine both the onsite and offsite impacts of mining on ground and surface water systems. While seemingly successful reclamation may be carried out at a particular site, a full understanding of the hydrologic situation is necessary before the reclamation can truly be evaluated. The key areas to be affected by strip mining are the aquifers, alluvial valley floors, and stream channels. The National Academy of Sciences study addresses itself directly to the water issue. Let me summarize the direct and indirect effects as spelled out by the NAS study:

In most areas of the West, the strippable coal seam serves as the aquifer, the water-carrying underground strata. This accounts for the high moisture content of western coal discussed earlier. Strip mining a coal seam aquifer can result in the following direct effects:

Groundwater supplies upslope and downslope from the cut may be depleted either temporarily or permanently, disruption of ephemeral stream channels below the site and change in the quality of water either through an increase in total dissolved solids or an increase in sediment load.

NAS states that:

It is not known to what extent the aquifer characteristics of the stratum formerly occupied by the coal seam might be restored.

Piping the ground water out of the mining pit as is done at the Amax operation near Gillette, Wyo., can result in major channel erosion, channel deepening, and sedimentation problems. As the Interior Committee report on pending legislation points out:

Deepening of the channel often results in lowering the ground water level.

These changes have very grave ramifications for beef and grain production in the West.

Erosional problems become even more significant where alluvial valley floors are involved. Alluvial valley floors are unconsolidated deposits formed by streams where the ground water level is so near the surface that it directly supports extensive vegetation. Alluvial valley floors receive water from surrounding areas and are thus capable of sustaining vegetation well in excess of what would be expected based on the precipitation levels in the area. These areas are the key hay meadows for cattle production. NAS states:

The unconsolidated alluvial deposits are highly susceptible to erosion. Removal of alluvium from the thalweg of the valley not only lowers the water table but also destroys the protective vegetation cover by draining soil moisture.

The House Interior Committee in its report even concedes—

That efforts by the Federal government to rehabilitate alluvial valley floors which have been denuded and damaged have been very expensive, of long duration, and only partially successful.

Thus, mining of these areas would means the loss of vital grazing land—perhaps permanently. This is what is at stake in strip mining western coal.

The Academy study summarizes the offsite impacts of strip mining as well:

(1) changes in volume of surface flow, both increases and decreases; (2) loss of groundwater; (3) deterioration of water quality; and (4) channel changes caused by an increase in sediment load; (5) destruction of aquatic habitats; and (6) increase in endemic diseases among users of water that has been contaminated by mining.

Recent data from a Montana Bureau of Mines study of Decker Coal Co's. operations at Decker, Mont., have confirmed the NAS conclusions concerning the effect of ground water levels. Wells within a quarter mile of the operations have dropped 20 feet in the last year; wells within a mile and a half have dropped 10 feet on the average.

And western strip mining has only just begun.

Can we afford to sacrifice productive land for what Gov. Arthur Link of North Dakota has aptly described as a "one-crop harvest"? Are we willing to sacrifice the land and life style of the West for this stripped coal when we can preserve the land and life style while deep mining the coal?

SAFETY RECORD IN UNDERGROUND MINES

To be sure, there are more accidents in deep mines, but a close look at the accident records of the major companies proves that this does not have to be the case. U.S. Steel, which operates only captive mines and produces 99 percent of its coal through deep mining, has by far the best safety records of any coal company. Similarly, Bethlehem Steel, which operates largely deep mines, ranks second in injuries and third in fatalities. This shows clearly that if a commitment is made to safety, deep mines can become safe. Here are the data on the 10 biggest producers from 1968 to 1971:

INJURIES PER MILLION MAN-HOURS

(Numbers in parentheses refer to rank of largest producers)

United States Steel mines (4)	2.72
Bethlehem Steel mines (10)	12.27
Consolidation Coal (2)	18.68
General Dynamics mines (6)	38.74
Peabody Coal (1)	46.91
Old Ben Coal (9)	47.40
Amax Coal (8)	48.23
Pittson (5)	56.57
Eastern Associated Coal (7)	62.51
Island Creek Coal (3	72.13

The differences are less marked but still significant when fatality rates are compiled.

FATALITIES PER MILLION MAN-HOURS

United States Steel mines (4)	0.28
Amax Coal (8)	0.35
Bethlehem Steel mines (10)	0.44
Eastern Associated Coal (7)	0.53
General Dynamics mines (6)	0.72
Island Greek Coal (3)	0.85
Peabody Coal (1)	0.94
Old Ben Coal (9)	1.07
Pittston (5)	1.10
Consolidation Coal (2)	1.52

Particular note should be made of the Peabody figures: 80 percent of their coal production comes from surface mining, yet their accident record is poor. The good safety record of the captive mines stems from the fact that they have a strong commitment to safety—which is exhibited in their steel operations as well—and they are free from the competitive pricing pressures of the marketplace which push other deep mine companies to cut corners on safety. Abolition of strip mining would eliminate these pressures particularly in the case of marginal operators. It thus would allow deep mine operators to make the necessary financial commitment to safety.

Data for 1972 follow basically the same pattern as that for the period 1968–71. Again United States Steel and Bethlehem Steel underground mines rank one and two in lowest frequency of injuries per million man-hours, 5.30 and 8.97 respectively—note that for 1972 data was available separating deep and strip operations of the major producers. In comparison, Consolidated Coal's strip mines which ranked first among strip mines in lowest frequency of injuries, 18.31 per million man-hours, lagged well behind the steel company deep mines record. Of particular interest is the fact that Bethlehem's strip mines registered a 29.61 injuries per million man-hours rate, nearly four times higher than that compiled by their sister deep mines.

In the fatalities per million man-hours rankings, seven of the top nine underground mining companies showed lower fatality rates than the two leading strip producers, Peabody and Consolidation. Peabody and Consolidation strip mines had identical 0.61 fatality per million man-hours rates which were exceeded only by Old Ben deep mines—0.62 and by Consolidation's own deep mines—1.14—which were the most dangerous mines in the industry from a fatalities point of view. These statistics certainly cast doubt on the common assumption that strip mining is much safer than deep

mining. Moreover, the combination of the good safety record of captive deep mines and the good safety records of European underground mines shows that deep mining can become a much safer operation.

Once again in 1973, United States Steel and Bethlehem Steel ranked Nos. 1 and 2 in safety. United States Steel's industry leading injury rate of 6.49 and Bethlehem's rate of 7.67 were far below the 38.26 posted by Pittston's strip mines, the 53.46 injury rate posted by North American strip mines, and the 20.03 rate posted in the strip mines of the Nation's No. 1 strip producer, Peabody Coal Co. In fact, large strip mining operations appear to be more dangerous than many deep mines. In 1973, the fatality rates on strip mines operated by the top two strip producers, Peabody and Consolidation Coal, were 0.47 and 0.45 fatality per million man-hours respectively. This is virturally identical to the industrywide rate of 0.50 scored by all underground operations in 1973. In short, large-scale strip mining is dangerous indeed.

And the trend toward increasing danger in strip mining seems to be continuing. In the first 4 months of 1974, the fatality rate for strip mines was 0.53, substantially higher than the 0.35 posted by deep mines nationwide during the same 4-month period.

EFFICIENCY IN COAL RECOVERY: DEEP AND STRIP

Strip mines are not necessarily more efficient in recovering all the coal in the area disturbed. Directly beneath the cut, strip mines will characteristically recover 90 percent of the coal. When auger mining is associated with strip mining, the augering recovers only 30–50 percent of the coal, reducing overall efficiency to around 60 percent. Whether or not augering is used, a solid block of coal must be retained between the strip cut and any future deep mine, further reducing efficiency. Even in area stripping, such solid blocks are commonly left where the overburden becomes too deep. Therefore strip mines may range in efficiency of coal recovery from about 40 to 90 percent, with contour stripping on steep slopes being the least efficient.

In other ways, strip mining may directly injure the efficiency of subsequent deep mining. Heavy blasting characteristically associated with strip mining in rocky terrain may fissure rock strata above deeper coal seams and create new roof support and water drainage hazards for subsequent underground mining. Extensive strip mining of near-surface seams may so disfigure and destroy an area as to make future access and future human habitation difficult or impossible.

This is a distinct threat in areas like Boone County, W. Va., where removal of the 6.5 percent of the coal which can be strip mined would leave the land surface totally destroyed, making subsequent deep mining of the remaining 96 percent of the coal reserves difficult and in some cases impossible.

The U.S. Bureau of Mines estimates that underground mining recovers 57 percent of the coal affected by mining. However, new technologies, particularly "longwall mining" can increase that recovery rate to 85–95 percent. The application of these technologies in the United States has been slowed by the stagnation and price pressures on underground mining for which strip mining is primarily responsible.

ABOLITION OF STRIP MINING AND THE COST OF ELECTRICITY

What is the effect of the increase in the price of electricity which would result from the abolition of strip mining?

I have asked the Congressional Research Service of the Library of Congress to prepare an analysis of this comparison in rising costs, which follows:

A ban on contour and auger mined coal would require the replacement of 50 million tons of such coal currently supplied to utilities (source: Bureau of Mines). A ban on all strip-mining would require the replacement of 214 million tons of strip-mined coal currently supplied to electric utilities. According to the Federal Power Commission, during the third quarter of 1972, the delivered price to utilities of deep mined coal was $9.40 per ton; the delivered price of strip-mined coal was $7.71. Thus, replacing the 214 million tons of strip-coal supplied to utilities in 1972 with deep mined coal would mean an increase of $361.7 million in delivered fuel costs to utilities, assuming that alternate fuel sources are either more expensive or unavailable. If this increase were all passed on to consumers of electricity, what would it mean to the average family's electricity bill? Just under one third of all electricity was consumed by residential users in 1972. Assuming that all rate payers are equally affected—which is an over-simplification, approximately $120 million of the increase in fuel costs will be passed on to residential users. There were more than 65 million residential users in 1972. Therefore, a ban on strip-mining would mean—taking the above assumptions in consideration—that the average family's electric bill would rise $1.80 annually or 15 cents per month.

ENVIRONMENTAL DAMAGE: DEEP AND STRIP

In every respect, strip mining is clearly more devastating to the environment than underground mining. Given the vast areas of land affected and the long term of the effects, this is the most significant comparison.

Strip mining characteristically involves the near-total destruction of the land surface throughout the area mined, and the spread of destruction through siltation, pollution, flooding, and so forth, far beyond the mined area. Underground since it characteristically removes coal from multiple underground seams in the same location rather than a single surface seam over a broader area. And in fact 95 percent of the surface undermined is not materially affected at all. The two principal exceptions are the undermining of towns which may lead to dangerous subsidence and the deposition of mine refuse on the surface. Undermining of towns can and should be prohibited to prevent future damage in this manner. Under better economic conditions and a stronger regulator framework, mine refuse could be reintroduced into the mine void or handled on the surface in a manner analogous to sanitary landfills to eliminate 75 percent of the potential surface disturbance.

WATER POLLUTION

The principal environmental characteristic which underground and strip mining clearly have in common is the production of acid and toxic water through the exposure of acid and mineral bearing shales to a combination of air and water. The strata of shale which are characteristically directly above and beneath the seam of coal are generally heavy producers of sulfuric acid when exposed to a combination of air and water.

In underground mines, water seeping through the roof and flowing out cracks and mine openings carries poisonous waters into streams—a major source of water pollution throughout the Appalachian region. This condition can be corrected in part by purposely caving in the mine roof following extraction of coal, by flooding the mine to the roof—which prevents access of air necessary for acid formation—by sealing all mine outlets, or by "back-filling" the mine with spoil material. All of these measures can reduce the problem, although frequently they do not cure it altogether.

In strip mines, the shale directly above the seam of coal is pulverized by the process of removal and cast on the spoil pile where it is exposed to air and rain water. Characteristically, since this strata is the last to be removed before the coal is reached, it reposes on top of the spoil pile. The strata of shale below the seam of coal is also exposed to air and water until it is recovered in the reclamation process.

The strip mine spoil banks have several characteristics which make them far more potent generators of acid than underground mines. First, the spoils are more directly exposed to air and water, both of which percolate to depths of 10 feet or more in the loose spoil material to generate acid water, which then runs out into surface watercourses or down into underground watercourses. Second, acid production is directly proportional to the surface area of the shales exposed to air and water; the pulverized shales in the spoil pile expose many more surfaces than do the solid shales underground. Third, acid production is also proportional to temperature, doubling for every 10° C rise in temperature. In summer months, shale exposed to air and water on spoil piles at 90° F will produce four times as much acid as shale underground at a constant 50° F.

Finally, acid production by strip mines is a greater problem because the acid water flows in all natural directions down off and down through the entire strip mine spoils, rather than through a few discrete openings as in underground mining.

Even though strip mining can be expected to produce more acid water than underground mining, this is not the major water pollution problem associated with strip mining. The major problem, particularly in mountainous areas, is sedimentation. Strip mined areas continuously erode, filing streams and rivers with sediment which impedes the flow of water, fills the stream channels and promotes flooding, coats stream bottoms and prevents the growth of aquatic plant and animal life, fills reservoirs and impoundments, clogs public water systems, and transmits pathogenic viruses. Erosion and sedimentation rates 500 times that of neighboring unstripped land are common, documented by the U.S. Geological Survey and many other studies.

Sedimentation problems are not significantly associated with underground mining.

Erosion from strip mined land also loads water with toxic quantities of other minerals such as managanese, aluminum, ammonium, magnesium, calcium, potassium, sodium. Not only does the erosion of these minerals from stripped spoils prevent revegetation in the soil of these spoils, but the toxic concentrations of these minerals in the runoff water inhibit life in the areas to which these waters flow.

The heavy blasting characteristically associated with strip mining also has adverse effects on underground watercourses in many areas—diverting underground water, opening fissures to pollute underground water with acid and toxic surface waters, et cetera.

Therefore, although the water pollution consequences of underground mining have been and continue to be serious, the water pollution consequencs of strip mining are far more serious relative to acid production, sedimentation, toxicity, and destruction of underground watercourses.

AIR POLLUTION

Air pollution is occasionally a problem with either mining method, though it is not of the magnitude of the other problems. "Noxious gases," testifies Hollis I. Dole, "are emitted from the 292 burning coal refuse banks and the 289 known coal outcrop and mine fires," resulting from underground mining. These are extremely difficult to control once underway, but adequate environmental regulation can largely prevent this problem with future underground mining. "Backfilling" of mine spoils into the mine or depositing them between layers of earth as in sanitary landfills can prevent future gob pile fires. Coal outcrop fires can also be prevented by back filling spoils against coal seams left exposed.

Strip mining, like other earth moving processes, can produce some air pollution problems through creation of dust during the mining process. This can be controlled in part by watering and is rarely serious unless the strip mine is very close to inhabited areas. More serious is the wind erosion of strip mine spoils in arid regions. This is already contributing to duststorms in the Black Mesa and Four Corners areas of Arizona and New Mexico.

THE MOMENT OF DECISION

I would hope that one lesson would be learned as a result of the current energy shortage. We must plan for the future in our handling of energy; we can no longer muddle through or leave the crucial energy decisions to the big oil conglomerates who are motivated by profits, not by any concern for what is best for the people. We have come up short in this crisis, and if we deal with this crisis by stepping up strip mining we will come up short again in the 1980's when all our eastern strippable reserves will be exhausted.

At that point, industry will finally turn to deep mining, but it is likely that the deep mining industry will be virtually extinct and the economic dislocations will be catastrophic. Furthermore, vast acreages of land will be devastated and precious water polluted beyond reclamation.

I can see only one positive result of our present energy problem. It has focused attention on coal and forced a decision on the abolition of strip mining. Many people have asked me: "How can you favor phasing out strip mining now?" The answer is simple: This is the last chance to make that decision. If Congress allows the administration and the energy conglomerates to increase strip mining as the answer to the energy crisis, we will have committed the Nation to a catastrophic and virtually irrevocable course. I discussed earlier several approaches to making the shift to deep mining, utilizing unused deep mine capacity, reopening closed deep mines, halting coal exports, expanding longwall mining. These can and must be implemented immediately. In addition, efforts are being made to line up long-term contracts for coal and to pump major amounts of investment into the coal industry. The prerequisites for a massive commitment to deep mining are in place. All that is needed is the commitment by Congress to phase out all strip mining of coal.

Congressional indecision on this question will be fatal.

We must save the land and the people by stopping the destruction caused by strip mining.

SUMMARY OF HOUSE ADMINISTRATION COMMITTEE PRINT ON CAMPAIGN FINANCE ELECTION REFORM

The SPEAKER. Under a previous order of the House, the gentleman from Minnesota (Mr. FRENZEL) is recognized for 10 minutes.

Mr. FRENZEL. Mr. Speaker, for about a year the American people have waited in vain for a positive response from the House on election reform. Finally, in March the House Administration Committee began to work seriously on this matter. Since March 26, the House Administration Committee has met more than 20 times in careful consideration of its election bill and over 75 amendments.

The committee has made a sincere, honest effort to reform the present system. Nevertheless, its bill is flawed by major deficiencies. It is fraught with loopholes and fails to establish an effective, independent administration and enforcement agency that would restore public confidence in the fairness and equity of our election laws.

The committee should be congratulated for its diligent, and often effective, work. But its work product will require substantial repair, particularly to close disclosure loopholes and reduce congressional domination of election supervision.

CONGRESSIONAL DOMINATION

At a time when there is widespread demand that administration and enforcement of election laws be stronger, more effective and more independent, the committee bill has three major provisions that will make administration and enforcement less effective and independent.

First. It establishes a Board of Supervisory Officers which would place four Members of Congress and three employees of Congress in charge of the administration and enforcement of election law. Instead of eliminating the present conflict of interest situation whereby employees of Congress administer and report violations of laws that directly affect their employers, the Board would worsen it by allowing Members of Congress to police themselves. There are no built-in safeguards to assure that violations by Members of Congress will actually be reported to the Justice Department. Moreover, the Board would be forced to operate in secrecy.

Even with the most conscientious, diligent Board, public skepticism is certain to run high, and there will be widespread doubt about the zeal and fairness of the Board's administration and enforcement efforts. The creation of a Supervisory Board could only further exacerbate the crisis of confidence in Congress and the Federal Government.

Second. It grants these seven people the power to interpret the law and grant presumed immunity from prosecution by issuing advisory opinions.

Third. It gives two committees of Congress veto power over the rules and regulations promulgated to administer and implement campaign finance legislation, thereby giving these two committees the power to control all regulations drawn under this law

Clearly, the Congress has a stranglehold on enforcement and supervision of its own elections. Not only is the fox in charge of the chicken coop, he is living in the farmhouse and managing the farm. In Congress' response to Watergate is to place its own members in charge of Federal elections, then it will be hard to blame the public for becoming even more cynical and alienated.

ADMINISTRATION AND ENFORCEMENT

The bill, by abolishing the elections clearinghouse in the General Accounting Office, eliminates the only good thing the Federal Government does to help the State and local governments run their election administration systems.

Instead of weakening the present administration and enforcement provisions, the committee could have strengthened them by establishing an independent Federal elections commission.

Because of its independence, the Commission would be able to restore public confidence, eliminate the present conflicts of interest and reverse the long history of nonenforcement of election law. It would also reduce the amount of bureaucracy needed to administer the present law, increase coordination between administrators and enforcers of the law and assure the expeditious enforcement of campaign finance law.

There are two good provisions that would strengthen enforcement: increased penalties and a requirement that the supervisory officers publish lists of those who do not file reports.

DISCLOSURE; LOOPHOLES UNLIMITED

The bill renders ineffective the full and complete disclosure requirements by

creating loopholes in the 1971 disclosure provisions:

First. Food and beverage of up to $500;

Second. Personal property of up to $500;

Third. Unreimbursed travel expenses of up to $500; and

Fourth. Slatecards, sample ballots, billboards and any other campaign activity involving three or more candidates—apparently including television and radio appearances.

These provisions, which also apply to contribution and expenditure limitations, will have several disastrous effects:

First. Candidates will no longer have to make full and complete disclosure of contributions and expenditures;

Second. Enforcement of both the disclosure provisions and of contribution and expenditure limitations will be extremely difficult; and

Third. Exemptions may be used as loopholes by consultants, special interest groups, and wealthy individuals to circumvent limitations and to channel funds, goods, and services into Federal campaigns from hidden sources.

All of these exemptions were written for well-intentioned purposes. At the least they could be reduced in scope and still preserve the intent of their advocates. In reality, there is no need for these loopholes.

The committee bill attempts to force lobby groups such as Common Cause to disclose their contributions and expenditures. This is a step that is long overdue, but unfortunately, the committee's provision is too vague and ambiguous to accomplish this purpose.

The bill improves disclosure by requiring all candidates to establish a central, principal campaign committee. This provision will centralize both accountability and responsibility, but it is weakened by the exemptions the committee made to the definition of expenditure.

CONTRIBUTION LIMITATIONS

Contribution limitations are the best way to limit the power that wealthy individuals and special interests gain through campaign contributions. The committee bill sets the limitations low—$1,000 per person per election and $5,000 per political committee per election. Due to the loopholes, a skillful contributor can give much more than this amount, and so can a special interest. The loopholes should be closed so that the effective limitation is closer to $2,000 or $3,000.

The bill wisely limits the aggregate amount an individual can contribute in 1 year to all candidates and committees to $25,000. However, the loophole-ridden definition of contribution also applies to this section.

EXPENDITURE LIMITATIONS

The committee bill sets expenditure limitations at $75,000 for a House race, $20 million for the President——$10 million for the nomination—and $75,000 or 5 cents times the population of the State, whichever is greater, for the Senate.

While the committee's limits are too low and have a pro incumbent bias, the loopholes in the definition of expenditure actually result in a more realistic figure of about $100,000 for a House race. The adoption of expenditure loopholes was the committee's tacit agreement that the expense limit of $75,000 is too low. Hopefully, if these exemptions are shut off, the limitation will be raised so that challengers are given a fair chance. In 1972, incumbents won well over 95 percent of the time, and the 12 challengers who did beat incumbents averaged $125,000 a piece in their campaigns. 1974 is supposed to be the year of the challenger. So far this year incumbents have won 80 of 82 races in the House.

PUBLIC FINANCING

The bill provides for public financing for Presidential nominating conventions and for Presidential elections. That is not necessarily a positive provision except in the sense that it provides no congressional public financing.

MISCELLANEOUS

The committee bill prohibits contributions by foreign nationals, contributions in the name of another, and cash contributions in excess of $100. However, since the loophole-ridden definition of contribution applies, these prohibitions and limitations may be less effective.

The bill also preempts State laws, a welcome change that will insure that election laws are consistent and uniform and that candidates for Federal office do not have to bear the burden of complying with several different sets of laws and regulations.

SUMMARY

After a late start, the committee has worked diligently to produce a workable election bill. Despite its shortcomings, particularly its lack of an independent Elections Commission, and its glaring disclosure loopholes, it should be promptly brought to the floor where I hope it can be improved by amendment.

The people have waited long enough for a simple, straightforward response to Watergate. The sooner the bill is passed, put into conference, and enacted; the better everyone will like it.

THE CONGRESS SHOULD COMMEMORATE THE 200TH ANNIVERSARY OF THE FIRST CONTINENTAL CONGRESS OF SEPTEMBER 1774

The SPEAKER. Under a previous order of the House, the gentleman from New York (Mr. KEMP) is recognized for fifteen minutes.

Mr. KEMP. Mr. Speaker, Septemberber 5 will mark the 200th anniversary of the convening in 1774 of the First Continental Congress in Philadelphia.

The importance of that event should be recognized through an official ceremony of the sitting Congress—a successor to the traditions arising from, and the principles enumerated through, the proceedings of that representative assembly of free men.

I think an appropriate means of showing such recognition is to have a special ceremony in these Chambers on Thursday, September 5—a ceremony commemorating the event, paying tribute to the valiant and courageous actions of the Delegates to that Congress, recalling the importance of the declaration and resolves it adopted to the subsequent formation of our Union, and reflecting upon the tenor of those times.

I have, therefore, appealed today to the leadership of the House—the Speaker, the majority leader, and the minority leader jointly—to set aside time at the beginning of the proceedings of Thursday, September 5, to mark this anniversary through a special ceremony.

My letter to the leadership follows:

Hon. CARL ALBERT,
Speaker,
Hon. THOMAS P. O'NEILL, Jr.,
Majority Leader,
Hon. JOHN J. RHODES,
Minority Leader.

MY DEAR SIRS: Tomorrow, the Fourth of July, our Nation will commemorate the 198th anniversary of the proclamation of the Declaration of Independence. In only two more years, we will celebrate the bicentennial of that historic day.

The events which led to our independence from the British Crown were many, but one of the most important of those events was the convening on September 5, 1774, of the First Continental Congress in Philadelphia. The 200th anniversary of that event is little more than two months away.

We should, as a Nation, never forget that the Congress which convened in 1789 under the new Federal Constitution was a continuation of the Continental Congresses which preceded Independence and the Congresses which served under the Articles of Confederation.

The House of Representatives, as a direct successor to that First Continental Congress, presently recognizes such annual events as Flag Day through special observances and ceremonies. Other special, national events are similarly recognized through special ceremonies of the House commemorating great events or honoring outstanding public service.

In keeping with the intent of the Congress in its authorization of a public celebration in 1976 of the bicentennial of the birth of our Nation and our call for the recognition by public institutions of events associated with our Independence, I believe it would be most appropriate for the present Congress to recognize the seating of that First Continental Congress.

I believe that setting aside the first order of business on Thursday, September 5, for ceremonies associated with the commemoration of this event would be most appropriate.

I urge you, Gentleman, as the principal leadership of the House, to provide for such a ceremony.

Sincerely,

JACK KEMP.

Let me comment for a moment on the events associated with the convening of the First Continental Congress.

EVENTS LEADING UP TO THE CONTINENTAL CONGRESS

That First Continental Congress was no rump session of dissidents. It was a representative body, reflecting a broad consensus.

The issues before it had been debated—within the colonies and between the colonies and the Crown—for well over a decade, especially after the retaliatory and punitive imposition of the notorious Stamp Act of 1765. The ministries of Grenville and North, coupled with the oppressive Townshend Acts and duties imposed by them, had given Crown-sponsored advantages to the economic powers of Britain at the expense of the colonies.

The delegates to the Continental Congress had been selected by their fellow colonists principally in hopes of averting further crises and disagreements with the mother country.

These delegates for the most part, saw themselves not as radicals or revolution-

aries but as men whose purpose it was to protect the fundamental rights and liberties of free men—rights and liberties first through Magna Carta and nurtured by hundreds of years of growing parliamentary counterforce to the Crown.

The events which preceded the convocation of the Continental Congress speak clearly on why that convocation ought to be observed by the representatives of the people in Congress assembled today.

The Treaty of Paris of 1763 ended the 9 years' Great War between England and France, fought on this side of the Atlantic as the French-Indian War. The American colonists had fought hard against the French and for the English Crown. They had every right to think that the Crown would treat them—after those successes in the field—with measures designed to enhance the colonies' status in the greatly expanded, first real British Empire.

Instead the Parliament passed in April 1774 the oppressive Sugar Act. The measure was designed specifically to raise money for the Crown from the Colonies. It inaugurated the Grenville ministry policy requiring the Colonies to pay the public debt of Britain.

That act was followed by the Currency Act, a program which prohibited the English Colonies from engaging in any commercial transactions except with Crown currency—currency which was in such short supply as to render commercial transactions virtually null and void.

These Crown measures were answered in a town meeting in Boston on May 24, 1764, with the first cry of "taxation without representation" from the remarks of James Otis, and on June 12, 1764, with the Massachusetts House of Representatives forming a committee of correspondence to sound out other colonies.

The period between the call for cooperation and the actual convening of the First Continental Congress was hallmarked by these additional events:

The imposition of the notorious Stamp Act and Quartering Act, both in March 1765.

The Virginia Resolutions of May 1765 and the oratory of Patrick Henry in the debate on those resolutions.

The organization that month of the Sons of Liberty, a group whose designs were to force the resignation of British tax agents.

The convening on the "Stamp Act Congress" at New York City in October 1765, with nine colonies represented, and the adoption of the "Declaration of Rights and Grievances" to be submitted to the Crown.

The refusal of the New York Assembly in January 1766 to support the Quartering Act, a refusal which led to the first clash between citizens and British soldiers.

The imposition of the Townshend Acts in 1767—imposing duties on a wide variety of imports, acts which gave rise to organized and massive resistance against importing English made goods.

The stationing of armed British regiments in Boston, beginning in the summer of 1768.

The historic Virginia Resolves of 1769, condemning the British Government for tax and other policies, a measure which struck so deeply at the Crown's power that to stop the speeches of Patrick Henry and Richard Henry Lee before the Virginia Assembly, the Governor dissolved that assemblage.

The Boston Massacre—during which five patriots were killed by volleys from British troops.

Uprisings in North Carolina of the "Regulators," protesting under representation of rural areas in its colonial assembly.

The imposition of the Tea Act of 1773 and the resulting Boston tea party.

And, the enactment of the first of the coercive acts—called the intolerable acts by the colonists—designed to punish all American ports sympathetic to the colonists cause.

This is the background for the First Continental Congress. These events reflect the mood which prevailed when it convened.

THE FIRST CONTINENTAL CONGRESS

The First Continental Congress, with all colonies represented except Georgia, assembled in Philadelphia to consider ways in which to deal with the coercive acts.

The delegates were initially persuaded to endorse the Suffolk Resolves, adopted earlier by the convention of Suffolk County, Mass., and regarded as a radical departure from the agreements of the committees on correspondence. Those resolves urged civil disobedience, severe economic pressure on Britain, and immediate self-rule.

In an effort to establish a milder alternative to these resolves, some of the delegates endorsed a Plan of Union between Great Britain and her colonies but were defeated by vote and the plan expunged from the record.

Then, the Congress took its most important step.

It adopted the Declaration and Resolves of 1774 within which the delegates declared, as reflected in the following excerpts, their determination to enter into nonimportation, nonconsumption, and nonexportation agreements and associations and to build public opinion for those policies:

> The good people of the several colonies . . . justly alarmed at these arbitrary proceedings of Parliament and administration, have severally elected, constituted, and appointed deputies to meet and sit in General Congress in the city of Philadelphia in order to obtain such establishment as that their religion, laws, and liberties may not be subverted. . . .
>
> To these grievous acts and measures Americans cannot submit, but in hopes that their fellow subjects in Great Britain will, on a revision of them, restore us to that state in which both countries found happiness and prosperity, we have for the present only resolved to pursue the following peaceable measures:
>
> 1. To enter into a nonimportation, nonconsumption, and nonexportation agreement or association.
>
> 2. To prepare an address to the people of Great Britain and a memorial to the inhabitants of British America.
>
> 3. To prepare a loyal address to His Majesty, agreeable to resolutions already entered into.

THE EVENT SHOULD BE COMMEMORATED

Mr. Speaker, we have given much thought, attention, and money to commemorating the 200th anniversary of the Declaration of Independence on July 4, 1976, as we should have. We should also give our attention to the events which led to that Declaration, among the most important of which was the convening of the Continental Congress and the policies it promulgated.

An official ceremony on September 5 could consist of the presentation of the colonial colors, readings from the debates of that Congress, a reading of the text of its Declaration and Resolves, and remarks from Members of States which were formerly colonies or events in those States leading to the convening of the Continental Congress.

I respectfully request the Speaker, the distinguished majority leader, Mr. O'NEILL, of Massachusetts, and the distinguished minority leader, Mr. RHODES of Arizona, to proceed with plans for an appropriate ceremony in recognition of that event.

THE ILLEGAL ALIEN PROBLEM

The SPEAKER. Under a previous order of the House, the gentleman from Texas (Mr. GONZALEZ) is recognized for 10 minutes.

Mr. GONZALEZ. Mr. Speaker, I rise on this occasion because it will be the first and really the last opportunity to do so before the recess, and because of the fact that what I have to say I believe is long overdue, and is especially appropriate on the eve of celebrating our Independence Day tomorrow.

As we look over the length and breadth of our land there are areas in our country where the July 4th celebration will be celebrated hardly at all because of the furtive existence by thousands, some say hundreds of thousands, and others assess it at more than 1 million people—to the illegal aliens who have come to our Southwestern borders and beyond because, once they reach the perimeters of our border and cross it, these individuals go to those areas of our country where they find economic opportunity; for much the same reason that I feel all of our ancestors came to this country.

Unfortunately, we live in a contradictory period of time, and very little attention is being paid to what I consider an enormous problem to our country. Very little is being said and very little attention is being paid to it, and yet it has the makings of one of the most serious, disturbing and disruptive circumstances in the future for our country and for our neighboring Republic to the south, the Republic of Mexico.

These people whom I speak of are direct descendants of people who have populated, built, and toiled in the southwestern portion of our country, and who have structured, built, and added to its wealth. There has been hardly a field in the Southwest where king cotton reigns where the white cotton boll fields were not plucked by these toilers and laborers. There has hardly been a road built in my State of Texas—and we prize ourselves in Texas in having the most efficient, the most effective, and the best built highway system in the whole 50 sweat and toil of these laborers. I do States of the Union—but not one of those roads has been built without the

not mean these illegal aliens, I mean their blood brothers, those who have come to the United States in the past, who have come here legally, and who came to our shores in a period of time in which there was very little differential or markings along our border.

Until 1924, or thereabouts, the crossings along our border of 2,000 miles from Texas to California were at will. There were no such things as visas, or 1-day border pass permits, there were no such things as immigration procedures. All you had to do if you wanted to cross over one of the bridges that had been constructed would be to pay a toll of about 5 cents, and you could cross at will. There was little to denote the border other than the river in Texas, the desert sands in Arizona, and a few landmarks along the California and New Mexico border.

The descendants of those people are an integral part of our society today. But in the last two decades, and particularly since World War II, we have had a reverse situation than what was registered during the depression years of the 1930's. In the 1930's a sociological phenomenon happened that has yet to be recorded historically in any place that I have read. First, in the Mexican revolutionary period, a period comprising a 3-decade period from 1910 to 1930, more than 1 million immigrants came into this country, mostly concentrated in the Southwest. Then the depression came, and with the declaration of amnesty and political exemptions, by the President of Mexico in 1934, just from my area alone, the district constituting the 20th Congressional District, more than 20,000 persons repatriated themselves. Twin circumstances led to this: They were caught at the height of the depression, and the fact that they could return to their native land where turbulence and violence had prevailed off and on for 30 years.

But then, during and after World War II, in the Republic to the south of us in some areas the average annual income is less than $200 a year, and where even less than 150 miles from the Texas border you have laborers working in the mines for less than $25 a month. With the pressures of a rising economy and a need for labor during World War II and subsequent to World War II, we in the United States had a tremendous number of these workers seeking employment. Finally in 1951 the so-called bracero law was approved by this Congress. It was the first time that contract labor was recognized since it had been abolished in the 1870's when the contract laborers were Europeans.

Unfortunately, the same thing happened with this group as happened in the 1870's which led to its prohibition by the U.S. Congress. Bracero labor was used as a tool of exploitation. It competed with American-born native labor, and displaced it economically. Yet this Bracero laborer was introduced for economy only under certain social conditions which also engendered problems in our society. Only the worker did not settle in. He could not bring his family in. He had come in only for his labor, and he had to come in for a specific period of time, unless the person who hired him decided he was intractable or otherwise unsatisfactory and he would have him sent back.

This Congress wisely stopped that practice exactly a year after I came to the Congress, and I led the fight against that malpractice. In the interim period of time things have continued to happen, even though the American press in the Southwest totally ignores happenings even of the most important nature in the republic south of us.

For example, just about 3 or 4 years ago there was a tremendous crisis in Mexico where the government was almost overturned through conspiratorial methods engendered in Russia and China. Yet there was very scant notice in this country.

Today we have kidnapings and assassinations of some of the wealthy class of Mexico and some of the political figures of the Government of Mexico which have hardly received a ripple of notice from the American press.

Economic conditions have deteriorated and highly inflationary pressures are also impinging on Mexican economy. All of this has led to a mass exodus of workers who are seeking tranquility, stability, and economic opportunity in our land. What have we done to confront this issue? Very little.

Whatever laws we have are directed wholly against the worker. If he is here and he is picked up by the Immigration Service, he is either transported on a bus or other means back to the border, or he is sent to a concentration camp which has existed at various points up and down the border. Some of these individuals are summarily rounded up, transported to the far interior of Mexico, and then turned loose there, regardless of where they came from in Mexico.

The Mexican Government up to this time has been characterized with an indifference to the real welfare of its own people who have come into the United States illegally. During the period of the bracero program, as long as it acted as a safety valve for the Mexican economy, the Mexican Government could not have cared less about how many of these people were being victimized or about how many were being robbed and killed for their money when they returned to Mexico—and we did not care either.

Today, other than an occasional and sporadic roundup of these individuals, we have no policy. This sounds very inconsistent to me and it is very difficult to explain. I have sympathized with those who have expressed apprehension, particularly from the forces of organized labor, but organized labor has also seemed to me to be hypocritical. It is worried about its own immediate interests, yes, that its standard of labor ought not to be eroded, and that is good, and that ought to be protected, but I think they have a responsibility, too, and it seems inconsistent with their failure to raise the same argument that they are raising against the Mexican legal or illegal immigrant when they have not done so in the case of the Cuban immigrant. The Cuban immigrant has had the same impact on the economy of Miami, but I have yet to see the same attitude expressed toward the Cuban immigrant that has been shown toward the Mexican immigrant. There is certainly a double standard here.

Mr. Speaker, the reason I am speaking today is that I want to place the House on notice that this is the initial of several times I will address this House, and, although it is a subject that is often overlooked, that rarely makes the headlines, and that nobody pays much attention to, I consider it to be one of the most explosive issues confronting our Republic today. Unless we express a humanitarian, equitable, and efficient and well thought out and knowledgeable approach, we will muddle it and get into embarrassing situations.

The Mexican Government, less than 3 weeks ago, issued a denunciation of the U.S. treatment of illegal aliens. This obviously requires a positive response from us.

THE FATE OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Virginia (Mr. DAN DANIEL) is recognized for 5 minutes.

Mr. DAN DANIEL. Mr. Speaker, the Commercial Appeal, a newspaper in my home town of Danville, Va., has reprinted this week a column written by Paul Harvey in which he reports on the fate suffered by the signers of the Declaration of Independence.

One wonders if those who now state it is time for a "new American Revolution" would be willing to suffer the fate of those brave men of that earlier time.

I include the article in the RECORD at this time:

Independence Day is coming soon and we are repeating the column published last year at this time because so many persons have requested copies.

Some years ago commentator Paul Harvey became curious about what happened to those men who signed the Declaration of Independence. He looked up the record and here's what he found: five signers were captured by the British as traitors, and tortured before they died . . . two lost their sons in the Revolutionary Army . . . one of the signers had two sons captured . . . nine of the 56 fought and died from wounds or the hardships of the Revolutionary War . . .

But what kind of men were they, these men who boldly wrote their names to the Declaration that lit the fires of the world? Twenty-four were lawyers and jurists. Eleven were merchants; nine were farmers and large plantation owners, men of means, well educated . . .

Their security, their incomes, their wordly possessions made them substantially well off. But they signed the Declaration of Independence even though they knew the penalty would be death on the gallows if they were captured. They signed, and they pledged their lives, their fortunes and their sacred honor . . . Carter Braxton of Virginia, a wealthy planter and trader, saw his ships swept from the seas by the British navy. He sold his home and his properties to pay his debts, and died in rags . . . Thomas McKean was so hounded by the British that he was forced to move his family almost constantly. He served in the Congress without pay, and his family was kept in hiding. His possessions were taken from him and poverty was his reward . . .

Vandals or soldiers or both looted the properties of Ellery and Clymer and Hall and Mid-

dleton . . . At the Battle of Yorktown, Thomas Nelson Jr. noted that the British General Cornwallis had taken over the Nelson home for his headquarters. The owner quietly urged Gen. George Washington to open fire, which was done. The home was destroyed and Nelson died bankrupt. His grave is unmarked and unknown . . . Francis Lewis had his home and properties destroyed. The enemy jailed his wife and she died within a few months . . . John Hart was driven from his wife's bedside as she was dying. Their 13 children fled for their lives. His fields and grist mills were laid waste. For more than a year he lived in forests and caves, returning home after the war to find his wife dead, his children vanished. A few weeks later he died from exhaustion and a broken heart . . .

Norris and Livingston suffered similar fates . . . Such were the stories and sacrifices of the American revolution. These were not wild-eyed, rabble-rousing ruffians. They were soft-spoken men of means, wealth and education. They had security but they valued liberty more. Standing tall, straight and unwavering, they pledged: "For the support of this Declaration with a firm reliance on the protection of the Divine Providence, we mutually pledge to each other, our lives, our fortunes and our sacred honor." They gave us an independent America. Can we keep it?

STEEL PRICE HIKES AND INSTITUTIONALIZED INFLATION

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Washington (Mr. ADAMS) is recognized for 5 minutes.

Mr. ADAMS. Mr. Speaker, the recent increases in steel prices by the major steel companies—on top of skyrocketing oil prices—bode ill for the Nation's economic well-being.

Worse still is the Nixon administration's and the Congress's apparent reluctance to do anything to halt or discourage these inflationary moves.

I have already discussed on two occasions in the House of Representatives some of my proposals for a program of "Tax Equity and Economic Stability." Today, I would like to make some remarks about the problems of our "institutionalized"—not "free-market"—economy.

Over the last week, there have been continual news reports of steel price increases by nearly all of the major steel companies in the United States. Bethlehem Steel led the pack with steel price increases from 5 to 15 percent—although I am pleased the company has recently announced some price reductions. The company's justification would probably apply to their competitors as well.

As reported in the Seattle Times, Bethlehem's statement read:

> The price increases are to cover "cost increases" during May and June "plus clearly identified additional increases over the next few months. They also constitute the long delayed first step towards earnings margins, which were not raised by prior price increases."

The steel companies are adding whatever justifiable costs they have previously incurred to anticipated higher costs—plus for good measure, enough padding to provide a substantial increase in profit margins. This is a typical inflationary push.

These recent steel price increases will have a very severe ripple effect on the economy.

Hardest hit will be the housing and automobile industries which have already suffered severe setbacks due to the energy crisis and the tight money policies of the Nixon administration. Chrysler and Ford, in response to the steel industry's actions, have already announced yet another automobile price increase. That is the sixth increase for Chrysler and the fourth for Ford in just 1 year. These are major cornerstones of our economy; if they decline, the Nation's rate of growth, or gross national product, falls.

I insert into the RECORD for the attention of my colleagues the following editorial from the New York Times entitled "As Steel Goes—So Goes Inflation":

AS STEEL GOES—SO GOES INFLATION

When the ending of economic controls after World War II brought an explosion of increases in prices and wages, steel became the yardstick for measuring how much trouble this country was in. "As steel goes, so goes inflation," was the watchword in the Truman years. It was still the watchword when President Kennedy cracked down on "Big Steel" for price gouging in 1962.

The arbitrariness that characterized White House conduct in that confrontation need not be emulated now; but there is warrant for the kind of concern that made President Kennedy and his predecessors so sensitive to the movement of steel prices as a peril barometer on the inflation front.

The sharp increases announced this week by the major steel producers will bring the total boost in mill prices since the beginning of the year to more than 25 per cent. On many types of steel most basic to the production of consumer goods the jump is much higher than that.

The announcement by Chrysler that it is raising the price of its automobiles to reflect the rise in its steel bill—the sixth Chrysler increase this year—is only the start of an avalanche of such "passthroughs" all through the economy. The steel companies are using the same justification. Costs are up for coal, power, scrap and labor. Steelmakers are also candid enough to concede that they are taking advantage of boom conditions in the market, plus the demise of Government price curbs, to improve their profit ratio.

What seems to be left out of the industry's calculations is the fact that its example will not only worsen inflation but add to the danger of an economic bust in which steel's profits would toboggan along with those of almost everyone else.

In the last year or two the steel companies and the United Steelworkers of America have been making a zealous joint effort to persuade the country of their social responsibility in avoiding strikes and heightening productivity. The spectre of competition from foreign steel made cost-consciousness a mutual concern, with clear benefits for the economy.

The current mood seems to be in the opposite direction. The labor contracts signed by the industry earlier this year appear to have been a good deal richer than originally indicated, with total annual benefits estimated at 12 to 14 per cent. And the companies are certainly showing no restraint on the price side, now that controls are gone.

Elsewhere in industry, wages are soaring as workers strive to catch up with living costs. East Coast longshoremen have just negotiated a new three-year pact three full months before expiration of their current agreement, but relief over the avoidance of a strike is tempered by apprehension over the increase in shipping costs that will stem from the 31 per cent size of the pay package. The current dock wage of $6.10 an hour will go to $8 by Oct. 1, 1976.

Railroad workers have filed demands for a 20 per cent pay increase, effective next Jan. 1, plus another 15 per cent in 1976. Rumbles of trouble in the coal mines when union contracts expire this fall are already strong. In New York City, stabilized rents are going up by 8.5 to 12 per cent a year. Hospital costs will zoom further into the stratosphere as a result of higher wage costs found justified by a state arbitration panel. In every other field, the trend is up, and up, and up.

The latest round of price increases in steel is a danger signal Washington cannot ignore. It is imperative that Administration and Congress fill the vacuum in anti-inflation policy left by termination of controls.

INSTITUTIONALIZED INFLATION

Much has been made of late about the need to balance the budget and drastically reduce the Federal budget—in other words, a strict fiscal policy. I agree that these are desirable goals and I believe that we should balance the Federal receipts and expenditures in the coming years.

However, despite what the administration's economic czars would have us believe, tight fiscal and monetary—incredibly high interest rates—policies will not solve our inflation dilemma.

I believe we must take a hard look at the basic structures in our economy. Let us face it. We no longer enjoy a "free-market" economy. Do not let this administration brainwash you into believing that we do.

Ours has become an institutionalized economy. Large, conglomerate industries now dominate the marketplace, dictating prices and distribution. Such industries are oil, steel, automobiles, communication, transportation, and dairy coops, to name only a few.

The American consumer has had to struggle in this anticompetitive marketplace for some time. It is no wonder that our people have agreed to join together to combat these conglomerates and no wonder workers are demanding livable wages.

Major institutions in our economic system are extremely effective in protecting and advancing their rights and well-being. Remember, during the last few years of economic chaos under the "Phases" of the Nixon administration, labor unions patriotically did their part in trying to hold wage increases to 5.5 percent so as not to feed inflationary fires.

Had monopoly-type institutions honored the same commitment—rather than searching for ways to pass on every cost increase to the consumer so as to widen their profit margins—people would not be in their current morass of having to pay higher prices with less real spendable income. It is no wonder that the worker has sought salary raises to try to compensate for his losses.

However, highly organized segments of industry and labor have grown larger and more powerful, they have taken hold of whole segments of the economy. If no restraints are applied, voluntary or otherwise, they can in a sense institutionalize inflation. They can dictate price and wage increases, leading to a vicious inflationary cycle: prices jump, wages leap to catch up, prices go up again to cover labor costs, and labor costs advance to try to make ends meet again.

This institutionalized inflation is habit forming. It continues but has no visible

means of support from underlying supply and demand conditions in the economy.

KICKING THE INFLATION HABIT

We must kick this inflation habit, or the price-wage spiral will continue to be injected into our economy like an addictive drug. The injection may seem to fix the situation for a while, leading to hallucinations like "the worst is over," "there will be no double-digit inflation this year," "we will ration by price," "we can catch up what we've lost." But when the euphoria wears off, people begin to realize that they have been caught in a wicked trap of skyrocketing prices, frightening shortages, and deflated incomes.

Instead, we should frankly admit that inflation is a sickness that must be cured, not by one policy taken to its extreme like an overrestrictive monetary policy or high unemployment due to an economic slowdown, but by several integrated, responsible programs.

I have already suggested to my colleagues in the House of Representatives certain ways in which I believe we can begin to tackle the problems of inflation.

First, I think that wage increases in these institutions should come out of the enormous profits already garnered by this big business. To foster this approach, I have introduced legislation to create an independent Economic Stabilization Board to act as a monitoring agent over the economy. It would have the authority to institute price—not wage—controls if it feels that they are required to keep inflation and unemployment down. The Board would also report on wage settlements arrived at by collective bargaining in these sectors of the economy.

Second, I believe that extensive and effective tax reform could serve to dampen inflationary pressures. Thus, I have already proposed a payroll tax cut to help wage earners and those on fixed incomes to recoup some of their income loss so that they will not have to demand wage increases of a magnitude that could fire inflation.

Third, on the revenue-raising side, I have proposed tax increases for wealthy individuals and corporations, especially the oil industry. The revenue increase will help balance the budget. The reform will also make our tax system more progressive and, therefore, more equitable. Furthermore, the measure will tax fairly the unconscionable profits reaped by big industries but will not affect any incentives for business investment.

Fourth, I believe that the interest-sensitive sectors of our economy, such as housing, small business, and essential capital investment, must be protected by law by channeling credit in their direction. Rather than relying on broad monetary policies, I believe a sophisticated program should be instituted to target credit on certain areas where it is needed to help consumers and the economy. I will address the House of Representatives on this subject in the near future.

These measures, when added to more responsible monetary and fiscal policies and antitrust actions, can begin to accomplish our most important task—the restructuring of our economy to prevent its stranglehold by enormous, anticompetitive institutions.

FOURTH OF JULY CELEBRATION

(Mr. LEHMAN asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. LEHMAN. Mr. Speaker, before I move for adjournment I would just like to wish all of our colleagues in the House as well as to the people of this country a safe Fourth of July.

I hope during the day of independence they will take the time to collectively and personally reaffirm the principles that the people who founded this country dedicated themselves to for the preservation and maintenance of our democratic institutions.

OPINIONS OF CONSTITUENCY OF FOURTH DISTRICT OF NEW JERSEY

(Mr. THOMPSON of New Jersey asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. THOMPSON of New Jersey. Mr. Speaker, it has been my custom throughout my tenure in the House to seek the opinions of my constituency on the major issues confronting the Nation and the Congress. The tabulated results of my 1974 legislative questionnaire are now available and reveal deep dissatisfaction with institutions of Government, particularly the Presidency. They also demonstrate great disfavor with the manner in which election campaigns are financed. Fortunately, legislation which is about to be reported from the Committee on House Administration will do much to allay public concern with campaign financing. It is legislation upon which I have worked for many months.

My constituents are also deeply disturbed about inflation and governmental failure to deal effectively with it. That dissatisfaction is so deep that 62 percent of my constituents would favor reimposition of strict Federal wage and price controls. My constituents generally commend Mr. Nixon's handling of our foreign policy, but show in other respects a marked disapproval of the manner in which the President is doing his job. They are also dissatisfied with the manner in which Congress is operating. They feel that more public funds should be spent for health, mass transportation, social security, consumer protection, crime control, and pollution control. They think less money should be spent on the military, foreign aid, highway construction, and space exploration. My constituents share a deep dissatisfaction with present day health services, but they do not express a marked consensus on any of the several health care proposals now pending before the Congress.

The questionnaire results reveal a fundamental distrust of the major oil companies and, in fact, indicate that most people feel that the oil companies have manufactured the energy crisis. There is enormous support and a desire for tax relief for families of low and moderate income. In this regard, I have sponsored legislation that would reduce payroll and income taxes for families whose earnings are $15,000 a year or less. In short, Mr. Speaker, the results of my questionnaire demonstrate conclusively that Congress should pursue tax reform, health care legislation, campaign financing reform, and that we should reorder our budgetary priorities so that we spend less on questionable weapons systems and more on meeting our domestic needs. I hope and trust that we will pass meaningful legislation in these areas before the current session concludes. The tabulation of my questionnaire was based upon a 10 percent sample of the more than 10,000 returns. The detailed results are as follows:

POLL RESULTS

BUDGET PRIORITIES

Inflationary pressures raise difficult choices about priorities for Federal spending. Please indicate those areas of the budget which you feel should be *increased, decreased,* or *remain the same.*

Education: increase, 51 percent; decrease, 10.5 percent; same, 38.1 percent.

Health: increase, 71.1 percent; decrease, 5.2 percent; same, 23.3 percent.

Military Spending: increase, 12.6 percent; decrease, 60.7 percent; same, 26.2 percent.

Foreign Aid: increase, 3.0 percent; decrease, 81.5 percent; same, 15.1 percent.

Mass Transportation: increase, 69.8 percent; decrease, 9.5 percent; same, 20.2 percent.

Highway Construction: increase, 20.9 percent; decrease, 40.4 percent; same 38.3 percent.

Community Development and Housing: decrease, 35.9 percent; decrease, 25.4 percent; same, 38.3 percent.

Social Security: increase, 60.3 percent; decrease, 7.3 percent; same 32.0 percent.

Space Exploration: increase, 14.0 percent; decrease, 56.5 percent; same, 29.1 percent.

Consumer Protection: increase, 63.3 percent; decrease, 6.7 percent; same, 29.6 percent.

Pollution Control: increase, 55.3 percent; decrease, 11.8 percent; same, 32.5 percent.

Crime Control: increase, 70.9 percent; decrease, 4.1 percent; same, 24.5 percent.

Veterans Benefits: increase, 47.3 percent; decrease, 8.3 percent; same, 44.0 percent.

ECONOMY

To curb inflation, I favor: (a) stricter federal wage and price controls, 62.0 percent; (b) present controls, 5:5 percent; or (c) no controls, 32.0 percent.

THE PRESIDENT

Do you think the President should: (a) finish his term, 34.2 percent; (b) resign, 21.8 percent; be impeached, 26.7 percent; be removed from office,16.9 percent.

CAMPAIGN FINANCE

Which, if any, of the following proposals do you favor as a means of improving our system of financing Federal election campaigns?

a. Limits on expenditures a candidate is allowed to spend? Yes, 93.4 percent; no, 5.8 percent.

b. Making contributions above a certain amount illegal? Yes, 84.1 percent; no, 15.1 percent.

c. Matching each private contribution with an equal amount of public funds? Yes, 13.1 percent; no, 85.9 percent.

d. Total public financing of elections? Yes, 31.8 percent; no, 67.4 percent.

e. No change in present laws? Yes, 26.8 percent; no, 71.9 percent.

TAX REFORM

Which, if any, of the following proposals for tax reform being considered by Congress should be adopted?

a. Equalize the income tax rate for single

and married persons? Yes, 57.1 percent; No, 42.0 percent.

b. Require persons with high incomes to pay a higher minimum tax, regardless of their deductions? Yes, 82.6 percent; No, 16.6 percent.

c. Eliminate tax deduction for certain interest payments? Yes, 40.0 percent; No, 59.0 percent.

d. Reduce the oil depletion allowance? Yes, 82.0 percent; No, 17.1 percent.

e. Reduce payroll and income taxes for families with low and moderate income? Yes, 78.6 percent; No, 20.4 percent.

f. Other (please comment).

HEALTH CARE

Congress has determined that one of its highest priorities is a system of improved health care. Which of the following systems do you favor?

a. Comprehensive national insurance funded by general tax revenues and a social security-like payroll deduction? Yes, 59.3 percent, No, 39.6 percent.

b. Tax credits for premiums paid for private health insurance? Yes, 70.4 percent; No, 28.4 percent.

c. Tax incentives to encourage employer-run insurance plans, with the Government subsidizing premiums for the poor? Yes, 57.5 percent; No, 4.1 percent.

d. Publicly subsidized insurance to pay for catastrophic medical expenses while relying on private insurance and personal resources for ordinary medical expenses? Yes, 65.5 percent; No, 33.4 percent.

e. Continuation of the present system? Yes, 18.1 percent; No, 80.5 percent.

PUBLIC CONFIDENCE

a. Do you approve of the way the President is doing his job? Yes, 24.4 percent; No, 74.7 percent.

b. Do you approve of the way the Congress is doing its job? Yes, 24.4 percent; No. 72.3 percent.

c. Do you approve of the way the news media is doing its job? Yes, 55.8 percent; No, 43.2 percent.

ENERGY CRISIS

In regard to the energy crisis, the public has frequently indicated doubt about the reality or the extent of the fuel and power shortages. Do you feel that—

a. An energy crisis does in fact exist? Yes, 53.5 percent; No, 45.4 percent.

b. A shortage of gasoline exists, but it is not critical? Yes, 63.6 percent; No, 35.2 percent.

c. The energy crisis has been contrived by the oil companies? Yes, 80.6 percent; No, 18.4 percent.

9. Are you satisfied with the Nixon Administration's handling of our foreign policy? Yes, 61.1 percent; No, 37.8 percent.

NIXON AGAINST UNITED STATES

(Mr. BRADEMAS asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. BRADEMAS. Mr. Speaker, on July 8, 1974 the U.S. Supreme Court will hear oral arguments in the case of Nixon against United States.

It will hardly be disputed that this case presents constitutional issues of the greatest magnitude. For not only will the Court be confronted with the question whether a subordinate officer of the executive branch may sue his superior, but also whether the President of the United States is amenable to the law.

I shall not dwell on the issues presented in Nixon against United States, for in broad outline they are well known.

I do think it essential, however, that Members have the opportunity to acquaint themselves with the specifics of the case, for when and if the Court renders an opinion in this matter it will be of the greatest importance for all of us to understand—in detail—precisely what has been decided.

I am, therefore, including in the RECORD the complete texts of the briefs submitted to the Court by both the Special Prosecutor and the President's counsel. I urge all Members to acquaint themselves with these documents, for while lengthy, they concern matters central to the interests not only of the parties in litigation, but also of the American people.

Mr. Speaker, the two briefs referred to are as follows:

[In the Supreme Court of the United States, October Term, 1973—Nos. 73–1766 and 73–1834]

BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

United States of America, petitioner *v.* Richard M. Nixon, President of the United States, et al., respondents.

Richard M. Nixon, President of the United States, cross-petitioner *v.* United States of America, respondent.

On writs of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion and order of the district court (P.A. 15)[1] has not yet been reported. The United States Court of Appeals for the District of Columbia circuit has neither considered nor rendered an opinion in this case.

JURISDICTION

The opinion and order of the district court was entered on May 20, 1974 (P.A. 15). On May 24, 1974, the President filed both a timely notice of appeal in the district court and a petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit. Upon the filing of the appeal, the order of the district court was stayed. On May 24, 1974, appellee, United States of America, filed in this Court a petition for writ of certiorari before judgment, which was granted on May 31, 1974. (No. 73–1766) On June 6, 1974, the President filed a cross-petition for writ of certiorari before judgment which was granted on June 15, 1974. (No. 73–1834) At that time, both cases were consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The district court, relying in part on *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973), denied the motions filed by the President to quash a trial subpoena *duces tecum* directed to the President for presidential materials, and to expunge any finding by the grand jury that he was an unindicted co-conspirator in a criminal proceeding. The questions presented here for review are:

1. Whether the Court has jurisdiction to review the order of the district court on the grounds that either:

a. the district court's order of May 20, 1974, was an appealable order, or

b. the Court has jurisdiction to entertain and decide a petition for mandamus transmitted by a court of appeals to this Court.

2. Whether the Judiciary has jurisdiction to intervene in an internal dispute of a co-equal branch.

3. Whether a court can substitute its judgment for that of the President, when he exercises his discretion, in determining that disclosures of presidential records would not serve the public interest.

4. Whether a court has authority to enforce a subpoena against a President of the United States by ordering him to produce for *in camera* inspection, records demanded by a subpoena when the President has interposed a valid and formal claim of privilege.

5. Whether, under the Constitution, a grand jury has the authority to charge an incumbent President of the United States as an unindicted co-conspirator in a criminal proceeding.

6. Whether the Special Prosecutor has made the necessary showing required to obtain materials under Rule 17(c), Federal Rules of Criminal Procedure, and *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

The constitutional provisions, statutes, rules, and regulations involved are set forth in the Appendix, *infra*, pp. 138–164, are:

Constitution of the United States:
Article I, section 2, clause 2.
Article I, section 3, clause 7.
Article I, section 5, clause 2.
Article I, section 6.
Article II, section 1.
Article II, section 1, clause 1.
Article II, section 1, clause 8.
Article II, section 2, clause 1.
Article II, section 2, clause 7.
Article II, section 3.
Article II, section 3, clause 1.
Article II, section 3, clause 7.
Article III, section 2.

Statutes of the United States:
18 U.S.C. 371; 62 Stat. 701.
18 U.S.C. 1001; 62 Stat. 749.
18 U.S.C. 1503; 82 Stat. 1115.
18 U.S.C. 1621; 78 Stat. 995.
18 U.S.C. 1623; 84 Stat. 932.
Jencks Act, 18 U.S.C. 3500; 84 Stat. 926.
18 U.S.C. 3731; 84 Stat. 1890.
28 U.S.C. 44; 82 Stat. 183.
2 U.S.C. 133; 85 Stat. 742.
28 U.S.C. 1254; 62 Stat. 928.
28 U.S.C. 1291; 72 Stat. 348.
28 U.S.C. 1651; 63 Stat. 102.
Presidential Libraries Act, 44 U.S.C. 2107; 82 Stat. 1288.
44 U.S.C. 2108(c); 82 Stat. 1289.

Rules:
Rule 26, Federal Rules of Civil Procedure.
Rule 6(e), Federal Rules of Criminal Procedure.
Rule 17(c), Federal Rules of Criminal Procedure.

Regulations:
Department of Justice Order No. 551–73 (November 2, 1973), 38 Fed. Reg. 30, 738, adding 38 C.F.R. ss 0.37, 0.38, and Appendix to Subpart G–1.
Department of Justice Order No. 554–73 (November 19, 1973), 38 Fed. Reg. 32, 805, amending 38 C.F.R. Appendix to Subpart G–1.

STATEMENT

This case presents for review an opinion and order of a federal district court holding that it has jurisdiction to intervene in a dispute between the President and the Special Prosecutor, jurisdiction to review a claim of privilege asserted by the President as to various executive materials, and jurisdiction to order the President, by compulsory process, to produce subpoenaed items for *in camera* review. Review is also sought of the lower court's order denying, without opinion, the President's motion to expunge from the record any finding by a grand jury that he was an unindicted co-conspirator in a criminal proceeding.

A. THE INDICTMENT

On June 5, 1972, a federal grand jury of the United States District Court for the District of Columbia was empanelled. To assist that grand jury, the President voluntarily waived all claim of privilege as to the personal testimony of his advisors and aides on all Watergate-related matters. Following the decision in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the President provided the

Footnotes at end of article.

grand jury with numerous documents and other materials including tape recordings.

On March 1, 1974, the grand jury returned an indictment charging seven individuals with one count each of conspiracy, 18 U.S.C. 371 (J.R. 5a–39a).[2] Four of the defendants were also charged with counts of obstruction of justice, 18 U.S.C. 1503; making false statements to agents of the Federal Bureau of Investigation, 18 U.S.C. 1001; perjury, 18 U.S.C. 1621; and making false declarations to a grand jury or court, 18 U.S.C. 1623.[3]

On March 1, 1974, the grand jury also lodged a report with the district court which it filed under seal. In its accompanying report and recommendation, the grand jury stated that it had heard evidence bearing on matters within the primary jurisdiction of the Committee of the Judiciary of the House of Representatives and recommended that the sealed materials be submitted to the Committee. This material was subsequently transmitted to the Committee by order of the court dated March 18, 1974.[4]

Subsequently, it was learned that the grand jury in a separate report named, among others, Richard M. Nixon as an "unindicted co-conspirator."

B. THE SPECIAL PROSECUTOR'S SUBPOENA

On April 16, 1974, the Special Prosecutor, Leon Jaworski, moved the district court for an order pursuant to Rule 17(c), Federal Rules of Criminal Procedure, directing the issuance of a subpoena to Richard Nixon, President of the United States, for the production and inspection of certain presidential material. This material consists of tapes and other electronic and mechanical recordings or reproductions and any memoranda, papers, transcripts, and other writings, relating to 64 confidential conversations between the President and his closest advisors. (J. A. 42a–46a). This motion was subsequently joined in by three of the defendants, Robert C. Mardian, John D. Ehrlichman, and Charles W. Colson, who is no longer a defendant in this proceedings.[5]

On May 1, 1974, the President, through his counsel, entered a special appearance and moved to quash the subpoena *duces tecum*. (J.A. 47a) A formal claim of privilege was filed by the President regarding the subpoenaed presidential materials with the exception of those portions of the conversations which had already been made public by the President. (J.A. 48a) On May 3, 1974, the Special Prosecutor moved the district court for an order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedures, authorizing the disclosure of matters occurring before the grand jury to the extent necessary to prepare its memorandum in response to the President's motion to quash. At an *in camera* hearing on May 6, 1974, the district court ruled that the grand jury material could be filed with the court under seal. On May 10, 1974, the Special Prosecutor submitted a memorandum in opposition to the motion to quash, accompanied by an appendix to support a claim of relevancy for the particular subpoenaed materials. (S.P.S.A.)[6] In part, the Special Prosecutor in this memorandum relied upon the finding by the grand jury that the President was an unindicted co-conspirator to establish the relevancy of many of the subpoenaed items and to overcome the presumptively privileged nature of the material as required by *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973).

On May 13, 1974, the President, through his counsel, filed a special appearance and motion to expunge the grand jury finding on the ground that such a finding was beyond the authority of the grand jury. (J.A. 3a) The President also submitted a point-by-point response to the Special Prosecutor's analysis of the relevancy of the subpoenaed materials. (P.S.A. 1–7)[7] Following oral arguments heard *in camera* on May 13, 1974, the Special Prosecutor filed a further memorandum under seal on May 17, 1974.

C. DISTRICT COURT'S OPINION

On May 20, 1974, the district court entered its opinion and order denying the President's motion to quash and his motion to expunge. The court further ordered the President to produce the subpoenaed materials together with an index and analysis of each item, and a copy of the tape of each portion of those conversations previously transcribed and published. (J.A. 3a)

Regarding its jurisdiction, the district court held that under *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the court had the authority to rule on the scope and applicability of executive privilege and that its jurisdiction was not affected by the intra-executive nature of the dispute, for the President was required to consult with congressional leaders prior to attempting to abridge the independence and authority granted to the Special Prosecutor. In the absence of such action, the court found it had jurisdiction to entertain this suit. The district court did not, however, address itself to the question of whether the President had ever delegated to the Special Prosecutor his authority as Chief Executive to determine what materials would not be available to a federal prosecutor upon request, and in the absence of such a delegation on what basis the court had jurisdiction to intervene in the prosecutorial discretion of the President.

On the merits, the court ruled that the requirements of Rule 17(c) had been met and that the Special Prosecutor had demonstrated the "compelling need" required under *Nixon* v. *Sirica* to overcome the presumptively privileged nature of the presidential communications. Therefore, the court ordered the President or any subordinate officer with custody or control of the materials to deliver the subpoenaed items to the court on April 18, 1974. The district court denied, without opinion, the President's motion to expunge the finding of the grand jury that the President was an unindicted co-conspirator. (J.A. 3a)

D. SUBSEQUENT EVENTS

On May 24, 1974, the President filed a notice of appeal in the district court, docketed the appeal in the Court of Appeals for the District of Columbia Circuit (D.C. Cir. No. 74–1534), and filed therein under a seal, a petition for a writ of mandamus (D.C. Cir. No. 74–1532). On May 24, 1974, the Special Prosecutor filed in this Court a petition for a writ of certiorari before judgment which was granted with expedited briefing schedule, by order of May 31, 1974.[8] The President, through his counsel, on June 6, 1974, filed under seal a cross-petition for a writ of certiorari before judgment which was granted by order of June 15, 1974.

On June 6, 1974, the President, through his counsel, also entered a special appearance and moved the district court to lift its protective order regarding the grand jury's naming of certain individuals as co-conspirators and to any additional extent deemed appropriate by the court on the grounds that public disclosure by the news media made the reasons for continuance of the protective order no longer compelling. By order of June 7, 1974, the district court removed its protective order. On June 10, 1974, the Special Prosecutor and counsel for the President jointly moved this Court to unseal those portions of the briefs and oral argument in the lower court which related to the action of the grand jury regarding the President. This Court denied that motion on June 15, 1974, except for the grand jury's immediate finding relating to the status of Richard M. Nixon as an unindicted co-conspirator.

The President's cross-petition for a writ of certiorari raised the issue of a grand jury's authority to charge an incumbent President as an unindicted co-conspirator in a criminal proceeding. In conjunction therewith, the President, through his counsel, on June 10, 1974, entered a special appearance and pursuant to Rule 6(e), Federal Rules of Criminal Procedure, moved the district court to disclose to the President any and all transcripts, tapes and recordings of Presidential conversations, grand jury minutes and exhibits, and any and all other matters occurring before the grand jury which pertained to the grand jury action in naming or authorizing the Special Prosecutor to identify Richard M. Nixon as an unindicted co-conspirator. It was requested that this material be transmitted as part of the record to this Court. This motion was denied by the district court on June 18, 1974.

On June 19, 1974, the President moved this Court to have the materials disclosed and transmitted to this Court in order that both the President and the Court would have the entire record upon which to present and decide this case.

INTRODUCTION

In a very real sense, every case that comes before this Court is unique; but few in the Nation's history have cut so close to the heart of the basic constitutional system in which our liberties are rooted.

Thus the stakes are enormously high, from a constitutional standpoint. At the same time, and making the Court's judgment more difficult, the case comes wrapped in the passions of a dramatic conflict which has dominated the Nation's headlines for more than a year. This is a conflict which now has involved all three branches of the Government, and pits their constitutional rights and responsibilities one against another.

Just as the first allegiance of this Court is to the Constitution, the first responsibility of this Court must now be to decide the case before it in a way which preserves the balances that are central to the Constitution.

At its core, this is a case that turns on the separation of powers.

All other considerations are secondary, because preserving the integrity of the separation of powers is vital to the preservation of our Constitution as a living body of fundamental law. If the arguments of the Special Prosecutor were to prevail, the constitutional balance would be altered in ways that no one alive today could predict or measure.

The questions presented reach beyond the exigencies of the moment; beyond the needs of any particular criminal prosecution; beyond the interests of any particular Administration.

The extraordinary nature of this case stems partly from the issues directly presented, and partly from the coloration placed on those issues by the surrounding circumstances.

It would do justice neither to the parties nor to the issues if this were treated as just another case, or simply as an appeal from a discovery procedure in a criminal action against private individuals. It is, in fact, an extraordinary proceeding intrinsically related to the move now pending in the Congress to impeach the President of the United States.

In effect, court process is being used as a discovery tool for the impeachment proceedings—proceedings which the Constitution clearly assigns to the Congress, not to the courts. This is so because of the particular relationship which has evolved among the Special Prosecutor, the district court and the House Judiciary Committee, and because of the impact which any presidential action with regard to the subpoenas issued would inevitably have in the impeachment proceedings. As a result of the history of the so-called Watergate cases in the district court, the Special Prosecutor is well aware that the district court feels obligated to turn over to the Judiciary Committee any information that might bear on the pending congressional action. Thus the effect being pressed

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by the Special Prosecutor would be to produce evidence for the Congress that the Congress could not obtain by its own procedures.

As a result, there has been a fusion of two entirely different proceedings: one, the criminal proceeding involving various individual defendants, and the other the impeachment proceeding involving the President. The first lies in the courts; the second lies in the Congress. The Special Prosecutor strengthens this fusion by utilizing the unsubstantiated, unprecedented and clearly unconstitutional device of naming the President as an unindicated co-conspirator in the criminal cases, with the apparent purpose of strengthening his claim to recordings of presidential conversations as potential evidence in the criminal cases.

Two processes—each with an entirely different history, function and structure—have become intertwined, and the resulting confusion, both conceptual and procedural, is manifestly unfair to the President as an individual and harmful to the relationship between his office and the legislative branch.

To place the present events in perspective, it is useful to reflect on how this case would have been viewed in normal times. If there were no impeachment pending, and if the Special Prosecutor used the device of naming the President as an unindicted co-conspirator in order to obtain recordings of private presidential conversations, on which the President had interposed a claim of executive privilege, the Special Prosecutor's request would be given short shrift.

If this procedure were allowed to go forward, inevitably affecting the impeachment inquiry, it would represent an expansion of the Court's jurisdiction into the impeachment process that the Constitution assigns solely to the House of Representatives. Whatever the combination of circumstances producing it, the result would be clear: an expansion of the Court's jurisdiction into a realm that the Constitution clearly prohibits. It follows necessarily that the courts may not be used, either deliberately of inadvertently, as a back-door route to circumvent the constitutional procedures of an impeachment inquiry, and thus be intruded into the political thicket in this most solemn of political processes.

Anyone who has practiced before this Court is familiar with the observation of Justice Holmes that "(g)reat cases, like hard cases, make bad law." This is true if the pressures of the moment allow the courts to be swayed from their rigid adherence to great principles; if remedies for the perceived passing needs of the moment are allowed at the expense of those enduring constitutional doctrines that have preserved our system of ordered liberty through the ages. Of those doctrines, none is more fundamental to our government structure itself than the separation of powers—with all of its inherent tensions, with all of its necessary inability to satisfy all people or all institutions all of the time, and yet with the relentless and saving force that it generates toward essential compromise and accommodation over the longer term even if not always in the shorter term. Often a price has to be paid in the short term in order to preserve the principle of separation of powers, and thereby to preserve the basic constitutional balances, in the longer term. The preservation of this principle, the maintenance of these balances, are at stake in the case now before this Court.

SUMMARY OF ARGUMENT

The district court order of May 20, 1974, is an appealable order under 28 U.S.C. 1291, for unless review is granted now the President's claimed right will be irremediably lost. This Court also has jurisdiction to entertain and decide the petition for mandamus transmitted by the Court of Appeals under 28 U.S.C. 1651 because the lower court's decision exceeded that court's jurisdiction.

Under the doctrine of separation of powers, the Judiciary is without jurisdiction to intervene in the intra-branch dispute between the President and the Special Prosecutor. The duty to determine whether disclosure of confidential presidental communications is in the public interest has not been, and cannot be, delegated to the Special Prosecutor.

Under the standards set forth in *Baked* v. *Carr*, 369 U.S. 186 (1962), this intra-branch dispute raises a political question which the federal courts lack jurisdiction to decide. The district court does not have the power to substitute its judgment for that of the President on matters exclusively within the President's discretion.

Inherent in the executive power vested in the President under Article II of the Constitution is executive privilege, generally recognized as a derivative of the separation of powers doctrine. The powers traditionally asserted by the other branches support the validity of the claim of confidentiality invoked by the President.

Even if this Court were to determine that a presidential privilege is subject to judicial supervision, the lower court erred in refusing to quash the subpoena since the Special Prosecutor failed to demonstrate the "unique and compelling need" required by *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973), to overcome the presumptively valid claim of presidential privilege.

However, even before a determination can be made as to whether the President's assertion of executive privilege is overcome, the Special Prosecutor has the burden of proving that his subpoena meets the requirements of Rule 17(c), Federal Rules of Criminal Procedure. An analysis of the showing made by Special Prosecutor in the court below demonstrates that he failed to meet the case law criteria developed to prevent abuse of Rule 17(c). For this reason alone the district court erred in refusing to quash the subpoena.

The President is not subject to the criminal process whether that process is invoked directly or indirectly. The only constitutional recourse against a President is by impeachment and through the electoral process. The naming of the President as an unindicted co-conspirator by an official body is a nullity which both prejudices the ongoing impeachment proceeding and denies due process to the President. The grand jury's action does not constitute a *prima facie* showing of criminality and is without legal effect to overcome a presidential claim of executive privilege.

ARGUMENT

I. THIS COURT MAY REVIEW THE MAY 20, 1974, ORDER OF THE DISTRICT COURT BY EITHER ONE OF TWO ALTERNATIVE METHODS:

A. BY APPEAL PURSUANT TO 28 U.S.C. 1291

The district court order of May 20, 1974, denying the motion of Richard Nixon, President of the United States, to quash a subpoena *duces tecum* directed to him at the request of the Special Prosecutor is an appealable order under 28 U.S.C. 1291.[9]

28 U.S.C. 1291 provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Under the criteria established by this Court for determining finality, it is clear that this order should be considered a "final order" and therefore subject to an immediate appeal. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court held that a denial of defendant-corporation's motion to compel the plaintiff-shareholder to produce security for payment of reasonable expenses incurred by the corporation in defense of the shareholder's derivative suit, should the plaintiff's claim fail, constituted an appealable order under 28 U.S.C. 1291. Justice Jackson explained the rationale of the Court:

"[T]he order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." (337 U.S. at 546).

Following this decision, the Court in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), reiterated an order granting a motion to strike a particular cause of action (a second cause of action survived). In discussing appealability, Justice Black emphasized that "this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.'" 379 U.S. at 152. He further noted that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" 379 U.S. at 152–153.

In light of the foregoing judicial precedent, this Court, on May 28, 1974, decided *Eisen* v. *Carlisle & Jacquelin*, — U.S. — (42 U.S.L.W. 4804, May 28, 1974). In *Eisen*, the plaintiff filed a class action on behalf of himself and all other odd-lot traders on the New York Stock Exchange charging various brokerage firms with numerous breaches of federal antitrust and securities laws. After a myriad of battles over the class action aspect, the district court finally held the suit maintainable as such an action. The brokerage firms appealed to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. 1291, over the plaintiff's vigorous objection of non-appealability. The Court of Appeals, for reasons irrelevant to this case, dismissed the suit as a class action. On further review, this Court met the issue of appealability head-on.

This Court, in concluding that the Court of Appeals had possessed jurisdiction under 28 U.S.C. 1291, relied upon *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). Justice Powell, speaking for the Court, called attention to two dispositive elements: (1) The order of the district court had *conclusively* determined, by rejection, the claim of the brokerage firms on the class action issue, and (2) That order was "a final disposition of a claim of right which is not an ingredient of the cause of action and does not require consideration with it," i.e. "it concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment." 42 U.S.L.W. at 4808–4809.

Applying these tests to the facts of this particular case in not difficult; neither is the result. The district court's order rejected the President's position, both on jurisdictional grounds and on the merits, and ordered the production of all subpoenaed items for an *in camera* inspection.[10] Therefore unless view is granted at this stage of the proceeding, the President's claimed right will be irremediably lost[11] because, as a non-party to the primary suit, he will not be able to appeal from the criminal judgment.[12] Moreover, if the materials requested are absolutely privileged, the irreparable nature of the injury resulting from disclosure cannot be questioned.

In a closely analogous case also involving the appealability of a ruling by a district court on a motion to quash a subpoena *duces tecum*, the Court of Appeals for the Fifth Circuit in *Caswell* v. *Manhattan Fire and Marine Insurance Co.*, 399 F. 2d 417, 422 (5th Cir. 1968), stated the following:

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"Manhattan contends we are without jurisdiction to review this question. We disagree. Although an order granting or denying a motion to quash a subpoena is normally considered interlocutory and not subject to review by immediate appeal, such an order, like other discovery orders, may be assigned as error on appeal from a final judgment on the merits. See 'Developments in the Law—Discovery,' 74 Harv. L. Rev. 940, 992 (1961). A nonparty may appeal an order denying his motion to quash when under the circumstances he would be otherwise denied an effective mode of review. *Carter Products, Inc.*, v. *Eversharp, Inc.*, 360 F. 2d 868 (7th Cir. 1966); *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964, 85 S. Ct. 1110, 14 L. Ed. 2d 155 (1965). Compare *Robinson* v. *Bankers Life & Cas. Co.*, 226 F. 2d 834 (6th Cir. 1965). *An order requiring a nonparty to produce documents often will be final insofar as the nonparty is concerned.* Moreover in many cases substantial prejudice may result from denying immediate appellate review." 399 F. 2d at 422. (Italic added.)

For the above reasons, the same conclusion is mandated here. More recently, the Court of Appeals for the District of Columbia Circuit in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), held that the district court's denial of the President's motion to quash a grand jury subpoena was reviewable under the All Writs Act, although the court did not discard "direct appeal as an alternative basis for review in the particular situation before us." 487 F. 2d at 707 n. 21. In addition, the court made particular reference to the unusual circumstances arising in an action involving the President, which further emphasize the critical need for appellate review at this stage of the proceeding:

"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." (487 F. 2d at 707 n. 21).

Although there is, as a general rule, a need to avoid piecemeal litigation which may unduly hamper the efficient administration of the courts, *Alexander* v. *United States*, 201 U.S. 117 (1906), this practical consideration has always given way when the rights of an individual will be irreparably affected by delay. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152–153 (1964).

Under the circumstances presented, the district court's denial of the President's motion to quash is a final order, and is therefore appealable under 28 U.S.C. 1291.

B. BY ENTERTAINING AND DECIDING A PETITION FOR WRIT OF MANDAMUS TRANSMITTING BY A COURT OF APPEALS

We also submit that this Court has jurisdiction to entertain and decide the petition for mandamus transmitted by the court of appeals to this Court under 28 U.S.C. 1651. Pursuant to this Court's order granting the Special Prosecutor's petition for certiorari, and the President's cross-petition for certiorari, the entire record before the court of appeals has been transmitted to this Court under the mandate of Rule 25 of the Rules of the Supreme Court of the United States.

The All Writs Statute of the Judicial Code of 1948, 28 U.S.C. 1651, provides that:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

(b) An alternative writ or *rule nisi* may be issued by a justice or judge of a court which has jurisdiction.

It is appropriate in the present case that this Court entertain and decide the petition for mandamus, because the order entered by the trial court demanding *in camera* inspection of the tape recordings is clearly erroneous and beyond that court's jurisdiction in that it purports to intervene in a wholly intra-executive dispute. In addition, this Court's discretion to issue this extraordinary writ should be exercised at this stage of the proceedings because judicial action which would necessitate presidential involvement in a criminal contempt proceeding would be action totally insensitive to the role of the Office of the Presidency in our framework of government, without judicial benefits to be gained.

This Court in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260 (1957), recognized that there are instances when a judgment that is not final and appealable under 28 U.S.C. 1291 must be subject to further review so as not to result in an injustice, and Congress via 21 U.S.C. 1651 has provided an effective remedy. In determining what is "necessary or appropriate" within the scope of 21 U.S.C. 1651, it is clear that this section operates in aid of this Court's appellate jurisdiction, for in *Ex parte Peru*, 318 U.S. 578 (1943), this Court considered this question in relationship to the Judiciary Act of 1925, the predecessor of this Act, and concluded that:

"The jurisdiction of this Court to issue common law writs in aid of its appellate jurisdiction has been consistently sustained. The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so. Such has been the office of the writs when directed by this Court to district courts, both before the Judiciary Act of 1925 and since". (318 U.S. at 582–583).

This Court also stated that:

"The jurisdiction of this Court to issue such [common law writs], like its jurisdiction to grant certiorari, is discretionary. The definite aim of the 1925 Act was to enlarge, not to destroy, the Court's discretionary jurisdiction. That aim can hardly give rise to an inference of an unexpressed purpose to amend or repeal the statutes of the United States conferring jurisdiction on the Court to issue the writs, or an inference that such would have been the purpose had repeal been proposed. The exercise of that jurisdiction has placed no undue burden on this Court." (318 U.S. at 585).

Once having the power to grant this writ, we submit this is a most appropriate instance to exercise that power, for the above reasons. In its recent statement this Court reviewed many of the instances where the writ of mandamus has been used; however, none are as timely and imperative as the present case. In *Will* v. *United States*, 389 U.S. 90 (1967), Chief Justice Warren, speaking for the Court, stated:

"The peremptory writ of mandamus 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.' *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction', it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy, *DeBeers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945). Thus, the writ has been invoked where unwarranted judicial action threatened 'to embarrass the execution arm of the Government in conducting foreign relations,' *Ex parte Peru*, 318 U.S. 578, 588 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland* v. *Soper*, 270 U.S. 9 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States* v. *United States Dist. Court*, 344 U.S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); see *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 706, 707 (1927) (dictum)." (389 U.S. at 95).

Thus, we submit that it is an appropriate exercise of jurisdiction under 28 U.S.C. 1651 for this Court to entertain a writ of mandamus transmitted to it by a Court of Appeals.

II. THE COURT LACKS JURISDICTION OVER AN INTERNAL DISPUTE OF A CO-EQUAL BRANCH [13]

Under the firmly established doctrine of separation of powers, the Judiciary is without jurisdiction to intervene in the solely intra-executive dispute presented here. This entire dispute, between two entities within the executive branch of the government, concerns the prosecutorial discretion vested in the executive branch and involves only the issue of what executive materials should be available to aid in a criminal prosecution. In this respect, this case differs fundamentally from *Nixon* v. *Sirica* 487 F.2d 700 (D.C. Cir. 1973), which involved a grand jury subpoena directed to the President and as such represented an inter-branch dispute.

The ultimate authority over all executive branch decisions is, under Article II of the Constitution, vested exclusively in the President of the United States. The President has neither waived nor delegated to the Special Prosecutor his duty to determine what confidential presidential documents shall be made available to another executive officer. Therefore, in the absence of a delegation of this duty, the President, as the chief executive officer, and not the Special Prosecutor or the Judiciary, is and remains the final authority as to what presidential material may be utilized in the furtherance of any prosecution. Because the President has not delegated this duty and responsibility to the Special Prosecutor, it is unnecessary for this Court to even consider whether such a delegation of responsibility is constitutionally permissible. *United States* v. *Burr*, 25 F. Cas. 187, 192 No. 14694 (C.C.D. Va. 1807),[14] See also *Williams* v. *United States*, 1 How. (14 U.S.) 290, 297 (1843); *Runkle* v. *United States*, 122 U.S. 543, 557 (1887); *United States* v. *Fletcher*, 148 U.S. 84, 88 (1893); *French* v. *Weeks*, 259 U.S. 326, 334 (1922); 38 Op. Att'y. Gen. 457 (1936). Accordingly, this entire dispute is intra-executive in nature and beyond the jurisdiction of this Court.[15]

At the outset, we wish to make clear to the Court that we do not question the jurisdiction of the Court to resolve any disagreement or conflict between the various independent but co-equal branches of the government, *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (1803). Nor do we challenge the jurisdiction of the court to negate an act performed by one branch in excess of its constitutionally delegated authority. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). However, under the clearly enunciated doctrine of separation of powers adopted by the Framers of the Constitution, we do challenge the authority of the court or any branch of the government to intervene in a solely intra-branch dispute, even at the request of a disputant, whether an individual member of that branch, an established committee, or a recognized department. Certainly, an intra-branch dispute, regardless of the context in which it arises, is within the exclusive jurisdiction of that body alone and can properly be resolved, if necessary, only by the constitutionally desig-

Footnotes at end of article.

nated official or body vested with the ultimate responsibility for that branch of government.

The concept of separation of governmental powers is deeply rooted in the history of political theory, finding its early expression in the works of Aristotle [16] who recognized the fundamental distinction between the legislative, executive and judicial functions.[17]

Although subsequently elaborated upon by many historians and scholars, the principal of separation of the branches of government was most familiar to colonial America in the writings of Locke [18] and Montesquieu.[19]

In the most influential political work of its day, Montesquieu in *The Spirit of Laws* wrote:

"In every government there are three sorts of power: the legislative, the executive * * * the judiciary * * * When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; * * * Again, there is no liberty if the judicial power be not separated from the legislative and executive.

"Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

"There would be an end of everything were the same men or the same body, whether of nobles or of the people to exercise all three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." [20]

It was this philosophy that influenced the Framers of the Constitution as they began their task of developing a form of government that would survive change and crisis over the long future.[21]

Even prior to the opening days of the Constitutional Convention, the doctrine of separation had been accepted by the states. This is exemplified by the Constitution of the State of Massachusetts, adopted in 1780, which provided:

Article XXX: In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.[22]

At the Constitutional Convention, the theory of separation was not seriously questioned. The tripartite form of government introduced by the Virginia proposal [23] was adopted in principle by the Convention [24] and referred to the Committee for Detail for implementation.[25] As described by the notes of James Wilson, the Committee set forth the tripartite principle and specifically stated that the legislative power of the United States shall be vested in Congress, the executive power in a single person, and the judicial power in a Supreme Court.[26] Following the submission of the Committee report to the full Convention, the structure and organization of the three branches were extensively debated but not the principle of separation itself. The separation doctrine as submitted by the Committee on Detail emerged from the debates intact and remained substantially unchanged by the Committee on Style.[27]

Although it is clear that a system of checks and balances was incorporated into the structure to avoid a domination or usurpation of power by any one branch, it was equally clear that each branch would be free to carry on its own delegated functions free from interference by a coordinate branch. James Madison eloquently stated the sentiment, which pervaded the Convention: "If it be essential to the preservation of the liberty that the Legisl:Execut; & Judiciary powers be separate, it is essential to the maintenance of the separation, that they should be independent of each other." [28] In further emphasizing this concept of separation and independence, James Wilson wrote that the independence of each department requires that its proceedings "shall be free from the remotest influence, direct or indirect of either of the other two." [29]

The doctrine of separation of powers, as a vital and necessary element of our democratic form of government, has long been judicially recognized. *United States* v. *Klein*, 13 Wall (80 U.S.) 128 (1872). As early as 1879, this Court stressed the integrity and independence of each branch of the government, when it stated: "One branch of the government cannot encroach on the domain of another without danger." The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking Fund Cases*, 99 U.S. 700, 718 (1879). Since that time, the Court has continually reaffirmed this doctrine is an unbroken line of decisions. In *O'Donoghue* v. *United States*, 289 U.S. 516 (1933) Justice Sutherland speaking for the Court stated:

"If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly, or indirectly, to, the coercive influence of either of the other departments." (289 U.S. at 530).

Again two years later, the Court added:

"The fundamental necessity of maintaining each of the three general departments of government, entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality. *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629–630 (1935) (emphasis added). See also: *Monaco* v. *Mississippi*, 292 U.S. 313 (1934); *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582 (1949); *Marshall* v. *Gordon*, 243 U.S. 521 (1917)."

It is this constitutional principle which establishes the most fundamental jurisdictional limitation on each of the three branches and prohibits each from intervening in the discretionary powers constitutionally vested in another coordinate branch.

In specifically referring to the jurisdiction of the Judiciary, Chief Justice Warren stated in *Flast* v. *Cohen*, 392 U.S. 83 (1968)—

"The jurisdiction of federal courts is defined and limited by Article III of the Constitution . . . [I]n part [that article] defines the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of the government." (392 U.S. at 94–95).

Stated more simply by Justice Story, neither of the departments in reference to each other "ought to possess directly or indirectly an overwhelming influence in the administration of their respective powers." [30]

This concept was elaborated by the Court in *Springer* v. *Philippine Islands*, 277 U.S. 189 (1927):

"Some of our state constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. See *Kilbourn* v. *Thompson*, 103 U.S. 168, 190–191 and this separation and the consequent exclusive character of the powers conferred upon each of the *three departments is basic and vital—not merely a matter of governmental mechanism* . . .

"It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise explicitly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes rather than casts doubts upon, *the generally inviolate character of this basic rule.*" 277 U.S. at 201–202 (Italics added).

It is therefore evident that the district court had no jurisdiction to settle or intervene in an intra-executive disagreement relating to the evidentiary material to be made available from one executive department to another. The settlement of such a dispute in all circumstances is within the exclusive jurisdiction of the chief executive officer, for as this Court stated in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935):

"So much is implied in the very fact of the separation of powers of these departments by the Constitution, and in the rule which recognizes the essential co-equality. The sound application of the principal that makes one master in his own house precludes him from imposing his control in the house of another who is master there." (295 U.S. at 629–630).

The district court's lack of jurisdiction here is illustrated by a simple analogy. If two congressional committees simultaneously claim jurisdiction over a particular bill, it is unlikely that anyone would question that their sole recourse is an appeal to the congressional committee designated to resolve such disputes, or in its absence, to the Speaker of the House. It is inconceivable that any court would conclude that it had jurisdiction to resolve the matter, even if one or both of the disputants were to appeal to the Judiciary.

Similarly, within the executive branch, if an Assistant United States Attorney seeking information to bolster his case against an individual, were denied access to executive documents by either the Attorney General or the President, he could not properly seek assistance from the Judiciary, for a court would have no jurisdiction in the matter. The same result is mandated here, for as this Court clearly stated in *Kilbourn* v. *Thompson*, 103 U.S. 168, 190 (1880):

"It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

In attempting to negate this fundamental jurisdictional limitation, the Special Prosecutor relies heavily upon this Court's decision in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 (1949) for the proposition that the Judiciary does have jurisdiction to intervene in this dispute. However, that case is plainly inapplicable for it did not involve an intra-branch dispute. On the contrary, there the Department of Justice, on behalf of the executive branch, brought suit against various independent railroads, and on appeal the Commission, a creation of the legislative branch, was joined as a party defendant. Under those circumstances, this Court had jurisdiction to resolve the dispute, for the ICC has been firmly

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recognized as an administrative body created by Congress to carry into effect its legislative policies and like the Federal Trade Commission, "cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935). Consequently, that dispute was plainly inter-branch in nature, and therefore within the Court's jurisdiction to resolve controversies arising among the various branches. That case does not, however, in any way support the proposition that the court has jurisdiction to entertain a solely intra-executive dispute for the Office of Special Prosecutor, unlike the Commission, was created by the executive branch, within the executive branch, and performs solely executive functions.

In this instance, there can be no question that under the doctrine of separation of powers, the Court lacks jurisdiction to intervene in an intra-executive dispute concerning the availability and use of executive documents to assist in the prosecution of any individual charged with criminal conduct. As the Judiciary has long recognized, under Article II, section 3 of the Constitution, it is the exclusive prerogative of the executive branch, not the Judiciary, to determine whom to prosecute, on what charges, and with what evidence or information. *Confiscation Cases*, 7 Wall (74 U.S.) 454 (1869); *United States* v. *Cox*, 342 F. 2d 167 (5th Cir), *cert. denied*, 381 U.S. 935 (1965); *Smith* v. *United States*, 375 F. 2d 243, 247 (5th Cir. 1967); *District of Columbia* v. *Buckley*, 128 F. 2d 17 (1942); *Pugach* v. *Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); and *In Re Grand Jury January 1969*, 315 F. Supp. 662 (D. Md. 1970). Under the Constitution, the President, as the highest executive officer, was expressly delegated all prosecutorial authority when he alone was vested with the responsibility "to take care that the laws be faithfully executed." In *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 164–166 (1803), Chief Justice Marshall expressed the views of the Court as to its jurisdiction to intervene in the authority constitutionally delegated to the President.

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. *The subjects are political: they respect the nation, not individual rights, and being instrusted to the executive, the decision of the executive is conclusive.*" (1 Cranch at 165–166) (emphasis added).

Thus, the courts have uniformly recognized that under the Constitution, the Judiciary was given no role in determining any matters within the executive's prosecutorial discretion. As demonstrated in *United States* v. *Cox*, 342 F. 2d 167 (5th Cir.) *cert. denied*, 381 U.S. 935 (1965), even when the executive branch determines, in the face of a grand jury finding of probable cause, that it will not prosecute a particular individual, the courts lack jurisdiction to intervene. In discussing the "absolute and exclusive discretion" of the executive branch in such matters, Judge Wisdom of the United States Court of Appeals for the Fifth Circuit stated in *United States* v. *Cox:*

"[W]hen, within the context of law-enforcement, national policy is involved, because of national security, conduct of foreign policy, or a conflict between two branches of government, the appropriate branch to decide the matter is the executive branch. The executive is charged with carrying out national policy on law-enforcement and, generally speaking, is informed on more levels than the more specialized judicial and legislative branches. In such a situation, a decision not to prosecute is analogous to the exercise of executive privilege. The executive's absolute and exclusive discretion to prosecute may be rationalized as an illustration of the doctrine of separation of powers, but it would have evolved without the doctrine and exists in countries that do not purport to accept this doctrine." (concurring opinion) (342 F. 2d at 193).

A fortiori, if it is solely an executive decision to prosecute, it follows that the courts are equally powerless to determine what material within the executive branch must be used in the case. Such a decision is exclusively within the power delegated by the Constitution to the Chief Executive; and the right of the Chief Executive to determine what presidential material shall or shall not be used in the furtherance of this or any prosecution has not been delegated to the Special Prosecutor.

If the President were interfering with a power that had been delegated to the Special Prosecutor, the conclusion of the district court that the President must, under 38 Fed. Reg. 30,738, first consult congressional leaders before taking such action might have been correct. However, it is absolutely clear from the regulation governing the authority of the Special Prosecutor, that the President has not delegated to the Special Prosecutor or any subordinate official, his duty to determine the privileged nature and use of executive material. Therefore, the district court plainly erred in asserting that it had jurisdiction to intervene in this suit on the ground that the President was abridging the independence of the Special Prosecutor over matters that were delegated to him. Moreover, it is unnecessary for this Court to speculate on the jurisdictional basis for this suit if the President, had, in fact, delegated his right and responsibilities concerning executive materials to the Special Prosecutor.

On November 27, 1973, Acting Attorney General Bork recreated the Office of Special Prosecutor and delegated to it his authority over all Watergate-related matters. The terms of this delegation are set forth in 38 Fed Reg. 30,738 (November 7, 1973) and the letter of Acting Attorney General Bork to Mr. Leon Jaworski, dated November 21, 1973. In accordance with that agreement, the President has not in the past nor does he here challenge those powers that were given to the Special Prosecutor in Watergate-related matters, including the right to conduct grand jury and other investigations, review documentary evidence available, and determine within the confines of the Constitution whom to prosecute and on what charges. Moreover, all decisions relating to the procedural aspects of prosecution including the right to request immunity for any witness are within the scope of his authority. In these and other areas delegated to him, the Special Prosecutor has had and continues to have complete independence.

However, as the agreement clearly shows on its face, the President has neither waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials, confidential in nature, which fall within the President's inherent authority to refuse to disclose to any executive officer. Nor did Acting Attorney General Bork attempt to delegate such authority to the Special Prosecutor.[21] On the contrary, the authority granted to the Special Prosecutor by then Acting Attorney General Bork in this regard was specifically limited to at most: "determin[ing] whether or not to contest the assertion of executive privilege or any other testimonial privilege." 38 Fed. Reg. 30,739 (1973).

From this provision, it is abundantly clear that the President has not waived or delegated to the Special Prosecutor his duty to determine within his discretion what executive materials were privileged. Since this decision was retained by the President and falls within the normal scope of his prosecutorial discretion over all criminal cases, the courts are powerless to intervene, even at the request of the Special Prosecutor.

Moreover, the court's fundamental lack of jurisdiction to intervene in the President's prosecutorial discretion or any other executive decision within the realm of his constitutionally delegated authority, was not altered by the arrangement between Acting Attorney General Bork and Mr. Jaworski allowing the Special Prosecutor to determine what testimonial privileges to challenge. It is an elementary rule of jurisdiction, that where the courts constitutionally lack jurisdiction to intervene in a decision, as they do in all decisions concerning prosecutorial discretion, such jurisdiction can neither be waived nor conferred by an agreement between the parties. *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934); *Industrial Addition Association* v. *I.R.S.*, 323 U.S. 310 (1945). Accordingly, even a decision by Mr. Jaworski that he wishes to contest a claim of privilege, either executive or testimonial, will not confer jurisdiction on the court.

Therefore, because the President in all criminal proceedings has the right to determine what confidential or sensitive material should not be used to assist a federal prosecutor, as this right was not delegated to the Special Prosecutor, the court remains without jurisdiction to intervene in his prosecutorial decision by the Chief Executive.

III. THIS INTRA-BRANCH DISPUTE DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III, SEC. 2 OF THE CONSTITUTION

We submit that the prior argument is dispositive of those questions presented to this Court by the Special Prosecutor and mandates that the district court order be vacated. However, should the Court determine that it does have jurisdiction to entertain this suit, it should of its own authority decline to do so, for a resolution of the fundamental issue as to whether it best serves the public interest to disclose presidential material, if not absolutely privileged, would require the Court to resolve a political question.

Underlying the doctrine of political question, is the fundamental notion that many controversies brought before the Court are best resolved by another branch of the government which possesses the necessary familiarity and expertise. This dispute raises a question of justiciability because it involves a political dispute solely between two officials of the executive branch—the President and a lesser official, the Special Prosecutor. Under Article III, Section 2 of the Constitution, the judicial branch does not have the constitutional power to resolve such a political question.

Courts have struggled to establish criteria that would enable them to identify and uniformly deal with political questions. Such criteria have been elusive. *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 164–166 (1803); *Coleman* v. *Miller*, 307 U.S. 433, 454–455 (1939); *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961); and *Flast* v. *Cohen*, 392 U.S. 83 (1968).

It was not until *Baker* v. *Carr*, 369 U.S. 186 (1962), however, that the Court finally succeeded in isolating and articulating a set of criteria for identifying an issue that presents a political question. The Court said:

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political

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department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." (369 U.S. at 217).

It is very clear that the Special Prosecutor's request that the district court overrule the legitimate invocation of executive privilege posed a nonjustifiable political question that meets the criteria established in *Baker*. There are no judicially discoverable standards or manageable criteria by which the courts could resolve this political question. The court below was asked to make an initial policy determination that the President has improperly or mistakenly invoked executive privilege against the Special Prosecutor. Such a determination by the lower court is constitutionally impermissible and violates the basic tenets of the separation of powers. Moreover, it is a determination beyond judicial abilities since the Court simply cannot substitute its judgment for that of the President. *Baker* is clear and compelling on this proposition and requires, in this case, recognition that the indicia of nonjusticiability are present.

Moreover, the matter before this Court is a nonjusticiable political question because it arises out of a President exercising a textually demonstrable grant of power from Article II of the Constitution.[32]

Any determination concerning the disclosure of presidential documents necessarily requires the exercise of the unique discretion and expertise of the Chief Executive, for such a decision involves "considerations of policy, considerations of extreme magnitude, and certainty, entirely incompetent to the examination and decision of a court of justice." *Ware* v. *Hylton*, 3 Dall. (3 U.S.) 199, 260 (1796). Only the President is in a position to determine which communications must be maintained in confidence, for the public interest in this matter is a judgment only the President can make. It involves a complex blend of policy, perspective, and knowledge uniquely within the province of the President and the executive branch. Neither the courts nor Congress can claim for themselves the elements of knowledge and perspective necessary to examine and review such a decision.

Gilligan v. *Morgan*, 413 U.S. 1 (1972), confirms the continuing validity of the concept of justiciability; in that case Chief Justice Burger said:

"Because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise. The voting rights cases, indeed, have represented the Court's efforts to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes, not the assumption of a continuing judicial review of substantive political judgments entrusted expressly to the coordinate branches of government." (413 U.S. at 11.).

Indeed, in recent political cases with political overtones such as *Powell* v. *McCormick*, 395 U.S. 486 (1969) and *Committee For Nuclear Responsibility* v. *Seaborg*, 463 F. 2d 788 (D.C. Cir. 1971), the issues related to the court's traditional role of interpreting the Constitution or legislation, vis-a-vis the constitutional rights of individuals, and thus are distinguishable from cases which concern discretionary decisionmaking by a coordinate branch of government.

This Court's resolution of this constitutional confrontation should not restrict the powers of the President by superimposing the decision of a subordinate in the executive branch over the Chief Executive through the impermissible intervention of the judicial branch. Rather, if any action is taken at all, the sole appropriate procedure for the consideration of alleged abuses is by way of impeachment. See *Ex Parte Grossman*, 267 U.S. 87, 121 (1925).

IV. A PRESIDENTIAL ASSERTION OF PRIVILEGE IS NOT REVIEWABLE BY THE COURT

A. THE SEPARATION OF POWERS DOCTRINE PRECLUDES JUDICIAL REVIEW OF THE USE OF EXECUTIVE PRIVILEGE BY A PRESIDENT

Justice Douglas, at the threshold of his dissent in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 105 (1973), remarked that "The starting point of decision usually indicates the result." In this case the foundation for the President's assertion of executive privilege is the Constitution.

The Constitution as the embodiment of the grand design of our political system was described in *Kilbourn* v. *Thompson*, 103 U.S. 168, 190–191 (1880), as follows:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all powers entrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."

The doctrine of the separation of powers, inherent in the nature of our government,[33] was reflected in the Constitution by the definitive expression of the Framers of each of the separate, co-equal branches. In the case at hand, Art. II, sec. 1, cl. 1 is in focus:

"The executive Power shall be vested in a President of the United States of America."

Inherent in that executive power, as part and parcel of the separation of powers, is executive privilege; in this case, more accurately described as presidential privilege. Unless this is so, the full panoply of power embodied in the executive power, would be, in reality, greatly diluted, a concept at odds with the intent of the Framers of the Constitution.[34 35]

A second parallel source of presidential privilege lies in the common law and its embodiment of the concept of confidentiality as a prerequisite to the effective administration of government. Rather than sapping vitality from our constitutional position, the common law, as described, adds increased force and dimension to it.[36]

This case is important, both to the parties involved and the citizenry at large. "The men and issues were large" [37] in 1807 when the Aaron Burr cases [38] were before Chief Justice Marshall and they are equally so here. Significantly, the precise issue of the "absoluteness" of executive privilege, as applied to presidential communications, has never been squarely confronted and definitely resolved by this Court. This Court's thoughtful consideration of the issues presented is of particular importance because the foundation of the district court's decision,[39] *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), rested upon a surface assessment that purely social or public policy considerations, as opposed to the Constitution, constituted the rationale for the privilege, 487 F. 2d at 712. As a result, the dimensions of presidential privilege have been miscalculated and its integrity impaired.

The Presidency, as the repository of the executive power of the United States, was forged out of intense controversy during the Constitutional Convention.[40] The debate is well-described by Clinton Rossiter:

"The prorgess of the Convention toward this decision was labored and uncertain, however, and it often seemed that the hard lessons of the previous decade would be wasted on a majority of the delegates. Persistent voices were raised against almost every arrangement that eventually appeared in Article II and Wilson and his colleagues were able to score their final success only after a series of debates, decisions, reconsiderations, references to committees, and private maneuvers that still leave the historian befuddled. I have followed the tortuous progress of the incipient Presidency through Madison's *Notes* four times, and I am still not sure how the champions of the strong executive won their smashing victory. It can be said for certain, however, that at least eight decisions on the structure and powers of the executive were taken at different stages of the proceedings, and that out of these arose the Presidency. Everyone of these decisions, with one partial exception that history was shortly to remedy, was taken in favor of a strong executive." [41]

The result of these deliberations was to create an officer who is Chief of State, Chief Executive, Chief Diplomat and Commander-in-Chief.[42] Because of the great role entrusted to the presidency by the Constitution and because the President alone is representative of the whole country,[43] there are important respects in which he is not treated by the law in the same fashion as are others.[44] The President is not above the law—but he is responsible to the law in a specific fashion that the Framers, with utmost care, wrote into the Constitution. That historical perspective serves to define the stark language of Article II, section 1, clause 1, that "the executive Power shall be vested in a President * * *" Judge MacKinnon, in his dissenting opinon in *Nixon* v. *Sirica*, 487 F. 2d 700, 750 (D.C. Cir. 1973), described the relationship between the exercise of that executive power and the doctrine of executive privilege:

"The effective discharge of the presidential duty faithfully to execute the law requires a privilege that preserves the integrity of the deliberative processes of the executive office. It would be meaningless to commit to the President a constitutional duty and then fail to protect and preserve that which is essential to its effective discharge. Thus the term "effective" is the *sine qua non* that imbues the presidential decisional process with a constitutional shield. The genius of our Constitution lies, perhaps as much as anywhere, in the generality of its principles which makes it susceptible to adaptation to the changing times and the needs of the country. But this much is explicit: '[The President] shall take Care that the Laws be faithfully executed. . . .' U.S. Const. art II § 3. Is it plausible that the Framers should have charged the President with so basic a responsibility, one upon which every ordered society is premised, and yet left him without that ability effectively to satisfy the high charge? Emphatically, the answer must be, 'No.' The duty and the means of its discharge coalesce and each, the one explicit and the other implicit, finds its source in the Constitution."

Executive privilege as claimed by this President, has been asserted by Presidents beginning with George Washington, just, as the legislative and judicial branches have continually asserted and jealously guarded their respective "privileges." The initial invocation occurred when in 1792, the House of Representatives passed a resolution requesting military papers pertaining to the campaign of Major General St. Clair. Although the papers were apparently produced,[45] the consideration given to that request is illustrative: [46]

"First, that the House was an inquest, and therefore might institute inquiries. Second that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of

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which would injure the public: *consequently were to exercise a discretion.* Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President." (emphasis added).

Since then, Presidents [47] and Attorneys General have asserted the privilege. Even more important is the fact that Presidents have always acted on the assumption that it is discretionary with them alone, to determine whether the public interest permits production of presidential papers, and the other branches of Government have until recently accepted this position. *Senate Select Committee on Presidential Campaign Activities* v. *Richard M. Nixon.* Slip Op. No. 74–1258 (D.C. Cir. May 23, 1974); *Nixon* v. *Sirica,* 487 F. 2d 700 (D.C. Cir. 1973). The opinions over a long period of years by the highest legal officer [48] in the Government cannot be lightly disregarded. The fact that the litigation arising out of the Watergate investigations is the first time that a subpoena has been directed to force production of presidential papers since Colonel Burr's abortive attempt to subpoena documents from President Jefferson is because it has been universally accepted that there is no power to compel the President in the exercise of his discretion. Uninterrupted usage continued from the early days of the Republic is weighty evidence of the proper construction of any clause of the Constitution. *Inland Waterways Corp.* v. *Young,* 309 U.S. 517, 525 (1940). Justice Lamar, in *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 472–473 (1915), observed:

"Both officers, lawmakers and citizens naturally adjust themselves to any long continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into regular practices. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of the statute or the exercise of a power, weight should be given to the usage itself—even when the validity of the practice is itself the subject of investigation."

The significance and rationale for this uninterrupted assertion of privilege by holders of the Office of the Presidency, are underscored by reference to the way in which the other co-equal branches of government have regarded the need for confidentiality. Chief Justice Burger, in *New York Times* v. *United States,* 403 U.S. 713, 752 n. 3 (1971), in his dissent, revealed his assessment of privilege:

"With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required."

Although Professor Arthur Selwyn Miller and a collaborator have recently argued to the contrary, Miller & Sastri, *Secrecy and the Supreme Court: On The Need For Piercing the Red Velour Curtain,* 22 Buff. L. Rev. 799 (1973), it has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality. Justice Brennan has written that Supreme Court conferences are held in "absolute secrecy for obvious reasons." Brennan, *Working at Justice,* in *An Autobiography of the Supreme Court* 300 (Westin ed. 1963). Justice Frankfurter had said that the "secrecy that envelops the Court's work" is "essential to the effective functioning of the Court." Frankfurter, *Mr. Justice Roberts,* 104 U. Pa. L. Rev. 311, 313 (1955).

Congress, too, has seen fit to hold to such a privilege. It is a long established practice of each House of Congress to regard its own private papers as privileged. No court subpoena is complied with by the Congress or its committees without a vote of the House concerned to turn over the documents. *Soucie* v. *David,* 448 F. 2d 1067, 1081–1082 (D.C. Cir. 1971). This practice is insisted on by Congress even when the result may be to deny relevant evidence in a criminal proceeding either to the prosecution or to the accused person.[49]

Similarly, when President Kennedy refused to disclose to a Senate Subcommittee the names of Defense Department speech reviewers, the Subcommittee, speaking through Senator Stennis, relied on the privilege of confidentiality Congress enjoys in upholding the President's claim of privilege:

"We now come face to face and are in direct conflicts with the established doctrine of separation of powers * * *.

I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files—and I do not think either one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field." (Committee on Armed Services, U.S. Senate, *Military Cold War Escalation* and *Speech Review Policies,* 87th Congress, 2d Sess., 512 [1962].).

On June 12, 1974, the United States Senate emphatically reiterated its position on privilege by deed, as well as by word. Senator Eastland, Chairman of the Judiciary Committee, urged, at the request of the Special Prosecutor, passage of a resolution permitting a staff attorney to file a trial affidavit with the Special Prosecutor. Without objection, S. Res. 338 was passed.

It reads in part:

"*Resolved,* That by the privilege of the Senate of the United States no evidence under the control and in the possession of the Senate of the United States can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession, but by its permission.

* * * (Sections 2–4) * * *

"SEC. 5. The said Peter Stockett, Junior, may provide information with respect to any other matter material and relevant for the purposes of identification of any document or documents in such case, if any such document has previously been made available to the public, but he shall respectfully decline to provide information concerning any and all other matters that may be based on knowledge acquired by him in his official capacity either by reason of documents and papers appearing in the files of the Senate or by virtue of conversations or communications with any person or persons."

The considerations of public policy that required the deliberations of the Constitutional Convention be held in confidence for half a century [50] and made it imperative that judges and members of Congress be permitted to work under conditions of absolute confidentiality are particularly compelling when applied to presidential communications with his advisers. As stated by the President on July 6, 1973, in his letter to Senator Sam J. Ervin:

"No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential."

This has been the position of every President in our history, and it has been specifically stated by President Nixon's immediate predecessors.

Writing his memoirs in 1955, President Truman explained that he had found it necessary to omit certain material, and said: "Some of this material cannot be made available for many years, perhaps for many generations." 1 Truman, *Memoirs* x (1955). President Eisenhower stated the point with force on July 6, 1955, in connection with the Dixon-Yates controversy:

"But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, and if they are, will wreck the Government. There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis. *Public Papers of Presidents of the United States: Dwight D. Eisenhower* 1955 at 674 (1959)."

Congress recognized the high degree of confidentiality that must attach to presidential papers for many years when it enacted the Presidential Libraries Act of 1955, Pub. L. 84–373, 69 Stat. 695 (1955), now codified in 44 U.S.C. 2107, 2108. That statute encourages Presidents to give their papers to a presidential library, and provides that papers, documents, and other historical materials so given "are subject to restrictions as to their availability and use stated in writing by the donors or depositors * * * The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf." 44 U.S.C. 2108(c); *Nichols* v. *United States,* 460 F. 2d 671 (10th Cir.), *cert. denied,* 409 U.S. 966 (1972). Since that Act was passed, the gifts of presidential papers of President Eisenhower, Kennedy, and Johnson have all specified that "materials containing statements made by or to" the President are to be kept "in confidence" and are to be held under seal and not revealed to anyone except the donors or archival personnel until "the passage of time or other circumstances no longer require such materials being kept under restriction." See letter of April 13, 1960, from President Dwight D. Eisenhower to the Administrator of General Services; Agreement of February 25, 1965, between Mrs. Jacqueline B. Kennedy and the United States and Letter of August 13, 1965, from President Lyndon B. Johnson to the Administrator of General Services. In addition, the letters from President Eisenhower and from President Johnson specifically prohibit disclosure to "public officials" and state, as the reason for these restrictions, that "the President of the United States is the recipient of many confidences from others, and * * * the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency * * *."

The need to preserve the confidentiality of the Oval Office has been recognized from without as well as by those who have borne the burdens of service there. What Justice Stewart, who was joined by Justice White, said in his concurring opinion in *New York Times Co.* v. *United States,* 403 U.S. 713, 728 (1971), has particular force here:

"And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. * * *

Footnotes at end of article.

"[I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." (403 U.S. at 728–730).

Of course, international relations and national defense have very special claims to secrecy, but the importance of the President being able to speak with his advisers "freely, frankly, and in confidence" is not confined to those matters. It is just as essential that the President be able to talk openly with his advisers about domestic issues as about military foreign affairs. The wisdom that free discussion provides is as vital in fighting inflation, choosing Supreme Court Justices, deciding whether to veto a large spending bill, and dealing with the myriad other important questions that the President must confront in his roles as Chief of State and Chief Executive, as it is when he is acting as Chief Diplomat or as Commander-in-Chief. Any other view would fragment the executive power vested in him and would assume that some of his constitutional responsibilities are more important than others. It is true that the President has more substantive freedom to act in foreign and military affairs than he does in domestic affairs, but his need for candid advice is no different in the one situation than in the other.

We submit, with all respect, that if the decision below were allowed to stand it could no longer fairly be contended that the President of the United States is "master in his own house." The confidences of that house would be open for disclosure to the Special Prosecutor—and thus ultimately to defendants—whenever one of 400 district judges chose not to accept the President's claim of privilege.[51] Judge MacKinnon, in his dissent, in *Nixon* v. *Sirica*, 487 F. 2d 700, 752 (D.C. Cir. 1973), laid his finger on the pulse:

"But the greatest vice of the decision sought by the Special Prosecutor is that it would establish a precedent that would subject every presidential conference to the hazard of eventually being publicly exposed at the behest of some trial judge trying a civil or criminal case. It is this precedential effect which transforms this case from one solely related to the recordings sought here, to one which decides whether this President, and all future President, shall continue to enjoy the independency of executive action contemplated by the Constitution and fully exercised by all their predecessors."

B. THE RIGHT OF PRIVACY AND FREEDOM OF EXPRESSION SUPPORT THE ABSOLUTE CONFIDENTIALITY OF PRESIDENTIAL COMMUNICATIONS WITH HIS ADVISERS

The President's sole discretion to decide what presidential communications he will disclose, and to control the circumstances of disclosure, is independently grounded in the right of privacy[52] and the constitutionally protected freedom of expression[53] possessed by the President, his advisers and others with whom he confers in the course of carrying out his official responsibilities. The relationship among these "rights" was summarized by Judge Wilkey, dissenting in *Nixon* v. *Sirica*, 487 F. 2d 700, 767 (D.C. Cir. 1973):

"Certainly the Chief Executive's right to be fully, frankly, and confidentially informed is equal to that of any other citizen in the land; his need is undeniably greater. To breach his privacy would unquestionably have a 'chilling effect' on those who otherwise would counsel and confide in the President with complete candor and honesty."

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) this Court acknowledged the broad scope of the First Amendment rights when it held immune from Sherman Act prosecution the attempts of railroads to influence legislation, the enforcement of laws, and the exercise of the veto power by the Governor of Pennsylvania, even though the railroads' efforts had been conducted fraudulently, unethically, and with an intent to injure or destroy competitors. This Court's interpretation of the Act was influenced heavily by the realistic assessment that the effective functioning of representative government depends on the most generous support for First Amendment values. Justice Black, for a unanimous Court, stated that application of the Sherman Act to the conduct in question—

"Would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." (365 U.S. at 137).

The Court, therefore, refused to find that—

"The government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes * * *." (365 U.S. at 137).

In *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958), this Court quashed Alabama's discovery attempt to obtain N.A.A.C.P.'s membership lists,[54] thus preserving the organization from the "chilling effect" that disclosure would have wrought. The court emphasized:

"That the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." (357 U.S. at 466).

See also *Dombrowski v. Pfister*, 380 U.S. 479, 488–489 (1965).

As illustrated by the *Noerr* and *N.A.A.C.P.* cases, the problem of protecting political communications and the right of petition is a recurring issue involving a wide variety of factual settings. The ramifications for the effective functioning of the Presidency are of course virtually endless. Congressmen or their staff members must be able to give the President candid assessments of the political situation in the country, including the likely reactions of the House of Representatives and the Senate to legislative proposals and to suggested presidential action. A legislator may wish to urge a course of action as wise, while warning that in a legislative battle he could not be counted on because of pressure from his constituents. Private persons and groups, too, may come to present points of view, offer support, warn of political retaliation, or suggest trade-offs. Contemporaneous memoranda prepared by or for the President and designed to preserve the details of such meetings are a vital part of the working and historical record. Knowledge that such records might be made public, under compulsion, in a future litigation would not only inhibit the expression of opinion but would dry up sources of indispensable information. The President would be denied the raw materials he needs to function effectively and responsibly.

The other side of this coin is that unless a President has the power to protect records of his private conversations from public disclosure, he himself would be seriously fettered. He would be less likely to seek out a broad range of advice and advisors; he would be constrained in his discourse or disabled from maintaining a record of his actions and conversations. Instead of concerning himself solely with shaping policy, a President would be driven to striking poses for the record, for history, or for his own personal protection.

C. THE JUDCIAL BRANCH CANNOT COMPEL PRODUCTION OF PRIVILEGED MATERIAL FROM THE PRESIDENT

The doctrine of the separation of powers embodies the concept that each branch is independent of the others, except where some form of interaction flows from the regular operation of the government or where the Constitution or statutes explicitly provide to the contrary. The doctrine necessarily includes the right of the holder of the privilege to decide when it is to be exercised. It means, in this case, that compulsory process cannot issue against the President.

Chief Justice Taft in *Myers* v. *United States*, 272 U.S. 106, 116 (1926), provided the classic judicial statement of one separation of powers doctrine:

"Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people had [the Framers'] full approval. Madison in the Convention, 2 Farrand, Records of the Federal Convention, 56 *Kendall* v. *United States*, 12 Pet. 524, 610, 9 L. ed. 1181, 1215. Accordingly the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this court in *Meriwether* v. *Garrett*, 102 U.S. 472, 515, 26 L. ed. 197, 205; *Kilbourn* v. *Thompson*, 103 U.S. 168, 190, 26 L. ed. 377, 386; *Mugler* v. *Kansas*, 123 U.S. 623, 662, 8 S. Ct. 273, 31 L. ed. 205, 210."

Although the specific holding in the *Myers* case was narrowed to some extent in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), that narrowing was on a point that does not bear on the present issue. The later case was at pains to reaffirm the vigor with which the constitutional separation of powers must be protected and preserved. Justice Sutherland, writing for a unanimous Court, said:

"The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the power of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." (295 U.S. at 629–630).

The President's assertion of his privilege as a functioning of his role as the head of an independent branch of government is supported by the basic case law. In *Marbury* v. *Madison, 1 Cranch* (5 U.S.) 137 (1803), William Marbury, a Federalist and recipient of a "lame duck" judicial appointment, i.e., justice of the peace, from President John Adams in the post-election days of 1800, sought, in early 1801, to secure from James Madison, the new Secretary of State under President Jefferson, the actual commission of his appointment. When Madison declined,

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Marbury sought mandamus relief in the Supreme Court pursuant to Section 13 of the Judiciary Act of 1789. On February 24, 1803, after a fourteen month "recess," Chief Justice John Marshall, a fellow Federalist, denied all relief, holding that although only a ministerial duty on Madison's part was involved, the statute bestowing the judicial power on the Supreme Court in such a case was unconstitutional.[55] In the course of ascertaining whether the particular factual situation excluded Marbury from obtaining legal redress, the Chief Justice examined the relationship between the official position of the defendant and the nature of his act. Significantly, he stated:

"By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use to his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases their acts are his acts; and *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, *the decision of the executive is conclusive.* 1 Cranch (5 U.S.) at 165" (emphasis added).

The exchange between the Chief Justice and Mr. Lincoln, the Attorney General, during the hearing of the case foreshadowed his decision:

"The questions being written, were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.

"1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and, 2d. He ought not be compelled to answer any thing which might tend to criminate himself.

"Mr. Lincoln thought it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider the subject.

"The court said that if Mr. Lincoln wishes time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. *There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it;* nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. 1 Cranch (5 U.S.) at 143–145." (emphasis added.)

Four years later, the *Burr* cases[56] came before Chief Justice Marshall. Three subpoenas *duces tecum, in toto,* were sought and issued during the course of the intensely-contested trials, although only two were directed to President Jefferson. The first was requested on June 11, 1807, by Colonel Burr to obtain an October 21, 1806, letter from Colonel Wilkinson to the President, and two military orders, thought to be exculpatory on charges raised by a possible treason indictment. Following more than two days of argument on whether the Court had the right, under the circumstances of the case, to issue a subpoena against President Jefferson, the Chief Justice found that it ought to issue. The Court confined its inquiry to the narrow question of whether a subpoena should issue, and not to whether the court could or would compel actual compliance.[57] The Chief Justice said:

If then, as is admitted by the counsel for the United States, a subpoena may issue to the President the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstances which is to precede their being issued." (25 Fed. Cas. at 34).

As best as can be determined from an ambiguous history, President Jefferson never complied with that subpoena. President Jefferson did transmit to the United States Attorney, George Hay, certain records from the offices of the Secretaries of the Army and Navy that were covered by the subpoena. This was done, however in apparent ignorance of the fact that the subpoena had issued because his transmittal letter contains a well-stated argument why a subpoena should not issue, 9 Ford, *Writings of Jefferson* 56–57 (1899). President Jefferson did not transmit the described letter from General Wilkinson, although that document was specifically designated by the subpoena. It appears Burr was forced to trial for treason without the benefit of the letter, for on the convening of his subsequent trial for misdemeanor on September 3, 1807, he again demanded that letter, and another.

If President Jefferson did fully comply with that first subpoena, this is unknown to Marshall's biographer. See 3 Beveridge, *The Life of John Marshall* 518–522 (1919). The letters called for were not produced and Colonel Burr asserted that the President was in contempt of court, since a subpena was outstanding. Jefferson was nervous about what Chief Justice Marshall might do, and threatened to use force against the execution of the process of the court. A subpoena *duces tecum* then issued against Hay, who had one of the letters Colonel Burr was seeking. Hay produced a part of the letter but refused to give passages that the President deemed confidential. After Mr. Hay made his return, unsatisfactory to Mr. Burr, Chief Justice Marshall, noting that the President had not personally assigned any reasons for nonproduction of the item sought, cautiously opined that the President could not lawfully delegate to his attorney presidential discretion concerning what matters required continued secrecy and ordered that the letter be produced.[58] Five days later, President Jefferson responded with his certificate and the letter, "excepting such parts as he deemed he ought not to permit to be made public." *United States* v. *Burr*, 25 F. Cas. 187, 193 No. 14,694 (C.C.D. Va. 1807). As Beveridge relates it:

"A second subpoena *duces tecum* seems to have been issued against Jefferson, and he defiantly refused to "sanction a proceeding so preposterous," by "any notice" of it. And there this heated and dangerous controversy appears to have ended. *Id.* at 522."

At this point, Beveridge adds in a footnote:

"For some reason the matters was not again pressed. Perhaps the favorable progress of the case relieved Burr's anxiety. It is possible that the 'truce' so earnestly desired by Jefferson was arranged. *Id.* at 522 n. 4."

Other historians have read the evidence the same way. Rossiter expresses doubt whether Jefferson was a great President but thinks that one act that remains "to his lasting credit" was his "first declaration of presidential independence in his rejection of Marshall's subpoena in the Burr trial." Rossiter, *The American Presidency* 70 (1956). At another point Rossiter says:

"Jefferson's rejection of Marshall's subpoena *duces tecum* in the Burr trial and Chase's opinion in *Mississippi* v. *Johnson* (1867), which spared Andrew Johnson the necessity of answering a writ of injunction, make clear that the judiciary has no power to enjoin or mandamus or even question the President. Id. at 39."[59]

The Court in *Mississippi* v. *Johnson* refuted the state's request to enjoin President Johnson from enforcing two Reconstruction Act statutes because "the duty thus imposed on the President (to see that the laws are faithfully executed) is in no sense ministerial. It is purely executive and political."[60] 4 Wall. (7 U.S.) at 499. The Court noted that the "fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained," 4 Wall. at 500, and summarized the thrust of the case in these terms:

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

* * * * *

"The Congress is the Legislative Department of the government, the President is the Executive Department. Neither can be restrained in its action by the Judicial Department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences." 4 Wall. at 499–500).

Without exception, the basic precedents support our contention that it is for the President to decide whether to disclose confidential presidential communications, and that his discretion is not subject to judicial review. Otherwise, the "essential coequality" of the three branches, as the Court described it in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 630 (1935), would be ended, and we would have taken a long—and probably irreversible—step toward government by Judiciary. Today it would be the Presidency that would be lessened and crippled in its ability to function. Tomorrow it could be Congress, for if presidential privacy must yield to a judicial determination, it is difficult to think of any ground on which congressional privacy could continue to stand.[61]

D. AN ALLEGATION OF CRIMINAL ACTIVITY DOES NOT OVERCOME THE ASSERTION OF PRESIDENTIAL PRIVILEGE

Even if the Special Prosecutor were able to make an evidentiary showing that the requested conversations were in furtherance of an alleged criminal conspiracy, such a showing could not overcome a presidential assertion of executive privilege. Executive privilege, unlike the attorney-client privilege, the husband-wife privilege, and other personal and evidentiary privileges, is a constitutional privilege which runs to the benefit of the public, rather than to the benefit of a particular individual. *Kaiser Aluminum and Chemical Corp.* v. *United States*, 157 F. Supp. 939 944 (Ct. Cl. 1958). Current case law supports the view that proof of criminality will allow the defeat of an assertion of individual privilege. *United States* v. *Aldridge*, 484 F. 2d 655, 658, (7th Cir. 1973).[62]

The issue of whether this Court should allow an allegation of criminality to defeat a presidential assertion of privilege should be reached only after thorough and careful consideration of the applicable constitutional principles. The separation of powers

Footnotes at end of article.

doctrine is obviously vital to this determination, since this Court's consideration of the issue must necessarily include the broadest logical extensions that could result from denying the validity of the privilege. The Special Prosecutor argued successfully to the district court that the public interest to be served by disclosure of presidential conversations is the interest in seeing that "a trial is based upon all relevant and material evidence relating to the charges." (Memorandum of the Special Prosecutor, May 10, 1974, at p. 24). This finite interest in one criminal case must be weighed against the public interest in preserving the Presidency as a co-equal branch of government. The district court's construction of the executive privilege should not be allowed to stand merely to satisfy the desire to insure that "a criminal trial [is] based upon *all* relevant and material evidence relating to the charges." (Memorandum of the Special Prosecutor, May 10, 1974, at 24.)

Executive privilege, inherent in the separation of powers doctrine, extends to an entire branch of government. It is not an individual privilege. The right of confidentiality of executive communications is not a right established for the personal benefit of any one President. Consequently, even an abuse of that right by a President should not affect the validity or vitality of the privilege. If a President abuses the privileges and powers of his office, the proper remedy is not to reduce the office, but to deal with the offense, and to do so in accordance with the Constitution, *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, (1803); *Kendall* v. *United States* ex rel. *Stokes*, 12 Peters (37 U.S.) 524, 609 (1838).

The Framers of the Constitution were aware of the potential abuse by a President of a right or privilege accorded to his office. Nevertheless, it was made clear that the privilege was not affected. Only two days before the adoption of the Constitution, the question of presidential abuse of power or personal involvement in criminal actions was discussed. To protect against a President who had committed treason from being able to pardon co-offenders, Gouvenor Randolph made a motion to except cases of treason from the presidential pardon power.[62] He argued that:

"The prerogative of pardon in these cases was to great a trust. The President may himself be guilty. The Traitors may be his own instruments" (2 *Farrand* 626–627).

In opposing the motion, James Wilson stressed the impropriety of limiting the applicability of a privilege accorded to the executive office because of the potential for abuse by an individual holding that office for a term. Should the officeholder be involved in the conspiracy, he argued, procedures were available in the Constitution other than the limitations or destruction of the privilege, that would deal with such abuse.

The Framers' rationale for not limiting the privileges and powers vested in the Presidency is equally applicable here. The right of confidentiality of the executive office, which has been recognized for the past 187 years, cannot be diminished, disregarded, or destroyed by the alleged criminal activities of the officeholder. Should any incumbent abuse the office, the sole remedy is impeachment, not judicial limitations or exceptions to the privileges or rights vested in the Presidency itself. *Mississippi* v. *Johnson*, 4 Wall (71 U.S.) 475 (1867); *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (1803); *Ex Parte Grossman*, 267 U.S. 87, 121 (1925). An allegation of criminal involvement on the part of a President, therefore, does not affect the right of confidentiality which inheres in his office.

Footnotes at end of article.

V. THE SPECIAL PROSECUTOR HAS FAILED TO DEMONSTRATE A UNIQUE AND COMPELLING NEED REQUIRED UNDER NIXON V. SIRICA TO OVERCOME A VALID CLAIM OF PRESIDENTIAL PRIVILEGE

As we have shown above, the assertion of privilege by a President is necessarily absolute and unreviewable. However, under different factual circumstances, in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the United States Court of Appeals for the District of Columbia Circuit held, that presidential conversations are "presumptively privileged," 487 F. 2d at 717, and may be overcome only by a "uniquely powerful showing," 487 F. 2d at 717, that the material subpoenaed was "critical," 487 F. 2d at 706, and contain[ed] evidence peculiarly necessary . . . for which no effective substitute is available. 487 F. 2d at 717.

A. PRIVILEGE GENERALLY

Thus, even if an evidentiary showing as required by Rule 17(c) had been made as to each of the requested items, the Special Prosecutor must demonstrate a unique and compelling need to overcome the privileged nature of the materials. He has not done so, nor is he able to do so in this case. Although a party seeking production of material pursuant to Rule 17(c) may establish that the requested items are both relevant and evidentiary, a subpoena will not issue if the requested material is subject to a valid claim of privilege. In *Mackey* v. *United States*, 351 F. 2d 794, 795 (D.C. Cir. 1965), the court of appeals acknowledged the defense of "privilege" and held that "the government may be required to produce documents in its possession unless it makes a valid claim of privilege." Courts have long recognized that the public interest in maintaining state secrets of a diplomatic or military nature will override the interests in continuing litigation. See e.g. *Totten* v. *United States*, 92 U.S. 105, 107 (1875); *United States* v. *Reynolds* 345 U.S. 1, 11 (1953). The Judiciary has also responded to executive pleas to protect "intra-governmental documents reflecting * * * deliberations comprising part of a process by which governmental decision and policies are formulated." *Cary Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd on the opinion below, 128 U.S. App. D.C. 10, 384, F. 2d 979, *cert. denied* 389 U.S. (1967); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958).

Similarly, in *Continental Oil Co.* v. *United States*, 330 F. 2d 347 (9th Cir. 1964), the existence of a valid claim of attorney-client privilege as to the various documents requested by a grand jury was sufficient alone to quash a subpoena *duces tecum*. See also *United States* v. *White*, 322 U.S. 694, 699 (1944) (privilege against self-incrimination), *United States* v. *Jacobs*, 322 F. Supp. 1299 (C.D. Cal. 1971) (attorney-client privilege) and *United States* v. *Judson*, 322 F. 2d 460 (9th Cir. 1963) (privilege against self-incrimination). Moreover, if even a portion of a requested document is not subject to a valid claim of confidentiality, the privileged portions should nevertheless not be subject to disclosure by subpoena. Cf. *Magida* v. *Continental Can Co.*, F.R.D. 74 77 (S.D. N.Y. 1951).

B. APPLICABILITY OF EXECUTIVE PRIVILEGE

Under *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the same rationale for individual privileges is equally applicable to a valid claim of executive privilege. The peculiar circumstances of the decision in *Nixon* v. *Sirica* should be outlined in order to better understand the scope of the court's treatment of executive privilege. In that case, the Special Prosecutor's showing in support of a grand jury subpoena was held to be sufficient to overcome the assertion of executive privilege. The court observed: "[t]he strength and particularity of this showing were made possible by a unique intermeshing of events unlikely soon, if ever, to recur." 487 F. 2d at 705. Based on sworn testimony before the Senate Committee investigating the Watergate incident and the testimony before the grand jury investigating the Watergate incident, the Special Prosecutor was able to demonstrate to the court's satisfaction that significant inconsistencies in the sworn testimony of presidential advisors relating to the content of conversations of these advisors raised a distinct possibility that perjury had been committed before the Senate Committee, and, perhaps, before the grand jury itself. 487 F. 2d at 705. This is the context in which *Nixon* v. *Sirica* must be read.

In that case, the court of appeals expressly "acknowledge[d] the longstanding judicial recognition of executive privilege," 487 F. 2d 713, and agreed that the conversations involved were "presumptively privileged" 487 F. 2d at 717. The court noted that the presumption of privilege premised on the public interest in confidentiality may "fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." *Id.* at 713. Simple logic dictates, however, that if a presumption is not to be merely illusory, then a certain quantum of evidence is needed to overcome it. In this regard, the court stated that a claim of executive privilege is entitled to "great weight." 487 F. 2d at 715. Thus, the quantum of evidence to overcome the privilege must necessarily be even greater. It must at least be "uniquely powerful" since the court's holding in *Nixon* v. *Sirica* was premised on a "particularized showing of the grand jury's need for each of the several subpoenaed tapes," a need that both the District Court, 360 F. Supp. at 11 n. 7, and the majority of the court of appeals called "well documented and imposing." 487 F. 2d at 705.

It is important to recognize that the decision of the majority of the court of appeals in *Nixon* v. *Sirica* was based on the unique need of the grand jury, and not that of a prosecutor in a post-indictment setting. Indeed, the special function of the grand jury was the predicate for the court's finding that the "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." 487 F. 2d at 717. The court said:

"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 probably cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist. As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carry out of this vital function—*evidence for which no effective substitute is available.*" (487 F. 2d at 717) (emphasis added).

The court of appeals continually reaffirmed this limitation of its holding by speaking in terms of the grand jury's access and emphasing that "we limit our decision strictly to that required by the precise and entirely unique circumstances of the case." 487 F. 2d at 704. See also 487 F. 2d at 733.

The fundamental distinction between a grand jury's need for evidence and that of a prosecutor in a post-indictment setting is significant here. The Special Prosecutor's position in requesting information for trial is not analogous to, and indeed is essentially different from, that of a grand jury seeking "evidence critical to [its] decision as to whether and whom to indict." 487 F. 2d at 706. By the very nature of the grand jury's function, the scope of its need for evidence is much broader than that of a prosecutor in a post-indictment setting. The standards

of relevancy and materiality are thus necessarily much narrower in a trial setting than that of a grand jury investigation. This undisputed fact was recognized in *Schwimmer* v. *United States*, 332 F. 2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956) when the court stated. "[R]elevance and materiality necessarily are items of broader content in their use as to grand jury investigation than in their use as to the evidence of a trial." 232 F. 2d at 862. The rationale for having this stricter standard at the trial stage was explained by the court *In Re Grand Jury Subpoena Duces Tecum*, 203 F. Supp. 575 (S.D. N.Y. 1961). "[B]ecause the grand jury may have to develop evidence for the first time, the requirements of relevance and materiality are certainly less strict on a grand jury investigation than at trial." 203 F. Supp. at 579. The district court in this case totally failed to address this distinction.

In *Nixon* v. *Sirica*, the Special Prosecutor was able to show that the nine tapes he requested "were each directly relevant to the grand jury's task" and they contained "evidence critical to the grand jury's decision as to whether and whom to indict," 487 F.2d at 706, "evidence for which no effective substitute is available." 487 F. 2d at 717. No such descriptions can be used to justify the Special Prosecutor's need in this case. There has been no allegation that the requested materials are essential or even necessary to the trial. Nor has there been any attempt to demonstrate what relevant and admissible evidence is lacking that the subpoenaed material will fulfill. For all that is known, the material sought, to the extent that it may exist, may not contain any relevant evidence or the evidence it may contain may be wholly cumulative of matters than can be otherwise proved. In addition a large volume of evidence, both documentary and testimonial, is already available to the Special Prosecutor, including a very significant amount of material furnished him by the President.[64]

We submit that the public interest that would be served by disclosure in a post-indictment context is substantially less compelling than it is in a grand jury context, a rationale recognized by the court in *Schwimmer* v. *United States*, 232 F. 2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956). The presumption of privilege remains the same in both contexts. However, after a grand jury's finding of probably cause, the prosecutor's ability to make a showing of compelling need for the production of evidence is greatly enhanced because of evidence already available to him. Thus, in a post-indictment setting his burden of showing compelling need must necessarily be greater and factually more difficult, if it is to overcome the presumption of privilege. This conclusion is further enhanced by the fact that the Special Prosecutor signed the indictment returned by the grand jury in this case, which indeed could not have been returned without his assent. *United States* v. *Cox*, 372 F. 2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). Therefore, the Special Prosecutor must have been satisfied that sufficient competent evidence of criminality was available to warrant the proceeding to trial against the persons indicted. The need for additional incriminating evidence, even if the items presently sought were in fact evidentiary, is bound to be cumulative or corroborative—certainly not a clear and compelling necessity.

C. BALANCING TEST

The court of appeals in *Nixon* v. *Sirica*, in deciding whether to quash a grand jury subpoena *duces tecum*, indicated that "the application of executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that could be served by disclosure in a particular case." 487 F. 2d at 716. The court also acknowledged, "[t]hat the President's special interests may warrant a careful judicial screening of subpoenas . . .," 487 F. 2d at 710, and if this "judicial screening" is to be meaningful, it must occur before a court engages in the balancing process. The court of appeals recognized this when it quoted with approval, the statement of Chief Justice Marshall in *United States* v. *Burr*, 25 F. Cas. 187, No. 14, 694 (C.C.D. Va. 1807):

"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. 25 F. Cas. at 190–192." (emphasis in original) (487 F. 2d at 710).

Other cases also clearly demonstrate that in order for a court to balance countervailing public interest, the party seeking disclosure must make a threshold showing of compelling need or "uniquely powerful" need. In *United States* v. *Reynolds*, 345 U.S. 1 (1953), a case relied upon in *Nixon* v. *Sirica*, this Court stated:

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori*, where necessity is dubious, a formal claim of privilege . . . will have to prevail. (345 U.S. at 11).

At another point in *Reynolds* this Court stated:

"[W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." *Id.*

This point is further illustrated by *Committee* for *Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 788, 792 (D.C. Cir. 1971). There the court held:

"Of course, the party seeking discovery must make a preliminary showing of necessity to warrant even *in camera* disclosure, . . ."

Certainly, this well-documented principle supports the proposition that, before a court can even engage in balancing, the party seeking disclosure must show a compelling need to overcome a presumption of privilege. *Senate Select Committee on Presidential Campaign Activities* v. *Richard M. Nixon*, Slip Op. No. 74–1258 (D.C. Cir. May 23, 1974). Since that showing has not been made in this case, it was incumbent upon the district court to grant the President's motion to quash.

It is clear that the Special Prosecutor has failed to make the requisite showing of compelling need necessary to activate the balancing test. Nor has he made a sufficient showing to establish that each of the requested materials is relevant and admissible and that it is not an attempt to discover additional evidence already known. Therefore under well-established case law, the subpoena should have been quashed in all respects by the court below.

VI. AN INCUMBENT PRESIDENT CANNOT LAWFULLY BE CHARGED WITH A CRIME BY A GRAND JURY

A. THE PRESIDENT CANNOT BE INDICTED WHILE HE IS SERVING AS PRESIDENT

It has never been seriously disputed by legal scholars, jurists, or constitutional authorities that a President may not be indicted while he is an incumbent. The reasons for the President's non-indictability bear directly on the question of whether he may be named as an unindicted co-conspirator by a grand jury. The reasons are obvious and compelling. They are particularly relevant in light of the ongoing proceedings in the House of Representatives.

The Presidency is the only branch of government that is vested exclusively in one person by the Constitution. Art. II, section 1, clause 1 states:

"The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years * * *"

Article II then details the powers and functions that the President shall personally have and perform. The functioning of the executive branch ultimately depends on the President's personal capacity: legal, mental and physical. If the President cannot function freely, there is a critical gap in the whole constitutional system established by the Framers.

The President, personally, as no other individual, is necessary to the proper maintenance of orderly government. Thus, in order to control the dangerous possibility of any incapacity affecting the President, and hence the executive branch, the Constitution specifically limits and provides for all those events that could incapacitate a President.[65]

The necessary reason for the great concern and specificity of the Constitution in providing for a President at all times capable of fulfilling his duties, is the fact that all three branches of government must have the capacity to function if the system is to work. While the capacity to function is assured to the legislative and judicial branches by the numbers of individuals who comprise them, the executive branch must depend on the personal capacity of a single individual, the President. Since the executive's responsibilities include the day-to-day administration of the government, including all emergency functions, his capacity to function at any hour is highly critical. Needless to say, if the President were indictable while in office, any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government and hence the whole system.

Further analysis makes it even more clear that a President may not be indicted while in office. The President is vested under Art. II, section 3, clause 1, with the power "that the Laws be faithfully executed" and he has under Art. II, section 2, clause 1, the power of granting "Pardons for Offenses against the United States, except in Cases of Impeachment." Under that same clause, he shall appoint the "Judges of the Supreme Court" with "the Advice and Consent of the Senate." The President has also been granted by Congress the same power to appoint all Article III judges. 28 U.S.C. 44 and 28 U.S.C. 133. Since the President's powers include control over all federal prosecutions, it is hardly reasonable or sensible to consider the President subject to such prosecution. This is consistent with the concept of prosecutorial discretion, the integrity of the criminal justice system or a rational administrative order. This is particularly true in light of the impeachment clause which makes a President amenable to post-impeachment indictment. Art. I, section 3, clause 7. This clause takes account of the fact that the President is not indictable and recognizes that impeachment and conviction must occur before the judicial process is applicable to the person holding office as President. This section reads: "But the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." While out of necessity an incumbent President must not be subject to indictment in order for our constitutional system to operate, he is not removed from the sanction of the law. He can be indicted after he leaves office at the end of his term or after being "convicted" by the Senate in an impeachment proceeding.

The history surrounding the Constitution's adoption further makes it clear that

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impeachment is the exclusive remedy for presidential criminal misconduct. A very revealing interchange took place on September 15, 1787, only two days before the final adoption of the Constitution. Gouverneur Randolph moved to except cases of treason from the power of the President to pardon offenses against the United States, a power granted by Art. II, section 1, clause 7.

"Judgment in Cases of Impeachment shall not extend further 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."

There are several relevant considerations that should be noted about the Convention and the provision that resulted from them. First, it is clear that an incumbent President is not subject to criminal prosecution. He is amenable to the criminal laws, but only after he has been impeached and convicted, and thus stripped of his critical constitutional functions.

The text of Art. I, section 3, clause 7, points so explicitly in that direction that it hardly requires exposition, and the legislative history is wholly in accord. James Wilson noted that if the President himself be a "party to the guilt he can be impeached and prosecuted." 2 *Farrand* 626. And on September 4, 1787, in the recurring debate on whether impeachments should be tried by the Senate or by the Supreme Court, Gouverneur Morris said:

"A conclusive reason for making the Senate instead of the Supreme Court the Judge of Impeachments, was that the latter was to try the President after the trial of the impeachment. 2 *Farrand* 500."

The decision to make the Senate, and not the Supreme Court,[96] the ultimate body to decide upon the President's removal, further argues for limiting any court or grand jury from removing a President by way of indictment or other judicial process.

There is literally nothing in all of the records of the Convention to suggest that any delegate had any contrary view. This reading of the language in question was put forward twice by Hamilton when he wrote:

"The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. *The Federalist*, No. 65, at 426." (Modern Library ed. 1937).

He returns to the point in the 69th *Federalist*, and uses it there to illustrate an important distinction between a President and a king.

"The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the King of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution."

So far as we are aware, that an incumbent President is not indictable is a proposition that has never been challenged by the Special Prosecutor. The proposition is relevant here because of the suggestion that an otherwise valid claim of privilege by the President should be overridden if there is in some manner an alleged showing of a *prima facie* criminal case or a *prima facie* finding of criminal involvement, such as the authorizing of the naming, or the naming of the President as an unindicted co-conspirator. If, however, such facts were true, which they are not, they go not to the evidentiary needs of the grand jury, but to those of the Committee on the Judiciary in the House.

Whatever the grand jury may claim about a President, its only possible proper recourse is to refer such facts, with the consent of the court, to the House and leave the conclusions of criminality to that body which is constitutionally empowered to make them. The grand jury may not indict the President or allege that there is probable cause to find criminal liability on the part of a President. Thus, such a claimed "finding" by the grand jury has no force in overcoming any presidential claim of privilege, as it is a legal nullity, being constitutionally impermissible.

A second important theme that runs through the debates of the Constitutional Convention of 1787 is whether the President should be answerable, in an impeachment proceeding, to the courts or to the Senate. On June 13, 1787, the Committee of the Whole adopted a resolution offered by Messrs. Randolph and Madison to give the national Judiciary jurisdiction of "Impeachments of any national officers." 1 *Farrand* 224. On July 18th, however, the Convention voted unanimously to remove the language giving the courts jurisdiction of impeachments. 2 *Farrand* 39. This did not end the matter. The report of the Committee on Detail, on August 6th, would have given the Supreme Court original jurisdiction "in cases of impeachment." 2 *Farrand* 186. As noted above a subsequent committee, however, recommended on September 4th that the trial of impeachments be by the Senate, 2 *Farrand* 493. This was approved on September 8th by a vote of nine states to two. 2 *Farrand* 547. See the report of the debate on this issue at 2 *Farrand* 551–553.

The significance of the foregoing history is that it is not mere chance or inadvertence that the President is made answerable to the Senate, sitting as a Court of Impeachment. The Framers repeatedly considered making him answerable to the Judiciary, and they twice rejected proposals to this effect, thus further reinforcing the conclusion that it would be wholly inconsistent with the Framer's intent to hold a President indictable.

Finally, it should also be observed that there was no sentiment in the Convention for providing restraints other than impeachment against a President. The argument went quite the other way. There was sentiment in the Convention that a President would not be subject even to impeachment and that it would be enough that he served for a limited term and would answer to the people if he chose to stand for reelection. This point was extensively debated on July 20, 1787, with the motion to strike out the impeachment provision offered by Charles Pinckney and Gouverneur Morris, 2 *Farrand* 64–69. The arguments in favor of the Pinckney motion seem unpersuasive, and in fact during the course of the debate on it, Morris admitted that the discussion had changed his mind. But the debate is interesting because those who opposed the Pinckney motion, and supported retention of impeachment, made it clear that this was the only means by which they considered that the President was subject to law. Thus, Colonel George Mason said:

"No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors." (2 *Farrand* 65).

And again Elbridge Gerry—

"urged the necessity of impeachment. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped that maxim would never be adopted here that the Chief Magistrate could do no wrong." (2 *Farrand* 66).

By a vote of eight states to two, the Pinckney motion was defeated and the Convention agreed that the Executive should be removable on impeachment. 2 *Farrand* 69. But it is only conviction in the Senate that leads to this result. On September 14th, the Convention rejected, by a vote of eight states to three, a proposal that an officer impeached by the House be suspended from office until tried and acquitted by the Senate. 2 *Farrand* 612–613.

This examination of the proceedings of the Constitutional Convention of 1787 establishes that the Framers deliberately chose one particular means of guarding against the abuse of the powers they entrusted to a President. He may not be indicted unless and until he has been impeached and convicted by the Senate. Impeachment is the device that ensures that he is not above justice during the term in office, and the trial of impeachment is left to the Senate and not to the courts.

Those principles have been recognized by this Court. In the early and leading case of *Marbury* v. *Madison* 1 Cranch (5 U.S.) 137. 165 (1803), the Court said:

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."

Thirty-five years later, in *Kendall* v. *United States ex. rel. Stokes*, 12 Pet. (37 U.S.) 524, 610 (1838) the Court said:

"The executive power is vested in a President and as far as his powers are derived from the Constitution he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power."[97]

We are wholly mindful of weighty warnings against the view that "the great clauses of the Constitution must be confined to the interpretation which the Framers, with the conditions and outlook of their time, would have placed upon them. . . ." *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 443 (1934). But if the provisions of the Constitution that we have been discussing can fairly be said to have taken on new meaning with the passage of years, and with the emergence of new problems, surely any change must be in the direction of strengthening the independence of the Presidency, rather than creating new hobbles on it.

Powell v. *McCormack*, 395 U.S. 486 (1969), reaffirms the extraordinary nature and strictly limited character of the power to remove political officials, particularly those directly elected by the people. That decision held that the Congress could not expand the constitutional limits mandated for expelling or alternatively excluding a Congressman from his seat. U.S. Const., Article I, section 5, clause 2; Article I, section 2, clause 2. The constitutional sanctity of the people's electorial choice, therefore, was considered so important that it required judicial intervention and protection. While judicial action was required in *Powell* to protect the electorate's rights under the Constitution, the reverse is certainly not true. This same power cannot be used to nullify the electorate's decision. This is particularly true in the case of the Presidency when the Constitution explicitly delegates the power to remove the President under strict conditions to the representatives of the voters who elected him. It seems improbable, at best, to suggest that the Framers felt that any court and grand jury could also remove or even legally incapacitate the Chief Executive. The specificity and grave nature of the

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impeachment process and the total absence of any discussion of any other method, is an extremely powerful argument for the exclusivity of impeachment as the only method of removing a President.

The POWELL case emphasizes that while another branch cannot control the Congress in the execution of their peculiar constitutional responsibilities, neither can the Congress, as a whole, control the execution of a particular Congressman's duties via exclusion. Exclusion is an action that the Congress may take solely within the limits of Article I, section 2, clause 2. It is not a political tool. Obviously this also applies to the executive branch. If Congressman Powell could not be excluded from his congressional seat by a majority of Congress except by adhering to the requirements of the Constitution, then surely the Chief Executive may not be deprived of his ability to control decisions in the executive branch by a member of the executive department, unless the President has specifically delegated this authority to him. Nor can such an employee control the President through judicial or criminal process.

The decision in *Powell* is also harmonious with the long established principle that the Judiciary may prevent other branches from overstepping their constitutional bounds of responsibility. *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (1803). In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), this Court made a similar determination that certain actions taken by the executive branch were beyond the scope of the constitutional duties mandated to the branch. If the Judiciary had determined that seizing the steel mills had been within the powers the Constitution and the laws had entrusted to the President, clearly it could not have forced the President to exercise his discretion and seize the mills. Although the Supreme Court has ruled innumerable laws unconstitutional over the last 187 years it has never once mandated that either Congress exercise its discretion to pass a law or the Executive prosecute an individual. The reasons are self-evident.

Today, in our nuclear age, far more than in George Washington's time, the nature of our country and of the world insistently requires a President who is free to act as the public interest requires, within the framework created by the Constitution. The whole Watergate problem has illustrated how truly complex the right decision can be. It is thus all the more necessary that a President have the ability to freely discuss issues, think out loud, play the devil's advocate, and consider alternatives, free from the threat that a probing statement will one day form the basis for an allegation of criminal liability.

B. THE GRAND JURY ACTION OF NAMING THE PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR IS A NULLITY

The constitutional policy that mandates that the President is not subject to judicial process or criminal indictment while President, clearly shows that the grand jury action naming or authorizing the name of the President as an unindicted co-conspirator contravenes the constitutional power of the grand jury or any court of this country.

The implication by a grand jury on the basis of certain alleged facts, that the President may have violated the law can have only one proper result. As stated above, the grand jury may with the district court's consent, forward the factual material creating the implications, minus any conclusions, to the House of Representatives.[68] That result was fulfilled when the grand jury filed with the court below its factual report and recommended that it be forwarded to the House Judiciary Committee, in March of 1974. The President made no objection to this move because the House of Representatives is the proper body, the only proper body, to impeach a President, as part of the process of removing a President from office. The grand jury's constitutionally impermissible authorization to the Special Prosecutor, permitting the President to be named or naming the President as an unindicted co-conspirator, however, attempts to subvert and prejudice the legitimate constitutional procedure of impeachment.

In its opinion in *In Re Report and Recommendation of the June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C. 1974), the district court convincingly demonstrated why the June 5, 1972, Grand Jury could not authorize the naming of the President as an unindicted co-conspirator. The very reasons why it was proper to refer the *Report and Recommendation to the House of Representatives* are those that argue against referring the naming or the authorization to name the President as an unindicted co-conspirator to that same body. In fact, these same considerations today require its expungement, because it is a legal nullity that continues to prejudice the President by its purported legal significance and apparent authority. The court below noted of the Report:

"The Report here at issue suffers from none of the objectionable qualities noted in *Hammond* and *United Electrical*. It draws no accusatory conclusions. It deprives no one of an official forum in which to respond. It is not a substitute for indictments where indictments might properly issue. *It contains no recommendations, advice or statements that infringe on the prerogatives of other branches of government.* Indeed, its only recommendation is to the Court, and rather than injuring separation of powers principles, the Jury sustains them by lending its aid to the House in the exercise of that body's constitutional jurisdiction. It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and no more." (370 F. Supp at 1226) (emphasis added).

As noted by the district court nothing could be more important to America's future than that the ongoing impeachment be "unswervingly fair." 370 F. Supp at 1230. And nothing could be more clear than that the naming of the President of the United States as an unindicted co-conspirator by a secret grand jury proceeding, which was subsequently leaked to the press, is a direct and damaging assault on the fairness of the House impeachment proceeding. It is the kind of prejudice that a court would certainly be required to remedy or compensate for if it affected the rights of a criminal defendant to a trial, free from the probability of prejudicial pre-trial publicity. *In Re Murchison*, 349 U.S. 133 (1955); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

This unauthorized action of the grand jury that has the appearance of official status, and presently the implicit approval of the lower court may well directly affect the outcome of the House procedure. Yet, the President has no legal recourse against the grand jury's action except with this Court. No petit jury, whose obligation is to find guilt "beyond a reasonable doubt" is empowered to adjudicate this charge against the President.[69]

The rigorous adversary format, with that most powerful tool for determining the truth, cross-examination, is not available in the secret grand jury setting. It is now well established that the right of cross-examination is an essential element of due process in any proceeding where an individual's "property" or "reputation" may be adversely affected.[70] The fundamental right to present evidence and to cross-examine witnesses in an impeachment proceeding is manifest. As the experience of our judicial system has demonstrated, the most effective method of establishing the truth of an accusation is to permit the respondent the right to personally cross-examine those presenting adverse testimony. The Supreme Court flatly states in *Greene* v. *McElroy*, 360 U.S. 474 (1959) that:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . action was under scrutiny." (360 U.S. at 496–497).

Justice Douglas in the concurring opinion in *Peters* v. *Hobby*, 394 U.S. 331 (1955), emphasized the necessity of permitting a respondent to cross-examine all adverse witnesses.

"Under cross-examination [witnesses] stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.

"Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and outer darkness, without the rudiments of a fair trial." (349 U.S. at 351).

There is no way within our judicial system to disprove allegations made against a President. It is because of this and because of the vast impact of this purportedly official criminal implication and charge against a President, on the whole body politic, that the Constitution requires no less a body than the whole House of Representatives to find the President likely enough to be guilty of criminal misconduct that he should be tried by the Senate.

The characterization of the President of the United States as an unindicted co-conspirator, is nothing less than an attempt to nullify the presumption of innocence by a secret, non-adversary proceeding. The presumption of innocence is a fundamental of American justice; the grand jury's procedure is an implication of guilt which corrupts this ideal. To thus allow the Special Prosecutor to use such a constitutionally impermissible device, as an incident to an evidentiary desire, for the purpose of overcoming executive privilege, is wholly intolerable. The American legal system has never allowed the desire for evidence to go beyond the bounds of law. *Boyd* v. *United States*, 116 U.S. 616 (1886); *Weeks* v. *United States*, 232 U.S. 383 (1914); *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385 (1920); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The President should not be made a hostage of the unwarranted pressure inherent in the grand jury's improper action.

The former Special Prosecutor, Mr. Archi-

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bald Cox, was quoted in the *New York Times* on January 5, 1974, as dealing with this exact issue. In response to rumors that he would name the President as an unindicted co-conspirator the newspaper printed this:

"Mr. Cox, in the telephone interview from his vacation home in Maine, described such a technique as 'just a backhanded way of sticking the knife in.' *New York Times*, January 6, 1974, p. 1, col. 6; p. 40, col 1."

A later issue of the *New York Times* dealt with the same basic questions when it stated:

"Leon Jaworski, the Watergate special prosecutor, advised the Federal Grand Jury investigating the Watergate break-in and cover-up that it would not be 'responsible conduct' to move to indict President Nixon, according to a spokesman for the office.

"Although Mr. Jaworski's advice to the Grand Jury did not refer to President Nixon by name—the matter was discussed in terms of a factual situation such as exists—it did include the suggestion that the House Judiciary Committee's impeachment inquiry was the proper forum to consider matters of evidence relating to a President.

"Although there had been speculation that Mr. Jaworski had tentatively concluded that legal complications militated against a move to indict the President, today's statement was the first direct confirmation of the fact. *New York Times*, March 12, 1974, p. 1."

It is only by impeachment and conviction and then subsequent criminal action that the President may be found to be a member of any criminal conspiracy. To base a desire for evidence on a stratagem which attempts to cripple the Presidency, and thus nullify the President's claim of executive privilege, is unprecedented, but more significantly a grotesque attempt to abuse the process of the judicial branch of government. Under our system of government only the House of Representatives may determine that evidence of sufficient quantity and quality exists to try the President. And, that trial must take place in the Senate with the Chief Justice presiding.

C. EVEN IF IT WERE PERMISSIBLE, THE NAMING OF AN INCUMBENT PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR DOES NOT CONSTITUTE A PRIMA FACIE SHOWING OF CRIMINAL ACTIVITY

In the preceding section we have conclusively demonstrated why it is not constitutionally permissible to name an incumbent President as an unindicted coconspirator. However, if such an act had been constitutionally permissible, it would nevertheless not have the effect of constituting a *prima facie* showing of criminality sufficient to overcome the President's constitutional claim of executive privilege.

There is a basic distinction between a finding of "probable cause" and the showing of a *"prima facie"* case which makes the Special Prosecutor's use of these two terms in the instant case both inaccurate and improper.

Probable cause is a legal concept based on the proposition that a crime "might" have been committed. As such it justifies an inquiry into an individual's guilt. It does not justify any legal effect that would operate to overcome either a presumption of innocence or executive privilege attaching to an otherwise valid claim. On the other hand, *prima facie* evidence is evidence sufficient to have a legal effect, which if unrebutted, is sufficient to go to a jury in a trial setting and sufficient to convict an individual of a crime before a petit jury. The finding of the grand jury at issue here has none of this sufficiency. It has never been tested in any adversary forum and hence is insufficient to have any legal effect on the right or privileges of anyone.

This elementary distinction was noted by the Court in *Locke* v. *United States*, 7 Cranch (11 U.S.) 339, 348 (1813):

"It is contended, that probable cause means *prima facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation.

"This argument has been very satisfactorily answered on the part of the United States by the observation that this would render the provision totally inoperative. It may be added, that the term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by Congress."

Nothing could make the legal objections to using a probable cause standard to overcome a valid claim of presidential privilege clearer, than this Court in *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949), when it stated:

"The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

The claim that the grand jury's action is sufficient to constitute a *prima facie* showing of criminality can be seen for what it is: an attempt to use a practical tool of law enforcement as a constitutional bludgeon to batter down the President's rights to due process and his fundamental right to be presumed innocent by the law. Recently this basic point was reaffirmed by the Court in *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965), when in quoting *Brinegar*, this Court stated:

"There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them." (338 U.S. at 108).

The *prima facie* showing that the Special Prosecutor claims to have made can only have been made if the President of the United States is to be tried and convicted by a grand jury! Thus the Special Prosecution's argument is a legal absurdity.

An indictment may be returned against an accused upon a grand jury's finding that the "evidence" constituted the existence of probable cause to believe the accused participated in criminal activity. It must always be remembered that this "evidence" is not the type of evidence that in a trial court goes to the question of guilt or innocence. It is not evidence that has ever been tested in an adversary forum, in which an opportunity would have been presented to explore its alternative inferences, to question its credibility by cross examination, and to offer evidence which may rebut the original allegation. All that the evidence weighed by a grand jury can ever be said to show fairly is that there is probable cause to believe someone should be brought to trial. In the instant case, the grand jury could only find "proable cause" of criminal activity on the part of the President and nothing more, if it could even find that. Yet the Special Prosecutor says this finding of probable cause is a *"prima facie"* showing of criminality. *Prima facie* evidence of a fact, however, is such evidence as will establish that fact in a court of law if not rebutted. *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237, 268 (1877); *United States* v. *Wiggins*, 14 Pet. (39 U.S.) 334 (1840). It thus becomes obvious that in a grand jury setting, the kind of *prima facie* showing the Special Prosecutor talks about, cannot occur.

A grand jury finding of probable cause in most cases results in an indictment which is merely an accusation of criminal activity and is not evidence of criminality. In *United States* v. *Cummings*, 468 F. 2d 274, 278 (9th Cir. 1972), the Court of Appeals found serious error and reversed the judgment of the trial court because it allowed counsel for the government in closing argument to suggest that the return of an indictment by a grand jury was an indication of the guilt of the accused. In a criminal trial, the fact that a grand jury heard evidence and, based on that evidence, returned an indictment, does not allow inference of guilt. *United States* v. *Sutton*, 312 F. Supp. 969, 972 (D. Ariz. 1970), *aff'd* 446 F. 2d 916, 922 (9th Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972). In *Sutton*, the United States Attorney, in his summation, made reference to the fact that the proceeding was by indictment and that at least twelve people have to agree on the indictment after hearing evidence. This comment was objected to and the trial judge sustained the objection and, shortly thereafter, instructed the jury that the indictment is no evidence and it does not create any presumption or inference of guilt. 312 F. Supp. at 972. In this regard the court of appeals found that only the trial judge's timely actions prevented the United States Attorney's improper comment from prejudicing the appellant and eliminated any necessity for a mistrial. 446 F. 2d at 922 Likewise, only this Court's timely action in declaring the invalidity and improper character of the grand jury's action in this case will offset to some degree the prejudice to the President.

Jury instructions are frequently, if not always, used to inform a jury that an indictment is merely a formal method of accusing a defendant of a crime and is not evidence of any kind against the accused.[1] e.g. 1 Federal Jury Practice and Instructions, Devitt & Blackmar, § 11.02 at 208 (1970). Such instructions are universally accepted. See e.g., *Adjmi* v. *United States*, 343 F. 2d 164, 165 (5th Cir. 1965); *Black* v. *United States*, 309 F. 2d 331, 343 (8th Cir. 1962), *cert. denied* 372 U.S. 934 (1963); *United States* v. *Senior*, 274 F. 2d 613, 617 (7th Cir. 1960). Therefore since the grand jury's determination of probable cause is not evidence of guilt or criminality in a trial proceeding we submit that the court below was not and could not have been presented with a *prima facie* showing of criminality.

Moreover, in the instant case, even if the Special Prosecutor could, by some strange convolution of law and logic, make an evidentiary showing of criminality on the part of the President, it would still have been necessary for this "showing" to overcome three distinct presumptions in order to allow the trial court to rule properly that the conversations sought here are not privileged. These presumptions are (1) the presumed validity of a claim of executive privilege, (2) the presumption that every man is innocent until proven guilty, beyond a reasonable doubt, in a court of law, and (3) the presumption of regularity applied to the acts of a government official.

Besides the presumption of validity that is inherent in any presidential assertion of executive privilege, *Nixon* v. *Sirica*, 487 F. 2d 700, 715, 717 (D.C. Cir. 1973), there exists the presumption of innocence afforded to every man under the law. At the start of a trial, the law presumes an accused innocent with no evidence against him. *United States* v. *Agnew* 165 U.S. 36, 52, (1897); 9 *Wigmore on Evidence* § 2511 (3rd ed. 1940). The President, who is not even involved in a criminal proceeding, is certainly presumed innocent of criminal activity until a proper and sufficient evidentiary showing is made to demonstrate the contrary. Such a showing could only be made in an impeachment proceeding, followed by indictment, trial and conviction in a court of law. In any event, a secret, non-adversary grand jury proceeding, leaked to the public, can hardly cast

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any legal stones at the President's presumption of innocence. In the instant case, the Special Prosecutor has not made any evidentiary showing of criminality.

The final presumption that must be overcome in order for a judicial determination to be made that the subpoenaed conversations deal with criminal conduct is the presumption of regularity. The law presumes that government officials perform the requirements of legal conditions incumbent to their office. 9 *Wigmore On Evidence*, § 2534 (3rd ed. 1940). The President operates under the constitutionally imposed duty to see "that the Laws be faithfully executed." U.S. Const., Art. II, sec. 3. The presumption of regularity applied to the acts of the President, in the instant case, would require a presumption that, when the President converses with his aides, his action is proper and pertains to the performance of official duties imposed by law. See *F.C.C.* v. *Schreiber*, 381 U.S. 279, 296 (1965). (Administrative agencies of the government are entitled to the presumption that they will act properly and according to law.) The nature and scope of the President's constitutional mandate dictate that the quantum of evidence necessary to overcome the presumption of regularity indeed be substantial. Any other result would severely limit the President's ability to fulfill his wide discretionary responsibilities under the Constitution. Thus, the presumptions of a valid claim of executive privilege, innocence, and the regularity of governmental activities present formidable barriers which the Special Prosecutor has not overcome, and which he certainly cannot overcome behind the closed doors of a grand jury proceeding.

VIII. THE SPECIAL PROSECUTOR FAILED TO SATISFY THE REQUIREMENTS FOR A RULE 17(c) SUBPOENA

A. THE SPECIAL PROSECUTOR HAS FAILED TO DEMONSTRATE THAT THE MATERIALS SOUGHT WERE RELEVANT AND EVIDENTIARY

Before a determination can be made that the President's assertion of executive privilege has been overcome, the Special Prosecutor has the burden of proving that his subpoena meets the stringent requirements of Rule 17(c), Federal Rules of Criminal Procedure. The court below in its May 20, 1974, opinion and order reached the conclusion that the requirements of Rule 17(c) were met. Specifically, the court stated:

"It is the Court's position that the Special Prosecutor's May 10, 1974, memorandum correctly applies the Rule 17(c) standards particularly in the more unusual situation of this kind where the subpoena, rather than being directed to the government by defendants, issues to what, as a practical matter, is a third party." (*United States* v. *Mitchell*, Cr. No. 74–110, (D.D.C. filed May 20, 1974) at 5).

This determination of the court below is a conclusion, unsupported by any reference either to the specific requirements of Rule 17(c) or to how the Special Prosecutor's showing has satisfied these requirements. The Court's conclusion is apparently based on the Special Prosecutor's memorandum of May 10, 1974, and the court's finding that the President is a third party. The showing made in the memorandum of May 10, 1974 does not meet the strict requirements of Rule 17(c). Furthermore, the President is not to be judged as a typical third party in a judicial subpoena proceeding.

The Special Prosecutor sought this subpoena pursuant to Criminal Rule 17(c), which provides:

"A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

The leading case discussing Rule 17(c) is U.S. 214 *Bowman Dairy Co.* v. *United States*, 341 (1951). In *Bowman*, this Court plainly emphasized that "Rule 17(c) was not intended to provide an additional means of discovery." 341 U.S. at 220. On the contrary, its application was specifically limited only to production of "evidentiary" material. 341 U.S. at 213. In this regard this court stated, "[I]n short, any document or other material admissible as evidence . . . is subject to subpoena." 341 U.S. at 221. By utilizing this admissible evidence standard in applying Rule 17(c), this Court rejected a conclusory request by the defendants for materials that "are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants . . ." 341 U.S. at 221, a request that is quite similar to the one sustained by the court below. This Court considered such a "catch-all" request as invalid for it was "not intended to produce evidentiary materials but [was] merely a fishing expedition to see what may turn up." 341 U.S. at 221.

That all subpoenaed materials under Rule 17(c) must be both evidentiary in nature and relevant is uniformly required by the courts, which have recognized that Rule 17(c) is subject to abuse by parties seeking additional pretrial discovery. Consequently, courts have developed criteria that the party seeking a pretrial subpoena must meet before compliance will be ordered. In *United States* v. *Iozia*, 13 F.R.D. 335 (S.D.N.Y. 1952), Judge Weinfeld formulated the following criteria, which have been frequently cited by other courts:

"(1) That the documents are evidentiary and relevant;

"(2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;

"(3) That the defendant cannot properly prepare for trial without such production, and inspection in advance of trial and failure to obtain such inspection may tend reasonably to delay the trial;

"(4) That the application is made in good faith and is not intended as a general fishing expedition." 13 F.R.D. at 338.[72]

As to the burden of establishing the validity of a subpoena *duces tecum*, controlling case law recognizes that it is incumbent upon the party seeking disclosure to set forth each request with sufficient specificity to establish that each document is both "relevant" and "admissible," and that the other *Iozia* criteria have been met. *United States* v. *Palermo*, 21 F.R.D. 11, 13 (S.D.N.Y. 1957). In this regard the court in *United States* v. *Winkler*, 17 F.R.D. 213 (D.R.I. 1955), held:

"[T]he right of a defendant to the production and inspection of documents and objects prior to trial under Rule 17(c) is not absolute but that upon objection thereto good cause for such production and inspection must be first shown by the party seeking the same." (17 F.R.D. at 215).

In *Iozia*, where the defendant sought a subpoena, the court held that "there must be a showing of good cause to entitle the defendant to production and inspection of documents under Rule 17(c)." 13 F.R.D. at 338. "Good cause" as defined by the *Iozia* court, requires a showing by the defendant [73] that all four of the criteria set out above have been met. In the court below there was not even a showing that the material sought "would be admissible in evidence or relevant at trial." See *United States* v. *Winkler*, 17 F.R.D. 213, 215 (D.R.I. 1955).

That the Special Prosecutor has failed to demonstrate that the materials requested are "relevant and evidentiary" is readily apparent from the record of the court below. The original Rule 17(e) motion was supported by the Special Prosecutor's affidavit and memorandum of May 10, 1974. At page two of this affidavit, the Special Prosecutor requested 64 presidential conversations on the bald assertion that each of these materials *"contains or is likely to contain* evidence that will be relevant to the trial of this case." (emphasis added). At page two of his memorandum of May 10, 1974, the Special Prosecutor, in an unsupported allegation, stated: *"In all probability*, many of the subpoenaed items will contain evidence which will be relevant and material to the trial . . ." (emphasis added). Thus, it is evident that the Special Prosecutor was unable to make the necessary showing that each of the requested 64 items was evidentiary. A general allegation that some or a majority of the material sought may be relevant or admissible is not sufficient under *Iozia* to establish that all requested items "are evidentiary and relevant." 13 F.R.D. at 338.

Moreover, even the general assertion made by the Special Prosecutor that *some* of the materials may be relevant is devoid of any meritorious factual support. As such, it was an unsupported allegation seeking discovery and Rule 17(c) may not be used for that purpose. It has been firmly established in criminal cases that in seeking discovery, the requirements of a showing of materiality and admissibility is not satisfied, "by a mere conclusory allegation that the requested information is material" to the preparation of a case. *United States* v. *Conder*, 423 F. 2d 904, 910 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970). Nor is it sufficient to make a "bare allegation that the requested information would be material in the preparation of the defense." 423 F. 2d at 910.

From the Special Prosecutor's statements that the requested materials were "likely to contain evidence" and "in all probability" may contain evidence, it is readily apparent that he was attempting to seek evidence not already known. As the court definitively stated in *United States* v. *Frank*, 23 F.R.D. 145 (D.D.C. 1959), Rule 17(c) "does not permit blunderbuss inspection of the government's evidence in an attempt to learn something not known, it is not a discovery provision." 23 F.R.D. at 147. This same concept was reaffirmed by the court in *United States* v. *Gross*, 24 F.R.D. 138 (S.D.N.Y. 1959), when it stated "the government [cannot] use Rule 17(c) to obtain leads as to the existence of additional documentary evidence or seek information relating to the defendant's case." 24 F.R.D. at 141 (emphasis added). Any request designed merely to disclose additional evidence not already known has properly been termed a "fishing expedition," which will not be countenanced under this rule. *Bowman Dairy Co.* v. *United States*, 341 U.S. at 221. The Special Prosecutor is obviously attempting to use Rule 17(c), contrary to established case law, to obtain additional evidence not already known.

In addition, the district court is noticeably silent to the teaching of *United States* v. *Marchisio*, 344 F. 2d 653, 669 (2d Cir. 1965), that a subpoena *duces tecum* in a criminal action is not intended for the purposes of discovery, and that the documents sought must at that time meet the test of relevancy and admissibility.

It is also important to emphasize that there is an essential distinction between disclosure in civil and criminal actions. *United States* v. *Maryland & Virginia Milk Producers, Inc.*, 9 F.R.D. 509 (D.D.C. 1949). In this regard it is interesting to note that contrary to the more limited criminal discovery provi-

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sions applicable here, the Special Prosecutor's request in this instance was very similar in both substance and tone to the broader civil discovery provisions of Rule 26 of the Federal Rules of Civil Procedure.[74]

Additionally, it has been judicially recognized that the test to be met by one seeking material must be met at the time that the items are sought, and the mere "probability" that the items may later become relevant is of no consequence. The court in *United States* v. *Marchisio*, 344 F. 2d 653 (2d Cir. 1965), stated: "Unlike the rule in civil actions, a subpoena *duces tecum* in a criminal action is not intended for the purpose of discovery; the documents sought must at that time meet the tests of relevancy and admissibility." 344 F. 2d at 669. See also *United States* v. *Murray*, 297 F. 2d 812, 821–822 (2d Cir. 1962); *United States* v. *Palermo*, 21 F.R.D. 11, 13 (S.D.N.Y. 1957).

Furthermore, in the Special Prosecutor's conclusion to the first section of his argument, he, in effect, urged the court below to allow him a lesser standard of relevancy and evidentiary showing when "seeking material from third parties the precise contents of which is unknown" (Special Prosecutor's memorandum, May 10, 1974, at 1, 10). This suggestion of a lesser standard than that required by Rule 17(c) case law is not as astonishing as the tacit implication that the Special Prosecutor does not know the contents of the material he is seeking. For without this knowledge, the Special Prosecutor cannot even hope to meet any of the *Iozia* criteria and is obviously on a "fishing expedition" or is attempting to use Rule 17(c) as a discovery device.

It is also readily apparent that since the Special Prosecutor cannot show that the privileged conversations are relevant for the purpose for which he seeks them, he is attempting to formulate a new standard whereby the President should produce the recorded conversations unless the President can establish to the satisfaction of the Special Prosecutor and this Court that the subpoenaed conversations are not relevant. This attempt to shift the burden of establishing relevancy from the party seeking material under Rule 17(c) to the party being subpoenaed is unsupported by any case law and flies in the face of established precedent. In this regard the court in *United States* v. *Winkler*, 17 F.R.D. 213 (D.R.I. 1955), held:

"The right of a defendant to the production and inspection of documents and objects prior to trial under Rule 17(c) is not absolute but that upon objection thereto good cause for such production and inspection must be first shown by the party seeking the same." (17 F.R.D. at 215).

As a further attempt to demonstrate admissibility, the Special Prosecutor proffers at pages 15–16 of his memorandum of May 10, 1974, that "statements made during conversations may be useful to the Government for the purpose of impeaching defendants Haldeman, Ehrlichman, and Colson should they elect to testify in their own behalf." The Special Prosecutor's suggestion that he is entitled to materials useful for impeachment conceals the fact that courts hold that impeachment materials cannot be obtained in advance of trial and one must wait to see if the person to be impeached actually testifies. *United States* v. *Carter*, 15 F.R.D. 367, 371 (D.D.C. 1954) (Holtzoff, J.); *United States* v. *Murray*, 297 F. 2d 812, 821–822 (2d Cir.) *cert denied*, 369 U.S. 828 (1962); *United States* v. *Brockington*, 21 F.R.D. 104, 106 (E.D. Va. 1957); *United States* v. *Hiss*, 9 F.R.D. 515, 516–517 (S.D.N.Y. 1949).

In light of the lower court's conclusion that the President was, in essence, a third party, it should be noted that in criminal proceedings, because of the respective roles of the parties, it is much easier for a defendant to factually satisfy the *Iozia* requirements when seeking items from the government than it is for the government or defendant to do so against a third party. This is because a defendant may make conclusive statement as to relevancy and admissibility without knowing the precise nature of the materials. Prosecutors presenting evidence to a grand jury and intending to use evidence at trial, necessarily classify such items as relevant and evidentiary. Thus, it follows that a defendant may utilize conclusive assertions regarding the quality of material he seeks. Obviously, the government does not have this same advantage of utilizing unsupported statements and must therefore justify in greater specificity the items it is seeking.

B. THE PRESIDENT SHOULD NOT BE JUDGED AS A "TYPICAL" THIRD PARTY

The Special Prosecutor has attempted to ease his "relevant and evidentiary" burden under Rule 17(c) by pointing out at page 7 of his memorandum of May 10, 1974, that "in the instant case the Government seeks to obtain evidentiary items from a third party." The President, however, is not a normal third party. But even if he were, it is well established that a typical third party has rights which protect him from burdensome subpoenas. *Application of Magnus*, 299 F. 2d 335, 337 (2d Cir.), *cert. denied*, 370 U.S. 918 (1962) (third party corporation has standing to object to an IRS subpoena which would infringe constitutional rights); *Amsler* v. *United States*, 381 F. 2d 37, 51 (9th Cir. 1967) (Rule 17 subpoena to third party quashed when court held subpoena was oppressive and unreasonable). As Judge Moore stated in *In Re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12 (2d Cir.), *cert. denied*, 373 U.S. 902 (1962):

"Third parties have the protection always accorded to them by the courts which limit burdensome subpoenas, restrict them to relevant materials and refuse to permit unwarranted searches and seizures." (311 F. 2d at 16).

Thus, even judicial subpoenas directed to third parties have been restricted to *relevant* materials, not materials which have a "likelihood of relevancy" as the Special Prosecutor suggests. Even as a normal third party responding to a judicial subpoena, the President should be afforded, at a minimum, the full range of rights afforded by the Fourth Amendment. As this Court observed in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), a subpoena is, in many ways, like a search warrant and as such it must meet the constitutional requirements of the Fourth Amendment. In the instant case, the Special Prosecutor's inadequate showing of relevancy can be likened to the lack of definiteness and overbreadth which are abuses guarded against by the Fourth Amendment. In this context, the Court in *Oklahoma Press* held, "[t]he gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." 327 U.S. at 208.

The district court's finding that the Special Prosecutor was merely seeking "evidentiary items from a third party" is clearly erroneous. The Constitution states, "The executive Power shall be vested in a President of the United States of America." U.S. Const., Article II, section 1. To allow this constitutionally mandated power to be challenged and overcome by a district court subpoena issued under the standards governing subpoenas to third parties, is an action that would erode and ultimately destroy the "separation of powers" concept that has existed since 1787.

CONCLUSION

Last fall, the United States Court of Appeals for the District of Columbia circuit observed in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973):

"We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a coequal branch." (487 F. 2d at 715).

The velocity with which the confidentiality of presidential communications has eroded in the short time since the quoted words were written is demonstrated by the vast scope of the Special Prosecutor's pending subpoena, by the meager grounds offered to support it, and by the district court's casual disposition of the President's motion to quash. This circumstance—and the escalating confusion and torret of prejudicial leaks generated by the concurrent involvement of the President in criminal proceedings as a so-called "third party" and in an impeachment investigation as the putative respondent—recalls the introductory words of the brief filed on behalf of the President in *Nixon* v. *Sirica*. Those words are relevant here because they analyze the dynamics of this case and the course it will take in terms that continue to be valid for this and other Presidents in their effort to maintain the confidentiality upon which the effective functioning of the Presidency so crucially depends.

"Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

Holmes, J., dissenting in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400–401 (1904). This case is a classic illustration of the danger against which Justice Holmes warned.

The District Court, in a decision utterly without precedent, has held that it is for it, and not for the President, to decide whether the public interest requires that private Presidential conversations be kept confidential, and it has held that it may, by compulsory process, order the President to produce recordings of these conversations if the Court determines to do so.

As recently as a year ago such a ruling would have been unthinkable. The universal view of the legal community, as reflected in the literature, was that the courts lacks power to substitute their judgment for that of the President on an issue of this kind and that they lack power to compel a President to make production. It was, quite literally, hornbook law that "confidential communications to and from the President are inviolate to a judicial request * * *." Forkosch, *Constitutional Law* 131 (1963).

The change in the climate of legal and popular opinion that has made a ruling such as that of the District Court possible is the result of Watergate. The hydraulic force arising out of that sordid and unhappy episode has led men of great distinction to suppose that the Constitution means something different today than it meant throughout all of our history and to contend that the need to exhaust every avenue of factual inquiry concerning Watergate ranks so high in our national priorities that it must be served, even if the cost is to impair markedly the ability of every President of the United States from this time forward to perform the Constitutional duties vested in him.

It is no exaggeration to say that the revelations of Watergate have so sharpened the public appetite for more revelations that the claim of a Presidential right and responsibility under the Constitution to maintain the confidentiality of Presidential conversations must run the gamut of a broadly held popular sentiment that the claim is probably unjust and is therefore presumably unsound. The President's assertion of a right to main-

Footnotes at end of article.

tain this confidentiality, a right relied on by every President since George Washington, is likened to the absolute claim of kings. His stand on an important Constitutional principle is viewed in many places with suspicion or even hostility. Despite his unprecedented cooperation with the investigations by allowing his advisers to testify about relevant portions of the conversations in question, he stands accused in some quarters of obstructing rather than facilitating the investigations.

Our submission on this appeal must acknowledge this Watergate phenomenon since it is an operative factor, though it is one that courts, judging in calmness and not moved by the passions of the moment, should be expected to ignore. We conceive it to be our task to demonstrate that the decision below was reached by casting the Constitution in the mold of Watergate rather than by applying Constitutional practices and restraints to the facts of Watergate. It is our further responsibility to show that what may seem inevitably just in the heat and excitement of an unprecedented political scandal may prove inexorably corrosive to the principles and practices of a Constitution that must stand the test of a long and uncertain future and serve the needs of a changing culture and polity.

With all respect, the decision below did not harmlessly walk the "middle ground" between an overbroad claim of privilege and an excessive demand for discovery. We do not doubt at all but that this was the well-intentioned aim of the distinguished judge of the court below. But in result, the ruling below, in decisive terms, came down squarely on the side of breaching the wall of confidentiality of Presidential communications. If sustained, that decision will alter the nature of the American Presidency profoundly and irreparably. If sustained, it will alter equally irreparably, the delicate balance that has existed between three heretofore separate and co-equal branches of government.

* * * * *

For the foregoing reasons, the decision of the district court denying the President's motions to quash and expunge should be reversed.

Respectively submitted.

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FOOTNOTES

[1] The reference "P.A." is to the Appendix to the Petition in No. 73–1766. The reference "J.A." is to be the unsealed joint appendix filed in this case.

[2] Those charged were Charles Colson, John Mardian, John Mitchell, Kenneth W. Parkinson and Gordon Strachan.

[3] The validity of the entire indictment is presently being challenged by defendant Haldeman in the district court on the ground that the grand jury had been improperly continued past its term, and therefore had no authority at the time the indictment was returned. See H. R. Haldeman "Motion to Dismiss Indictment" filed May 1, 1974, in *United States* v. *Mitchell*, et al., (D.D.C. Cr. No. 74–110).

[4] The President declined to express his views on the propriety of the transmittal because in his view, such matters were within the court's own discretion. In its decision authorizing the transmittal of this material, however, the court noted that the grand jury report drew no accusatory conclusions deprived no individual of an official forum in which to respond, was not a substitute for indictments where such indictments might properly issue, and contained no recommendation, advice, or statements that infringed on the prerogatives of the other branches of the government. *In Re Report and Recommendations of the June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C. 1974).

[5] On June 3, 1974, Charles Colson pleaded guilty to the felony of obstruction of justice in violation of 18 U.S.C. 1503 in the case of *United States* v. *Ehrlichman et al.*, (D.D.C. Cr. No. 74–116).

[6] This reference "S.P.S.A." is to the Special Prosecutor's Sealed Appendix.

[7] The reference "P.S.A." is to the President's Sealed Appendix.

[8] Unfortunately, the accelerated schedule under which this case is being argued has not permitted the kind of time for the precise and detailed preparation of briefs that Counsel feel the historic nature of both the case and occasion requires.

[9] Although this particular action springs from a criminal proceeding, it is a collateral matter of sufficient independence to warrant civil treatment under 28 U.S.C. 1291 and applicability of the reasoning of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), a civil case, and its progeny. See *Carroll* v. *United States*, 354 U.S. 394, 403, (1957). See also *United States* v. *Ryan*, 402 U.S. 530, 532 (1971).

[10] *United States* v. *Mitchell*, Cr. No. 74–110 (D.D.C. May 20, 1974) at pp. 3–7.

[11] In *North Dakota State Board of Pharmacy* v. *Synder's Drug Stores, Inc.*, 414 U.S. 156, 159, 162 (1973), Justice Douglas, speaking for a unanimous Court, held a judgment of the Supreme Court of North Dakota to be "final" even though that court had remanded the case to a state administrative board for further hearings; to do otherwise would have deprived the petitioner of a constitutional issue which would have been lost. Although decided under 28 U.S.C. 1254, dealing with review of state judgments, the decision and language reflected the traditional requirements of 28 U.S.C. 1291, set out in *Cohen, supra*. See *United States* v. *Ryan*, 402 U.S. 530, 532 (1971).

[12] In addition, the observation by the court in *Nixon* v. *Sirica*, 487 F. 2d 700, 721 n. 100 (D.C. Cir. 1973) is instructive: 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. 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 Presidents as final judgments under 29 U.S.C. 1291 (1970), and by the Special Prosecutor under 18 U.S.C. 3731 (1970). See also the (Order of June 18, 1974), in *Nixon* v. *Sirica* and *Jaworski*, (D.C. Cir. No. 74–1618).

[13] The Court should be advised that a difference of opinion exists between the Special Prosecutor and Special Counsel to the President as to the propriety of presenting this argument. The Special Prosecutor contends that as an inducement to his accepting his position, he was provided free access to the courts to resolve any dispute with the President involving the claim of executive privilege. Special Counsel to the President has not been able to confirm that the President at any time agreed to forego any legal remedies available to him in opposing the efforts of the Special Prosecutor to obtain materials over which the President claimed executive privilege. Be that as it may, the jurisdiction of the court cannot be stipulated by the parties and counsel have a duty to call the attention of the court to the possible lack of jurisdiction. See discussion *infra* at pp. 43–44. See also the excellent discussion of this jurisdictional question published by Professor Bickel at an earlier stage of the Special Prosecutor's efforts to obtain presidential tape recordings. *The Tapes, Cox, Nixon*, The New Republic (September 29, 1973).

[14] In *Burr*, the Court specifically stated:

"In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him." (25 F. Cas. at 192.)

[15] We do not challenge the jurisdiction to a court to entertain a properly documented request by a defendant for exculpatory materials. *Brady* v. *Maryland*, 373 U.S. 83 (1963).

[16] *Aristotle's Politics*, 197–198 (B. Jowett transl. 1943).

[17] The early history of the doctrine of separation, as set forth above, is from Forkosch, *Separation of Powers*, 41 U. Colo. L. Rev. 529 (1969).

[18] J. Locke, *An Essay Concerning the True Original Extent and End of Civil Government* (J. W. Gough, ed. 1947).

[19] Montesquieu, *The Spirit of Laws* (38 Great Books of the Western World, 1900).

[20] *Id.* Bk XI, ch. 6 at 70.

[21] *The Federalist* No. 47 (J. Madison).

[22] At the present time 40 state constitutions expressly provide for a separation of powers and the remaining states have provisions substantially identical to the United States Constitution, W. Dodd, *State Government*, 58 (2d ed. 1928); See also: Constitutions of Hawaii (1959) and Alaska (1959).

[23] 1 Farrand, *Records of the Federal Convention of 1787*, 20–21 (rev. ed. 1966); [hereinafter cited as *Farrand*].

[24] 1 *Farrand* 30–31.

[25] 2 *Farrand* 129.

[26] 2 *Farrand* 152, 171, 172.

[27] 2 *Farrand* 590, 597, 600.

[28] 2 *Farrand* 34.

[29] Andrews, 1 *The Works of James Wilson*, 367 (1896).

[30] *The Federalist* No. 48 (J. Madison) cited in 1 Story, *The Constitution* 530 (4th ed.).

[31] It should be noted that had Acting Attorney General Bork attempted to delegate this right to the Special Prosecutor such a grant of authority would have been void, for the Attorney General himself has never had authority to override or challenge a decision by the Chief Executive and therefore could not delegate such authority to another.

[32] Textually demonstrable grants of power are both explicit and implied in Article II of the Constitution. The Supreme Court has stated:

"It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the Constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate." (*Anderson v. Dunn*, 6 Wheat [19 U.S.], 204, 225–226 [1821].) See also, *New York Times* v. *United States*, 403 U.S. 713, 752 n.3 (1971) (Burger, C. J. dissenting).

[33] Cf. E. Corwin, *Introduction to Congressional Research Service, The Constitution of the United States of America* XII (1973).

[34] Unlike its companion privilege attendant upon the Congress by virtue of the Speech and Debate Clause, executive privilege was not meticulously delineated by the Framers of our Constitution. Its nature as a constitutional privilege, however, is not undermined by that fact. See *Kilbourn* v. *Thompson*, 103 U.S. 168, 189 (1880); see also *Inland Waterways* v. *Young*, 309 U.S. 517, 525 (1940); *United States* v. *Midwest Oil*, 236 U.S. 459, 483, 505 (1915).

[35] We suggest an additional constitutional source of presidential privilege resides in Article II, sec. 1, cl. 8;

"Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solmenly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.' "

The duty of the holder of the Office of the President to preserve, protect and defend the Constitution compels care that Article II, sec. 1, cl. 1 be fully defended from encroachment.

[36] Judge Wilkey, dissenting in *Nixon* v. *Sirica*, 487 F. 2d 700, 763 (D.C. Cir. 1973), succinctly stated:

"The oldest source of Executive Branch privilege, the common sense-common law privilege of confidentiality, existed long before the Constitution of 1789, and might be deemed an inherent power of any government."

[37] See dissenting opinion of Judge Wilkey in *Nixon* v. *Sirica*, 487 F. 2d 700, 768 (D.C. Cir. 1973).

[38] *United States* v. *Burr*, 25 F. Cas. 30, No. 14692d (C.C.D. Va. 1807). *United States* v. *Burr*, 25 F. Cas. 187, No. 14694 (C.C.D. Vt. 1807).

[39] *United States* v. *Mitchell*, Cr. No. 74–110 (D.D.C. 1974) at 3, 7.

[40] See Congressional Research Service, *The Constitution of the United States of America* 429–433 (1974).

[41] C. Rossiter, *The American Presidency* 55 (1956).

[42] *Id.* at 16.

[43] Lest the President's position be misunderstood, it must be stressed we do not suggest that the President has the attributes of a king. *Inter alia*, a king rules by inheritance and for life. See A. Hamilton, *The Federalist*, No. 69; 3 *Farrand* 301–302; Letter of Pierce Butler, dated May 5, 1788, to Weedon Butler, an English subject.

[44] This fact was recognized by Justices Warren and Douglas, in dissent, in *Barr* v. *Matteo*, 360 U.S. 564, 582–583 (1959), a controversy involving issues of executive immunity:

"*Spalding* v. *Vilas*, *supra*, presents another situation in which absolute privilege may be justified. There the Court was dealing with the Postmaster General—a Cabinet Officer personally responsible to the President of the United States for the operation of one of the major departments of government. Cf. *Glass* v. *Ickes*, 73 App. D.C. 3, 117 F. 2d 273; *Mellon* v. *Brewer*, 57 App. D.C. 126, 18 F. 2d 168. The importance of their positions in government as policymakers for the Chief Executive and the fact that they have the expressed trust and confidence of the President who appointed them and to whom they are personally and directly responsible suggest that the absolute protection partakes of presidential immunity. Perhaps the *Spalding* v. *Vilas* rationale would require the extension of such absolute immunity to other government officials who are appointed by the President and are directly responsible to him in policy matters even though they do not hold Cabinet positions. But this extension is not now before us, since it is clear that petitioner Barr was not appointed by the President nor was he directly responsible to the President. Barr was exercising powers originally delegated by the President to the Director of Economic Stabilization who redelegated them to the Director of Rent Stabilization (footnote omitted)."

[45] 1 P. Ford, *The Writings of Thomas Jefferson* 303–305 (1893).

[46] 3 *Annals of Congress* 493; 1 P. Ford, at 303–304.

[47] In 1948, President Truman, railing against an anticipated bill from a Republican Congress that would have required every President to produce confidential information even though the President might consider compliance to be contrary to the public interest, had a Memorandum prepared to demonstrate the bill's unconstitutionality. Part of that Memorandum follows:

Resume and Conclusions

A bird's-eye view of the refusals by seventeen of our Presidents, and their heads of departments, to comply with congressional requests for information and papers from the Executive, beginning with 1796 to the present time, follows:

President	Date	Type of Information Refused
George Washington	1796	Instruction to U.S. Minister concerning Jay Treaty.
Thomas Jefferson	1807	Confidential information and letters relating to Burr's conspiracy.
James Monroe	1825	Documents relating to conduct of naval officers.
Andrew Jackson	1833	Copy of paper read by President to heads of departments relating to removal of bank deposits.
	1835	Copies of charges against removed public official.
	1835	List of all appointments made without Senate's consent, since 1829, and those receiving salaries, without holding office.
John Tyler	1842	Names of Members of 26th and 27th Congress who applied for office.
	1843	Report to War Department dealing with alleged frauds practiced on Indians, and Col. Hitchcock's views of personal characters of Indian delegates.
James K. Polk	1846	Evidence of payments made through State Department, on President's certificates, by prior administration.
Millard Fillmore	1852	Official information concerning proposition made by King of Sandwich Islands to transfer Islands to U.S.
James Buchanan	1860	Message of Protest to House against Resolution to investigate attempts by Executive to influence legislation.
Abraham Lincoln	1861	Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.
Ulysses S. Grant	1876	Information concerning executive acts performed away from Capitol.
Rutherford B. Hayes	1877	Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as Collector of Port of New York.
Grover Cleveland	1886	Documents relating to suspension and removal of Federal officials.
Theodore Roosevelt	1909	Attorney General's reasons for failure to prosecute U.S. Steel Corporation, Department of Commerce.
Calvin Coolidge	1924	List of companies in which Secretary of Treasury Mellon was interested.
Herbert Hoover	1930	Telegrams and letters leading up to London Naval Treaty.
	1932	Testimony and documents concerning investigations made by Treasury Department.
Franklin D. Roosevelt	1941	Federal Bureau of Investigation reports.
	1943	Director, Bureau of the Budget, refused to testify and to produce files.
	1943	Chairman, Federal Communications Commission, and Board of War Communications refused records.
	1943	General Counsel, Federal Communications Commission, refused to produce records.
	1943	Secretaries of War and Navy refused to furnish documents, and permission for Army and Naval officers to testify.
	1944	J. Edgar Hoover refused to give testimony and to produce President's directive.
President Truman	1945	Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee.
	1945	President's directive did not include any files or written material.
	1947	Civil Service Commission records concerning applicants for positions.

Note: Truman Memorandum at 44 a, b, c (1948).

In the bird's-eye picture, reference is made to the refusals of Presidents Monroe, Fillmore, Lincoln, and Hayes[;] Monroe's refusal may be found in a message dated January 10, 1825, 2 Richardson, *Messages and Papers of Presidents*, p. 278' [sic] Fillmore's in 5 Richardson, p. 159; Lincoln's in 6 Richardson p. 12, and the refusal in Hayes' administration is dealt within 17 Cong. Rec. 2332 and 2618.

(In addition, it appears President Kennedy exercised executive privilege four times, the Johnson Administration twice, and, through March 28, 1973, the Nixon Administration fifteen times, four of which were actually claimed by the President, 119 Cong. Rec. 2244–2245 (daily ed. March 28, 1973).

[48] See 11 Op. Att'y Gen. 137, 142–143 (1865) (Atty. Gen. Speed); 20 Op. Att'y Gen. 557, 558 (1893) (Atty. Gen. Olney); 25 Op. Att'y Gen. 326, 331 (1905) (Atty. Gen. Moody); 40 Op. Att'y Gen. 45, 49 (1941) (Atty Gen., later Justice Jackson).

[49] See e.g., 108 Cong. Rec. 3626 (1962), showing Senate adoption of a resolution permitting staff members and former staff members of a Senate Committee to appear and to testify in a criminal proceeding against James Hoffa but forbidding them from taking any documents or records in the custody of the Senate and from testifying about information that they gained while employed in the Senate. In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of Government, which it wishes to protect." *Id.* at 3627.

On July 16, 1970, counsel for 1st Lt. William L. Calley, Jr., moved in his court-martial proceeding for production of testimony concerning the My Lai incident that had been presented to a subcommittee of the House Committee on Armed Services in executive session. Calley claimed that his testimony would be exculpatory of him and would help him establish his defense in the court-martial. The subcommittee Chairman, Rep. F. Edward Hébert, refused to make the testimony available, advising defense counsel on July 17, 1970, that Congress is "an independent branch of the Government, separate from and equal to the Executive and Judicial branches," and that accordingly only Congress can direct the disclosure of legislative records. He concluded from this that the material requested by the defense was not within the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), nor subject to the requirements of the Jencks Act, 18 U.S.C. 3500. Subsequently the military court issued a subpoena to the Clerk of the House of Representatives. The Speaker laid this before the House on November 17, 1970, 116 Cong. Rec. 37652 [1970] but to date the House has taken no action nor given any indication that it will supply the information sought.

On October 4, 1972, the United States Senate bluntly refused, via Senate Resolution,

a judicial subpoena for *inter alia*, documentary evidence in the criminal case of *United States* v. *Brewster*, then pending in the federal district court, District of Columbia. 118 Cong. Rec. S. 16, 766 (92d Cong., 2d Sess.).

[50] The Framers understood perfectly well that enlightened decision-making requires the kind of frank and free discussion that can only be had when confidentiality is absolutely assured. On May 29, 1787, one of the first acts of the Constitutional Convention was the adoption of the following rule: "That nothing spoken in the House be printed, or otherwise published, or communicated without leave." 1 *Farrand* XV. It was not until 1819, that the Journal of the Convention, a mere skeleton of motions and votes, was made public. The fullest record of the proceedings of the Convention is in Madison's *Notes*. As late as 1831, 44 years after the Convention, Madison thought it was not yet appropriate for those *Notes* to be made public, 3 *Farrand* 497, and they were not published until 1840, four years after his death. I *Farrand* xv. President Madison thus anticipated the view of the most distinguished modern student of the Constitution, Paul Freund, who has said: "I sometimes wonder irreverently whether we would have had a Constitution at all if the Convention had been reported by daily columnists." Hughes, *The Living Presidency* 33n. (1973).

[51] *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the court emphatically stated, at 705: "The strength and particularity of this showing were made possible by a unique intermeshing of events, unlikely soon, *if ever*, to recur." It said at 722: "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 a grand jury's compelling showing of need." Since that decision, the President has received more than two dozen subpoenas emanating from various courts throughout the country, calling for the production of voluminous amounts of privileged materials. Indeed, the crippling effect on the Executive Branch, generated by that decision, was correctly predicted by Judge MacKinnon in his dissent. Thus, the impairment of the Executive function is no longer just an unverified, theoretical proposition. A further denial of the President's claim of privilege, as asserted, can only foreshadow further destruction to the Office of the Presidency. As Justice Rehnquist recognized in *State of Michigan* v *Tucker*, No. 73–482 (June 10, 1974): "The pressure of law enforcement and the vagaries of human nature would make such an expectation [no errors by policemen in investigating serious crimes] unrealistic."

[52] See *Griswold* v. *Connecticut*, 381 U.S. 479, 483–484 (1965), wherein Justice Douglas etched these words:

"In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion."

* * * * *

"The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

[53] Article II, section 2, clause 1, of the Constitution, states, in part:

"[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."

[54] Alabama's objective was to ensure compliance by the N.A.A.C.P. with the state's corporate registration laws, an objective uncontested by the N.A.A.C.P. The N.A.A.C.P.'s objection was to the *means* to obtain the end.

[55] M. R. Cohen, *The Supreme Court in United States History*, 178–180 (1946) states that Marshall's decision was motivated by fear of impeachment from the newly-elected Republican Congress. Charles Warren, *The Supreme Court in United States History* 206–265 (1922), indicates the Republicans had been incensed at Adams' post-election appointments. This controversy eventually led to the fourteen month involuntary recess of the Court.

[56] *United States* v. *Burr*, 25 Fed. Cas. 30, No. 14692d (C.C.D. Va. 1807); *United States* v. *Burr*, 25 Fed. Cas. 187, No. 14694 (C.C.D. Va. 1807).

[57] The cautious reference to the *Burr* ruling in *Branzbury* v. *Hayes*, 408 U.S. 665, 689 n. 26 (1972), goes no further than to note that Chief Justice Marshall had "opined" that a subpoena might issue. In *Branzburg*, itself, this Court recognized that ordinarily a grand jury has the right to every man's evidence, but immediately qualified that statement by adding "except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).

[58] One writer has asserted that "in fact [Jefferson] *fully complied* with the subpoena." Berger, *Executive Privilege* v. *Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043, 1107 (1965) (emphasis in original). The author's footnote at that point, however, fails to support the statement in the text. Indeed, that same writer has retreated, since then, from his earlier categorical position. He now says: "In fact Jefferson went a *long way* toward full compliance." R. Berger, *Executive Privilege: A Constitutional Myth* 188 (1974). See 60 A.B.A.J., Irwin Rhodes, *What Really Happened to the Jefferson Subpoenas* 52 (January, 1974) for an additional, contemporary analysis of the *Burr* cases, which concludes: "It is eminently clear that President Jefferson never submitted the contents of the withheld material to the Court or Burr and that his claim to an exclusive exercise of executive privilege, unreviewed by the courts, was upheld by Chief Justice Marshall." (At 54).

[59] Actually, in *United States* v. *Cooper*, 25 Fed. Cas. 631, 633, No. 14,865 (C.C. Pa. 1800), Justice Chase, sitting as a Circuit Justice, refused to direct a subpoena to President Adams stating that "it was a very improper and very indecent request." Cooper, *Account of the Trial of Thomas Cooper* 10 (1800).

[60] See *Kendall* v. *United States* ex rel *Stokes*, 12 Pet. (37 U.S.) 524, 609 (1838), and *Nat'l. Treasury Employees Union* v. *Nixon*, 492 F. 2d 587 (D.C. Cir. 1974), for cases where purely ministerial duties were involved. While the courts are unable to compel a President to act or restrain him from acting, his act, when performed, is in proper cases subject to judicial review and disallowance. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

[61] Some measure of congressional privacy would remain under the Speech or Debate Clause of Article I, Sec. 6, but it is clear that Congress has long claimed a right of privacy, based on separation of powers, that goes far beyond what is protected by the Speech or Debate Clause.

[62] It is interesting to note in *Aldridge* that the individual privilege was held to fail only after the government, by producing evidence *at trial*, has established a *prima facie* case that the defendants had been involved in both securities and mail-fraud. 484 F. 2d at 658. It would be incongruous to allow a pretrial showing of a grand jury's determination developed in a non-adversary forum, namely, that the President had an undefined role in a conspiracy, to overcome a constitutional privilege vital to the separation of powers doctrine. To do so would give the individual privilege a preferred classification over a constitutional privilege.

[63] Describing the President's power to grant pardons, the United States Constitution, Art. II, section 2, clause 1, provides: ". . . he shall have the power to Grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."

[64] Subsequent to the issuance of this subpoena, the President made available voluminous transcripts of numerous privileged conversations regarding Watergate-related matters to both the Special Prosecutor and the general public.

[65] U.S. Const., Amend. 25, ratified on February 23, 1967. See Congressional Research Service, United States Congress, *The Constitution of the United States* at 42–43.

[66] In this respect Gouverneur Morris noted:

[N]o other tribunal than the Senate could be trusted [to try the President]. The Supreme Court were too few in number and might be warped or corrupted. He was agst. [sic] a dependence of the Executive on the Legislature, considering the Legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out. *2 Farrand 551.*

[67] See also the observations in 1 Bryce, *The American Commonwealth* 89 (1889):

"The President is personally responsible for his acts, not indeed to Congress, but to the people, by whom he is chosen. No means exist of enforcing this responsibility, except by impeachment, but as his power lasts for four years only, and is much restricted, this is no serious evil."

[68] This is the necessary implication of the grand jury's role, as a body with a limited mandate, as opposed to the House of Representatives whose political and constitutional mandate entitles them to consider whether in light of the President's complex responsibilities and political concerns a particular action or statement of his constitutes a crime. While any citizen may clearly express an opinion to his Congressman on the President's guilt, innocence or character, a grand jury, as an official part of our system of justice, with all that implies for its credibility and impact, may not.

[69] While the President, as an individual, might some day vindicate himself before a petit jury, as long as he holds the office of President he could not be vindicated in a court of law.

[70] *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Bell* v. *Benson*, 402 U.S. 535 (1971); *Cf. Board of Regents* v. *Roth*, 408 U.S. 564, 573, (1972) and *Wisconsin* v. *Constaintineau*, 400 U.S. 433, 437 (1971).

[71] A similar instruction is used when a charge is made by an information rather than an indictment.

[72] This case has been prominently cited in numerous decision. See for example, *United States* v. *Bearden*, 423 F. 2d 805, 810 n. 4, (5th Cir.), *cert. denied*, 400 U.S. 836 (1970); *United States* v. *Garrison*, 168 F. Supp 622, 624 (E.D. Wis. 1958); *United States* v. *Duncan*, 22 F.R.D. 295, 298 (S.D.N.Y. 1958).

[73] That the provisions of Rule 17(c) are applicable to the government as well as to a defendant is not open to serious challenge. See *United States* v. *Gross*, 24 F.R.D. 138, 140 (S.D.N.Y. 1959).

[74] Rule 26, F.R.C.P. provides, in part:

(b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

"(1) IN GENERAL. Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the information sought will be inadmissible at the trial if

the information sought appears reasonably calculated to lead to the discovery of evidence. (emphasis added)."

[In the Supreme Court of the United States, October Term, 1973]

BRIEF FOR THE UNITED STATES

No. 73-1766: UNITED STATES OF AMERICA, PETITIONER v. RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS.

No. 73-1834: RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER *v.* UNITED STATES OF AMERICA.

On writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINION AND ORDERS BELOW

The district court's order of April 18, 1974 (Pet. App. 47 [1]) issuing the subpoena *duces tecum* in question is unreported. The district court's opinion and order of May 20, 1974, denying the motion to quash order of May 20, 1974, denying the motion to quash the subpoena, enforcing compliance therewith, and denying the motion to expunge (Pet. App. 15) is not yet officially reported.

JURISDICTION

The order of the district court (Pet. App. 23) was entered on May 20, 1974. On May 24, 1974, Richard M. Nixon, President of the United States, filed a timely notice of appeal from that order in the district court, and the certified record was docketed in the United States Court of Appeals for the District of Columbia Circuit that same day (D.C. Cir. No. 74-1534). Also on May 24, 1974, the President filed a petition for a writ of mandamus in the court below seeking review of the district court's order (D.C. Cir. No. 74-1532).[2]

On May 24, 1974, the Special Prosecutor filed a petition for a writ of certiorari before judgment on behalf of the United States (No. 73-1766),[3] and certiorari was granted on May 31, 1974. On June 6, 1974, President Nixon filed a cross-petition for a writ of certiorari before judgment (No. 73-1834), which was granted on June 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1), 1651, and 2101(e).

In response to the Court's order of June 15, 1974, two jurisdictional questions are being discussed in our Supplemental Brief.

QUESTIONS PRESENTED

In No. 73-1766:

1. Whether a federal court must determine itself if executive privilege is properly invoked in a criminal proceeding or whether it is bound by the President's assertion of an absolute "executive privilege" to withhold demonstrably material evidence from the trial of charges of conspiracy to defraud the United States and obstruct justice by his own White House aides and party leaders, upon the ground that he deems production to be against the public interest.

2. Whether the President is subject to a judicial order directing compliance with a subpoena *duces tecum* calling for production of evidence, under his sole personal control, that is demonstrably material to a pending federal criminal prosecution.

3. Whether the President's claim of executive privilege based on the generalized interest in the confidentiality of government deliberations can block the prosecution's access to material evidence for the trial of criminal charges against the former officials who participated in those deliberations, particularly where there is a *prima facie* showing that the President is a co-conspirator and that the deliberations occurred in the course of and in furtherance of the conspiracy.

4. Whether any executive privilege that otherwise might have been applicable to discussions between the President and alleged co-conspirators concerning the Watergate matter has been waived by previous testimony given pursuant to the President's approval and by the President's public release of edited transcripts of forty-three such conversations.

5. Whether the district court properly determined that the subpoena *duces tecum* issued to the President satisfied the standards of Rule 17(c) of the Federal Rules of Criminal Procedure because an adequate showing had been made that the subpoenaed items are relevant to issues to be tried and will be admissible in evidence.

In No. 73-1834:

6. Whether the district court acted within its discretion in declining to expunge the federal grand jury's naming of the President as an unindicted co-conspirator in offenses for which the grand jury returned an indictment.

The two questions the parties were requested to brief and argue by the Court's order of June 15, 1974, are discussed in our Supplemental Brief.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, rule, and regulations involved, which are set forth in the Appendix, *infra*, pp. 141-53, are:

Constitution of the United States:
Article II, Section 1
Article II, Section 2
Article II, Section 3
Article III, Section 2
Statutes of the United States:
5 U.S.C. 301
28 U.S.C. 509, 510, 515-519
Rule:
Rule 17(c), Federal Rules of Criminal Procedure
Regulations:
Department of Justice Order No. 551-73 (November 2, 1973), 38 Fed. Reg. 30,738, adding 28 C.F.R. §§ 0.37, 0.38, and Appendix to Subpart G-1
Department of Justice Order No. 554-73 (November 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G-1

STATEMENT

This case presents for review the denial of a motion filed on behalf of respondent Richard M. Nixon, President of the United States, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, seeking to quash a subpoena *duces tecum* issued in a criminal case, directing the President to produce tape recordings and documents relating to sixty-four specifically described Presidential conversations. This subpoena (Pet. App. 39) issued on behalf of the United States at the request of the Special Prosecutor covers evidence which is demonstrably material to the trial of charges of conspiracy to defraud the United States and obstruct justice by former aides and associates of the President.

1. APPOINTMENT OF A SPECIAL PROSECUTOR

On May 25, 1973, Attorney General Elliot L. Richardson established the Office of the Watergate Special Prosecution Force, to be headed by Special Prosecutor Archibald Cox, with "full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee headquarters at the Watergate." [4] The appointment of the Special Prosecutor, together with his specific duties and responsibilities, including full authority for determining whether or not to contest the assertion of "executive privilege," was settled in connection with the hearings of the Senate Judiciary Committee on the nomination of Mr. Richardson to be Attorney General.[5]

2. ENFORCEMENT OF THE 1973 GRAND JURY SUBPOENA DUCES TECUM

On July 16, 1973, Alexander Butterfield, formerly chief administrative officer at the White House, testified before the Senate Select Committee on Presidential Campaign Activities that at the President's direction the Secret Service as a matter of course had been recording automatically all conversations in the President's offices in the White House and Old Executive Office Building.[6] Because there had been sharply contradictory testimony regarding the relationship between several Presidential meetings and telephone conversations and an alleged conspiracy to conceal the identity of the persons responsible for the Watergate break-in, the Special Prosecutor issued a grand jury subpoena *duces tecum* to the President, who had assumed sole personal control over the recordings,[7] requiring him to produce the recordings of these meetings.

When the President refused to comply with the subpoena, the grand jury unanimously instructed the Special Prosecutor to apply for a court order requiring production. After a hearing, the court ordered the President to produce the subpoenaed items for *in camera* inspection, rejecting the President's contentions that he is immune from compulsory process and that he has absolute, unreviewable discretion to withhold evidence from the courts on the ground of executive privilege. In re *Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, 360 F. Supp. 1 (D.D.C. 1973). The Court of Appeals for the District of Columbia Circuit upheld this order, with modifications, in an *en banc* decision denying the President's petition for a writ of mandamus. *Nixon* v *Sirica*, 487 F. 2d 700 (1973). The court of appeals *sua sponte* then stayed its order to permit the President to seek review by this Court.

3. DISMISSAL OF THE SPECIAL PROSECUTOR

The President decided, however, not to seek review by this Court, and instead proposed a "compromise" to the Special Prosecutor which would have supplied edited transcripts of the subpoenaed recordings for use before the grand jury and at any subsequent trial. At the same time the President issued an order to Special Prosecutor Cox forbidding him ever again to resort to the judicial process to seek evidence from the President. The Special Prosecutor refused to accept this compromise or to accede to the order that would have barred him from exercising his discretion to seek evidence necessary for prosecutions within his jurisdiction. When the President then ordered Attorney General Richardson to dismiss the Special Prosecutor, the Attorney General resigned rather than obey, and Deputy Attorney General William Ruckelshaus was fired when he too refused to carry out the President's order.[8] On the night of October 20, 1973, Solicitor General Robert H. Bork, upon whom the responsibilities of Acting Attorney General devolved, elected to obey the President's instruction and peremptorily discharged Special Prosecutor Cox and abolished the Watergate Special Prosecution Force.[9]

On October 23, 1973, after considerable congressional and public reaction, counsel for the President announced to the district court that the President would comply with the district court's order as modified by the court of appeals.[10] Counsel for the President subsequently disclosed for the first time that two of the subpoenaed conversations were not recorded, and that eighteen and one-half minutes of the subpoenaed recording of the meeting between the President and H. R. Haldeman on June 20, 1972, had been obliterated.[11]

4. APPOINTMENT OF A NEW SPECIAL PROSECUTOR

In response to the discharge of Special Prosecutor Cox, both the Senate Judiciary Committee and the House of Representatives Judiciary Subcommittee on Criminal Justice

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began hearings on legislation to establish a court-appointed Special Prosecutor independent of control by the President.[13] Both committees reported out such bills for action by the House and Senate.[13]

Neither House considered the legislation on the floor, however, because on October 26, 1973, the President announced that Acting Attorney General Bork would appoint a new Special Prosecutor. The President explained that he had no greater interest than seeing that the Special Prosecutor has "the independence that he needs" to prosecute the guilty and clear the innocent.[14]

On November 2, 1973, the Acting Attorney General re-established the Watergate Special Prosecution Force and appointed Leon Jaworski as Special Prosecutor, vesting in him the same powers and authority possessed by his predecessor, including "full authority" to "contest the assertion of 'Executive Privilege' or any other testimonial privilege" (Appendix pp. 146–51. *infra*).[15] The only change in the regulations relevant to this Court's consideration was the addition of a provision, in "accordance with assurances given by the President to the Attorney General," that the President would not limit the jurisdiction of the Special Prosecutor or effect his dismissal without first consulting with the Majority and Minority Leaders of both Houses of Congress and their respective Committees on the Judiciary (Appendix pp. 151–52, *infra*).[16] Thereafter both Houses tabled the legislation for court appointment of an independent Special Prosecutor, but the bills remain on their respective calendars.

5. THE INDICTMENT IN THIS CASE AND THE NAMING OF THE PRESIDENT AS A CO-CONSPIRATOR

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment (A. 5A) charging respondents John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson and Gordon Strachan with various offenses relating to the Watergate matter, including a conspiracy to defraud the United States and to obstruct justice. *United States* v. *Mitchell, et al.*, D.D.C. Crim. No. 74–110. At some or all of the times in question, respondent Mitchell, a former Attorney General of the United States, was Chairman of the Committee for the Re-Election of the President; respondent Haldeman was Assistant to the President and his chief of staff; respondent Ehrlichman was Assistant to the President for Domestic Affairs; respondent Colson was Special Counsel to the President; respondent Mardian, a former Assistant Attorney General, was an official of the President's re-election campaign; respondent Parkinson was an attorney for the re-election committee; and respondent Strachan was Staff Assistant to the President.

In the course of its consideration of the indictment, the grand jury, by a vote of 19–0, determined that there is probably cause to believe that respondent Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice as charged in the indictment, and the grand jury authorized the Special Prosecutor to identify President Nixon (among others) as an unindicted coconspirator in connection with subsequent legal proceedings.

6. ISSUANCE OF THE TRIAL SUBPOENA TO THE PRESIDENT

In order to obtain additional evidence which the Special Prosecutor has reason to believe is in the custody of the President and which would be important to the government's proof at the trial in *United States* v. *Mitchell, et al.*, the Special Prosecutor, on behalf of the United States, moved on April 16, 1974, for the issuance of the subpoena *duces tecum* in question (Pet. App. 39). On April 18, 1974, the district court ordered the subpoena to issue, returnable on May 2, 1974 (Pet. App. 47). The subpoena called for production of the evidence in advance of the September 9, 1974, trial date in order to allow time for any litigation over the subpoena and for transcription and authentication of any tape recordings produced.

On April 30, 1974, the President released to the public and submitted to the House Judiciary Committee conducting an impeachment inquiry 1,216 pages of edited transcripts of forty-three conversations dealing with Watergate. Portions of twenty subpoenaed conversations were included. On May 1, 1974, President Nixon, through his White House counsel, filed in the district court a "special appearance," a "formal claim of privilege," and a motion to quash the subpoena (A. 47A). At the suggestion of counsel for the President and the Special Prosecutor and with the approval of counsel for the defendants, subsequent proceedings were held *in camera* because of the sensitive nature of the grand jury's finding with respect to the President, which was submitted to the district court by the Special Prosecutor as a ground for denying the motion to quash. Defendants Colson, Mardian, and Strachan formally joined in the Special Prosecutor's motion for issuance of the subpoena, and all seven defendants (respondents herein) argued in opposition to the motion to quash at the hearing in the district court. At that hearing, counsel for the President also moved to expunge the grand jury's finding and to enjoin all persons, except for the President and his counsel, from ever disclosing the grand jury's action.

7. THE DECISION BELOW

In its opinion and order of May 20, 1974 (Pet. App. 15), the district court denied the motion to quash and the motion to expunge and for protective orders. It further ordered "the President or any subordinate officer, official or employee with custody or control of the documents or objects subpoenaed" to deliver to the court the originals of all subpoenaed items as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30, 1974. The district court stayed its order pending prompt application for appellate review and further provided that matters filed under seal remain under seal when transmitted as part of the record (Pet. App. 22–23).[17]

In requiring compliance with the subpoena *duces tecum*, the district court rejected the contention by counsel for the President that it had no jurisdiction because the proceeding allegedly involved solely an "intra-executive" dispute (Pet. App. 18). The court ruled that this argument lacked substance in light of jurisdictional responsibilities and independence with which the Special Prosecutor had been vested by regulations that have the force and effect of law and that had received the explicit concurrence of the President. The court noted the "unique guarantee of unfettered operation" given to the Special Prosecutor and emphasized that under these regulations the Special Prosecutor's jurisdiction, which includes express authority to contest claims of executive privilege, cannot be limited without the President's first consulting with the leaders of both Houses of Congress and the respective Committees on the Judiciary and securing their consensus (Pet. App. 18–19). In these circumstances, the court found that there exists sufficient independence to provide the ccurt with a concrete legal controversy between adverse parties and not simply an intra-agency dispute over policy. Moreover, the court later noted that as a recipient of a subpoena in this criminal case, the President "as a practical matter, is a third party" (Pet. App. 19).

On the merits, and relying in the *en banc* decision in *Nixon* v. *Sirica, supra*, the district court held that in the circumstances of this case, the courts, and not the President, are the final arbiter of the applicability of a claim of executive privilege for the subpoenaed items (Pet. App. 17). Here, the court ruled, the presumptive privilege for documents and materials reflecting executive deliberations was overcome by the Special Prosecutor's *prima facie* showing that the items are relevant and important to the issues to be tried in the Watergate cover-up case and that they will be admissible in evidence (Pet. App. 20–21).[18]

fidential intra-governmental deliberations, Special Prosecutor, in his memorandum and appendix submitted to the court, satisfied the requirements of Rule 17(c) that the subpoenaed items be relevant and evidentiary (Pet. App. 19–20).

The President has sought review of this decision in the court of appeals, and the case is now before this court on writs of certiorari before judgment granted on May 31, 1974, and June 15, 1974, on the petition of the United States and the cross-petition of the President, respectively.

SUMMARY OF ARGUMENT

The narrow issue presented to this Court is whether the President, in a pending prosecution against his former aides and associates being conducted in the name of the United States by a Special Prosecutor not subject to Presidential directions, may withhold material evidence from the court merely on his assertion that the evidence involves confidential governmental deliberations. The Court clearly has jurisdiction to decide this issue. The pending criminal prosecution in which the subpoena *duces tecum* was issued constitutes a "case of controversy," and the federal courts naturally have the duty and, therefore, the power to determine what evidence is admissible in that prosecution and to require that that evidence be produced. This is only a specific application of the general but fundamental principle of our constitutional system of government that the courts, as the "neutral" branch of government, have been allocated the responsibility to resolve all issues in a controversy property before them, even though this requires them to determine authoritatively the powers and responsibilities of the other branches.

Any notion that this controversy, arising as it does from the issuance of a subpoena *duces tecum* to the President at the request of the Special Prosecutor, is not justiciable is wholly illusory. In the context of the most concrete and vital kind of case—the federal criminal prosecution of former White House officials—the Special Prosecutor, as the attorney for the United States, has resorted to a traditional mechanism to procure evidence for the government's case at trial. In objecting to the enforcement of the subpoena, the President has raised a classic question of law—a claim of privilege—and the United States, through its counsel and in its sovereign capacity, is opposing that claim. Thus, viewed in practical terms, it would be hard to imagine a controversy more appropriate for judicial resolution.

The fact that this concrete controversy is represented in the context of a dispute between the President and the Special Pros-

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ecutor does not deprive this Court of jurisdiction. Congress has vested in the Attorney General, as the head of the Department of Justice, the exclusive authority to conduct the government's civil and criminal litigation, including the exclusive authority for securing evidence. The Attorney General, with the explicit concurrence of the President, has vested that authority with respect to Watergate matters in the Special Prosecutor. These regulations have the force and effect of law and establish the functional independence of the Special Prosecutor. Accordingly, the Special Prosecutor, representing the sovereign authority of the United States, and the President appear before the Court as adverse parties in the truest sense. The President himself has ceded any power that he might have had to control the course of the pending prosecution, and it would stand the Constitution on its head to say that this arrangement, if respected and given effect by the courts, violates the "separation of powers."

I

Throughout our constitutional history the courts, in cases or controversies before them, consistently have exercised final authority to determine whether even the highest executive officials are acting in accordance with the Constitution. In fulfilling this basic constitutional function, they have issued appropriate decrees to implement those judicial decisions. The courts have not abjured this responsibility even when the most pressing needs of the Nation were at issue.

In applying this fundamental principle, the courts have determined for themselves not only what evidence is admissible in a pending case, but also what evidence must be produced, including whether particular materials are appropriately subject to a claim of executive privilege. Indeed, this Court has squarely rejected the claim that the Executive has absolute, unreviewable discretion to withhold documents from the courts.

The unbroken line of precedent establishing that the courts have the final authority for determining the applicability and scope of claims of executive privilege is supported by compelling arguments of policy. The Executive's legitimate interests in secrecy are more than adequately protected by the qualified privilege defined and applied by the courts. But as this Court has recognized, an absolute privilege which permitted the Executive to make a binding determination would lead to intolerable abuse. This case highlights the inherent conflict of interest that is presented when the Executive is called upon to produce evidence in a case which calls into question the Executive's own action. The President cannot be a proper judge of whether the greater public interest lies in disclosing evidence subpoenaed for trial, when that evidence may have a material bearing on whether he is impeached and will bear heavily on the guilt or innocence of close aides and trusted advisors.

In the framework of this case, where the privilege holder is effectively a third party, the interests of justice as well as the interests of the parties to the pending prosecution require that the courts enter a decree requiring that relevant and unprivileged evidence be produced. The "produce or dismiss" option that is sometimes allowed to the Executive when a claim of executive privilege is overruled merely reflects a remedial accommodation of the requirements of substantive justice and thus has never been available to the Executive where the option could not satisfy these requirements. This is particularly true where the option would make a travesty out of the independent institution of the Special Prosecutor by allowing the President to accomplish indirectly what he cannot do directly—secure the abandonment of the Watergate prosecution.

II

There is nothing in the status of the President that deprives the courts of their constitutional power to resolve this dispute. The power to issue and enforce a subpoena *duces tecum* against the President was first recognized by Chief Justice Marshall in the *Burr* case in 1807, in accordance with two fundamental principles of our constitutional system: First, the President, like all executive officials as well as the humblest private citizens, is subject to the rule of law. Indeed, this follows inexorably from his constitutional duty to "take Care that the Laws be faithfully executed." Second, in the full and impartial administration of justice, the public has a right to every man's evidence. The persistent refusal of the courts to afford the President an absolute immunity from judicial process is fully supported by the deliberate decision of the Framers to deny him such a privilege.

Although it would be improper for the courts to control the exercise of the President's constitutional discretion, there can be no doubt that the President is subject to a judicial order requiring compliance with a clearly defined legal duty. The crucial jurisdictional factor is not the President's office, or the physical power to secure compliance with judicial orders, but the Court's ability to resolve authoritatively, within the context of a justiciable controversy, the conflicting claims of legal rights and obligations. The Court is called upon here to adjudicate the obligation of the President, as a citizen of the United States, to cooperate with a criminal prosecution by performing the solely ministerial task of producing specified, unprivileged evidence that he has taken within his sole personal custody.

III

The qualified executive privilege for confidential intra-governmental deliberations, designed to promote the candid interchange between officials and their aides, exists only to protect the legitimate functioning of government. Thus, the privilege must give way where, as here, it has been abused. There has been a *prima facie* showing that each of the participants in the subpoenaed conversations, including the President, was a member of the conspiracy to defraud the United States and to obstruct justice charged in the indictment in the present case, and a further showing that each of the conversations occurred in the course of and in furtherance of the conspiracy. The public purpose underlying the executive privilege for governmental deliberations precludes its application to shield alleged criminality.

But even if a presumptive privilege were to be recognized in this case, the privilege cannot be sustained in the face of the compelling public interest in disclosure. The responsibility of the courts in passing on a claim of executive privilege is, in the first instance, to determine whether the party demanding the evidence has made a *prima facie* showing of a sufficient need to offset the presumptive validity of the Executive's claim. The cases have held that the balance should be struck in favor of disclosure only if the showing of need is strong and clear, leaving the courts with a firm conviction that the public interest requires disclosure.

It is difficult to imagine any case where the balance could be clearer than it is on the special facts of this proceeding. The recordings sought are specifically identified, and the relevance of each conversation to the needs of trial has been established at length. The conversations are demonstrably important to defining the extent of the conspiracy in terms of time, membership and objectives. On the other hand, since the President has authorized each participant to discuss what he and the others have said, and since he repeatedly has summarized his views of the conversations, while releasing partial transcripts of a number of them, the public interest in continued confidentiality is vastly diminished.

The district court's ruling is exceedingly narrow and, thus, almost no incremental damage will be done to the valid interests in assuring future Presidential aides that legitimate advice on matters of policy will be kept secret. The unusual circumstances of this case—where high government officials are under indictment for conspiracy to defraud the United States and obstruct justice—at once make it imperative that the trial be conducted on the basis of all relevant evidence and at the same time make it highly unlikely that there will soon be a similar occasion to intrude on the confidentiality of the Executive Branch.

IV

Even if the subpoenaed conversations might once have been covered by a privilege, the privilege has been waived by the President's decision to authorize voluminous testimony and other statements concerning Watergate-related discussion and his recent release of 1,216 pages of transcript from forty-three Presidential conversations dealing with Watergate. A privilege holder may not make extensive disclosures concerning a subject and then selectively withhold portions that are essential to a complete and impartial record. Here, the President repeatedly has referred to the conversations in support of his own position and even allowed defendant Haldeman access to the recordings after he left public office to aid him in preparing his public testimony. In the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has made far-reaching, but expurgated disclosures, the court may use its process to acquire all relevant evidence to lay before the jury.

The district court, correctly applying the standards established by this Court, found that the government's showing satisfied the requirements of Rule 17(c) of the Federal Rules of Criminal Procedure that items subpoenaed for use at trial be relevant and evidentiary. The enforcement of a trial subpoena *duces tecum* is a question for the trial court and is committed to the court's sound discretion. Absent a showing that the finding by the court is arbitrary and had no support in the record, the finding must not be disturbed by an appellate court. Here, the Special Prosecutor's analysis of each of the sixty-four conversations, submitted to the district court, amply supports that court's finding.

ARGUMENT

INTRODUCTION: THE ISSUES BEFORE THE COURT PRESENT A LIVE, CONCRETE JUSTICIABLE CONTROVERSY

In the district court, counsel for the President, in a sealed reply to the government's papers opposing the motion to quash, raised for the first time the contention that the court lacked "jurisdiction to consider the Special Prosecutor's request of April 16, 1974, relating to the disclosure of certain presidential documents." Counsel was referring to the trial subpoena applied for by the Special Prosecutor on behalf of the United States (Pet. App. 39) and issued by the district court on April 18, 1974 (Pet. App. 47). It was that subpoena that the President moved to quash. The basis for the President's contention that the court lacked jurisdiction to "consider" that "request" for evidence was the assertion that the subpoena involved merely a "dispute between two entities within the Executive Branch."

The district court rejected this contention, ruling that under the circumstances established by applicable statutes and regulations, the President's "attempt to abridge the Special Prosecutor's independence with

the argument that he cannot seek evidence from the President by court process is a nullity and does not defeat the Court's jurisdiction" (Pet. App. 19). Before addressing the issues before this Court on the merits, we pause to express the reasons why this litigation between the United States, represented by the Special Prosecutor, and the President presents a live, concrete, justiciable controversy.

A. THIS CASE COMES WITHIN THE JUDICIAL POWER OF THE FEDERAL COURTS

This litigation is not merely a dispute between two executive officers over preferred policy, or even over an interpretation of a statute. The courts have not been called upon to render an advisory opinion upon some abstract or theoretical question. Rather, in the context of the most concrete and vital kind of case—the federal criminal prosecution of former White House officials, styled *United States* v. *Mitchell, et al.*—the Special Prosecutor as the attorney for the United States has resorted to a traditional mechanism to procure evidence for the government's case at trial—a subpoena—in the face of the unwillingness of a distinct party or entity—the President—to furnish the evidence voluntarily. In objecting to the enforcement of the subpoena, the President has raised a classic question of law—a claim of privilege—and the United States, through its counsel, is opposing that claim. Thus, viewed in practical terms, it would be hard to imagine a controversy more appropriate for judicial resolution and more squarely within the jurisdiction of the federal courts. This Court is called upon to review questions that are well "within the traditional role accorded courts to interpret the law." *Powell* v. *McCormack*, 395 U.S. 486, 548; see, *e.g.*, *Roviaro* v. *United States*, 353 U.S. 53; *United States* v. *Reynolds*, 345 U.S. 1.

Ever since *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, it has been settled that, as long as a federal court is properly vested with subject-matter jurisdiction,[19] it has the judicial power to render an authoritative, binding decision on the rights, powers, and duties of the other two branches of government. See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579; *United States* v. *United States District Court*, 407 U.S. 297; *Kendall* v. *United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524; *Kilbourn* v. *Thompson*, 103 U.S. 168; *Doe* v. *McMillan*, 412 U.S. 306. This judicial power extends fully to disputes between representatives of the other two branches, *e.g.*, *United States* v. *Brewster*, 408 U.S. 501; *Gravel* v. *United States*, 408 U.S. 606; *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, — F. 2d — (D.C. Cir. No. 74–1258) (May 23, 1974), as well as to disputes within one of those other branches, *e.g.*, *Powell* v. *McCormack*, *supra*; *Service* v. *Dulles*, 354 U.S. 363; *Sampson* v. *Murray*, — U.S. — (42 U.S.L.W. 4221, February 19, 1974).

As we shall discuss below, the fact that the President and the Special Prosecutor (on behalf of the United States) are the legal adversaries in this phase of the controversy in no way undermines the existence of the judicial power to adjudicate the legal rights and duties at issue—namely, the existence *vel non* of a privilege to withhold evidence from a criminal trial pending in the federal court.

B. THE UNITED STATES, REPRESENTED BY THE SPECIAL PROSECUTOR, IS A PARTY DISTINCT FROM THE PRESIDENT

We begin by making the fundamental point, overlooked by counsel for the President, that federal criminal prosecutions are brought in the name of the United States of America as a sovereign nation. Despite his extensive powers and even his status as Chief Executive and Chief of State, the President, whether in his personal capacity or his official capacity, is distinct from the United States and is decidedly *not* the sovereign. Although the Constitution vests the executive power generally in the President (Art. II, Sec. 1), it expressly contemplates the establishment of executive departments which will actually discharge the executive power, with the President's function necessarily limited to "take Care that the Laws be faithfully executed" by other officers of the government (Art. II, Sec. 3). Thus, Article II, Section 2 expressly provides that, instead of giving the President power to appoint (and, perhaps, remove) "inferior Officers" of the Executive Branch, "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, * * * in the Courts of Law, or in the Heads of Departments."

Congress has organized the Department of Justice and provided that the Attorney General is its head. 28 U.S.C. 501, 503. Under Article 11, Section 2, Congress has vested in him alone the power to appoint subordinate officers to discharge his powers, 28 U.S.C. 509, 510, 515, 533. Among the responsibilities given by Congress to the Attorney General is the authority to conduct the government's civil and criminal litigation (28 U.S.C. 516):

> Except as otherwise authorized by law, the conduct of litigation *in which the United States*, an agency, or officer thereof *is a party*, or is interested, *and securing evidence therefor*, is reserved to officers of the Department of Justice under the direction of the Attorney General. (Italics added.)

As this Court has recognized, this section and companion provisions, see 28 U.S.C. 515–519, "impose on the Attorney General the authority and the duty to protect the Government's interests through the courts." *United States* v. *California*, 332 U.S. 19, 27–28. Under this framework it is not the President who has personal charge of the conduct of the government's affairs in court but, rather, it is the Attorney General acting through the officers of the Department of Justice appointed by him. This Court underscored the special status of the officers of the Department of Justice before the courts in *Berger* v. *United States*, 295 U.S. 78, 88, explaining that the federal prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty. * * * As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

Thus, as the district judge below pointedly recognized (Pet. App. 19), the subpoena *duces tecum* issued by the prosecution to the President is directed to a person who "as a practical matter, is a third party."[20]

It was in the capacity as attorney for the United States that the Special Prosecutor invoked the judicial process. Exercising his exclusive authority under 28 U.S.C. 516 to secure evidence for a pending criminal prosecution within his jurisdiction, the Special Prosecutor is seeking evidence from an adverse party—evidence which the Special Prosecutor has reason to believe is highly material to the trial. Under the law, the Special Prosecutor speaks for the United States in conducting this criminal trial, and under the applicable statutes and regulations he has authority, which can be enforced by the courts, to seek evidence even from the President. Not only is this authority expressly included in the Department of Justice regulations defining his powers (Appendix pp. 146–50, *infra*), but the record shows that the President personally acceded to the arrangement whereby his assertion of privilege would not preclude the Special Prosecutor, in a proper case, from invoking the judicial process to litigate the validity of the claim.

Before agreeing to accept appointment as the new Special Prosecutor, Mr. Jaworski obtained an assurance from the President's chief of staff, General Alexander Haig, who had conferred with the President, that there would be no bar to his resorting to judicial process, if necessary, to fulfill his responsibilities as he viewed them.[21] The Acting Attorney General, who appointed the Special Prosecutor, was fully apprised of the understanding. He testified as follows before the Senate Judiciary Committee:

> "Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that *he has the power to use judicial processes to pursue evidence if disagreement should develop.*" (Italics added.)[22]

He also assured the House Subcommittee on Criminal Justice: "I understand and it is clear to me that Mr. Jaworski can go to court and test out" any refusal to produce documents on the ground of confidentiality.[23]

Similarly, the President's nominee to be Attorney General, William Saxbe, testified that the Special Prosecutor would have "sole discretion" in deciding whether to contest an assertion of executive privilege by the President and stated "he can go to court at any time to determine that."[24] Significantly, neither the President, nor his counsel, nor Acting Attorney General Bork has ever disavowed the assurances given. In fact, in announcing the appointment of a new Special Prosecutor on October 26, 1973, President Nixon stated (9 Weekly Compilation of Presidential Documents (Oct. 29, 1973)):

> "And I can assure you ladies and gentlemen, and all our listeners tonight, that I have no greater interest than to see that the new special prosecutor has the cooperation from the executive branch *and the independence that he needs* to bring about that conclusion [of the Watergate investigation]." (Italics added.)

The regulations governing the Special Prosecutor's jurisdiction and independence, together with the Presidential assurances given to the public directly and to the Special Prosecutor through General Haig, reflect the public demand for an independent prosecutor not subject to the direct or indirect control of the President and not dependent upon the discretion of the President for access to information upon which to base investigations and prosecutions.[25] From the first, the regulations establishing and then reestablishing the Office of the Watergate Special Prosecution Force[26] have had the force and effect of law, *e.g.*, *Vitarelli* v. *Seaton*, 359 U.S. 535; *Service* v. *Dulles*, *supra*; *Accardi* v. *Shaughnessy*, 347 U.S. 209; *Nader* v. *Bork*, *supra*, and empower the Special Prosecutor to contest the assertion of executive privilege in any case within his jurisdiction when he, not the President, concludes the assertion is unwarranted. See *Accardi* v. *Shaughnessy*, *supra*, 347 U.S. at 266–67.

This Court has held that, by virtue of their office, public officials necessarily have a sufficient "personal stake in the outcome" of any litigation that challenges the performance of their duties on constitutional grounds. See, *e.g.*, *Board of Education* v. *Allen*, 392 U.S. 236, 241 n. 5; *Coleman* v. *Miller*, 307 U.S. 433, 437–45. It follows, therefore, that under applicable statutes and regulations the Special Prosecutor has standing to take all necessary steps in court to promote the conduct of the cases under his jurisdiction, including litigation of claims of "executive privilege" advanced as a reason for withholding evidence considered important to one of those prosecutions.

C. THE SPECIAL PROSECUTOR HAS AUTHORITY TO SEEK, AND THE FEDERAL COURTS HAVE POWER TO GRANT, A PRODUCTION ORDER ADDRESSED TO THE PRESIDENT EVEN THOUGH THE SPECIAL PROSECUTOR IS A MEMBER OF THE EXECUTIVE BRANCH

What has been shown above makes clear the authority of the Special Prosecutor to

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bring such prosecutions as are within his jurisdiction and to seek court orders for the production of such evidence as is necessary to the litigation. We have shown that, in so discharging his duties, the Special Prosecutor does not act as the mere agent-at-will of the President. He enjoys an independent authority derived from constitutional delegations of authority by the Congress to the Attorney General and from the Attorney General to him under valid regulations that reflect the solemn commitments of the President himself.

Since the Special Prosecutor has authority to bring prosecutions and to seek production of evidence and does not take such actions in the President's name or at his behest, and since, as we show in Part II of our argument below, the President can, in an appropriate case, be ordered to produce evidence, there would seem to be no obstacle to the Special Prosecutor's seeking an order that the President produce evidence. The proceedings surrounding such an order constitute a justiciable controversy whether or not the President could, through a complicated series of steps, lawfully replace the Special Prosecutor and despite the somewhat unusual appearance on opposite sides of two parties both of whom are members of the Executive Branch.

1. Whatever power the President may have to circumvent an adverse ruling by taking steps to abrogate the Special Prosecutor's independence cannot serve to render the controversy nonjusticiable

The mere fact that the President is Chief Executive, with ultimate responsibility to "take Care that the Laws be faithfully executed," does not destroy the Special Prosecutor's independence or standing to sue. Whatever might be the situation in a proceeding conducted by a mere agent of the President, the Special Prosecutor's functional and legal independence empowers him, on behalf of the United States, to seek a subpoena against the President for evidence.

Congress frequently confers powers and duties upon subordinate executive officials, and in such situations the President's function as Chief Executive does not authorize him to displace the designated officer and to act directly in the matter himself. As long as the officer holds his position, the power to act under the law is his alone. A familiar example of this basic principle was illustrated by President Andrew Jackson's legendary battle over the Bank of the United States. Two Secretaries of the Treasury refused to obey the President's command to withdraw deposits from the Bank, a function entrusted to the Secretary by law. The President's only recourse was to seek a third, who complied with Jackson's wish. See generally Van Deusen, *The Jacksonian Era*, 1828–1848, pp. 80–82 (1959). Attorney General Roger Taney gave a similar opinion to President Jackson, advising him that as long as a particular United States Attorney remained in office, he was empowered to conduct a particular litigation as he saw fit, despite the wishes of the President. See 2 Op. Att'y Gen. 482 (1831).

More recently, President Nixon apparently recognized a similar limitation on his powers as Chief Executive when, in order to effect the discharge of the former Special Prosecutor over the refusal of Attorney General Richardson and Deputy Attorney General Ruckelshaus to dismiss him, the President had to procure the removal of those officials and rest upon Acting Attorney General Bork's exercise of their power.

These principles, considered in light of the authority of the Special Prosecutor reviewed above, establish that, short of finding some way to accomplish the removal of the Special Prosecutor, the President has no legal right or power to limit or direct his actions in bringing prosecutions or in seeking the evidence needed for these prosecutions. Any effort to interfere in the Special Prosecutor's decisions is inadmissible and any order would be without legal effect so long as the Attorney General has not effectively rescinded the regulations creating and guaranteeing the Special Prosecutor's independence—a course he may be legally barred from taking without the Special Prosecutor's consent, see *Nader* v. *Bork, supra*, 366 F. Supp. at 108. Even then any order would have to come from the Attorney General to satisfy statutory requirements.

The President is bound by duly promulgated regulations even where he has power to amend them for the future. *Accardi* v. *Shaughnessy*, 347 U.S. at 266–67. It is even clearer in the present situation that regulations and statutes which he has no power to modify prevent him from assuming direction of the Watergate prosecutions. Thus, there can be no argument that a case or controversy is lacking because the President could dismiss the prosecution or withdraw the subpoena even if he so desired.

Nor is any valid objection to the concrete reality of this dispute furnished by the hypothesis, *arguendo*, that the President could nullify any adverse ruling by procuring the dismissal of the Special Prosecutor and finding another prosecutor who would not enforce the Court's decision. A similar argument was rejected well over a century ago. In *Kendall* v. *United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, it was argued that the Judiciary lacked power to issue a mandamus requiring the Postmaster General to credit a sum of money to a contractor on the ground that the President would frustrate performance of the decree by discharging the respondent and appointing a new Postmaster General. The Court rejected the argument and granted mandamus. The federal courts have continued to resolve legal controversies despite the theoretical power of one of the parties to avoid the impact of the judgment by lawful means. See, *e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530.

The same argument against jurisdiction fails in the present case, not only on the basis of precedent, but for three other reasons as well.

First, in the present situation, the President does not have the power to remove the Special Prosecutor and to appoint a replacement more to his liking. Under Article II, Section 2 of the Constitution, Congress has vested appointment of officers of the Department of Justice, like the Special Prosecutor, in the Attorney General, not the President.[27] And the President explicitly has ceded any right and power he may have to restrict the independence of the Sepecial Prosecutor or effect his discharge by agreeing to the issuance of regulations precluding such action unless the "consensus" of eight specified Congressional officials concurs in that course. The regulations establishing this condition precedent to any action by the President have the force of law, and the Special Prosecutor thus stands before the Court independent of any direct control by the Attorney General or the President. In short, the present regulations governing the Special Prosecutor's tenure and independence are even more restrictive of the residual authority of the President and the Attorney General than were the regulations that were held in *Nader* v. *Bork, supra*, to have been violated by the dismissal of Special Prosecutor Cox.[28]

Second, even the dismissal of the Special Prosecutor would not nullify a ruling that the evidence must be produced, since the Attorney General and the Solicitor General, as officers of this Court, would be legally obliged to attend to the proper enforcement of a decree by the Court, particularly one in favor of the United States. See *United States* v. *Shipp*, 203 U.S. 563; *United States* v. *Shipp*, 214 U.S. 386 (proceedings for criminal contempt initiated and conducted before this Court by Attorney General for defiance of Court's order); 28 U.S.C. 518(a).

Third, the speculative possibility that something might occur in the future cannot render a presently live controversy moot, when it is hardly inevitable that the Court's decision will be ineffective. Compare *DeFunis* v. *Odegaard*, ——— U.S. ——— (42 U.S.L.W. 4578, April 23, 1974). Just as "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632, it follows *a fortiori* that the hypothetical—and possibly illegal—dismissal of the Special Prosecutor after a decision in his favor by this Court cannot render the present case moot. As this Court noted earlier this Term in rejecting a mootness claim involving a challenge to state welfare benefits to striking workers where the particular strike had ended: "The judiciary must not close the door to the resolution of the important questions these concrete disputes present." *Super Tire Engineering Co.* v. *McCorkle*, ——— U.S. ——— (42 U.S.L.W. 4507, 4511, April 16, 1974). In the present case, the precise controversy is still very much alive, and the President has not even threatened to attempt to defeat an adverse ruling by effecting the dismissal of the Special Prosecutor.

2. There is no lack of a true case or controversy because the opposing parties are both members of the Executive Branch

In the present matter, there can be no serious contention that this is a feigned or collusive suit or an abstract or speculative debate; the issues are sharply drawn over the production or nonproduction of specific evidence for a pending criminal trial, and the litigants—the United States and President Nixon—have manifestly concrete but antagonistic interests in the outcome, for if the subpoenaed materials are ordered produced the United States can proceed to trial in a major criminal case armed with important evidence, while a contrary decision would leave President Nixon in absolute control over those materials and thereby weaken the government's case against his former aides, whom he has publicly supported in this criminal investigation (see pp. 59–60, *infra*).

Thus, we submit that it is clear beyond peradventure that the Special Prosecutor, as the exclusively authorized attorney for the United States—the prosecuting sovereign in the pending criminal case of *United States* v. *Mitchell, et al.*, for which the instant trial subpoena was issued—has standing to seek enforcement of the subpoena, for the prosecution has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204. See also *Flast* v. *Cohen*, 392 U.S. 83, 98–100.

Framing this controversy as a mere "intra-executive branch" dispute, as counsel for the President did below, seems to invoke the sterile conceptualism, long ago discarded, that since "no person may sue himself," suits between government officials cannot be maintained. As this Court said when it rejected such an argument in *United States* v. *ICC*, 337 U.S. 426, 430, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."[29] See also *Secretary of Agriculture* v. *United States*, 350 U.S. 162. This practical approach was underscored only this Term, when the Court noted probable jurisdiction and heard argument in two cases in which the United States, represented by the Justice Department, was appealing from two separate district court decisions dismissing the government's complaints attacking

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bank mergers under Section 7 of the Clayton Act. *United States* v. *Marine Bancorporation, Inc.*, No. 73-38; *United States* v. *Connecticut National Bank*, No. 73-767. The Comptroller of the Currency has responsibility for administering the Bank Merger Act and the National Bank Act, and in each case the Comptroller had approved a merger challenged by the Department of Justice under the Clayton Act. In each case the Comptroller of the Currency, an official of the Treasury Department, 12 U.S.C. § 1, 2, was named as an appellee and filed a brief in opposition to the position taken by the Solicitor General on behalf of the Department of Justice. Although such litigation is relatively rare and typically involves disputes between an executive department and a "quasi-independent" regulatory agency, there is nothing in the "case or controversy" requirement of Article III that denies the federal courts the power to adjudicate concrete controversies between government officials over their respective legal powers and duties, see *e.g.*, *Powell* v. *McCormack, supra*, particularly when—as in the present case—the resolution of the legal controversy has direct consequences upon them and private parties.

We do not suggest, of course, that the President or the Department of Justice could confer jurisdiction on the courts where such jurisdiction is constitutionally impermissible. What we do argue, however, is that the Court must look beyond the President's formalistic objections to the Court's jurisdiction, based as they are in a talismanic incantation of the "intra-executive" nature of the proceeding. By pointing to the mere formality of the Special Prosecutor's status as an executive officer, counsel to the President ignores the substantive concern underlying the "case or controversy" requirement of Article III. A proceeding is justiciable if it presents live, concrete issues between adverse parties that are susceptible of adjudication. See, *e.g.*, *O'Shea* v. *Littleton*, ——— U.S. ——— (42 U.S.L.W. 4139, January 15, 1974); *United States* v. *SCRAP*, 412 U.S. 669, 687; *Flast* v. *Cohen*, 392 U.S. 83, 94–101; *Baker* v. *Carr*, 369 U.S. 186, 204. And it is against these standards that the Court must resolve the objections to its jurisdiction.

Although counsel for the President has argued that somehow the "separation of powers" principle denies to the federal courts the power to decide this controversy between the President and the prosection in *United States* v. *Mitchell*, this argument will not withstand analysis. The inescapable irony of the President's position can only be appreciated by focusing on the fact that the regulations creating a Special Prosecutor's office armed with functional independence and with explicit authority to litigate against Presidential claims of privilege do not reflect a statutory regime imposed by the Legislative Branch; these regulations were promulgated with the President's approval by his Attorney General. This, then, is the President's position—not that Congress has unconstitutionally invaded his sphere, but rather that the doctrine of separation of powers forecloses *him* from the ability to control his "own" Executive Branch in such a way as to safeguard public confidence in the integrity of the law enforcement process. The Office of the Watergate Special Prosecution Force was established with the approval of the President as an independent entity within the Department of Justice in response to the public demand for an impartial investigation of charges of criminal misconduct by officials in the Executive Office of the President. After Special Prosecutor Cox's dismissal, the Office was re-established amid a public reaction so severe that it has generated the first serious possibility of a Presidential impeachment in more than a century and made enactment of legislation for a court-appointed Special Prosecutor almost certain.[30] Perhaps the most important assurance of independence built into the proposed role of the Special Prosecutor, as reflected in congressional testimony[31] as well as public statements by the President and the Attorney General, was his authority to invoke the judicial process to obtain necessary evidence from the President. It simply stands the doctrine of separation of powers on its head to suggest that it precludes the Judiciary from giving full force and effect to the allocation of authority within the Executive Branch under an arrangement that was designed by the Attorney General and approved by the President as indispensible to forestall a further erosion of faith in the Executive Branch.

D. THE SPECULATE POSSIBILITY THAT THE PRESIDENT MAY DISREGARD A VALID COURT DOES NOT DEPRIVE THE COURT OF JURISDICTION

A theme advanced earlier by counsel for the President in opposition to enforcement of a grand jury subpoena *duces tecum* in *Nixon* v. *Sirica* was that the President has "the power and thus the privilege to withhold information."[32] This raw assertion in no way undermines the justiciability of this controversy. The naked power of the Chief Executive, despite a court order, to withhold evidence from a judicial proceeding does not deprive the courts of jurisdiction to order its production. To link physical power with legal privilege runs contrary to our entire constitutional tradition. As this Court stated in *Kendall* v. *United States ex rel. Stokes, supra*, 12 Pet. at 613, "[t]o contend that the obligation imposed on the President to see the laws are faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible." It might as well be said that a Secretary of State, acting upon orders of the President, would have had "the power and thus the privilege" to withhold the signed commission at issue in *Marbury* v. *Madison, supra;* or that a Postmaster General, acting upon instructions of the President, would have had "the power and thus the privilege" to refuse to pay money owed pursuant to a contract contrary to the decision in *Kendall, supra;* or that the President has "the power and thus the privilege" to seize industrial property in a wartime labor dispute, contrary to *Youngstown Sheet & Tube Co.* v. *Sawyer, supra;* or to conduct warrantless electronic surveillance in domestic security investigations, contrary to the Fourth Amendment as interpreted in *United States* v. *United States District Court, supra.*

This Court has never allowed doubt about its physical power to enforce its commands to deter the issuance of appropriate orders. In *Worcester* v. *Georgia*, 6 Pet. (31 U.S.) 515, counsel strenuously argued that the Court should not order Georgia to surrender jurisdiction over a prisoner seized in Cherokee Indian territory because the President would not and the Court could not force Georgia to obey the judicial command, but the Court did not abdicate its responsibility to decide the issues. In *McPherson* v. *Blackmer*, 146 U.S. 1, 24, the Court ruled upon the constitutionality of a Michigan statute providing for the choice of Presidential electors by congressional districts despite the argument that the State's political agencies might frustrate the decision, saying:

"The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own."

Most recently in *Glidden Co.* v. *Zdanok, supra*, the Court rejected the argument that a money claim against the United States did not present a justiciable issue because the courts were without power to force execution of a judgment against the United States: "If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States." 370 U.S. at 571.[33] In conformity with this principle, the court of appeals in *Nixon* v. *Sirica* rejected the attempt to equate physical power to disobey with legal immunity from the judicial process itself: "The legality of judicial orders should not be confused with the legal consequences of their breach; for the courts of this country always assume that their orders will be obeyed, especially when addressed to responsible government officials." *Nixon* v. *Sirica, supra*, 487 F. 2d at 711–12.

The effect of a President's physical power to disobey a court order is wholly speculative at this juncture and undoubtedly will remain so. There is no reason to believe that President Nixon would disregard a decision of this Court fixing legal responsibilities, any more than he did the order of the district court, as modified by the court of appeals in *Nixon* v. *Sirica, supra*, requiring him to submit for *in camera* inspection recordings subpoenaed by the grand jury. In announcing that President Nixon would comply with the mandate in *Nixon* v. *Sirica*, counsel for the President stated in open court: "This President does not defy the law, and he has authorized me to say he will comply in full with the orders of the court."[34]

The Court, therefore, can cast aside as wholly illusory any of the obstacles that may be suggested as barring its exercise of the judicial power of the United States to decide the evidentiary privilege issue interposed in this criminal case. The case is within the jurisdiction of the federal courts and is fully justiciable.

I. THE COURTS HAVE BOTH THE POWER AND THE DUTY TO DETERMINE THE VALIDITY OF A CLAIM OF EXECUTIVE PRIVILEGE WHEN IT IS ASSERTED IN A JUDICIAL PROCEEDING AS A GROUND FOR REFUSING TO PRODUCE EVIDENCE

A. THE COURTS HAVE THE POWER TO RESOLVE ALL ISSUES IN A CONTROVERSY PROPERLY BEFORE THEM, EVEN THOUGH THIS REQUIRES DETERMINING, AUTHORITATIVELY, THE POWERS AND RESPONSIBILITIES OF THE OTHER BRANCHES

Our basic submission, and the one we suggest controls this case, is a simple one—the courts, in the exercise of their jurisdiction under Article III of the Constitution, have the duty and, therefore, the power to determine all issues necessary to a lawful resolution of controversies properly before them. The duty includes resolving issues as to the admissibility of evidence in a criminal prosecution as well as the obligation to produce such evidence under subpoena. This allocation of responsibility is inherent in the constitutional duty of the federal courts, as the "neutral" branch of government, to decide cases in accordance with the rule of law, and it supports rather than undermines the basic separation of powers conceived by the Constitution.

The principle was clear at the very outset of our constitutional history. Since 1803 there has been no question that in resolving any case or controversy within the jurisdiction of a federal court, "[i]t is emphatically the province and the duty of the judicial department to say what the law is." *Marbury* v. *Madison, supra*, 1 Cranch at 177. See *Powell* v. *McCormack, supra*, 395 U.S. at 521. As *Marbury* v. *Madison* firmly establishes, this is true even though the controversy before the courts implicates the powers and responsibilities of a co-ordinate branch. In conformity with this principle the courts consistently have exercised final authority

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to determine whether even the highest executive officials are acting in accordance with the Constitution and have issued appropriate decrees to implement those judicial decisions. *E.g., Youngstown Sheet & Tube Co.* v. *Sawyer, supra* (alleged right of President to authorize the Secretary of Commerce to seize steel mills); *United States* v. *United States District Court, supra* (alleged power of the President, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval); *Kendall* v. *United States ex rel. Stokes, supra* (alleged power of the President, acting through the Postmaster General, to withhold money owed pursuant to a contract); *Land* v. *Dollar*, 190 F. 2d 623 (D.C. Cir. 1954), vacated as moot, 344 U.S. 806 (alleged right of Secretary of Commerce and Acting Attorney General to obey order of President inconsistent with judicial decree; officials adjudicated in civil contempt).

The courts have not retreated from this responsibility even when the most pressing and immediate needs of the Nation were at issue. President Truman directed the Secretary of Commerce to seize and operate specified steel facilities because of his judgment that a threatened work stoppage at the Nation's steel mills during the Korean War "would immediately jeopardize and imperil our national defense." Executive Order No. 10340 (April 8, 1952). Nevertheless, this Court ruled that the President had exceeded his constitutional powers and upheld a preliminary injunction enjoining the seizure. Justice Jackson's concurring opinion expresses the fundamental principle underlying the Court's decision (343 U.S. at 655):

"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."

Even Justice Frankfurter, one of the most ardent exponents of the separation of powers, who expressed "every desire to avoid judicial inquiry into the powers and duties of the other two branches of government," concurred in the judgment of the Court, albeit "with the utmost unwillingness." He recognized: "To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power * * *." 343 U.S. at 596.

It is too late in our history to contend that this duty and competence of the Judiciary is inconsistent with the separation of powers, either in general or as applied to questions of evidentiary privilege. As the court of appeals held in *Nixon* v. *Sirica, supra*, 487 F. 2d at 715, such a claim, premised on the contention that the separation of powers prevents the courts from compelling particular action from the President or from reviewing his determinations, mistakes the true nature of our constitutional system. Focusing on the "separation" of functions in our tripartite system of government obscures a crucial point: the exercise by one branch of constitutional powers within its own competence frequently requires action by another branch within its field of powers. Thus, the Legislative Branch has the power to make the laws. Its enactments bind the Judiciary—unless unconstitutional — not only in decision of cases and controversies, but in the very procedures through which the Judiciary transacts its business.[35] Congress, in scores of statutes, regularly imposes legal duties upon the President.[36] The very essence of his constitutional function is the legal duty to carry out congressional mandates by taking "Care that the Laws be faithfully executed." Finally, the President may require action by the courts. The courts, for example, have a legal duty to give—and do give—effect to valid executive orders.[37] Where the President or an appropriate official institutes a legal action in his own name or that of the United States, a judge is compelled to grant the relief requested if in accordance with law.

We enjoy a well-functioning constitutional government because each branch is independent and yet acknowledges its duties in response to the functioning of others. "Checks and balances were established in order that this should be a "government of laws and not of men.' * * * 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." *Myers* v. *United States*, 272 U.S. 52, 292–93 (Brandeis, J., dissenting). At the same time, as Mr. Justice Jackson explained in *Youngstown Sheet & Tube Co.* v. *Sawyer, supra*, 343 U.S. at 635 (concurring opinion):

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

Thus, there is no room to argue that the separation of powers makes each branch an island, alone unto itself. Despite the "separation of powers implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts" of a coordinate branch of the government when placed in issue in a case within the jurisdiction of the federal courts. *Doe* v. *McMillan, supra*, 412 U.S. at 318 n. 12.

B. THE JUDICIAL POWER TO DETERMINE THE LIMITS OF EXECUTIVE AUTHORITY WHEN NECESSARY TO RESOLVE A JUSTICIABLE CONTROVERSY INCLUDES THE POWER TO RESOLVE CLAIMS OF EXECUTIVE PRIVILEGE MADE WITH REGARD TO EVIDENCE SOUGHT BY THE PROSECUTOR FOR USE IN A PENDING CRIMINAL CASE

In applying the fundamental principle that the Judiciary, and not the Executive, has the ultimate responsibility for interpreting and applying the law in any justiciable case or controversy, the courts consistently have determined for themselves not only what evidence is admissible, but also what evidence must be produced, including, whether particular materials are appropriately subject to a claim of executive privilege. This issue, like questions of the constitutionality and meaning of statutes or executive orders, is one of the matters that a court has a duty to resolve authoritatively whenever their resolution is an integral part of the outcome of a case or controversy within the court's jurisdiction.[38]

The question was decided squarely in *United States* v. *Reynolds*, 345 U.S. 1, where the Executive Branch argued that "department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest," 345 U.S. at 6 (footnote omitted)—a position strikingly similar to the one advanced by counsel for the President. The case involved a Tort Claims Act suit arising out of the crash of a B–29 bomber testing secret electronic equipment. The plaintiffs sought discovery of the Air Force's official accident investigation report and the statements of the surviving crew members. Although this Court agreed that an evidentiary privilege covers military secrets, 345 U.S. at 6–7, 11, it held that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege * * *. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 8, 9–10 (footnote omitted). See also *Roviaro* v. *United States, supra*, 353 U.S. at 62.

Since the decision in *Reynolds*, every court of appeals that has confronted the question has rejected a claim of absolute executive privilege to withhold evidence merely upon the assertion by the Executive that disclosure would not be in the public interest. The Court of Appeals for the District of Columbia Circuit, for example, which has had the most frequent occasion to consider and discuss the issue, has noted that "this claim of absolute immunity for documents in the possession of an executive department or agency, upon the bald assertion of its head, is not sound law." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 783, 792 (1971). In recently reaffirming the validity of this decision, the court ruled *en blanc* that judicial determination "is not only consistent with, but dictated by, separation of powers doctrine." *Nixon* v. *Sirica, supra*, 487 F. 2d at 714.[39]

Even in the first case that firmly recognized a confidentiality privilege for "intra-agency advisory opinions," *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (1958),[40] the Court of Claims, in an opinion by Justice Reed, held that documents reflecting executive deliberations "are privileged from inspection as against public interest *but not absolutely*. * * * The power must lie in the courts to determine executive privilege in litigation." 157 F. Supp. at 946–47 (emphasis added). Thus, even in the embryonic stages of this relatively recently articulated version of "executive privilege," the courts recognized that the legitimate interests of the Executive do not require unreviewable discretion to shield its decisionmaking processes from scrutiny by the Judiciary. A similar conclusion has been reached by the courts of almost all other countries following the common law.[41]

In short, the President's assertion in the district court "that it is for the President of the United States, rather than for a court, to decide when the public interest requires that he exercise his constitutional privilege to refuse to produce information" flies in the face of an unbroken line of precedent.[42]

The uniform precedent of allocating to the Judiciary the determination of the applicability and scope of executive claims of privilege not to produce necessary evidence is supported by compelling arguments of policy. Certainly, there are legitimate interests in secrecy. But these interests are more than adequately protected by the qualified privilege defined and applied by the courts.[43] This Court, as we have noted, has adverted to the danger of abdicating objective judicial discernment "to the caprice of executive officers," *United States* v. *Reynolds, supra*, 345 U.S. at 9–10, and stated that "complete abandonment of judicial control would lead to intolerable abuses." 345 U.S. at 8. This is necessarily true because the Executive has an inherent conflict of interest when its actions are called into question if it is to decide whether evidence is to remain secret. Thus, in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra*, the Court of Appeals for the District of Columbia Circuit has emphasized a related rationale for denying absolute executive discretion to assert a binding confidentiality privilege: "executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will." 463 F. 2d at 793. The court presciently stated (463 F. 2d at 794):

"[N]o 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 any 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."[44]

In a similar vein, the Court of Appeals for the Fifth Circuit recently noted:

"The granting or withholding of any privilege requires a balancing of competing pol-

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icies. 8 Wigmore, § 2285 at 527–28. The claim of governmental privilege is no exception; in fact, the potential for misuse of government privilege, and the consequent diminution of information about government available to the public, is one more factor which strongly suggests the need for judicial arbitration of the availability of the privilege." *Carr* v. *Monroe Manufacturing Co., supra.* 431 F. 2d at 388.

We do not question the need for a qualified privilege to serve as an encouragement to the candid exchange of ideas necessary for the formulation of executive policy. Indeed, as the court of appeals held in *Nixon* v. *Sirica, supra,* 487 F. 2d at 717, such discussions are "presumptively privileged." But this case brings into high relief the dangers that would be posed by unbridled, absolute discretion to invoke executive privilege and underscores the wisdom of the rule vesting ultimate power in the courts to rule upon such claims when they are advanced in the context of judicial proceedings. President Nixon cannot be a proper judge of whether the greater public interest lies in disclosing the subpoenaed evidence for use at trial or in withholding it. He is now the subject of an impeachment inquiry by the Committee on the Judiciary of the House of Representatives, and the subpoenaed evidence may have a material bearing on whether he is impeached and, if impeached, whether he is convicted and removed from office. This is an issue to which he can hardly be indifferent. In addition, the Special Prosecutor, as prosecuting attorney for the United States, seeks the subpoenaed evidence in prosecuting the President's highest and closest aides and associates. The President is bound to them by the natural emotions of loyalty and gratitude.

Thus, in his Address to the Nation on April 30, 1973, announcing the resignation of defendants Haldeman and Ehrlichman, the President referred to them as "two of the finest public servants it has been my privilege to know." 9 Weekly Compilation of Presidential Documents 434 (May 7, 1973). And during a question-and-answer session between President Nixon and participants at the Associated Press Managing Editors Association annual convention on November 17, 1973, the President stated unequivocally: "* * * Mr. Haldeman and Mr. Ehrlichman had been and were dedicated, fine public servants, and I believe, it is my belief based on what I know now, that when these proceedings are completed that they will come out all right." 9 Weekly Compilation of Presidential Documents 1349 (November 26, 1973).

We call attention to these facts without disrespect to the President or his Office. But even if by extraordinary act of conscience, he could judge impartially the relative public advantages of secrecy and disclosure without regard to the consequences for himself or his associates, confidence in the integrity and impartiality of the legal system as between the high and the lowly still would be impaired through violation of the ancient precept that no man shall be a judge in his own cause. Compare *Ward* v. *Village of Monroeville,* 409 U.S. 57; *Mayberry* v. *Pennsylvania,* 400 U.S. 455; *Offutt* v. *United States,* 348 U.S. 11; 28 U.S.C. 455.

C. COURTS HAVE THE POWER TO ORDER THE PRODUCTION OF EVIDENCE FROM THE EXECUTIVE WHEN JUSTICE SO REQUIRES

When the court's duty to decide a case or controversy requires the court to determine the validity of a claim of executive privilege, the court has the concomitant power to order the production of the evidence from the Executive Branch when justice so requires. This Court's decision last Term in *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, clearly establishes the proposition that the constitutional separation of powers does not give the Executive any constitutional immunity from judicial orders for the production of evidence. The plaintiffs there had sought access under the Freedom of Information Act to a report prepared for the President by the Undersecretaries Committee of the National Security Council on the proposed underground nuclear test on Amchitka Island. The government opposed the request partly upon the ground that the documents were exempt from disclosure as "inter-agency memorandums, or letters," [45] arguing that the need to avoid disclosure of communications with the President was "particularly important." Brief for the Petitioners 39–40. Nevertheless, this Court remanded for a judicial determination of the claim of privilege; the opinion states explicitly that in opposing disclosure the government carried the burden of establishing "to the satisfaction of the District Court" that the documents were exempt from disclosure. 410 U.S. at 93. Significantly, the Freedom of Information Act expressly provides that "[i]n the event of noncompliance with the order of the court" to disclose material found unprivileged, the court may punish the responsible executive officer "for contempt." 5 U.S.C. 552(a)(3). Neither in *Mink* nor in any other decision has any doubt been expressed about the constitutional power of the court to enter a mandatory order for the production of evidence after a claim of executive privilege has been overruled by the court.

Other precedents confirm the existence of judicial power to require the production of evidence by executive officials when the court determines the evidence to be material and unprivileged. *United States* v. *Burr,* 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807), of course, is an early and clear example involving evidence in the possession of the President sought for use in a federal criminal case. In *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 221, this Court treated contempt as a proper sanction against government counsel if he refused to obey a subpoena for the production of documents after the court rejected a claim of privilege. Similarly, while holding that an FBI agent could not properly be held in contempt for refusing to obey a subpoena to produce information for use in a state prisoner's habeas corpus action without permission from the Attorney General, the Court implicitly assumed, and Justice Frankfurter explicitly stated in his concurring opinion, that the Attorney General himself could be required to litigate the underlying claim of privilege in court. *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462, 473. In private litigation the lower courts consistently have assumed the existence of power to enforce a subpoena for documents in the Executive Branch over a claim of privilege.[46]

Thus, Professor Charles Alan Wright, after explaining that—

"The determination whether to allow the claim of [executive] privilege is then for the court * * *"

goes on to say that—

"In private litigation refusal of a government officer to comply with a court order overruling a claim of executive privilege and ordering disclosure could lead to conviction for contempt * * *" 8 Wright and Miller, Federal Practice and Procedure § 2019, at 171–72 (1970) (footnotes omitted).

In some cases, it is true, the Executive Branch has been left free to decline to produce information if it is willing to suffer the loss of litigation in which it is a party. See, e.g., Alderman v. United States, 394 U.S. 165, 184; Jencks v. United States, 353 U.S. 657, 672; Roviaro v. United States, supra, 353 U.S. at 60–61; cf. Reynolds v. United States, supra, 345 U.S. at 12. But the existence of this remedial alternative in some cases does not support the proposition that the Executive rather than the courts has the final authority for determining whether, legally, a claim of privilege is well founded or not. Moreover, those decisions do not mark the limits of judicial power, for the underlying rationale in each was that the remedial "choice" fully protected the rights of the opposing party, the interests of the Executive and the integrity of the judicial process. In each case this Court recognized that the courts had the ultimate responsibility for passing upon the claim of privilege; only after the courts made the decisive determination could the government elect whether to sacrifice the case or produce the evidence found unprivileged.

In these "produce or dismiss" cases, the requirements of justice could be satisfied without compelling production of particular evidence sought by an adverse party, after **judicial** rejection of an executive claim of privilege, if the government preferred to accept the "remedy" of losing the case to which it was a party. See generally Rule 16(g), Federal Rules of Criminal Procedure; Rule 37(b), Federal Rules of Civil Procedure.

Where dismissal is not an adequate or proper remedy for the parties or is not consistent with judicial integrity, however, the "produce or dismiss" choice cannot be available to the Executive following a judicial ruling rejecting the claim of privilege. As the district court recognized in the present case, the subpoena *duces tecum* to the President here issued to a person who, "as a practical matter, is a third party" (App. 98A). The President has personal custody of evidence sought by the United States, through its attorney, for use in a preceeding in which the President is not a party. Clearly, a person who is not a party to the main lawsuit has no lawful "election" other than to comply with a judicial determination overruling his claim of a privilege to refuse to give material evidence. The cases have so held.[47]

Furthermore, there is no such election when the very object of the legal proceeding is to acquire the information. Thus, for example, in the Freedom of Information Act cases, it could not be seriously contended that the government had some option other than to disclose any information the court finally *determines* was unprivileged. Indeed, as we observed above, the Act itself specifically provides the sanction of contempt for such an attempt to flout the court's decision.

Most basically, the "produce or dismiss" option reflects a realistic accommodation of the requirements of substantive justice in litigation. But any reliance on an alleged Presidential option to cause dismissal of this criminal prosecution by standing on a claim of privilege, even if overruled by the courts, must be rejected out of hand as plainly insufficient to satisfy the needs of public justice. The seriousness of the charged offenses and the high offices held by those indicted brand that "solution" as impermissible. The President, himself subject to investigation with respect to the offenses charged in the indictment, is in no position to make the delicate judgment whether the greater public interest lies in producing the evidence and continuing the prosecution or abandoning the prosecution.

As we discussed above (pp. 27–39), under the regulations establishing the Watergate Special Prosecution Force as a quasi-independent office within the Department of Justice, the President has no authority directly—or through the Attorney General—to decide that the Watergate prosecution, *United States* v. *Mitchell, et al.,* should be abandoned. It would make a travesty out of the independent institution of the Special Prosecutor if the President could accomplish this objective by indirection—by claiming that the courts have no power to order the production of evidence in this criminal prosecution and insisting that the courts be content with posing the dilemma of "produce or dismiss."

Counsel for the President previously argued that "[i]n the exercise of his discretion

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to claim executive privilege the President is answerable to the Nation but not the courts." [48] This assertion merely highlights the salutary effect of requiring the Executive to make its choice after the courts have adjudicated the relevant rights and obligations. Public responsibility cannot be fixed, however, until the alternatives are defined. Only then can the people, as the ultimate rulers, know who controlled the course of events and who took what decisions. The President cannot have it both ways: he cannot suggest that he could abort this investigation rather than comply with an order overruling his claim of privilege and use that hypothetical course to prevent the Court from ruling on the validity of the privilege claim itself. Unless and until the President attempts to exercise whatever powers he might have under the Constitution as Chief Executive to intervene directly in the conduct of this prosecution by the Department of Justice, as represented by the Special Prosecutor, and to procure the Special Prosecutor's dismissal and the countermanding of his conduct of the case, the President must allow the Special Prosecutor and the courts to conduct the prosecution in accordance with the regular processes of the law and without regard to any potential executive power to frustrate the administration of justice.

II. THE PRESIDENT IS NOT IMMUNE FROM JUDICIAL ORDERS REQUIRING THE PRODUCTION OF MATERIAL EVIDENCE FOR A CRIMINAL TRIAL

There is nothing in the position of the President, despite his status as Chief Executive, that deprives the courts of their constitutional power to resolve this dispute. The power to decide this case simply cannot differ because the President elected to take personal control of the subpoenaed evidence.

The Framers of our Constitution, concerned as they were about the abuses of royal prerogative, were very careful to provide for a Presidency with defined and limited constitutional powers and not the prerogatives and immunities of a sovereign. Under our Constitution, the people are sovereign, and the President, through Chief Executive and Chief of State, remains subject to the law.[49] Indeed, it is the very essence of the Presidential Office that it is subject to the commands of the law, for the President's basic governmental function is that of Chief Executive—whose duty it is to "take Care that the Laws be faithfully executed." It follows inexorably that in our system *even the President* is under the law.

No one would deny that every other officer of the executive branch is subject to judicial process,[50] and there is little basis in logic, policy or constitutional history for concluding that a matter becomes walled off from judicial authority simply because the President has elected to become personally involved in it. More basically, however, a true regard for the constitutional separation of powers compels the conclusion that the President himself is appropriately subject to judicial orders. It is the function of the courts to determine rights and obligations of public officers within the context of a justiciable controversy, including those of the President, and it is his sworn duty to "execute" those decisions. See *Cooper* v. *Aaron*, 358 U.S. 1. 12. It must follow that the courts have the power in appropriate cases to order even the President to perform a legal duty.

A. THE POWER OF THE COURTS TO ISSUE SUBPOENAS TO THE PRESIDENT, LONG RECOGNIZED BY THE COURTS, FLOWS FROM THE FUNDMENTAL PRINCIPLE THAT NO MAN IS ABOVE THE LAW

At the heart of the court's power to issue and enforce a subpoena *duces tecum* directed to the President of the United States lies the "longstanding principle 'that the public * * * has a right to every man's evidence.' " *Branzburg* v. *Hayes*, 408 U.S. 665, 688; [51] *cf. Watkins* v. *United States*, 354 U.S. 178, 187. This power, which in the context of the Watergate investigation and prosecution has proved essential to the full and impartial administration of justice, was upheld in *Nixon* v. *Sirica, supra*, 487 F. 2d at 708–12, a decision with which President Nixon willingly complied, rather than seek review in this Court. As the court of appeals recognized, "incumbency does not relieve the President of the routine legal obligations that confine all citizens." 487 F. 2d at 711. "The clear implication [of the *Burr* case] 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." 487 F. 2d at 710.

The holding of the court in *Nixon v. Sirica* is hardly a newfound principle wrought from the exigencies of Watergate. The authority to issue a subpoena *duces tecum* to a sitting President was recognized as early as 1807 by Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va.).[52] This landmark decision was noted with approval by this Court in *Branzburg* v. *Hayes, supra*, 408 U.S. at 689 n.26. Although Chief Justice Marshall acknowledged that the power was one to be exercised with attention both to the convenience of the President in performing his arduous duties and to the possibility that the public interest might preclude coercing particular disclosures, he utterly rejected any suggestion that the President, like the King of England, is absolutely immune from judicial process (25 Fed. Cas. at 34):

"Although he [the King] may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the president, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject. By that of the United States, the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the executive chief, will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a state; at any rate, under the former Confederation; and it is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum."

The decisions in the *Burr* case and *Nixon* v. *Sirica* are premised on the theory that every citizen, no matter what his station or office, has an enforceable legal duty not to withhold evidence the production of which the courts determine to be in the public interest. Stated more broadly, and in more familiar terms, they flow from the premise that this is a government of laws and not of men. This Court summed up this fundamental precept of our republican form of government nearly a century ago in *United States* v. *Lee*, 106 U.S. 196, 220:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by acepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

The Steel Seizure Case is perhaps the most celebrated instance where this Court has reviewed the assertion of Presidential power. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra*. As we noted above, President Truman concluded that a work stoppage at the Nation's steel mills during the Korean War "would immediately jeopardize and imperil our national defense." In directing the Secretary of Commerce to seize certain of the mills, the President asserted that he "was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States." 343 U.S. at 582. District Judge Holtzoff denied a temporary restraining order on the ground that what was involved was the action of the President and that the courts should not enjoin Presidential action. Judge Pine, however, granted a preliminary injunction. This Court, deciding "whether *the President* was acting within his constitutional power" (343 U.S. at 582, emphasis added), upheld the preliminary injunction. In doing so, there was no doubt expressed that the Court could adjudicate the claim that the President had no constitutional power to issue the Executive Order. Nor, after reading the opinions of the Court, can there be any question that the Court would have granted relief against the President if he had directly ordered the seizure of the mills rather than acting through the Secretary of Commerce.[53] See, *e.g.*, 343 U.S. at 585.

The Executive's claim of total immunity from judicial decrees is not a new one. In *Land* v. *Dollar, supra*, the Court of Appeals for the District of Columbia Circuit held Secretary of Commerce Sawyer and Acting Attorney General Perlman and subordinate executive officials in civil contempt for failing to comply with a final order requiring them to deliver full and effective possession of certain stock to the prevailing litigant. They attempted to justify their conduct in part on the ground that they were following the directive of the President to Secretary Sawyer "to continue to hold this stock on behalf of the United States" and they further asserted "that, even though the courts determine that a specific action is not within the official capacity of an executive officer, he is immune from compulsion by the courts in respect to that action." 190 F. 2d at 639. The court of appeals rejected the argument in the most emphatic terms (*ibid.*):

"To claim that the executive has such power [to hold the shares despite the decree] is to claim the total independence of the executive from judicial determinations in justiciable cases and controversies. To characterize such judicial determinations as illegal coercion of the executive is to deny one of the fundamental concepts of our government."

Although there have been a few notorious instances in our history in which Presidents have refused to give appropriate force to judicial decrees, or are reputed to have made disdainful statements about the decisions, none involved direct disobedience of a court order. More importantly, it is the judgment of history that those were essentially lawless departures from the constitutional norm.[54] The responsible constitutional position was expressed by President Truman—a defender of a strong Executive—in announcing that he would comply with an order of this Court in the Steel Seizure Case if it went against him.

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despite his claim of constitutional power to order the seizure. The President's position was stated through Senator Hubert Humphrey, who quoted the President as saying he would "rest his case with the courts of the land." The President was further quoted as saying:

"I am a constitutional President and my whole record and public life has been one of defense and support of the Constitution."

New York Times, April 29, 1952, p. 1, col. 3. A report of a later press conference with President Truman on this issue stated:

"Asked whether he had been quoted correctly in saying that he would accept the Supreme Court's decision on seizure, the President said certainly—he had no ambition to be a dictator."

New York Times, May 2, 1952, p. 1, col. 5. Of course, when this Court later rejected the constitutional bases for President Truman's action, he complied with the decision, in deference to the principle that even in the gravest matters, the President is under the law.

B. THERE IS NO BASIS EITHER IN THE CONSTITUTION OR IN THE INTENT OF THE FRAMERS FOR CONFERRING ABSOLUTE IMMUNITY ON THE PRESIDENT

The decisions in the *Burr* case and *Nixon* v. *Sirica* are in accord with settled decisions of this Court and others. They establish principles that faithfully reflect what historical evidence shows was the intent of the Framers. Contrasted with the explicit privileges in Article I for Congress, no comparable privileges or immunities were specified for the President or Executive Branch in Article II, even though they had been commonplace for the King. The Founding Fathers were keenly aware of the dangers of executive power. Even James Wilson, who favored a strong Executive,[55] rejected "the Prerogatives of the British Monarch as a proper guide in defining the Executive powers." [56] He stated at the Pennsylvania Ratification Convention:

"The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality * * *. And to all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character * * *." [57]

One might infer quite plausibly from the specific grant of official privileges to Congress that no other constitutional immunity from normal legal obligations was intended for government officials or papers. Indeed, Charles Pinckney stated in the Senate on March 5, 1800, speaking of the express congressional privilege from arrest:

"They [the Framers] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here. * * *

* * * * *

"No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature." [58]

The teaching of history is thus persuasive against the claim of an absolute Presidential prerogative to be immune from the judicial process. The Court of Appeals for the District of Columbia Circuit recognized this in rejecting President Nixon's claim of absolute immunity from a grand jury subpoena *duces tecum* (*Nixon* v. *Sirica*, *supra*, 487 F. 2d at 711):

The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. * * * 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."

Similarly, a special panel composed of Senior Circuit Judges Johnsen, Lumbard and Breitenstein, speaking for the Seventh Circuit in connection with the prosecution of Circuit Judge Otto Kerner, recently rejected his argument, similar to the one made by counsel for the President, that the constitutional provision for impeachment (Art. I, Sec. 3, cl. 7) implicitly confers immunity on civil officers from the criminal process prior to impeachment and removal from office, *United States* v. *Isaacs and Kerner*, 493 F. 2d 1124 (7th Cir. 1974), cert. denied, ———U.S.——— (June 17, 1974). The court concluded (493 F. 2d at 1144):

"[W]hatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government they do not exempt the members of those branches "from the operation of the ordinary criminal laws." Criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government."

The fact that the President is the *head* of the Executive Branch does not render these principles inapplicable here.[59] "We have no officers in this government from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." *The Floyd Acceptances*, 7 Wall (74 U.S.) 666, 676–77.

C. THE COURTS CAN ISSUE PROCESS TO THE PRESIDENT WHERE, AS HERE, IT DOES NOT INTERFERE WITH HIS EXERCISE OF DISCRETIONARY POWER BUT MERELY REQUIRES MINISTERIAL COMPLIANCE WITH A LEGAL DUTY

The argument that the President is immune from process is sometimes rested upon a misreading of *Mississippi* v. *Johnson*, 4 Wall. (71 U.S.) 475.[60] In that case the State of Mississippi sought leave to file an original bill to enjoin President Johnson from enforcing the Reconstruction Acts, which provided for reconstitution of the governments of the erstwhile Confederacy. Because the President was named as a defendant in the bill, this Court heard argument upon the question of jurisdiction before the bill was filed, instead of reserving the question to a later stage.[61] Attorney General Stanbery argued to the Court that the President is "above the process of any court," asserting that "[h]e represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world." 4 Wall. at 484.

Faithful to the tradition that in the United States no man and no office are above the law, this Court refused to accept the Attorney General's claim of royal immunity for the President of the United States (4 Wall at 498). Rather, it held that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties" (4 Wall. at 501), distinguishing the power of the courts to require the President to perform a simple ministerial act from an attempt to control the exercise of his broad constitutional discretion (4 Wall. at 499):

"In each of these cases [involving ministerial duties] nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus.

"Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. * * * The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political."

Mississippi v. *Johnson* arose shortly after the Civil War, when there was a bitter political conflict over the proper national policy to be followed in dealing with the secessionist States. In declining to exercise its original jurisdiction over an equitable suit brought by a State seeking to enjoin the President from enforcing congressional policy, the Court had no occasion to decide that *no* federal court could ever issue *any* order to the President, and the Court was careful to leave upon the question of the President's amenability to the judicial process where only a clear legal duty, rather than the exercise of discretionary political judgment, is involved, as in the present case.

Shortly after the decision in *Mississippi* v. *Johnson*, the Court also declined jurisdiction of similar bills naming the Secretary of War or a military commander as respondent, *Georgia* v. *Stanton*, 6 Wall. (73 U.S.) 50. Their disposition is further proof that it was the character of the question presented and not the identity of the respondent that determined the issue in *Mississippi* v. *Johnson*. In the words of Chief Justice Marshall, "[i]t is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." *Marbury* v. *Madison*, *supra*, v. *Cranch* at 170.

Later cases have confirmed that *Mississippi* v. *Johnson* did not turn on the fact that the respondent was the President, but was an early expression of the non-justiciability of "political questions." [62] This Court has cited the decision as an example of instances where the Court has refused "to entertain * * * original actions * * * that seek to embroil this tribunal in 'political questions.'" *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 496.

The crucial jurisdictional issue, then, is not the identity of the executive officer of the physical power to secure compliance with judicial orders,[63] but the Court's ability to resolve authoritatively the conflicting claims of legal rights and obligations. See *Baker* v. *Carr*, *supra*, 369 U.S. at 208–237. The Judiciary, of course, must be circumspect in issuing process against the President to avoid interference with the proper discharge of his executive functions. For example, it might not be proper, in the absence of strong necessity, to require the President to appear personally before a court if that appearance would interfere with his schedule or the performance of his duties. Similarly, the courts should not saddle the Chief Executive with requests that are administratively burdensome. Compare *United States* v. *Burr*, 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807). The court's discretionary power to control its own process and grant protective orders provides adequate safeguard against undue imposition on the President's time. Beyond that, there may be some Presidential acts that are beyond the court's ken entirely, such as his exercise of discretionary constitutional powers that implicate "political questions." See *Mississippi* v. *Johnson*, *supra*, 4 Wall. at 499–501; *Marbury* v. *Madison*, *supra*, 1 Cranch at 165–66, 170. See also *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587, 606 (D.C. Cir. 1974).

But the question here is very different. The Court is called upon to adjudicate the obligation of the President, as a citizen of the United States, to cooperate with a criminal prosecution by performing the solely ministerial task of producing specified recordings and documentary evidence. This Court has defined "ministerial duty" as "one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Mississippi* v. *Johnson*, *supra*, 4 Wall. at 498. Judge Fahy, noting that "the word 'ministerial' is not sufficient-

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ly expressive to denote adequately every situation into which the courts may enter," added, however, that "a duty often becomes ministerial only after a court has reached its own judgment about a disputable legal question and its application to a factual situation." *Seaton* v. *Texas Co.*, 256 F. 2d 718, 723 (D.C. Cir. 1958). As we have shown above, the courts, and not the Executive, must decide the existence *vel non* of a privilege for evidence material to a criminal prosecution. A decision overruling the claim will be as fully binding on the President as it would be upon a subordinate executive officer who had custody or control of the subpoenaed evidence.[64]

III. THE CONVERSATIONS DESCRIBED IN THE SUBPOENA RELATING TO WATERGATE LIE OUTSIDE THE EXECUTIVE PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS

The President, in his Formal Claim of Privilege submitted to the court below, asserted that the items in the subpoena, other than the portions of twenty conversations already made public:

"Are confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce. Thus I must respectfully claim privilege with regard to them to the extent that they may have been recorded, or that there may be memoranda, papers, transcripts, or other writings relating to them."

The President was relying, of course, on "the longstanding judicial recognition of Executive privilege * * * [for] 'intra-governmental documents reflecting * * * deliberations comprising part of a process by which governmental decisions and policies are formulated.'" [65] *Nixon* v. *Sirica, supra,* 487 F. 2d at 713.

The President made a similar claim in response to the grand jury's subpoena *duces tecum* at issue in the earlier litigation involved in *Nixon* v. *Sirica.*[66] His counsel argued to the court that the "threat of potential disclosure of any and all conversations would make it virtually impossible for President Nixon or his successors in that great office to function."[67] Counsel argued further that the President's absolute prerogative to withhold information "reaches any information that the President determines cannot be disclosed consistent with the public interest and the proper performance of his constitutional duties."[68] Within the contours of the instant case, counsel for the President in effect poses the following question for the Court: Shall guilt or innocence in the criminal trials of former White House aides be determined upon full consideration of all the evidence found relevant, competent and unprivileged by due process of law? Or shall the evidence from the White House be confined to what a single person, highly interested in the outcome, is willing to make available?

By urging upon the courts the absolute, unreviewable discretion of the President to withhold evidence from the trial in *United States* v. *Mitchell, et al.,* counsel for the President seemingly ignores the principle, articulated by Justice Reed, that executive privilege is granted "for the benefit of the public." *Kaiser Aluminum & Chemical Corp.* v. *United States, supra,* 157 F. Supp. at 944. Ultimately, the public interest must govern whether or not particular items are disclosed. When the participants in Presidential conversations are themselves subject to indictment and the subject matter of the conversations is material to the issues to be tried upon the indictment, denying the courts access to recordings of the conversations impedes the due administration of justice.

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Moreover, production of the evidence sought, even upon order of the court, does not threaten wholesale disclosure of Presidential documents either now or in the future. It bears repeating that this is a case in which the other participants in the conversations are subject to indictment. The conversations covered by the present subpoena are demonstrably important—as the trial court below found—to defining the extent of the conspiracy in terms of time, membership, and objectives. Surely there will be a few instances, if ever, where there are similar concrete circumstances warranting intrusion into an otherwise privileged domain of conversations involving the President and his aides. Thus, any slight risk that future conversations may be disclosable under such a standard hardly will intimidate Presidential aides in giving open and candid advice. Furthermore, the desirable public policy of encouraging frank advice to governmental officials does not and cannot depend on any expectation of absolute confidentiality. It is almost commonplace in our system for former officials, including Presidents, promptly to publish their memoirs, frequently based on documents reflecting governmental deliberations.[69] This is a generally understood phenomenon, and it is unthinkable that the court's entitlement to important evidence must be relegated to a lower priority.

Under these circumstances, the district court properly rejected the claim of privilege (Pet. App. 20), holding that the "Special Prosecutor's submissions * * * constitute a *prima facie* showing adequate to rebut the presumption [of privilege] in each instance, and a demonstration of need sufficiently compelling to warrant judicial examination in chambers incident to weighing claims of privilege where the privilege has not been relinquished." The court followed the "settled rule" that "the court must balance the moving party's need for the documents in the litigation against the reasons which are asserted in defending their confidentiality." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 791. See also *United States* v. *Reynolds, supra,* 345 U.S. at 11; *Nixon* v. *Sirica, supra,* 487 F. 2d at 716; cf. *Doe* v. *McMillan, supra,* 412 U.S. at 320.

Although the court below followed the "settled rule" of balancing particular need against the specific interest in confidentiality, that rule becomes applicable only where the "presumptive privilege" for the materials has not been vitiated by other factors. In the present case, there are two additional grounds for overruling the asserted privilege, each of which shows that the subpoenaed material has lost its character as "presumptively privileged." First, the interest in confidentiality is never sufficient to support an official privilege where, as here, there is a *prima facie* showing that the subpoenaed materials cover conversations and activities in furtherance of a criminal conspiracy; thus, Watergate-related conversations are not even covered by the presumptive privilege recognized in *Nixon* v. *Sirica, supra,* 487 F. 2d at 717. Second, as we show in Part IV below, to the extent that the subpoenaed conversations relating to Watergate are deemed covered by some presumptive executive privilege, any claim to continued secrecy has been waived as a matter of law by the extensive testimony and public statements of participants, given with the President's consent, concerning these conversations and by the President's recent release of transcripts of forty-three Presidential conversations dealing with these issues.

Before turning to the discussion of the independent grounds for overruling the President's claim of privilege, we briefly mention two basic principles that should guide this Court's determination. First, whether particular documents or other materials are privileged in the context of a criminal prosecution is *for judicial determination*—upon the extrinsic evidence if sufficient, but otherwise upon *in camera* inspection (see Part I(A), *supra*). Second, in making this determination, the Court must construe the privilege strictly. Evidentiary privileges generally are "an obstacle to the administration of justice" (8 Wigmore § 2192, at 73), and, "so many derogations from [the] positive general rule" that the public has a right to every man's evidence (*id.*, at 70), they must be confined to the narrowest limits justified by their underlying policies.[70] "To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose." *Doe* v. *McMillan, supra,* 412 U.S. at 316–17. Such strictness in application of executive privilege conforms to the ideas of the Founding Fathers, who were keenly aware of the dangers of Executive secrecy.[71]

A. EXECUTIVE PRIVILEGE BASED UPON A NEED FOR CANDOR IN GOVERNMENTAL DELIBERATIONS DOES NOT APPLY WHERE THERE IS A PRIMA FACIE SHOWING THAT THE DISCUSSIONS WERE IN FURTHERANCE OF A CONTINUING CRIMINAL CONSPIRACY

As stated above, the only privilege relied upon by the President stems from his assertion that the "items sought are confidential conversations between a President and his close advisers." We freely concede that a qualified or "presumptive" privilege normally attaches to "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd on opinion below, 384 F. 2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952. But there can be no valid public policy affording the protection of executive privilege where there is a *prima facie* showing that the officials participating in the deliberations did so as part of a continuing criminal plan. In this case, where the grand jury has voted the Special Prosecutor the authority to identify the President himself as an unindicted co-conspirator in the events charged in the indictment and covered by the government's subpoena, there is such a *prima facie* showing and the President is foreclosed from invoking a privilege that exists only to protect and promote the legitimate conduct of the Nation's affairs.

The qualified privilege for governmental deliberations is based on "two important policy considerations * * *: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers."[72] *International Paper Co.* v. *Federal Power Commission,* 438 F. 2d 1349, 1358–59 (2d Cir. 1971), cert. denied, 404 U.S. 827. The privilege, however, whether in the context of intra-agency communications or in the context of deliberations at the highest level of the Executive Branch, exists only to promote the legitimate functioning of government. It cannot serve as a cloak to protect those charged with criminal wrong-doing. Executive privilege is granted "for the benefit of the public, not of executives who may happen to then hold office." *Kaiser Aluminum & Chemical Corp.* v. *United States, supra,* 157 F. Supp. at 944.

This is a familiar principle in the law of evidentiary privileges generally. For example, a client may not hide behind the attorney-client privilege and prevent his attorney from being required to disclose plans of continuing criminal activity even though told to him in confidence. See, *e.g., United States* v. *Aldridge,* 484 F. 2d 655 (7th Cir. 1973); *United States* v. *Rosenstein,* 474 F. 2d 705 (2d Cir. 1973); *United States* v. *Shewfelt,* 455 F. 2d 836 (9th Cir. 1972), cert. denied, 406 U.S. 944; *United States* v. *Bartlett,* 449 F. 2d 700 (8th Cir. 1971), cert. denied, 405 U.S. 932; *Garner* v. *Wolfinbarger,* 430 F. 2d

1093 (5th Cir. 1970), cert. denied, 401 U.S. 974. Similarly, the courts have refused to recognize any privilege not to disclose communications by a patient which were not for the legitimate purpose of enabling the physician to prescribe treatment. See 8 Wigmore § 2383; McCormick, *Evidence* § 100 (2d ed. 1972). Even the privilege against disclosing marital communications or jury deliberations has been overruled when such communications were in furtherance of fraud or crime. See, *e.g., United States* v. *Kahn*, 471 F. 2d 191 (7th Cir. 1972), cert. denied, 411 U.S. 986. See generally Note, *Future Crime or Tort Exception to Communications Privileges*, 77 Harv. L. Rev. 730 (1964).

The Speech or Debate Clause provides a compelling illustration of this principle. That clause confers an explicit constitutional privilege on members of Congress in order to promote candid and vigorous deliberations in the Legislative Branch.[72] Like executive privilege, which is based upon the same underlying policies and interests, "[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process." *United States* v. *Brewster, supra*, 408 U.S. at 507. The purpose of the Clause was to "assure a co-equal branch of the government-wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States, supra*, 408 U.S. at 616. But even through the Clause protects a legislator in the performance of legislative acts, "it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts." *Gravel* v. *United States, supra*, 408 U.S. at 626. See also *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (legislative immunity is restricted to "the sphere of legitimate legislative activity"). Thus, both the legislator and his aide may be compelled to give evidence in that situation, notwithstanding the explicit privilege. See also *Doe* v. *McMillan, supra*.

Similarly, discussions within the Executive Branch which are in furtherance of a criminal conspiracy cannot be subsumed within executive privilege. The privilege, which is limited by its underlying public purpose, see, *e.g., Halpern* v. *United States, supra*, 258 F. 2d at 44, does not extend beyond the transaction of legitimate official activities so as to protect conversations that constitute evidence of official misconduct or crime. In *Rosee* v. *Board of Trade*, 36 F.R.D. 684, 690 (N.D. Ill. 1965), for example, the court overruled a claim of executive privilege invoked in the face of a substantiated charge of official misconduct where the party seeking the evidence showed "(1) that there is a reasonable basis for his request and (2) that the defendant government agents played some part in the operative events."[74] When the governmental processes which are fostered and protected by a privilege of confidentiality are abused or subverted, the reasons for secrecy no longer exist and the privilege is lifted.

Executive privilege compares in this respect to executive immunity. A government official, of course, may not be held liable for damages in a civil action for the consequences of acts within the scope of his official duties. *Barr* v. *Matteo*, 360 U.S. 564. This immunity, like privilege, has been considered necessary to foster "the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571. But the immunity does not shield him for acts "manifestly or palpably beyond his authority." *Spalding* v. *Vilas*, 161 U.S. 483, 498. See also *Doe* v. *McMillan, supra; Bivens* v. *Six Unknown Federal Bureau of Narcotics Agents*, 456 F. 2d 1339 (2d Cir. 1972). And, as in the present case, the policy underlying executive immunity does not permit it to reach "so far as to immunize criminal conduct. * * *" *O'Shea* v. *Littleton, supra*, ——— U.S. at ——— (42 U.S.L.W. at 4144).

The Court of Appeals for the District of Columbia Circuit vividly highlighted the essence of this principle when it explained why the courts must not feel bound by the assertion of executive privilege but must instead scrutinize the propriety of the claim. "Otherwise," the court said, "the head of any 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." *Committee for Nuclear Responsibility, inc.* v. *Seaborg, supra*, 463 F. 2d at 794.

Justice Cardozo gave an eloquent statement of why this is not the law in *Clark* v. *United States*, 289 U.S. 1, an analogous case dealing with the secrecy normally attaching to a jury's deliberations. Speaking for a unanimous Court, he recognized that the privilege, based upon a need for confidentiality, is generally valid: "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." 289 U.S. at 13. But Justice Cardozo also held that such a privilege, like other priviliges based on the desirability of encouraging candid discourse and interplay, is subject to "conditions and exceptions" when there are other policies "competing for supremacy. It is then the function of the court to mediate between them." *Ibid.* The Court then held that where there is a "showing of a *prima facie* case" (289 U.S. at 14) that the relation has been tainted by criminal misconduct, the interest in confidentiality must yield. The Court held that the jury's privilege of confidentiality is dissipated if there is "evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote" (289 U.S. at 14). Justice Cardozo reasoned (*ibid.*):

"The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the * * * juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth."

The Court then drew an analogy to the attorney-client privilege, one of the most venerable privileges in the law, and emphasized: "The privilege takes flight if the relation is abused." 289 U.S. at 215.[75]

1. The grand jury's finding is valid and is sufficient to show prima facie that the President was a co-conspirator

The present case is governed by these principles, as articulated in cases like *Clark*. On February 25, 1974, in the course of its consideration of the indictment in *United States* v. *Mitchell, et al.*, the grand jury, by a vote of 19–0, determined that there is probable cause to believe that Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice charged in Count I of the indictment. The grand jury authorized the Special Prosecutor to identify Richard M. Nixon (among others) as an unindicted co-conspirator in connection with subsequent proceedings in *United States* v. *Mitchell, et al.* The district court below, denying the President's motion to expunge the grand jury's finding, ruled that this finding is relevant "to a determination that the presumption of privilege is overcome" (Pet. App. 23).

The grand jury's authorization to the Special Prosecutor constitutes the requisite *prima facie* showing to negate any claim of executive privilege for the subpoenaed conversations relating to Watergate and is binding on the courts at this stage of the proceedings in *United States* v. *Mitchell, et al.* As this Court held in *Ex Parte United States*, 287 U.S. 241, 250, the vote of a "properly constituted grand jury conclusively determines the existence of probable cause * * *."[76] Despite the President's contention in No. 73–1834, therefore, the district court properly refused to expunge this finding.[77]

Each of the principal participants in the subpoenaed conversations has been identified by the grand jury as a co-conspirator, and, as demonstrated by the showing in the Appendix submitted to the district court below in opposition to the President's motion to quash, it is probable that each of the subpoenaed conversations includes discussions in furtherance of the conispiracy charged in the indictment. Thus, there is no room to argue that the subpoenaed conversations are subject to a privilege that exists to protect the public's legitimate interests in effective representative government. The grand jury has returned an indictment charging criminal conduct by high officials in the Executive Branch, and the public interest requires no less than a trial based upon *all* relevant and material evidence relating to the charges.

In opposing the grand jury's subpoena *duces tecum*, counsel for the President argued that despite any showing that statements in the course of Presidential conversations were made in furtherance of a conspiracy to obstruct justice, the general principle of confidentiality must be maintained in order to assure the effective functioning of the Presidential staff system. An analogous argument was made in *Clark* and decisively rejected by this Court in a passage we are constrained to quote at length (289 U.S. at 16):

"With the aid of this analogy [to the attorney-client privilege] we recur to the social policies competing for supremacy. A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney. Is there sufficient reason to believe that it will be found to be inadequate for the protection of a juror? No doubt the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption."

It is hard to imagine a stronger need for piercing the cloak of confidentiality than in the present case. Requiring production of the evidence under these circumstances presents only a minimal threat to a President's ability to obtain advice from his aides with complete freedom and candor, for surely there will be few occasions where there is probable cause to believe that conversations in the Executive Office of the President occurred during the course of and in furtherance of a criminal conspiracy. Counsel cannot seriously claim that the aides of any future President will be so "timid" in the face of such a remote danger of disclosure of their advice, or that some small risk of reticence is too great a price to pay to preserve the President's Office "against the inroads of corruption." In light of the grand jury's finding of probable cause to believe that the President was a co-conspirator in the indictment charging a conspiracy to de-

Footnotes at end of article.

fraud the United States and obstruct justice and the showing by the Special Prosecutor that the subpoenaed conversations in all probability occurred during the course of and in furtherance of the conspiracy, the conversations relating to Watergate cannot be shielded by a privilege designed to protect the objective, candid, and honest formulation of policy in government affairs.[78]

B. THE PUBLIC INTEREST IN DISCLOSURE OF RELEVANT CONVERSATIONS FOR USE AT TRIAL IN THIS CASE IS GREATER THAN THE PUBLIC INTEREST SERVED BY SECRECY

Even apart from the *prima facie* showing that the President and the other participants in the subpoenaed conversations were co-conspirators, the claim of privilege cannot stand here. Executive privilege, unlike personal privileges (for example, the privilege against self incrimination) is an official privilege, granted for the benefit of the public, not of executives who may happen to hold office. Thus, when this privilege is asserted in a judicial proceeding as a reason for refusing to produce evidence, the overall public interest, as determined by the Judiciary, must control. It is now settled law "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." *Nixon* v. *Sirica, supra,* 487 F. 2d at 716. See, *e.g., United States* v. *Reynolds, supra,* 345 U.S. at 11; *Carr* v. *Monroe Manufacturing Co., supra,* 431 F. 2d at 388; cf. *Doe* v. *McMillan, supra,* 412 U.S. at 320.

Where the courts are left with the firm and abiding conviction that the public interest requires disclosure, particularly where disclosure does not pose any discernible threat to the interests protected by secrecy, the privilege must give way. Accordingly, even if the subpoenaed conversations here remain "presumptively privileged," despite the *prima facie* showing of the President's complicity, the privilege must yield. There is a compelling public interest in the availability of all relevant and material evidence for the trial of the charges in *United States* v. *Mitchell, et al.,* involving as they do a conspiracy to defraud the United States and obstruct justice by high government officials. The subpoenaed conversations consist of discussions by the defendants or other co-conspirators about the subject matter of the alleged conspiracy: Watergate. Such evidence is obviously of fundamental importance. Moreover, the public interest in continued secrecy is vastly diminished, if not nonexistent, in the wake of the extensive testimony on this subject permitted by the President and of the President's recent release of transcripts of parts of forty-three Presidential conversations relating to Watergate, including parts of twenty of the subpoenaed conversations.

1. The balancing process followed by the district court accords with decisions of this Court

In holding that the applicability of executive privilege depends upon a weighing of competing interests, the court in *Nixon* v. *Sirica* relied upon Chief Justice Marshall's decision in the misdemeanor trial of Aaron Burr. *United States* v. *Burr,* 25 Fed. Cas. 187 (No. 14,694) (C.C.D. Va. 1807). The Chief Justice, at the request of Burr, issued a subpoena *duces tecum* to the United States Attorney, who had possession of a letter written to President Jefferson by General Wilkinson.[79] In his return, the United States Attorney surrendered a copy of the letter "excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined." 25 Fed. Cas. at 190. In ruling that only the President could assert "motives for declining to produce a particular paper" in such a situation, the Chief Justice did recognize "that the president might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure." 25 Fed. Cas. at 191–92. The Chief Justice, however, clearly contemplated that the court could require production even though the President's showing was entitled to "much reliance": "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." 25 Fed. Cas. at 192.[80]

Similarly, this Court in *Reynolds, supra,* held that a claim of privilege may be rejected upon a sufficient showing (345 U.S. at 11):

"Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted."

In reversing the lower court decisions which would have required *in camera* inspection to determine whether the privilege should be upheld, this Court held merely that there had only been a "dubious" showing of necessity for access to confidential investigative reports on the crash of a bomber testing secret equipment.[81] Since state secrets were involved, the party seeking the evidence had not made the requisite threshold showing to overcome the presumptive privilege even to justify *in camera* inspection.

More recently the Court considered the governmen s privilege to withhold the identity of informants. *Roviaro* v. *United States, supra.* This privilege, like the privilege for government deliberations, encourages candor through secrecy. Persons are thought to be more likely to provide information to law enforcement agencies if they can remain anonymous. But the privilege is not absolute. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." 353 U.S. at 60–61. See also *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.,* 459 F. 2d 303, 305 (5th Cir. 1969).

2. There is a compelling public interest in trying the conspiracy charged in United States *v.* Mitchell, et al., *upon all relevant and material evidence*

Whether one views the President's assertion of privilege as entitled to "much reliance," see *United States* v. *Burr, supra,* 25 Fed. Cas. at 192, or "presumptively" valid, see *Nixon* v. *Sirica, supra,* 487 F. 2d at 717, the privilege is overcome here. In upholding the district court's order enforcing the grand jury's subpoena *duces tecum,* the court of appeals held that the "presumption of privilege * * * must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." *Nixon* v. *Sirica, supra,* 487 F. 2d at 717. According to the court, this showing was made possible by the "unique intermeshing of events unlikely soon, if ever, to recur." 487 F. 2d at 705. It is clear that the "unique" circumstances which led to the rejection of the President's claim of privilege in the context of a grand jury investigation have continued applicability. Indeed, now that the grand jury has returned an indictment charging a conspiracy to defraud the United States and obstruct justice, the need for full disclosure is, if anything, greater.

At the time *Nixon* v. *Sirica* was decided, the grand jury was investigating mere allegations of criminal wrongdoing by high government officials. That investigation has resulted in a finding of probable cause to believe that some of those officials have committed offenses which strike at the very essence of a "government of laws." It is precisely this type of situation where this Court has spoken of the "over-mastering" need for preserving our institutions against "the inroads of corruption," even to the extent of overcoming a privilege of confidentiality. *Clark* v. *United States, supra,* 289 U.S. at 16. The warning of the court of appeals in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 794, bears repeating:

"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."

That the privilege must yield regardless of the President's involvement is easily demonstrated by analogy. Justice Cardozo's opinion in Clark indicated that if there were direct or substantial evidence that a juror had accepted a bribe, the veil of secrecy ordinarily surrounding a jury's deliberations would be dissipated and the arguments and votes of even the unsuspected jurors would be admissible as evidence upon whether the putatively guilty juror had in fact taken a bribe. 289 U.S. at 16. It would seem clear that, if there were a prima facie showing that a high executive official had accepted a bribe in consideration of his fraudulently inducing the President to grant a pardon or take other executive action favorable to the one giving the bribe, executive privilege would not be allowed to bar proof of the official's representations to the President even though the President was totally ignorant of the wrongdoing and had acted innocently in exercising his constitutional powers. So here, regardless of the President's wish, the law cannot and does not recognize a privilege that would shield a miscreant adviser from prosecution for a criminal offense in violation of the President's confidence as well as his public trust.

It is thus immaterial whether the President was actually aware that other participants in the conversations were discussing criminal activities in which they themselves were involved. The district court below found that the Special Prosecutor had made a sufficient showing of relevancy and evidentiary value with respect to the subpoenaed conversations (Pet. App. 19–20), since the conversations are material to defining the scope, membership, and objects of the conspiracy. The public interest in laying this evidence before a jury, therefore, must be considered compelling.

The President himself emphasized this interest, albeit in the context of impeachment, in discussing the factors that persuaded him to release transcripts of portions of forty-three conversations dealing with Watergate—

"I believe all the American people, as well as their Representatives in Congress, are *entitled to have not only the facts, but also the evidence that demonstrates those facts."* [82] This judgment is highly relevant to any balance drawn by the courts. See *Nixon* v. *Sirica, supra,* 487 F. 2d at 717–18.

Counsel for the President, in his memorandum in support of the motion to quash, argued that because the Special Prosecutor signed the indictment, he must have been satisfied that there was sufficient evidence available to him to make a *prima facie* showing of guilt, thereby suggesting that the Special Prosecutor should be content with the evidence now available to him. The indictment, of course, rests upon the requisite finding of probable cause. The standard that the government now bears, however, is proof beyond a reasonable doubt, and the public is entitled to the most effective presentation of its case that can be made. Justice will be done here only if the jury hears the whole story and not just excerpted evidence the President chooses to make available.

This is not a case where the government is seeking incriminating evidence which is merely cumulative or corroborative. The analysis of the released transcripts in the

Footnotes at end of article.

Appendix submitted to the district court shows that conversations not previously available to the Special Prosecutor in fact contain evidence extremely important to material issues in the indictment—evidence that would not otherwise be available to the Special Prosecutor. See *Nixon v. Sirica, supra*, 487 F. 2d at 717.[83] Two of the principal areas are discussions relating to the future testimony of White House officials and campaign aides and discussions of how to handle executive clemency and other benefits for various individuals as charged in the indictment. As the analysis in the Appendix shows, it is likely that the forty-four subpoenaed conversations for which no transcripts have been released include additional evidence which also is not merely cumulative or corroborative. When one is considering an on-going conspiracy, evidence of each link in the conspiracy, either in terms of time or in terms of objectives, may be crucial to a successful prosecution.[84]

We note that there has been not as much as a suggestion from counsel for the President that any of the subpoenaed conversations are *not* relevant to the criminal trial. Moreover, we emphasize that neither the President nor his counsel is in a position to make the refined judgments as to what evidence is necessary to the Special Prosecutor's case in chief or for use on cross-examination. Neither is familiar with the evidence in the possession of the government or with the theory on which the government's case will be prosecuted. In our adversary system, the judgments of what evidence to offer and how to use that evidence must be left to the advocates. See, *e.g., Dennis* v. *United States*, 384 U.S. 855, 874–75.

The court of appeals in *Nixon* v. *Sirica* also emphasized the impact of existing contradictory testimony. *E.g.*, 487 F. 2d at 705. Since that decision, the debate over the credibility of witnesses has heightened. On May 4, 1974, during the pendency of the present motion, the White House released a memorandum based on its expurgated transcripts, attacking the credibility of a prospective government witness, John W. Dean, 32 Congressional Quarterly 1154 (May 11, 1974). Conflicts in testimony continue. The tape recordings of Presidential conversations will be critical to resolving these conflicts and weighing the credibility of trial witnesses.

3. Disclosure of the subpoenaed recordings will not significantly impair the interests protected by secrecy

It is axiomatic, of course, that once privileged communications are no longer confidential, the privilege no longer applies and the public interest no longer is served by secrecy. See, *e.g., Roviaro* v. *United States, supra*, 353 U.S. at 60. In *Nixon* v. *Sirica*, the court of appeals considers important to its calculus that "the public testimony given consequent to the President's decision [on May 22, 1973, to waive executive privilege] substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate." 487 F. 2d at 718. We argue in Part IV below that, as a matter of law, the President, as a result of his May 22, 1973, statement and the recent release of transcripts of portions of forty-three Presidential conversations, has waived executive privilege with respect to any Watergate-related conversations. There simply is no confidentiality left in that subject and no justification in terms of the public interest in keeping from public scrutiny the best evidence of what transpired in Watergate-related conversations. Whether or not this Court agrees that there has been a waiver as a matter of law, the "diminished interest in maintaining the confidentiality of conversations pertinent to Watergate" is an important consideration in this case in drawing any balance.

The enforcement of the subpoena in this case marks only the most modest and measured displacement of presumptive privacy for Presidential conversations, and augurs no general assault on the legitimate scope of that privilege. This is not a civil proceeding between private parties or even between the United States and a private party, where masses of confidential communications might be arguably relevant in wide-ranging civil discovery. The more rigorous standards applicable in a criminal case have been satisfied here, and they sharply narrow the scope of possible future demands for such evidence. Nor is this one of a long history of congressional investigations seeking to expose to the glare of publicity the policies and activities of the Executive Branch. In such instances the evidence is often sought in order to probe the mental processes of the Executive Office in a review of the wisdom or rationale of official Executive action. Compare Morgan v. United States, 304 U.S. 1, 18; United States v. Morgan, 313 U.S. 409, 422. The threat to freedom and candor in giving advice is probably at the maximum in such proceedings; they invite bringing to bear upon aides and advisors the pressures of publicity and political criticism, the fear of which may discourage candid advice and robust debate.

The charges to be prosecuted here involve high Presidential assistants and criminal conduct in the Executive Office. Such involvement is virtually unique. Because it is—hopefully—unlikely to recur, production of White House documents in this prosecution will establish no precedent to cause unwarranted fears by future Presidents and their aides or to deter them from full, frank and vigorous discussion of legitimate governmenal issues. Indeed, future aides may well feel that the greatest danger they face in engaging in free and trusting discussion is the type of partial, one-sided revelations that the President has encouraged in this case.

4. The balance in this case overwhelmingly mandates in favor of disclosure

Certainly, courts should not lightly override the assertion of executive privilege. But the privilege is sufficiently protected if it yields only when the courts are left with the firm and abiding conviction that the public interest requires disclosure. The factors in this case overwhelmingly support a ruling that Watergate-related Presidential conversations are not privileged in response to a reasonable demand for use at the trial in *United States* v. *Mitchell, et al.* There is probable cause to believe, based upon the indictment, that high Executive officers engaged in discussions in furtherance of a criminal conspiracy in the course of their deliberations. The veil of secrecy must be lifted; the legitimate interests of the Presidency and the public demand this action.

IV. ANY PRIVILEGE ATTACHING TO THE SUBPOENAED CONVERSATIONS RELATING TO WATERGATE HAS BEEN WAIVED AS A RESULT OF PERVASIVE DISCLOSURES MADE WITH THE PRESIDENT'S EXPRESS CONSENT

Even if the conversations described in the subpoena could be regarded as covered by a privilege for executive confidentiality, the privilege cannot be claimed in the face of the President's decision to authorize voluminous testimony and other statements concerning Watergate-related discussions and his recent release of 1,216 pages of transcript from forty-three Presidential conversations, including twenty covered by the present subpoena. In his Formal Claim of Privilege submitted to the disrict court, the President stated that because "[p]ortions of twenty of the conversations described in the subpoena have been made public, no claim of privilege is advanced with regard to those Watergate related portions of those conversations." This concession reflects inevitable recognition that there can be no generalized claim of executive privilege based upon confidentiality where, in fact, no confidentiality exists. "[T]he moment confidence ceases, privilege ceases." *Parkhurst* v. *Lowten*, 36 Eng. Rep. 589, 596 (Ch. 1819). But as we show below, the waiver in this case extends beyond those transcripts released publicly, since a privilege holder may not make extensive but selective disclosures concerning a subject and then withhold portions that are essential to a complete and impartial record. The circumstances of this case compel the conclusion that, as a matter of law, the President has waived executive privilege with respect to all Watergate-related conversations described in the subpoena.

The rule that voluntary disclosure eliminates any privilege that would otherwise attach to confidential information has been applied in cases dealing with claims of governmental privilege. *Roviaro* v. *United States, supra*, 353 U.S. 53; *Westinghouse Electric Corp.* v. *City of Burlington*, 351 F. 2d 762 (D.C. Cir. 1965), as well as in cases dealing with attorney-client privilege, *Hunt* v. *Blackburn*, 128 U.S. 464; *United States* v. *Woodall*, 438 M. 2d 1317, 1325 (5th Cir. 1970); physician-patient privilege, *Munzer* v. *Swedish American Line*, 35 F. Supp. 493, (S.D.N.Y. 1940); and marital privilege, *Pereira* v. *United States*, 347 U.S. 1, 6. The general principles governing waiver are stated concisely and forcefully in Rule 37 of the Uniform Rules of Evidence.[85]

"A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he * * * without coercion and with the knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one."

This is precisely the situation here. In his statement of May 22, 1973, the President announced, in light of the importance of the "effort to arrive at the truth," that "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."[86] As the Court can judicially notice, in the months following that statement there has been extensive testimony in several forums concerning the substance of the recorded conversations now sought for use at the trial in *United States* v. *Mitchell, et al.* The testimony, as the Court is also aware, is quite often contradictory and is pervaded by hazy recollections. See also *Nixon* v. *Sirica, supra*, 487 F. 2d at 705.

It could be argued that the express waiver of May 22, 1973, coupled with the subsequent testimony of participants in the conversations, is itself sufficient to preclude a claim of executive privilege based upon confidentiality for Watergate-related conversations. There has been a supervening event, however, which as a matter of law removes any vestige of confidentiality in the President's discussions of Watergate with Messrs. Colson, Dean, Ehrlichman and Haldeman. On April 30, 1974, the President submitted to the Committee on the Judiciary of the House of Representatives and released to the public 1,216 pages of transcript from forty-three Watergate-related Presidential conversations.[87] The conversations range over the period from September 15, 1972, until April 27, 1973.

In his address on live television and radio on the evening prior to releasing the transcripts, the President explained that he was seeking "[t]o complete the record." He further explained: "As far as what the President personally knew and did with regard to Watergate and the cover-up is concerned, these materials—together with those already made available, will tell it all."[88] This state-

Footnotes at end of article.

ment is not literally accurate, but it is true that the broad outlines of the President's conversations and conduct throughout the relevant period may be portrayed by the transcripts that have been publicly released. These disclosures are sufficient to cede any privilege to conceal from production pursuant to the subpoena either the original tapes from which the publicly released transcripts were purportedly made or tapes of other relevant conversations which necessarily complete the picture the public and the jury are entitled to see.

A privilege holder who opens the door to an area that was once confidential can no longer control the fact-finder's search for the whole truth by attempting to limit the ability to discern the interior fully. The boundaries of the disclosure are legally no longer within his exclusive control. For example, in cases involving the analogous privileges accorded to attorney-client and physician-patient communications, it is clear that once testimony has been received as to a particular communication, either with the consent of the holder of the privilege or without his objection, the privilege is lost. There can be no assertion of the privilege to block access to another version of the conversation. See, *e.g., Hunt* v. *Blackburn, supra,* 128 U.S. at 470–71; *Rosenfeld* v. *Ungar,* 25 F.R.D. 340, 342 (S.D. Iowa 1969); *Munzer* v. *Swedish American Line, supra,* 35 F. Supp. at 497–98; *In re Associated Gas & Electric Co.,* 59 F. Supp. 743, 744 (S.D. N.Y. 1944); 8 Wigmore §§ 2327, 2389, at 636 and 855–61.

The same principles apply to the Fifth Amendment's privilege against self-incrimination. Once the privilege holder elects to disclose his version of what happened, a due "regard for the function of courts of justice to ascertain the truth" requires further disclosure "on the matters relevantly raised by that testimony." *Brown* v. *United States,* 356 U.S. 148, 156, 157. Once the privilege holder has opened the door, "he is not permitted to stop, but must go on and make a full disclosure." *Brown* v. *Walker,* 161 U.S. 591, 597.

There is still another dimension that the Court should consider. The President in the past has used the recordings of Presidential conversations to aid in the presentation of the White House interpretation of relevant events. For example, in June 1973, the White House transmitted a memorandum to the Senate Select Committee on Presidential Campaign Activities listing "certain oral communications" between the President and John W. Dean. Subsequently, but prior to Mr. Dean's testimony before the Committee, J. Fred Buzhardt. Special Counsel to the President, telephoned Fred D. Thompson, to relate to him Mr. Buzhardt's "understanding as to the substance" of twenty of the meetings.[89]

The President also has allowed, indeed requested, the recordings to be used in preparing public testimony. Defendant H.R. Haldeman, one of the respondents in the case before the Court and hardly a disinterested witness, was allowed to take home the tapes of selected conversations even after he had resigned his position as Assistant to the President and to use them in preparing his testimony.[90]

The general principle that the privilege holder's offer of his own version of confidential communications constitutes a waiver as to all communications on the same subject matter governs under these circumstances. "This is so because the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." 8 Wigmore § 2327, at 638. The President time and again—even before the existence of the recordings was publicly known—has resorted to the recordings in support of his position.[91] In short, the President cannot have it both ways. He cannot release only those portions he chooses and then stand on the privilege to conceal the remainder. No privilege holder can trifle with the judicial search for truth in this way.

The high probability that the yet undisclosed conversations include information which will be important to resolving issues to be tried in *United States* v. *Mitchell, et al.* provides a compelling reason for disclosure. As the President himself recognized, the public interest demands the complete story based upon the impartial sifting and weighing of all relevant evidence. That is emphatically the province of the judicial process for it is "the function of a trial * * * to sift the truth from a mass of contradictory evidence. * * *" *In the Matter of Michael,* 326 U.S. 224, 227. And in the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has chosen to make far-reaching but expurgated disclosures, the Court must use its process to acquire all revelant evidence to lay before the jury. In the present context it can do so with the least consequences for confidentiality of other matters and future deliberations of the Executive Branch by ruling that there has been a waiver with respect to this entire affair.

V. THE DISTRICT COURT PROPERLY DETERMINED THAT THE SUBPOENA "DUCES TECUM" ISSUED TO THE PRESIDENT SATISFIED THE STANDARDS OF RULE 17(C), BECAUSE AN ADEQUATE SHOWING HAD BEEN MADE THAT THE SUBPOENAED ITEMS ARE RELEVANT AND EVIDENTIARY

Once the privilege issues are passed,[92] the only remaining question before the Court is whether the district judge properly found (Pet. App. 19–20) that the government's subpoena satisfied the standards generally applied under Rule 17(c) of the Federal Rules of Criminal Procedure. The district court held that the standards of Rule 17(c) had been satisfied by the Special Prosecutor's submission of a lengthy and detailed specification setting out with particularity the relevance and evidentiary value of each of the tape recordings and other material being sought. This showing was submitted as a forty-nine page Appendix to the Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum included in the record before this Court.[93]

Enforcement of a trial subpoena *duces tecum* is preminently a question for the trial court and is committed to the court's sound discretion. For this reason, the district court's determination should not be disturbed absent a finding by the reviewing court that it was arbitrary and had no support in the record. See *Covey Oil Co.* v. *Continental Oil Co.,* 340 F. 2d 993, 999 (10th Cir. 1965), cert. denied, 380 U.S. 964; *Sue* v. *Chicago Transit Authority,* 279 F. 2d 416, 419 (7th Cir. 1960); *Schwimmer* v. *United States,* 232 F. 2d 855, 864 (8th Cir. 1956), cert. denied, 352 U.S. 833; *Shotkin* v. *Nelson,* 146 F. 2d 402 (10th Cir. 1944). This is especially true where, as here, the assessment of the relevancy and evidentiary value of the items sought is primarily a determination of fact and the district judge is intimately familiar with the grand jury's investigation and the indictment in the case. Since the district court's findings are amply supported by the record and reflect the application of the proper legal criteria, those findings should not be disturbed by this Court. Indeed, in the absence of any dispute between the parties on the correctness of the legal principles applied by the district court under Rule 17(c), this essentially factual determination ordinarily would not merit review by this Court at all. In the interest of final disposition of the case, however, we urge the Court to uphold the lower court's action on this aspect of the case as well.

A. RULE 17(C) PERMITS THE GOVERNMENT TO OBTAIN RELEVANT, EVIDENTIARY MATERIAL SOUGHT IN GOOD FAITH FOR USE AT TRIAL

Rule 17(c) provides:

"A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

As all parties and the district court recognized (Pet. App. 19), the leading cases establishing the criteria for satisfaction of Rule 17(c) are *Bowman Dairy Co.* v. *United States, supra,* 341 U.S. 214, and *United States* v. *Iozia,* 13 F.R.D. 335 (S.D.N.Y. 1952). See generally 8 Moore, Federal Practice ¶17.07 (1973). In *Bowman Dairy,* the Court held that the government properly had been ordered, under Rule 17(c), to produce to the defendant prior to trial all documents, books, records, and objects gathered by the government during its investigation or preparation for trial which were either presented to the grand jury or would be offered as evidence at trial. The Court upheld the order to produce even though the defendant's subpoena did not further specify particular items sought.

In *Iozia,* the question presented was whether defendant properly could obtain material from the government under Rule 17(c) upon a mere showing that it might be material to the preparation of the defense. The district court, elaborating upon the *Bowman Dairy* standard, declared that a mere showing of possible use in pre-trial preparation was insufficient: the defendant must show (1) that the material was evidentiary and relevant, (2) that it was not otherwise procurable reasonably in advance of trial, (3) that the party seeking it could not properly prepare for trial without it and failure to obtain it might delay trial, and (4) that the request was made in good faith and did not constitute a general "fishing expedition." These were the tests the district court below stated it was applying when it found that "the requirements of Rule 17(c) are here met" (Pet. App. 20).

The standard of relevancy established by these cases is clear. Material being sought under Rule 17(c) is relevant if it is "related to the charges" in the indictment, *United States* v. *Gross,* 24 F.R.D. 138, 140 (S.D.N.Y. 1959), or "closely related to the subject matter of the indictment," *United States* v. *Iozia, supra,* 13 F.R.D. at 339, even though it might not, for example, "serve to exonerate this defendant of the crime charged * * *." *Ibid.*

In contrast, the requirement that the material sought be "evidentiary" has not been as well defined in the case law. See 8 Moore, *supra,* ¶ 17.07, at 17–19. In the district court, counsel for the President asserted that under Rule 17(c) the government must show that the items sought would be admissible at trial in its case in chief. The reported decisions, however, show that the purpose of the "evidentiary" requirement articulated in *Bowman* and *Iozia* is to oblige the party seeking production to show that the items sought are of a character that they could be used in the trial itself, not simply for general pre-trial preparation. Thus, a subpoena can seek not only evidence that would be admissible in the party's direct case but can also demand material that could be used for impeachment purposes. "Rule 17(c) is applicable only to such documents or objects as would be admissible in evidence at the trial, or which may be used for im-

peachment purposes." *United States* v. *Carter*, 15 F.R.D. 367, 371 (D.D.C. 1954) (Holtzoff, J.). See also 8 Moore, *supra*, ¶ 17.07, n. 16 ("the documents sought must be admissible in evidence (at least for the purpose of impeachment)").[94] For example, evidentiary material sought by the government such as prior inconsistent statements by defendants, even if not pertinent in the government's case in chief, would be admissible for purposes of impeachment if a defendant took the stand or in the government's rebuttal case.

Moreover, the "evidentiary" requirement of *Bowman Dairy* and *Iozia* has developed almost exclusively in cases in which defendants sought material prior to trial from the government in addition to that to which they were entitled by the comprehensive pre-trial discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure. Courts have, therefore, taken special care, as the *Bowman* and *Iozia* opinions show, to insure that Rule 17(c) not be used as a device to circumvent the limitations on criminal pretrial discovery embodied in Rule 16. Rule 16 provides only for discovery from the parties. By contrast, in the instant case the government seeks material from what is in effect, as the district court observed, a third party. As applied to evidence in the possession of third parties, Rule 17(c) simply codifies the traditional right of the prosecution or the defense to seek evidence for trial by a subpoena *duces tecum*. Whether the stringent standards developed in *Bowman Dairy* and *Iozia* for Rule 17(c) subpoenas between the prosecution and the defense should be applied to subpoenas to third parties is a question the Court need not reach, however, since the court below correctly found that the Special Prosecutor had fully met even the higher standards.

The final requirement enunciated in *Iozia*, that the application be made "in good faith" and not "as a general fishing expedition," appears to be simply a requirement that the materials sought be sufficiently identifiable that the court can make a determination that they exist, that they are relevant, and that they would have some evidentiary use at trial. Indeed, the standard most often applied after *Iozia* in determining enforceability of subpoenas under Rule 17(c) appears to be a combination of the *Iozia* requirements of relevancy, evidentiary value, and good faith: the subpoena must be an "honest effort to obtain evidence for use on trial." *United States* v. *Gross*, *supra*, 24 F.R.D. at 141; *United States* v. *Solomon*, 26 F.R.D. 397, 407 (S.D. Ill. 1960); *United States* v. *Jannuzio*, 22 F.R.D. 223 (D. Del. 1958).

In the district court, counsel for the President took the position that a subpoena should be considered a "fishing expedition" unless the party seeking its enforcement can make a *conclusive* showing that each and every item sought is, beyond doubt, both relevant and evidentiary. As to the majority of conversations involved in the subpoena, this standard is satisfied by consideration of the transcripts made public by the White House, uncontradicted testimony, and other evidence. As to the remaining conversations, there is strong and unrebutted circumstantial evidence—the inferences from which are not denied—indicating that the standard is met.

But the position urged by counsel for the President is not supported and indeed is contradicted by the reported decisions. For instance, the subpoena held enforceable in *Bowman Dairy* was directed to all material in the government's possession that had been presented to the grand jury in the course of the investigation or that would be presented at trial, without further specificity. The subpoena held enforceable in *Iozia* was directed at certain documents, correspondence, and files of a former associate of the defendant. The defendant alleged that he had reason to believe that certain activities may have been engaged in by still other persons and that the former associate was "in the best position to know" about these if they indeed occurred. The cases realistically recognize that the party seeking production often cannot know precisely what is contained in the material sought until he has the opportunity to inspect it. The Court in *Bowman Dairy*, for example, quoted with approval the statement of a member of the Advisory Committee on the Criminal Rules, to the effect that the purpose of Rule 17(c) was to permit a court to order production in advance of trial "for the purpose of course of enabling the party to see whether he can use it or whether he wants to use it." 341 U.S. at 220 n. 5. Common sense dictates that the party seeking production cannot tell what it "can or will use until it has had the opportunity to see the documents." *United States* v. *Gross*, *supra*, 24 F.R.D. at 141. As Chief Justice Marshall observed in considering a trial subpoena *duces tecum* directed to President Jefferson in *United States* v. *Burr*, *supra*, 25 Fed. Cas. at 191: "It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?"

Because the Special Prosecutor has been denied even preliminary access to the subpoenaed materials, it is obviously impossible for him to demonstrate *conclusively* with respect to a small number of the conversations that they are relevant and evidentiary. But Rule 17(c) and the cases interpreting it do not require that this be done. Rather, they require only that an adequate showing of relevancy and evidentiary value be made, based upon the evidence available. In short:

"A predetermination of the admissibility of the subpoenaed material is not the criterion of the validity of the process. It need only appear that the subpoena is being utilized in good faith to obtain evidence * * * [citing *Bowman Dairy*]. *United States* v. *Jannuzio*, *Supra*, 22 F.R.D. at 226."

B. THERE WAS AMPLE SUPPORT FOR THE FINDING OF THE DISTRICT COURT THAT THE GOVERNMENT'S SHOWING OF RELEVANCY AND EVIDENTIARY VALUE WAS ADEQUATE TO SATISFY RULE 17(C)

1. Relevance

Transcripts released to the public by the White House, uncontradicted testimony concerning the subject matter of certain conversations, and other evidence compiled in the Special Prosecutor's showing establish beyond any question the relevancy of the vast majority of the subpoenaed conversations.[96] Indeed, the White House transcripts that have been released of twenty of the subpoenaed conversations not only show conclusively the relevancy of those conversations but also tend to prove the relevancy of the rest of the sixty-four conversations sought by the subpoena.[96]

With respect to some of the conversations, particularly those listed in Items 32–40 of the subpoena, relevancy can be established at this time only by circumstantial and indirect evidence. Nevertheless, the available evidence that these conversations—all of which took place in the three days from April 18 to April 20, 1973—in fact concerned Watergate is strong. The evidence, set forth in detail in the government's Appendix below, shows that the primary subject of concern to the participants in the meetings sought over those three days—the President and defendants Haldeman and Ehrlichman—was Watergate; that Haldeman and Ehrlichman had withdrawn from their regular White House duties to work exclusively on a Watergate defense; and that meetings between these three persons very probably could have concerned only Watergate. Furthermore, with respect to these conversations, the evidence that is available is unrebutted. The Special Prosecutor argued below that since only the President was in a position to make more informed representations about the relevancy of the subpoenaed conversations, the showing made by the Special Prosecutor was at least sufficient to shift the burden to the President to demonstrate any alleged irrelevancy to the district court by providing the appropriate recordings for *in camera* inspection. In subsequent oral argument in the district court counsel to the President, responding to direct questions from the court, stated that he could make no representations whatever concerning the relevancy *vel non* of any of the subpoenaed conversations.[97]

2. Evidentiary nature

Tape recordings of conversations are admissible as evidence upon the laying of a proper and adequate foundation showing that "the recording as a whole [is] accurate and sufficiently complete."[98] This foundation may be laid by the testimony of one of the participants in the conversation that the recording accurately represents the conversation that was held.[99] Alternatively, the government could introduce a recording in its direct case even if none of the participants were available as a prosecution witness by showing the circumstances and method by which the recording was made and the chain of custody of the particular recording sought to be introduced.[100]

There can be no doubt that the tape recordings sought by the subpoena here, covering conversations of co-conspirators relating to the subject matter of the alleged conspiracy, are of an evidentiary character. In *Nixon* v. *Sirica*, *supra*, in upholding enforcement of an earlier subpoena for Presidential tapes, the court squarely held: "Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corrobative of the truth concerning the testimony." 487 F. 2d at 718 (footnote omitted). The same principle would apply to use of such recordings for impeachment purposes. Such materials are, therefore, amenable to a trial subpoena. In *Monroe* v. *United States*, 234 F. 2d 49, 55 (D.C. Cir. 1956), cert. denied. 352 U.S. 873, the court of appeals held that tape recordings made by a police officer of conversations between himself and defendants were "admissible as independent evidence of what occurred" and that they "were evidentiary, and therefore under the interpretation of Rule 17(c) adopted by the Supreme Court [in *Bowman Diary*] and already followed by this Court, the trial court in its discretion could have required pretrial production."[101] See also *United States* v. *Lemonakis*, 485 F. 2d 941 (D.C. Cir. 1973), cert. denied, ——— U.S. ——— (42 U.S.L.W. 3541, March 26, 1974).

Statements recorded on tapes sought by the instant subpoena, while hearsay for some purposes, but see *Anderson* v. *United States*, ——— U.S. ——— (42 U.S.L.W. 4815, June 3, 1974), would be admissible into evidence in the government's case in chief under one or more of the traditional exceptions to the hearsay rule.

First, it is settled that extra-judicial admissions made by one conspirator in the course of and in furtherance of a conspiracy are admissible against his fellow co-conspirators. *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Myers* v. *United States*, 377 F. 2d 412, 418–19 (5th Cir. 1967), cert. denied, 390 U.S. 929. Each of the principal participants in the subpoenaed conversations either has been indicted as a conspirator or will be named as an unindicted co-conspirator in the government's bill of particulars. As the Special Prosecutor demonstrated in his showing, the transcripts released by the White House, together with both direct and circumstantial

Footnotes at end of article.

evidence, establish a very strong probability that substantial portions of each and every one of the subpoenaed conversations occurred in the course of and in furtherance of the conspiracy alleged in the indictment. Subject to proof of this fact at trial, any recorded statements in futherance of the conspiratorial objectives made by any one of the conspirators in the course of these conversations would be admissible under the co-conspirator exception to the hearsay rule.

Second, even absent proof *aliunde* that each and every subpoenaed conversation was held in the furtherance of the conspiracy, any relevant taped extrajudicial statements made by defendants Haldeman or Ehrlichman would be admissible in the government's case in chief against that particular defendant. *On Lee* v. *United States*, 343 U.S. 747, 756; *United States* v. *Lemonakis, supra*, 485 F. 2d at 949.

Furthermore, other recorded statements made during these conversations may be useful to the government for the purpose of impeaching defendants Haldeman or Ehrlichman should they elect to testify in their own behalf. *E.g., Calumet Broadcasting Corp.* v. *FCC*, 160 F. 2d 285, 288 (D.C. Cir. 1947); *United States* v. *McKeever*, 169 F. Supp. 426, 430 (S.D.N.Y. 1958). And statements on the tapes by government witnesses would be admissible to show the witnesses' prior consistent statements, should the defense attack the witnesses' credibility or the truth of their testimony on cross-examination.[102]

The Special Prosecutor's showing submitted to the district court listed, by individual subpoenaed conversation, the admissions and other statements that are contained in the recordings (according to the White House transcripts released to the public) or should be found therein (according sworn testimony and other evidence) which would be admissible for one or more of the above-stated reasons. With respect to those conversations in late April 1973 about which there has not been detailed testimony and for which transcripts have not been made public by the White House, the Special Prosecutor argued below that the rich evidentiary vein running through the conversations already released constituted a sufficient showing that similar statements are likely to be contained in those not yet disclosed. Again, this showing was at least sufficient to shift the burden to the President to demonstrate, by submission of tape recordings of these conversations to the Court for *in camera* inspection or at least by certification of counsel, that no evidentiary material was in fact contained therein.

3. Need for the evidence prior to trial

In his affidavit in connection with the Motion of the United States for issuance of the subpoena, the Special Prosecutor stated that based on experience with other Presidential recordings a considerable amount of time would be necessary to analyze and transcribe the tapes sought by the instant subpoena and that pretrial production of the tapes was therefore warranted under Rule 17 (c). At no point below has counsel for the President sought to contest this showing. A considerable amount of time is required to listen and relisten to recordings and filter or enhance them where necessary, to make accurate transcripts, to select and prepare relevant portions for trial, and to make copies for defendants where appropriate under the discovery rules. Moreover, much of this work can be performed only by attorneys knowledgeable about the case who must simultaneously prepare all other aspects of the case for trial. The Court should be advised that the Special Prosecutor's staff originally estimated that the simple physical process described above of preparing the recordings sought for trial would require at least two months.

For these reasons, the district court correctly held that the subpoenaed items were genuinely needed prior to trial for preparation of the case and to avoid delay of the trial itself.

CONCLUSION

Settled principles of law, therefore, lead inevitably to the conclusion that the order of the district court, denying the President's motion to quash the subpoena *duces tecum* and directing compliance with it, and denying the motion to expunge the grand jury's action listing him as an unindicted co-conspirator, should be affirmed in all respects.

Respectfully submitted.

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JUNE 1974.

FOOTNOTES

[1] "Pet. App." refers to the Appendix to the Petition in No. 73–1766. "A." refers to the printed joint Appendix.

[2] In *Nixon* v. *Sirica*, 487 F. 2d 700, 707 n. 21 (D.C. Cir. 1973), the court of appeals stated that an order of this type directed to the President is appealable under 28 U.S.C. 1291. In any event, the court also asserted jurisdiction pursuant to the All Writs Act, 28 U.S.C. 1651. See 487 F. 2d at 706–707.

[3] Under 28 U.S.C. 510, 517, and 518, and Department of Justice Order No. 551–73, 28 C.F.R. § 0.37 *et seq.* (Appendix pp. 143–50, *infra*), the Special Prosecutor has authority, in lieu of the Solicitor General, to conduct litigation before this Court on behalf of the United States in cases within his jurisdiction.

[4] Department of Justice Order No. 517–73, 38 Fed. Reg. 14,688, adding 28 C.F.R. § 0.37 and Appendix to Subpart G–1.

[5] See *Hearings Before the Senate Judiciary Committee on the Nomination of Elliot L. Richardson to be Attorney General*, 93d Cong., 1st Sess. 144–46 (1973).

[6] *Hearings Before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong., 1st Sess., Book 5, at 2074–81 (1973).

[7] Letter from Richard M. Nixon to Senator Sam J. Ervin, Chairman of the Senate Select Committee on Presidential Campaign Activities, July 23, 1973, *id.*, Book 6, at 2479.

[8] See generally Congressional Qurarterly, Inc., *Historic Documents 1973*, at 859–78.

[9] The United States District Court for the District of Columbia later ruled that the Special Prosecutor's firing was illegal because Acting Attorney General Bork had relied simply upon instructions from the President and had not purported to find any "extraordinary impropriety," as had been specified by the regulations establishing the Office of the Watergate Special Prosecutor as the sole ground for dismissal. *Nader* v. *Bork*, 366 F. Supp. 104 (1973), appeal pending.

[10] Hearing on October 23, 1973, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, D.D.C. Misc. No. 47–73.

[11] An Advisory Panel of experts, nominated jointly by the Special Prosecutor and counsel for the President, and appointed by the district court, has concluded that the only "completely plausible explanation" of the 18½ minute "buzz" section is a set of from five to nine erasures caused by manual operation of a recording machine. "Report on a Technical Investigation Conducted for the U.S. District Court for the District of Columbia by the Advisory Panel on White House Tapes," filed June 4, 1974. *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, D.D.C. Misc. No. 47–73.

[12] See *Hearings Before the Senate Judiciary Committee on the Special Prosecutor*, 93d Cong., 1st Sess. (1973): *Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93d Cong., 1st Sess. (1973).

[13] The Senate Committee on the Judiciary reported out S. 2611 (S. Rep. 93–595) and S. 2642 (S. Rep. 93–596). See 119 Cong. Rec. D 1324 (daily ed. Nov. 21, 1973). The House Committee on the Judiciary reported out H.R. 11401 (H. Rep. 93–660), which was rewritten as H.R. 11555 by the House Rules Committee. See 119 Cong. Rec. D 1371 daily ed. Dec. 3, 1973). All three bills remain on the calendars of each House, subject to being called up on the floor without further hearings or committee action. See House Calendar, 93d Cong., 2d Sess., for June 5, 1974, at 138, 139 (Senate bills), 92 (House bill).

[14] 9 Weekly Compilation of Presidential Documents 1289 (October 29, 1973).

[15] Department of Justice Order No. 551–73, 38 Fed. Reg. 30,738.

[16] See also letter from the Acting Attorney General to the Special Prosecutor explaining this amendment (Appendix pp. 152–53, *infra*).

[17] By order entered on June 7, 1974, the district court rescinded its orders sealing portions of the record. On June 15, 1974, this Court denied a motion to unseal the record except as it related to an extract concerning the grand jury's finding with respect to the President.

[18] As to claims by defendants that they are entitled to the subpoenaed items under Rule 17(c), the court withheld ruling, stating that defendants' requests for access will be more appropriately considered in conjunction with their pre-trial discovery motions (Pet. App. 21–22). Accordingly, the court refused to decide whether *Bradly* v. *Maryland*, 373 U.S. 83, applies to "privileged" evidence not in the possession of the prosecutor.

[19] The District court's subject-matter jurisdiction over the pending criminal case and over the trial subpoena *duces tecum* issued in this case is clear. See 18 U.S.C. 3231: Rule 17, Federal Rules of Criminal Procedure.

[20] District Judge Gesell, who is presiding over the trial in *United States* v. *Ehrlichman, et al.* (D.D.C. Crim. No. 74–116), which involves charges against former White House officials growing out of the break-in at the offices of Dr. Louis Fielding, Daniel Ellsberg's psychiatrist, has recognized the independent status of the Special Prosecutor and the peculiar and unique circumstances that surround prosecutions within his jurisdiction:

"In one view of the matter, one portion of the Government is prosecuting another portion of the Government. Thus perhaps very unique circumstances are presented that require trial judges to use common sense to adapt criminal procedures and rules developed under more routine circumstances to the peculiar necessities of this special situation."

Transcript of Hearings on June 3, 1974, at 7–8, *United States* v. *Ehrlichman, et al, supra.*

[21] Mr. Jaworski testified as follows, under oath, before the Senate Committee on the Judiciary, which was considering legislation concerning establishment of an independent Special Prosecutor's office:

"* * * And when I came to Washington I first met with General Haig for probably an hour or an hour and a half, during which time this matter was discussed in detail. And as a result of that discussion, there eventuated the arrangement that we have mentioned.

"General Haig assured me that he would go and talk with the President, place the matter before him. And he came back and told me after a while, after maybe a lapse of 30 minutes or so, that it had been done, and that the President had agreed.

"The CHAIRMAN. You are absolutely free to prosecute anyone: is that correct?

"Mr. JAWORSKI. That is correct. And that is my intention.

"The CHAIRMAN. And that includes the President of tthe United States?

"Mr. JAWORSKI. It includes the President of the United States.

* * * * *

"Senator MCCLELLAN. May I ask you now, do you feel that with your understanding with the White House that you do have the right, irrespective of the legal issues that may be involved—that you have an understanding with them that gives you the right to go to court if you determine that they have documents you want or materials that you feel are essential and necessary in the performance of your duties, and in conducting a thorough investigation and following up with prosecution thereon, *you have the right to go to court to raise the issue against the President and against any of his staff with respect to such documents or materials and to contest the question of privilege.*

"Mr. JAWORSKI. *I have been assured that right.* And I intend to exercise it if necessary. (Emphasis added.)

Hearings Before the Senate Judiciary Committee on the Special Prosecutor, 93d Cong., 1st Sess., pt. 2, at 571, 573 (1973).

[22] *Id.*, at 450. See also *id.*, at 470.

[23] *Hearings Before the House Judiciary Subcommittee on Criminal Justice on H.J. Res. 784 and H.R. 10937*, 93d Cong., 1st Sess. 266 (1973).

[24] *Hearings Before the Senate Judiciary Committee on the Nomination of William B. Saxbe to be Attorney General*, 93d Cong., 1st Sess. 9 (1973).

[25] After the appointment of the new Special Prosecutor with these assurances of independent authority, *inter alia*, to contest in court any Presidential claims of executive privilege, both Houses of Congress tabled bills that would have provided for court appointment of a Special Prosecutor pursuant to Article II, Section 2. See note 13, *supra*.

[26] The authority of the Attorney General to issue the regulations is conferred by 28 U.S.C. §§ 509, 510 and 5 U.S.C. § 301. The legality of these regulations delegating the authority of the Attorney General has been sustained in *Nader* v. *Bork, supra; United States* v. *Andreas*—F. Supp.—(D. Minn. No. 4–73–Cr. 201) (March 12, 1974); *United States* v. *Ehrlichman*—F. Supp.—(D.D.C. Crim. No. 74–116) (May 21, 1974.

[27] The locus of the appointment power may also fix the authority to remove, *United States* v. *Perkins*, 116 U.S. 483, although the removal power itself is not absolute. *Humphrey's Executor* v. *United States*, 295 U.S. 602; *Wiener* v. *United States*, 357 U.S. 349: *Myers* v. *United States*, 272 U.S. 52.

The regulations also provide that the Special Prosecutor's office will not be abolished without the consent of the Special Prosecutor and that the Attorney General will not countermand any decisions of the Special Prosecutor (see Appendix pp. 149, 151, *infra*). Judge Gesell in *Nader* v. *Bork, supra*, 336 F. Supp. at 108, indicated that those guarantees are legally binding and not unilaterally revocable.

This Court has recognized, of course, that the President's power to remove subordinate officers of the government, even those in the Executive Branch, is not unlimited, and may be non-existent when the executive official exercises some "duties of a quasi-judicial character." *Myers* v. *United States, supra*, 272 U.S. at 135. See also *Humphrey's Executor* v. *United States, supra; Weiner* v. *United States, supra*.

[29] Judge Holtzoff had held that the suit there had to be dismissed because "the United States of America always acts in a sovereign capacity. It does not have separate governmental and proprietary capacities." *United States* v. *ICC*, 78 F. Supp. 580, 583, (D.D.C. 1948). This Court reversed.

[30] See note 13, *supra*.

[31] *Hearings Before the Senate Judiciary Committee on the Special Prosecutor*, 93d Cong., 1st Sess., pt. 2, at 571, 573 (1973).

[32] Brief in Opposition p. 3, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, 360 R. Supp. 1 (D.D.C. 1973).

[33] See also *Powell* v. *McCormack, supra*, 395 U.S. at 517–18; *Baker* v. *Carr, supra*, 369 U.S. at 208–37; *South Dakota* v. *North Carolina*, 192 U.S. 286, 318–21; *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 461–62.

[34] Transcript of Hearing on October 23, 1973. *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, supra*, D.D.C. Misc. No. 47–73.

[35] See, *e.g.*, 28 U.S.C. 2. 44(c), 45, 47, 48, 134(b), 144, 331, 332, 333, 455, 1731–1745, 1826(b), 1863, 2102, 2254(b), 2284(4), 2403: 18 U.S.C. 2519, 3006A, 3331(a), 6003(a), 6005 (a).

[36] See, *e.g.*, *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587, 603 (D.C. Cir. 1974) (holding the President was obliged to submit a federal employee pay increase as required by Congress).

[37] See, *e.g.*, *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (security classification).

[38] Because there is no legislative analogy to the historic judicial duty to determine all questions of law necessarily raised by a case or controversy, rejection of the claim of executive privilege in the present case does not necessarily suggest any answer to the distinct questions of the scope of the President's right to stand on a claim of executive privilege *vis-a-vis* the Congress or of the role, if any, of the courts in such a confrontation. History provides a great variety of opinions on the relative rights of the Executive and the Congress in such a situation. See generally Berger, *Executive Privilege* v. *Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043, 1078–98 (1965).

The Court of Appeals for the District of Columbia Circuit recently affirmed a decision of the district court refusing a declaratory judgment that a subpoena issued to the President by the Senate Select Committee on Presidential Campaign Activities was valid and enforceable. *Senate Select Committe on Presidential Campaign Activities* v. *Nixon*. ——— F. 2d ——— (No. 74–1258) (D.C. Cir. May 23, 1974). By deciding that the Committee's "need" for the subpoenaed recordings was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena," thereby reaching the merits of the claim of executive privilege, the court held implicitly that the Committee's action presented a justiciable controversy. Cf. *Powell* v. *McCormack, supra*.

At one time it was generally assumed that a claim of executive privilege *vis-a-vis* the Congress presented a nonjusticiable political question. See, *e.g.*, L. Hand, The Bill of Rights 17–18 (1958). But no one has ever suggested that an application for an order requiring the Executive Branch to produce evidence in the usual course of judicial or grand jury proceedings presents a nonjusticiable "political question."

[39] Accord, *Ethyl Corporation* v. *Environmental Protection Agency*, 478 F. 2d 47, 51 (4th Cir. 1973); *Carr* v. *Monroe Manufacturing Co.*, 431 F. 2d 384, 388 (5th Cir. 1970), cert. denied, 400 U.S. 1000; *Sperandeo* v. *Milk Drivers & Dairy Employees Local 537*, 334 F. 2d 381, 384 (10th Cir. 1964); *N.L.R.B.* v. *Capitol Fish Co.*, 294 F. 2d 868, 875 (5th Cir. 1961); *Halpern* v. *United States*, 258 F. 2d 36, 43 (2d Cir. 1958). See also *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1139–40 (S.D.N.Y. 1973); *United States* v. *Article of Drug, etc.*, 43 F.R.D. 181, 190 (D. Del. 1967); *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329, 334 (S.D.N.Y. 1965); *Timken Roller Bearing Co.* v. *United States*, 38 F.R.D. 57, 63 (N.D. Ohio 1964); *Morris* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 21 F.R.D. 155, 157–58 (W.D. Mo. 1957); *Snyder* v. *United States*, 30 F.R.D. 7, 9 (E.D.N.Y.).

[40] See generally R. Berger, *Executive Privilege: A Constitutional Myth* 353–55 (1974).

[41] In *Conway* v. *Rimmer*, [1968] 1 All E.R. 874, the House of Lords unanimously overruled the prior English rule that an assertion of executive (or "Crown") privilege is absolute: The House of Lords ruled that the courts may require *in camera* inspection to weigh the competing interests. See generally Cappelletti and Golden, *Crown Privilege and Executive Privilege: A British Response to an American Controversy*, 25 Stanford L. Rev. 836 (1973).

As the court of appeals noted in *Nixon* v. *Sirica, supra*, 487 F. 2d at 713–14, n. 60, judicial power to scrutinize claims of privilege has been recognized in nearly 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.

[42] This Court has not even afforded such status to the Speech or Debate Clause, which is an *express* constitutional privilege for congressmen and their aides similar to the privilege claimed by the President. This Court repeatedly has affirmed that the courts must determine the reach of the Clause. See, *e.g.*, *Gravel* v. *United States, supra; United States* v. *Brewster, supra; United States* v. *Johnson*, 319 U.S. 503.

[43] The courts never have decided whether executive privilege derives implicitly from the constitutional separation of powers, or whether it is merely a common law evidentiary privilege. See, *e.g.*, *United States* v. *Reynolds*, 345 U.S. at 6–7: *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra*, 463 F. 2d at 793–94. Professor Charles Alan Wright has observed at "[t]he commentators * * * have not found much substance in the constitutional argument, based, as it is, on separation of powers." 8 Wright and Miller, Federal Practice and Procedure, §2019, at 175 n. 44 (1970 ed.).

[44] The rationale is equally well summarized by Wigmore (§ 2379, at 809–10):

"A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the court."

See also *United States* v. *Cotton Valley Operators Comm.*, 9 F.R.D. 719, 720–21 (W.D. La. 1949), aff'd by an equally divided Court, 339 U.S. 940.

[45] Although the Court dealt within the framework of the Freedom of Information Act, 5 U.S.C. 552(b)(5), it recognized that Congress simply had incorporated the common law executive privilege. 410 U.S. at 85–89. The exemption was defined with specific reference to the court decisions that had developed the privilege at issue here.

[46] See, *e.g.*, *Westinghouse Electric Corp.* v. *City of Burlington*, 351 F. 2d 762 (D.C. Cir. 1965): *Machin* v. *Zuckert*, 316 F. 2d 336 (D.C. Cir. 1963), cert. denied, 175 U.S. 896; *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654 (D.C. Cir. 1960); *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098 (S.D.N.Y. 1973); *Pilar* v. *SS Hess Petrol*, 55 F.R.D. 159 (D. Md. 1972); *Hancock Bros., Inc.* v. *Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968); *Cooney* v. *Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968); *McFadden* v. *Avco Corp.*, 278 F. Supp. 57 (M.D. Ala. 1967); *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965); *Roses* v. *Board of Trade*, 35 F.R.D. 512 (N.D. Cal. 1964); *Morris*

v. *Atchison, Topeka & Sante Fe Ry. Co.*, 21 F.R.D. 155 (W.D. Mo. 1957); cf. *Garland* v. *Torre*, 259 F. 2d 545 (2d Cir. 1958) (Stewart, J.), cert. denied, 358 U.S. 910.

[47] See cases cited in note 46, *supra*.

[48] Brief in Opposition 4, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, supra*.

[49] Alexander Hamilton explained the posture of the President in our constitutional system in *The Federalist* Number 69 (B. F. Wright ed. 1961):

"The President of the United States would be an officer elected by the people for *four* years: the king of Great Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable." (Emphasis is original.)

[50] See, *e.g.*, *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309, 317–18; *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218–22; *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177–78; *Ballinger* v. *United States ex rel. Frost*, 216 U.S. 240, 249; *Garfield* v. *United States ex rel. Goldsby*, 211 U.S. 249, 262; *Roberts* v. *United States ex rel. Valentine*, 176 U.S. 221, 229–31; *United States ex rel. McBride* v. *Schurz*, 102 U.S. 378; *Kendall* v. *United States ex rel. Stokes, supra*, 12 Pet. at 609 *et seq.*; *Marbury* v. *Madison, Supra*, 1 *Cranch* at 1964–66.

[51] This Court in *Branzburg* quoted Jeremy Bentham's vivid illustration:

"Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody . . . Where the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimneysweeper and a barrow-woman were in dispute about a halfpenny-worth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

See 4 The Works of Jeremy Bentham 320–21 (Bowring ed. 1843).

See also *United States* v. *Dionisio*, 410, 1, 9; *Blackmer* v. *United States*, 284 U.S. 421, 438; *Blair* v. *United States*, 250 U.S. 273, 280–281; 8 Wigmore, Evidence § 2192 (McNaughton rev. 1961) [hereinafter cited as "Wigmore"].

[52] For a complete exposition of the decisions in the *Burr* cases based upon the original record of the Burr trials, see Berger, *The President, Congress, and the Courts*, 83 Yale L.J. 1111–22 (1974).

[53] It is true that custom dictates that legal process should not be addressed to the President of the United States whenever a Cabinet member or lesser official is available, even though the subordinate official is acting upon direct order of the President. *E.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer, supra*, 343 U.S. 579; *cf. United States Servicemen's Fund* v. *Eastland*, 488 F. 2d 1252. 1270 (D.C. Cir. 1973). It became necessary to seek this evidence from the President only because actions, to displace the ordinary custodians of the materials and to assume personal control of them. To allow this device to render the tapes immune from ordinary legal process would exalt form over substance and set a President above the law, contrary to our firm constitutional tradition. As the court of appeals stated in *Nixon* v. *Sirica, supra*. 487 F. 2d at 709. [t]he 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." See also *National Treasury Employees Union* v. *Nixon, supra*, 492 F. 2d at 613.

In addition to the courts below in the present case and in *Nixon* v. *Sirica*, other courts have recognized that compulsory process may issue against the President, when necessary. See *Minnesota Chippewa Tribe* v. *Carlucci*, 358 F. Supp. 973, 975 (D.D.C. 1973) (holding that the President can be sued to compel performance of specific legal duties) (order vacated on grounds of mootness); *Meyers* v. *Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972); *Atlee* v. *Nixon*, 336 F. Supp. 790 (E.D. Pa. 1972).

[54] See, *e.g.*, R. Scagliano, *The Supreme Court and the Presidency* 36–37 (1971) and C. Warren, *The Supreme Court in United States History* 759 (rev. ed. 1926) (President Andrew Jackson's failure to take steps to vindicate the Court's decision in the Cherokee Nation case, *Worcester* v. *Georgia*, 6 Pet. (31 U.S. 515): Scigliano, *supra*, at 37–38 (Jackson's vetoing of the national bank bill on constitutional grounds, despite an earlier decision by this Court tending to sustain its validity); Scigliano, *supra*, at 41–43 (President Lincoln's ignoring of several writs of habeas corpus addressed to military commanders during the Civil War). See generally Scigliano, *supra*, 58–59.

[55] See E. Corwin, *The President: Office and Powers* 11 (1948).

[56] 1 Farrand, Records of the Federal Convention of 1787, at 65–66 (1911) (hereinafter "Farrand"). See also 4 Elliot's Debates 108–09 (2d ed. 1836) (remarks of Iredell at the North Carolina Ratification Convention).

[57] 2 Elliot's Debates 480 (2d ed. 1836).

[58] Farrand at 384–385.

The Founding Fathers were conscious of the "aversion of the people to monarchy." *The Federalist* Number 67 (B. F. Wright ed. 1961). Corwin has explained "that 'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty." E. Corwin, *The President: Office and Powers* 4 (1948).

[59] We are not dealing in this case, of course, with the question whether, even in the absence of any explicit immunity, an incumbent President is entitled to implicit immunity from having to defend himself against criminal charges lodged against him in an indictment.

[60] Scattered district court opinions seem to have accepted that argument, at least where discretionary executive powers were at issue. See, *e.g.*, *National Ass'n of Internal Revenue Employees* v. *Nixon*, 349 F. Supp. 18, 21 (D.D.C. 1972), rev'd 492 F. 2d 587 (D.C. Cir. 1974); *Reese* v. *Nixon*, 347 F. Supp. 314, 316–17 (C.D. Cal. 1972).

[61] Fairman, *Reconstruction and Reunion 1864–88*. History of the Supreme Court of the United States 379–80, 436–37 (1971).

[62] See also *Colegrove* v. *Green*, 328 U.S., 549, 556; *Louisiana* v. *McAdoo*, 234 U.S. 627, 633–34; *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 296; *National Treasury Employees Union* v. *Nixon, supra*, 492 F. 2d at 613–15.

[63] See pp. 44–47, *supra*.

[64] The subpoena *duces tecum* is directed to "Richard M. Nixon *or* any subordinate officer" whom he may designate as having custody of the tape recordings and other documents.

[65] We use the term "generalized claim of executive privilege" to cover a claim of privilege based on an asserted interest in the confidentiality of communications within the Executive Branch, as distinguished from more specific privileges sometimes covered by the term "executive privilege."

Thus, the courts have recognized a specific privilege for "state secrets," covering government information bearing on international relations, military affairs and the national security. See, *e.g.*, *United States* v. *Reynolds, supra*, 345 U.S. at 6–7; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–21; 8 Wigmore § 2378. There is also a privilege for "investigative files," including information relating to confidential informants. See, *e.g.*, *Alderman* v. *United States*, 394 U.S. 165, 184–85; *Roviaro* v. *United States*, 353 U.S. 53; *Machin* v. *Zuckert, supra*, 316 F. 2d at 339; 8 Wigmore §§ 2374–77; cf. *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462.

The President has not claimed any such specific type of "executive privilege" for any of the conversations described in the subpoena.

[66] In a letter to Chief Judge Sirica on July 25, 1973, the return date of that subpoena, President Nixon stated:

"I have concluded, however, that it would be inconsistent with the public interest and with the Constitutional position of the Presidency to make available recordings of hearings and telephone conversations in which I was a participant and I must respectfully decline to do so.

Special Appearance of Richard M. Nixon, Exh. A, *In Re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, supra*.

[67] Brief in Opposition 2–3, *id*.

[68] Brief in Opposition 12–13, *id*.

[69] For example, Executive Order 11,652, "Classification and Declassification of National Security Information and Material," issued by President Nixon on March 8, 1972, provides for access to classified data by persons "who have previously occupied policy-making positions to which they were appointed by the President" (Sec. 12), although publication of the material is not authorized.

[70] See 8 Wigmore § 2192, at 73; Morgan, Foreword to ALI Model Code of Evidence 7 (1942).

[71] For a discussion of the intent of the Framers, see pp. 76–80, *supra*.

[72] Only the interest in confidentiality as an encouragement to candor is involved in the present case, for there is plainly no challenge to the rationale for any governmental decision or order.

[73] The Speech or Debate Clause, Art. I. Sec. 6, cl. 1, provides that no Senator or Representative may be "questioned in any other Place" for "any Speech or Debate in either House." It prohibits inquiry "into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *United States* v. *Brewster, supra*, 408 U.S. at 512.

[74] See also *Black* v. *Sheraton Corp.*, 371 F. Supp. 97 (D.D.C. 1974); *United States* v. *Procter & Gamble Co.*, 25 F.R.D. 485, 490–91 (D.N.J. 1960); *cf. Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss. Jena, supra*, 40 F.R.D. at 329 (footnotes omitted): "Here, unlike the situation in some cases, no charge of governmental misconduct or perversion of governmental power is advanced."

[75] Recently the Court of Appeals for the Seventh Circuit held that the attorney-client privilege must yield upon a *"prima facie"* showing that the communications were made in furtherance of a continuing or future fraud or crime. *United States* v. *Aldridge, supra*, 484 F. 2d at 658. Other circuits agree that a *prima facie* showing that some fraud or criminal misconduct may have tainted what would otherwise have been a privileged, confidential relationship is sufficient to require that the privilege yield. See, *e.g.*, *Pfizer, Inc.* v. *Lord*, 456 F. 2d 545 (8th Cir. 1972); *United States* v. *Friedman*, 445 F. 2d 1076 (9th Cir. 1971), cert. denied, 404 U.S. 958; *United States* v. *Bob*, 106 F. 2d 37 (2d Cir. 1939), cert. denied, 308 U.S. 589. See also *O'Rourke* v. *Darbishire*, [1920] A.C. 581 (H.L.). establishing the same standard.

[76] Accord, *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599; *United States* v. *King*, 482 F. 2d 768, 776 (D.C. Cir. 1973): *United States* v. *Kysar*, 459 F. 2d 422, 424 (10th Cir. 1972). The grand jury's finding cannot be challenged on the ground that it was based upon inadequate evidence. See, *e.g.*, *United States*

v. *Calandra*, ——— U.S. ———, ——— (42 U.S.L.W. 4104, 4106, Jan. 8, 1974); *Costello* v. *United States*, 350 U.S. 359, 363 (1956).

The above decisions, of course, concern findings of probable cause which appear on the face of the indictment. The June 5, 1972 grand jury could likewise have listed every known co-conspirator in the indictment, in which case that finding of complicity in the conspiracy would have been conclusive in these pre-trial proceedings. Out of deference to the President's public position, however, the grand jury instead decided to vote *in camera* upon a finding of probable cause against each alleged co-conspirator, but not to name any formally in the indictment. The grand jury further authorized the Special Prosecutor to disclose and rely upon its determination of probable cause if and when such action became necessary. There is no reason why the same conclusive effect should not be given to the grand jury's determination in this case as would have been accorded if the grand jury had been less solicitous of the President's position.

[77] There is no reason to believe that the grand jury's finding is unconstitutional or in any sense an abuse of the grand jury's power. In the district court, the President premised the motion to expunge on the contention that the President is not subject to indictment prior to removal from office. The Constitution, however, contains no explicit Presidential immunity from the ordinary process of the criminal law prior to impeachment and removal, and there are substantial arguments that an implicit immunity is likewise not warranted by the Constitution. See Berger, "The President, Congress, and the Courts," 83 Yale L.J. 1111, 1123–36 (1974); Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829). See also, *United States* v. *Isaacs and Kerner*, *supra*, holding that an impeachable officer is liable to criminal prosecution prior to impeachment and removal.

Here, however, the grand jury did not indict the President, but only named him as an unindicted co-conspirator. Therefore, the broader question of whether an indictment of a sitting President is constitutionally permissible need not be reached. None of the practical difficulties incident to indicting an incumbent President and requiring him to defend himself while still conducting the affairs of state exists when the grand jury merely names the President as an unindicted co-conspirator. This action does not constitute substantial interference with the President's ability to perform his official functions. For example, an unindicted co-conspirator need not spend time and effort in preparing his defense, time which a President may need to devote to carrying out his constitutional duties. Nor is there any inherent unfairness in such a course since an incumbent President has at his command all of the Nation's communications facilities to convey his position on the events in question. Thus, whatever may be the case with respect to indictment, there are no substantial arguments for creating an immunity for the President even from being identified as a co-conspirator when a grand jury finds it necessary and appropriate to do so in connection with an independent criminal prosecution of others.

Furthermore, even assuming *arguendo* that the grand jury's action was without legal effect, the district judge had ample discretion to refuse to expunge its finding. See *In re Grand Jury Proceedings*, 479 F. 2d 458, 460 n. 2 (5th Cir. 1973) and *Application of Johnson*, 484 F. 2d 791 (7th Cir. 1973), discussing the criteria to be applied in passing upon motions to expunge grand jury reports. The grand jury's action concerns a subject of legitimate public concern. The President has neither alleged nor established any prejudice from the grand jury's action. The strong public interest in placing before the petit jury what the grand jury believed was the full scope of the alleged conspiracy to obstruct justice which forms the basis for the indictment in *United States* v. *Mitchell, et al.* made it reasonable for the grand jury to designate all participants in the conspiracy as co-conspirators. In deference to the Office of the Presidency, and sensitive to the practical difficulties in indicting an incumbent President, the grand jury named him as an unindicted co-conspirator, and there is no constitutional impediment to such action, and no compelling reason to expunge that determination.

[78] Executive privilege still may attach, of course, to any subpoenaed material irrelevant to the issues to be tried in *United States* v. *Mitchell, et al.* The district court, in accordance with the procedures established in *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 716–21, and followed thereafter, has ordered the President or any subordinate officer to submit the originals of the subpoenaed items to that court. Briefly, under those procedures, the President or his designee must submit an "analysis" itemizing and indexing those segments of the materials for which he asserts a particularized claim of privilege (*e.g.*, items subject to a claim of "national security") and those segments which he asserts are irrelevant to Watergate. The President may decline initially to submit for *in camera* inspection those items which he contends relate to "national defense or foreign relations." If there are any such claims, the district judge must hold a hearing to determine whether to sustain the claim of particularized privilege. As to all items for which there is no claim of particularized privilege or as to which the district judge rejects such a claim, the judge must inspect them *in camera* to determine which segments relate to Watergate and thus are not privileged. The judge may consult with the parties in determining relevancy.

These procedures are fully consistent with the principles set forth by this Court in *Environmental Protection Agency* v. *Mink*, *supra*, 410 U.S. at 92–94, and *United States* v. *Reynolds*, *supra*, 345 U.S. at 7–10.

[79] This was a different letter than the one for which the Chief Justice had issued a subpoena to the President in connection with the grand jury inquiry. *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

[80] The Chief Justice continued: "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."

[81] Justices Black, Frankfurter and Jackson dissented from the decision of the Court, relying on the opinion of Judge Maris below. 192 F. 2d 987 (3d Cir. 1951). Judge Maris, as did this Court, rejected the government's contention that the determination of the executive officer claiming the privilege must be accepted. Although Judge Maris recognized a privilege for "state secrets," he rejected the availability of a "housekeeping" privilege in an instance where the government had consented to be sued. Judge Maris predicted (192 F. 2d at 995): "[W]e regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. * * * It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. * * *"

[82] The President's Address to the Nation, April 29, 1974. 10 Weekly Compilation of Presidential Documents 452 (May 6, 1974).

[83] The recordings themselves are necessary for trial, and the President's release of portions of some transcripts cannot be considered adequate compliance with the subpoena. As this Court is well aware, the recordings themselves, and not the transcripts, constitute the most reliable evidence of what actually transpired. In *Lopez* v. *United States*, 373 U.S. 427, 439–40, the Court acknowledged that recordings of admissible conversations are "highly useful evidence" and the "most reliable evidence possible of a conversation." Cf. *United States* v. *White*, 401 U.S. 745, 753. In addition to providing the most accurate reflection of what was actually spoken, the recordings also are important because they reveal tone and inflection often necessary to evaluate the meaning of spoken words.

Furthermore, a comparison of the transcripts prepared by the White House and the transcripts prepared by the Watergate Special Prosecution Force of recordings previously produced by the President reveals material differences. In some cases, the transcripts differ as to the words spoken. In other cases, a comparison indicates that the White House has failed to transcribe portions without indicating that material has been deleted or is unintelligible. A number of these discrepancies were called to the attention of the district court. See Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum 40–43. The White House transcripts also indicate that "material unrelated to Presidential actions" has been deleted. The reasonable inference to be drawn is that material has been deleted that relates to other persons' actions concerning Watergate. Clearly, such material is important to the prosecution of defendants in *United States* v. *Mitchell et al.*

Finally, there is some question whether the transcripts, without the underlying recordings, would be admissible under the "best evidence" rule. Generally stated, that rule provides that where a party seeks to prove the terms of a "writing," the original writing must be produced unless it is shown to be unavailable. See McCormick, *Evidence* § 230, at 560 (1972). "The danger of mistransmitting critical facts which accompanies the use of written copies or recollection, but which is largely avoided when an original writing is presented to prove its terms, justifies preference for the original documents." *Id.*, § 231, at 561. Although recordings do not fall within the strict confines of the rule, "sound recordings, where their content is sought to be proved, so clearly involve the identical considerations applicable to writings as to warrant inclusion within the rule." *Id.*, § 232, at 563.

[84] In *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, *supra*, the court of appeals ruled that the Committee's "need" for the five recordings it had subpoenaed "is too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the committee's subpoena" (slip op. at 17). The question the court asked was whether the recordings were "demonstrably critical to the responsible fulfillment of the Committee's functions" (slip op. at 13). Highly specific factfinding, of course, is rarely, if ever, "demonstrably critical" to the legislative function, whereas it is the very essence of the determination a trial jury is called upon to make beyond a reasonable doubt.

[85] This rule was approved by the Court of Appeals for the District of Columbia Circuit in *Ellis* v. *United States*, 416 F. 2d 791, 801 n. 26 (1969). See also *United States* v. *Cote*, 456 F. 2d 142, 145 (8th Cir. 1972).

[86] 9 Weekly Compilation of Presidential Documents 697 (May 28, 1973).

[87] *Submission of the Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon, April 30, 1974.* This document was before the district court. See Transcript of Hearing on May 13, 1974.

[88] 10 Weekly Compilation of Presidential Documents 451–52 (May 6, 1974).

[89] Affidavit of J. Fred Thompson dated August 9, 1973, *Hearings before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong. 1st Sess., Book 4, at 1794–1800 (1973).

[90] *Id.*, Book 7, at 2888–89; Book 8, at 3101–02.

[91] See, *e.g.*, Letter from President Richard M. Nixon to Senator Sam J. Ervin, Chairman of the Senate Select Committee on Presidential Campaign Activities, July 23, 1973, *id.*, Book 6, at 2479:

"Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth."

[92] In the Formal Claim of Privilege which was submitted along with the Motion to Quash, the President expressly stated that he was not asserting any privilege with respect to the twenty conversations for which partial transcripts already have been released publicly by the White House. Since no privilege was asserted as to these conversations, no further inquiry was necessary by the district court into whether there would otherwise have been any privilege, or whether the government had a strong need for the evidence, or whether the government's need outweighed any available privilege. Thus, the Special Prosecutor's showing of relevancy and evidentiary value as to these conversations, which was held adequate to satisfy Rule 17(c), warranted enforcement of the subpoena (at least as to the portions of the tapes for which transcripts have been released) without more.

[93] Some of the material contained in the Appendix, and additional material relating to conversations of June 4, 1973, being sought by Item 46 of the subpoena, were also discussed at oral argument before the district court on May 13, 1974.

[94] In his Reply Memorandum below, counsel for the President argued that the Special Prosecutor's reliance on *Carter* and related cases was misleading because in some of those cases *pretrial* production of material admissible for impeachment of witness was in fact denied. In the instant case, of course, the necessity of pre-trial production is predicated on the government's showing—apparently not contested by counsel for the President—that delaying production of the recordings until trial would not allow adequate time for testing, enhancement, transcription, and preparation of the evidence that would be required for actual use at trial.

[95] In some instances tape recordings already obtained by the Special Prosecutor contain strong evidence of the relevancy of additional conversations sought under this subpoena. For example, it was pointed out in oral argument in the district court that the June 4, 1973, recording of the President listening to prior recordings indicates why the March 13, 1973, telephone conversations sought by Item 46 of the subpoena are important. See Transcript of Hearing on May 13, 1974, at 57.

[96] As pointed out below, the transcripts in some instances provide circumstantial evidence concerning what happened at meetings for which no transcripts were released. In addition, the Court certainly may take notice of the fact that each and every subpoenaed conversation for which a transcript was subsequently released did in fact substantially concern Watergate.

[97] Transcript of Hearing, May 13, 1973, at 61–62.

[98] *Stubbs* v. *United States*, 428 F. 2d 885, 888 (9th Cir. 1970), cert. denied, 400 U.S. 1009; *United States* v. *McKeever*, 160 F. Supp. 426 (S.D.N.Y. 1958).

[99] *United States* v. *Madda*, 345 F. 2d 400, 403 (7th Cir. 1965).

[100] See *Stubbs* v. *United States*, *supra*; cf. *United States* v. *Sutton*, 426 F. 2d 1202, 1207 (D.C. Cir. 1969) (authentication of writings); Proposed Federal Rules of Evidence, Rule 901(b)(9).

[101] The court upheld the district court's exercise of discretion not to compel production prior to trial because the government had already played the recordings for defendant and his counsel over a period of several days.

[102] See *Monroe* v. *United States*, *supra*. Prior consistent statements have traditionally been admissible only to rebut charges of recent fabrication or improper influence or motive, but the Proposed Federal Rules of Evidence, Rule 801(d)(1)(B), would permit use of such statements as substantive evidence as well.

[Appendix]

APPLICABLE PROVISIONS OF CONSTITUTION, STATUTES, RULES, AND REGULATIONS

1. The Constitution of the United States provides in pertinent part—

Article II, Section 1:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

* * * * *

Article II, Section 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States: he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

Article II, Section 3:

* * * he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens of Subjects.

* * * * *

2. Title 5, United States Code, provides in pertinent part—

§ 301. DEPARTMENTAL REGULATIONS.

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Title 28. United States Code, provides in pertinent part—

§ 509. FUNCTIONS OF THE ATTORNEY GENERAL.

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

2) of the Federal Prison Industries, Inc.;

3) of the Board of Director and officers of the Federal Prison Industries, Inc.; and

4) of the Board of Parole.

§ 510. DELEGATION OF AUTHORITY.

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function or the Attorney General.

§ 515. AUTHORITY FOR LEGAL PROCEEDINGS; COMMISSION, OATH, AND SALARY FOR SPECIAL ATTORNEYS.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

* * * * * *

§ 516. CONDUCT OF LITIGATION RESERVED TO DEPARTMENT OF JUSTICE.

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

§ 517. INTERESTS OF UNITED STATES IN PENDING SUITS.

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

§ 518. CONDUCT AND ARGUMENT OF CASES.

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

§ 519. SUPERVISION OF LITIGATION

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys ap-

pointed under section 543 of this title in the discharge of their respective duties.

3. Rule 17. Federal Rules of Criminal Procedure, provides in pertinent part—

SUBPOENA

* * * * *

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

4. Department of Justice Order No. 551–73 (Nov. 2, 1973) 38 Fed. Reg. 30,738 adding 28 C.F.R. §§ 0.37, and 0.38, and Appendix to Subpart G–1, provides

TITLE 28—JUDICIAL ADMINISTRATION
CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Order No. 551–73

Establishing the Office of Watergate Special Prosecution Force

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part O of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1(a) which lists the organization units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of Criminal Justice."

2. A new Subpart G–1 is added immediately after subpart G, to read as follows:

Subpart G–1—Office of Watergate Special Prosecution Force

§ 0.37 GENERAL FUNCTIONS.

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecutor appointed by the Attorney General. The duties and responsibilities of the Special Prosecutor are set forth in the attached appendix which is incorporated and made a part hereof.

§ 0.38 SPECIFIC FUNCTIONS.

The Special Prosecutor is assigned and delegated the following specific functions with respect to matters specified in this Subpart:

(a) Pursuant to 28 U.S.C. 515(a), to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct, and to designate attorneys to conduct such legal proceedings.

(b) To approve or disapprove the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order, or other demand of a court or other authority. (See Part 16(B) of this chapter.)

(c) To apply for and to exercise the authority vested in the Attorney General under 18 U.S.C. 6005 relating to immunity of witnesses in Congressional proceedings.

The listing of these specific functions is for the purpose of illustrating the authority entrusted to the Special Prosecutor and is not intended to limit in any manner his authority to carry out his functions and responsibilities."

ROBERT H. BORK,
Acting Attorney General.

Date: November 2, 1973.

[Appendix]

DUTIES AND RESPONSIBILITIES OF THE SPECIAL PROSECUTOR

The Special Prosecutor

There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

Conducting proceedings before grand juries and any other investigations he deems necessary;

Reviewing all documentary evidence available from any source, as to which he shall have full access;

Determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;

Determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders;

Deciding whether or not to prosecute any individual, firm, corporation or group of individuals;

Initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals;

Coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;

Dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairman and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.

Staff and Resource Support

1. *Selection of Staff.*—The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budget.*—The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and Responsibility.*—The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division.—Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies.—Except as otherwise herein specified or as mutually agreed between the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be subject to the administrative regulations and policies of the Department of Justice.

Public Reports.—The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment.—The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

5. Department of Justice Order No. 554–73 (Nov. 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G–1, provides—

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Subpart G–1—Office of Watergate Special Prosecution Force

Order No. 554–73

AMENDING THE REGULATIONS ESTABLISHING THE OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, the last sentence of the fourth paragraph of the Appendix to Subpart G–1 is amended to read as follows: "In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, (1) the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action, and (2) the jurisdiction of the Special Prosecutor will not be limited without the Presi-

dent's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action."

ROBERT H. BORK,
Acting Attorney General.

Date: November 19, 1973.

6. The letter from the Acting Attorney General to the Special Prosecutor on November 21, 1973, stating the intention of Department of Justice Order No. 554–73, is as follows—

OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C. 20530,
November 21, 1973.

LEON JAWORSKI, Esq.,
Special Prosecutor,
Watergate Special Prosecution Force,
1425 K Street, N.W.,
Washington, D.C. 20005

DEAR MR. JAWORSKI: You have informed me that the amendment to your charter of November 19, 1973 has been questioned by some members of the press. This letter is to confirm what I told you in our telephone conversation. The amendment of November 19, 1973 was intended to be, and is, a safeguard of your independence.

The President has given his assurance that he would not exercise his constitutional powers either to discharge the Special Prosecutor or to limit the independence of the Special Prosecutor without first consulting the Majority and Minority leaders and chairmen and ranking members of the Judiciary Committees of the Senate and the House, and ascertaining that their consensus is in accord with his proposed action.

When that assurance was worked into the charter, the draftsman inadvertently used a form of words that might have been construed as applying the President's assurance only to the subject of discharge. This was subsequently pointed out to me by an assistant and I had the amendment of November 19 drafted in order to put beyond question that the assurance given applied to your independence under the charter and not merely to the subject of discharge.

There is, in my judgment, no possibility whatever that the topics of discharge or limitation of independence will ever be of more than hypothetical interest. I write this letter only to repeat what you already know: the recent amendment to your charter was to correct an ambiguous phrasing and thus to make clear that the assurances concerning congressional consultation and consensus apply to all aspects of your independence.

Sincerely,

ROBERT H. BORK,
Acting Attorney General.

CURB SPENDING—CUT INFLATION

(Mr. MILLER asked and was given permisison to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. MILLER. Mr. Speaker, as this Nation prepares to celebrate its 198th birthday, we face some of the most severe economic problems of our entire history. The unfortunate aspect of this economic slide is that the Congress is responsible for a great deal of it. Inflation is proceeding at a double-figure annual rate. Interest rates are pushing the 12-percent mark. The average American has to wonder when, if ever, this is all going to stop. While this is occurring, the Congress is in the process of approving one of the most inflationary budgets of this century. Estimates now are that the deficit for fiscal year 1975 will run over the $10 billion level on a total budget of $300 billion. It is a total that I am sure our Founding Fathers would not be able to comprehend. Consider the fact that the budgets for the U.S. Government for 60 years from 1789 to 1849 ran to a total of slightly over $1 billion. Our deficit today is 10 times that amount.

Even many of our economic experts frankly admit that they do not have the answers to our economic ills. However, it is a certainty that one step can be taken by the Congress to help cure our inflation—cut wildfire spending. In the past week alone we have seen numerous measures go sailing through the House that will hamper our economic recovery; a Labor-HEW appropriations bill totaling $32.8 billion and a grant of $1.5 billion to the International Development Association—IDA. The Labor-HEW bill did not include over $4 billion in programs that will come along later in a "supplemental."

The IDA bill will cost the American taxpayer far more than the $1.5 billion since the absence of interest rates means that the U.S. Treasury will go even deeper in debt because of borrowing. This national debt already totals an astounding $500 billion. By the time the 50-year IDA terms are up they will have added further to the national debt.

Mr. Speaker, it is time that this body began to realize that a curbing of inflation can only begin when the Congress starts to act in a fiscally responsible manner. It is time to stop adding amendments to bills that provide for "only a few more million." No citizen can afford to run his household budget in such a manner. It is time the Congress realizes that the national budget can no longer be run that way either.

Mr. Speaker, I shall continue to do my best to insure that wasteful, inflation-feeding programs are not enacted by this body, only to be shouldered by future generations. I would urge each of my colleagues to pause over this Independence Day recess to reflect on our national priorities and on what must be done by this Congress to restore our economy to a vigorous state without inflation.

SPECIAL ORDERS GRANTED

By unanimous consent, permission to address the House, following the legislative program and any special orders heretofore entered, was granted to:

Mr. HECHLER of West Virginia, for 60 minutes, today; and to revise and extend his remarks and include extraneous matter.

(The following Members (at the request of Mr. ROUSSELOT) to revise and extend their remarks and include extraneous material:)

Mr. FRENZEL, for 10 minutes, today.

Mr. KEMP, for 15 minutes, today.

(The following Members (at the request of Mr. GONZALEZ) to revise and extend their remarks and include extraneous material:)

Mr. GONZALEZ, for 10 minutes, today.

Mr. DAN DANIEL, for 5 minutes, today.

Mr. ADAMS, for 5 minutes, today.

EXTENSION OF REMARKS

By unanimous consent, permission to revise and extend remarks was granted to:

Mr. MAHON and to include extraneous matter in two instances.

Mr. STRATTON and to include extraneous matter in two instances.

Mr. BRADEMAS and to include extraneous matter, notwithstanding the fact that it exceeds two pages of the RECORD and is estimated by the Public Printer to cost $13,274.50.

(The following Members (at the request of Mr. ROUSSELOT) and to include extraneous material:)

Mr. BROYHILL of North Carolina.

Mr. FISH.

Mr. RONCALLO of New York.

Mr. HAMMERSCHMIDT in two instances.

Mr. MCCLORY.

Mr. SMITH of New York.

Mr. ROUSSELOT.

Mr. MCKINNEY.

Mr. KETCHUM.

Mr. HUNT.

(The following Members (at the request of Mr. GONZALEZ and to include extraneous material:)

Mr. DINGELL in two instances.

Mr. ANDERSON of California in two instances.

Mr. SISK.

Mr. GONZALEZ in three instances.

Mr. RARICK in three instances.

Mr. DAN DANIEL.

Mr. MURPHY of New York.

Mrs. SCHROEDER in 10 instances.

Mr. BLATNIK.

Mr. COTTER.

Mr. JOHNSON of California.

Mr. HAMILTON.

Mrs. MINK.

Mr. YOUNG of Georgia.

Mr. VANDER VEEN.

ADJOURNMENT

Mr. LEHMAN. Mr. Speaker, I move that the House do now adjourn.

The SPEAKER. In accordance with Senate Concurrent Resolution 96, 93d Congress, the Chair declares the House adjourned until 12 o'clock noon on July 9, 1974.

Thereupon (at 12 o'clock and 34 minutes p.m.), pursuant to Senate Concurrent Resolution 96, the House adjourned until Tuesday, July 9, 1974, at 12 o'clock noon.

EXECUTIVE COMMUNICATIONS, ETC.

Under clause 2 of rule XXIV, executive communications were taken from the Speaker's table and referred as follows:

2519. A letter from the Assistant Secretary of the Air Force, transmitting a draft of proposed legislation to amend title 10, United States Code, to authorize, with respect to certain members of the Army Reserve or Air Force Reserve, their employment as Army or Air Reserve technicians, and for other purposes; to the Committee on Armed Services.

2520. A letter from the Chairman, Board of Trustees, Public Defender Service for the District of Columbia, transmitting the annual report of the Board for fiscal year 1973, pursuant to 2 District of Columbia Code 2221–2228; to the Committee on the District of Columbia.

2521. A letter from the Secretary of the Treasury, transmitting the first annual audit report of the Student Loan Marketing Association for the fiscal year ended December 31,

1973, pursuant to section 439(k), title IV of the Higher Education Act of 1965, as amended (20 U.S.C. 1087–2(k)); to the Committee on Education and Labor.

2522. A letter from the Chairman, Federal Power Commission, transmitting a copy of the publication entitled, "Natural Gas Act, March 1, 1974"; to the Committee on Interstate and Foreign Commerce.

2523. A letter from the Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting a copy of the order suspending deportation in the case of Benito Palafox-Gutierrez, pursuant to section 244(a)(2) of the Immigration and Nationality Act, as amended (8 U.S.C. 1254(c)(1)); to the Committee on the Judiciary.

2524. A letter from the Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting copies of orders suspending deportation, together with a list of the persons involved, pursuant to section 244(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1254(c)(1)); to the Committee on the Judiciary.

RECEIVED FROM THE COMPTROLLER GENERAL

2525. A letter from the Comptroller General of the United States, transmitting a report on the implementation and impact of reductions in civilian employment during fiscal year 1972; to the Committee on Government Operations.

REPORTS OF COMMITTEES ON PUBLIC BILLS AND RESOLUTIONS

Under clause 2 of rule XIII, reports of committees were delivered to the Clerk for printing and reference to the proper calendar, as follows:

Mr. PERKINS: Committee of conference. Conference report on S. 3203 (Rept. No. 93–1175). Ordered to be printed.

Mr. HOLIFIELD: Committee on Government Operations. H.R. 15233. A bill to establish an Office of Federal Procurement Policy within the Office of Management and Budget; with amendment (Rept. No. 93–1176). Referred to the Committee of the Whole House on the State of the Union.

Mr. PATMAN: Committee on Banking and Currency. H.R. 9989. A bill to further the national housing goal of encouraging homeownership by regulating certain lending practices and closing and settlement procedures in federally related mortgage transactions to the end that unnecessary costs and difficulties of purchasing housing are minimized, and for other purposes; with amendment (Rept. No. 93–1177). Referred to the Committee of the Whole House on the State of the Union.

Mr. PATMAN: Committee on Banking and Currency. H.R. 15578. A bill to amend the Small Business Act, the Small Business Investment Act, and for other purposes; with amendment (Rept. No. 93–1178). Referred to the Committee of the Whole House on the State of the Union.

Mr. STAGGERS: Committee on Interstate and Foreign Commerce. S. 1728. An act to increase benefits provided to American civilian internees in Southeast Asia; with amendment (Rept. No. 93–1179). Referred to the Committee of the Whole House on the State of the Union.

PUBLIC BILLS AND RESOLUTIONS

Under clause 4 of rule XXII, public bills and resolutions were introduced and severally referred as follows:

By Mr. BROYHILL of North Carolina:

H.R. 15789. A bill to regulate commerce by establishing a nationwide system to restore motor vehicle accident victims and by requiring no-fault motor vehicle insurance as a condition precedent to using a motor vehicle on public roadways; to the Committee on Interstate and Foreign Commerce.

By Mr. CARNEY of Ohio (for himself, Mr. TEAGUE, Mr. DORN, and Mr. SATTERFIELD):

H.R. 15790. A bill to amend section 802 of title 38, United States Code, so as to increase Veterans' Administration assistance to seriously disabled veterans in acquiring specially adapted housing; to the Committee on Veterans' Affairs.

By Mr. DIGGS (for himself, Mr. FRASER, Mr. FAUNTROY, and Mr. BROYHILL of Virginia):

H.R. 15791. A bill to amend section 204(g) of the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes; to the Committee on the District of Columbia.

By Mr. ERLENBORN (for himself and Mr. STEIGER of Wisconsin):

H.R. 15792. A bill to amend the National Labor Relations Act to extend its coverage and protection to employees of nonprofit hospitals, and for other purposes; to the Committee on Education and Labor.

By Mr. FRENZEL:

H.R. 15793. A bill to amend the Federal Election Campaign Act of 1971 to impose overall limitations on campaign expenditures and political contributions; to provide that expenditures made by a candidate may be made only by the central campaign committee designated by him; to provide for a single reporting responsibility with respect to receipts and expenditures; to change the times for the filing of reports regarding campaign expenditures and political contributions; and for other purposes; to the Committee on House Administration.

H.R. 15794. A bill to amend chapter 17 of title 38 of the United States Code to require the etsablishment of comprehensive treatment and rehabilitative services and programs for all veterans suffering from alcoholism, drug dependence, or alcohol or drug abuse disabilities; to the Committee on Veterans' Affairs.

By Mr. OWENS:

H.R. 15795. A bill to amend title 5, United States Code, to regulate certain activities of Federal employees, and for other purposes; to the Committee on House Administration.

By Mr. RIEGLE (for himself, Mr. CORMAN, Mr. DANIELSON, Mr. DRINAN, Mr. HAMILTON, Mr. HECHLER of West Virginia, Ms. HOLTZMAN, Mr. MALLARY, Mr. PREYER, Mr. ROSE, Mr. TRAXLER, and Mr. VANDER VEEN):

H.R. 15796. A bill to amend the Employment Act of 1946 with respect to price stability; to the Committee on Government Operations.

By Mr. ROE (for himself, Mr. BAFALIS, Mr. HAMMERSCHMIDT, Mr. MCSPADDEN, Mr. MOLLOHAN, and Mr. STUCKEY):

H.R. 15797. A bill to amend the Public Health Service Act to provide assistance for programs for the diagnosis, prevention, and treatment of, and research in, Huntington's disease; to the Committee on Interstate and Foreign Commerce.

By Mr. SYMMS:

H.R. 15798. A bill to authorize and direct the Secretary of the Interior to study the feasibility and suitability of establishing a Hells Canyon National Recreation Area in the States of Idaho and Oregon; to the Committee on Interior and Insular Affairs.

By Mr. WYLIE:

H.R. 15799. A bill to provide for protection of franchised dealers in petroleum products; to the Committee on Interstate and Foreign Commerce.

By Mr. ROGERS:

H. Con. Res. 558 Concurrent resolution expressing the sense of Congress that the President exercise his authority to suspend assistance to the Government of Turkey; to the Committee on Foreign Affairs.

By Mr. FUQUA:

H. Res. 1221. Resolution expressing the sense of the House regarding the reclassification of servicemen listed as missing in action in Southeast Asia to presumptive finding of death status; to the Committee on Armed Services.

PRIVATE BILLS AND RESOLUTIONS

Under clause 1 of rule XXII,

Mr. GUDE introduced a bill (H.R. 15800) for the relief of Victor Henrique Carlos Gibson, which was referred to the Committee on the Judiciary.

EXTENSIONS OF REMARKS

"AMERICA"

HON. BARRY M. GOLDWATER, JR.

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, July 2, 1974

Mr. GOLDWATER. Mr. Speaker, as we pause to celebrate the 198th anniversary of America's independence, it seems appropriate to point out what is right about our great country. When confronted with so many crises, it is often difficult to sit back and reflect on the positive aspects of America.

Just recently a poem entitled, "America," was brought to my attention by a good friend. The poem is by a young man from Los Angeles who has a deep and abiding sense of the greatness of America and what must be done to preserve our democratic way of life. I was so impressed with the maturity of his poem and the message it conveys that I want to share it with the Congress and the Nation. Therefore, I include this very moving and prophetic poem by Mr. James Bruce Joseph Sievers:

"AMERICA"

If you think you feel badly
You can be happy you are able to think
When you are walking about sadly
How fortunate you are able to walk
Or when you dent your car
Think how many have no car to dent
Or your golf's not up to par
What a luxury it is to golf

In a country such as ours
With its trees and its flowers
And its days and its nights
Full of freedoms and rights
Can't we see what it means to be free?

There's no country on earth
Like the land of our birth
We're Americans and we're proud to be.
But if you had a dollar
How you'd scream and you'd holler
If someone tried to take it away.
Listen to me stranger
Your freedom's in danger
Look around at our country today.
The left is too left
And the right's too right
And the middle can't make up its mind
It's not others we should fear
Look into your mirror
A traitor in there you might find