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OPINION ANNOUNCED JULY 24, 1974

The Supreme Court decided:

EVIDENCE — Executive Privilege

Neither doctrine of separation of powers nor general need for confidentiality of high-level communications, absent claim of need to protect military, diplomatic, or sensitive national security secrets, sustains absolute, unqualified presidential privilege of immunity from judicial process or precludes federal district court's in camera inspection of presidential communications demanded under subpoena essential to enforcement of criminal statutes; order denying President's motion to quash subpoena duces tecum is appealable as "final" order since contempt avenue to immediate appeal is inappropriate and could itself engender protracted litigation; dispute between President and Special Prosecutor as to existence of executive privilege does not involve nonjusticiable political question; executive privilege is derived from enumerated powers, interpretation of which is properly subject to judicial review; President's cross-petition for certiorari raising issue of whether he can be named as unindicted coconspirator is dismissed as improvidently granted. (U.S. v. Nixon, Nixon v. U.S., Nos. 73-1766 & 73-1834) ..... page 5237

Full Text of Opinion

Nos. 73–1766 AND 73–1834

United States, Petitioner,
73–1766 *v.*
Richard M. Nixon, President of the United States, et al.

Richard M. Nixon, President of the United States, Petitioner,
73–1834 *v.*
United States.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit before judgment.

[July 24, 1974]

Syllabus

Following indictment alleging violation of federal statutes by certain staff members of the White House and political supporters of the President, the Special Prosecutor filed a motion under Fed. Rule Crim. Proc. 17 (c) for a subpoena *duces tecum* for the production before trial of certain tapes and documents relating to precisely identified conversations and meetings between the President and others. The President, claiming executive privilege, filed a motion to quash the subpoena. The District Court, after treating the subpoenaed material as presumptively privileged, concluded that the Special Prosecutor had made a sufficient showing to rebut the presumption and that the requirements of Rule 17 (c) had been satisfied. The court thereafter issued an order for an *in camera* examination of the subpoenaed material, having rejected the President's contentions (a) that the dispute between him and the Special Prosecutor was nonjusticiable as an "intra-executive" conflict and (b) that the judiciary lacked authority to review the President's assertion of executive privilege. The court stayed its order pending appellate review, which the President then sought in the Court of Appeals. The Special Prosecutor then filed in this Court a petition for a writ of certiorari before judgment (No. 73–1766) and the President filed a cross-petition for such a writ challenging the grand-jury action (No. 73–1834) The Court granted both writs. *Held:*

1. The District Court's order was appealable as a "final" order under 28 U. S. C. § 1291, was therefore properly "in" the Court of Appeals when the petition for certiorari before judgment was filed in this Court, and is now properly before this Court for review. Although such an order is normally not final and subject to appeal, an exception is made in a "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims," *United States* v. *Ryan*, 402 U. S. 530, 533. Such an exception is proper in the unique circumstances of this case where it would be inappropriate to subject the President to the procedure of securing review by resisting the order and inappropriate to require that the District Court proceed by a traditional contempt citation in order to provide appellate review.

2. The dispute between the Special Prosecutor and the President presents a justiciable controversy.

(a) The mere assertion of an "intra-branch dispute," without more, does not defeat federal jurisdiction. *United States* v. *ICC*, 337 U. S. 426.

(b) The Attorney General by regulation has conferred upon the Special Prosecutor unique tenure and authority to represent the United States and has given the Special Prosecutor explicit power to contest the invocation of executive privilege in seeking evidence deemed relevant to the performance of his specially delegated duties. While the regulation remains in effect, the Executive Branch is bound by it. *Accardi* v. *Shaughnessy*, 347 U. S. 260.

(c) The action of the Special Prosecutor within the scope of his express authority seeking specified evidence preliminarily determined to be relevant and admissible in the pending criminal case, and the President's assertion of privilege in opposition

thereto, present issues "of the type which are traditionally justiciable," *United States* v. *ICC*, *supra*, at 430, and the fact that both litigants are officers of the Executive Branch is not a bar to justiciability.

3. From this Court's scrutiny of the materials submitted by the Special Prosecutor in support of his motion for the subpoena, much of which is under seal, it is clear that the District Court's denial of the motion to quash comported with Rule 17 (c) and that the Special Prosecutor has made a sufficient showing to justify a subpoena for production *before* trial.

4. Neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137, 177; *Baker* v. *Carr*, 369 U. S. 186, 211. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the confidentiality of presidential communications is not significantly diminished by producing material for a criminal trial under the protected conditions of *in camera* inspection, and any absolute executive privilege under Art. II of the Constitution would plainly conflict with the function of the courts under the Constitution.

5. Although the courts will afford the utmost deference to presidential acts in the performance of an Art. II function, *United States* v. *Burr*, 25 Fed. Cas. 187, 190, 191–192 (No. 14,694), when a claim of presidential privilege as to materials subpoenaed for use in a criminal trial is based, as it is here, not on the ground that military or diplomatic secrets are implicated, but merely on the ground of a generalized interest in confidentiality, the President's generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial and the fundamental demands of due process of law in the fair administration of justice.

6. On the basis of this Court's examination of the record, it cannot be concluded that the District Court erred in ordering *in camera* examination of the subpoenaed material, which shall now forthwith be transmitted to the District Court.

7. Since a President's communications encompass a vastly wider range of sensitive material than would be true of an ordinary individual, the public interest requires that presidential confidentiality be afforded the greatest protection consistent with the fair administration of justice, and the District Court has a heavy responsibility to ensure that material involving presidential conversations irrelevant to or inadmissible in the criminal prosecution be accorded the high degree of respect due a President and that such material be returned under seal to its lawful custodian. Until released to the Special Prosecutor no *in camera* material is to be released to anyone.

No. 73-1766, — F. Supp. —, affirmed; No. 73-1834, certiorari dismissed as improvidently granted.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except REHNQUIST, J., who took no part in the consideration or decision of the cases.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These cases present for review the denial of a motion, filed on behalf of the President of the United States, in the case of *United States* v. *Mitchell et al.* (D. C. Crim. No. 74-110), to quash a third-party subpoena *duces tecum* issued by the United States District Court for the District of Columbia, pursuant to Fed. Rule Crim. Proc. 17 (c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17 (c). The President appealed to the Court of Appeals. We granted the United States' petition for certiorari before judgment,[1] and also the President's responsive cross-petition for certiorari before judgment,[2] because of the public importance of the issues presented and the need for their prompt resolution. — U. S. —, — (1974).

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals[3] with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator.[4] On April 18, 1974, upon motion of the Spe-

[1] See 28 U. S. C. §§ 1254 (1) and 2101 (e) and our Rule 20. See, *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 937, 579, 584 (1952); *United States* v. *United Mine Workers*, 329 U. S. 708, 709, 710 (1946); 330 U. S. 258, 269 (1947); *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936); *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110 (1936); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 344 (1935); *United States* v. *Bankers Trust Co.*, 294 U. S. 240, 243 (1935).

[2] The cross-petition in No. 73-1834 raised the issue whether the grand jury acted within its authority in naming the President as a coconspirator. Since we find resolution of this issue unnecessary to resolution of the question whether the claim of privilege is to prevail, the cross-petition for certiorari is dismissed as improvidently granted and the remainder of this opinion is concerned with the issues raised in No. 73-1766. On June 19, 1974, the President's counsel moved for disclosure and transmittal to this Court of all evidence presented to the grand jury relating to its action in naming the President as an unindicted coconspirator. Action on this motion was deferred pending oral argument of the case and is now denied.

[3] The seven defendants were John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan. Each had occupied either a position of responsibility on the White House staff or the Committee for the Re-Election of the President. Colson entered a guilty plea on another charge and is no longer a defendant.

[4] The President entered a special appearance in the District Court on June 6 and requested that court to lift its protective order regarding the naming of certain individuals as coconspirators and to any additional extent deemed appropriate by the Court. This motion of the President was based on the ground that the disclosures to the news media made the reasons for continuance of the protective order no longer meaningful. On June 7, the District Court removed its protective order and, on June 10, counsel for both parties jointly moved this Court to unseal those parts of the record which related to the action of the grand jury regarding the President. After receiving a statement in opposition from the defendants, this Court denied

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cial Prosecutor, see n. 8, *infra*, a subpoena *duces tecum* was issued pursuant to Rule 17 (c) to the President by the United States District Court and made returnable on May 2, 1974. This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others.[5] The Special Prosecutor was able to fix the time, place and persons present at these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel, filed a "special appearance" and a motion to quash the subpoena, under Rule 17 (c). This motion was accompanied by a formal claim of privilege. At a subsequent hearing,[6] further motions to expunge the grand jury's action naming the President as an unindicted coconspirator and for protective orders against the disclosure of that information were filed or raised orally by counsel for the President.

On May 20, 1974, the District Court denied the motion to quash and the motions to expunge and for protective orders. — F. Supp. — (1974). It further ordered "the President or any subordinate officer, official or employee with custody or control of the documents or objects subpoenaed," *id.*, at —, to deliver to the District Court, on or before May 31, 1974, 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. The District Court rejected jurisdictional challenges based on a contention that the dispute was nonjusticiable because it was between the Special Prosecutor and the Chief Executive and hence "intra-executive" in character; it also rejected the contention that the judiciary was without authority to review an assertion of executive privilege by the President. The court's rejection of the first challenge was based on the authority and powers vested in the Special Prosecutor by the regulation promulgated by the Attorney General; the court concluded that a justiciable controversy was presented. The second challenge was held to be foreclosed by the decision in *Nixon* v. *Sirica*, — U. S. App. D. C. —, 487 F. 2d 700 (1973).

The District Court held that the judiciary, not the President, was the final arbiter of a claim of executive privilege. The court concluded that, under the circumstances of this case, the presumptive privilege was overcome by the Special Prosecutor's prima facie "demonstration of need sufficiently compelling to warrant judicial examination in chambers . . ." — F. Supp., at —. The court held, finally, that the Special Prosecutor had satisfied the requirements of Rule 17 (c). The District Court stayed its order pending appellate review on condition that review was sought before 4 p. m., May 24. The court further provided that matters filed under seal remain under seal when transmitted as part of the record.

On May 24, 1974, the President filed a timely notice of appeal from the District Court order, and the certified record from the District Court was docketed in the United States Court of Appeals for the District of Columbia Circuit. On the same day, the President also filed a petition for writ of mandamus in the Court of Appeals seeking review of the District Court order.

Later on May 24, the Special Prosecutor also filed, in this Court, a petition for a writ of certiorari before judgment. On May 31, the petition was granted with an expedited briefing schedule. — U. S. — (1974). On June 6, the President filed, under seal, a cross-petition for writ of certiorari before judgment. This cross-petition was granted June 15, 1974, — U. S. — (1974), and the case was set for argument on July 8, 1974.

I

JURISDICTION

The threshold question presented is whether the May 20, 1974, order of the District Court was an appealable order and whether this case was properly "in," 28 U. S. C § 1254, the United States Court of Appeals when the petition for certiorari was filed in this Court. Court of Appeals jurisdiction under 28 U. S. C. § 1291 encompasses only "final decisions of the district courts." Since the appeal was timely filed and all other procedural requirements were met, the petition is properly before this Court for consideration if the District Court order was final. 28 U. S. C. § 1254 (1); 28 U. S. C. § 2101 (e).

The finality requirement of 28 U. S. C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. See, *e. g.*, *Cobbledick* v. *United States*, 309 U. S. 323, 324–326 (1940). This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation. In applying this principle to an order denying a motion to quash and requiring the production of evidence pursuant to a subpoena duces tecum, it has been repeatedly held that the order is not final and hence not appealable. *United States* v. *Ryan*, 402 U. S. 530, 532 (1971); *Cobbledick* v. *United States*, 309 U. S. 322 (1940); *Alexander* v. *United States*, 201 U. S. 117 (1906). This Court has

> "consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any

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that motion on June 15, 1974, except for the grand jury's immediate finding relating to the status of the President as an unindicted coconspirator. — U. S. — (1974).

[5] The specific meetings and conversations are enumerated in a schedule attached to the subpoena. 42a–46a of the App.

[6] At the joint suggestion of the Special Prosecutor and counsel for the President, and with the approval of counsel for the defendants, further proceedings in the District Court were held *in camera*.

not automatically bar all out-of-court statements by a defendant in a criminal case.[13] Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence,[14] of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy. The same is true of declarations of coconspirators who are not defendants in the case on trial. *Dutton* v. *Evans*, 400 U. S. 74, 81 (1970). Recorded conversations may also be admissible for the limited purpose of impeaching the credibility of any defendant who testifies or any other coconspirator who testifies. Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial. See, *e. g.*, *United States* v. *Carter*, 15 F. R. D. 367, 371 (D. D. C. 1954). Here, however, there are other valid potential evidentiary uses for the same material and the analysis and possible transcription of the tapes may take a significant period of time. Accordingly, we cannot say that the District Court erred in authorizing the issuance of the subpoena *duces tecum*.

Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17 (c). See, *e. g.*, *Sue* v. *Chicago Transit Authority*, 279 F. 2d 416, 419 (CA7 1960); *Shotkin* v. *Nelson*, 146 F. 2d 402 (CA10 1944).

In a case such as this, however, where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of government, should be particularly meticulous to ensure that the standards of Rule 17 (c) have been correctly applied. *United States* v. *Burr*, 25 Fed. Cas. 30, 34 (No. 14,692d) (1807). From our examination of the materials submitted by the Special Prosecutor to the District Court in support of his motion for the subpoena, we are persuaded that the District Court's denial of the President's motion to quash the subpoena was consistent with Rule 17 (c). We also conclude that the Special Prosecutor has made a sufficient showing to justify a subpoena for production *before* trial. The subpoenaed materials are not available from any other source, and their examination and processing should not await trial in the circumstances shown. *Bowman Dairy Co., supra; United States* v. *Iozia, supra*.

IV

THE CLAIM OF PRIVILEGE

A

Having determined that the requirements of Rule 17 (c) were satisfied, we turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." App. 48a. The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena *duces tecum*.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* v. *Madison*, 1 Cranch 137 (1803), that "it is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177.

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential presidential communications for use in a criminal prosecution, but other exercises of powers by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. *Powell* v. *McCormack, supra; Youngstown, supra*. In a series of cases, the Court interpreted the explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause, U. S. Const. Art. I, § 6. *Doe* v. *McMillan*, 412 U. S. 306 (1973); *Gravel* v. *United States*, 408 U. S. 606 (1973); *United States* v. *Brewster*, 408 U. S. 501 (1972); *United States* v. *Johnson*, 383 U. S. 169 (1966). Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by

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[13] Such statements are declarations by a party defendant that "would surmount all objections based on the hearsay rule . . ." and, at least as to the declarant himself "would be admissible for whatever inferences" might be reasonably drawn. *United States* v. *Matlock*, — U. S. — (1974). *On Lee* v. *United States*, 343 U. S. 747, 757 (1953). See also McCormick on Evidence, § 270, at 651–652 (1972 ed.).

[14] As a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury. *United States* v. *Vaught*, 385 F. 2d 320, 323 (CA4 1973); *United States* v. *Hoffa*, 349 F. 2d 20, 41–42 (CA6 1965), aff'd on other grounds, 385 U. S. 293 (1966); *United States* v. *Santos*, 385 F. 2d 43, 45 (CA7 1967), cert. denied, 390 U. S. 954 (1968); *United States* v. *Morton*, 483 F. 2d 573, 576 (CA8 1973); *United States* v. *Spanos*, 462 F. 2d 1012, 1014 (CA9 1972); *Carbo* v. *United States*, 314 F. 2d 718, 737 (CA9 1963), cert. denied, 377 U. S. 953 (1964). Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge.

another branch." *Powell* v. *McCormack, supra,* 549. And in *Baker* v. *Carr,* 369 U. S., at 211, the Court stated:

> "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art. III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (C. F. Mittel ed. 1938). We therefore reaffirm that it is "emphatically the province and the duty" of this Court "to say what the law is" with respect to the claim of privilege presented in this case. *Marbury* v. *Madison, supra,* at 177.

B

In support of his claim of absolute privilege, the President's counsel urges two grounds one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.[15] Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II 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;[16] the protection of the confidentiality of presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, *Humphrey's Executor* v. *United States,* 295 U. S. 602, 629–630; *Kilbourn* v. *Thompson,* 103 U. S. 168, 190–191 (1880), insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

> "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." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 635 (1952) (Jackson, J., concurring).

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset

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[15] There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. 1 Farrand, The Records of the Federal Convention of 1787, xi–xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. See 3 U. S. Stat. At Large, 15th Cong. 1st Sess., Res. 8 (1818). Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written. Warren, The Making of the Constitution, 134–139 (1937).

[16] The Special Prosecutor argues that there is no provision in the Constitution for a presidential privilege as to his communications corresponding to the privilege of Members of Congress under the Speech or Debate Clause. But the silence of the Constitution on this score is not dispositive. "The rule of constitutional 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." *Marshall* v. *Gordon,* 243 U. S. 521, 537 (1917).

tne constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

C

Since we conclude that the legitimate needs of the judicial process may outweigh presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the judiciary from according high respect to the representations made on behalf of the President. *United States* v. *Burr*, 25 Fed. Cas. 187, 190, 191–192 (No. 14,694) (1807).

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making. 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.[17] In *Nixon* v. *Sirica*, — U. S. App. D. C. —, 487 F. 2d 700 (1973), the Court of Appeals held that such presidential communications are "presumptively privileged," *id.*, at 717, and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that "in no case of this kind would a court be required to proceed against the President as against an ordinary individual." *United States* v. *Burr*, 25 Fed. Cas. 187, 191 (No. 14,694) (CCD Va. 1807).

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger* v. *United States*, 295 U. S. 78, 88 (1935). We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial,

> "'that the public . . . has a right to every man's evidence' except for those persons protected by a constitutional, common law, or statutory privilege, *United States* v. *Bryan*, 339 U. S., at 331 (1949); *Blackmer* v. *United States*, 284 U. S. 421, 438; *Branzburg* v. *United States*, 408 U. S. 665, 688 (1973)."

The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.[18]

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities. In *C. & S. Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948), dealing with presidential authority involving foreign policy considerations, the Court said:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant in-

[17] "Freedom of communication vital to fulfillment of wholesome relationships is obtained only by removing the specter of compelled disclosure . . . [G]overnment . . . needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F. R. D. 318, 325 (D. C. 1966). See *Nixon* v. *Sirica*, — U. S. App. D. C. —, — 487 F. 2d 700, 713 (1973); *Kaiser Aluminum & Chem. Corp.* v. *United States*, 157 F. Supp. 939 (Ct. Cl. 1958) (*per* Reed, J.); The Federalist No. 64 (S. F. Mittel ed. 1938).

[18] Because of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges. Justice Frankfurter, dissenting in *Elkins* v. *United States*, 364 U. S. 206, 234 (1960), said of this: "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."

> formation, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Id.*, at 111.

In *United States* v. *Reynolds*, 345 U. S. 1 (1952), dealing with a claimant's demand for evidence in a damage case against the Government the Court said:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters, which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. 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.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice.[19] The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.[20]

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

D

We have earlier determined that the District Court did not err in authorizing the issuance of the subpoena. If a president concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena. Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the presidential material was "essential to the justice of the [pending criminal] case." *United States* v. *Burr*, *supra*, at 192. Here the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption and ordered an *in camera* examination of the subpoenaed material. On the basis of our examination of the record we are unable to conclude that the District Court erred in ordering the inspection. Accordingly we affirm the order of the District Court that sub-

[19] We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence to criminal trials.

[20] Mr. Justice Cardozo made this point in an analogous context. Speaking for a unanimous Court in *Clark* v. *United States*, 289 U. S. 1 (1933), he emphasized the importance of maintaining the secrecy of the deliberations of a petit jury in a criminal case. "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 in the world." *Id.*, at 13. Nonetheless, the Court also recognized that isolated inroads on confidentiality designed to serve the paramount need of the criminal law would not vitiate the interests served by secrecy:

"A juror of integrity and reasonably firmness will not fear to speak his mind if the confidences of debate bar 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 shadowly to shape the course of justice." *Id.*, at 16.

poenaed materials be transmitted to that court. We now turn to the important question of the District Court's responsibilities in conducting the *in camera* examination of presidential materials or communications delivered under the compulsion of the subpoena *duces tecum*.

E

Enforcement of the subpoena *duces tecum* was stayed pending this Court's resolution of the issues raised by the petitions for certiorari. Those issues now having been disposed of, the matter of implementation will rest with the District Court. "[T]he guard, furnished to [President] to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of the [district] court after the subpoenas have issued; not in any circumstances which is to precede their being issued." *United States* v. *Burr*, *supra*, at 34. Statements that meet the test of admissibility and relevance must be isolated; all other material must be excised. At this stage the District Court is not limited to representations of the Special Prosecutor as to the evidence sought by the subpoena; the material will be available to the District Court. It is elementary that *in camera* inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. Mr. Chief Justice Marshall sitting as a trial judge in the *Burr* case, *supra*, was extraordinarily careful to point out that:

> "[I]n no case of this kind would a Court be required to proceed against the President as against an ordinary individual." *United States* v. *Burr*, 25 Fed. Cases 187, 191 (No. 14,694).

Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." It is therefore necessary [21] in the public interest to afford presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to presidential records that high degree of deference suggested in *United States* v. *Burr*, *supra*, and will discharge his responsibility to see to it that until released to the Special Prosecutor no *in camera* material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

Affirmed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

LEON JAWORSKI, Special Prosecutor, and PHILIP A. LACOVARA, Counsel to the Special Prosecutor, for petitioner in No. 73-1766 and respondent in No. 73-1834; JAMES D. ST. CLAIR, Attorney for the President (MICHAEL A. STERLACCI, JEROME J. MURPHY, LOREN A. SMITH, JAMES R. PROCHNOW, EUGENE R. SULLIVAN, JEAN A. STAUDT, THEODORE J. GARRISH, JAMES J. TANSEY and LARRY G. GUTTERRIDGE, with him on the brief) for respondent in No. 73-1766 and petitioner in No. 73-1834; NORMAN DORSEN, MELVIN L. WULF and JOHN H. F. SHATTUCK filed brief for American Civil Liberties Union, as amicus curiae, seeking affirmance, in No. 73-1766.

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[21] When the subpoenaed material is delivered to the District Judge *in camera* questions may arise as to the excising of parts and it lies within the discretion of that court to seek the aid of the Special Prosecutor and the President's counsel for *in camera* consideration of the validity of particular excisions, whether the basis of excision is relevancy or admissibility or under such cases as *Reynolds*, *supra*, or *Waterman Steamship*, *supra*.

NINETY-THIRD CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT OPERATIONS

2157 Rayburn House Office Building

Washington, D.C. 20515

August 27, 1974

MEMORANDUM FOR: The Honorable Frank Horton

FROM: Steve Daniels

SUBJECT: Executive privilege -- Supreme Court opinion in U.S. v. Nixon, 42 U.S.L.W. 5237 (July 24, 1974), and Government Operations Committee bill H.R. 12462

The term "executive privilege" is nowhere defined, but generally considered to be a doctrine which permits the President to withhold certain information from other people.

In recent months, executive privilege has been asserted by a President as the basis for withholding information from two different groups of people -- prosecutors and Congressional committees. The Supreme Court has ruled in U.S. v. Nixon on the question of when the President can claim this privilege to withhold information from prosecutors. The Government Operations Committee has proposed in H.R. 12462 a procedure which could be used to determine when the Chief Executive can claim the privilege to keep material secret from the Congress.

In U.S. v. Nixon, the Court considered the permissible use of executive privilege in a narrow area. In an 8-0 decision written by Chief Justice Burger, it ruled:

> We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. 42 U.S.L.W. 5237, 5246.

The Court made clear that "We are not here concerned with the balance between the President's generalized interest in confidentiality ... and

congressional demands for information ...." (Id. n. 19) Nevertheless, this decision is consistent with H.R. 12462, the bill reported by the Government Operations Committee which does address that subject, with regard to all four major issues which have been raised about that bill.

1. Is a legal contest between two governmental entities justiciable?

H.R. 12462 provides that "The United States District Court for the District of Columbia shall have exclusive jurisdiction of any complaint filed by either House of Congress (to require the President to disclose information to the Congress)." (paragraph (d)(3)(B))

The Department of Justice has argued that this matter "would appear to satisfy virtually all of the tests enunciated in Baker v. Carr, 369 U.S. 186, 217 (1962), as to what constitutes a non-justiciable question." (H.R. Rep. No. 990, 93d Cong., 2d Sess. 14 (1974))

The Court ruled in the present case, however:

> In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the government within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable." ... This setting assures there is "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 42 U.S.L.W. 5237, 5241.

The situation in the context of Executive withholding of information from Congress is congruent -- one entity of the government, the Congress, seeks information within the scope of its express authority, and the Chief Executive resists. Consequently, following U.S. v. Nixon, the issue is of a type which is traditionally justiciable. The fact that that case was brought in a criminal context seems incident to the Court; the test for justiciability apparently would be the same in a legislative-executive dispute.

2. Is executive privilege a valid doctrine?

H.R. 12462 permits the President, in the first instance, to withhold any material requested by Congress of an Executive branch agency, provided that he sends the Legislature a signed statement setting forth a detailed explanation of the grounds upon which the withholding is based. (paragraphs (d)(1) and (2))

Several members of the Government Operations Committee have protested that this provision acknowledges the existence of a doctrine which has no basis in law. Mr. Brooks, for example, argues, "Enactment of this bill ... would enscribe into law the concept of executive privilege, and give to ... the President the appearance of legitimacy in denying certain information to Congress. ... The Constitution places no limits upon the kinds of information which the executive branch is to furnish Congress." (H.R. Rep. No. 93-990, at 31)

The Supreme Court states in U.S. v. Nixon, however, "A presumptive privilege for presidential communications ... is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." (42 U.S.L.W. 5237, 5245)

H.R. 12462, then, does not give legitimacy to a false theory; it merely recognizes what the Court has declared the law to be.

3. When may a claim of executive privilege be challenged?

H.R. 12462 prescribes that whenever the President denies a Congressional request, "Either House of Congress ... may adopt a resolution stating that the information or testimony is needed for the exercise of a valid legislative or investigative function under the Constitution and that the national interest outweighs the grounds cited by the President for withholding the information or testimony, and empowering ... counsel to file a civil suit in the U.S. District Court for the District of Columbia to compel the ... President ... to supply the requested information or testimony." (paragraph (d)(3)(A))

Some individuals have argued that Congress might bring all sorts of ill-advised actions against the President under this authority. Mr. Holifield, for example, has said, "I am particularly concerned that confrontations ... could be generated on the initiative of any subcommittee of the House or Senate .... There are some 250 subcommittees in the Congress now, and their jurisdiction collectively covers the universe. ... (The) action starts in the subcommittee. It would be difficult for a full committee to reject such a resolution. If the House turns down a resolution, the committee's prestige suffers." (H.R. Rep. No. 93-990, at 29)

In U.S. v. Nixon, the Court was confronted with the question of whether the prosecutor's subpoena for documents was sufficiently relevant, admissible, and specific to be permissible. The justices endorsed the formula-

tion in U.S. v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952), that in order to require production of material prior to trial, the moving party must show:

(1) that the documents are evidentiary and relevant;
(2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;
(3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial;
(4) that the application is made in good faith and is not intended as a general "fishing expedition." 42 U.S.L.W. 5237, 5242.

This test is closely analogous to the one provided in H.R. 12462. One House's adoption of a resolution stating that the information is needed for the exercise of a valid legislative or investigative function would satisfy the requirements that the documents be evidentiary and relevant, and that they not be procurable by other means. The inclusion in the resolution of a statement that the national interest outweighs the grounds cited by the President for withholding the information would satisfy the requirements that the documents be essential to informed action and that they be requested in good faith. In short, a Congressional resolution passed under H.R. 12462 would likely fulfill all the demands which the Court placed on the prosecutor's subpoena in U.S. v. Nixon.

4. When must a claim of executive privilege yield to requests for information?

H.R. 12462 requires that in any case brought by a House of Congress to enforce its demands for information, "Unless ... the court finds a compelling national interest that the information not be delivered to the House or committee involved, the court shall order the delivery of any material or portions thereof which it deems necessary for the exercise of a proper legislative or investigative function under the Constitution." (paragraph (d)(3)(B))

The Department of Justice and former President Nixon's lawyers have frequently contended that the President's ability to invoke executive privilege is absolute. Former Attorney General Kleindienst told a Senate subcommittee, for example, "Your power to get what the President knows is in the President's hands." (H.R. Rep. No. 93-990, at 3-4)

U.S. v. Nixon rejects that thesis. The Court said in that case, "This presumptive (executive) privilege must be considered in light of our historic commitment to the rule of law." (42 U.S.L.W. 5237, 5245) The privilege is general in nature; in each case, its value must be balanced against the need of the opposing party for the information whose disclosure is in dispute.

In the case of a criminal trial, the Court said:

> ... we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice.

On the one hand, the learned justices went on:

> The interest in preserving confidentiality is weighty indeed and entitled to great respect. ... On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.

In the final analysis:

> The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases. Id. at 5246.

H.R. 12462 is founded on the proposition that the Congress, to fulfill its constitutional responsibilities, must have access to all information the possession of which could help it to make wise determinations. The bill contemplates that this interest be balanced against the "general privilege of confidentiality of presidential communications," just as the right of defendants in a criminal trial to the production of all evidence was balanced against a claim of executive privilege in U.S. v. Nixon.

Where the Court ruled that "the generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial," the Government Operations Committee's report on its bill advises that "Only in cases of paramount importance, where information is of exceptional sensitivity and disclosure to the Congress would clearly pose a grave danger to the national interest, should the court permit withholding of that information." (H.R. Rep. No. 93-990, at 10)

The only difference between these two approaches is that in the legal case, the burden of proof was on the prosecutor, whereas in the House bill, it is on the President. This difference is in keeping with the disparity between the two situations: in the first, the Court was applying general rules of law which place the burden on the plaintiff; in the second, the

C

Congress is altering that burden by legislating within the scope of authority granted it by Article I, section 8, of the Constitution.

In summary, H.R. 12462 is consistent with the Supreme Court's resolution of important issues regarding the doctrine of executive privilege; the Court's opinion in U.S. v. Nixon should strengthen the case of those who maintain that enactment of this bill is necessary to preserve Congress' access to information within the executive branch.

Jay —

cy for

Mr. Lazarus

Mr. B has copy

on his desk

THE WHITE HOUSE

WASHINGTON

October 9, 1974

MEETING WITH REPS. WILLIAM S. MOORHEAD (D-PA.)
AND JOHN ERLENBORN (R-ILL.)
October 10, 1974
12:00 Noon (15 Minutes)
The Oval Office

Via: William E. Timmons
Max L. Friedersdorf MLF.

From: Vern Loen VL

I. PURPOSE — To discuss the President's policy in regard to the use of Executive Privilege.

II. BACKGROUND, PARTICIPANTS & PRESS PLAN

A. Background:

1. Rep. Moorhead is Chairman of the House Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations. Rep. Erlenborn is ranking minority member.

2. By letter dated August 13, 1974, they jointly requested a meeting with the President before he makes any decision with respect to an exchange of correspondence on this question (see Tab A).

3. The Senate already has passed a bill on this subject and H.R. 12462, co-sponsored by Reps. Moorhead, Erlenborn and others, is pending before the House. This measure has been under study by Counsel Philip Buchen.

B. Participants: The President
Rep. Moorhead
Rep. Erlenborn
Counsel Philip Buchen
Vern Loen (Staff)

C. Press Plan: Announce meeting: White House photo only.

III. TALKING POINTS

1. I know you gentlemen have given a great deal of consideration to the Executive Privilege question during the past two Congresses.

2. Both of you know that I want my Administration to be as open and as cooperative with the Congress as possible, as demonstrated by my own intention to appear before the House Judiciary Committee next week.

3. My counsel, Philip Buchen, and I would be most interested in having your views and recommendations.

NINETY-THIRD CONGRESS

Congress of the United States

House of Representatives

225-3741

FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-371-B
WASHINGTON, D.C. 20515

August 13, 1974

The Honorable Gerald R. Ford
President of the United States
The White House
1600 Pennsylvania Avenue, N. W.
Washington, D. C. 20500

Dear Mr. President:

Enclosed are copies of correspondence between the former chairman of this subcommittee and each of the three previous Presidents, relating to their Administration's policies to limit the use of so-called "Executive Privilege" only upon personal invocation by the President himself.

As you know, this subcommittee has conducted both investigative and legislative hearings on this subject during the past two Congresses and on March 14, 1974, favorably reported H. R. 12462, a bipartisan bill sponsored by Representative Erlenborn, myself, and other Members of both parties. A similar bill was passed by the Senate last December. A copy of our hearings and report on this measure is also enclosed.

In view of the then pending litigation over the tapes involving President Nixon and the Special Prosecutor, in which this issue was indirectly involved, we decided not to press for a rule on H. R. 12462 until after the Supreme Court had ruled in that case. Our staff analysis of the July 24, 1974, decision of the Court indicates that the ground rules for the use of "Executive Privilege" established in H. R. 12462 are not inconsistent with that decision since it did not deal directly with Congress' right to information from the Executive. We have since requested a rule on the measure and are awaiting the scheduling of a hearing by the Rules Committee.

As you were a long-time Member of the House, it is not necessary to spell out to you details about the steady erosion in the flow of information from the Executive to the Congress which has taken place over the past generation. You are well aware of such problems and of the disastrous effect which the wholesale withholding of information from the Congress under "Executive Privilege" has had on the credibility of our government and its leaders. Last Friday's New York Times quoted remarks you made on this subject more than a decade ago: "Congress cannot help but conclude that executive privilege is most often used in opposition to the public interest."

Before you make any decision with respect to an exchange of correspondence on the use of "Executive Privilege" in your Administration, we would appreciate the opportunity to meet with you to discuss this issue and your position on H. R. 12462.

With best wishes and highest regards,

Sincerely,

William S. Moorhead
Chairman

John N. Erlenborn
Ranking Minority Member

Enclosures