In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73–1766

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

No. 73–1834

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Special Prosecutor, on behalf of the United States, submits this Reply Brief in response to the brief submitted by counsel for the President on June 21, 1974.

ARGUMENT

I

THE GRAND JURY'S ACTION IN DESIGNATING THE PRESIDENT AS ONE OF THE UNINDICTED CO-CONSPIRATORS WAS A RESPONSIBLE EXERCISE OF ITS CONSTITUTIONAL POWERS

In the district court, counsel for the President premised his motion to expunge the grand jury's action concerning the President on the argument that an incumbent President could not be indicted. In this Court, counsel also challenges the motives that led to that action. These are false issues that should be dismissed at once so that the Court can address on the merits the question on which certiorari was granted in No. 73–1834.

A. THE GRAND JURY'S ACTION WAS TAKEN AND DISCLOSED IN GOOD FAITH AND WAS UNRELATED TO THE IMPEACHMENT INQUIRY BEFORE THE HOUSE OF REPRESENTATIVES

One of the contentions that is repeated throughout the President's brief in this Court is that "court process is being used as a discovery tool for the impeachment proceedings" now pending before the Committee on the Judiciary of the House of Representatives (P. Br. 13[1]). The argument is advanced that the courts are being used "as a back-door route to circumvent the constitutional procedures of an impeachment inquiry, and thus [being] intruded into the political

[1] "P. Br." refers to the printed brief submitted by counsel for the President on June 25 in substitution for the brief filed on June 21. "Br." refers to the main brief for the United States.

thicket in this most solemn of political processes" (P. Br. 15). Later, counsel charges that our submissions, relying in part on the grand jury's finding, "base a desire for evidence on a strategem which attempts to cripple the Presidency" and constitute "a grotesque attempt to abuse the process of the judicial branch of government" (P. Br. 114). These assertions are unfounded.

The grand jury's determination that there is evidence that the President was one of the conspirators involved in the conspiracy alleged in the indictment in *United States* v. *Mitchell, et al.*, D.D.C. No. 74–110 (A. 5A–14A), and the government's reliance on that action in opposing the President's motion to quash the subpoena *duces tecum* were made in good faith, within the legitimate sphere of constitutional authority. We shall discuss below the reasons why the President can be identified constitutionally as an unindicted co-conspirator by a federal grand jury (see pp. 16–23, *infra*), but we consider it important to set the record straight on the reasons for its action and the context of the disclosure of that action. The record shows that both the grand jury and the Special Prosecutor have been sensitive to the President's position and have endeavored to avoid unnecessary interference with the constitutional processes being pursued simultaneously by the House Judiciary Committee.

By the time it returned the conspiracy indictment in this case on March 1, 1974, the grand jury had been in session since June 5, 1972, and had first heard Watergate-related evidence shortly after the June 17

1972 break-in.[2] It resumed its investigation in March 1973 after the trial and conviction of the seven Watergate burglars and pursued this inquiry virtually full-time until the return of the indictment. During the course of its investigation, it received a considerable amount of information concerning the President's role in the alleged conspiracy to obstruct justice and to defraud the United States charged in Count I. As we pointed out in our principal brief, out of "deference to the President's public position" (Br. 98 n. 76), the grand jury elected to take no action publicly that would cause needless embarrassment to the President at the time the Judiciary Committee was conducting its inquiry.

But as an independent constitutional institution with grave public responsibilities, the grand jury was not free to ignore the evidence it had heard. Hence, it decided to recommend to the chief judge of the district court that the material evidence concerning the President be transmitted to the Judiciary Committee. The Special Prosecutor, as the grand jury's counsel, notified the chief judge of this intended

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[2] Counsel for the President notes (P. Br. 6 n. 3) that the validity of the indictment has been challenged by the defendants in this case on the ground that the grand jury's term had expired under Rule 6(g), Fed. R. Crim. P. However, by act of Congress (Pub. L. 93–172, 87 Stat. 691), the term of the grand jury was extended until June 4, 1974, (subject to further extension by the court) to allow it to continue and conclude this investigation. This legislation was unquestionably valid. See *United States* v. *Johnson*, 319 U.S. 503, 507–513; *Stillman* v. *United States*, 177 F. 2d 607, 611 n. 2 (9th Cir. 1949). Cf. *Government of Virgin Islands* v. *Parrott*, 476 F. 2d 1058, 1060–61 (3d Cir. 1973), cert. denied, 414 U.S. 871 (later statute prevails over rule).

action, and, at the time the indictment was received, the chief judge received and sealed the grand jury's "Report and Recommendation" together with the accompanying evidence. The "Report and Recommendation" stated that the grand jury was "deferring" to the "primary jurisdiction" of the House. Before taking any action, the court gave counsel for the President and counsel for the defendants (as well as counsel for the Judiciary Committee) an opportunity to submit written memoranda and to argue the matter orally at a hearing. Counsel for the President was allowed to inspect the "Report and Recommendation" and stated that the President had no objection to the court's granting the grand jury's request that the evidence be transmitted. See *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1221 & nn. 1, 2 (D.D.C. 1974), narrating these developments. In fact, at the hearing before the district court, counsel stated that it was the President's own decision to make available to the House directly any evidence he had furnished to the grand jury. Transcript of Hearing, March 6, 1974, at 3 (D.D.C. Misc. No. 74–21).

In determining that he would exercise his discretion under Rule 6(e) of the Federal Rules of Criminal Procedure and would transmit the grand jury evidence to the House, the judge found that the grand jury's report "draws no accusatory conclusions. It deprives

no one of an official forum in which to respond." 370 F. Supp. at 1226.[3] The court also noted (*ibid*):

> It contains no recommendation, advice or statements that infringe on the prerogatives of other branches of government. Indeed, its only recommendation is to the Court, and rather than injuring separation of powers principles, the Jury sustains them by lending its aid to the House in the exercise of that body's constitutional jurisdiction. It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and no more.

When several defendants filed petitions for writs of mandamus or prohibition to preclude the transmission of the evidence, the court of appeals called for the "Report and Recommendation" and the accompanying evidence. With the materials before the court *en banc,* the court of appeals denied the petitions, noting that "the President of the United States, who is described by all parties as the focus of the report and who presumably would have the greatest interest in its disposition, has interposed no objection to the District Court's action." *Haldeman* v. *Sirica,* —— F. 2d ——, —— (Nos. 74–1364, 74–1368) (D.C. Cir. March 27, 1974). The court did not challenge the district court's finding that the grand jury's proposed submission to the House was not accusatory and involved merely a compilation of evidence. When no further review was

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[3] The President's motion and exhibits before this Court concerning the grand jury evidence show that the House Judiciary Committee is giving counsel for the President access to the grand jury materials placed on the record before the Committee.

sought, the evidence thereafter was transmitted to the House.

The grand jury's action identifying the President as a co-conspirator, now at issue before this Court, is entirely unrelated. This determination was made as an integral part of the grand jury's performance of its own constitutional functions. In making its determination, the grand jury was not focusing on the President *qua* President. Rather, it was discharging its sworn duty to determine "whether a crime has been committed and who has committed it." *United States* v. *Dionisio*, 410 U.S. 1, 15. It decided to indict seven persons and to state in the indictment simply its belief that there were other co-conspirators "to the Grand Jury known and unknown" (A. 7A), but without publicly identifying those who were known. At the same time, however, the grand jury recorded for later disclosure in connection with the criminal trial its determination of the identity of each of the known co-conspirators, including "Richard M. Nixon". It takes no extended discussion to show that this action, while unquestionably painful for all parties concerned, was in furtherance of legitimate and, indeed, compelling purposes.

Counsel for the President is simply wrong in alleging that the naming of the President was a "stratagem" or "device" to "nullify the President's claim of executive privilege" (P. Br. 113, 114). This claim ignores the basic principle that the grand jury's function is to return a "true bill" that fully and fairly alleges what it believes the evidence shows. Moreover, in light of the apparent thrust of the evidence here,

the naming of the President at some stage prior to trial was virtually inevitable. While it is not mandatory that unindicted conspirators be named in the indictment, see *Rogers* v. *United States*, 340 U.S. 367, 375, such information commonly must be furnished by the prosecution in its bill of particulars. See, *e.g.*, *United States* v. *Pilnick*, 267 F. Supp. 791, 801 (S.D. N.Y. 1967); cf. *United States* v. *Debrow*, 346 U.S. 374, 378.

A specific finding by the grand jury on the identity of the known but unindicted co-conspirators was especially important here to furnish additional protection against the possibility of unfounded accusations, particularly when one of the persons seemingly involved was the President. This course makes it clear that the grand jury—the "conscience of the community"—and not merely the prosecutor, made this important determination in the first instance.

Furthermore, the identification of each co-conspirator—regardless of his station—is a prerequisite to making his declarations in furtherance of the conspiracy admissible against the other conspirators. See *Lutwak* v. *United States*, 344 U.S. 604, 617–19; *Anderson* v. *United States*, — U.S. — (42 U.S.L.W. 4815, June 3, 1974). This will be an essential consideration in assuring a trial upon all material and important evidence. It is well within a prosecutor's proper discharge of his duties to pursue a case to trial by relying on the grand jury's *prima facie* determination of the membership in the alleged conspiracy, and unless good reason exists to the contrary, he is obligated to do so. It is for these reasons that the grand jury properly made its judgments on the question, and that the Special Prosecutor was authorized to disclose its action

to the court and the parties to this case in connection with the post-indictment proceedings.

Nor is there any foundation for the insinuation that the grand jury's determination regarding President Nixon was intended to prejudice the President's position before the country or before the Judiciary Committee. As noted above, when the grand jury transmitted the material evidence concerning the President to the Judiciary Committee, it carefully disavowed any assessment of its significance insofar as the President's official status was concerned, and, as the district court and court of appeals agreed, the grand jury abstained from offering the House its views on the thrust of the evidence. In discharging its own constitutional functions and in appraising the involvement of "Richard M. Nixon" (and other unindicted co-conspirators) in the offenses for which it returned an indictment, it also endeavored to respect the President's official position by maintaining its determination as to *all* unindicted co-conspirators in secret. That vote was taken on February 25, 1974. It was anticipated that disclosure of the identity of the co-conspirators, including Richard M. Nixon, would be deferred many months, at least until pre-trial discovery proceedings were under way and a bill of particulars filed, by which time the impeachment proceedings might have been concluded.

When, however, the President refused to comply with the instant subpoena for evidence to be used at the trial on the indictment and on May 1, 1974, moved to quash it, claiming "executive privilege", it became appropriate, if not obligatory, to invoke the grand jury's finding in order to permit the court to make an

informed determination whether the President could lawfully invoke that public privilege to withhold the evidence sought. As the record before the Court reflects, counsel for the President was advised of the grand jury's action before any answering papers were filed by the Special Prosecutor and, again out of regard for the President's position, the Special Prosecutor suggested to the President's counsel that the matter should be handled *in camera.*[4] The President's counsel then joined in the Special Prosecutor's motion to seal all pleadings reflecting the grand jury's action and to hold oral argument *in camera.* The district court, after an *in camera* hearing with defense counsel present, accepted this suggestion, and further proceedings were conducted in this extraordinary way—to avoid, insofar as possible, having the proceedings in this important criminal prosecution affect the concurrent proceedings before the House.

In denying the President's motion to quash, the district court's opinion was carefully guarded in referring to the significance of the sealed material (Pet. App. 22–23). Because of the number of persons who were necessarily privy to this information, however, news media were able to piece together the essentials of what had been disclosed and litigated *in camera,* and on June 6, 1974, counsel for the President publicly confirmed the reports about the grand jury's action. But the record shows that the grand jury, the district court and the Special Prosecutor successfully maintained the grand jury's determination in strict

[4] Counsel for the President commended the Special Prosecutor for suggesting this procedure. Transcript of *In Camera* Hearing on May 8, 1974, at 4.

confidence for several months in order to avoid unnecessary impact upon the Judiciary Committee's inquiry. It is hardly fair to say, therefore, as counsel for the President does, that the grand jury and Special Prosecutor were attempting "to subvert and prejudice the legitimate constitutional procedure of impeachment" (P. Br. 108).

B. A FEDERAL GRAND JURY HAS THE CONSTITUTIONAL POWER TO IDENTIFY AN INCUMBENT PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR IN CONNECTION WITH ITS RETURN OF AN INDICTMENT AGAINST OTHER PERSONS

Upon analysis of the merits, the Court will conclude, we believe, that counsel's assertions that an incumbent President cannot be named an unindicted co-conspirator are unpersuasive. The federal grand jury's constitutional powers and responsibilities are sweeping. Although it is by no means clear that a President is immune from indictment prior to impeachment, conviction, and removal from office, the practical arguments in favor of that proposition cannot fairly be stretched to confer immunity on the President from being identified as an *unindicted* co-conspirator, when it is necessary to do so in connection with criminal proceedings against persons unquestionably liable to indictment. Since the naming of unindicted co-conspirators is a fair and common practice and was required here to outline the full range of the alleged conspiracy, the district court's refusal to expunge its determination was fully justified.[5]

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[5] Even assuming, for some legal reason, that the grand jury's naming of the President as an unindicted co-conspirator is ineffective, it does not follow that the court below abused its discretion in denying the motion to expunge. Expunction of a formal finding by a grand jury, whose existence and powers are

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1. The grand jury has broad and important powers as an independent institution of our government

Only a brief discussion is required to establish the unique and important role of the grand jury in the American judicial system. Though an arm of the court,

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constitutionally established, is a drastic remedy, to be granted only after a careful weighing of the legitimacy of the grand jury's action, the strength of the public interest in an accurate public record of proceedings, and the degree of prejudice to those persons affected by full disclosure. See *Application of Johnson*, 484 F. 2d 791, 797 (7th Cir. 1973); *In re Grand Jury Proceedings*, 479 F. 2d 458, 460 n. 2 (5th Cir. 1973).

The President's principal argument below was that expunction was necessary because of the damage which disclosure would cause to the fairness of the impeachment inquiry being conducted by the House of Representatives. *Reply to Memorandum in Opposition to the Motion to Quash Subpoena Duces Tecum* 25–27 (D.D.C. May 13, 1974) (Crim. No. 74–110). That concern has now become academic because of the public disclosure of the grand jury's action. Any resulting harm to him before the House or in the eyes of the public is now unfortunately an "accomplished fact." *Application of Johnson, supra*, 484 F. 2d at 797. See also *United States* v. *Connelly*, 129 F. Supp. 786, 787 (D. Minn. 1955) (refusal to expunge grand jury report that had already been widely publicized).

The listing of specific co-conspirators pursuant to the finding and return of an indictment was clearly within the traditional confines of grand jury power. The grand jury here did not go beyond this function by making merely gratuitous expressions of views about a general societal condition; or concerning matters outside its area of expertise. Compare *Application of United Electrical, Radio & Machine Workers*, 111 F. Supp. 858 (S.D.N.Y. 1953). Cf. *Hammond* v. *Brown*, 323 F. Supp. 326, 337 (N.D. Ohio), affirmed, 450 F. 2d 480 (6th Cir. 1971). Certainly the grand jury's action here is not clearly *ultra vires*. There is, in addition, a legitimate public purpose in reporting the fact that serious criminal charges against a government official have been made. *In re Presentment of Special Grand Jury, January 1969*, 315 F. Supp. 662, 678 (D. Md. 1970).

The district judge, therefore, did not abuse his discretion in refusing to expunge the finding.

Levine v. *United States*, 362 U.S. 610, 617, the grand jury has an independent constitutional basis in the Fifth Amendment and has functions and prerogatives which are "rooted in long centuries of Anglo-American history." *Hannah* v. *Larche*, 363 U.S. 420, 490 (Frankfurter, J., concurring). The adoption of the grand jury "in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice." *Costello* v. *United States*, 350 U.S. 359, 362. See also *Branzburg* v. *Hayes*, 408 U.S. 665, 687.

Like its English progenitor, the American grand jury is designed to reflect the conscience of the community. 2 Pollock & Maitland, *History of the English Law* 642 (2d ed. 1909). Its members are "selected from the body of the people"[6] and are "pledged to indict no one because of prejudice and to free no one because of special favor." *Costello* v. *United States*, *supra*, 350 U.S. at 362.[7] Its first and only obligation is to the truth—to determine, unhindered by external influence or supervision, "whether a crime has been committed and who has committed it." *United States* v. *Dionisio*, *supra*, 410 U.S. at 15. See also *Wood* v. *Georgia*, 370 U.S. 375, 390; *Ex parte Bain*, 121 U.S. 1, 11.

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[6] See the Jury Selection and Service Act of 1968, 28 U.S.C. 1861–1871.

[7] Immediately after the President procured the dismissal of Special Prosecutor Cox when he refused to obey the President's instruction not to seek enforcement of the grand jury subpoena *duces tecum* that had been upheld by the court of appeals in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), Chief Judge Sirica summoned the two grand juries that were

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Reflecting this "special role in insuring fair and effective law enforcement," *United States* v. *Calandra*, 414 U.S. 338, 343 (1974), the grand jury's powers of inquiry are extremely broad. It has a right to every man's evidence, and proceeds unhindered by the var-

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then conducting investigations with the assistance of the Special Prosecutor, including the grand jury that took the action now being challenged by the President. In open court on October 23, 1973, the chief judge instructed them:

"You are advised first, that the grand juries on which you serve remain operative and intact. You are still grand jurors, and the grand juries you constitute still function. In this regard you should be aware that the oath you took upon entering this service remains binding. You must all be especially careful at this time to fully and strictly adhere to that oath which states:

"You and each of you as a member of the grand jury for the District of Columbia, do solemnly swear that you will diligently, fully, and impartially inquire into and true presentment make of all offenses which shall come to your knowledge and of which the United States District Court for the District of Columbia has cognizance; that you will present no one from hatred or malice nor leave anyone unpresented from fear, favor, affection, reward, or hope of reward; that the counsel of the Attorney of the United States, your fellows and your own, you will keep secret and that you will to the best of your ability perform all the duties enjoined upon you as a grand juror, so help you God.

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"This brings me to my second point; these two grand juries *will* continue to function and pursue their work. You are not dismissed and will not be dismissed except as provided by law upon the completion of your work or the conclusion of your term. Your service to date, I realize, has occasioned personal sacrifices for many of you and inconvenience for all of you. You did not choose this assignment; it is an obligation of citizenship which it fell your lot to bear at this time, and you have borne it well. The Court and the country are grateful to you. Nevertheless, you must be prepared to press forward. We rely on your continued integrity and perseverance." (Emphasis in original.)

ious evidentiary and exclusionary rules which apply at trial. *Branzburg* v. *Hayes, supra; Lawn* v. *United States,* 355 U.S. 339; *Costello* v. *United States, supra; Holt* v. *United States,* 218 U.S. 245. See also *Gravel* v. *United States,* 408 U.S. 606, 628, where this Court allowed wide scope to a grand jury's investigation involving a United States Senator, despite claims that such matters were immune from inquiry under the Speech or Debate Clause. As the courts have frequently noted, society's interests are best served by a grand jury investigation which is "thorough and extensive." *Wood* v. *Georgia, supra,* 370 U.S. at 392.

The grand jury has the unreviewable independence to refuse to return an indictment requested by the prosecution. *Gaither* v. *United States,* 413 F. 2d 1061, 1066 (D.C. Cir. 1969). Conversely, even direct instructions from the President cannot prevent the grand jury "from making the fullest investigation into the matter" and "from returning an indictment against the accused if the evidence should warrant it * * *." *In re Miller,* 17 Fed. Cas. 295 (No. 9,552) (C.C.D. Ind. 1879). For as the court instructed the grand jury in that case, it was free to disregard the instructions from President Hayes to the prosecutor to restrict its inquiry: "The moment the executive is allowed to control the action of the courts in the administration of criminal justice their independence is gone." See also *United States* v. *Cox,* 342 F. 2d 167, 174–80 (5th Cir. 1965), cert. denied, 381 U.S. 935 (opinion of Rives, Gewin, and Bell, JJ.); *United States* v. *Smyth,* 104 F. Supp. 283, 293–295 (N.D. Calif. 1952).

Thus, in our jurisprudence this body of citizens, randomly selected, beholden neither to court nor prosecutor, trusted historically to protect the individual against unwarranted governmental charges, but sworn to ferret out criminality by the exalted and powerful as well as by the humble and weak, must be able to take cognizance of *all* possible violators of the laws of the United States.

2. An incumbent President may be named as an unindicted co-conspirator

Although we shall indicate below why it is not at all clear that an incumbent President may not be named as a *defendant* in a criminal indictment, this case does not turn on that issue and the Court need not decide it. Even assuming *arguendo* that an incumbent President has some implicit constitutional immunity that prevents a federal grand jury from indicting him, he nevertheless may be named as an *unindicted* co-conspirator under the traditional grand jury power to investigate and charge conspiracies that include co-conspirators who are not legally indictable. This power is part of the constitutional power to return indictments in the form and scope the grand jury determines is proper.[8] It includes the authority to indict a person and charge him with conspiring with a person who, for one reason or another, is immune from prosecution.

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[8] *Gaither* v. *United States*, *supra*, 413 F. 2d at 1069; *United States* v. *Cox*, *supra*, 342 F. 2d at 181, 182.

It is not disputed, of course, that a grand jury has the power to name persons other than a President as unindicted co-conspirators. While no case in this Court has directly considered the existence of such power, it has long been commonplace for persons to be identified in this way in a conspiracy indictment. See, *e.g.*, *Kotteakos* v. *United States*, 328 U.S. 750, 752 n. 1; *United States* v. *Agueci*, 310 F. 2d 817, 820 (2d Cir. 1962), cert. denied, 372 U.S. 959; *United States* v. *Edwards*, 366 F. 2d 853, 858 (2d Cir. 1966). Indeed, it has been held proper to refuse to strike the names of 37 unindicted co-conspirators from an indictment. *United States* v. *Penney*, 416 F. 2d 850, 852 (6th Cir. 1969), cert. denied, 398 U.S. 932.

The grand jury has the right to decide whether to indict or not to indict particular persons and to decide what charge or charges such person or persons shall face. It may decline to indict a person in the face of sufficient evidence because of mitigating circumstances. In addition, some persons believed to be criminally involved may be immune from prosecution, legally or practically, for any one of numerous reasons: transactional or use immunity; prior acquittal or conviction; diplomatic immunity; incompetence; flight to a foreign sanctuary; pardon; expiration of a statute of limitations; or death. Accordingly, the grand jury has the right to charge some of the participants as defendants and to name others as unindicted co-conspirators. Even where some of the participants enjoy constitutional, legal, or practical immunity from being criminally prosecuted, neither the

grand jury nor the prosecution at trial is obliged to suppress all evidence of their complicity.

For example, in *Farnsworth* v. *Zerbst*, 98 F. 2d 541 (5th Cir. 1938), cert. denied, 307 U.S. 642, and *Farnsworth* v. *Sanford*, 115 F. 2d 375 (5th Cir. 1940), cert. denied, 313 U.S. 586, the court of appeals ruled that a person may be convicted and punished for a conspiracy even though his fellow conspirators were immune from prosecution because of the immunity attaching to representatives of foreign governments. There, the defendant, a naval officer, was charged with conspiring with two *named* Japanese diplomats to transmit defense secrets to a foreign government. He argued that the indictment was defective because he was charged with conspiring with persons who had diplomatic immunity from prosecution. In rejecting this argument, the court said (98 F. 2d at 544):

> If such persons in the United States join with a citizen of the United States in a conspiracy to commit a crime, though it be conceded that the foreign diplomat would not be indicted in the District Court, or even that he could not be, his immunity will not excuse the local citizen. At least two persons must join in an unlawful enterprise to constitute it a conspiracy. The statute expressly so says. But both need not be prosecuted, or prosecutable. One may die, may escape, or obtain a pardon; but the other remains guilty.

Later the court held that the case had not "affected" the diplomats in such a way as to deprive the lower

federal courts of jurisdiction over the matter, reasoning (115 F. 2d at 379):

> [W]e think that when the Japanese defendants were not arrested and Farnsworth was arraigned alone there was as complete a severance of the case against him as though he alone had been indicted. The case to be tried then in no substantial way affected the ex-attachés in Japan, or the Japanese Ambassador. Each of course would be concerned as the trial might involve reflections on the character and conduct of the ex-attachés, but the case in its results would not touch the person or goods or servants of any of them. * * * The ambassador's feelings, his integrity as a witness, and his standing as a man might all be involved, but he is held not affected.

In *United States* v. *Johnson*, 337 F. 2d 180 (4th Cir. 1964), aff'd and remanded, 383 U.S. 169, the court of appeals expressly held that the government could prosecute private individuals for conspiring to defraud the United States by bribing a Congressman to make a speech on the floor of the House, even though the prosecution required exploration of the Congressman's motivation for the speech and even though the Congressman himself was immune under the Speech or Debate Clause from prosecution on that theory. This Court also has implied that third-party witnesses may be questioned about the legislative acts of congressmen, despite the Speech or Debate Clause, where third-party crimes are the "proper concern of the grand jury or the Executive Branch" in its prosecutive capacity. *Gravel* v. *United States*, 408

U.S. 606, 629, n. 18. Thus, the mere fact that an official has a personal immunity from prosecution does not bar the prosecution from alleging and proving his complicity as part of a case against persons who have no such immunity.

In short, the jurisdiction of the grand jury to name unindicted co-conspirators is a necessary part of the power to charge defendants in a conspiracy case and is not restricted by any immunity a co-conspirator may enjoy not to be brought personally before the bar of justice to answer for the offense.

There is, we submit, no reason to make an exception for an incumbent President. We realize that the President is entrusted with awesome powers and responsibilities requiring his full attention. While indictment would require the President to spend time preparing a defense and, thus, would interfere to some extent with his attention to his public duties, the course the grand jury has followed here in naming the President as an unindicted co-conspirator cannot be regarded as equally burdensome. It is regrettable that the thrust of the evidence in the grand jury's view encompasses an incumbent President, but it would not be fair to our legal system or to the defendants and other unindicted co-conspirators to blunt the sweep of the evidence artificially by excluding one person, however prominent and important, while identifying all others.

We concede that any person—President or "ordinary" citizen— may suffer adverse consequences if he is named as an unindicted co-conspirator, whether in an indictment, in a bill of particulars or in testimony at a trial. But such consequences are an inevitable part

of the judicial process and do not justify prior judicial screening or complete silence. As Justice Douglas observed for the Court in *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599:

> The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. * * * As a result the defendant can be arrested and held for trial. See *Beavers* v. *Henkel,* 194 U.S. 73, 85; *Ex parte United States,* 287 U.S. 241, 250. The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. The harm to property and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts.

Similar considerations apply to the interests of persons who are brought into criminal proceedings collaterally, as unindicted co-conspirators. For example, in *United States* v. *General Motors Corp.*, 352 F. Supp. 1071 (S.D. Mich. 1973), the court denied a motion of the defendants in a conspiracy case under the Sherman Act to suppress a bill of particulars on the ground that numerous unindicted prominent persons named in the bill would be subjected to adverse publicity and embarrassment.[9]

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[9] Unindicted co-conspirators have sometimes been afforded relief from being named in an indictment *after* a trial where the evidence showed that they were *not* in fact involved in the

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This does not mean that a person has no protection against being named unfairly as a co-conspirator. His primary protection is in the finding of the grand jury that there is sufficient evidence to believe that the conspiracy as charged in the indictment existed. It also lies in the conscience of each member of a grand jury, the same protection that is applicable to an indicted defendant. As this Court stated in *Wood* v. *Georgia, supra,* 370 U.S. at 390:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society for standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an

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conspiracy charged. See *Application of American Society for Testing and Materials*, 231 F. Supp. 686 (E.D. Pa. 1964); *Application of Turner & Newall, Ltd.*, 231 F. Supp. 728 (E.D. Pa. 1964). See also *Beverly* v. *United States*, 5th Cir., No. 73–2027, pending on appeal, where persons named as unindicted co-conspirators are contending that their names should be expunged from a conspiracy indictment.

It is not unusual for persons tangentially involved in criminal proceedings to suffer adverse consequences. In many instances, an innocent witness may suffer some injury as a result of his testimony. As this Court explained in *United States* v. *Calandra*, *supra*, 414 U.S. at 345:

"The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure."

intimidating power or by malice and personal ill will.

The scope of the indictment itself as returned by the grand jury and the duty of the United States Attorney to refrain from improper methods also afford protection to an individual from being wrongfully accused as a co-conspirator in the bill of particulars or the evidence. See *Berger* v. *United States*, 295 U.S. 78, 88.

While we readily concede that the naming of an incumbent President as an unindicted co-conspirator is a grave and solemn step and may cause public as well as private anguish, we submit that such action is not constitutionally proscribed. The answer to the constitutional question must be shaped by two postulates of our free society: that grand juries are ordinarily responsible [10] and that, in the public market place of ideas, the people can be trusted to assess the worth of charges and counter-charges, particularly where the acts of a public official are in dispute.[11] There is little reason to fear either that grand juries will accuse an incumbent President maliciously, or that, if they do, their charges will receive credit they do not deserve.

In light of the foregoing principles, we submit that the grand jury's action here was constitutionally legitimate.

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[10] See, *e.g.*, *Wood* v. *Georgia*, *supra*.

[11] See, *e.g.*, *Garrison* v. *Louisiana*, 379 U.S. 64, 76–77; *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 273–277.

3. It is an open and substantial question whether an incumbent President is subject to indictment

Counsel for the President bases his argument against the constitutionality of the grand jury's action here on the premise that an incumbent President cannot be indicted (P. Br. 107–108). We believe we have just shown that the Court's consideration of the issue actually before the Court—whether a President can be named as an *unindicted* co-conspirator—does not require consideration of the assertion by counsel for the President that it cannot be "seriously disputed" that "a President may not be indicted while he is an incumbent" (P. Br. 95). Nevertheless, we cannot allow the assertion to stand uncontroverted. Thus, we outline the reasons why the President's major premise may be unsound, even though the Court need not decide the issue in order to reject the contention that the district court erred in refusing to expunge the grand jury's finding.

Resort to constitutional interpretation, history, and policy does not provide a definitive answer to the question of whether a sitting President enjoys absolute immunity from the ordinary processes of the criminal law. What we believe is clear is that nothing in the text of the Constitution or in its history—including close scrutiny of the background of relevant constitutional provisions and of the intent of the Framers—imposes any bar to indictment of an incumbent President. Primary support for such a prohibition must be found, if at all, in considerations of constitutional and public policy including competing factors such as the nature and role of the Presidency

in our constitutional system, the importance of the administration of criminal justice, and the principle that under our system no person, no matter what his station, is above the law. Whether these factors compel a conclusion that as a matter of constitutional interpretation a sitting President cannot be indicted for violations of federal criminal laws is an issue about which, at best, there is presently considerable doubt.

The President rests his textual argument primarily on Article I, Section 3, clause 7, of the Constitution, which provides that "the Party convicted [after impeachment] shall *nevertheless* be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law" (emphasis added). It is argued that the Framers thereby contemplated that criminal indictment must *follow* impeachment by the House and conviction and removal by the Senate. A contemporary student of the subject of impeachment suggests, on the basis of his study of the relevant materials, that the purpose of the "nevertheless" clause was only to preclude the expelled civil officer from avoiding later criminal prosecution by claiming "double jeopardy." Berger, *The President, Congress, and the Courts,* 83 Yale L.J. 1111, 1124 (1974).[12]

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[12] Berger in this article surveys the historical material relevant to the indictability of an incumbent President and finds that the Framers did not intend to clothe a President with immunity from criminal process. Berger, *supra*, at 1123–1136.

Luther Martin, a delegate to the Constitutional Convention, stated during the impeachment proceedings against Justice Chase that the "nevertheless" clause was designed to eliminate any double jeopardy argument. 14 Annals of Congress 431 (8th

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Significantly, the clause in question applies to all civil officers who are subject to impeachment, and not solely to the President. Yet, from the earliest days of the Republic, civil officers liable to impeachment have been dealt with in the criminal courts without first being impeached, convicted, and removed. Recently, as this Court is well aware, a panel of the Seventh Circuit composed of three distinguished Senior Circuit Judges specially designated to review the appeal of United States Circuit Judge Otto Kerner rejected the textual argument relied on by counsel for the President and observed that "[t]he purpose of the phrase may be to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy, or it may be to differentiate the provisions of the Constitution from the English practice of impeachment." *United States* v. *Isaacs and Kerner*,

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Cong., 2d Sess., 1805). Our research has failed to locate any other statement by a delegate to the Constitutional Convention explicitly stating that the purpose of the "nevertheless" clause was either to avoid the double jeopardy problem or to immunize a President or civil officers from criminal prosecution.

Delegates during the North Carolina debates spoke at length about whether impeachment was the exclusive remedy against miscreant federal officials. 4 Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* 32–50 (2d ed. 1836) [hereinafter cited as Elliot's Debates]. At one point Iredell stated that "[h]e [the government official] may be tried in such a court for common-law offenses, whether impeached or not." 4 Elliot's Debates 37. But Governor Johnston was seemingly of the view "that men who were in very high offices could not be come at by the ordinary course of justice; but when called before this high tribunal and convicted, they would be stripped of their dignity, and reduced to the rank of their fellow citizens, and then the courts of common law might proceed against them." *Ibid.*

493 F. 2d 1124, 1142 (7th Cir.), cert. denied, — U.S. — (June 17, 1974). In accordance with the plain thrust of the language of this clause, the court expressly refused to construe it to imply that a sitting federal judge, who is liable to impeachment under the same clause that is applicable to the President, may not be indicted and tried prior to removal from office.[13] In language equally applicable to a federal judge or a President, the court wrote (493 F. 2d at 1144):

> We conclude that whatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government they do not exempt the members of those branches "from the operation of the ordinary criminal laws." Criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government. Historically, the impeachment process has proven to be cumbersome and fraught with political overtones.

The panel made no effort to distinguish the President from the sweep and force of this statement.

The President also refers to the views expressed by the Framers as evidencing at least a clear *intent* to immunize the President from criminal prosecution. While there are some statements cited in the

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[13] The same clause in the Constitution provides for the impeachment of the "President, the Vice President and all civil Officers of the United States" (Article II, Section 4), and Article I, Section 3, clause 7, relied on so heavily by the President, does not distinguish among the President, Vice President and other civil officers.

President's brief indicating that criminal indictment was expected to follow impeachment, these few statements cannot support the conclusion that the Framers *unambiguously* intended to immunize an incumbent President from criminal prosecution. They were made by the delegates to the Convention while discussing the issues of executive power, checks on Presidential prerogatives, and the relationship between the impeachment remedy and the President's independence. The precise issue of Presidential immunity was not confronted by those who wrote and debated the Constitution.[14]

The President relies heavily on Gouverneur Morris' opinion articulated at the federal Convention:

> A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachment, was that the latter was to try the President after the trial of the impeachment. 2 Farrand, *Records of the Federal Convention of 1787* at 550 (1911) [hereinafter cited as Farrand].

All this view contemplates is that a President may commit an act which constitutes *both* an impeachable offense and an indictable crime, and it would be anomalous for the same people who try his impeachment to participate later in the adjudication of his guilt or innocence in a different proceeding but in-

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[14] When the Framers were debating what privileges should be accorded the legislators, James Madison suggested that the Convention consider "what privileges ought to be allowed to the Executive." The Convention adjourned at that point, however, and did not return to the topic in its later proceedings. 2 Farrand at 502–03. See also statement of Charles Pinckney in the Senate on March 5, 1800 (Br. 77–78).

volving the same basic activity. The statement does not imply that Morris considered it mandatory that impeachment precede indictment. Moreover, there was some concern about the possible partiality of judges who had been appointed by the President. Madison, *Debates in the Federal Convention* 536 (1920 ed.). One commentator has suggested that this was the prime reason for having the Senate rather than this Court serve as the tribunal for an impeachment trial. 1 Curtis, *Constitutional History* 482 (1889).

We do not claim that any of the actual debates provide any definitive insight into the Framers' intention on the question of the President's amenability to criminal indictment. While counsel for the President states that "there is literally nothing in all of the records of the Convention to suggest that any delegate had any contrary view" (P. Br. 100), the simple fact is that the Framers never confronted the issue at all.

It is significant in this context that unlike congressmen, who were afforded an explicit, limited immunity in the Constitution with respect to their legislative duties, see *Gravel* v. *United States, supra; United States* v. *Brewster,* 408 U.S. 501; *United States* v. *Johnson,* 383 U.S. 169, the President was provided none.[15] And, as we show in our main brief (pp. 67–80),

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[15] We do not believe that the failure to provide explicitly for executive immunity was a mere oversight. The debates indicate that much time was spent debating the specifics of the impeachment clause, the powers of the President, and the checks on executive power. A desire to place the Chief Executive above the ordinary processes of law until his term is completed most surely would have been expressly enunciated in the text of the Constitution or at least explicitly recognized during the de-

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the separation of powers doctrine does not result in an absolute immunity.

The President offers the additional argument that "[s]ince the President's powers include control over all federal prosecutions, it is hardly reasonable or sensible to consider the President subject to such prosecution" (P. Br. 97).[16] As we have explained in the introduction to our main brief (pp. 27–44), however, the Special Prosecutor, under applicable regulations, has final control over the position the United States, as sovereign, asserts in cases under his defined jurisdiction. Indeed, as we discussed in our main brief (pp. 20–33), the President personally agreed here to

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bates. In our main brief, moreover, we have cited the passages showing that the Framers were careful *not* to give the Executive any sweeping privileges or immunity (Br. 76–79).

There is a dearth of scholarly treatment of the question whether an incumbent President can be indicted. One nineteenth century commentator believed that "the ordinary tribunals, as we shall see, are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency." Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1929). See also 1 Curtis, *Constitutional History* 481 (1889). A contemporary scholar is of the view that an incumbent President can be indicted and he has concluded that "[i]t was because the Founders had learned this lesson from history that presidential powers were enumerated and limited, and that immunity from arrest was altogether withheld." Berger, *The President, Congress and the Courts*, 83 Yale L.J. 1111, 1136 (1974).

[16] The force of the President's argument here could lead to the conclusion that the Attorney General who under 28 U.S.C. 516 and 519 is authorized to conduct and supervise all litigation in which the United States is a party would likewise be immune from federal indictment, as would the United States Attorney for crimes committed in his district. 28 U.S.C. 547. The Constitution could not intend such a result.

the Attorney General's promulgation of regulations (a) giving the Special Prosecutor "full authority for investigating and prosecuting * * * allegations involving the President," (b) specifying that "the Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions," and (c) pledging that "the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor," or to "limit the independence that he is hereby given" or to limit "the jurisdiction of the Special Prosecutor" unless the consensus of eight Legislative leaders approves the President's "proposed action." (See pp. 148, 149, 151–153 of the Appendix to our main brief.) Evidently, therefore, neither the President nor the Attorney General considered *prosecution of a President by an independent* Special Prosecutor constitutionally inconceivable. It is hardly inevitable, therefore, that future Presidents must be left with personal control over the decision whether they—or their friends and associates—should be prosecuted.

Counsel for the President suggests that the President may have a unique immunity because the "Presidency is the only branch of government that is vested exclusively in one person by the Constitution" (P. Br. 96). Thus, it is argued: "The functioning of the executive branch ultimately depends on the President's personal capacity: legal, mental and physical. If the President cannot function freely, there is a critical gap in the whole constitutional system established by the Framers." (*Ibid.*) This is a weighty argument and it is entitled to great respect. But

whether it is conclusive is uncertain and need not be decided here. It is fair to note, however, that our constitutional system has shown itself to be remarkably resilient. Our country has endured through periods of great crises, including several when our Presidents have been personally disabled for long periods of time. Furthermore, although the executive power is constitutionally vested in the President, it cannot escape notice that, in practical terms, the governmental system that has evolved since 1789 depends for the day-to-day management of the Nation's affairs upon the operation of the several cabinet departments and independent regulatory agencies, without direct Presidential guidance. In addition, the Twenty-fifth Amendment to the Constitution now expressly provides for interim leadership whenever a President is temporarily disabled or incapable of discharging the responsibilities of his office. And it is by no means inevitable, in any event, that the lodging of an indictment against an incumbent President would "cripple an entire branch of the national government and hence the whole system" (P. Br. 97).

Finally, there are very serious implications to the President's position that he has absolute immunity from criminal indictment and to his insistence that under "our system of government only the House of Representatives may determine that evidence of sufficient quantity and quality exists to try the President" (P. Br. 114–15). It is conceded that while the King can do no wrong, a President, in the eyes of the law, is not impeccable. But while there is currently a great debate about whether "impeachable offenses" under

the Constitution include *non-criminal* abuses of official power,[17] it appears that not *every* crime would justify impeachment. As both the House Judiciary Committee staff and the attorneys for the President seem to agree, there must be some nexus between the impeachable misconduct and the office held. As one early commentator explained about the phrase "high Crimes and Misdemeanors":

> They can only have reference to public character and official duty. * * * In general those offences which may be committed equally by a private person as a public officer are not the subjects of impeachment. Murder, burglary, robbery and indeed all offences not immediately connected with office, except the two expressly mentioned [treason and bribery], are left to the ordinary course of judicial proceeding * * *. Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829).

In his submission to the House Judiciary Committee, counsel for the President therefore argued that he is impeachable only for "great crimes against the state." 10 Weekly Compilation of Presidential Documents 271 (March 4, 1974). If counsel for the President is correct that a President is amenable to impeachment only for certain grave public offenses

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[17] Compare *Constitutional Grounds for Presidential Impeachment: Report by the Staff of the Impeachment Inquiry*, House Judiciary Committee, 93d Cong., 2d Sess. (Comm. Print February 1974), with *An Analysis of the Constitutional Standard for Presidential Impeachment: Analysis Submitted to the House Committee on the Judiciary by Attorneys for the President*, 10 Weekly Compilation of Presidential Documents 270 (March 4, 1974).

and that he is absolutely immune from criminal prosecution, then indeed the Constitution has left a *lacuna* of potentially serious dimensions.[18]

Because of this purported gap and because of the virtually universal application of statutes of limitations, a President who shared complicity in such "private" crimes as burglary or assault might well be beyond the reach of the law, partaking at least in part of the royal immunities associated with a King. Perhaps this is the design of the Constitution, or a regrettable corollary of it, but we urge caution before such a proposition is accepted as inevitable.

II

THIS DISPUTE BETWEEN THE UNITED STATES, REPRESENTED BY THE SPECIAL PROSECUTOR, AND THE PRESIDENT—TWO DISTINCT PARTIES—PRESENTS A JUSTICIABLE CONTROVERSY

Principles of "separation of powers," frequently quoted in the President's brief, show why on the facts of the present case there are *no* obstacles to the

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[18] It is not surprising, therefore, that James Wilson, in the Pennsylvania ratification debates, observed that "far from being above the laws, he [the President] is amenable to them in his private character as a citizen, and in his public character by *impeachment*." 2 Elliot's Debates 480 (emphasis in original). James Iredell, during the North Carolina debates stated:

"If he [the President] commits any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit. If he commits any crime, he is punishable by the laws of his country, and in capital cases may be deprived of his life." 4 Elliot's Debates 109.

See also *Langford* v. *United States*, 101 U.S. 341, 343, suggesting in dictum that indictment of a President is an alternative to impeachment "if the wrong amounts to a crime."

Court's authority to entertain and decide this controversy. This Court's jurisdiction to consider and resolve this dispute on the merits stems from the fundamental role of the courts in our tri-partite constitutional system—the courts, as the "neutral" branch of government, have been allocated the responsibility to resolve all issues in a controversy properly before them, even though this requires them to determine authoritatively the powers and responsibilities of the other branches (Br. 25–27, 48–52).

This is true even when the dispute presented for resolution implicates intra-branch relationships. Thus, this Court has entertained cases challenging the right of Congress to exclude a duly-elected representative, see *Powell* v. *McCormack*, 395 U.S. 486, and cases brought by an executive officer challenging the propriety of his dismissal by his executive superiors, see, *e.g.*, *Sampson* v. *Murray*, — U.S. — (42 U.S.L.W. 4221, February 19, 1974); *Service* v. *Dulles*, 354 U.S. 363. Indeed, in *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, Chief Justice Marshall recognized that a federal court could determine whether the Secretary of State improperly withheld Marbury's commission. Contrary to the implications of the argument by counsel for the President (P. Br. 74–76), the case was not dismissed because it involved the "political" powers of the President. Rather, it was dismissed because the statute conferring original jurisdiction on this Court in that case was not consonant with the provisions of Article III narrowly circumscribing the Court's original jurisdiction.

The present controversy arises in the midst of a criminal prosecution pending in the federal courts.

At issue is the enforceability of a subpoena for allegedly privileged evidence. The questions for this Court, then, are whether the judicial process is validly invoked by the Special Prosecutor on behalf of the United States and whether the issue presented for review—the validity of the claim of executive privilege—is justiciable.

A. THE SPECIAL PROSECUTOR HAS INDEPENDENT AUTHORITY TO MAINTAIN THE PROSECUTION IN UNITED STATES V. MITCHELL, ET AL.

There is no need here to review again the history that led to the regulations establishing the Office of the Watergate Special Prosecution Force or the exclusive authority that the Special Prosecutor has to maintain prosecutions within his jurisdiction (Br. 5–6, 9–11, 27–33). What is important to note here, however, is that counsel for the President, by accepting the proposition that the President and Attorney General can delegate certain Executive functions to subordinate officers (P. Br. 10, 41, 106), implicitly has conceded the validity of the regulations, promulgated with the President's consent, delegating specific prosecutorial duties and powers to the Special Prosecutor.[19]

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[19] The delegation of specific and limited powers by the President or by cabinet officers is constitutional. See generally *Jay* v. *Boyd*, 351 U.S. 345, 351 n. 8; *Rose* v. *McNamara*, 375 F. 2d 924, 925 n. 2 (D.C. Cir. 1967), cert. denied, 389 U.S. 856; *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106, 110 (2d Cir. 1966), cert. denied, 385 U.S. 898.

As we establish in our main brief (32–33), the regulations delegating authority to the Special Prosecutor have the force and effect of law.

There can be no question that the Attorney General, with the concurrence of the President, has delegated to the Special Prosecutor "full authority" to prosecute the present criminal case and "full authority" to contest claims of executive privilege made during that prosecution. In exercising this authority, the Special Prosecutor has the "greatest degree of independence that is consistent with the Attorney General's statutory accountability." More specifically, the regulations provide that the "Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions." The only control the Attorney General retains is to dismiss the Special Prosecutor for "extraordinary improprieties." (Br. 146–49.)

Thus, it wholly misses the point for counsel to the President to say that the separation of powers precludes the courts from entertaining this action because "it is the exclusive prerogative of the executive branch, not the Judiciary, to determine whom to prosecute, on what charges, and with what evidence" (P. Br. 39).[20] To the extent this prerogative is exclu-

[20] The implication that this "prerogative" resides ultimately with the President in this case directly contradicts the position of former counsel for the President at oral argument before the court of appeals in *Nixon* v. *Sirica*, *supra*, on September 11, 1973 (p. 15):

"Now, in this instance we have a division of function within the Executive in that my friend, Mr. Cox, has been given absolute independence. It is for him to decide whom he will seek to indict. It is for him to decide to whom he will give immunity—decision[s] that ordinarily would be made at the level of the Attorney General, or in an important enough case at the level of the President."

sively Executive, it now lies with the Special Prosecutor with respect to the prosecution of *United States* v. *Mitchell, et al.*, and not with the Attorney General or the President. In a very real sense, therefore, the Office of the Watergate Special Prosecution Force is a quasi-independent agency. It is an agency intended and designed to be "independent of executive authority, *except in its selection,* and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Humphrey's Executor* v. *United States,* 295 U.S. 602, 625–26 (emphasis in original).[21]

This case, therefore, is wholly unlike the case of a subordinate executive officer, subject to the direct con-

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[21] Indeed, even absent the specific delegation to the Special Prosecutor, the President may not have the same unbridled discretion over the Department of Justice, which enforces the law through the courts and whose officers have duties and responsibilities owed to the courts, as he does, for example, over the State Department or the Department of Defense. Cf. *Myers* v. *United States*, 272 U.S. 52, 135. In *Berger* v. *United States*, *supra*, this court noted (295 U.S. at 88):

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

It should be emphasized that the Special Prosecutor's independence flows from an arrangement established *by the Executive.* Compare *Humphrey's Executor* v. *United States*, *supra*, 295 U.S. at 629; *Myers* v. *United States*, 272 U.S. 52. Thus, although the Congress was about to enact legislation to provide for an independent Special Prosecutor and has implicitly ratified the current status of the Special Prosecutor's Office under the Department of Justice regulations by special funding, the

trol of his superior, suing that superior. Rather, it is analogous to independent governmental agencies or departments, each pursuing its respective responsibilities, on opposite sides of a case within the courts' jurisdiction. Thus, for example, as this Court noted in its recent decision in *United States* v. *Marine Bancorporation, Inc.*, — U.S. — (June 26, 1974), the Comptroller of the Currency, an officer of the Treasury Department, "intervened in support of the merger as a party defendant" (slip op. at 10) in opposing a suit brought by the Department of Justice in the name of "the United States," challenging a merger the Comptroller had approved under his official powers. The Comptroller was heard in this Court in opposition to the Solicitor General. See also *Secretary of Agriculture* v. *United States*, 350 U.S. 162; *United States* v. *ICC*, 337 U.S. 426. The Special Prosecutor in accordance with his independent responsibilities signed the indictment and initiated the prosecution in the present case. In connection with that prosecution, now properly before the courts, the Special Prosecutor, as attorney for the United States and an officer of the court, is seeking evidence from the President that is relevant and material to the prosecution. The President, acting pursuant to what he views as his responsibilities, has interposed a claim of executive privilege. Fully consistent with the regulations empowering him to contest such a claim, as well as with the expectations of all those who were parties to the establish-

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Court is not faced with the "separation of powers" issue that would be presented if the Special Prosecutor derived his authority from a regime designed solely by Congress.

ment of the Office of the Watergate Special Prosecution Force (Br. 29–32), the Special Prosecutor challenged that claim by subpoena, as he is authorized to do without restriction by the President or the Attorney General.

Counsel for the President repeatedly stresses that the President has not delegated to the Special Prosecutor his "*duty*" to claim executive privilege when he sees fit, suggesting that his retention of that power somehow deprives the courts of jurisdiction (*e.g.*, P. Br. 28–29, 43). We fully agree that the President's power to assert a claim of privilege for presidential papers has not been delegated to the Special Prosecutor. Indeed, it is precisely that power, when it comes into conflict with the independent power of the Special Prosecutor in the context of a pending criminal prosecution to contest the claim of privilege, that creates the live, concrete controversy before the courts.[22]

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[22] Even if the Special Prosecutor were to be dismissed, the Office of the Watergate Special Prosecution Force abolished, and the prosecution of *United States* v. *Mitchell, et al.* placed under the control of the Criminal Division of the Department of Justice, such action would not render moot a decision by this Court upholding enforcement of the subpoena or deprive the Court's ruling of finality.

First, several defendants are asserting rights under *Brady* v. *Maryland*, 373 U.S. 83, and its progeny, to obtain access to the subpoenaed material, and they could pursue independently any decision enforcing the subpoena.

Second, although prosecution is generally considered an executive function, even the Attorney General—still assuming hypothetically that the Special Prosecutor is legally ousted from this case—would not have *carte blanche* to dismiss the prosecution here except by leave of court. See Rule 48(a), Federal Rules of Criminal Procedure. And as we pointed out in our main brief, the Attorney General and Solicitor General would be obliged to see to the enforcement of the Court's mandate.

Third, as long as the prosecution remains pending, the district

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B. THE ASSERTION OF EXECUTIVE PRIVILEGE AS A GROUND FOR REFUSING TO PRODUCE EVIDENCE IN A CRIMINAL PROSECUTION DOES NOT PRESENT A POLITICAL QUESTION AND THE VALIDITY OF SUCH A CLAIM MUST BE RESOLVED BY THE COURTS

In arguing that the Judiciary, and not the Executive, ultimately must determine the validity of a claim of executive privilege when it is asserted in a judicial proceeding, we rely on the fundamental principle that the courts have the power and the duty to resolve all issues necessary to a lawful resolution of controversies properly before them (Br. 48–52). Although counsel for the President virtually has ignored all the relevant cases, this principle has been applied squarely to cases involving claims of executive privilege. See *Environmental Protection Agency* v. *Mink*, 410 U.S. 73; *Roviaro* v. *United States*, 353 U.S. 53; *United States* v. *Reynolds*, 345 U.S. 1. As those cases demonstrate, the validity *vel non* of a claim of executive privilege presents a justiciable issue. The duty to produce relevant and material evidence for a criminal prosecution, a duty that reaches all citizens, is a duty that "can be judicially identified," and "its breach judicially deter-

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court itself, under its established power to summon "court witnesses," could insist on compliance with the subpoena. See, *e.g.*, Rule 614(a), Proposed Federal Rules of Evidence; *United States* v. *Lutwak*, 195 F. 2d 748 (7th Cir. 1952), affirmed, 344 U.S. 604; *Troublefield* v. *United States*, 372 F. 2d 912, 916 n. 8 (D.C. Cir. 1966); *Estrella-Ortega* v. *United States*, 423 F. 2d 509 (9th Cir. 1970). As Justice Frankfurter explained in *Johnson* v. *United States*, 333 U.S. 46, 54 (dissenting opinion): "A trial is not a game of blind man's buff; and the trial judge * * * need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony"—"Federal judges are not referees at prize-fights but functionaries of justice."

mined," and the remedy for any breach "can be judicially molded." *Baker* v. *Carr*, 369 U.S. 186, 198.

Counsel for the President nevertheless asserts that this controversy presents a non-justiciable "political question" (P. Br. 44). It was long ago established, however, that the mere fact that a case has "political overtones" (P. Br. 48) does not mean it involves a "political question." See, *e.g.*, *Nixon* v. *Herndon*, 273 U.S. 536. This case involves no "political question" as that concept is correctly understood under the criteria articulated in *Baker* v. *Carr*, *supra*, 369 U.S. at 217. See also *Powell* v. *McCormack*, *supra*, 395 U.S. at 518–19.

Perhaps the principal hallmark of a "political question" beyond the power of the federal courts to decide is its commitment by the text of the Constitution to another branch of government for final resolution. Counsel for the President concedes, with considerable understatement, that "[u]nlike its companion privilege attendant upon the Congress by virtue of the Speech and Debate Clause, executive privilege was *not meticulously delineated* by the Framers of our Constitution" (P. Br. 50 n. 34) (emphasis added). Such a privilege is not "delineated" at all in the text of the Constitution and it is still a matter of dispute whether "executive privilege" is a true constitutional privilege at all or simply a common law evidentiary privilege (Br. 57 n. 43). At the very least it is evident that it has been the courts that have fashioned "executive privilege" to promote unfettered and robust debate on matters of policy and they have done so without reliance on any specific clause in the text of the Constitution. Certainly there is nothing in the

text of the Constitution that commits the final determination of the privilege to the Executive. On the contrary, in recognizing this privilege in the context of litigation, the courts from the outset have assumed and asserted that it is for them and not the Executive to determine the validity of a particular claim in the context of the pending case (Br. 54–56).

Moreover, the decisions of this Court, including *Clark* v. *United States*, 289 U.S. 1, as well as *Mink*, *Reynolds* and *Roviaro*, demonstrate that there are "judicially discoverable and manageable standards" for resolving claims of privilege. And thus, there is no basis for invoking the "political question" doctrine on that ground. Indeed, the common law development of evidentiary privileges generally, even those now embodied explicitly in the Constitution, belies any claim that the courts are not suited for such determinations. While in cases where military secrets or foreign affairs are involved, the courts may not be able to make the delicate judgment whether the national interest requires continued secrecy, the generalized executive privilege for confidential deliberations does not implicate any such sensitive matters properly entrusted to the discretion of the Executive. Compare *Gilligan* v. *Morgan*, 413 U.S. 1, 10–11.

Finally, this Court's decision in *Powell* v. *McCormack*, *supra*, 395 U.S. at 549, dispels any notion that the courts are precluded by the political question doctrine from overriding a determination by the President:

> Our system of government requires that federal courts on occasion interpret the Constitu-

tion in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.

Nothing about the present litigation over a subpoena for allegedly privileged evidence, issued in a pending criminal prosecution, renders it a "political question" beyond the jurisdiction of the federal courts.

III

THE EXECUTIVE BRANCH DOES NOT HAVE AN ABSOLUTE PRIVILEGE TO WITHHOLD EVIDENCE OF CONFIDENTIAL COMMUNICATIONS FROM A CRIMINAL PROSECUTION

A. THE VALID INTERESTS OF THE EXECUTIVE BRANCH IN PROMOTING CANDID INTRA-AGENCY DELIBERATIONS ARE FULLY PROTECTED BY THE QUALIFIED EXECUTIVE PRIVILEGE REGULARLY RECOGNIZED AND APPLIED BY THE COURTS

We share the desire of counsel for the President to maintain a strong and viable Executive. And we do not deny that wholesale access to evidence of confidential governmental deliberations by every congressional committee and by every private litigant, no matter what the context of the request for information or the need for information, might "chill" the interchange of ideas necessary for the successful administration of the Executive Branch. But this Court is not confronted with the alternatives seemingly posed by counsel for the President: this case does not present a choice between recognizing an absolute privilege on the one hand, or exposing the Executive to repeated unwarranted intrusions on its confidentiality on the other hand. The narrow issue before the Court

is whether the President, in a pending prosecution against his former aides and associates, may withhold material evidence from the court merely on his assertion that the evidence involves confidential communications.

We emphasize at this point that we are not concerned in this case with the "sovereign prerogative" of the Executive "to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." *New York Times Co.* v *United States*, 403 U.S. 713, 729–30 (Stewart, J., concurring). There has been no claim that any of the subpoenaed conversations involves "state secrets" or that disclosure of any of them will "result in direct, immediate, and irreparable damage to our Nation or its people." 403 U.S. at 730.[23] We deal instead solely with deliberations regarding a domestic crime. Thus, the concerns of Justice Stewart and Justice White do not have "particular force here" (P.Br. 66), and there can be no question that in the context of this case, the qualified executive

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

privilege long recognized and applied by the courts fully protects the Executive's legitimate interests in secrecy.

Neither Presidents nor their aides ever have been assured that their communications will be maintained absolutely confidential, and they certainly cannot confer with that expectation.[24] More often than not, Presidents and their aides voluntarily disclose communications when it serves their purposes. There is no better example than the extensive disclosures by President Nixon with respect to Watergate.

Counsel for the President points to the alleged "crippling effect" of the decision in *Nixon* v. *Sirica*, relying solely on the fact that the President "has received more than two dozen subpoenas emanating from various courts throughout the country, calling for the production of voluminous amounts of privileged materials" (P. Br. 68 n. 51). Significantly, counsel for the President does not tell the Court how many of these subpoenas have been quashed. Nor does

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[24] Counsel for the President states that "Presidents have always acted on the assumption that it is discretionary with them, and with them alone, to determine whether the public interest permits production of presidential papers, and the other branches of Government have until recently accepted this position" (P. Br. 55–56). He relies solely on examples, set forth in a table on pp. 55–58 of his brief, where Presidents have refused to submit evidence to *Congress or congressional committees*. Those examples are wholly inapposite to the case at hand. Congressional oversight responsibilities continually place the Congress and Executive in conflict. On many occasions, probing into the mental processes of Executive decision-making results from essentially political considerations. It is in this context, where executive officers are held up to public ridicule, that

he indicate in how many instances courts have ordered compliance with the subpoena.[25]

As counsel for the President himself notes (P. Br. 77–78), however, Chief Justice Marshall held in *United States* v. *Burr,* 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807), that subpoenas may issue to the President and that the "guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued." While counsel for the President apparently rejects the notion that the courts are equipped to protect the Executive Branch against burdensome and oppressive subpoenas, there is no evidence that the courts have failed in this duty. Indeed, the expectation that the courts are incapable of protecting the legitimate interests of the Executive strikes at the very core of the concept of principled adjudication which is reflected in *Reynolds, Roviaro* and the lower court cases which hold that executive privilege is not absolute and is subject to determination by the courts (see our main brief at 52–60). The

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there is the greatest danger to the policies underlying executive privilege. We emphasize, as we did in our main brief (53–54, n. 38), that determining the validity of a claim of privilege in a pending criminal prosecution in no way requires this Court to determine whether a claim of privilege asserted against Congress presents a justiciable issue. Thus, a decision in this case will not affect the relationship between the President and Congress that until now has depended largely on political factors.

[25] A number of these have been issued at the request of defendants seeking purportedly exculpatory materials in the President's possession. As counsel for the President concedes (P. Br. 29 n. 15): "We do not challenge the jurisdiction of a court to entertain a properly documented request by a defendant for exculpatory materials."

plain fact is that, as far as we are aware, with the exception of a few subpoenas issued to the President at the request of his former aides who are now awaiting criminal trial, all of the other subpoenas to which counsel refers have been quashed by the courts, including several quashed at the Special Prosecutor's urging. Thus, just as with subpoenas to cabinet officers, the courts should be solicitous to avoid *unwarranted* interference with the performance of executive functions, but it is for the courts to decide whether enforcement of process is necessary in each particular case. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 420.

It is true that in the past it has been rare for subpoenas to be issued against the President. This is hardly surprising, because there have been few occasions on which there has been reason to believe that the President has had in his *personal* possession evidence directly material to a criminal prosecution. Counsel for the President cites (P. Br. 80 n. 59) Justice Chase's refusal to issue a subpoena *ad testificandum* to President Adams during the criminal trial of Thomas Cooper for seditious libel against the President, *United States* v. *Cooper,* 25 Fed. Cas. 631, 633 (No. 14,865) (C.C.D. Pa. 1800). But, despite the implication of counsel's assertion, Justice Chase did *not* refuse the subpoena because he viewed the President as immune from process or as having an absolute privilege not to testify. Rather, the court apparently considered it irrelevant and improper on a charge of criminal libel to call the alleged victim to ask him whether he had done the acts he was mali-

ciously accused of. See Cooper, *Account of the Trial of Thomas Cooper of Northumberland* 10 (1800). Indeed, Cooper at first understood that the subpoena had been refused on grounds of privilege, but Justice Chase was categorical in disabusing him of that notion (*ibid.*):

> [Y]ou have totally mistaken the whole business. It is not upon the objection of privilege that we have refused this subpoena: This court will do its duty against any man however elevated his situation may be.—You have mistaken the ground.

It was in that context, when Cooper, who was appearing *pro se*, sought to argue the matter further that Justice Chase interjected: "The Court will not hear you after they have given their decision: It was a very improper and a very indecent request." *Ibid.* That case hardly advances the President's claim here.[26]

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[26] In fact, William Rawle, who was the United States Attorney for the District of Pennsylvania who personally handled the Cooper prosecution, later wrote in his treatise that the President *is* subject to process, explaining:

"* * * The law makes no distinction of persons, and the maxim that the king can do no wrong, so much admired in England, exists by no analogy in a republican government.

"It may not be improper to consider why such a rule is admitted in monarchies, and why it cannot take place in a well constituted republic. In every monarchy, a quality termed prerogative, is attached to the monarch. * * * But the principle which thus shields and protects the monarch; the sovereignty resident in himself, creates the distinction between him and the elected, though supreme, magistrate of a republic, where the sovereignty resides in the people. All its officers, whether high or low, are but agents, to whom a temporary power is imparted, and on whom no immunity is conferred. An exemption from the power of the law, even in a small particular, except upon

(Continued)

The two most notable instances where subpoenas have been issued to the President include the *Burr* cases and the court martial of Dr. William Barton. As we discussed at length in our main brief, Chief Justice Marshall was unequivocal in upholding the judicial power to issue a subpoena to the President. While there has been dispute over whether President Jefferson complied with the subpoenas, Raoul Berger, after a thorough study of the original reports of the *Burr* trial, has concluded that Jefferson fully intended to comply with the first subpoena, including that part which called for the Wilkinson letter of October 21, 1806. Moreover, after some delay in locating the letter, a copy apparently was submitted to the clerk. See Berger, *The President, Congress, and the Courts,* 83 Yale L.J. 1111, 1115 (1974). As to the second Wilkinson letter, which was in the possession of United States Attorney Hay, the record remains unclear. President Jefferson had claimed privilege with respect to specific portions, asserting that they were irrelevant to the issues at trial. There is no indication whether Chief Justice Marshall ever ruled whether the requirements of Burr's defense to the misdemeanor charge were sufficient to overcome the assertion of privilege. Nor does it appear whether, as the trial developed,

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(Continued)
special occasions, would break in upon this important principle, and the freedom of the people, the great and sacred object of republican government, would be put in jeopardy. The exception adverted to, is that already noticed, of members of the legislature * * * but no other officer of government is entitled to the same immunity in any respect."
Rawle, *A View of the Constitution of the United States of America* 168–170 (2d ed. 1829).

Burr's counsel had any occasion to offer the letter into evidence. *Id.*, at 1118–20.

In the Barton court martial, President Monroe was subpoenaed by the defendant.[27] Heeding the advice of his Attorney General that under the *Burr* case such a subpoena may "be properly awarded to the President of the U.S.," [28] President Monroe indicated on the return that although his official duties precluded a personal appearance at the time, he was prepared to testify by deposition.[29] President Monroe subsequently submitted answers to the interrogatories forwarded him by the court martial.[30]

In support of an absolute executive privilege, counsel for the President analogizes to the secrecy of internal court deliberations and refusals by Congress to afford evidence for criminal prosecutions. Certainly, we do not question the views of either the Chief Justice or Justice Brennan, quoted in the President's brief at pp. 59–60, that as a general rule the deliberations of judges, either among themselves or with their law clerks, must be kept secret. But nowhere has there been the suggestion that the secrecy is impenetrable, regardless of the reasons mandating

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[27] See Attorney General's Papers: Letters received from the State Department, January 12, 1818, Record Group 60, National Archives.

[28] Letter from Attorney General William Wirt to Secretary of State John Quincy Adams, January 13, 1818, in Attorney General's Opinions, Book A, at 21, Record Group 60, National Archives.

[29] Records of General Courts Martial and Courts of Inquiry of the Navy Department, Record Group 125, National Archives, Microfilm Publication M273, roll 10, frame 0834.

[30] *Id.*, at frames 0799–0806.

in favor of disclosure. For example, consider the *Manton* case, where Circuit Judge Manton was convicted of a conspiracy to obstruct justice and defraud the United States arising out of bribes Manton accepted to influence his decision of cases. See *United States* v. *Manton*, 107 F. 2d 834 (2d Cir. 1939), cert. denied, 309 U.S. 664. We cannot believe that if judicial colleagues of Judge Manton or his law clerk had been in a position to give material testimony on the elements of the crimes charged that they would have been excused because of general notions of confidentiality. Indeed, such a decision would fly in the face of this Court's decision in *Clark* v. *United States, supra.*[31]

Moreover, congressional refusals to supply evidence offer no aid at all to the President's position. On each occasion when Congressmen have refused to testify or when committees have refused to supply documents for use at a trial, there has been an explicit constitutional privilege at issue. These privileges include: (1) the Speech or Debate Clause (Art. I, Sec. 6, cl. 1), which prohibits inquiry "into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts," *United States* v. *Brewster, supra,* 408 U.S. at 512; (2) the Freedom from Arrest Clause (Art. I,

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[31] In fact, Circuit Judges Learned Hand, Augustus Hand, and Thomas Swann did testify at the trial (for the defense) about their participation in court conferences with Judge Manton concerning the cases at issue. They stated they had observed nothing unusual about Manton's behavior. Trial Transcript pp. 792–93.

Sec. 6, cl. 1);[32] and (3) Article I, Section 5, clause 3, which empowers each House to maintain Journals which must be published, "excepting such Parts as may *in their Judgment* require Secrecy" (emphasis added).[33]

If there is anything to be learned from the congressional refusals to produce evidence, it is that they are justified from the explicit privileges accorded Congress—privileges that are noticeably absent from Article II. Unlike Congress, the President has no explicit privileges, and if any inference is to be drawn, it is that the Framers intended that he have none. See *Anderson* v. *Dunn*, 6 Wheat. (19 U.S.) 204, 223. Accordingly, examples of congressional refusals to provide evidence in no way imply that the "separation of powers" doctrine would otherwise have justified an absolute congressional privilege and certainly do not support the creation of an absolute executive privilege in the face of the silence of the Constitution on the subject.

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[32] Even that clause does not provide absolute immunity from service of process in a criminal proceeding. See *Gravel* v. *United States*, *supra*; *United States* v. *Cooper*, 4 Dall. (4 U.S.) 341.

[33] This clause was discussed in the recent decision in *United States* v. *Richardson*, —— U.S. —— (June 25, 1974), where Mr. Justice Douglas observed in his dissenting opinion: "Secrecy has of course some constitutional sanction" (pp. 2–3).

In the Calley court martial, cited by counsel for the President (P. Br. 61 n. 49), Calley attempted to subpoena secret testimony which had been given before a subcommittee of the House Armed Services Committee. When the subcommittee chairman refused to supply the testimony, the military court recognized that this was proper under Article I, Section 5. See 116 Cong. Rec. 37,652 (1970).

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B. THE FIRST AMENDMENT ERECTS NO ABSOLUTE PRIVILEGE FOR THE PRESIDENT TO WITHHOLD RELEVANT EVIDENCE

For the first time, in this Court, counsel for the President advances the novel argument that the President's rights as an ordinary citizen to privacy and freedom of expression support his claim of an absolute privilege to withhold physical evidence determined to be relevant to the trial of criminal prosecutions.[34]

Viewing this argument as a claim of the President's right as a citizen to free speech, we have an initial difficulty in identifying precisely how the President's freedom of expression would be violated by compliance. There can be no suggestion that enforcement of the subpoena would burden or chill his ability to communicate with the public. This is particularly true

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[34] While the President's chief reliance is on the First Amendment, he also invokes Article II, Section 2, clause 1 of the Constitution:

"[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."

Unfortunately, this provision is cited without elaboration or explanation and its relevance to the claim of privilege in this case is not otherwise readily apparent. With the single exception of one meeting on April 17, 1973, at which then-Secretary of State Rogers was present for part of the time, the subpoenaed tape recordings do not relate to meetings between the President and members of his Cabinet concerning their official duties, but rather to conversations between the President and members of his personal staff concerning the Watergate cover-up. To the extent the meeting of April 17 may have included discussions of Secretary Rogers' official responsibilities, not related to Watergate, the possibility of excising such portions can most appropriately be considered when the full tapes are presented to the district judge for his *in camera* examination.

in light of the fact that the White House recording system was established in the first place at government expense by government personnel expressly to create an accurate "historical" record of the President's conduct of his office—to create "a complete, accurate record of conversations held by the President." See Transcript of Hearing on November 6, 1973, at 906, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon,* D.D.C. Misc. No. 47–73 (testimony of witness Haldeman). As shown by his unilateral action of April 30, 1974, in releasing a great quantity of edited transcripts of Watergate-related conversations, he is free at any time to disclose as much of the recorded material in his possession as he chooses. The thrust of the President's position, however, is to *prevent* any dissemination of the subpoenaed material. Consequently, the interests asserted cannot realistically be those of freedom of expression, but rather solely the converse—the right to refuse to disclose what has been expressed.

But any claim that a constitutional right to privacy bars disclosure here will not withstand analysis. Of course, we do not quarrel with the proposition that the Constitution protects the rights of privacy and freedom of association. These are values at the center not only of the First Amendment, *e.g. Griswold* v. *Connecticut,* 381 U.S. 479, 483; *NAACP* v. *Alabama,* 357 U.S. 449, but also of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment, *Couch* v. *United States,* 409 U.S. 322; *Katz* v. *United States,* 389 U.S. 347; *Hale* v. *Henkel,* 201 U.S. 43; *Boyd* v. *United States,* 116 U.S. 616. The President

at no time has claimed to rely on either the Fourth or Fifth Amendment. The subpoena is narrowly and specifically framed, and the President has not resisted disclosure on the ground that the tape recordings in his possession would tend to incriminate him; on the contrary, the President has consistently maintained his innocence of any wrongdoing. Indeed, the edited transcripts were released publicly on April 30 in an effort to demonstrate "that the President has nothing to hide in this matter." 10 Weekly Compilation of Presidential Documents 452 (May 6, 1974).

Nor does the First Amendment shield the President or any other citizen from "the longstanding principle that 'the public . . . has a right to every man's evidence,'"—that was the precise holding in *Branzburg* v. *Hayes*, 408 U.S. 665, 688, where the Court made perfectly clear that even reliance upon the explicit First Amendment freedom of the press creates no absolute privilege to withhold evidence in criminal prosecutions. In *Branzburg*, which involved a grand jury subpoena for testimony by reporters concerning information received from confidential informants, the claim of the newsmen was virtually identical to that of the President here—that "the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation," 408 U.S. at 693. This Court considered and decisively rejected the claim of privilege in a setting where the reporter was asked to provide information concerning possible criminal activities by his informants. The parallel between that situation and this case is obvious, for the subpoenaed conversations here all involve persons (in-

cluding the President) charged by the grand jury to have been members of a conspiracy to obstruct justice. Entirely aside from the issue of the President's own alleged complicity,[35] the fact that there is reason to believe that these conversations record or reflect criminal conduct by the other participants is sufficient to override any claim of First Amendment privilege that might otherwise apply. As this Court stated in *Branzburg* (408 U.S. at 692):

> Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.

This analysis applies equally to the Executive Office of the President.

The Court also considered the case of a reporter subpoenaed to provide information received from confidential sources about third-party crime. Although it recognized that it was "not irrational" to fear that

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[35] While dissenting from the majority opinion in *Branzburg*, Justice Douglas agreed that even a reporter would have no First Amendment privilege to refuse to testify if he were himself implicated in a crime (although of course he could invoke the Fifth Amendment). 408 U.S. at 712.

compelling such testimony would burden freedom of the press, 408 U.S. at 693, it held that such a burden is justifiable when the government's purpose is the vindication of the "compelling" and "paramount" public interest in the enforcement of the criminal laws. That test was satisfied as to the reporters' testimony since, on the record,

> it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment. 408 U.S. at 701.

[*A fortiori*, the evidence sought from the President in this case is producible, since the grand jury has already found reason to believe that crimes—involving the President—have been committed, and the tape recordings have been found to be material to the guilt or innocence of defendants already indicted.

First Amendment concepts, therefore, cannot bolster the President's refusal to honor this subpoena for important evidence, whether or not he is regarded as personally implicated in the conspiracy.

IV

THE SUBPOENAED CONVERSATIONS ARE UNPRIVILEGED BECAUSE A PRIMA FACIE SHOWING HAS BEEN MADE THAT THEY OCCURRED IN THE COURSE OF A CRIMINAL CONSPIRACY INVOLVING THE PRESIDENT

We have argued that under cases like *Clark* v. *United States*, *supra*, the qualified privilege accorded to executive deliberations is inapplicable in this case because of the *prima facie* showing made by the Spe-

cial Prosecutor below that the subpoenaed conversations were part of a continuing criminal conspiracy involving the President himself (Br. 90–102). Indeed, former counsel for the President conceded in *Nixon* v. *Sirica, supra,* that "[e]xecutive privilege cannot be claimed to shield executive officials from prosecution for crime" (Brief of Petitioner 69). Counsel for the President now responds by challenging the sufficiency of our *prima facie* showing, claiming that the grand jury's naming of the President as an unindicted co-conspirator is proof only of probable cause, which is alleged to be something less than the *prima facie* showing of criminality necessary to overcome the privilege.[36] The President's position, however, not only misconceives the meaning of the grand jury's action, but also ignores the weighty evidentiary presentation, based upon statements supplied by the President himself or by others under oath, which was submitted to the district court.

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[36] The President also contends that a claim of executive privilege, unlike claims of other privileges concerning confidential communications, cannot be defeated by a showing that the discussions were in furtherance of a conspiracy because the privilege exists for the benefit of the public rather than the individual asserting it. We freely concede, indeed we emphasize, that executive privilege is not a personal or "individual" privilege. But the recognition that the privilege exists to promote the legitimate functioning of government in no way warrants the conclusion that it must stand as a shield in the face of evidence that it has been abused by the officeholder. Indeed, *Clark* v. *United States*, *supra*, unmentioned by the President's brief, conclusively rebuts any such notion. The "public" rather than "individual" nature of the privilege demonstrates that it cannot be maintained to conceal the criminal activity of a miscreant officeholder. See our main brief at 90–97.

Relying upon cases which hold that there is a distinction between a *prima facie* showing of guilt beyond a reasonable doubt and a determination of "probable cause," the President suggests that the grand jury's decision that the evidence before it warranted the return of an indictment represents only a determination that a crime "might" have been committed (P. Br. 115). This suggestion, however, fundamentally misconstrues the standard applied by a grand jury in determining whether an indictment should issue. A grand jury indictment may not rest on mere suspicion. Thus, as long ago as 1836, Chief Justice Roger B. Taney, sitting as circuit justice in the District of Maryland, instructed a grand jury that it could not indict unless "the evidence before you is sufficient, in the absence of any other proof, to justify the conviction of the party accused." *Charge to Grand Jury,* 30 Fed. Cas. 998, 999 (No. 18, 257) (C.C.D. Md. 1836). This is the settled standard. Sufficient evidence to indict exists "only when there is competent evidence, direct or circumstantial, before you which leads you, as reasonable persons, to believe that the defendant is guilty of the offense charged." Yankwich, *Charge to Grand Jury,* 16 F.R.D. 93, 94 (1955). Indeed, Chief Judge Sirica specifically instructed the grand jury which voted the indictment in *this* case and which alleged that President Nixon was a co-conspirator:

> you ought not to find an indictment unless in your judgment the evidence before you, unexplained and uncontradicted, would warrant a

conviction by a petit jury. (Transcript of June 5, 1972).

Thus, the grand jury's naming of the President and others as participants in a conspiracy to obstruct justice constitutes a determination by an independent body, based upon more than eighteen months of evidence, that substantial evidence exists of sufficient strength "to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt," *Coleman* v. *Burnett*, 477 F. 2d 1187, 1202 (D.C. Cir. 1973), and was not an expression of a mere suspicion of possible criminality.

To the extent that the President suggests that the *prima facie* showing which the government must make to overcome the privilege is equivalent to proof of the conspiracy and its participants beyond a reasonable doubt (P. Br. 120), his position is clearly erroneous. The absurdity of requiring the government to prove an individual's guilt beyond a reasonable doubt in order to obtain evidence relevant to a conclusive jury determination of that guilt is obvious. See *United States* v. *Matlock*, —— U.S. —— (42 U.S.L.W. 4252, February 20, 1974); *Lego* v. *Twomey*, 404 U.S. 477, 489. Such a rule would put the government to its proof twice, in an enormous expenditure of time and energy, particularly in a case as complex as the present. Indeed, that very rule has been rejected in the analogous context of the co-conspirator-admissions exception to the hearsay rule. See, *e.g.*, *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028; *Carbo* v. *United States*, 314 F. 2d 718, 736 (9th Cir. 1963), cert. denied, 377 U.S. 953.

The type of showing which must be made to negate the attorney-client privilege on the ground the relationship was used to further crime is discussed in McCormick, *Evidence,* § 95, at 200 (2d ed. 1972), in terms which are patently relevant here:

> Must the judge, before denying the claim of privilege on [the ground that the communication was made in furtherance of a crime or fraud] find as a fact, after a preliminary hearing if contested, that the consultation was in furtherance of crime or fraud? This would be the normal procedure in passing on a preliminary fact, on which the admissibility of evidence depends, *but here this procedure would facilitate too far the use of the privilege as a cloak for crime.* (Emphasis added.)

Faced with this consideration, McCormick notes that many courts, including this Court in *Clark* v. *United States, supra,*

> have cast the balance in favor of disclosure by requiring only that the one who seeks to avoid the privilege bring forward evidence from which the existence of an unlawful purpose could reasonably be found.

In maintaining that we have made a sufficient showing that the subpoenaed conversations were in furtherance of a continuing criminal conspiracy so as to overcome the presumptive privilege, we have not relied, as the President's brief appears to suggest, solely upon the fact that the grand jury has named all of the principal participants in those conversations as con-

spirators in a conspiracy to obstruct justice. We do maintain that the grand jury's findings as to the existence of the conspiracy and as to its members are conclusive at this stage of the proceedings, and represent a *prima facie* determination that the conspiracy did exist and that the participants in the subpoenaed conversations were among its members. The credit given to grand jury determinations in such similarly important settings, see *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599; *Ex parte United States*, 287 U.S. 241, 250; *Beavers* v. *Henkel*, 194 U.S. 73, 85; justifies acceptance of its considered judgment as an adequate *prima facie* showing here for rejecting a claim of executive privilege.

In addition to these findings, however, we presented to the court below a detailed factual submission which demonstrated at least *prima facie* that each of the 64 subpoenaed conversations was in furtherance of the conspiracy charged in the indictment. See *Appendix to Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum*. The district judge expressly held that these submissions, when viewed in light of the grand jury's findings, "constitute a *prima facie* showing adequate to rebut the presumption [of privilege] in each instance" (Pet. App. 20).

In sum, the indictment, the grand jury's finding concerning the President and the evidence presented to the district judge regarding each specific subpoenaed conversation were clearly sufficient to warrant the conclusion that the claim of executive privilege

must give way and that "the light should be let in." *Clark* v. *United States, supra,* 289 U.S. at 14.

V

THERE IS A COMPELLING PUBLIC INTEREST IN TRYING THE CONSPIRACY CHARGED IN UNITED STATES V. MITCHELL, *ET AL. UPON ALL RELEVANT AND MATERIAL EVIDENCE*

In our main brief, in addition to showing that the subpoenaed recordings no longer remain presumptively privileged because they were part of a continuing criminal conspiracy (Br. 90–102) and because any privilege has been waived as a matter of law (Br. 116–123), we demonstrated that, in any event, any qualified privilege must yield in the face of the compelling public interest in trying the conspiracy charged in *United States* v. *Mitchell, et al.,* upon all relevant and material evidence.[37] Counsel for the President now

[37] Respondents Ehrlichman and Strachan, defendants in *United States* v. *Mitchell, et al.,* have filed briefs in this Court asserting that they are entitled to the subpoenaed material under *Brady* v. *Maryland, supra,* the Jencks Act, 18 U.S.C. 3500, and Rules 16 and 17(c) of the Federal Rules of Criminal Procedure. The district court withheld ruling on these contentions, stating that defendants' request for access will be more appropriately considered in conjunction with their pre-trial discovery motions (Pet. App. 21–22).

There is no question that the prosecution will make available to defendants any material within its control to which they are entitled under *Brady* or relevant statutes and rules. Beyond that, despite the question raised in the President's mandamus petition, it is clear that the government's obligations under *Brady* extend even to "privileged" evidence. See, *e.g.*, *Roviaro* v. *United States, supra; United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir. 1944). Moreover, *Brady* in all likelihood is applicable to materials within the possession of the President, even though the prosecution has no direct access to them. See *United States* v. *Deutsch,* 475 F. 2d 55, 57 (5th Cir. 1973);

asserts that we have not shown sufficient need to overcome the privilege.

The simple answer to that contention, however, is that after analyzing our submission below in light of *Nixon* v. *Sirica* and the relevant decisions of this Court, the district court found that the submissions "constitute a *prima facie* showing adequate to rebut the presumption in each instance, and a demonstration of need sufficiently compelling to warrant judicial examination in chambers incident to weighing claims of privilege where the privilege has not been relinquished" (Pet. App. 20).[38] This finding of the district

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United States v. *Ehrlichman*, Crim. No. 74–116 (D.D.C. June 14, 1974).

Nevertheless, although *Brady* imposes an affirmative obligation on the government not to suppress exculpatory evidence and to make available to defendants any such evidence of which it is aware, it does not obligate the government to undertake a fishing expedition without any reason to believe exculpatory evidence will be uncovered. See, *e.g.*, *Ross* v. *Texas*, 474 F. 2d 1150, 1153 (5th Cir. 1973), cert. denied, 414 U.S. 850. Here, no defendant has specifically identified any of the subpoenaed material he believes to be exculpatory, and the Special Prosecutor has no reason to believe that the subpoenaed conversations will exculpate any of the defendants.

[38] Counsel for the President asserts that because of executive privilege, "the subpoena should have been quashed in all respects by the court below" (P. Br. 95). So that the record is perfectly clear, we emphasize that the President in his Formal Claim of Privilege expressly stated that he was *not* advancing any "claim of privilege" with respect to the portions of twenty of the subpoenaed conversations for which transcripts have been made public (A. 48A). Nowhere in his brief before this Court does counsel advance any reason why the tapes of those portions of the conversations for which the President himself expressly disclaims privilege can be lawfully withheld.

court, arising from a mixed question of law and fact, is amply supported by the record.

The integrity of the administration of justice demands that all persons—no matter what their station or official status—be answerable to the law. In the context of the indictment in *United States* v. *Mitchell, et al.*, which charges former high government officials with a conspiracy to obstruct justice and defraud the United States, the demands of public justice require a trial based on all relevant and material evidence, particularly where, as here, evidence within the personal possession of the President demonstrably bears on the scope, membership and duration of the conspiracy.

CONCLUSION

For the reasons stated above and in our main brief, the order of the district court should be affirmed in all respects.

Respectfully submitted.

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