The original documents are located in Box 13, folder "Executive Privilege (6)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

For Executive Privilege file

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* NIXON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT BEFORE JUDGMENT

No. 73-1766. Argued July 8, 1974—Decided July 24, 1974*

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

*Together with No. 73-1834, *Nixon* v. *United States*, also on certiorari before judgment to the same court.

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. Pp. 5–7.

2. The dispute between the Special Prosecutor and the President presents a justiciable controversy. Pp. 7–12.

(a) The mere assertion of an "intra-branch dispute," without more, does not defeat federal jurisdiction. *United States* v. *ICC*, 337 U. S. 426. P. 8.

(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. 266. Pp. 9–11.

(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. P. 12.

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. Pp. 13–17.

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

Syllabus

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. Pp. 18–22.

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. Pp. 22–28.

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. Pp. 28–29.

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. Pp. 29–31.

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.

SUPREME COURT OF THE UNITED STATES

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]

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 respon-

[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,

sive 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 co-

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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

conspirator.[1] On April 18, 1974, upon motion of the Special 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.[2] 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,[3] 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.

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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 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).

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

[3] 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*.

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*

dick 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 review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." *United States* v. *Ryan*, 402 U. S. 530, 533 (1971).

The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. For example, in *Perlman* v. *United States*, 247 U. S. 7 (1918), a subpoena had been directed to a third party requesting certain exhibits; the appellant, who owned the exhibits, sought to raise a claim of privilege. The Court held an order compelling production was appealable because it was unlikely that the third party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege. *Id.*, at 12–13. That case fell within the "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States* v. *Ryan*, *supra*, at 533.

Here too the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying criminal action for which his evidence is sought. These considerations lead us to conclude that the order of the District Court was an appealable order. The appeal from that order was therefore properly "in" the Court of Appeals, and the case is now properly before this Court on the writ of certiorari before judgment. 28 U. S. C. § 1254; 28 U. S. C. § 2101 (e). *Gay* v. *Ruff*, 292 U. S. 25, 30 (1934).[7]

II

JUSTICIABILITY

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution.

[7] The parties have suggested this Court has jurisdiction on other grounds. In view of our conclusion that there is jurisdiction under 28 U. S. C. § 1254 (1) because the District Court's order was appealable, we need not decide whether other jurisdictional vehicles are available.

That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, *Confiscation Cases*, 7 Wall. 454 (1869); *United States* v. *Cox*, 342 F. 2d 167, 171 (CA5), cert. denied, 381 U. S. 935 (1965), it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case. Although his counsel concedes the President has delegated certain specific powers to the Special Prosecutor, he has not "waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer." Brief for the President 47. The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under *Baker* v. *Carr*, 369 U. S. 186 (1962), since it involves a "textually demonstrable" grant of power under Art. II.

The mere assertion of a claim of an "intra-branch dispute," without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry. In *United States* v. *ICC*, 337 U. S. 426 (1949), the Court observed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *Id.*, at 430. See also: *Powell* v. *McCormack*, 395 U. S. 486 (1969); *ICC* v. *Jersey City*, 322 U. S. 503 (1944); *United States*

ex rel. Chapman v. *FPC*, 345 U. S. 153 (1953); *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1954); *FMB* v. *Isbrandsten Co.*, 356 U. S. 481, 482 n. 2 (1958); *United States* v. *Marine Bank Corp.*, — U. S. — (1974), and *United States* v. *Connecticut National Bank*, — U. S. — (1974).

Our starting point is the nature of the proceeding for which the evidence is sought—here a pending criminal prosecution. It is a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign. *Berger* v. *United States*, 295 U. S. 78, 88 (1935). Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U. S. C. § 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U. S. C. §§ 509, 510, 515, 533. Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure.[8] The regulation gives the

[8] The regulation issued by the Attorney General pursuant to his statutory authority, vests in the Special Prosecutor plenary authority to control the course of investigations and litigation related to "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." 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805. In particular, the Special Prosecutor was given full authority, *inter alia*, "to contest the assertion of 'Executive Privilege' . . . and handl[e] all aspects of any cases within his jurisdiction." *Ibid.* The regulations then go on to provide:

"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

Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties." 38 Fed. Reg. 30739.

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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 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 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."

[9] That this was the understanding of Acting Attorney General Robert Bork, the author of the regulations establishing the independence of the Special Prosecutor, is shown by his testimony 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."

Hearings before the Senate Judiciary Committee on the Special Prosecutor, 93d Cong., 1st Sess., pt. 2, at 470 (1973). Acting Attorney General Bork gave similar assurances to the House Subcommittee on Criminal Justice. Hearings before the House Judiciary Subcommittee on Criminal Justice on H. J. Res. 784 and H. R. 10937, 93d Cong., 1st Sess. 266 (1973). At his confirmation hearings, Attorney General William Saxbe testified that he shared Acting Attorney General Bork's views concerning the Special Prosecutor's authority to test any claim of executive privilege in the courts. Hearings before the Senate Judiciary Committee on the nomination of William B. Saxbe to be Attorney General, 93d Cong., 1st Sess. 9 (1973).

So long as this regulation is extant it has the force of law. In *Accardi* v. *Shaughnessy*, 347 U. S. 260 (1953), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations. *Service* v. *Dulles*, 354 U. S. 363, 388 (1957), and *Vitarelli v. Seaton*, 359 U. S. 535 (1959), reaffirmed the basic holding of *Accardi*.

Here, as in *Accardi*, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so.[10] So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it. Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress. Note 8, *supra*.

[10] At his confirmation hearings Attorney General William Saxbe testified that he agreed with the regulations adopted by Acting Attorney General Bork and would not remove the Special Prosecutor except for "gross impropriety." Hearings, Senate Judiciary Committee on the nomination of William B. Saxbe to be Attorney General, 93d Cong., 1st Sess., 5–6, 8–10 (1973). There is no contention here that the Special Prosecutor is guilty of any such impropriety.

The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense, but that alone is not sufficient to meet constitutional standards. 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." *United States* v. *ICC*, 337 U. S., at 430. The independent Special Prosecutor with his asserted need for the subpoenaed material in the underlying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material. 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." *Baker* v. *Carr*, 369 U. S., at 204. Moreover, since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power. *Id.*, at 198.

In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision.

III

RULE 17 (c)

The subpoena *duces tecum* is challenged on the ground that the Special Prosecutor failed to satisfy the requirements of Fed. Rule Crim. Proc. 17 (c), which governs the issuance of subpoenas *duces tecum* in federal criminal proceedings. If we sustained this challenge, there would be no occasion to reach the claim of privilege asserted with respect to the subpoenaed material. Thus we turn to the question whether the requirements of Rule 17 (c) have been satisfied. See *Arkansas-Louisiana Gas Co.* v. *Dept. of Public Utilities*, 304 U. S. 61, 64 (1938); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346–347 (1936). (Brandeis, J., concurring.)

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 supoena 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."

A subpoena for documents may be quashed if their production would be "unreasonable or oppressive," but not otherwise. The leading case in this Court interpreting this standard is *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1950). This case recognized certain fundamental characteristics of the subpoena *duces tecum* in

criminal cases: (1) it was not intended to provide a means of discovery for criminal cases. *Id.*, at 220; (2) its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of subpoenaed materials." *Ibid.* As both parties agree, cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States* v. *Iozia*, 13 F. R. D. 335, 338 (SDNY 1952), as to the required showing. Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary [12] and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due dili-

[11] The Court quoted a statement of a member of the advisory committee that the purpose of the Rule was to bring documents into court "in advance of the time that they are offered in evidence, so that they may then be inspected in advance, for the purpose . . . of enabling the party to see whether he can use [them] or whether he wants to use [them]." 341 U. S., at 220 n. 5. The Manual for Complex and Multi-district Litigation published by the Administrative Office of the United States Courts recommends that Rule 17 (c) be encouraged in complex criminal cases in order that each party may be compelled to produce its documentary evidence well in advance of trial and in advance of the time it is to be offered. P. 142, CCH Ed

[12] The District Court found here that it was faced with "the more unusual situation . . . where the subpoena, rather than being directed to the government by the defendants, issues to what, as a practical matter, is a third party." *United States* v. *Mitchell*, — F. Supp. — (D. C. 1974). The Special Prosecutor suggests that the evidentiary requirement of *Bowman Dairy Co.* and *Iozia* does not apply in its full vigor when the subpoena *duces tecum* is issued to third parties rather than to government prosecutors. Brief for the United States 128–129. We need not decide whether a lower standard exists because we are satisfied that the relevance and evidentiary nature of the subpoenaed tapes were sufficiently shown as a preliminary matter to warrant the District Court's refusal to quash the subpoena.

gence; (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."

Against this background, the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity. Our own review of the record necessarily affords a less comprehensive view of the total situation than was available to the trial judge and we are unwilling to conclude that the District Court erred in the evaluation of the Special Prosecutor's showing under Rule 17 (c). Our conclusion is based on the record before us, much of which is under seal. Of course, the contents of the subpoenaed tapes could not at that stage be described fully by the Special Prosecutor, but there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment. *United States v. Gross*, 24 F. R. D. 138 (SDNY 1959). With respect to many of the tapes, the Special Prosecutor offered the sworn testimony or statements of one or more of the participants in the conversations as to what was said at the time. As for the remainder of the tapes, the identity of the participants and the time and place of the conversations, taken in their total context, permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment.

We also conclude there was a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment. The most cogent objection to the admissibility of the taped conversations here at issue is that they are a collection of out-of-court statements by declar-

ants who will not be subject to cross-examination and that the statements are therefore inadmissible hearsay. Here, however, most of the tapes apparently contain conversations to which one or more of the defendants named in the indictment were party. The hearsay rule does 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.

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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.

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 immu-

nity 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 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

[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

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.

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).

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 the 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

[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).

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 privi-

leges 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 information, 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), deal-

[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."

ing 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 con-

[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 to 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 ghadowly to shape the course of justice." *Id.*, at 16.

fidentiality 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 subpoenaed 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

[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*.

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.

refusal to expunge. The Special Prosecutor regarded this action of the grand jury as helpful, though not essential, on the issue of the admissibility of the tapes sought.[25] Without focusing on the President, the Court was able to hold most of the tapes potentially admissible either as out-of-court admissions by a defendant or as declarations by a co-conspirator made in the course of the conspiracy and in furtherance of it.[26]

Had the Court examined the question of admissibility with greater particularity, it might have been forced to address the role of the President as an alleged co-conspirator. One group of tapes included conversations between the President and Charles W. Colson,[27] who was one of those indicted but who had been dismissed as a defendant pursuant to a plea bargain under which he pleaded guilty to an offense in another case. Thus, the admissibility of these tapes would have to be based on either the President's or Colson's status as a co-conspirator. Although it is possible that all of the recorded conversations might be admissible by virtue of Colson's status alone, the Court apparently chose not to address this possibility.[28] Reliance on the naming of Mr. Nixon by the grand jury would have afforded clearer support for admissibility, but the Court understandably may have preferred some measure of discreet logical blindness for the sake of greater blandness.

II. Executive Privilege

And so we are brought to the question of "executive privilege" itself. The term appears to be of recent origin,[29] but that circumstance sheds little light on the legitimacy of the concept itself, just as Jeremy Bentham's invention of the term "international law" [30] gave a new name, but not a new birth, to a body of received

[25] Reply Brief for Petitioner at 59–64.

[26] 94 S. Ct. at 3104 & nn.13–14.

[27] Reply Brief for Respondent at 42 n.30.

[28] The tapes might conceivably be admissible for purposes of impeaching, or rehabilitating, either Colson or President Nixon as a witness; but as the opinion observes, without reference to the precise problem, "[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." 94 S. Ct. at 3104. The opinion is content to state that "most of the tapes apparently contain conversations to which one or more of the defendants named in the indictment were party." *Id.* Perhaps the very bulk of the materials subpoenaed by the Prosecutor facilitated a relatively general approach by the Court to the question of admissibility.

[29] The earliest use which the author has discovered is in the government briefs in the *Reynolds* case. Petitioner's Brief for Certiorari at 11, 12, United States v. Reynolds, 345 U.S. 1 (1953). *See* R. Berger, Executive Privilege: A Constitutional Myth 1 & n.3 (1974).

[30] 5 Oxford English Dictionary 409–10 (1933), *citing* J. Bentham, Principles of Legislation xvii § 25 (1780).

doctrine. Of greater concern is the problem of the meaning of the term, which can embrace at least two distinct, though related, claims.

The privilege might be invoked as an immunity of the President from legal process. This position, advanced on the President's behalf in the earlier tapes case,[31] was not renewed in the present controversy. A concession that a President is not subject to compulsory process was made, arguendo, in *Marbury v. Madison*[32] by Charles Lee, counsel for Marbury, in contending that James Madison, as Secretary of State, was by contrast subject to mandamus for the performance of a ministerial duty. Lee said in oral argument: [33]

> It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a mandamus to a secretary of state, is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the president is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution.

This concession could be readily made, however, because a practical alternative existed — the President's subordinate could stand in judgment. In the trial of Aaron Burr four years later, when a subpoena duces tecum addressed to President Jefferson himself directly raised the question of immunity from process, Chief Justice Marshall, presiding on circuit, treated it as a matter not of legal immunity but of practical convenience.[34] This approach, eschewing absolutes, serves to maintain the rule of law in its most elementary aspect. In the tension between the claims of governance and those of restraint, the ancient tension between *gubernaculum* and *jurisdictio*,[35] the availability of a subordinate has served as a way of procedural accommodation. If members of Congress cannot be sued for their official conduct, still officers of their house may be answerable for carrying out those actions,[36] as cabinet officers may be legally accountable for executing presidential directions.[37] This time-honored means of accommodation

[31] *See* Nixon v. Sirica, 487 F.2d 700, 708–12 (D.C. Cir. 1973).

[32] 5 U.S. (1 Cranch) 137 (1803).

[33] *Id.* at 149.

[34] United States v. Burr, 25 F. Cas. 30, 34–35 (No. 14,692d) (C.C.D. Va. 1807).

[35] *See* C. McIlwain, Constitutionalism: Ancient and Modern *passim* (rev. ed. 1947).

[36] *See* Powell v. McCormack, 395 U.S. 486, 504–06 (1969); Jurney v. MacCracken, 294 U.S. 125 (1935) (petitioner for writ of habeas corpus being held in custody of the Sergeant-at-Arms of the Senate on account of destruction of documents under subpoena by a Senate committee).

[37] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

was made unavailable in the tapes cases by the President's action in formally taking sole custody of the tapes. Thus the usual suit against a subordinate became impossible, and a confrontation was compelled.[38] In the eighteenth-century Newtonian universe that is the Constitution, an excessive force in one direction is apt to produce a corresponding counterforce. The forcing of the issue in the tapes cases served in the end to solidify the principle of presidential amenability to process.

A second possible meaning of executive privilege is the evidentiary claim directly raised in the tapes case, an exemption from a duty to produce testimony or documents and a legal capacity to control the production of certain kinds of evidence by others. Such a privilege with respect to military secrets or sensitive diplomatic communications and intelligence, recognized in the law of evidence, was not in issue. The controversy was limited to the "generalized" claim, as the brief of the Special Prosecutor[39] and the Court's opinion[40] put it, of a privilege concerning confidential communications to which the President was a party.[41]

In considering whether such a privilege exists, do we look to the Constitution or to the law of evidence? Actually the question is not a very meaningful one. It resembles the query raised by some irreverent friends of Lord Rutherford, who asked whether he had really discovered the nucleus of the atom or had simply put it there. The privilege, unlike the immunity accorded to members of Congress under the "speech and debate" clause,[42] is not expressly granted by the Constitution. It would, confessedly, be a privilege implied by the necessities of the system, in particular by the separation of powers,[43] as intergovernmental tax immunities are implied in the cause of a working federalism. If certain relationships, like that of lawyer and client, are deemed to

[38] *See* Nixon v. Sirica, 487 F.2d 700, 709 (D.C. Cir. 1973); 87 HARV. L. REV. 1557, 1562–63 (1974).

[39] *See* Brief for Respondent at 85 n.65.

[40] *See* 94 S. Ct. at 3109–10.

[41] Another possible meaning of executive privilege is a substantive immunity from liability, qualified or absolute. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 553–55 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951); W. PROSSER, LAW OF TORTS § 132, at 987–92 (4th ed. 1971). Absolute immunity, designed to protect certain discretionary functions from even the burden of litigation, is more familiar in the law of torts than of crimes, perhaps because of the greater public concern and the greater screening process in the bringing of actions in the latter area. *Cf.* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.):

> There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.

[42] *See* 94 S. Ct. at 3105–06 & n.16; Gravel v. United States, 408 U.S. 606 (1972).

[43] *See* 94 S. Ct. at 3105, 3107.

require the preservation of confidentiality of communications even from the demand of litigation, then arguably a similar privilege should be recognized for the relationship of President and confidant. Whether it ought to be recognized calls for the kind of weighing of interests, *mutatis mutandis*, that is practiced in assessing relative needs in other relationships. If the balance is struck by the courts in favor of confidentiality, the resulting principle as applied to the presidential office becomes one of constitutional dimensions. Although the analysis is similar in the private and the official spheres, the differences in content are significant. Full and frank interchange is a desideratum in both spheres; but the President is a public trustee in a sense beyond that applicable to a lawyer or physician, and so the countervailing interest in disclosure should weigh more heavily.

The principal clue to a resolution of the interests at stake can be derived from the intergovernmental tax doctrine itself. It was put thus by Chief Justice Hughes: [44]

> The principle invoked by the petitioner, of the immunity of state instrumentalities from federal taxation, has its inherent limitations. It is a principle implied from the necessity of maintaining our dual system of government. Springing from that necessity it does not extend beyond it.

If the Court had accepted the grand jury's naming of the President as an unindicted co-conspirator [45] the issue of privilege could have been more easily resolved; on the analogy of other confidential relationships, the privilege would not extend to communications in furtherance of a course of criminal conduct.[46] Once more, in bypassing this action of the grand jury, proferred by the Special Prosecutor,[47] the Court elected to take broader ground in support of the Special Prosecutor's position. The same is true with respect to the question who is to decide on the balance of interests. More than once the Court's opinion quotes Marshall's magisterial words in *Marbury v. Madison*: ". . . it is emphatically the province and duty of the judicial department to say what the law is." [48] But of course the judiciary might declare "the law" to be that the President is the sole determiner of the need for protecting the confidentiality of particular com-

[44] Board of Trustees v. United States, 289 U.S. 48, 59 (1933) (citations omitted).

[45] The Court dismissed as improvidently granted the President's cross-petition challenging this action of the grand jury, holding that determination of the grand jury's reach was "unnecessary to resolution" of the President's claim of privilege. 94 S. Ct. at 3097 n.2.

[46] *See, e.g.*, 8 J. WIGMORE, EVIDENCE § 2298 (McNaughton rev. ed. 1961) (attorney-client privilege).

[47] *See* Brief for Petitioner at 90–102.

[48] 5 U.S. (1 Cranch) at 177, *quoted in* 94 S. Ct. at 3105, 3106.

munications, just as "the law" grants him sole authority over recognition of the legal government of a foreign state.[49] To support such an authority in a case where there was complicity between the President and the defendants would offend violently against the ancient precept that no man shall be judge in his own cause. The Court chose, however, to base its decision more impersonally, and hence more broadly, on the proposition that a court in a criminal case possesses the ultimate authority to decide what is required on balance to be produced in the interests of the administration of criminal justice.[50]

In striking a balance, the degree of relevance and materiality of the evidence is a significant factor. It is here that the real problems arise, particularly where the evidence sought is documentary and may contain material of varying relevance and sensitivity. The problems are those of procedure and mechanics, and they were first addressed by John Marshall, preliminarily in *Marbury v. Madison*[51] and more fully in the trial of Aaron Burr.

The proceedings in *Marbury v. Madison* in 1803 were something of a rehearsal for the issue of executive privilege in the Burr trial in 1807. A summons was issued to Levi Lincoln, then attorney general, who had been secretary of state at the outset of Jefferson's administration in 1801, when the commissions signed by the outgoing President Adams were allegedly withheld from Marbury and his co-petitioners. Lincoln objected to answering written questions as to any facts which came officially to his knowledge while acting as secretary of state.[52] Charles Lee, counsel for Marbury, conceded that Lincoln need not answer as to any facts which came to his knowledge in the discharge of that part of his duties as "an agent of the president, bound to obey his orders, and accountable to him for his conduct,"[53] but maintained that the facts concerning the commissions were within an independent branch of his duties, as a public ministerial officer of the United States.[54] The Court allowed Lincoln until the next day to consider his position, but took occasion to express its views in a monitory way:[55]

> . . . [the Court] 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 dis-

[49] United States v. Belmont, 301 U.S. 324, 330 (1937).
[50] *See* 94 S. Ct. at 3107.
[51] 5 U.S. (1 Cranch) 137 (1803).
[52] *Id.* at 143–44.
[53] *Id.* at 143.
[54] *Id.*
[55] *Id.* at 144–45.

> close 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. If he thought any of the questions improper, he might state his objections.

The next day Lincoln went far toward an accommodation, agreeing to answer all the questions except one, namely, what had been done with the commissions. He professed to have no knowledge whether they ever came into the possession of Secretary of State Madison.[56] The Court, evidently relieved that a full-scale confrontation could be avoided, now absolved Lincoln of a duty to answer that question: ". . . he was not bound to say what had become of them; if they never came into the possession of Mr. Madison, it was immaterial to the present causes what had been done with them by others." [57]

And so the issue of materiality provided an escape, although if the question of privilege had not been involved it is difficult to believe that the question put to Lincoln would have been excluded. After all, evidence concerning the further disposition of the commissions might have been useful in producing further witnesses who could throw clearer light on the previous whereabouts and state of the documents, and on the question whether they were in fact brought to the attention of President Jefferson, in which event his failure to order delivery might be taken as an intended removal from office.[58]

Marshall again faced the question of executive privilege at the Burr trial, or more accurately trials. In the course of those proceedings, he delivered the following two statements concerning the duty of the President to respond to a subpoena duces tecum in a criminal case: [59]

> The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it.
>
> In no case of this kind would a court be required to proceed against the president as against an ordinary individual.

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[56] *Id.* at 145.

[57] *Id.*

[58] The recession of the Court at this stage may be compared with the cadence of Marshall's opinion on the full case, taking occasion to castigate an executive who would "at his discretion sport away the vested rights of others," *id.* at 166, then avoiding a collision by holding that the Court could not exercise original jurisdiction to issue a writ of mandamus, although of course in so abstaining the Court established the momentous doctrine of judicial review of congressional acts.

[59] 25 F. Cas. at 34, 192.

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[59] 25 F. Cas. at 34, 192.

The juxtaposition, though tantalizing, is not altogether fair: Marshall was not suffering from judicial schizophrenia. Rather, he was speaking at two different points in the proceedings and was addressing two different issues — the issuance of a subpoena to the President, and its enforcement after the President's counsel made a return claiming privilege.

The Burr trials [60] passed through four stages: the grand jury inquiry (indictments for treason and misdemeanor were returned on June 24 and 26, 1807); the treason trial (Burr was acquitted on September 1); the misdemeanor trial (Burr was acquitted on September 15); and commitment to the Federal Circuit Court for Ohio on a misdemeanor charge.[61] Two subpoenas were issued by Chief Justice Marshall and the district judge sitting with him as the Circuit Court for Virginia on motion of counsel for Burr: one on June 13, addressed to President Jefferson, calling for the production of a letter written to Jefferson by General Wilkinson on October 21, 1806; the second on September 4, addressed to the United States Attorney, George Hay, for a letter from Wilkinson to Jefferson written on November 12, 1806. The actual content of these letters was not described or disclosed, but that of October 21 had been referred to by Jefferson in a message to Congress as establishing Burr's guilt beyond doubt,[62] and that of November 12, it was intimated throughout the arguments of counsel, contained scandalous charges by Wilkinson against other respectable officials. Both letters were evidently sought to provide a basis for impeaching the credibility of Wilkinson should he testify for the prosecution.[63]

In support of his demand for the first letter Burr submitted his affidavit stating simply that "he hath great reason to believe that

[60] Recent discussions of the Burr trials include: Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1111–22 (1974); Nathanson, *From Watergate to* Marbury v. Madison*: Some Reflections on Presidential Privilege in Current and Historical Perspectives*, 16 ARIZ. L. REV. 59, 61–65 (1974); Rhodes, *What Really Happened to the Jefferson Subpoenas*, 60 A.B.A. J. 52 (1974); Wills, *Executive Privilege: Jefferson & Burr & Nixon & Ehrlichman*, The New York Review of Books, July 18, 1974, at 36; R. BERGER, *supra* note 29, at 187–94; 5 D. MALONE, JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT, SECOND TERM, 1805–08, at 215–370 (1974).

The trials are reported in two shorthand transcriptions: T. CARPENTER, THE TRIAL OF COL. AARON BURR (1807) (three volumes) [hereinafter cited as CARPENTER]; D. ROBERTSON. THE TRIALS OF COLONEL AARON BURR (1808) (two volumes) [hereinafter cited as ROBERTSON]. The opinions of Chief Justice Marshall and some of the arguments of counsel are reported at 25 F. Cas. 2–207 (Nos. 14,692a–14,694a) (C.C.D. Va. 1807).

[61] *See* Berger, *supra* note 60, at 1112; Rhodes, *supra* note 60, at 52–53.

[62] *See* 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 412 (1896).

[63] *See* 25 F. Cas. at 31–32; 2 ROBERTSON 512–27. Wilkinson testified before the grand jury, but he was not in fact called as a witness in the two trials. *See* 5 D. MALONE, *supra* note 60, at 336, 344.

a letter from General Wilkinson to the president of the United States, dated 21st October, 1806, as mentioned in the president's message of the 22d January, 1807, to both houses of congress . . . may be material in his defence, in the prosecution against him . . . ." [64] Burr's argument to the court contained a concession with respect to state secrets and to confidential matters not relevant to the case: [65]

> If the letter contained state secrets which it would be inconsistent with the public safety to disclose, the president could say so in the return to the subpoena; but it was not to be assumed until he did say so. Or, if the letter contained anything of a confidential character, not relating to the case, the president could point out such parts as he did not wish to have exposed, and they need not be read in court.

The United States Attorney, George Hay, was remarkably close to Burr's position on when disclosure was appropriate, although he resisted the issuance of a subpoena. The difference turned mainly on whether the executive or judiciary should decide. Hay informed the court that he had written the President "stating the motion that was to be made this day, and suggesting the propriety of sending on the papers required; but reserving to himself [Hay] the right of retaining them, till the court saw them, and determined their materiality." [66] Jefferson, in response, stating that the letter in question was no longer in his possession, having been entrusted to Attorney General Rodney, undertook to see that it was delivered to Hay, but insisted on the principle that the President must "decide, independently of all other authority, what papers coming to him as president, the public interest permits to be communicated, and to whom." He added, "I assure you of my readiness, under that restriction, voluntarily to furnish, on all occasions, whatever the purposes of justice may require." [67] Then, referring to his lack of actual possession of the letter, he devolved discretion regarding materiality upon Hay: [68]

> But as I do not recollect the whole contents of that letter, I must beg leave to devolve on you, the exercise of that discretion which it would be my right and duty to exercise, by withholding the communication of any parts of the letter which are not directly material for the purposes of justice.

A further message from Jefferson to Hay, read to the court, explained that he had written to Attorney General Rodney but had

[64] 25 F. Cas. at 31; 1 ROBERTSON 119.

[65] 25 F. Cas. at 31.

[66] 1 ROBERTSON 120.

[67] Letter from Thomas Jefferson to George Hay, June 12, 1807, 1 ROBERTSON 210.

[68] *Id.*

received no information concerning Wilkinson's letter; Jefferson referred to certain other letters and orders that were wanted, stating, "[t]he receipt of these papers has, I presume, so far anticipated, and others this day forwarded, will have substantially fulfilled the object of a subpoena from the district court of Richmond . . . ." [69] He repeated his insistence that with respect to papers not in the public domain the President "must be the sole judge of which of them the public interest will permit publication." [70] Jefferson managed a delicate thrust at what he regarded as judicial pretensions: [71]

> The respect mutually due between the constituted authorities in their official intercourse, as well as sincere dispositions to do for every one what is just, will always insure from the executive, in exercising the duty of discrimination confided to him, the same candour and integrity, to which the nation has in like manner trusted in the disposal of its judiciary authorities.

Meanwhile, between Hay's letter to Jefferson and the receipt of the latter's responses, Marshall had proceeded to issue the subpoena, with an opinion, already quoted,[72] taking broad ground concerning the amenability of the President to the court's process, but adding that any claim of privilege would be considered in due course if made on the return. Marshall adumbrated the criteria he would apply if a claim were made that disclosure would be incompatible with the public interest: [73]

> That there may be matter, the production of which the court would not require, is certain; but, in a capital case, that the accused ought, in some form, to have the benefit of it, if it were really essential to his defence, is a position which the court would very reluctantly deny . . . . There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.

And then, in an obvious reference to Jefferson's public denunciation of Burr, Marshall thrust the rapier: [74]

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[69] Letter from Thomas Jefferson to George Hay, June 17, 1807, 1 ROBERTSON 254–55.

[70] *Id.* at 255.

[71] *Id.*

[72] *See* p. 23 *supra*.

[73] 25 F. Cas. at 37.

[74] *Id.*

> It is not easy to conceive that so much of the letter as relates to the conduct of the accused can be a subject of delicacy with the president. Everything of this kind, however, will have its due consideration on the return of the subpoena.

The issue proceeded no further, however, for the original of the October 21 letter seems never to have come into the United States Attorney's possession, and Burr's acquittal in the treason trial rendered the matter academic in that context.[75] Thus, the questions whether disclosure would be compelled, who would be the arbiter of privilege, what criteria would apply, and what procedures would be adopted, were not finally resolved at this stage.

Although Burr renewed his demand for the letter of October 21 at the outset of the trial for misdemeanor, attention turned now to Wilkinson's letter of November 12, which had been presented to the grand jury. Evidently it contained material embarrassing to Jefferson in that Wilkinson made serious charges against certain of the President's political friends.[76] Marshall issued a subpoena for the letter to the United States Attorney, although Marshall had doubts about its materiality to the defense. The Chief Justice was evidently familiar with it, since at one point he observed that "[w]e must consider the subject as if we had not seen the letter." [77] He intimated broadly that the contents were not so significant as the spirited contest over their production might suggest: [78]

> It is with regret that I decide a question under such circumstances, because it is probable that those parts of the letter which are withheld, are of much less importance than gentlemen suppose; and that the effect of their production would be to dissipate suspicions which are now entertained, and to shew that the subject of the controversy is by no means proportioned to the zeal with which it has been maintained.

Discussion turned to the mechanics by which the character and materiality of passages objected to might be decided. On this procedural problem the defense maintained that "the party, and not the court, judges of the materiality of witnesses or documents;

[75] A copy of the October 21 letter was apparently delivered to the clerk of the court, *see* 3 CARPENTER 112 (statement of Aaron Burr), and during the commitment proceedings a portion of that copy was quoted by John Wickham, one of Burr's counsel, in his cross-examination of General Wilkinson. *Id.* at 265–66. It is unclear from the trial transcript whether the whole letter or only portions of it were made available to the defense, but Hay's remark that he no longer objected to the disclosure of all of the letter, *see* 2 ROBERTSON 505, suggests that the entire document was turned over.

[76] 2 ROBERTSON 529–30; Rhodes, *supra* note 60, at 53.

[77] 2 ROBERTSON 511.

[78] *Id.* at 533–34.

The opinion proceeds to set forth dialectically Marshall's analysis. In an ordinary case an affidavit of materiality would suffice to order production. But the President may have sufficient reasons for withholding a document whose exposure would be of "manifest inconvenience." It would be "a very serious thing," however, to withhold from the accused "any information material to the defence." But "on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case." On the weight to be given to the President's objection, "the court would unquestionably allow their full force to those reasons." If a reservation of certain portions of a paper were made by the President, "all proper respect" would be paid to it. Here, however, no objection had been interposed by the President himself, but only by his delegate, the United States Attorney. With the case in this posture, and because "[t]he only ground laid for the court to act upon is the affidavit of the accused," "the court is induced to order that the paper be produced, or the cause be continued." [85]

President Jefferson subsequently sent a copy of the letter, with his own deletions, to the United States Attorney, but Burr did not press his demand, probably because his acquittal on the misdemeanor charge, as on the trial for treason, was confidently expected (and did occur). Demand for the letter was renewed, however, in the final stage of the proceedings, on motion to commit Burr to the custody of the federal marshal for transfer for trial in Ohio. At this stage Marshall delivered no further opinion but made rulings in the course of colloquies with counsel. The Chief Justice's private knowledge of the contents of the letter was shared by Burr's counsel,[86] and doubtless by Burr himself, and Marshall was manifestly annoyed that the defense offered no further statement of its materiality; the contest over production had become a protracted bout of shadowboxing. But Marshall did reassert his opinion that it was his responsibility to weigh the President's claim. Addressing Burr, he said: [87]

> After such a certificate from the president of the United States as has been received, I cannot direct the production of those parts of the letter, without sufficient evidence of their being relevant to the present prosecution. I should suppose, however, that the same source, which informed you of the existence of this paper, might inform you of the particular way in which it was relevant.

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[85] *Id.* at 192.
[86] *See* 3 CARPENTER 282.
[87] *Id.* at 280–81.

In the end Marshall refrained from ordering production, ruling instead that the omitted parts of the letter might be taken to support the defendant's assumption regarding them: [88]

> After a long and desultory argument, the Chief Justice determined that the correct course was, to leave the accused all the advantages which he might derive from the parts already produced; and to allow all the advantages of *supposing* that the omitted parts related to any particular point. The accused may avail himself as much of them, as if they were actually produced.
>
> . . . .
>
> I have already decided this question. It is certainly fair to supply the omitted parts by suppositions, though such ought not to affect General Wilkinson's private character. If this were a trial in chief, I should perhaps think myself bound to continue the cause, on account of the withholding the parts of this paper: and I certainly cannot exclude the inferences which gentlemen may draw from the omissions.

Marshall's ruling at this stage appears to have been compounded of exasperation, desire to avoid an outright collision with Jefferson, and conviction that commitment proceedings were not an appropriate forum for resolution of difficult legal questions. He stated a preference for leaving such questions to the trial judge, who could certify them to a higher court.[89]

The Burr trials may be taken to have established four principles, all pertinent to and important for the tapes case: (1) There is no absolute privilege in a criminal case for communica-

[88] *Id.* at 281–82, 284.

A ruling such as Marshall's might conceivably reflect an opinion that the matter was indeed privileged but that the prosecution was, in effect, estopped from taking advantage of the privilege. *See* United States v. Beekman, 155 F.2d 580, 584 (2d Cir. 1946) (Frank, J.) ("When the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege."). Marshall, however, gave no indication that he was silently renouncing his position that the judge, not the President, was the ultimate arbiter, and his remarks to Burr, quoted in the text, indicate the contrary. Moreover, in context Marshall's ruling was as helpful to the defense as actual delivery of the letter would have been. *See* note 90 *infra*.

[89] *See* 3 CARPENTER 409. Marshall appeared anxious to terminate his part in the Burr affair. Shortly afterwards, he wrote to Judge Peters of Philadelphia, thanking him for a volume of *Admiralty Reports* and revealing something of his feelings about the Burr trials:

> I have as yet been able only to peep into the book . . . . I received it while fatigued, and occupied with the most unpleasant case which has ever been brought before a judge in this or, perhaps, in any other country which affected to be governed by laws; since the decision of which I have been entirely from home. The day after the commitment of Colonel Burr . . . I galloped to [his vacation home in] the mountains . . . .

J. THAYER, JOHN MARSHALL 97 (Phoenix ed. 1967).

tions to which the President is a party. (2) Upon a particularized claim of privilege by the President the court, giving due respect to the President's judgment, will weigh the claim against the materiality of the evidence and the need of the accused for its production. (3) For purposes of determining whether disclosure is required, the material sought may be ordered to be produced for in camera inspection by the court, with the participation of counsel and, it seems, of the accused. (4) In lieu of such production, the court may direct that inferences shall be drawn favorable to the accused, or that the prosecution be dismissed.

In the tapes case these principles were largely confirmed,[90] and the mechanics of an in camera inspection were refined. If the President invokes a claim of privilege in response to a subpoena, the district judge should treat the materials as "presumptively privileged" and order in camera inspection only if the Special Prosecutor demonstrates that they are " 'essential to the justice of the [pending criminal] case.' " [91] Since the Special Prosecutor had already been required to demonstrate relevancy in order to obtain the subpoena in the first instance,[92] presumably this further requirement calls for a stronger showing of need. During the inspection the judge should exercise the utmost care for the safekeeping of the materials.[93] In determining whether particular portions are to be excised, the judge in his discretion may call upon the aid of counsel for both sides, although neither appears to be entitled to participate as of right.[94] Such procedures ensure that presidential confidentiality will not be broken except where a genuine need exists; enable the court to make an informed judgment about the need for disclosure of specific segments of

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[90] The *Nixon* Court nowhere expresses any view as to the propriety of permitting evidentiary inferences on behalf of the accused in lieu of requiring production of evidence. In *Nixon* the inappropriateness of that alternative was evident: the materials sought included conversations between indicted conspirators and others and therefore would be likely to relate to central elements in the case; their actual contents were unknown and in some instances in dispute; and they were being sought for use by both the prosecution and the defense in a criminal trial in chief. In *Burr*, however, it appeared to make little real difference in the outcome of the proceedings whether the defense received the inference or the actual letter: the letter was only marginally relevant to the defendant's case, being sought solely in order to impeach the veracity of a witness, *see* 3 CARPENTER 280–81; and most important, the actual contents were already known both to the defense and to Marshall, who was sitting without a jury and would be the sole judge of whether to commit Burr for a new trial. *See id.* at 280, 282; 2 ROBERTSON 509.

[91] 94 S. Ct. at 3110 (brackets in original), *quoting* United States v. Burr, 25 F. Cas. at 192.

[92] *See* p. 17 *supra*.

[93] *See* 94 S. Ct. at 3110–11.

[94] *See id.* at 3110–11 & n.21.

subpoenaed materials; and protect against disclosure of irrelevant portions.[95]

In the tapes case the Court was not called upon to deal with materials that contain military or diplomatic secrets. Nevertheless, citing *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*[96] and *United States v. Reynolds*,[97] the opinion observes that the "high degree of deference" shown to the executive's judgment in such cases need not be shown where the privilege claimed is only the generalized one in confidentiality.[98] The apparent approval given to the *Reynolds* decision may be disquieting. There the Court held that in a tort action by the widows of three civilian engineers who were killed in the crash of an Air Force plane on which experimental and secret electronic equipment was carried, the plaintiffs were not entitled to the production, even for in camera inspection by the trial court, of a report of an official board of inquiry investigating the airplane accident. There was no suggestion that the electronic equipment figured in the cause of the crash. The decision reversed a strong court of appeals (Judges Maris, Goodrich, and Kalodner) [99] and drew a dissent from Justices Black, Frankfurter, and Jackson. Particularly surprising was Chief Justice Vinson's observation that production of the report was of dubious necessity since the

[95] There is, of course, one conspicuous difference between the *Burr* case and the tapes case: in the latter the documents were sought not by the accused but by the prosecution. The difference, however, is more conspicuous than significant. Not only does the pursuit of justice have a double aspect, but in fact the interests of the accused may be served by production at the instance of the prosecution. Under the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), the accused is entitled to access to evidentiary material of an exculpatory nature in the possession of the prosecution, and several of the defendants were asserting rights under that doctrine. As Mr. Justice Douglas pointed out at the oral argument, the rights of the accused were lurking not far beneath the surface of the case:

> Question: I thought the heart of this case was the rights of defendants in a criminal trial to that evidence. It may be exculpatory and free them of all liability . . . .
> Mr. Jaworski: Well, it certainly is in the case. Now, of course what you have reference to also, I am sure, Mr. Justice Douglas, is *Brady* . . . .
> . . . .
> Question: And the question of whether or not the defendants, under the *Brady* doctrine, are entitled to subpoena information and material that is not now in your possession but is in the possession of the President, was an issue that was left undecided by the District Court.
> Mr. Jaworski: That is correct, sir.

Transcript of Oral Argument at 41–42. The Special Prosecutor freely stated that he would make available to defendants any material to which they were entitled under *Brady*, and that the obligations "extend even to 'privileged' evidence." Reply Brief for Petitioner at 64 n.37.

[96] 333 U.S. 103 (1948).

[97] 345 U.S. 1 (1953).

[98] 94 S. Ct. at 3108–09.

[99] 192 F.2d 987 (3d Cir. 1951).

survivors themselves, who had been interviewed by the board, were available as witnesses; [100] one might have thought that this circumstance enhanced the value of the report in the interest of completeness and confrontation.[101]

The *Reynolds* Court's willingness to honor a claim of privilege merely on the basis of the executive's judgment is not, however, a forceful precedent for the inappropriateness of an in camera hearing to determine whether production of national security information may be compelled in the course of criminal proceedings. *Reynolds* was a civil case — a situation with which the *Nixon* Court was expressly not concerned [102] — and one in which the litigant's demand for evidence was arguably less appealing because his suit was permissible only by virtue of the Government's consent as manifested in the Tort Claims Act.[103] However that may be, an important and reassuring footnote near the end of Chief Justice Burger's opinion assimilates claims of military and diplomatic secrets to those of general confidentiality for the purposes of the availability of an in camera procedure.[104] The somewhat greater deference to the executive that the *Nixon* opinion indicates is appropriate when national security information is under subpoena thus appears to go to the weight to be accorded

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[100] 345 U.S. at 11.

[101] Compare the remark of George S. Kaufman in the course of a bridge game, whose application to the tapes case need not be labored: "I would like a review of the bidding, with the original intonations." L. KRONENBERGER, THE CUTTING EDGE 169 (1970). Possibly more authoritative is the statement of Lord Reid when a similar ground was suggested for exclusion of official reports:

> No doubt if a report contains more than a statement of the facts there may be reasons at least for withholding that part which ought not to be disclosed, but I fail to see what public interest is served by permitting evidence to be given but withholding the contemporary report of the witness about the facts.

Conway v. Rimmer, [1968] A.C. 910, 946.

[102] 94 S. Ct. at 3109 n.19.

[103] 60 Stat. 842 (codified in scattered sections of 28 U.S.C. (1970)). *See* United States v. Reynolds, 345 U.S. 1, 12 (1953) (footnote omitted):

> Respondents have cited to us those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.

[104] 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.*

94 S. Ct. at 3111 n.21 (emphasis added).

the needs of confidentiality versus the needs of litigants, rather than to the procedures for striking that balance. A litigant may be required to make a stronger showing of need before a district judge will order production of national security material for in camera inspection,[105] but such an inspection remains the primary method of resolving the conflicting claims of the executive branch and the criminal process.

The British rule, too, is that no absolute Crown privilege can be claimed on the ground of confidentiality.[106] It was so decided by the House of Lords in 1968, in a unanimous decision repudiating an earlier statement of Lord Simon accepting as conclusive a claim of privilege by a principal Minister.[107] That practice had proved quite unacceptable, for the reason put concisely in Lord Pearce's speech: " 'It is not surprising,' it has been said . . . , 'that the Crown, having been given a blank cheque, yielded to the temptation to overdraw.' " [108] There is no reason to suppose that this is a peculiarly British phenomenon.[109]

Most "great" cases, those that, in Justice Holmes' words, "deal with the Constitution or a telephone company," [110] are argued with prophecies of doom. The tapes case was no exception. The

[105] Indeed, the *Reynolds* Court went so far as to state that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." 353 U.S. at 11.

[106] Conway v. Rimmer, [1968] A.C. 910. The Scottish law is in accord. *See* Glasgow Corp. v. Central Land Bd., [1956] S.C. (H.L.) 1.

In *Conway* the House of Lords analyzed the claim of governmental privilege for confidential documents as a "class" privilege, a characterization essentially the same as the Supreme Court's phrase "generalized privilege." *See* 94 S. Ct. at 3109–10. In each case, the assertion of such privilege was held insufficient to preclude in camera review. Each court also left room for more specific claims, the House of Lords speaking of "contents" and the Supreme Court of "particular excisions" in referring to the examining judge's authority to excise portions of the documents. *See* 94 S. Ct. at 3111 n.21; [1968] A.C. at 952–53, 994–96.

[107] *See* Duncan v. Cammell Laird & Co., [1942] A.C. 624.

[108] [1968] A.C. at 983, *quoting* H. WADE, ADMINISTRATIVE LAW 285 (2d ed. 1967).

[109] Compare the statement of the Special Prosecutor:

> In oral argument before the district court on the enforceability of the grand jury's subpoena, counsel representing the President stated that "the President has told me that in one of the tapes that is the subject of the present subpoena there is national security material so highly sensitive that he does not feel free even to hint to me what the nature of it is." Transcript of Hearing on August 22, 1973, at 56, *In re* Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, 360 F. Supp. 1 (D.D.C. 1973). Nevertheless, when the recordings were submitted to the district court in compliance with later orders of that court and the court of appeals, counsel for the President no longer asserted that any of the subpoenaed conversations included matters relating to the national security and no such information was found.

Reply Brief for Petitioner at 45 n.23.

[110] *John Marshall, reprinted in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 131, 134 (M. Howe ed. 1962) [hereinafter cited as OCCASIONAL SPEECHES].

brief for President Nixon closed with these words, referring to the decision of Judge Sirica in the district court: "If sustained, that decision will alter the nature of the American Presidency profoundly and irreparably." [111] History has a way of mocking these specters of disaster forecast from judicial decisions.[112] So long as the courts retain their resourcefulness in applying precedents, and their authority to reconsider doctrine in the light of "the lessons of experience and the force of better reasoning," [113] fears of irreparable harm are likely to prove exaggerated. Moreover, transforming decisions, however dramatic, are generally reflections of deeper currents in the national thought and culture. To borrow again from the wisdom of Holmes: [114] "I have no belief in panaceas and almost none in sudden ruin. I believe with Montesquieu that if the chance of a battle — I may add, the passage of a law — has ruined a state, there was a general cause at work that made the state ready to perish by a single battle or law." But the short answer to the apprehensions over an affirmance of Judge Sirica's decision is that it could be said with stronger reason that a reversal would have marked a fundamental alteration in our standards of criminal justice.

III. Beyond the Tapes Case

The opinion of the Supreme Court was careful to state that it was concerned with executive privilege only in the context of the criminal law, and not in the setting of presidential relations with Congress.[115] Nevertheless, the rejection of a generalized privilege

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[111] Brief for Respondent at 137.

[112] *See, e.g.*, Justice McReynolds' dissenting opinion delivered from the bench in The Gold Clause Cases, Perry v. United States, 294 U.S. 330 (1935); Nortz v. United States, 294 U.S. 317 (1935); Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935): "Shame and humiliation are upon us now. Moral and financial chaos may confidently be expected." 334 U.S. at xi. Or witness Chief Justice Fuller's dissent in The Lottery Case, Champion v. Ames, 188 U.S. 321, 375 (1903) (footnote omitted):

> Our form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions, the form may survive the substance of the faith.

[113] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407–08 (1932) (Brandeis, J., dissenting). *See* F. Cornford, Microcosmographia Academica 15 (1908):

> The *Principle of the Dangerous Precedent* is that you should not now do an admittedly right action for fear you, or your equally timid successors, should not have the courage to do right in some future case, which, *ex hypothesi*, is essentially different, but superficially resembles the present one. Every public action which is not customary, either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time.

[114] *Law and the Court, reprinted in* Occasional Speeches, *supra* note 110, at 163, 172.

[115] 94 S. Ct. at 3109 n.19.

in the President's discretion, and the adoption of a standard of weighing the need for information against the injury to the national interest through disclosure, will doubtless have a radiating effect. Indeed the United States Court of Appeals for the District of Columbia Circuit, in judging the Watergate Committee's suits for presidential tapes, applied essentially the same standards it had employed in the first Special Prosecutor's suit, though with a different outcome.[116]

The issue of executive privilege is one aspect of a reexamination by Congress of the larger subject of relations between Congress and the President. A rationalization of congressional procedures, long overdue, has been seen as a necessary element in congressional oversight. The purse and the sword are the instruments of national policy that have been of most acute concern to Congress, and in each of these fields new legislative controls have been devised.

Out of these recent efforts a pattern seems to be emerging, one that would replace the isolation of the two branches, their unilateral acts and recriminations, with a procedure for consultation and for informed review by Congress. With respect to presidential impoundment of appropriated funds,[117] a statute now requires the President to communicate his reasons to Congress, which in turn must approve the impoundment (if it constitutes more than a deferral) as a condition of its becoming effective.[118] With respect to military action, the War Powers Resolution of 1973 recognizes the power of the President to commit troops to hostilities abroad in certain emergencies without a declaration of war, but requires a ratifying vote by Congress within sixty days.[119] A like proposal regarding presidential proclamations of states of national emergency is before Congress.[120]

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[116] *Compare* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc), *with* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (en banc) (per curiam).

[117] *See* Baade, *Mandatory Appropriations of Public Funds: A Comparative Study, Parts I, II*, 60 VA. L. REV. 393, 611 (1974); Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973).

[118] *See* Pub. L. No. 93-344, tit. X, 88 Stat. 297, 332 (U.S. CODE CONG. & AD. NEWS 1720, 1761 (93d Cong., 2d Sess. July 12, 1974)).

[119] *See* Pub. L. No. 93-148, 87 Stat. 555, (U.S. CODE CONG. & AD. NEWS 614 (93d Cong., 1st Sess. Nov. 7, 1973)). The 60-day waiting period before congressional ratification is required may give the administration the opportunity to argue with some plausibility that the resolution gives the President a free hand, independent of congressional opinion, to conduct military actions of less than two months duration. *See* T. EAGLETON, WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER 216, 218-21 (1974).

[120] *See* S. 3957, 93d Cong., 2d Sess. (1974), *reprinted at* 120 CONG. REC. 15788-89 (daily ed. Aug. 22, 1974).

Similar procedures for dealing with executive privilege are under active consideration. In general, the proposals would require an executive department to furnish any information or records within thirty days of receipt of a request from a House or committee of Congress, unless the department can supply a statement signed by the President explaining why the material is privileged.[121] Some of the proposals would detail the grounds which the President could legitimately advance for nondisclosure: the need to withhold, for example, military secrets, other information whose disclosure might create grave and irreparable harm to the vital interests of the United States, and advice and opinions concerning policy in relation to legitimate functions of government.[122] Provision for limited disclosure, as in executive session, might further narrow the scope of the privilege, just as such a provision might warrant a request for otherwise privileged investigatory files in connection with appointments and removals.[123]

All such efforts to provide standards and procedures are laudable, though experience with the Freedom of Information Act,[124] applicable to private demands for information, cautions against seeking clear and distinct solutions by codification.[125] The efforts are nonetheless praiseworthy because they compel closer attention to standards which serve the public interest, recognize the need for restraint both in the demand for information and in the assertion of privilege, encourage rational communication between the two branches, and furnish a basis for more informed public judgment if in the end confrontation occurs.

The more troublesome question is whether, if an impasse does develop, resort should be had to the courts. Given the widespread and appreciative acceptance of the courts' role in resolving the contest over production of the tapes, it seems natural enough to turn to the judiciary for settlement of congressional-presidential disputes as well. There are, however, significant differences that counsel against an easy transference of judicial review. The tapes case arose in the setting of a criminal proceeding. That factor

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[121] *See* H.R. 12462, 93d Cong., 2d Sess. (1974).

[122] *See* Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 11–33 (1974); Committee on Civil Rights, *Executive Privilege: Analysis and Recommendations for Congressional Legislation*, 29 THE RECORD 177 (1974).

[123] *See* Dorsen & Shattuck, *supra* note 122, at 24–29.

[124] 5 U.S.C. § 552 (1970).

[125] *See* EPA v. Mink, 410 U.S. 73, 79 (1973); Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047 (1973). *See also* Committee on Federal Legislation of the Association of the Bar of the City of New York, Amendments to the Freedom of Information Act, Fed. Legis. Rep. No. 74-1 (April 22, 1974).

gives rise to three distinctive characteristics that bear on the appropriateness of judicial review. In the first place, there was a conventional case already lodged in the court, not a plenary proceeding between two branches of government. Second, and related to the first characteristic, is the fact that private interests of the most acute kind — the potential loss of liberty of the defendants — were at stake. Third, the weighing of the need for disclosure is more congruent with the judicial function, and more comfortably performed, in a criminal case than in a legislative investigation: relevance and materiality are more focused in the search for defined facts than in a wide-ranging inquiry either to furnish a basis for legislation or to probe into maladministration.[126]

If a prosecution were brought against an executive officer for contempt of Congress in refusing to give evidence or produce records, or if a House itself committed an officer to custody on that ground, a court ought not to refrain from deciding the issue; basic personal rights would have been put in jeopardy by a solemn act of the legislative body. Short of that kind of collision, at the very least there ought to be a considered resolution of the full House before a legislative committee would seek, and a court would provide, judicial review.[127] But adoption of such legislation at this time may be premature. The whole subject of executive privilege is under close scrutiny; executive cooperation is likely to be more forthcoming, and Congress, for its part, is sensitive to criticisms of past excesses of some of its committees. A pattern of communication and better understanding, together with the force of public opinion, ought to be allowed to have its day. Routine resort to the courts could stunt these promising developments, draw the judiciary into intragovernmental controversies in their raw, politically-tinged state, and expose the courts to the risk of rendering unsatisfactory judgments on matters where the judicial

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[126] *See* C. MOSHER *et al.*, WATERGATE: IMPLICATIONS FOR RESPONSIBLE GOVERNMENT 121–22 (1974); Nathanson, *supra* note 60, at 77.

Those especially who would look to the courts to vindicate the legislature's right to obtain information may reflect on the unanimous decision of the court of appeals against the Senate Watergate Committee. The court ruled that production of the tapes was not vitally necessary to the Committee on two grounds: that these tapes would probably come into the possession of another legislative group charged with investigative and reporting responsibilities similar to that Committee's, and that fulfillment of the Committee's lawmaking responsibilities did not require access to such detailed information as the tapes held. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732–33 (D.C. Cir. 1974). This result may well be disquieting to supporters of broad judicial review to vindicate congressional authority.

[127] *Cf.* O'Brien v. Brown, 409 U.S. 1, 5 (1972) (per curiam) (denying review of action of credentials committee of Democratic National Convention).

touch is likely to be unsure. Here, as elsewhere in our constitutional order, when personal rights are not in jeopardy,[128] it is well to give scope for "a frank and candid co-operation for the general good." [129] The vision may be too ideal, the hope misplaced. But in the freer and healthier atmosphere into which we are emerging the vision and the hope deserve a trial.

[128] *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315, 401 (1819).

[129] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 238 (1824) (Johnson, J., concurring).