Truman also stated that he would be happy to appear and respond to questions relating to his acts as a private citizen either before or after leaving office and unrelated to his activities as President. The committee took no further action.

Similarly, Supreme Court Associate Justice Tom C. Clark, Attorney General in 1946, refused to appear on Nov. 13, 1953, as ordered by subpena. In a letter to the Chairman of the Committee on Un-American Activities, Mr. Justice Clark cited the importance of judicial branch independence and freedom from the strife of public controversy as reasons for his refusal to appear. He offered to consider responding to any written questions, subject only to his constitutional duties.

The Governor of South Carolina, James F. Byrnes, Secretary of State in 1946, refused to appear before the committee on Nov. 13, 1953, in response to a subpena. In a telegram to the chairman, Governor Byrnes stated that he could not by appearing admit the committee's right to command a Governor to leave his state and remain in Washington until granted leave to return. Such authority, he said, would enable the legislative branch to paralyze the administration of affairs of the sovereign states. He offered to respond to written questions and invited the committee or a subcommittee to meet with him at the State House in Columbia, S.C. The committee sent a subcommittee to South Carolina.

§ 4. Litigation to Enforce a Subpena; Senate Select Committee v Nixon

A review of recent litigation to enforce congressional subpenas may help reveal the issues involved in reconciling the congressional authority to seek information with the Chief Executive's claim of right to deny access to information in some circumstances.

The stage for a historic confrontation was set when the Senate Select Committee on Presidential Campaign Activities, created on Feb. 7, 1973, by unanimous approval of Senate Resolution 60,[19] with authority to investigate and study illegal, improper, or unethical activities in connection with the 1972 Presidential campaign and to issue subpenas,[20] discovered that

19. See § 1.46, supra, and 119 CONG. REC. 3830–51, 93d Cong. 1st Sess. for a discussion of this resolution.

20. Authority to issue subpenas, originally granted by S. Res. 60, was buttressed and clarified by S. Res. 194,

President Nixon had tape recorded conversations at the White House. After failing to obtain certain information by informal means, the select committee issued two subpenas duces tecum, one for tape recordings of five meetings between the President and White House Counsel John W. Dean III, and another for documents and materials relating to alleged criminal acts by a list of 25 persons. When the President failed to disclose the recordings and other materials, the select committee filed a civil action[1] for declaratory judgment, mandatory injunction, mandamus, and summary judgment in the District Court of the District of Columbia to enforce its subpenas and compel the President to transmit these materials to the select committee.[2]

In an order dated Oct. 17, 1973, the trial court dismissed the select committee's prayer for enforcement of its subpena after deciding only one of the several issues raised, that existing statutes did not grant jurisdiction to decide

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which expressed the sense of the Senate that issuance of a subpena to the President was authorized by S. Res. 60, and ratified that issuance. Furthermore, S. Res. 194 expressed the sense of the Senate that the select committee's initiation and pursuit of the lawsuit to compel disclosure of the subpenaed materials did not require prior approval of the Senate, and that in seeking this information which was of vital importance the select committee furthered a valid legislative purpose. See 119 CONG. REC. 36094, 36095, 93d Cong. 1st Sess., Nov. 7, 1973.

1. This case, captioned as Senate Select Committee on Presidential Campaign Activities, suing in its own name and in the name of the United States, et al. v Richard M. Nixon, individually and as President of the United States, was the subject of three judicial pronouncements discussed here, two in the District Court of the District of Columbia, an opinion entered by Chief Judge John J. Sirica and reported at 366 F Supp 51 (Oct. 17, 1973), and an order and memorandum entered by Judge Gerhard A. Gesell and reported at 370 F Supp 521 (Feb. 8, 1974); and one in the Court of Appeals for the District of Columbia Circuit, an opinion written by Chief Judge David L. Bazelon for the court sitting en banc and reported at 498 F2d 725 (May 23 1974).

2. In seeking these civil remedies, the select committee rejected as "unseemly and inappropriate" two traditional procedures to enforce subpenas, a contempt proceeding under 2 USC §192 and common law powers permitting the Sergeant at Arms forcibly to secure attendance of a subpenaed person. See *Senate Select Committee on Presidential Campaign Activities, et al.* v *Nixon,* 366 F Supp 51, 54 (D.D.C., Oct. 17, 1973), John J. Sirica, Chief Judge.

such a controversy.[3] To remedy this inhibition, Congress, at the instance of the select committee, expressly conferred special jurisdiction on the District Court of the District of Columbia to consider civil actions brought by the select committee to enforce its subpenas.[4]

After rehearing the case and considering the contentions of the parties, the district court[5] made several findings: first, a controversy between two branches of government in which one sought information from the other was justiciable (appropriate for resolution by the courts) and was not, as suggested by the President's counsel, a nonjusticiable political question; second, that in a controversy of this kind, the court, after determining justiciability, had a "duty to weigh the public interest protected by the President's claim of privilege against the public interest that would be served by disclosure to the Committee in this particular instance";[6] third, that the select committee failed to demonstrate either a pressing need for the subpenaed tapes or that further public hearings concerning the tapes would serve the public interest; fourth, the President's claim that the public interest was best served by a blanket unreviewable claim of confidentiality over all communications was rejected; and fifth, that the pending criminal prosecutions had to be safeguarded from the prejudicial effect which might arise if the select committee subpenaed the materials. On the basis of these holdings, the court declined to issue an injunction directing the President to comply with the subpena requiring information about the 25 listed individuals, and instead directed the President to submit a particularized statement as to selected portions of the subpenaed tape recordings.

The President refused to submit such a statement and reasserted

3. *Senate Select Committee on Presidential Campaign Activities, et al.* v *Nixon,* 366 F Supp 51, 61 (D.D.C.) John J. Sirica Chief Judge.

4. This jurisdictional statute, Pub. L. No. 93–190 (Dec. 19, 1973), appears in Senate Select Committee on Presidential Campaign Activities, Presidential Campaign Activities of 1972, S. Res. 60, appendix to the hearings, 93d Cong. 2d Sess. (1974).

5. See *Senate Select Committee on Presidential Campaign Activities, et al.* v *Nixon,* 370 F Supp 521 (D.D.C., Feb. 8, 1974), Gerhard A. Gesell, District Judge.

6. 370 F Supp 521, 522 (D.D.C. 1974); the quoted language was taken from *Nixon* v *Sirica,* 487 F2d 700, 716–718 (D.C. Cir., 1973), the suit brought by the Special Prosecutor to obtain certain evidence from the President.

his generalized claim of privilege on the grounds of confidentiality and his duty to prevent the possibly prejudicial effects on criminal prosecutions which might result from disclosure of the materials to the select committee. The trial court dismissed the select committee's suit to compel disclosure of the tapes.[7]

The select committee did not contest the decision to quash the subpena for materials relating to the 25 named individuals, but appealed the dismissal of the action to compel disclosure of the tapes. The United States Court of Appeals for the District of Columbia Circuit applying the reasoning it had used in *Nixon* v *Sirica*,[8] in which the Special Prosecutor was granted access to certain Presidential tapes for use in grand jury investigations, rejected the select committee's argument that a district court, once it had determined that a generalized claim of privilege failed, lacked authority to balance public interests. The court of appeals also rejected the district court's rulings that the President's generalized claim of privilege failed and that the Chief Executive must submit subpenaed materials to the court accompanied by particularized claims to be weighed against the public interest.

Restating its belief expressed in *Nixon* v *Sirica,* that Presidential communications are "presumptively privileged,"[9] and that the privilege is analogous to the privilege "between a congressman and his aides under the speech and debate clause; to that among judges and their law clerks; and . . . to that contained in the fifth exemption to the Freedom of Information Act,"[10] the court held that, ". . . the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government, a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations. . . ."[11] Such a showing "turns not on the nature of the Presidential conduct the subpenaed materials might reveal, but

7. 370 F Supp 521, 524 (D.D.C. 1974).

8. *Nixon* v *Sirica,* 487 F2d 700 (D.C. Cir. 1973) [hereinafter cited as *Nixon*].

9. *Senate Select Committee on Presidential Campaign Activities, et al.* v *Nixon,* 498 F2d 725, 730 (D.C. Cir. 1974) [hereinafter cited as Select Committee]; see also *Nixon,* at 705, 717, and 718.

10. Select Committee, at 729; see also *Nixon,* at 717.

11. Select Committee, at 730; see also *Nixon,* at 722.

rather on the nature and appropriateness of the function in the performance of which the material was sought and the degree to which the material was necessary to its fulfillment."[12]

The court applied these tests to the select committee's functions and asserted needs. The select committee maintained that it needed subpenaed materials to resolve conflicts in the voluminous testimony it had received so that it could responsibly exercise its duty to oversee activities and ascertain malfeasance in the executive department. Without denying the congressional role to exercise a general oversight power or defining the limits of that power, the court found that the select committee's oversight authority was subordinate to the constitutionally prescribed method of ascertaining malfeasance by executive officials, impeachment. Because the House Committee on the Judiciary had commenced an impeachment inquiry, the Select Committee's immediate need for the subpenaed materials was "merely cumulative" from a congressional perspective. The need for the subpenaed materials to fulfill its legislative responsibility, to determine whether Congress should enact laws to regulate political activities, also failed because the court believed that legislative judgments, unlike grand jury determinations of probable cause, depend more on predicted consequences of proposed legislative actions and their political acceptability than on precise reconstruction of past events.[13]

The court indicated that the President's obligation to respond to a subpena would not require him to submit particularized claims of privilege to the court to be weighed against the public interest in disclosure unless the select committee made a "showing of the order made by the grand jury" in *Nixon* v *Sirica*.[14] Applying this standard, the court concluded that the need demonstrated by the select committee in the circumstances of this case and in light of the impeachment investigation by the House Committee on the Judiciary, was "too attenuated and too tangential" to permit a judicial judgment that the President was required to comply with the committee's subpena.[15]

The court of appeals affirmed the order dismissing the select

12. Select Committee, at 731; see also *Nixon*, at 717, 718.

13. Select Committee, at 732.

14. Select Committee, at 729, 730; in *Nixon*, at 715, the Special Prosecutor was found to have made a "uniquely powerful showing" of need for subpenaed materials.

15. Select Committee, at 733.

committee's suit without prejudice, although on grounds different from those announced by the district court.[16]

A review of the Chief Executive's refusal to disclose information on the basis of privilege would not be complete without a discussion of certain aspects of the 8–0 Supreme Court decision in *United States* v *Nixon*,[17] in which the President was ordered to respond to a subpena issued by the Special Prosecutor for tape recordings by submitting them to the district court for judicial inspection. Because the opinion expressly stated that the court was "not here concerned with the balance . . . between the confidentiality interest of the executive and congressional demands for information,"[18] its holding would not control a future suit brought to enforce a congressional subpena. Nonetheless, an analysis of the court's reasoning and approach demonstrates the limits and foundation of executive privilege, factors which would be involved in such an action. Reaffirming that "it is emphatically the province and duty of the Supreme Court to 'say what the law is'",[19] the court rejected the President's claim of absolute discretion exclusively to determine what information may be withheld under the shield of executive privilege. However, in one of the most significant holdings of the opinion, the court at three points alluded to a constitutional foundation for a claim of executive privilege based on confidentiality of Presidential communications:

> Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. III powers the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers;[20] the protection

16. *Id.*

17. 418 U.S. 683 (1974) [hereinafter cited as *U.S.* v *Nixon*]; Mr. Justice Rehnquist took no part in the consideration or decision of this case. See Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92–82, 92 Cong. 2d Sess., 1975 Supplement, p. S 20–22, for a discussion of this decision.

18. *U.S.* v *Nixon,* at 712 n. 19.

19. *U.S.* v *Nixon,* at 705; the internal quotes were taken from *Marbury* v *Madison,* 1 Cranch 137 (1803).

20. In a footnote at this point the court dealt with the Special Prosecutor's contention that no constitutional provision authorized the Executive to assert privilege by stating that silence of the Constitution is not dispositive. To support this position, the following passage from *Marshall* v *Gordon,* 243 U.S. 521, 537 (1937), was cited: "The rule of constitutional

of the confidentiality of presidential communications has similar constitutional underpinnings.(1)

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.(2)

Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.(3)

The court's willingness to balance competing interests depends on the nature of the claim of executive privilege. Although it found that a generalized claim of privilege based on confidentiality must yield to a need of the Special Prosecutor to obtain information for use in a pending criminal trial, the court indicated that it would not be as willing to balance interests or reject a claim of executive privilege based on the President's need to protect military, diplomatic or sensitive national security secrets. "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities." (4)

Another factor in the authority of courts to review claims of executive privilege is the nature of the asserted need for information. Because claims of executive privilege either on grounds of confidentiality or diplomatic, military, or national security secrets are constitutionally based, the claim of need based on the Constitution is more likely to be reviewed than

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interpretation announced in *McCulloch* v *Maryland,* 4 Wheat. 316, that that which was reasonably appropriate and relevant to the exercise of a granted power was considered as accompanying the grant, has been so universally applied that it suffices merely to state it." See *U.S.* v *Nixon,* at 705, n. 16.

1. *U.S.* v *Nixon,* at 705, 706.

2. Here the Court cited *Carl Zeiss Stiftung* v *V.E.B.* Carl Zeiss, Jena, 40 F.R.D. 318, 325 (DDC 1966), [aff'd. 384 F2d 979, cert. denied 389 U.S. 952 (1967)]; *Nixon* v *Sirica,* 487 F2d 700, 713 (D.C. Cir. 1973); *Kaiser Aluminum and Chem. Corp.* v *U.S.,* 157 F Supp 939 (Ct. Cl. 1958); and The Federalist No. 64 (S.F. Mittel ed. 1938). *U.S.* v *Nixon,* at 708, n. 17.

3. *U.S.* v *Nixon,* at 711.

4. *U.S.* v *Nixon,* at 710; the court cited *C. & S. Air Lines* v *Waterman,* 333 U.S. 103, 111 (1948) and *U.S.* v *Reynolds,* 345 U.S. 1 (1952), two cases where the Supreme Court deferred to Presidential claims of secrecy in foreign policy and military affairs, respectively.

one which is not. The fact that the Special Prosecutor's claim of need for information needed in a pending criminal trial was based on the fifth amendment guarantee of due process of law and the sixth amendment right to be confronted with witnesses against him and have compulsory process (subpenas) for obtaining witnesses in his favor was accorded great weight by the court in balancing the need for evidence against the requirement of confidentiality. Linking these constitutional bases to the responsibilities of the judicial branch tipped the balance in favor of requiring the President to submit subpenaed materials for a judicial inspection.

> The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty on the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. . . .
>
> To read the Art. II powers of the President as providing [such] privilege [on the basis merely of] a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.(5)

Additional factors in the decision were the court's unwillingness to conclude that advisors would temper the candor of their remarks because of the possibility of occasional disclosure;(6) and its belief that a judge in chambers could protect the confidentiality of Presidential communications consistent with the fair administration of justice.(7)

§ 5. Legislation to Obtain Information

Some statutes require agencies to provide information to selected committees. An executive agency, on the request of the Committee on Government Operations of the House, or any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, is required to submit any information requested of it relating to any matter within the jurisdiction of the committee.(8)

The Atomic Energy Commission is required to keep the Joint Committee on Atomic Energy fully and currently informed with respect to all commission activities.(9) The

5. *U.S.* v. *Nixon,* at 707.

6. *U.S.* v. *Nixon,* at 712.

7. *U.S.* v. *Nixon,* at 714.

8. 5 USC § 2954; Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 413.

9. 42 USC § 2252; Aug. 1, 1946, c. 724, § 202, as added Aug. 30, 1954, c.