The original documents are located in Box 13, folder "Executive Privilege (7)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

ry for companies confined to the producing function.

We find a rate of return of approximately 15 percent proper to be used in these proceedings. (R. 2670.)

Continental argues that the Commission improperly determined initial rate levels solely on the basis of cost comments, and that in any event the rates established were inadequate to promote necessary and future gas supplies.

[5, 6] We need not labor the point that the Commission has wide discretion in deciding what factors to consider in certifying initial rates as required by public convenience and necessity, FPC v. Sunray DX Oil Co., 391 U.S. 9, 88 S.Ct. 1526, 20 L.Ed.2d 388 (1968); United Gas v. Callery Properties, 382 U.S. 223, 86 S.Ct. 360, 15 L.Ed.2d 284 (1965), rehearing denied, 382 U.S. 1001, 86 S.Ct. 526, 15 L.Ed.2d 491 (1966); Atlantic Refining Co. v. Public Service Commission of N.Y. (CATCO), 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959), and cost is one factor which may be considered, Permian Basin Area Rate Cases, 390 U.S. 747, 815, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968). As we have indicated moreover the record discloses that the Commission did consider factors other than cost comments; contrary to the contention of Continental evidence concerning intrastate sales and supply and demand was considered. We must also decline Continental's invitation to hold that the rates established were too low. There is no showing that the rates are outside "the 'zone of reasonableness' within which the courts may not set aside rates adopted by the Commission." FPC v. Sunray DX Oil Co., 391 U.S. 9, 29, 88 S.Ct. 1526, 1537, 20 L.Ed.2d 388 (1968).

We think the Commission's orders sufficiently articulated and explained the reasoning and factual basis of the conclusions reached; and considering the record as a whole we find that the orders were supported by substantial evidence.

The orders of the Commission are

Affirmed.

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, suing in its own name and in the name of the United States, et al., Appellants,

v.

Richard M. NIXON, Individually and as President of the United States.

No. 74-1258.

United States Court of Appeals, District of Columbia Circuit.

Argued April 2, 1974.

Decided May 23, 1974.

Suit by Senate committee for enforcement of subpoena duces tecum served on President for production of tape recordings of conversations between President and presidential aide. The United States District Court, Gerhard A. Gesell, J., 370 F.Supp. 521, dismissed the action, and the committee appealed. The Court of Appeals, Bazelon, Chief Judge, held that Court would not enforce subpoena in light of fact that subpoenaed material was not critical to committee's performance of its legislative functions.

Affirmed.

MacKinnon, Circuit Judge, filed a concurring opinion; Wilkey, Circuit Judge, filed a concurring opinion.

1. United States ⇐26

Presumption that presidential conversations are privileged, premised on public interest and confidentiality of presidential decision-making process, can be overcome only by an appropriate showing of public need by party seeking access to conversations.

2. United States ⇐26

Executive cannot, any more than other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by proper governmental institutions into possible criminal wrongdoing.

3. United States ⇐23(4)

Court would not enforce subpoena duces tecum served by Senate committee on President seeking production of five tape recordings of conversations between President and presidential aide, where subpoenaed evidence was not critical to committee's performance of its legislative function to investigate improper activities occurring in connection with presidential campaign and where committee's investigative objectives overlapped with objectives of House committee which had in its possession copies of each of tapes subpoenaed by Senate committee. 28 U.S.C.A. § 1364; U.S.C.A. Const. art. 1, § 2, cl. 5.

Samuel Dash, Chief Counsel, Senate Select Committee on Presidential Campaign Activities, Washington, D. C., with whom Rufus Edmisten, Deputy Counsel, James T. Hamilton, Asst. Chief Counsel, Richard B. Stewart, Sp. Counsel, Ronald D. Rotunda, Asst. Counsel, Senate Select Committee on Presidential Campaign Activities, Washington, D. C., Sherman L. Cohn, Eugene Gressman and Jerome A. Barron, Washington, D. C., were on the brief for appellants.

John J. Chester, Washington, D. C., with whom James St. Clair, Boston, Mass., Michael A. Sterlacci, Jerome J. Murphy, Loren A. Smith and Charles Alan Wright, Austin, Tex., was on the brief, for appellee. George P. Williams, Washington, D. C., also entered an appearance for appellee.

Philip A. Lacovara, Counsel to the Sp. Prosecutor, Washington, D. C., with whom Leon Jaworski, Sp. Prosecutor and Peter M. Kreindler, Executive Asst. to the Sp. Prosecutor, Washington, D. C., were on the brief for the Sp. Prosecutor as amicus curiae.

Irving Jaffe, Acting Asst. Atty. Gen., Robert E. Kopp, Washington, D. C., and Thomas G. Wilson, Alexandria, Va., filed a brief on behalf of the United States as amicus curiae.

Before BAZELON, Chief Judge, and WRIGHT, McGOWAN, LEVENTHAL, ROBINSON, MacKINNON and WILKEY, Circuit Judges.

BAZELON, Chief Judge:

In this suit, the United States Senate Select Committee on Presidential Campaign Activities seeks a declaration that President Richard M. Nixon has a legal duty to comply with its subpoena *duces tecum*, directing him to produce "original electronic tapes" of five conversations between the President and his former Counsel, John W. Dean, III. By memorandum and order of February 8, 1974, the District Court for the District of Columbia denied the Committee's motion for summary judgment and dismissed the suit without prejudice.[1] The Committee appeals. For the reasons stated herein, we affirm.

I.

The Select Committee was created on February 7, 1973, by a resolution of the Senate empowering the Committee to investigate "illegal, improper or unethical activities" occurring in connection with the presidential campaign and election of 1972, and "to determine . . . the necessity or desirability of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen."[2] In testimony before the Committee on July 16, 1973, Alexander Butterfield, a former Deputy Assistant to the President, stated that certain presidential conversations, presumably including those about which Mr. Dean and others had previously testified, had been recorded on electronic tapes. The Committee thereupon attempted informally to obtain certain tapes and other materials from the President. When these efforts proved unsuccessful, the Committee issued the

1. Senate Select Committee on Presidential Campaign Activities v. Nixon, 370 F.Supp. 521 (D.D.C.1974).

2. Senate Resolution 60, 93rd Cong., 1st Sess. § 1(a) (1973).

subpoena that is the
appeal.[3]

This subpoena direc
to make available to
taped recordings of
that had occurred on
tween President Nixon
Dean, III, discussing
acts occurring in con
Presidential election
subpoena was duly se
dent, together with a
duces tecum, requiring
records that concerne
rectly, the "activities,
sponsibilities or invo
ty-five named person
criminal acts related
election of 1972."[5] B
returnable on July 26
July 25, 1973, address
vin as chairman of t
tee, the President d
with either subpoena,
fication the doctrine
lege. The Presiden
though he had direct
privilege not be invol
testimony by present
bers of [his] staff
criminal conduct,"
was being asserted w
uments and recordin
made public consiste
dentiality essential to
the Office of the Pres

The Committee, in
in the name of the
brought this action

3. Section 3(a)(5) of
supra, empowers the C
* * * to require
any department, ager
of the executive bra
Government * *
consideration or for
investigation and st
or materials relatin
ters or questions it
tigate and study
thers may have in
their control * * *

4. Joint Appendix at 2

subpoena that is the subject of this appeal.[3]

This subpoena directed the President to make available to the Committee taped recordings of five conversations that had occurred on specified dates "between President Nixon and John Wesley Dean, III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972."[4] The subpoena was duly served on the President, together with a second subpoena *duces tecum*, requiring production of all records that concerned, directly or indirectly, the "activities, participation, responsibilities or involvement" of twenty-five named persons "in any alleged criminal acts related to the Presidential election of 1972."[5] Both subpoenas were returnable on July 26. By letter dated July 25, 1973, addressed to Senator Ervin as chairman of the Select Committee, the President declined to comply with either subpoena, asserting in justification the doctrine of executive privilege. The President stated that, although he had directed "that executive privilege not be invoked with regard to testimony by present and former members of [his] staff concerning possible criminal conduct," executive privilege was being asserted with respect to "documents and recordings that cannot be made public consistent with the confidentiality essential to the functioning of the Office of the President."[6]

The Committee, in its own name and in the name of the United States, then brought this action to enforce the subpoenas. It alleged in its complaint that "the subpoenaed electronic tapes and other materials are vitally and immediately needed if the Select Committee's mandate and responsibilities . . . are to be fulfilled."[7] On August 29, the Committee filed a motion for summary judgment, seeking a declaration that the subpoenas were lawful and that the President's refusal to honor them, on the ground of executive privilege or otherwise, was illegal. On October 17, the District Court dismissed the Committee's action for want of statutory subject matter jurisdiction.[8] The Committee appealed to this Court.

While the appeal was pending, the Senate on November 2 passed a resolution stating that the Select Committee is authorized to subpoena and sue the President and that the Committee, in subpoenaing and suing the President, was acting with valid legislative purposes and seeking information vital to the fulfillment of its legitimate legislative functions.[9] The Select Committee asked this Court to hold its appeal in abeyance pending action on a bill, then before Congress, which conferred jurisdiction on the District Court for the District of Columbia in any civil action that the Committee theretofore or thereafter brought "to enforce or secure a declaration concerning the validity of any subpoena." This bill was enacted by Congress and the President having failed to exercise his veto, took effect on December 19, 1973.[10] On December 28, in light of this new jurisdictional stat-

3. Section 3(a)(5) of Senate Resolution 60, *supra*, empowers the Committee:
> * * * to require by subpoena * * * any department, agency, officer, or employee of the executive branch of the United States Government * * * to produce for its consideration or for use as evidence in its investigation and study any * * * tapes, or materials relating to any of the matters or questions it is authorized to investigate and study which they or any of them may have in their custody or under their control * * *.

4. Joint Appendix at 26–27.

5. Joint Appendix at 29–33.

6. Joint Appendix at 35.

7. Complaint of the Senate Select Committee on Presidential Campaign Activities, et al., at 8; Joint Appendix at 8.

8. Senate Select Comm. on Presidential Campaign Activities et al. v. Nixon, 366 F.Supp. 51 (D.D.C.1973).

9. Senate Resolution 194, 93rd Cong., 1st Sess. (1973).

10. Pub.L.No. 93–190 (Dec. 18, 1973) to be codified as 28 U.S.C. § 1364.

ute, we remanded the case to the District Court for further consideration.[11]

Following the remand, on January 25, 1974, the District Court issued an order quashing the Committee's subpoena concerning twenty-five individuals. The Court found the subpoena "too vague and conclusory to permit a meaningful response" and, referring to our intervening opinion in Nixon v. Sirica,[12] held the subpoena "wholly inappropriate given the stringent requirements applicable where a claim of executive privilege has been raised."[13] No appeal was taken from this order and the matter is not before us.

At the same time, the District Court issued two orders concerning the subpoena of the five identified tapes. In the first, the Court requested the Watergate Special Prosecutor to submit a "statement concerning the effect, if any, that compliance with [the subpoena] would, in his opinion, be likely to have upon pending criminal cases or imminent indictments under his supervision."[14] In the second order, finding the President's claim of executive privilege "too general and not sufficiently contemporaneous to enable the Court to determine the effect of that claim under the doctrine of Nixon v. Sirica," the Court requested the President to submit "a particularized statement addressed to specific portions of the subpoenaed tape recordings indicating whether he still wishes to invoke executive privilege as to these tapes and, with regard to those portions as to which the privilege is still asserted, if any, the factual ground or grounds for his determination that disclosure to the Select Committee would not be in the public interest."[15] The President responded to this order by letter dated February 6, 1974. Rather than setting forth the particularized claims and reasons for which the District Court had called, the President reasserted executive privilege generally as to all of the subpoenaed material, citing as the bases for his claim the need for confidentiality of conversations that take place in the performance of his constitutional duties, and the possibly prejudicial effects on Watergate criminal prosecutions should the contents of the subpoenaed conversations become public.[16] The latter concern was raised with reference to the President's constitutional duty to see that the laws are faithfully executed.

On February 8, the District Court entered the order at issue here. In the memorandum accompanying the order, the Court dealt first with the President's assertion that the matter before it constituted a non-justiciable political question. Finding the reasoning of this Court in Nixon v. Sirica, which concerned a grand jury subpoena, "equally applicable to the subpoena of a congressional committee," the District Court held that, under that case and the relevant Supreme Court precedents, the issues presented to it were justiciable.[17] The Court then turned, in the terms of Nixon v. Sirica, to a weighing of "the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance." The Court found, first, that the Select Committee had failed to demonstrate either "a pressing need for the subpoenaed tapes or that further public hearings before the Committee concerning the content of those tapes will at this time serve the public interest." At the same time, however, the Court rejected the President's claim of privilege insofar as it was premised on the public interest in confidentiality, because, in its view, "the President's un-

11. Order, No. 73-2086 (D.C.Cir., Dec. 28, 1973) (*en banc*).

12. 159 U.S.App.D.C. 58, 73-76, 487 F.2d 700, 716-718 (1973).

13. Order, C.A. 1593-73 (D.D.C. Jan. 25, 1974); Joint Appendix at 148.

14. Order, C.A. 1593-73 (D.D.C. Jan. 25, 1973); Joint Appendix at 144.

15. Order, C.A. 1593-73 (D.D.C. Jan. 25, 1974); Joint Appendix at 139-140.

16. Joint Appendix at 162-63.

17. 370 F.Supp. at 522.

willingness to submit th
Court's *in camera ex pa*
in any other fashion to
claim of executive privile
dicial recognition of th
confidentiality grounds.
then, in the discharge c
court of equity, undertoc
to weigh the public in
guarding pending crimi
from possibly prejudici
licity, against the Comn
need for the subpoenaed
particular circumstances
cluding the fact that th
ready been made availal
1972, grand jury of th
Court found it necessary
ity to the public interest
ty of the criminal proce
the Committee's need."
missed the Committee'
prejudice.

II.

The Select Committee
once having determined
dent's general confident
failed, the District Cou
thority to engage in a
terests, where the resu
judgment on the magnit
derlying the Committee's
thorize and issue a subp
tively, the Committee a
such balancing must fav
gently affected with the
the Committee's asserted
public interest in the
criminal process. We f
sary to reach either conte
the Committee's position
it correctly, that of the
accurately reflects the do
on v. Sirica, doctrines th
analogy, we think controll

In Nixon v. Sirica, we
ed with a challenge to a
District Court, entered

18. *Id.*

19. 487 F.2d at 704.

20. 487 F.2d at 708-716.

willingness to submit the tapes for the Court's *in camera ex parte* inspection or in any other fashion to particularize his claim of executive privilege precludes judicial recognition of that privilege on confidentiality grounds."[18] The Court then, in the discharge of its duty as a court of equity, undertook independently to weigh the public interest in safeguarding pending criminal prosecutions from possibly prejudicial pretrial publicity, against the Committee's asserted need for the subpoenaed tapes. In the particular circumstances of this case, including the fact that the tapes had already been made available to the June, 1972, grand jury of this district, the Court found it necessary to assign priority to the public interest in "the integrity of the criminal process, rather than the Committee's need." It therefore dismissed the Committee's suit without prejudice.

II.

The Select Committee contends that, once having determined that the President's general confidentiality privilege failed, the District Court had no authority to engage in a balancing of interests, where the result was to pass judgment on the magnitude of need underlying the Committee's decision to authorize and issue a subpoena. Alternatively, the Committee argues that any such balancing must favor, as more urgently affected with the public interest, the Committee's asserted need over the public interest in the fairness of the criminal process. We find it unnecessary to reach either contention. Neither the Committee's position nor, if we read it correctly, that of the District Court accurately reflects the doctrines of Nixon v. Sirica, doctrines that, at least by analogy, we think controlling here.

In Nixon v. Sirica, we were confronted with a challenge to an order of the District Court, entered as a means of enforcing a grand jury subpoena, requiring the President to produce the subpoenaed items to enable the Court to determine by *in camera* inspection whether the items were exempted from disclosure by evidentiary privilege.[19] In his challenge to this order, the President argued that the District Court had acted beyond its jurisdiction. He contended that he is absolutely immune in all cases from the compulsory process of the courts, and that whenever, in response to a grand jury subpoena, he interposes a formal claim of privilege, that claim without more disables the courts from inquiring by any means into whether the privilege is applicable. We rejected both contentions, holding, contrary to the President, that at least with respect to grand jury subpoenas, it is the responsibility of the courts to decide whether and to what extent executive privilege applies.[20] And we held further that, generally, "application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case."[21]

As in the present case, our attention in Nixon v. Sirica was directed solely to one species of executive privilege—that premised on "the great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties."[22] We recognized this great public interest, analogizing the privilege, on the basis of its purpose, "to that between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and their law clerks; and . . . to that contained in the fifth exemption to the Freedom of Information Act."[23] We recognized, moreover, that protection of the presidential decision-making process requires a promise that, as a general matter, its confidentiality would not be

18. *Id.*
19. 487 F.2d at 704.
20. 487 F.2d at 708–716.
21. 487 F.2d at 716.
22. 487 F.2d at 717.
23. *Id.*

invaded, even to the limited extent of a judicial weighing in every case of a claimed necessity for confidentiality against countervailing public interests of the moment.

[1] We concluded that presidential conversations are "presumptively privileged," even from the limited intrusion represented by *in camera* examination of the conversations by a court.[24] The presumption can be overcome only by an appropriate showing of public need by the party seeking access to the conversations. In Nixon v. Sirica, such a showing was made by the Special Prosecutor:

> [W]e think that this presumption of privilege premised on the public interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case. The function of the grand jury, mandated by the Fifth Amendment for the institution of federal criminal prosecutions for capital or other serious crimes, is not only to indict persons when there is probable cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist. As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function—evidence for which no effective substitute is available. The grand jury here is not engaged in a general fishing expedition, nor does it seek in any way to investigate the wisdom of the President's discharge of his discretionary duties. On the contrary, the grand jury seeks evidence that may well be conclusive to its decisions in on-going investigations that are entirely within the proper scope of its authority.[25]

We concluded that this strong showing of need was sufficient to overcome the general presumption of privilege premised on the public interest in the confidentiality of the presidential decision-making process. We held that it was within the power of the District Court "[to] order disclosure of all portions of the tapes relevant to matters within the proper scope of the grand jury's investigations, unless the Court judges that the public interest served by nondisclosure of *particular* statements or information outweighs the need for that information demonstrated by the grand jury."[26] It became, therefore, incumbent upon the President to make particularized showings in justification of his claims of privilege, and upon the District Court to follow procedures, including *in camera* inspection, requiring careful deliberation before even the demonstrated need of the grand jury might be satisfied.[27]

III.

The staged decisional structure established in Nixon v. Sirica was designed to ensure that the President and those upon whom he directly relies in the performance of his duties could continue to work under a general assurance that their deliberations would remain confidential. So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations—we believed in Nixon v. Sirica, and continue to believe, that the effective functioning of the presidential office will not be impaired.[28] Contrary, therefore, to the apparent understanding of the District Court,[29] we think that Nixon v. Sirica requires a showing of the order made by the grand jury before a generalized claim of confidentiality can be said to fail, and before the Presi-

24. 487 F.2d at 705, 717–718.

25. 487 F.2d at 717 (citations omitted).

26. 487 F.2d at 718.

27. 487 F.2d at 718–722.

28. 487 F.2d at 722.

29. *See* text and note at note 18, *supra*.

dent's obligation to respond
poena is carried forward in
tion to submit subpoenaed
the Court, together with p
claims that the Court will w
whatever public interest
might serve. The presump
any judicially compelled ir
presidential confidentiality
showing requisite to its
with at least equal force her

Particularly in light of
have occurred since this li
begun and, indeed, since
Court issued its decision,
the Select Committee has f
the requisite showing. In
low and in its initial br
Court, the Committee st
seeks the materials in ques
to resolve particular confli
luminous testimony it has
flicts relating to "the exte
sance in the executive b
most importantly, the pos
ment of the President hi
Committee has argued tha
ny before it makes out "
case that the President a
associates have been involv
conduct," that "the mat
bear on that involvemen
these facts alone must de
sumption of privilege that
wise prevail.[31]

[2] It is true, of cou
Executive cannot, any m
other branches of governi
general confidentiality
shield its officials and e
investigations by the prop
tal institutions into pos
wrongdoing.[32] The Con

30. Brief of the Senate Sele
al., at 27–28.

31. *E.g.*, Supplemental Mem
Senate Select Committee, e

32. Committee for Nuclear
Seaborg, 149 U.S.App.D.C.
786, 794 (1971). *See* G
States, 408 U.S. 606, 627,
L.Ed.2d 583 (1972).

dent's obligation to respond to the subpoena is carried forward into an obligation to submit subpoenaed materials to the Court, together with particularized claims that the Court will weigh against whatever public interests disclosure might serve. The presumption against any judicially compelled intrusion into presidential confidentiality, and the showing requisite to its defeat, hold with at least equal force here.

Particularly in light of events that have occurred since this litigation was begun and, indeed, since the District Court issued its decision, we find that the Select Committee has failed to make the requisite showing. In its papers below and in its initial briefs to this Court, the Committee stated that it seeks the materials in question in order to resolve particular conflicts in the voluminous testimony it has heard, conflicts relating to "the extent of malfeasance in the executive branch," and, most importantly, the possible involvement of the President himself.[30] The Committee has argued that the testimony before it makes out "a *prima facie* case that the President and his closest associates have been involved in criminal conduct," that "the materials sought bear on that involvement," and that these facts alone must defeat any presumption of privilege that might otherwise prevail.[31]

[2] It is true, of course, that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing.[32] The Congress learned this as to its own privileges in Gravel v. United States,[33] as did the judicial branch, in a sense, in Clark v. United States,[34] and the executive branch itself in Nixon v. Sirica. But under Nixon v. Sirica, the showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal,[35] but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment. Here also our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions.

[3] In its initial briefs here, the Committee argued that it has shown exactly this. It contended that resolution, on the basis of the subpoenaed tapes, of the conflicts in the testimony before it "would aid in a determination whether legislative involvement in political campaigns is necessary" and "could help engender the public support needed for basic reforms in our electoral system."[36] Moreover, Congress has, according to the Committee, power to oversee the operations of the executive branch, to investigate instances of possible corruption and malfeasance in office, and to expose the results of its investigations to public view. The Committee says that with respect to Watergate-related matters, this power has been delegated to it by the

30. Brief of the Senate Select Committee, et al., at 27–28.

31. *E.g.*, Supplemental Memorandum of the Senate Select Committee, et al., at 2.

32. Committee for Nuclear Responsibility v. Seaborg, 149 U.S.App.D.C. 385, 463 F.2d 788, 794 (1971). *See* Gravel v. United States, 408 U.S. 606, 627, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

33. 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

34. 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993 (1933).

35. 487 F.2d at 718.

36. Brief of Senate Select Committee, et al., at 27–28.

Senate, and that to exercise its power responsibly, it must have access to the subpoenaed tapes.[37]

We turn first to the latter contention. In the circumstances of this case, we need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the Committee's constituent resolution. Since passage of that resolution, the House Committee on the Judiciary has begun an inquiry into presidential impeachment. The investigative authority of the Judiciary Committee with respect to presidential conduct has an express constitutional source.[38] Moreover, so far as these subpoenaed tapes are concerned, the investigative objectives of the two committees substantially overlap: both are apparently seeking to determine, among other things, the extent, if any, of presidential involvement in the Watergate "break-in" and alleged "cover-up." And, in fact, the Judiciary Committee now has in its possession copies of each of the tapes subpoenaed by the Select Committee. Thus, the Select Committee's immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative. Against the claim of privilege, the only oversight interest that the Select Committee can currently assert is that of having these particular conversations scrutinized simultaneously by two committees. We have been shown no evidence indicating that Congress itself attaches any particular value to this interest. In these circumstances, we think the need for the tapes premised solely on an asserted power to investigate and inform cannot justify enforcement of the Committee's subpoena.

The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes. If, for example, as in Nixon v. Sirica, one of those crimes is perjury concerning the content of certain conversations, the grand jury's need for the most precise evidence, the exact text of oral statements recorded in their original form, is undeniable.[39] We see no comparable need in the legislative process, at least not in the circumstances of this case. Indeed, whatever force there might once have been in the Committee's argument that the subpoenaed materials are necessary to its legislative judgments has been substantially undermined by subsequent events.

By order of May 2, 1974, this Court took judicial notice of the President's public release of transcripts, with partial deletions, of each of the tapes at issue here. In light of the President's action we requested the Select Committee to file a supplemental memorandum stating whether the Committee "has a present sense of need for the materials subpoenaed" and, if so, in what specific respects the transcripts now available to the Committee, and to the public generally, are deficient in meeting that need. In its response to this order, the Committee states, first, that it needs access to the tapes in order to verify the accuracy of the public transcripts. In fact,

37. *E.g.*, Reply Brief of Senate Select Committee, et al., at 21–23.

38. U.S.Const., art. I, § 2, ¶5.

39. *See* 487 F.2d at 718.

however, the origina
five tapes subject t
subpoena have been
President to the Dis
ant to that Court's o
in the District (
Thus, as the Comm
knowledged at oral
poena now applies o
the tapes that remai
possession. This bei
Committee would e
measure, the same
tion with respect t
tapes as it claims
the transcripts.

The Committee al
portions of the con
deleted from the tr
tions that they con
lated to Watergat
Presidential action,
the tapes played
equipment, portions
designate as "inau
derstood. Finall
argues that inflect
that the tapes wo
pensable to a corre
conversations. T
however, shown n
materials deleted
may possibly have
vance to the subje
and to the areas in
legislation. It poi
islative decisions t
be made without
uniquely containe
out resolution of
the transcripts m
portantly, perhaps
guities relate to t
tions, there is
findings of the H
Judiciary and, ev
Representatives i
inconclusive or l
Select Committe
cess of its own.

40. *See* In re Gr
Tecum to Nixon
1973).

however, the originals of four of the five tapes subject to the Committee's subpoena have been transmitted by the President to the District Court, pursuant to that Court's order,[40] and are now in the District Court's possession. Thus, as the Committee's counsel acknowledged at oral argument, the subpoena now applies only to the copies of the tapes that remain in the President's possession. This being so, however, the Committee would encounter, in some measure, the same problem of verification with respect to four of the five tapes as it claims now to confront in the transcripts.

The Committee also says that certain portions of the conversations have been deleted from the transcripts, with notations that they contain material "unrelated to Watergate" or "unrelated to Presidential action," [41] and that, were the tapes played on highly sensitive equipment, portions that the transcripts designate as "inaudible" might be understood. Finally, the Committee argues that inflection and tone of voice that the tapes would supply are indispensable to a correct construction of the conversations. The Committee has, however, shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain. More importantly, perhaps, insofar as such ambiguities relate to the President's own actions, there is no indication that the findings of the House Committee on the Judiciary and, eventually, the House of Representatives itself, are so likely to be inconclusive or long in coming that the Select Committee needs immediate access of its own.

40. *See* In re Grand Jury Subpoena Duces Tecum to Nixon, 360 F.Supp. 1 (D.D.C. 1973).

IV.

In approaching our judicial function, we have no doubt that the Committee has performed and will continue to perform its duties fully in the service of the nation. We must, however, consider the nature of its need when we are called upon, in the first such case in our history, to exercise the equity power of a court at the request of a congressional committee, in the form of a judgment that the President must disclose to the Committee records of conversations between himself and his principal aides. We conclude that the need demonstrated by the Select Committee in the peculiar circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena. We therefore affirm the order dismissing the Committee's action without prejudice, although on grounds that differ from those announced by the District Court.

Affirmed.

MacKINNON, Circuit Judge (concurring):

I concur in the result reached by the foregoing opinion but have some additional comments.

As I argued in dissent in Nixon v. Sirica, 159 U.S.App.D.C. 58, 87–120, 487 F.2d 700, 729–762 (1973), the President, as distinct from the executive establishment generally, possesses a constitutionally founded privilege enabling him to protect the confidentiality of conferences with his advisors. Recognition of that presidential privilege would dispose of the demands made by the instant subpoena, but failing majority consensus on this point I concur generally in the reasoning of the foregoing opinion as embracing an accurate analysis and sound

41. Supplemental Memorandum of the Senate Select Committee in Response to this Court's Order of May 2, 1974, at 3.

application of the principles established in Nixon v. Sirica. This position evidences no retreat from my previously expressed views on the force, validity and importance of congressional subpoenas, *id.* at 95–96, 487 F.2d at 737–738, nor does it reflect a comparatively higher esteem for judicial subpoenas. Rather, my concurrence today is premised on the basic proposition that enforcement of any subpoena, whether congressional or judicial, depends in the first instance upon an assessment of the immediate purpose, object and need which prompted its issuance. Thus, even though recognizing that the legislative function is no less important than the prosecutorial, I agree that the Senate Committee has failed to demonstrate a present need of sufficient urgency to overcome even the qualified presidential privilege recognized by the majority in Nixon v. Sirica. Additionally, while I would not characterize the Senate Committee's need as "merely cumulative," it bears particular emphasis that legislation involves a cooperative effort of both the House and the Senate, that the House Committee on the Judiciary already possesses the recordings sought here, and that these materials more than likely eventually will be released to the public.

WILKEY, Circuit Judge (concurring):

On my own analysis our logical first conclusion should be that the constitutional principle of separation of powers makes the issue here a political question and therefore not justiciable (Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1968), and Nixon v. Sirica, 159 U.S.App.D.C. 120–157, 487 F.2d 700, 762–799 (1973) (Wilkey, J., dissenting)); however, I agree that, taking the majority opinion in Nixon v. Sirica as still prevailing, Chief Judge Bazelon's opinion is likewise a sound basis for the action we take, and I therefore join therein without further reservation.

CAPITAL TELEPHONE COMPANY, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee,

Boris and Annette F. Squire, d/b/a Air Page, Intervenor.

No. 72-1715.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 30, 1973.

Decided May 24, 1974.

The Federal Communications Commission denied corporate applicant's application for authority to construct and operate a one-way radio-paging station and the corporate applicant appealed. The Court of Appeals, MacKinnon, Circuit Judge, held that the Federal Communications Commission validly exercised its discretion in piercing the corporate veil of corporation applicant for high-band radio-paging channel, in treating the corporate applicant and its individual owner as one applicant, and in only granting the individual applicant's application.

Affirmed.

1. Corporations ⇐1.6(1)

The Federal Communications Commission validly exercised its discretion in piercing the corporate veil of corporation applicant for high-band radio-paging channel, in treating the corporate applicant and its individual owner as one applicant, and in only granting the individual applicant's application. Communications Act of 1934, § 1 et seq., 47 U.S.C.A. § 151 et seq.

2. Telecommunications ⇐333

By directing the Federal Communications Commission to provide fair and equitable distribution of radio service, the Communications Act protects both the general public and other broadcasters. Communications Act of 1934, § 1 et seq., 47 U.S.C.A. § 151 et seq.

3. Telecommunica

When one ap
two available fr
qualified applica
eral Communica
grant one freque
matter of sound
tions Act of 1934
§ 307(b).

4. Corporations ⇐

A corporate
garded in the in
ience, fairness ar

5. Corporations ⇐

Substantial
applicant was wh
vidual who was
manager of the c
same individual
from the same
that was substa
corporation's sup
eral Communic
pierce the corpor
order to carry o
munications Act
cient and equital
service in alloca
channels for pag
cations Act of 1
A. § 307(b).

6. Telecommunic

Where Fe
Commission no
transmitter bel
plicant would e
tions market co
and noted that
did not receive
transmitter, ap
authority to ad
to reach any def
al applicant w
area wide servi
mission denied
tion wholly own
plicant for allo
for radio-pagin
tions Act of 19
A. § 151 et seq.

UNITED STATES, Petitioner,

v.

Richard M. NIXON, President of the United States, et al.

Richard M. NIXON, President of the United States, Petitioner,

v.

UNITED STATES.

Nos. 73-1766, 73-1834.

Argued July 8, 1974.

Decided July 24, 1974.

Prosecution of former government officials and presidential campaign officials for conspiracy to defraud United States and to obstruct justice, and for other offenses, wherein special prosecutor caused third-party subpoena duces tecum to be issued directing the President to produce tape recordings and documents relating to conversations with aides and advisors. The United States District Court for the District of Columbia, denied the President's motion to quash subpoena, ——F.Supp. ——, and an appeal was taken. Certiorari before judgment was granted to bring matter before Supreme Court before disposition by Court of Appeals. The Supreme Court, Mr. Chief Justice Burger, held that dispute was justiciable; that District Court was not shown to have erred in determining that special prosecutor's showing of relevancy, admissibility, and specificity was sufficient to warrant issuance of order; and that President's generalized interest in confidentiality, unsupported by claim of need to protect military, diplomatic, or sensitive national security secrets, could not prevail against special prosecutor's demonstrated, specific need for the tape recordings and documents.

Affirmed.

Mr. Justice Rehnquist did not participate.

1. Courts ⇐385(1½)

Supreme Court granted special prosecutor's petition and President's responsive cross petition for certiorari before judgment with respect to President's appeal to Court of Appeals from district court's orders denying motion to quash subpoena directing President to produce certain tape recordings and documents relating to conversations with aides and advisors for use in pending criminal prosecution, and denying motion to expunge action of federal grand jury naming President as unindicted coconspirator, because of public importance of issues presented and need for their prompt resolution. 28 U.S.C.A. §§ 1254(1), 2101(E), Supreme Court Rules, rule 20.

2. Criminal Law ⇐1131(2)

Resolution of whether federal grand jury acted within its authority in naming President as unindicted coconspirator, raised by President's cross petition for certiorari before judgment, was unnecessary to resolution of question presented by special prosecutor's petition for certiorari before judgment with respect to whether President's claim of absolute executive privilege as to tape recordings and documents relating to his conversations with aides and advisors subpoenaed by special prosecutor for pending prosecution was to prevail; accordingly, cross petition for certiorari before judgment was dismissed as improvidently granted.

3. Courts ⇐405(12.1)

Finality requirement of statute relating to appeals to Courts of Appeals from final decisions of district courts embodies strong congressional policy against piecemeal reviews, and against obstructing or impeding ongoing judicial proceeding by interlocutory appeal. 28 U.S.C.A. § 1291.

4. Courts ⇐405(12.1)

Finality requirement of statute relating to appeals to Courts of Appeals from final decisions of district courts ordinarily promotes judicial efficiency and hastens ultimate terminatio gation. 28 U.S.C.A. § 1291.

5. Criminal Law ⇐1023(2)

Order of district court r President to produce, for in inspection, tape recordings ar ments relating to conversati aides and advisors subpoenaed b prosecutor for use in pending prosecution was final and ap even though orders requiring pr are not ordinarily appealable. C.A. § 1291.

6. Courts ⇐385(1½)

Where district court order requisite finality for appeal to Appeals, and appeal was timely other procedural requirements w appeal was properly "in" Cour peals at time of filing of peti certiorari before judgment, and Court thus had jurisdiction upon granting of petition. 28 § 1254(1).

7. Constitutional Law ⇐76

Executive Branch has exclu thority and absolute discretion whether to prosecute case.

8. Courts ⇐281

Mere assertion of claim o branch dispute" does not opera feat jurisdiction; justiciability depend on such a surface inquiry

9. Courts ⇐300

Courts must look behind na symbolize parties to determine justiciable case or contro presented.

10. Criminal Law ⇐639(2)

So long as Attorney Genera lation vesting authority in speci cutor was extant, it had force Executive Branch was bound b United States as sovereign com three branches was bound to res enforce it.

11. Courts ⇐300

In constitutional sense, "c s means more than disagreen

and hastens ultimate termination of litigation. 28 U.S.C.A. § 1291.

5. Criminal Law ⇐1023(2)

Order of district court requiring President to produce, for in camera inspection, tape recordings and documents relating to conversation with aides and advisors subpoenaed by special prosecutor for use in pending criminal prosecution was final and appealable, even though orders requiring production are not ordinarily appealable. 28 U.S.C.A. § 1291.

6. Courts ⇐385(1½)

Where district court order possessed requisite finality for appeal to Court of Appeals, and appeal was timely filed and other procedural requirements were met, appeal was properly "in" Court of Appeals at time of filing of petition for certiorari before judgment, and Supreme Court thus had jurisdiction of cause upon granting of petition. 28 U.S.C.A. § 1254(1).

7. Constitutional Law ⇐76

Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute case.

8. Courts ⇐281

Mere assertion of claim of "intra-branch dispute" does not operate to defeat jurisdiction; justiciability does not depend on such a surface inquiry.

9. Courts ⇐300

Courts must look behind names that symbolize parties to determine whether justiciable case or controversy is presented.

10. Criminal Law ⇐639(2)

So long as Attorney General's regulation vesting authority in special prosecutor was extant, it had force of law, Executive Branch was bound by it, and United States as sovereign composed of three branches was bound to respect and enforce it.

11. Courts ⇐300

In constitutional sense, "controversy" means more than disagreement and conflict; rather it means kind of controversy courts traditionally resolve.

See publication Words and Phrases for other judicial constructions and definitions.

12. Criminal Law ⇐627.8(6)

Special prosecutor had standing to seek judicial enforcement of subpoena requiring President to produce tape recordings and documents relating to conversations with aides and advisors for use in pending criminal prosecution.

13. Constitutional Law ⇐72
Courts ⇐281

Dispute between special prosecutor and President with respect to production of tape recordings and documents relating to President's conversations with aides and advisors, for use in pending criminal prosecution, was justiciable, even though both parties were officers of Executive Branch. U.S.C.A.Const. art. 3.

14. Criminal Law ⇐627.6(2)

Subpoena for documents may be quashed in criminal case if their production would be unreasonable or oppressive, but not otherwise. Fed.Rules Crim.Proc. rule 17(c), 18 U.S.C.A.

15. Criminal Law ⇐627.5(4)

Subpoena duces tecum in criminal case is not intended to provide means of discovery. Fed.Rules Crim.Proc. rule 17(c), 18 U.S.C.A.

16. Criminal Law ⇐627.5(4)

Subpoena duces tecum in criminal case is intended to expedite trial by providing time and place before trial for inspection of subpoenaed materials.

17. Criminal Law ⇐627.8(3)

In order to require production of documents prior to criminal trial, party moving for subpoena duces tecum must show that documents are evidentiary and relevant, that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence, that party cannot properly prepare for trial without such production and inspection in advance of trial, that failure to obtain

such inspection may tend unreasonably to delay trial, and that application is made in good faith and is not intended as general "fishing expedition." Fed. Rules Crim.Proc. rule 17(c), 18 U.S.C.A.

18. Criminal Law ⇐627.5(4), 627.6(2), 627.8(4)

Where tape recordings and documents relating to President's conversations with aides and advisors were unavailable except from President, there was likelihood that each tape contained conversations relevant to offenses charged, there were valid potential evidentiary uses for material in addition to possible impeachment of witnesses in pending criminal prosecution, and possible transcription of tapes might take significant period of time, district court properly authorized issuance of subpoena duces tecum to compel production, subject to in camera inspection, for use by special prosecutor in pending criminal prosecution of former government officials and presidential campaign officials for conspiracy to defraud United States and to obstruct justice, and for other offenses. Fed.Rules Crim.Proc. rule 17(c), 18 U.S.C.A.

19. Criminal Law ⇐412(1)

Hearsay rule does not automatically bar all out-of-court statements by defendant in criminal case.

20. Criminal Law ⇐412(1)

Out-of-court statements by defendant are declarations that surmount objections based on hearsay rule, and at least as to declarant are admissible for whatever inferences might be reasonably drawn.

21. Criminal Law ⇐423(1), 427(2)

Declarations by one defendant may be admissible against other defendants upon sufficient showing, by independent evidence, of conspiracy among one or more other defendants and declarant and that declarations at issue were in furtherance of that conspiracy.

22. Criminal Law ⇐427(5)

Under coconspirator exception to hearsay rule, there must as preliminary matter be substantial independent evidence of conspiracy, at least enough to take question to jury.

23. Criminal Law ⇐736(1)

Whether there is substantial independent evidence of conspiracy necessary to reception of testimony under coconspirator exception to hearsay rule is question of admissibility of evidence to be decided by trial judge.

24. Criminal Law ⇐423(4), 427(2)

Declarations of unindicted coconspirators may be admissible against named defendants upon sufficient showing, by independent evidence, of conspiracy among one or more defendants and declarant, and that declarations at issue were in furtherance of that conspiracy.

25. Witnesses ⇐331½

Recorded conversations may be admissible for limited purpose of impeaching credibility of any defendant who testifies or any other coconspirator who testifies.

26. Criminal Law ⇐627.7(4)

Generally, need for evidence to impeach witnesses is insufficient to require its production in advance of trial.

27. Criminal Law ⇐627.5(2)

Enforcement of pretrial subpoena duces tecum must necessarily be committed to sound discretion of trial court in criminal case, since necessity for subpoena most often turns upon determination of factual issues.

28. Criminal Law ⇐1158(2)

Without determination of arbitrariness or that trial court finding was without record support, appellate court will not ordinarily disturb finding that applicant for subpoena duces tecum complied with federal criminal rule. Fed. Rules Crim.Proc. rule 17(c), 18 U.S.C.A.

29. Criminal Law ⇐1134(1)

Where subpoena duces tecum is directed to President in criminal case, appellate review should be particularly meticulous to insure that standards of federal criminal rule have been correctly applied, in deference to coordinate

branch of gove
Crim.Proc. rule 17(

30. Constitutional L

In performanc
tutional duties, ea
ment must initiall
tion, and interpret
any branch is du
others.

31. Constitutional L

It is emphatic
duty of the Judici
what the law is.

32. Constitutional L

Supreme Cour
terpret claims of o
spect to powers a
enumerated powers

33. Constitutional L

Notwithstandi
branch must accor
er can no more be
Branch than Pres
judiciary veto pow
with judiciary pov
dential veto.

34. Constitutional L

Judicial powe
extended to Presid
privilege with resp
and documents rel
with aides and ad
special prosecutor
criminal prosecutic

35. Constitutional L

Silence of Con
to executive privil
communications wi
was not determina
of privilege had co

36. Constitutional L

Neither doctr
powers nor need
high level commur
more, sustain absol

branch of government. Fed.Rules Crim.Proc. rule 17(c), 18 U.S.C.A.

30. Constitutional Law ⇐50

In performance of assigned constitutional duties, each branch of government must initially interpret Constitution, and interpretation of its powers by any branch is due great respect from others.

31. Constitutional Law ⇐67

It is emphatically the province and duty of the Judicial Department to say what the law is.

32. Constitutional Law ⇐67

Supreme Court has authority to interpret claims of other branches with respect to powers alleged to derive from enumerated powers.

33. Constitutional Law ⇐72

Notwithstanding deference each branch must accord others, judicial power can no more be shared with Executive Branch than President can share with judiciary veto power or Congress share with judiciary power to override presidential veto.

34. Constitutional Law ⇐72

Judicial power under Constitution extended to President's claim of absolute privilege with respect to tape recordings and documents relating to conversation with aides and advisors, subpoenaed by special prosecutor for use in pending criminal prosecutions.

35. Constitutional Law ⇐72

Silence of Constitution with respect to executive privilege as to President's communications with aides and advisors was not determinative of whether claim of privilege had constitutional basis.

36. Constitutional Law ⇐72

Neither doctrine of separation of powers nor need for confidentiality of high level communications can, without more, sustain absolute unqualified presidential privilege of immunity from judicial process under all circumstances.

37. Constitutional Law ⇐72

Legitimate needs of judicial process may outweigh presidential privilege.

38. Constitutional Law ⇐72

Right and duty of judiciary to determine whether legitimate needs of judicial process outweigh presidential privilege does not free judiciary from according high respect to representations made on behalf of President.

39. Constitutional Law ⇐76

Presidential communications are presumptively privileged, and such privilege is fundamental to operation of government and inextricably rooted in separation of powers under Constitution.

40. Criminal Law ⇐627.5(1)

Need to develop all relevant facts in adversary system of criminal justice is fundamental and comprehensive; ends of criminal justice would be defeated if judgments were to be founded on partial or speculative presentation of facts.

41. Criminal Law ⇐627.5(1)

Integrity of criminal justice system and public confidence in system depends on full disclosure of all facts within framework of rules of evidence.

42. Criminal Law ⇐627.5(1, 3)

To insure that justice is done, it is imperative to function of court that compulsory process be available for production of evidence needed either by prosecution or by defense.

43. Criminal Law ⇐627.5(6)

Privileges against forced disclosure are exceptions to demand for every man's evidence and are not lightly created nor expansively construed, since they are in derogation of search for truth.

44. Constitutional Law ⇐76
United States ⇐26

To extent that President's interest in confidentiality of communications with aides and advisors relates to effective discharge of President's powers it is constitutionally based.

45. Constitutional Law ⇐266(1)
Criminal Law ⇐662(1)

Right of defendant to production of all evidence at criminal trial has constitutional dimensions. U.S.C.A.Const. Amends. 5, 6.

46. Constitutional Law ⇐266(1)
Criminal Law ⇐662(1)
Witnesses ⇐2(2)

It is manifest duty of courts to vindicate guarantees of confrontation, compulsory process, and due process clauses, and to accomplish that it is essential that all relevant and admissible evidence be produced. U.S.C.A.Const. Amends. 5, 6.

47. Constitutional Law ⇐268(1, 5)

When ground for asserting executive privilege as to subpoenaed materials sought for use in criminal trial is based only on generalized interest in confidentiality, it cannot prevail over fundamental demands of due process of law in fair administration of criminal justice.

48. Criminal Law ⇐627.5(6)

President's generalized interest in confidentiality, unsupported by claim of need to protect military, diplomatic, or sensitive national security secrets, could not prevail against special prosecutor's demonstrated, specific need for tape recordings and documents relating to conversations with presidential aides and advisors subpoenaed for use in pending criminal prosecution of former government officials and presidential campaign officials for conspiracy to defraud United States and to obstruct justice, and for other offenses.

49. Criminal Law ⇐627.5(6), 627.8(1)

If President to whom subpoena duces tecum is directed concludes that compliance would be injurious to public interest, he may properly invoke claim of privilege on return of subpoena.

50. Criminal Law ⇐627.8(1)

Upon invocation of claim of privilege by President to whom subpoena duces tecum had been directed, it was duty of district court to treat subpoenaed material as presumptively privileged and to require special prosecutor to demonstrate that presidential material was essential to justice of pending criminal case.

51. Criminal Law ⇐627.8(4)

District court, upon determining that sufficient showing had been made to rebut presumption of executive privilege with respect to presidential tape recordings and documents subpoenaed by special prosecutor, properly ordered in camera examination of subpoenaed material.

52. Criminal Law ⇐627.8(4)

Upon district court's in camera inspection of presidential tape recordings and documents, subpoenaed by special prosecutor for use in pending criminal prosecution, statements meeting test of admissibility and relevance were to be isolated and all other materials excised, but district court was not limited to representations of special prosecutor as to evidence sought by subpoena.

53. Criminal Law ⇐627.8(4)

In camera inspection of evidence is procedure calling for scrupulous protection against any release or publication of material not found by court probably admissible in evidence and relevant to issues of trial for which it is sought.

54. United States ⇐26

It is necessary in public interest to afford presidential confidentiality greatest protection consistent with fair administration of justice.

55. Criminal Law ⇐627.8(4)

District court, upon determining that presidential tape recordings and documents or portions thereof should not be released to special prosecutor under subpoena duces tecum for use in pending criminal prosecution was to return material under seal to its lawful custodian.

56. Criminal Law ⇐1192

Where matter came before Supreme Court during pendency of criminal prosecution and it was represented that time was of the essence, it was appropriate that Supreme Court's mandate issue forthwith.

Syllabus

Following indictmen
tion of federal statutes
members of the White H
cal supporters of the Pr
cial Prosecutor filed a
Fed.Rule Crim.Proc. 17(
na *duces tecum* for the
fore trial of certain tape
relating to precisely ide
tions and meetings bet
dent and others. The
ing executive privilege,
quash the subpoena.
Court, after treating
material as presumpti
concluded that the Sp
had made a sufficient s
the presumption and t
ments of Rule 17(c) ha
The court thereafter iss
an *in camera* examinati
naed material, having re
dent's contentions (a)
between him and the Sp
was nonjusticiable as
tive" conflict and (b) t
lacked authority to re
dent's assertion of exe
The court stayed its or
pellate review, which th
sought in the Court o
Special Prosecutor the
Court a petition for a
before judgment (No.
President filed a cross-
a writ challenging the
(No. 73–1834) The Co
writs. *Held*:

1. The District C
appealable as a "final"
S.C. § 1291, was theref
the Court of Appeals v
for certiorari before ju
in this Court, and is
fore this Court for re
such an order is norma
subject to appeal, an e
in a "limited class of c

* The syllabus constitute
opinion of the Court bu
by the Reporter of Deci

Syllabus *

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

1. The District Courts order was appealable as a "final" order under 28 U.S.C. § 1291, was therefore properly "in" the Court of Appeals when the petition for certiorari before judgment was filed in this Court, and is now properly before this Court for review. Although such an order is normally not final and subject to appeal, an exception is made in a "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." United States v. Ryan, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85. 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. 3098–3099.

2. The dispute between the Special Prosecutor and the President presents a justiciable controversy. Pp. 3099–3102.

(a) The mere assertion of an "intrabranch dispute," without more, does not defeat federal jurisdiction. United States v. ICC, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451. P. 3100.

(b) The Attorney General by regulation has conferred upon the Special Prosecutor unique tenure and authority to represent the United States and has given the Special Prosecutor explicit power to contest the invocation of executive privilege in seeking evidence deemed relevant to the performance of his specially delegated duties. While the regulation remains in effect, the Executive Branch is bound by it. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681. Pp. 3100–3102.

(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*, 337 U.S., at 430, 69 S.Ct., at 1413, and the fact that both litigants are officers of the Executive Branch is not a bar to justiciability. P. 3102.

* 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 Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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. 3102–3105.

4. Neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute unqualified presidential privilege of immunity from judicial process under all circumstances. See, *e. g.*, Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60; Baker v. Carr, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663. 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. 3105–3107.

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. pp. 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. 3107–3110.

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. P. 3110.

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. 3110–3111.

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

Leon Jaworski and Philip A. Lacovara, Washington, D. C., for United States.

James D. St. Clair, Washington, D.C., for the President.

Mr. Chief Justice BURGER delivered the opinion of the Court.

[1, 2] 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 P
the Court of Appea
United States' petiti
fore judgment,[1] and
responsive cross-pet
before judgment,[2] b
importance of the i
the need for their p
U.S. ——, ——, 94 S
Ed.2d —— (1974).

On March 1, 1974
United States Dist
District of Columbi
ment charging sever
with various offense
acy to defraud the
obstruct justice. A
designated as such i
grand jury named t
others, as an unind
On April 18, 1974,
Special Prosecutor,
poena *duces tecum*

1. See 28 U.S.C. §§ 1
our Rule 20. See, e.
Tube Co. v. Sawyer,
72 S.Ct. 775, 863, 86
(1952); United State
ers, 329 U.S. 708,
373, 485, 91 L.Ed. 6
U.S. 258, 269, 67 S.
884 (1947); Carter
U.S. 238, 56 S.Ct.
(1936); Rickert Ric
U.S. 110, 56 S.Ct. 37
Railroad Retirement
295 U.S. 330, 344, 5
Ed. 1468 (1935); U
Trust Co., 294 U.S.
408, 79 L.Ed. 885 (19

2. The cross-petition
the issue whether the
in its authority in na
coconspirator. Since
this issue unnecessa
question whether th
to prevail, the cross-
dismissed as improvi
remainder of this op
the issues raised in
19, 1974, the Presid
disclosure and transi
all evidence presente
lating to its action i
as an unindicted co
this motion was defe
ment of the case and i

Rule 17(c). The President appealed to the Court of Appeals. We granted the United States' petition for certiorari before judgment,[1] and also the President's responsive cross-petition for certiorari before judgment,[2] because of the public importance of the issues presented and the need for their prompt resolution —— U.S. ——, ——, 94 S.Ct. ——, ——, 40 L.Ed.2d —— (1974).

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals[3] with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator.[4] On April 18, 1974, upon motion of the 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.[5] The Special Prosecutor was able to fix the time, place and persons present at these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel, filed a "special appearance" and a motion to quash the subpoena, under Rule 17(c). This motion was accompanied by a formal claim of privilege. At a subsequent

1. See 28 U.S.C. §§ 1254(1) and 2101(e) and our Rule 20. See, *e. g.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 937, 579, 584, 72 S.Ct. 775, 863, 865, 96 L.Ed. 1345, 1153 (1952); United States v. United Mine Workers, 329 U.S. 708, 709, 710, 67 S.Ct. 359, 373, 485, 91 L.Ed. 616, 617, 618 (1946), 330 U.S. 258, 269, 67 S.Ct. 677, 684, 91 L.Ed. 884 (1947); Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936); Rickert Rice Mills v. Fontenot, 297 U.S. 110, 56 S.Ct. 374, 80 L.Ed. 513 (1936); Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 344, 55 S.Ct. 758, 760, 79 L.Ed. 1468 (1935); United States v. Bankers Trust Co., 294 U.S. 240, 243, 55 S.Ct. 407, 408, 79 L.Ed. 885 (1935).

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

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

4. The President entered a special appearance in the District Court on June 6 and requested that court to lift its protective order regarding the naming of certain individuals as coconspirators and to any additional extent deemed appropriate by the Court. This motion of the President was based on the ground that the disclosures to the news media made the reasons for continuance of the protective order no longer meaningful. On June 7, the District Court removed its protective order and, on June 10, counsel for both parties jointly moved this Court to unseal those parts of the record which related to the action of the grand jury regarding the President. After receiving a statement in opposition from the defendants, this Court denied 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. ——, 94 S.Ct. ——, 40 L.Ed.2d —— (1974).

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

hearing,[6] further motions to expunge the grand jury's action naming the President as an unindicted coconspirator and for protective orders against the disclosure of that information were filed or raised orally by counsel for the President.

On May 20, 1974, the District Court denied the motion to quash and the motions to expunge and for protective orders. —— F.Supp. —— (1974). It further ordered "the President or any subordinate officer, official, or employee with custody or control of the documents or objects subpoenaed," *id.*, at —— to deliver to the District Court, on or before May 31, 1974, the originals of all subpoenaed items, as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. The District Court rejected jurisdictional challenges based on a contention that the dispute was nonjusticiable because it was between the Special Prosecutor and the Chief Executive and hence "intra-executive" in character; it also rejected the contention that the judiciary was without authority to review an assertion of executive privilege by the President. The court's rejection of the first challenge was based on the authority and powers vested in the Special Prosecutor by the regulation promulgated by the Attorney General; the court concluded that a justiciable controversy was presented. The second challenge was held to be foreclosed by the decision in Nixon v. Sirica, 159 U.S.App.D.C. 58, 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. ——, 94 S.Ct. 2637, 40 L.Ed.2d —— (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. ——, 94 S.Ct. ——, 40 L.Ed.2d —— (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

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

for consideration if t
order was final. 28
28 U.S.C. § 2101(e).

[3, 4] The finality
U.S.C. § 1291 embod
gressional policy aga
views, and against obs
ing an ongoing judic
interlocutory appeals.
dick v. United Stat
324–326, 60 S.Ct. 540,
783 (1940). This req
ly promotes judicial e
tens the ultimate ter
tion. In applying th
order denying a motio
quiring the productio
suant to a subpoena d
been repeatedly held
not final and henc
United States v. Ry
532, 91 S.Ct. 1580, 15
(1971); Cobbledick
309 U.S. 323, 60 S.Ct.
(1940); Alexander v.
U.S. 117, 26 S.Ct. 3
(1906). This Court h

"consistently held
for expedition in t
of the criminal law
one who seeks to re
of desired informat
tween compliance w
order to produce pr
of that order, and
order with the conc
of an adjudication
claims are rejected
ed States v. Ryan,
91 S.Ct. 1580, 158
(1971).

The requirement of
tempt, however, is not
and in some instances
derlying the finality
ferent result. For ex
v. United States, 247
417, 62 L.Ed. 950 (

7. The parties have sug
jurisdiction on other g
our conclusion that the
der 28 U.S.C. § 1254(1

for consideration if the District Court order was final. 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(e).

[3, 4] The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. See, *e. g.*, Cobbledick v. United States, 309 U.S. 323, 324–326, 60 S.Ct. 540, 541–542, 84 L.Ed. 783 (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, 91 S.Ct. 1580, 1581, 29 L.Ed.2d 85 (1971); Cobbledick v. United States, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940); Alexander v. United States, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (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, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (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, 38 S.Ct. 417, 62 L.Ed. 950 (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, 38 S.Ct. at 419–420. 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*, 402 U.S., at 533, 91 S.Ct., at 1582.

[5, 6] 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, 54 S.Ct. 608, 610, 78 L.Ed. 1099 (1934).[7]

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.

II

JUSTICIABILITY

[7] 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. 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, 19 L.Ed. 196 (1869), United States v. Cox, 342 F.2d 167, 171 (CA5), cert. denied, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (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, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), since it involves a "textually demonstrable" grant of power under Art. II.

[8, 9] 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, 69 S.Ct. 1410, 93 L.Ed. 1451 (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, 69 S.Ct., at 1413. See also: Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); ICC v. Jersey City, 322 U.S. 503, 64 S.Ct. 1129, 88 L.Ed. 1420 (1944); United States ex rel. Chapman v. FPC, 345 U.S. 153, 73 S.Ct. 609, 97 L.Ed. 918 (1953); Secretary of Agriculture v. United States, 347 U.S. 645, 74 S.Ct. 826, 98 L.Ed. 1015 (1954); FMB v. Isbrandsten Co., 356 U.S. 481, 482 n. 2, 78 S.Ct. 851, 853, 2 L.Ed.2d 926 (1958); United States v. Marine Bancorporation Corp., — U.S. —, 94 S.Ct. 2856, 40 L.Ed.2d — (1974), and United States v. Connecticut National Bank, — U.S. —, 94 S.Ct. 2788, 40 L.Ed.2d — (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. Verger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (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 Spe-

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 investiga-

cial 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.[9] 38 Fed.Reg. 30739.

[10] So long as this regulation is extant it has the force of law. In Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (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, 77 S.Ct. 1152, 1165, 1 L.Ed.2d 1403 (1957), and Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (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

tions 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 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 regulation 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).

10. At his confirmation hearings Attorney General William Saxbe testified that he agreed with the regulation 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.

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*.

[11] 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, 69 S.Ct., at 1413. 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, 82 S.Ct., at 703. 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, 82 S.Ct. 691.

[12, 13] 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, 58 S.Ct. 770, 771, 82 L.Ed. 1149 (1938); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346–347, 56 S.Ct. 466, 482–483, 80 L.Ed. 688 (1936). (Brandeis, J., concurring.)

[14–17] 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 parties and thei

A subpoena for quashed if their "unreasonable or otherwise. The Court interpreting man Dairy Co. v. S. 214, 71 S.Ct. (1950). This ca fundamental char poena *duces tecu* (1) it was not i means of discover *Id.*, at 220, 71 S.(innovation was to providing a time for the inspection rials.[11] *Ibid.* As cases decided in t have generally follc formulation in Uni F.R.D. 335, 338 (S required showing. order to require pr the moving party the documents are evant; (2) that th procurable reasonal by exercise of due the party cannot trial without su inspection in adva the failure to ob may tend unreasc trial; (4) that the

11. The Court quoted ber of the advisory pose of the Rule into court "in advan are offered in evide then be inspected in pose . . . of en whether he can use wants to use [them] 5, 71 S.Ct. at 678. plex and Multi-distr by the Administrativ States Courts recom be encouraged in cor order that each part produce its document vance of trial and in is to be offered. P. 14

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, 71 S.Ct. 675, 95 L.Ed. 879 (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, 71 S.Ct. 675; (2) its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of subpoenaed materials.[11] *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 diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; (4) that the application is made in good faith and is not intended as a general "fishing expedition."

[18] 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.

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, 71 S.Ct. at 678. 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.

[19–26] 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 declarants 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, 91 S.Ct. 210, 215, 27 L.Ed.2d 213 (1970). Recorded conversations may also be admissible for the limited purpose of impeaching the credibility of any defendant who testifies or any other coconspirator who testifies. Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial. See, *e. g.*, United States v. Carter, 15 F.R.D. 367, 371 (D.D.C.1954). Here, however, there are other valid potential evidentiary uses for the same material and the analysis and possible transcription of the tapes may take a significant period of time. Accordingly, we cannot say that the District Court erred in authorizing the issuance of the subpoena *duces tecum*.

[27, 28] 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).

[29] 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. pp. 30, 34 (No. 14,692d) (1807). From our examination of the materials submitted by the Special Prosecutor to the District Court in support

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. —, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). On Lee v. United States, 343 U.S. 747, 757, 72 S.Ct. 967, 973, 96 L.Ed. 1270 (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, 485 F.2d 320, 323 (CA 4 1973); United States v. Hoffa, 349 F.2d 20, 41–42 (CA 6 1965), aff'd on other grounds, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); United States v. Santos, 385 F.2d 43, 45 (CA 7 1967), cert. denied, 390 U.S. 954, 88 S.Ct. 1048, 19 L.Ed.2d 1148 (1968); United States v. Morton, 483 F.2d 573, 576 (CA 8 1973); United States v. Spanos, 462 F.2d 1012, 1014 (CA 9 1972); Carbo v. United States, 314 F.2d 718, 737 (CA 9 1963), cert. denied, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498 (1964). Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge.

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.*

[30, 31] 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, 2 L.Ed. 60 (1803), that "it is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177, 2 L.Ed. 60.

[32] No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential presidential communications for use in a criminal prosecution, but other exercises of powers by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. Powell v. McCormack, *supra*; *Youngstown, supra.* In a series of cases, the Court interpreted the explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause, U.S.Const. Art. I, § 6. Doe v. McMillan, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973); Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1973); United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972); United States v. Johnson, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (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.

[33, 34] 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,* 395 U.S., at 549, 89 S.Ct., at 1978. And in Baker v. Carr, 369 U.S., at 211, 82 S.Ct., at 706, 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" this Court "to say what the law is" with respect to the claim of privilege presented in this case. Marbury v. Madison, *supra*, 1 Cranch. at 177, 2 L.Ed. 60.

B

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

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, Humphrey's Executor v. United States, 295 U.S. 602, 629–630, 55 S.Ct. 869, 874–875, 79 L.Ed. 1611; Kilbourn v. Thompson, 103 U.S. 168, 190–191, 26 L. Ed. 377 (1880), insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

[36] 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 ob-

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, p. 475, 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 the President's communications corresponding to the privilege of Members of Congress under the Speech or Debate Clause. But the silence of the Constitution on this score is not dispositive. "The rule of constitutional interpretation announced in McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be 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, 37 S.Ct. 448, 451, 61 L.Ed. 881 (1917).

jectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

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

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (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

[37, 38] 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. pp. 187, 190, 191–192 (No. 14,694) (1807).

[39] 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 decisionmaking. 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, 159

17. "Freedom of communication vital to fulfillment of the aims 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, 159 U.S.App.D.C. 58, 71, 487 F.2d 700, 713 (1973); Kaiser Aluminum & Chem. Corp. v. United States, 157 F.Supp. 939, 141 Ct.Cl. 38 (1958) (*per* Reed, J.); The Federalist No. 64 (S. F. Mittel ed. 1938).

U.S.App.D.C. 58, 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. pp. 187, 192 (No. 14,694) (CCD Va.1807).

[40–42] But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (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.

[43] 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. [323], at 331 [70 S.Ct. 724, 94 L.Ed. 884] (1949); Blackmer v. United States, 284 U.S. 421, 438 [52 S.Ct. 252, 76 L.Ed. 375]. . . . ." Branzburg v. [Hayes] United States, 408 U.S. 665, 688 [92 S.Ct. 2646, 33 L.Ed. 2d 626] (1973).

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

[44] 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, 68 S.Ct. 431, 436, 92 L.Ed. 568 (1948),

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, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (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."

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, 68 S.Ct., at 436.

In United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1952), dealing with a claimant's demand for evidence in a damage case against the Government the Court said:

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

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

[45, 46] 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]

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 in 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, 53 S.Ct. 465, 77 L.Ed. 993 (1933), he emphasized the importance of maintaining the secrecy of the deliberations of a petit jury in a criminal case. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published in the world." *Id.*, at 13, 53 S.Ct., at 469. 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 reasonable firmness will not fear to speak his mind if the confidences of debate bar barred to the ears of mere impertinence of malice. He will not expect to be shielded against the disclosure

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

[47, 48] 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

[49–51] 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*, 25 Fed. Cas., 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

[52–55] 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 [the 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 circumstance 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*

of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice." *Id.*, at 16, 53 S.Ct., at 470.

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.Cas. pp. 187, 192 (No. 14,694).

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

[56] 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.

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*.

William G. MILLIKEN, Governor of Michigan, et al., Petitioners,

v.

Ronald BRADLEY and Richard Bradley, by their mother and next friend, Verda Bradley, et al.

ALLEN PARK PUBLIC SCHOOLS et al., Petitioners,

v.

Ronald BRADLEY and Richard Bradley, by their mother and next friend, Verda Bradley, et al.

The GROSSE POINTE PUBLIC SCHOOL SYSTEM, Petitioner,

v.

Ronald BRADLEY and Richard Bradley, by their mother and next friend, Verda Bradley, et al.

Nos. 73-434, 73-435 and 73-436.

Argued Feb. 27, 1974.

Decided July 25, 1974.

Parents, children and others instituted a class action against various state and school district officials seeking relief from alleged illegal racial segregation in the Detroit public school system. On remand after two prior appeals, 433 F.2d 897 and 438 F.2d 945, the United States District Court for the Eastern District of Michigan ruled that the system was an illegally segregated one, 338 F.Supp. 582, and, after the Court of Appeals dismissed appeals from orders requiring submission of desegregation plans, 468 F.2d 902, directed preparation of a metropolitan desegregation plan, 345 F.Supp. 914, and purchase of school buses. The Court of Appeals affirmed the holding that a constitutionally adequate system of desgregated schools could not be established within the Detroit school district's geographic limits and that a multidistrict metropolitan plan was necessary, 484 F. 2d 215, and defendants appealed. The Supreme Court, Mr. Chief Justice Burger, held, inter alia, that it was improper to impose a multidistrict remedy for single-district de jure segregation in the absence of findings that the other included districts had failed to operate unitary school systems or had committed acts that effected segregation, in the absence of any claim or finding that school district boundary lines were established with the purpose of fostering racial segregation, and without affording a meaningful opportunity for the included neighboring districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those districts.

Reversed and remanded.

Mr. Justice Stewart concurred and filed opinion.

Mr. Justice Douglas dissented and filed opinion.

Mr. Justice White dissented and filed opinion in which Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Marshall, joined.

Mr. Justice Marshall dissented and filed opinion in which Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice White, joined.

1. Constitutional Law ⇐220

Doctrine of "separate but equal" has no place in field of public education, since separate educational facilities are inherently unequal. U.S.C.A.Const. Amend. 14.

2. Schools and School Districts ⇐13

Finding of district court that Detroit public school system was illegally segregated on basis of race was not plain error. Supreme Court Rules, rules 23, subd. 1(c), 40, subd. 1(d)(2), 28 U. S.C.A.

3. Schools and School Districts ⇐13

Desegregation, in sense of dismantling dual school system, does not require any particular racial balance in each school, grade or classroom.

4. Schools and

While b
bridged where
tional violatic
relief, notion
may be casua
mere administ
trary to histc
United States.

5. Schools and

School d
laws with resp
sacrosanct, a
Fourteenth A
have duty to p
dies. U.S.C.A

6. Schools and

Before bc
autonomous sc
aside by conso
remedial purp
district remed
that there has
tion within o
significant seg
district; spec
that racially d
or local scho
school distric
cause of interd

7. Schools and

District c
multidistrict n
plan to remec
segregation f
school system
of findings th
had failed to c
tems or had c
ed segregation
sence of any cl
district bound
with purpose o
tion, and with
opportunity f
districts to pre
on propriety c
on question o
by those distr
340.27, 340.55,
340.148, 340.1
192, 340.352,

provision shall apply to such member or nonmember association, institution, bank, or affiliate or to any other person."

Sec. 304. The amendments made by this title shall apply to any deposit made or obligation issued in any State after the date of enactment of this title, but prior to the earlier of (1) July 1, 1977 or (2) the date (after such date of enactment) on which the State enacts a provision of law which limits the amount of interest which may be charged in connection with deposits or obligations referred to in the amendments made by this title.

Approved Oct. 29, 1974.

FREEDOM OF INFORMATION ACT

For Legislative History of Act, see p. 6203

PUBLIC LAW 93-502; 88 STAT. 1561

[H. R. 12471]

An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

(a) The fourth sentence of section 552(a)(2) of title 5, United States Code,[18] is amended to read as follows: "Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication.".

(b)(1) Section 552(a)(3) of title 5, United States Code,[19] is amended to read as follows:

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.".

(2) Section 552(a) of title 5, United States Code,[20] is amended by redesignating paragraph (4), and all references thereto, as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt

18. 5 U.S.C.A. § 552(a)(2).
19. 5 U.S.C.A. § 552(a)(3).
20. 5 U.S.C.A. § 552(a).

of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

"(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

"(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

"(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

"(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acting arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

88 U.S.Cong.News '74—16

"(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.".

(c) Section 552(a) of title 5, United States Code,[21] is amended by adding at the end thereof the following new paragraph:

"(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

"(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review

21. 5 U.S.C.A. § 552(a).

of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.".

Sec. 2. (a) Section 552(b)(1) of title 5, United States Code,[22] is amended to read as follows:

"(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;".

(b) Section 552(b)(7) of title 5, United States Code,[23] is amended to read as follows:

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;".

(c) Section 552(b) of title 5, United States Code,[24] is amended by adding at the end the following: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.".

Sec. 3. Section 552 of title 5, United States Code,[25] is amended by adding at the end thereof the following new subsections:

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

"(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

22. 5 U.S.C.A. § 552(b)(1).
23. 5 U.S.C.A. § 552(b)(7).
24. 5 U.S.C.A. § 552(b).
25. 5 U.S.C.A. § 552.

"(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

"(5) a copy of every rule made by such agency regarding this section;

"(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

"(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

"(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.".

Sec. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

Approved Nov. 21, 1974.

DISSENTING VIEWS OF HON. BELLA S. ABZUG

I concur in the dissent of my colleagues, Representative Brooks and Representative Moss. Like them, I cannot support H.R. 12462. This bill, for the very first time, gives statutory recognition to a concept which has no constitutional basis—the discretionary authority of the executive to withhold information from the legislature. In so doing, it not only legitimizes this concept of "executive privilege" but severely and unnecessarily limits the well-established power of Congress to obtain necessary information from the executive branch. From the earliest days of the Republic, the congressional requirement of information from the executive, in furtherance of its legislative function, has been a well-recognized principle. The Supreme Court, in *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927), reaffirmed this principle when it stated that "the power of inquiry—*with process to enforce it*—is an essential and appropriate auxiliary to the legislative function." (Italic supplied.)

Along with the well-established authority of Congress to require information in fulfillment of its legislative or investigative duties, there has been a concomitant obligation on the part of the executive to make such information available when it serves a legitimate legislative or investigative purpose. Nowhere in the Constitution is there any mention of "executive privilege" nor any hint of a discretionary authority to withhold such information from the legislative branch. In fact, the concept of "executive privilege" vis-a-vis the Congress has no foundation—in judicial precedent, in statute, in the constitutional doctrine of separation of powers, or in any constitutional provision.

Of course, I realize that, despite its lack of legitimacy, this so-called privilege has been invoked to thwart the efforts of Congress and its committees to obtain much-needed information. Although, over the past 200 years, most congressional requests for specific information from the executive have met with compliance, there has been a growing tendency, especially during the past 20 years, for the executive branch to resist the disclosure of information. This is a serious problem and one which severely hampers the Congress in the performance of its duties. But is H.R. 12462 the solution to the problem? I think not.

Congress already has the power to compel the production of information from the executive branch. Through its subpena power and its power to initiate contempt proceedings, it already has the recourse to the courts which this bill pretends to confer. As the court of appeals stated in *Nixon* v. *Sirica and Cox*, 42 L.W. 2211, (CADC, 1973):

> Throughout our history, there have frequently been conflicts between independent organs of the Federal Government * * *. When such conflicts arise in justiciable cases, our constitutional system provides a means for resolving them—one Supreme Court.

Quite apart from this judicial remedy, there exists a political process that has worked more than reasonably well over the course of our history. The system of checks and balances designed by the framers of our Constitution has been effective in restraining the excessive exercise of power by any of the three separate branches.

H.R. 12462 would add nothing to the power of Congress to compel the disclosure of executive information. It adds no new remedies nor does it simplify existing procedures. Quite the contrary. It would set up cumbersome and costly procedures for Congress to obtain judicial compliance. It would permit the executive branch to delay and interfere further with the legislative process. And, most important, by setting forth a definition of "compelling national interest" for the courts to interpret on a case-by-case basis, in order to determine whether particular information should be disclosed, H.R. 12462 would distort the role of the courts and force them into the position of rewriting the constitution rather than interpreting it.

But what is most abhorrent in H.R. 12462 is its ceding to the President the discretion to withhold vital information, not on the basis of any constitutional power, but as a congressional grant of authority. At this moment in history, we are engaged in a strenuous effort to restore the constitutional balance and to reverse the recent trend toward excessive executive power. At the very least, the enactment of this bill at this time would compound past executive usurpations and congressional ceding of legislative authority and muddy the waters.

BELLA S. ABZUG.

DISSENTING VIEWS OF HON. CARDISS COLLINS

I believe that this bill does little more than recognize the right of discretionary executive privilege, and I cannot support it for the following reasons.

The Constitution was written by men who were well acquainted with a system of government that relied heavily upon its legislative branch. The British Parliament was charged with overseeing all aspects of the empire, both at home and abroad. In 1742, William Pitt summarized this by stating that Parliament is "the Grand Inquest of the Nation, and as such it is our duty to inquire into every step of public management, either abroad or at home, in order to see that nothing has been done amiss." [1]

Complete oversight was the role of Parliament; and, according to the U.S. Supreme Court, complete oversight is the role of Congress. In *McGrain* v. *Daugherty*, 273 U.S. 135 (1927), the Court said that investigatory power "was regarded as an attribute of the power to legislate in the British Parliament." [2] It further declared:

> We are of the opinion that the power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both Houses of Congress took this view of it early in their history * * * and both Houses have employed the power accordingly up to the present time.[3]

The Court expanded on the *McGrain* decision in 1957, in *Watkins* v. *United States:*

> The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic, or political system for the purpose of Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress * * *. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.[4]

[1] Raoul Berger, *Executive Privilege* v. *Congressional Inquiry*, 12 UCLA L. R. 1044, 1058 (1965).
[2] 273 U.S. 135, 161.
[3] 273 U.S. 135, 174.
[4] 354 U.S. 178, 187.

The Supreme Court has laid down the bounds within which Congress may investigate. There is no reason for Congress, in its quest for information to be used in furtherance of its legitimate constitutional role, to narrow, in any way, its investigatory scope. Yet, that is what this legislation attempts to do.

During the last two decades, rights of Congress and of the American people have diminished under a new constitutional doctrine called executive privilege. We were advised in the 1950's by former Attorney General Rogers and more recently by former Attorney General Kleindienst, that the President is privileged to withhold from Congress whatever information he so chooses.

This is contrary to the Supreme Court's holdings in *Watkins* and *McGrain*. There has never been any historical and/or legal justification for discretionary executive privilege. In fact, Attorney General Cabel Cushing, in 1854, wrote to President Pierce and stated that he and his predecessors "had recognized the right of either House of Congress to call on [Heads of Departments] for information in any matters within the scope of his office, and his duty to communicate the same".[5]

In my view H.R. 12462 tacitly recognizes discretionary executive privilege. It allows the courts to determine whether the President has a "compelling national interest" in refusing to give Congress pertinent facts. It allows aides from any level of Government the identical privilege. Any legitimized withholding of information from Congress will work to the detriment of its investigatory role. I believe that with the bill there will be an acquiescence to absolute privilege: a privilege which is without justification.

CARDISS COLLINS.

---

[5] VI *Opinions of Attorneys General* 326, 335 (1854).

ADDITIONAL VIEWS OF HON. JIM WRIGHT

I had hoped to be able to support workable legislation to provide an effective way for Congress to obtain all information needed from the executive branch for us to fulfill our constitutional responsibilities. As a member of the Foreign Operations and Government Information Subcommittee that has struggled to draft such legislation, I agreed to join in sponsoring the bipartisan measure, H.R. 12462, in order to break the philosophical impasse which developed during many days of markup sessions on several different versions of this legislation.

The thrust of the debate in the full committee on this issue, however, has persuaded me that H.R. 12462, for all its careful draftsmanship, still may not be that workable legislation which we are seeking to curb the excessive use of Presidential authority to withhold vital information from Congress. During debate in the full committee, I became awkwardly aware of at least the ironic possibility that such a bill conceivably could have just the opposite effect from that which the proponents and sponsors of H.R. 12462, myself included, have intended. It is just conceivable that it might inadvertently offer tempting loopholes for Federal bureaucrats to avoid direct testimony before congressional committees and be subject to an unintended interpretation of giving some heretofore nonexistent legal standing to some presumed constitutional privilege of the President to withhold information from Congress.

For these reasons, I ultimately voted against reporting this bill to the House floor at this time.

JIM WRIGHT.