In the

Supreme Court of the United States

UNITED STATES, Petitioner, v. RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, et al., Respondents.	No. 73-1766
and	
RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, Petitioner, v. UNITED STATES, Respondent.	No. 73-1834

Washington, D. C.
July 8, 1974

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Washington, D. C.,

Monday, July 8, 1974.

The above-entitled matters came on for argument at 10:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice

APPEARANCES:

LEON JAWORSKI, ESQ., Special Prosecutor, Watergate Special Prosecution Force, Department of Justice, Washington, D. C. 20005; and

PHILIP A. LACOVARA, ESQ., Counsel to the Special Prosecutor, Watergate Special Prosecution Force, Department of Justice, 1425 K Street, N. W., Washington, D. C. 20005; for the United States.

JAMES D. ST. CLAIR, ESQ., The White House, Washington, D. C., 20500; for the President.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 73-1766, The United States of America against Nixon; and Richard M. Nixon against the United States.

Mr. Jaworski, there has been a request for additional time, and the Court grants that additional time of one-half-hour, I understand. Is that correct?

MR. JAWORSKI: That is correct, sir.

MR. CHIEF JUSTICE BURGER: That will be allowed to each side. And we will not interrupt the argument with any recess. We will go right through until you have finished.

You may proceed whenever you are ready, Mr. Jaworski.

ORAL ARGUMENT OF LEON JAWORSKI, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. JAWORSKI: Mr. Chief Justice, and may it please the Court: On March 1 last, a United States District Court Grand Jury, sitting here, returned an indictment against seven defendants charging various offenses, including among them a conspiracy to defraud the United States, and also to obstruct justice.

John Mitchell, one of the defendants, was a former Attorney General of the United States, and also chairman of the Committee to Re-Elect the President.

Another, H. R. Haldeman, was the President's Chief of Staff. Another, John Ehrlichman, was Assistant to the President for Domestic Affairs. The others were either on the President's staff or held responsible positions on the Re-Election Committee.

In the course of its deliberations, the Grand Jury voted unanimously with 19 members concurring, that the course of events in the formation and continuation of a conspiracy was such that President Nixon, among a number of ot hers, should be identified as an undicted co-conspirator in the bill of particulars to be filed in connection with the pre-trial proceedings.

Now, although this particular decision and determination on the part of the Grand Jury occurred in February, it was a well-kept secret for two-and-a-half months. The Grand Jury, of course, knew it; the members of the prosecution staff knew it.

It was done so to avoid affecting the proceedings in the House Judiciary Committee.

And it was so kept during these two-and-a-half months until it became necessary to reveal it as a result of the President's motion to quash the subpoena, as I will indicate subsequently in my argument.

Now, to obtain additional evidence, which the Special Prosecutor has good reason to believe is in the

possession of and under the control of the President, and which it is believed by the Special Prosecutor is quite important to the development of the Government's proof in the trial in United States vs. Mitchell et al, the Special Prosecutor, on behalf of the United States, moved for a subpoena duces tecum. And it is the subpoena here in question.

The District Court ordered the subpoena to issue, returnable on May 2. And the subpoena, of course, called for the production of tape recordings in advance of September 9, 1974, which is the trial date. This was done to allow time for litigation in the event litigation was to ensue over the production of the tapes. And also for transcription and authentication of any tape recordings that were produced in response to the subpoena.

Now, on April 30 the President released to the public and submitted to the House Judiciary Committee 1,216 pages to edited transcripts of 43 conversations dealing with Watergate. Portions of 20 of the subpoeaned conversations were included among the 43. Than on May 1, by his counsel, filed a special appearance, a formal claim of privilege and a motion to quash the subpoena.

Now, for the United States to conduct a full and appropriate hearing a motion to quash the subpoena, it became necessary to reveal the Grand Jury's finding

regarding the President. And this was first done by the Special Prosecutor calling on the Chief of Staff, General Alexander Haig, and the President's counsel, Mr. St. Clair, and advising them of what had occurred two-and-a-half months perior. And then on the following morning advising Judge Sirica of what had occurred, in camera, and pointing out the necessity of this being used in connection with the arguments on a motion to quash because of their relevance and the necessity of these matters being made a part of the proceedings.

Now, the Special Prosecutor joined counsel for the President in urging that the matter be heard in camera, which was done. Three of the defendants had joined the Special Prosecutor in moving for the subpoena. All of the defendants, at the time of argument in camera to Judge Sirica, opposed the motion to quash.

QUESTION: I don't see the relevancy of the fact that the Grand Jury indicated the President as co-conspirator to the legal issue as to the duty to deliver pursuant to the subpoena that you are asking for.

MR. JAWORSKI: The only relevance, Mr. Justice, lies in it being necessary to show, under Rule 17(c), that there is some relevance to the material that we seek to subpoena.

QUESTION: 17(c) presupposes the subpoena running

against the party. The President is not a party. He is not a defendant in one of these cases.

MR. JAWORSKI: That is correct, sir. But it was also felt that it would be necessary to show why, in order to prove this conspiracy, and in order to provide all of the links in the conspiracy -- it was deemed necessary to show that the President was named as an unindicted co-conspirator and also that this --

QUESTION: I thought that was primarily just for the knowledge, information, of the House Judiciary Committee.

MR. JAWORSKI: No, sir. That is not correct, sir. It became very important, Mr. Justice, for us to have that as a part of the proceedings so that we could use the various links in the testimony so as to show that the conversations were such as to make one admissible as against a co-conspirator.

QUESTION: The Grand Jury sent it to the House Committee, didn't they?

MR. JAWORSKI: The Grand Jury sent nothing of an accusatory nature to the House Committee, no, sir. What the Grand Jury sent to the House Committee was the evidence that had been accumulated, and it very carefully excised from it anything by way of the Grand Jury's interpretation or anything along that line, Mr. Justice.

Now, in its Opinion and Order of May 20, the District Court --

QUESTION: You would be here, Mr. Jaworski, whether or not the President had been named as an indicted co-conspirator. That simply gives you another string to your bow -- isn't that about it?

MR. JAWORSKI: It is true that it admits some evidence that would otherwise not be admissible.

QUESTION: Right. But even had the President not been named, you would still have subpoenaed at least part of this material.

MR. JAWORSKI: There is no question about that.

QUESTION: And you would still be here.

MR. JAWORSKI: That is right, sir. But in order to present the full picture, and in order to present -- that also is a part of it.

The District Court denied the motion to quash and a motion to expunge that had also been filed.

QUESTION: No one yet has ever suggested that during a criminal trial, a conspiracy trial, and some evidence is offered of an out-of-court statement, of someone who is alleged to be a co-conspirator, that it is enough for the prosecution to then show that the Grand Jury had named him a co-conspirator.

MR. JAWORSKI: No.

QUESTION: That will never get you over the --

MR. JAWORSKI: And we don't so contend.

QUESTION: That was the direction of your --

MR. JAWORSKI: No. This was in connection with the subpoening of this evidence, Mr. Justice. In other words this was in connection with showing that we have the right to this evidence.

QUESTION: I understand that.

MR. JAWORSKI: Yes, sir.

QUESTION: But you do not suggest that that is all you need to show, is that it?

MR. JAWORSKI: No, sir. Of course not.

QUESTION: You don't suggest that the Grand Jury finding is binding on the Court or not?

MR. JAWORSKI: I do suggest that it makes a prima facie case. And I think under the authorities, it so does.

QUESTION: Let me understand this, Mr. Jaworski. You don't suggest that your right to this evidence depends upon the President having been named as an unindicted co-conspirator.

MR. JAWORSKI: No, sir.

QUESTION: And so for the purposes of our decision, we can just lay that fact aside, could we?

MR. JAWORSKI: What I was really doing in

pointing to that --

QUESTION: Well, could we?

MR. JAWORSKI: Yes. Primarily, it was in order to show a reason for the Grand Jury's action. There is also before this Court a motion to expunge the act of a Grand Jury in naming the President as an unindicted co-conspirator. And I was trying to lay before the Court the entire situation that warranted that action.

QUESTION: Mr. Jaworski, as I understand your brief you go beyond what you have addressed so far. I think you say that the mere fact that the President was named as an unindicted co-conspirator forecloses his claim of privilege.

MR. JAWORSKI: Well, we certainly --

QUESTION: That is one of the points in your brief.

MR. JAWORSKI: We certainly make that as one of the point s which I intend to discuss at a later point.

QUESTION: That reduces him in and of itself to the status of any other person accused of a crime?

MR. JAWORSKI: I don't say that it forecloses. What I think we suggest is that it does present a situation here that should not make the application of executive privilege appropriate. We do say that,

QUESTION: But only prima facie.

MR. JAWORSKI: Prima facie -- that is correct. But when you get to the matter, Mr. Justice Powell,

of balancing interests, we do feel that that particular situation is a factor that is important. And this is why we lay stress on it.

The Court's order, of course, was to deliver the originals of all subpoenaed items, as well as an index and an analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30.

Now, this case presents for review the action of the lower court.

Now, may I, before I get to the jurisdictional points, briefly state what we consider to be a bird's eye view of this case.

Now enmeshed in almost 500 pages of briefs, when boiled down, this case really presents one fundamental issue. Who is to be the arbiter of what the Constitution says? Basically this is not a novel question -- although the factual situation involved is, of course, unprecedented.

There are corollary questions, to be sure. But in the end, after the rounds have been made, we return to face these glaring facts that I want to briefly review for a final answer.

In refusing to produce the evidence sought by

a subpoena duces tecum in the criminal trial of the seven defendants -- among them former chief aides and devotees, the President invokes the provisions of the Constitution. His counsel's brief is replete with references to the Constitution as justifying his position. And in his public statements, as we all know, the President has embraced the Constitution as offering him support for his refusal to supply the subpoenaed tapes.

Now, the President may be right in how he reads the Constitution. But he may also be wrong. And if he is wrong, who is there to tell him so? And if there is no one, then the President, of course, is free to pursue his course of erroneous interpretations. What then becomes of our constitutional form of government?

So when counsel for the President in his brief states that this case goes to the heart of our basic constitutional system, we agree. Because in our view, this nation's constitutional form of government is in serious jeopardy if the President, any President, is to say that the Constitution means what he says it does, and that there is no one, not even the Supreme Court, to tell him otherwise.

QUESTION: Mr. Jaworski, the President went to a court. He went to the District Court with his motion to quash. And then he filed a cross-petition here.

He is asking the Court to say that his position is correct as a matter of law, is he not?

MR. JAWORSKI: He is saying his position is correct because he interprets the Constitution that way.

QUESTION: Right. He is submitting his position to the Court and asking us to agree with it. He went first to the District Court, and he has petitioned in this Court. He has himself invoked the judicial process. And he has submitted to it.

MR. JAWORSKI: Well, that is not entirely correct, Mr. Justice.

QUESTION: Didn't he file a motion to quash the subpoenas in the District Court of the United States?

MR. JAWORSKI: Sir, he has also taken the position that we have no standing in this Court to have this issue heard.

QUESTION: As a matter of law -- he is making that argument to a court: that as a matter of constitutional law he is correct.

MR. JAWORSKI: So that of course this Court could then not pass upon the constitutional question of how he interprets the Constitution, if his position were correct. But I --

QUESTION: As a matter of law -- his position is that he is the sole judge. And he is asking this

Court to agree with that proposition, as a matter of constitutional law.

MR. JAWORSKI: What I am saying is that if he is the sole judge, and if he is to be considered the sole judge, and he is in error in his interpretation, then he goes on being in error in his interpretation.

QUESTION: Then this Court will tell him so. That is what this case is about, isn't it?

MR. JAWORSKI: Well, that is what I think the case is about, yes, sir.

QUESTION: He is submitting himself to the judicial process in the same sense that you are, is that not so, Mr. Jaworski?

MR. JAWORSKI: Well, I can't --

QUESTION: You take one position and he takes anot her.

MR. JAWORSKI: Well, Mr. Chief Justice, in my view, frankly, it is a position where he says the Constitution says this, "and nobody is going to tell me what the Constitution says." Because up to this point he says that he and he alone is the proper one to interpret the Constitution. Now, there is no way to escape that. Because the briefs definitely point that out, time after time.

QUESTION: I think this matter may be one of

semantics. Each of you is taking a different position on the basic question, and each of you is submitting for a decision to this Court.

MR. JAWORSKI: That may be, sir.

QUESTION: Well, we start with a Constitution that does not contain the words "executive privilege" is that right?

MR. JAWORSKI: That is right, sir.

QUESTION: So why don't we go on from there?

MR. JAWORSKI: All right, sir. That is a very good beginning point. But of course there are other things that need to be discussed inasmuch as they have been raised.

QUESTION: Perhaps we can further narrow the area if, as I take it from your briefs, you do emphasize there is no claim here of typical milit ary secrets, or diplomatic secrets, or what in the Burr case were referred to as state secrets. None of those things are in this case, is that right?

MR. JAWORSKI: That is correct, sir. And we do point to the authorities to show that there is a difference in the situation here. I do think that it is proper, as much as I regret to have to do it, to point out that the President's interpretation of what his action should be in this particular set of circumstances is one that really

requires judicial intervention perhaps moreso than a normal one would. I think that we realize that there is at stake the matter of the supplying of evidence that relates to two former close aides and devotees. I think we are aware of the fact that the President has publicly stated that he believed that these two aides of his, Mr. Haldeman and Mr. Ehrlichman, would come out all right in the end. Added to that the fact that the President has a sensitivity of his own involvement, is also a matter that calls for the exercise of the question to which Mr. Justice Douglas alluded as one that is somewhat unusual.

Turning now to jurisdiction -- before the Court are the two questions of statutory jurisdiction the Court directed the parties to brief and argue.

QUESTION: Mr. Jaworski, at this point, help me over one hurdle. Do you feel that the mandamus case as such is here ?

MR. JAWORSKI: Yes, we do, sir.

QUESTION: I search your petition for certiorari in vain to find even a mention of it. And I wondered if it is a political question. What is your position -- that the issues in any event are here?

MR. JAWORSKI: Yes, sir.

QUESTION: Whether the case is heard or --

MR. JAWORSKI: Yes, sir, we say it is here,

not only because of the appeal itself, but also because of petition for mandamus.

Now, we did, Mr. Justice, discuss that in one of the briefs. Now, it may be that it wasn't originally when we filed the original brief on jurisdiction. But we certainly --

QUESTION: You mentioned it in your second brief on the merits --

MR. JAWORSKI: Yes.

QUESTION: But not at all in your petition for certiorari.

MR. JAWORSKI: Well, we did in the -- it was in a footnote, on page 2 of the petition for writ of certiorari, Mr. Justice.

QUESTION: It usually takes more than a footnote to get a case --

MR. JAWORSKI: Well, I would think so. But there really is no issue here between the parties here on the issue of jurisdiction. I mean there is no argument as between the parties on it. And while of the parties cannot agree on it, I must say that on three different bases the jurisdiction does exist as we see it. Now, I am not yet getting to the question of the intra-executive matter that has been raised. But I am discussing now the statutory basis of jurisdiction.

QUESTION: Your footnote merely refers to the presence of a mandamus case. It doesn't purport to bring it up here.

But go ahead.

MR. JAWORSKI: But to answer your question directly, sir, this is correct; we are standing upon not only the matter that this is an appeal that properly had been in the Court of Appeals, and for that reason has been moved up here properly under 1254.1. We also say that the Court has jurisdiction over the petition and cross-petition under 1254.1 because they present for review all questions raised by the petition - by the President's petition for writ of mandamus. And then we also say that in addition to that the All Writs Act gives this Court the jurisdiction to proceed.

QUESTION: Of course, in a mandamus action Judge Sirica would be the party respondent. And he is not a party in this case. And he is not represented by counsel here, is he?

MR. JAWORSKI: As far as I know, he is not, no sir.

QUESTION: The mandamus would be Nixon vs. Sirica, would it not?

MR. JAWORSKI: But it was brought up by the President in their petition for mandamus, that is right.

That is the way it got into this Court. It raises the same questions actually that were raised on the matter that we brought up on appeal.

QUESTION: What was the chronology, Mr. Jaworski? Notice of appeal from Judge Sirica's order was the first step taken to get to the Court of Appeals, was it/

MR. JAWORSKI: That is, I believe, right, sir.

QUESTION: And while that was pending, then I gather the President's petition for mandamus was filed.

MR. JAWORSKI: Yes, sir.

QUESTION: And then the last step was that you filed the petition to bypass here.

MR. JAWORSKI: Right.

QUESTION: And that petition to bypass applied I gather to whatever case was pending in the Court of Appeals?

MR. JAWORSKI: That is correct, sir.

QUESTION: And at that time the case pending was both the appeal from Judge Sirica's order and the President's --

MR. JAWORSKI: Mandamus. Correct, sir.

QUESTION: You feel they are not two cases?

MR. JAWORSKI: No, sir, they raise the same question.

QUESTION: Yet you could bring each up separately if you so chose.

MR. JAWORSKI: Yes, sir, could have.

QUESTION: It seems to me they are two cases.

MR. JAWORSKI: Inasmuch as they present the same questions -- it occurred to us that it was appropriate to rely upon jurisdiction as to both of them.

QUESTION: Again, with respect to the mandamus action, one of the parties isn't here in Court represented by counsel. He is the party respondent.

MR. JAWORSKI: Well, I don't have the record before me, but I must say -- and I will not make an outright representation that Judge Sirica is -- and that is why I hesitated a few minutes ago -- was made a party. After all, it was brought up by the President. But I am advised by a note just passed me that Judge Sirica is a party to that proceeding.

QUESTION: Who represents him here?

MR. JAWORSKI: I don't know of anyone representing him here.

QUESTION: Has he filed any brief or made any appearance at all in any sense?

MR. JAWORSKI: So far as I know, no.

QUESTION: In any event, Judge Sirica's order was an appealable order.

MR. JAWORSKI: Yes, sir, that is correct.

QUESTION: If you are correct in that submission -

do we ever have to reach any issues raised by the mandamus?

MR. JAWORSKI: No, you would not. We were pointing out that the jurisdiction rests on a three-pronged basis.

QUESTION: But the mandamus is not your act.

MR. JAWORSKI: It is not, no, sir.

QUESTION: You are not obliged to defend it.

MR. JAWORSKI: That is correct, sir. We, however, were pointing out that the same issues really were raised by if the petition is properly before the Court.

Now, if there are no further questions on the matter of statutory jurisdiction, I would like to pass to the intra-executive dispute.

First, we recognize, of course, that jurisdiction cannot be waived, and nothing that is presented here is with the idea of suggesting even remot ely that there is any waiver with respect to the question of jurisdiction. But we do say that the contention that there is an intra-executive dispute and for that reason this Court cannot pass upon these questions is not sound.

Before discussing the cases, however, I think it would be appropriate for us to undertake to place this in the right perspective.

Let me say first that we stand upon two bases: first, that actually the orders that were entered creating the Office of the Special Prosecutor and delineating his

authority, even the original order at the time that my predecessor was acting as Special Prosecutor, had the force and effect of law. We also point to the fact that the arrangement made itself with the Acting Attorney General that I made, if I may point to it -- and one reason I have no reticence in discussing the facts is because the facts are undisputed. There has been no dispute raised as to just what actually transpired.

The situation is one of the arrangement itself, which the Acting Attorney General points to, with respect to the matter of independence having been discussed by himwith the President -- thus meaning that the President himself had approved the setting up of this particular office, and the rights and the responsibilit ies that it has under the charter.

We set this out in the appendix, of course, pointing precisely to what the authority and the responsibilit ies and the obligations of the Special Prosecutors are. One of the express duties that is delegated to the Special Prosecutor is that he shall have full authority for investigating and prosecuting -- among others -- allegations involving the President. And the delegation of authority expressly stated in particular the Special Prosecutor shall have full authority to determine whether or not to contest the assertion of executive

privilege, or any other testimony of privilege.

Now, in the instance of my appointment, unlike the appointment that had been made prior thereto, there was an amended order, and it referred to assurances given by the President to the Attorney General that the President will not exercise his constitutional powers to effect the discharge of the Special Prosecutor, or to limit the independence that he is hereby given. And that he will not be removed from his duties except for extraordinary improprieties on his part, and without the President first consulting the majority and minority leaders and the chairman and ranking minority members of the Judiciary Committees of the Senate and House of Representatives, in ascertaining that their consensus is in accord with the proposed action. And then, that the jurisdiction of the Special Prosecutor will not be limited without the President first consulting with such members of Congress and ascertaining that their consensus is in accord with his proposed action.

Now, at the time --

QUESTION: What does "consensus" mean -- unanimous?

MR. JAWORSKI: No, sir. It has been interpreted by the Acting Attorney General in conversations as meaning six of eight.

QUESTION: I take it when you make reference to this, you are in effect suggesting that your position is certainly

different than if a United States Attorney were prosecuting this case.

MR. JAWORSKI: That is correct, sir. I think we have what might be termed a quasi-independent status, where there were delegated to this particular office performance of certain functions. And there is no reason why the President could not have delegated those to us.

As a matter of fact --

QUESTION: Mr. Jaworski -- quasi-independent in the sense of an agency?

MR. JAWORSKI: Yes, sir. For instance, the Comptroller of the Currency -- he has a status somewhat similar to that. And we know that there are suits brought between the Department of Justice and the Comptroller.

QUESTION: I have trouble with your position being similar to a U.S. Attorney, because a U.S. Attorney is absolutely under the thumb of the Attorney General.

MR. JAWORSKI: Well, I didn't say -- what I meant was that we had independent status that was really different from the status of the United States Attorney.

QUESTION: I'm sorry.

MR. JAWORSKI: I thought that was the way I answered the question.

Now, I should say that it is interesting when the case of Nixon vs. Sirica was before the Court of

Appeals, Professor Charles Allan Wright, who was then arguing that case, and who was not on the original brief, but I observe was on the reply brief filed on behalf of the President -- at that time argued with respect to the particular Office of the Special Prosecutor: "Now, in this instance we have a division of function within the Executive in that my friend Mr. Cox" -- referring to Archibald 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..." a decision that would ordinarily be made at the level of the Attorney General or in an important enough case at the level of the President.

But the President's present counsel in his motion to quash, as he does here -- except the words here are different, but the effect is the same -- is contending to the Court that the President has the right to determine who, when and with what information individuals shall be prosecuted.

QUESTION: Well, Nixon against Sirica was different in that the parties there were the Grand Jury on the one hand, represented, to be sure, by the Special Prosecutor -- the Grand Jury, which is an adjunct of the judicial branch of government, on the one hand -- and the Chief Executive, on the other. And here, now

that an indictment has been returned, the two parties are both members of the executive branch. Isn't that correct -- that there is that difference?

MR. JAWORSKI: Yes, sir, that is correct. But I don't think it is a distinction as to the substance.

QUESTION: You are a member -- you are the United States -- the people of the United States, who you represent. You are not a member of the judicial branch, unlike the Grand Jury in Nixon against Sirica -- you are a memb er of the executive branch of government, are you not?

MR. JAWORSKI: That is correct, sir, yes.

QUESTION: There is that difference.

MR. JAWORSKI: There is that difference, yes.

QUESTION: And it might be a crucial difference, might it not?

MR. JAWORSKI: But I don't think the description to which I pointed as to the independent status of the independent executor would be any different in the Sirica case than it would be in this case. And I was merely --

QUESTION: No -- you are if anything more independent than Mr. Cox was under the regulations.

MR. JAWORSKI: That is correct, sir.

QUESTION: But that doesn't really go to the question that I am raising.

MR. JAWORSKI: Yes, sir. I realize that.

Now, may I, however, indicate very briefly -- and I know this is an important question -- but I do feel that the facts ought to be before the Court in detail -- indicate just what did transpire with respect to how these particular regulations, this order, was interpreted by the President's Acting Attorney General, and also by the Attorney General Designate, and also by the President himself, and by the President's Chief of Staff General Haig.

Mr. Bork, in hearings at a time when Congress was pressing the bill of an independent Special Prosecutor, testified that "Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that he has the power to use judicial processes to pursue evidence if disagreements should develop."

It was further pointed out --

QUESTION: You are quoting from whom at what time?

MR. JAWORSKI: Acting Attorney General Bork's testimony in the House.

QUESTION: On what occasion?

MR. JAWORSKI: After I had been appointed, and in connection with the hearings on the bill to establish

an independent prosecutor by congressional act.

QUESTION: Thank you.

MR. JAWORSKI: Then he further said: "I understand and it is clear to me that Mr. Jaworski can go to court and test out..." and these are the important words -- "and test out any refusal to produce documents on the grounds of confidentiality." And Attorney General Saxbe, then a designate, who was also present at the time that this matter was discussed, and at the time that I accepted the responsibilities, testified that I had the right to contest an assertion of executive privilege and stated that I can go to court at any time to determine that.

Now, the President himself, as we point out in our brief, in announcing the appointment of a new independent prosecutor, stated to the nation that he had no greater interest than to see that the new Special Prosecutor had the cooperation from the executive branch and the independence that he needs to bring about that conclusion of the Watergate investigation.

The President's Chief of Staff at the time that this appointment was accepted, and at the time that the new regulations were then drafted by the Acting Attorney General, had assured me -- and this is a part of the record, because a letter was written at the request of Senator Hugh Scott to the White House as a result of

discussions that he had with General Haig, in which I sent a copy of the testimony that I had given to the congressional committees to the White House so it would be fully aware of it and the receipt of it was acknowledged without any change in the testimony.

So I had been assured to the right to judicial process by him after he had reviewed the matter with the President and came and told me that I would have the right to take the President to court, and that these were the key words in this arrangement, and that the right would not be questioned.

Of course, this independence that was given to the Special Prosecutor actually was but an echo of public demand. And if I may be permitted to say so, it was the only basis on which, after what had occurred, and a predecessor had been discharged -- it was the only basis on which the Special Prosecutor could have felt that he could have come in and serve and undertake to perform these functions.

It is important, I think, to observe that counsel for the President, in his brief, by accepting the proposition that the President and the Attorney General can delegate certain executive functions to subordinate officers implicitly has conceded we think the validity of the regulations delegating prosecutorial powers to the

Special Prosecutor.

The regulations specifically provide, as you will notice from the appendix -- and we have set them out -- the Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. This is also a part of the charge.

Thus, to argue, as has been done in these briefs, that the separation of powers preclude 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, we think misses the point.

What has evolved from the regulations in our view is a prosecutorial force with certain exclusive responsibilities. And this is why I say that to some degree it could be described as a quasi-independent agency.

It is not unlike, our situation is, the case we alluded to a few minutes ago decided by the Court just a week or so ago. It is not unlike the case of the Secretary of Agriculture vs. the United States. This isn't the first time that there has been an action brought by one member of the executive branch against another official in the executive branch. And we refer to these cases in our briefs in detail.

Now, I want to make it clear that the President

at no point of course delegated to the Special Prosecutor the exclusive right to pass on the question of executive privilege or any other privilege -- attorney/client privilege, or any other testimonial privilege. What we are merely saying is that we have the clear right to test it in this court. And this is on what we stand.

Well, because of the passage of time, if I may, I think I should get to other discussions -- unless there are questions on this particular point.

Passing to the merits, we would say if there is any one principle of law that Marbury vs. Madison decides is that it is up to the court to say what the law is. And almost to the point of redundancy, but necessary because it was a landmark decision, Chief Justice Marshall reasoned we think with clarity and emphasis that it is emphatically the province and the duty of the judicial department to say what the law is. And this Court, of course, through the years has reaffirmed,consistently applied that rule. It has done it in a number of cases -- in Powell v. McCormack, in the Youngstown Steel seizure case, in Doe v. McMillan, and a footnote, I think a very important one, appears in that opinion, when Mr. Justice White pointed out that "While an inquiry such as involved in the present case, because it involves two coordinate branches of government, must necessarily have separation of power implications,

the separation of powers doctrine has not prevented this Court from reviewing acts of Congress, even when, it is pointed out, the executive branch is also involved."

Now, there are a number of cases that speak to that. I think one of the cases that perhaps went into greater detail, and also points out quite a distinguishing feature, is the Gravel case; whereas in the Gravel case the Court did hold that it was appropriate to go into certain matters where privilege had been exercised on the part of a Senator on behalf of his aide.

There are two things that I believe clearly help us in that decision, and also other decisions as far as the questions here involved. One is that the speech or debate clause is in the Constitution; it is written in there. And this is what was invoked. I don't find anything written in the Constitution, and nothing has been pointed, that is a writing in the Constitution that relates to the right of the exercise of executive privilege on the part of the President.

Another very important thing that is pointed out in that case is that it did involve an examination into wrong-doing on the part of those who were seeking to invoke the privilege.

QUESTION: Is the term "executive privilege" an ancient one ?

MR. JAWORSKI: I beg your pardon, sir?

QUESTION: Is the term "executive privilege" an ancient one?

MR. JAWORSKI: It has been used oær a period of time. How ancient, Mr. Justice Brennan, I am not in a position to say. But certainly it has been one that has been used over the years. But it is not one that I find any basis for in the Constitution.

QUESTION: Are you now arguing that there is no such thing as executive privilege ?

MR. JAWORSKI: No, sir.

QUESTION: I didn't think so.

MR. JAWORSKI: No, sir. Because I say there is no basis for it in the Constitution.

QUESTION: You think if anything it's a common law privilege? Is that your point?

MR. JAWORSKI: Yes, sir. And it has been traditionally recognized and appropriately so in a number of cases as we see it. We do not think it is an appropriate one in this case. But we certainly do not for a moment feel that it has any constitutional base.

?

QUESTION: In Thyer against Rose I thought we held that there is a common law privilege in the executives dealing at the state level, but that it is a qualified privilege, is that not so?

MR. JAWORSKI: Yes, Mr. Chief Justice, that is exactly the point. This Court has examined a number of situations. And in some situations, as I think was pointed out earlier, where military secrets and such as that were involved, or national secrets of great importance, the Court has taken a good, close look, and has upheld privilege. But --

QUESTION: When you say it has taken a good, close look -- without looking at the evidence sometimes; taken a good close look at the claim and the basis of the claim, is that what you mean?

MR. JAWORSKI: That is what I mean, yes, sir.

QUESTION: Didn't this Court say that it did have constitutional overtones?

MR. JAWORSKI: It said it had constitutional overtones. And I don't know in what case it may have been used. But --

QUESTION: That was in the Court of Claims, I think.

MR. JAWORSKI: Yes, sir. But it certainly has never placed it in the Constitution so far as I am aware of, and President's counsel who have carefully examined the authorities.

QUESTION: Right.

QUESTION: That was in Kaiser Aluminum and Chemical

Corporation case in the Court of Claims that phrase was used.

QUESTION: That is judicially tailored?

MR. JAWORSKI: Yes, sir.

QUESTION: Is it your view that there are no influences to be derived from the doctrine of separation of powers? Are you saying this is purely an evidentiary privilege?

MR. JAWORSKI: That the privilege as recognized judicially may have been tied into a separation of powers doctrine we don't deny. What we say is that the separation of pow rs doctrine in the exercise of and calling for executive privilege has not been applied in a number of instances involving both Congress and involving also the Executive -- despite the fact that even in the congressional situations the speech and debate clause is there.

What I am saying is that the separation of powers doctrine, as was pointed to in the Doe v. McMillan case has not been permitted to stand in the way of this Court examining it from a standpoint of whether the executive privilege should be permitted or not.

QUESTION: In Reynolds the Court ended up treating the assertion of privilege there as an evidentiary privilege but it did allude to the fact that there was a constitutional question, and it said the Court wasn't reaching it, as I

MR. JAWORSKI: On the issue of executive privilege, I should point out here, it is a very narrow one. And I think it is important that we bear this in mind. It doesn't involve a very large or broad privilege rights. What it really narrows down to is somewhat simple but very important issue in the administration of criminal justice, and that is whether the President, in a pending prosecution, can withhold material evidence from the court, merely on his assertion that the evidence involves confidential communications. And this is what it really gets down to.

We know that there are sovereign prerogatives to protect the confidentiality necessary to carry out responsibilities in the fields of international relations and national defense that are not here involved. And there is no claim of any state secrets or that disclosure will have dire effect on the nation or its people.

Actually, I think when we get to weighing the non-disclosure as against disclosure, and I think when we begin to weigh the balance of interests, it would seem to me that the balance clearly lies in favor of a disclosure in a situation such as the circumstances here.

Of course --

QUESTION: That certainly would not be true if a case of the fifth amendment were involved. But that is not present here.

MR. JAWORSKI: Not present, Mr. Justice Douglas. And there is no question but what the fifth amendment is very plainly written out in the Constitution and is invoked as a clear constitutional privilege.

I think that it would be of help if I may point out to the Court that there is an excellent article that we have alluded to in our briefs by Professor Berger that appears in the Yale Law Journal, which discusses the Aaron Burr case at length, and also other cases that have been pointed to since the time of that case. And if I may just say, very briefly, that summarizes the situation by saying that the heart of Marshall's opinion was justly summarized by the Court of Appeals in the Nixon v. Sirica case, in a tapes case, that we have talked about. "The Court was to show respect for the President's reason, but the ultimate decision remained with the Court." And we are not suggesting for a moment here that the matter of executive privilege should not be looked into. It deserves to be tested. It should be tested. And we urge that it be tested. But the ultimate decision is not one of saying that it is absolute, it rests in the Constitution, that it doesn't entitle anyone, it doesn't authorize anyone, it doesn't even authorize this Court to look into it -- because if the courts are the ultimate interpreters of the Constitution and can restrain Congress to operate within constitutional

bounds, they certainly shouldn't be empowered any less to measure Presidential claims of constitutional powers.

I wanted briefly to make mention of the question that had been raised by counsel for the President that involves a motion to expunge the finding of the Grand Jury's action that the President is to be named as an unindicted co-conspirator along with a number of ot hers when the pre-trial proceedings are gone into and a bill of particulars is being filed.

And I say that the Grand Jury's finding, painful as it is, I think on the part of the Court, must be considered as being valid and sufficient to show prima facie -- it is sufficient to show prima facie that the President was involved in the proceedings in the course and in the continuation of the particular conspiracy that was charged.

QUESTION: Well, is that the issue, Mr. Jaworski, or is the issue whether there can be a collateral attack?

MR. JAWORSKI: That is also another issue.

But I merely wanted to point out that I believe that this Court would not go into the Grand Jury's findings. But it's a prima facie matter. And that this Court would not go into it for the purpose of determining a matter of that kind.

QUESTION: I thought we had put that issue aside.

I just don't understand what the relevance of that is to this case.

MR. JAWORSKI: Well, I have to agree with you -- neither do I see what the relevance is of the matter of saying -- there is another argument advanced here, and that is that the President can't be indicted. And I don't know what the relevance of it is in this case, either, very frankly, because it is not before the Court. And yet the argument is made, and many pages of briefs are devoted to it.

QUESTION: I am just wondering, Mr. Jaworski, why you aren't content it is irrelevant without taking on the right --

MR. JAWORSKI: This is why I skipped the argument with respect to the matter of whether he could be indicted or not -- inasmuch as this question had been raised and briefed and a motion exists before the Court -- I have to agree it is not relevant. But it is a part of the case, and that is the only reason I alluded to it. And I have no interest in spending much time on it.

QUESTION: Except part of the grounds on which you rest in subpoeaning this material is the fact that the President has himself been named as a co-conspirator, an unindicted one. That's true, isn't it? That is part of the grounds on which you rest in subpoeaning this

material. And the response to that is that the President cannot constitutionally be named as an unindicted co-conspirator. So to that extent it is in this case -- the question is in this case.

MR. JAWORSKI: I don't think it is a matter that, very frankly, has any particular basis to it, because I don't see how this Court could be asked to substitute its judgment for that of a Grand Jury.

QUESTION: Well, that is something quite different again -- whether or not there was sufficient evidence before the Grant Jury to justify the Grand Jury in naming the President. That is quite different, and, as the Chief Justice suggested, a collateral issue.

MR. JAWORSKI: That is right.

QUESTION: But the issue of whether or not the President can constitutionally be named by a Grand Jury as a co-conspirator, even though an unindicted one, is at least tangentially before us. Because it is the fact that he has been named by the Grand Jury that is part of the grounds and part of the foundation upon which you have based your subpoena duces tecum.

MR. JAWORSKI: Not only that. I think it has been pinpointed in our view in materiality because it does relate to the question of the proof that we are seeking, the relevance of the proof that we are seeking.

And this gets into, of course, a discussion of matters that are sealed and which I cannot discuss with the Court.

QUESTION: I understand -- right.

QUESTION: Whether or not they had the authority, they did it. It is a fact that the Grand Jury did it.

MR. JAWORSKI: That is correct, sir.

QUESTION: And so I don't see how we have anything to do with whether they had the authority or not. It is a fact. Is that right?

MR. JAWORSKI: That is, I think, correct.

Now --

QUESTION: I thought the heart of this case was the rights of defendants in a criminal trial to that evidence. It may be exculpatory and free them of all liability. I don't know, but I --

MR. JAWORSKI: Well, it certainly is in the case. Now, of course what you have reference to also, I am sure, Mr. Justice Douglas, is Bray and the Jencks -- Maryland v. Bray, and the Jencks. And this is part of the case. However, it happens not to be a part of the appeal, although it is a part of the case. But as far as our position is concerned, it doesn't relate to that. But certainly it is true that this material, as we have pointed out in our communications to the President, may well involve exculpatory matters. And we time and again pointed out we wanted them

not simply because we felt that there were matters that needed to be developed in connection with the prosecution, but that they could well contain exculpatory matter.

QUESTION: The Brady question really lurks just in the background, does it not? That is, if you get information, whatever you get will be available to -- you would concede is available to any defendant who can make a showing.

MR. JAWORSKI: Correct, sir.

QUESTION: And the question of whether or not the defendants, under the Brady doctrine, are entitled to subpoena information and material that is not now in your possession but is in the possession of the President, was an issue that was left undecided by the District Court.

MR. JAWORSKI: That is correct, sir.

QUESTION: Am I right about that?

MR. JAWORSKI: Before this Court.

I believe with the permission of the Court, unless there are further questions, I will reserve the rest of the time to close.

CHIEF JUSTICE BURGER: Mr. St. Clair.

ORAL ARGUMENT OF JAMES D. ST. CLAIR, ESQ.,

ON BEHALF OF THE PRESIDENT

MR. ST. CLAIR: Mr. Chief Justice and Members of the Court, my learned brother has approached this case, I think, from the traditional point of view -- namely, this is an attempt by a Special Prosecutor to obtain what he thinks is desirable evidence in a criminal prosecution that he has the responsibility for. Not once, however, have I heard him mention what I think is really involved, at least in significant part, and that is the co-pendency of impeachment proceedings before the House of Representatives, and the realistic fusion that has taken place with respect to these two proceedings, and the promise of continued fusion, as I understand my brother's position.

May I quote from page --

QUESTION: Well, those are none of our problems, are they?

MR. ST. CLAIR: I think, sir, they really are. First, by way of factual --

QUESTION: The sole authority to impeach is in the House.

MR. ST. CLAIR: That is correct.

QUESTION: The sole authority to try is in the Senate.

MR. ST. CLAIR: Right. And the Court shall not be

used to implement or aid that process, which is what is what is happening in this case. This case wouldn't be here on July 8 --

QUESTION: Just how is this done? How does this case implement that?

MR. ST. CLAIR: I would like to review some of the facts for you in this regard.

QUESTION: Which are in the record?

MR. ST. CLAIR: Yes. My brother has mentioned them to you-.

QUESTION: But are they in the record?

MR. ST. CLAIR: Yes, sir.

QUESTION: Well, if we are just an adjunct of the House Judiciary Committee, this case should be dismissed as improvidently granted, shouldn't it?

MR. ST. CLAIR: Exactly right, sir. Not only that, it makes the case unjusticiable, at least.

QUESTION: Then the District Court's decision stands. Is that what you want?

MR. ST. CLAIR: No. The case should be dismissed, sir.

QUESTION: If we dismiss as improvidently granted, I submit that the District Court's judgment would stand.

MR. ST. CLAIR: Then I would retract what I said. This case should be dismissed.

QUESTION: The case would be on appeal in the Court of Appeals.

QUESTION: Are you now talking about the by-passing of the Court of Appeals?

MR. ST. CLAIR: No, sir. I am talking about the proceeding before the District Court, through the Court of Appeals, to this Court.

QUESTION: If we dismissed this appeal as improvidently granted, it would go back to the Court of Appeals.

MR. ST. CLAIR: Well, as I say, I think this case should be dismissed -- period.

QUESTION: No. Really what you mean is you think that the order of Judge Sirica should be vacated and set aside.

MR. ST. CLAIR: That is right, sir.

QUESTION: That is quite different from dismissing the case.

MR. ST. CLAIR: I agree.

QUESTION: That's deciding it on the merits.

MR. ST. CLAIR: That's right. That is what I am trying to get across to this Court, perhaps unartfully -- this case should be disposed of, be it by vacating the order below or not. In any event, it is improper in our view that this case should be heard in the

context it is now being heard. We wouldn't be here on July 8, before a crowded courtroom if it was not recognized generally --

QUESTION: It is a political question here, and it was a political question in the District Court.

MR. ST. CLAIR: Exactly. And therefore it is a non-justiciable issue in this and in the District Court. What has happened in this case is --

QUESTION: Did you argue that to the District judge?

MR. ST. CLAIR: I believe we argued the non-justiciability argument, yes, sir. I know we did. But --

QUESTION: Your position is that the issuance of a subpoena duces tecum is not a justiciable issue.

MR. ST. CLAIR: In this context at this time, sir. What has happened is this.

As you know, on February 24 a Grand Jury secretly named the President among others as an unindicted co-conspirator. That fact was not made known. On March 1 an indictment was returned against a number of the President's chief aides. Coincident with that, and in an open courtroom, the Assistant Prosecutor -- Special Prosecutor, handed up to the judge a bag, together with a sealed letter, requesting that this material be sent over to the House of Representatives. The President took no position regarding that proposal, because he considered it to be probably

appropriate, under the belief that there was nothing accusatory in that material. Judge Sirica himself rev iewed the material, found nothing accusatory, and said it would therefore be quite appropriate to send this material to the House of Representatives -- not realizing and not knowing that the Special Prosecutor had previously obtained a secret charge against the President and others, which was definitely accusatory.

QUESTION: But that, as I understand it, was not among the material that was conveyed to the Grand Jury. At least that is what I understood Mr. Jaworski to tell us this morning.

MR. ST. CLAIR: The material that was turned over was before the Grand Jury.

QUESTION: Now, just a moment. I understood Mr. Jaworski to tell us this morning very unambiguously and explicitly, that the fact that the President was named as an unindicted co-conspirator was not conveyed to the Grand Jury -- I mean to the House of Representatives.

MR. ST. CLAIR: No, it was not. The material was sent to the House of Representatives in the belief that it was non-accusatory in nature -- it was simply a recital of facts.

QUESTION: Exactly. And that is what Mr. Jaworski has represented again to us this morning, was the fact of the matter.

MR. ST. CLAIR: Mr. Jaworski had available to him, unknown to the Judge, and unknown to counsel for the President, a secret indictment naming the President as a co-conspirator. The accusatory part followed later.

QUESTION: Followed in what form?

MR. ST. CLAIR: By a newspaper leak.

QUESTION: It wasn't sent from the court over to the House.

MR. ST. CLAIR: It didn't have to be. All they had to do was read the newspaper. There can be no question about it. And therefore I say this case has to be viewed realistically in the context that it is now being heard.

QUESTION: I am not sure -- perhaps you can help me -- are you suggesting that there was some duty on the part of the Special Prosecutor to disclose to the District Judge that there was this secret indictment before the Judge passed on whether the material should be sent to the House?

MR. ST. CLAIR: I think it would have been quite appropriate, because the Judge's decision was based on the proposition there was nothing accusatory; that under the circumstances absolute fairness was appropriate and required insofar as the President was concerned. No one could argue that the indictment as a co-conspirator,

naming him as a co-conspirator, does anything but impair the President's position before the House of Representatives. That should in my judgement, have been made known to the Judge. I don't know what he would have done under those circumstances. His decision was based solidly on the proposition there was nothing accusatory in the material.

Now, my brother says in his brief that this material he now seeks of course will be available to the House Committee and will be used to determine whether or not the President should be impeached. So this fusion is going to continue. And under the Constitution, as we view it, only the legislature has the right to conduct impeachment proceedings. The courts have been, from the history involved and from the language of the provisions, excluded from that function. And yet the Special Prosecutor is drawing the Court into those proceedings, inevitably, and inexorably.

No one could stand here and argue with any candor that a decision of this Court would have no impact whatsoever on the pending inquiry before the House of Representatives concerning the impeachment of the President.

QUESTION: Well, how far does your point go? Let's assume that a murder took place on the streets of Washington of which the President happened to be one of the very few eye witnesses. And somebody was indicted

for that murder. And the President was subpoeaned as a witness. Would you say he cannot be subpoeaned now, because there is an impeachment inquiry going on and the courts absolutely have to stop dead in their tracks from doing their ordinary judicial business?

MR. ST. CLAIR: I would not say that. I don't think he could be necessarily subpoeaned. I don't think the President is subject to the process of the court unless he so determines he would give evidence. But the murder --

QUESTION: Putting that to one side. You are saying that the courts, as I understand it, have to stop dead in their tracks from doing their ordinary business in any matter involving even tangentially the President of the United States if, as and when a committee of the House of Representatives is investigating impeachment.

MR. ST. CLAIR: No, Justice Stewart, I am not. The subject matter of these two matters is the same subject matter.

QUESTION: Seven people have been indicted, six of whom remain under indictment. A trial is scheduled for next September 9.

MR. ST. CLAIR: Right.

QUESTION: The prosecutor is preparing for that trial. He is trying under Rule 17 of the Federal Rules

of Criminal Procedure to adduce matters to be used in evidence at that trial. You say that cannot go forward because of some tangential effect, or you say a direct effect, upon some other matter going on in another branch of the government.

MR. ST. CLAIR: I say it should not go forward at this time at the very least, because the subject matter being inquired or in large measure before the House Committee is exactly the same subject matter being involved in this argument -- namely, should the President produce the tapes.

QUESTION: What in those tapes involves the impeachment proceedings?

MR. ST. CLAIR: Pardon?

QUESTION: What in any of these tapes is involved in the impeachment proceeding?

MR. ST. CLAIR: Well, if Your Honor please, the House of Representatives has subpoeaned --

QUESTION: I don't know what is in the tapes. I assume you do.

MR. ST. CLAIR: No, I don't.

QUESTION: You don't know, either. Well, how do you know that they are subject to executive privilege?

MR. ST. CLAIR: Well, I do know that there is a preliminary showing that they are conversations between

the President and his close aides.

QUESTION: Regardless of what it is.

MR. ST. CLAIR: Regardless of what it is. They may involve a number of subjects.

QUESTION: But you don't know.

QUESTION: Does not the Special Prosecutor claim that the subject matter is the same?

MR. ST. CLAIR: He claims that, but he has no way of showing it. In fact, he says it is only probable or likely. He has no way of showing that they in fact involve the subject of Watergate.

QUESTION: If his claim is honored by this Court, all that would happen is the evidence would go to Judge Sirica who would examine it in camera, I assume.

MR. ST. CLAIR: I presume that is so. And it would then be made available to the Special Prosecutor, the Special Prosecutor says this of course would then become part of the impeachment proceedings, and there we are.

QUESTION: Mr. St. Clair, going back to this murder witness situation, if the President, any President, witnessed an automobile accident, was the sole witness, or a murder, as Mr. Justice Stewart suggested, you are not indicating that his testimony, his evidence would not be available to the Court, but merely that he cannot

be subpoeaned, but might give it by deposition, as several Presidents have in the past.

MR. ST. CLAIR: That is quite correct.

QUESTION: The testimony of Justices of this Court has been given in past times by deposition.

MR. ST. CLAIR: It really is a matter of accommodation, not as a matter of assertion of a right of one branch over anot her.

But the point I want to make is that the same subject matter is inexorably involved in both proceedings now proceeding at the same time. And, you know, the House of Representatives has not --

QUESTION: Why were you willing to give up twenty-some of them?

MR. ST. CLAIR: That is a very good question, and I would like to answer it. The decisions that are made in the impeachment proceedings, Justice Marshall, are essentially political decisions.

QUESTION: I'm talking about this case. You say he will give up twenty of them in this case.

MR. ST. CLAIR: Yes, we will -- because they have already been made public.

QUESTION: The tapes, or transcriptions?

MR. ST. CLAIR: As soon as the Judge approves some method of v alidating the accuracy of these tapes,

they can have t he tapes. But you have to understand, the tape is a part of a reel. A reel may cover a dozen conversations. So there is a mechanical problem of trying to validate or be sure that this is correct. B ut it is only a mechanical problem. Once that is solved, subject to the approval of the Judge below, they have the availability of that.

QUESTION: Are the tapes that you are willing to release be valuable to the Watergate Committee in Congress?

MR. ST. CLAIR: We think so. That is why we made them available.

QUESTION: I thought you said you didn't want them to have any tapes.

MR. ST. CLAIR: No, sir.

QUESTION: That this was merely a way of getting stuff over to them. But you are going to give them some.

MR. ST. CLAIR: I say this. I say the President should decide as a political matter what should be made available to the House.

QUESTION: Oh.

MR. ST. CLAIR: That the Court ought not to be drawn into that decision.

QUESTION: And that's final. Nobody can do anything about it.

MR. ST. CLAIR: The House takes a different view. The House has subpoeaned something in the neighborhood of 145 tapes. And that is a political decision.

QUESTION: So that the House can get them, the President can get them, and the only people I know that cannot get them is the courts.

MR. ST. CLAIR: The President has not honored any of the subpoenas other than the first one issued by the House. So that there is a dispute in the House now between the President and the Committee on the Judiciary. It is essentially a political dispute. It is a dispute that this Court ought not be drawn into. And the result of a decision in this case would inexorably result in being brought into it.

QUESTION: You have not convinced me that we are drawn into it by deciding this case. How are we drawn into the impeachment proceedings by deciding this case?

MR. ST. CLAIR: The impact of a decision in this case undeniably, Mr. Justice Brennan, in my view, cannot have -- will not be overlooked.

QUESTION: Any decision of this Court has ripples.

MR. ST. CLAIR: I think it would be an inappropriate thing to do at this time because there is pending --

QUESTION: Well, that's a different thing. You've been arguing we have absolutely no authority constitutionally to decide this case.

MR. ST. CLAIR: I will argue that in a moment. But I am arguing now only that you should not. I am arguing now, sir, only that you should not -- because it would involve this Court inexorably in a political process which has been determined by the Constitution to be solely the function of the legislative branch. And it cannot be that the impact of this Court's decision in this matter, which is one of the principal matters now pending before the House, would be overlooked. It would certainly as a matter of realistic fact have a significant impact.

QUESTION: But as I said before, we have -- the beneficiaries here are six defendants being tried for criminal charges. And what the President has may free them completely. Is that true? Theoretically.

MR. ST. CLAIR: Mr. Justice Douglas -- it may. The Brady issue we don't believe is properly before the Court. It has not been briefed by us nor by my brother.

QUESTION: It was not decided by the District Court.

MR. ST. CLAIR: It was not decided by the District Court. I would only say this. That in the experience that I have had in connection with cases tried, such as the Stans-Mitchell case in New York, the Chapin case in

Washington, the Ehrlichman case now going on, there has never been a claim that the President has not made available appropriate and adequate Brady material. But I do not believe it is before this Court at this time. What is before this Court is a prosecutor's demand for evidence. And I direct my remarks for a moment to that problem. He says that in effect we have no right to be here, that we have delegated the who, the when, and with what issues to him. We have delegated the who and the when, and pursuant to that he has indicted a number of people. And he has indicted them at such time as he thought appropriate. But even he contends that we did not delegate to him what Presidential conversations would be used as evidence. That was reserved. And he concedes that that is the fact. And that is what is at issue here. Not when and who is to be indicted, but what Presidential communications are going to be used as evidence. And that is what the issue is in this case.

QUESTION: Mr. St. Clair, you left me in a little bit of doubt about this mechanical problem. I think perhaps we diverted you from it. Are you suggesting that on a given tape, which is a reel type of thing, having an hour or more of material, or maybe several hours --

MR. ST. CLAIR: Two or three days.

QUESTION: Two or three days -- I see. That

the first three hours might be material which has already been transcribed and released; the next three or four hours might be a conference with the Joint Chiefs of Staff or the Chairman of the Atomic Energy Commission, or a program to give under-developed nations, for example, aid or peaceful uses of atomic energy -- matters totally irrelevant but confidential. Is that your argument?

MR. ST. CLAIR: It is my argument, and the fact. For example --

QUESTION: And you want some mechanism set up so that these things can be screened out.

MR. ST. CLAIR: They have been screened out in the transcripts. Whatever has been published to the public we are quite prepared to verify the accuracy of. Now, in the course of those transcripts there are, of course, portions left out.

QUESTION: Have you at any time tendered or proferred a statement that a particular tape from eighteen minutes after eleven until three o'clock that afternoon, including the lunch hour, included a conference with the Secretary of State, the Secretary of Defense and someone else having to do with totally unrelated matters. Has that kind of a tender been made?

MR. ST. CLAIR: No. We simply published the portion of that conversation which does not relate to

that with the notation that a portion had been left out.

QUESTION: But no explanation of why it is left out.

MR. ST. CLAIR: It was left out because it did not involve Presidential action as it related to Watergate, or something to that effect. We did not disclose the substance of that left-out material.

QUESTION: Is there any particular reason why at least the identity of the conferees could not be made --

MR. ST. CLAIR: There might well be such a reason. My proffer to my brother has been that we will verify the accuracy of the printed transcript, so this 1240-odd pages of Presidential conversations that are available to the public and available to him will be useable in the trial. Now, this may well involve a mechanism approved by the Court involving counsel for the defendant to be satisfied -- that they are satisfied that the copy is accurate. But this all has to be expurgated out of a reel of tape that may involve several days of conversation. But it is essentially a mechanical problem.

QUESTION: The tapes that they ask for in this subpoena duces tecum, which is the only thing before us -- has any effort been made to say what if any part of that can be released?

MR. ST. CLAIR: Other than the twenty that are already published, no effort has been made as yet, sir.

QUESTION: Why not?

MR. ST. CLAIR: Because, if Your Honor please, we have not felt that it has been necessary to do so, because we firmly feel that the President has every right to refuse to produce them.

QUESTION: You don't think that a subpoena duces tecum is sufficient reason for you to try? You just ignored it, didn't you?

MR. ST. CLAIR: No, sir, we did not. We filed a motion to quash it.

QUESTION: The difference between ignoring and filing a motion to quash is what?

MR. ST. CLAIR: Well, if Your Honor please, we are submitting the matter --

QUESTION: You are submitting the matter to this Court --

MR. ST. CLAIR: To this Court under a special showing on behalf of the President --

QUESTION: And you are still leaving it up to this Court to decide it.

MR. ST. CLAIR: Yes, in a sense.

QUESTION: In what sense?

MR. ST. CLAIR: In the sense that this Court has the obligation to determine the law. The President also has an obligation to carry out his constitutional duties.

QUESTION: You are submitting it for us to decide whether or not executive privilege is available in this case.

MR. ST. CLAIR: Well, the problem is the question is even more limited than that. Is the executive privilege, which my brother concedes, absolute or is it only conditional.

QUESTION: I said "in this case". Can you make it any narrower than that?

MR. ST. CLAIR: No, sir.

QUESTION: Well, do you agree that that is what is before this Court, and you are submitting it to this Court for decision?

MR. ST. CLAIR: This is being submitted to this Court for its guidance and judgment with respect to the law. The President, on the ot her hand, has his obligations under the Constitution.

QUESTION: Are you submitting it to this Court for this Court's decision?

MR. ST. CLAIR: As to what the law is, yes.

QUESTION: If that were not so, you would not

be here.

MR. ST. CLAIR: I would not be here. Now, my brother says I have no right to even challenge his right to be here. And I would like to deal with that for a moment.

This is, as we have pointed out in our brief, essentially an executive department matter. Whatever may have been the arrangements between the branches of the executive with respect to evidentiary matter -- and in fact there were no arrangements regarding evidentiary matters -- it is not the function of the Court to direct or rule what evidence will be presented to it by the executive in the executive's duty of prosecuting.

If this was a United States Attorney, this case would not be here, of course. It is here only because certain things were delegated to the Special Prosecutor. But the Special Prosecutor was not delegated the right to tell the President what of his conversations are going to be made available as evidence. That was specifically reserved. And the only thing that my brother can do is argue about it. And that is what he is doing right here today. Therefore --

QUESTION: Why wouldn't this case be here if this were a United States Attorney? I think I agree with you. But I would like to ask you to tell me why.

MR. ST. CLAIR: Well, the United States Attorney would be directed --

QUESTION: By whom?

MR. ST. CLAIR: By the President or the Attorney General at the direction of the President --

QUESTION: I thought the Attorney General was the one who directed the United States Attorney.

MR. ST. CLAIR: By the Attorney General at the direction of the President.

QUESTION: No, no. In the normal case -- the President doesn't know anything about mine-run federal prosecutions -- that's fair to say, isn't it?

MR. ST. CLAIR: I think so. But most cases don't involve --

QUESTION: And in fact in mine-run cases, the Attorney General doesn't know much about them.

MR. ST. CLAIR: Yes, sir -- with all due respect.

QUESTION: Right. So the United States Attorney brings a prosecution, and in the course of that prosecution he, before trial, subpoenas under Rule 17 of the Federal Rules of Criminal Procedure -- he subpoenas material in the custody of the President. So what happens?

MR. ST. CLAIR: The President says to the Attorney General "I am not going to produce this material."

QUESTION: No. It's the United States Attorney subpoenaing it under your hypothetical case.

MR. ST. CLAIR: That is right.

QUESTION: And so what happens?

MR. ST. CLAIR: In my view the President would instruct the Attorney General to instruct the United States Attorney to withdraw his motion.

QUESTION: And the United States Attorney says "I'm not going to do that because I am sworn to uphold justice."

MR. ST. CLAIR: Then you would have a new United States Attorney.

Well, I'm being a little facetious.

QUESTION: I'm being serious, because I think --

MR. ST. CLAIR: I think the United States Attorney, with all respect, would and should be removed from that case.

QUESTION: By whom?

MR. ST. CLAIR: The executive power of the government is not vested in the United States Attorney; it is vested in one man and that man is the President of the United States.

QUESTION: By statute it is vested -- law enforcement is vested in the Attorney General.

MR. ST. CLAIR: Yes. But that statute which my brother cites in his brief does not deprive, nor could it deprive the President of his constitutional authority

to be the chief law enforcement officer. He shall take care to see that the laws are enforced. The executive power is vested in him, in one man. And the Attorney General is nothing but a surrogate for the President of the United States.

QUESTION: Your argument is a very good one as a matter of political science, and it would be a very fine one as a matter of constitutional and probably statutory law -- except hasn't your client dealt himself out of that argument by what has been done in the creation of the Special Prosecutor? You have just pointed out that the Special Prosecutor is quite different from the United States Attorney.

MR. ST. CLAIR: Right. Perhaps with respect to everything except -- the President did not delegate to the Special Prosecutor the right to tell him whether or not his confidential communications should be made available as evidence. So that within the package of executive power normally represented by the executive department as to who shall be prosecuted, that has been delegated to this gentleman and he has exercised that power. When -- he has done that. With what evidence -- he has done that, as we will deal with in a few moments. But not with that portion of the evidence that is available that constitutes Presidential confidential communications.

And the Special Prosecutor cannot, and even if the President did give him that authority, probably could not, as a constitutional matter, delegate that. But in any event --

QUESTION: Delegate what? He probably would not and could not delegate what?

MR. ST. CLAIR: The right to order the President to give up confidential communications. That was not delegated.

QUESTION: Not the unfettered right to get it, but the right to go to court and ask a court to decide whether or not he is entitled to it.

MR. ST. CLAIR: Right. And the President, under no circumstances, gave up any of his defense with respect to that.

QUESTION: And you are making those defenses right here and now.

MR. ST. CLAIR: Making them right no.

QUESTION: No question about that.

MR. ST. CLAIR: And even if we did agree between us that we would vest this Court with jurisdiction, simply because of the politics of the situation, this Court, by all of its decisions, would not accept the vesting of such jurisdiction.

QUESTION: Why not?

MR. ST. CLAIR: Because this Court determines

its jurisdiction -- the parties can't agree --

QUESTION: We all know that law, yes. And surely you are right, as I say -- a lawsuit between the Secretary of Commerce, for example, suing the President over a matter of executive policy, we both agree it would be unthinkable -- and since any cabinet officer is the creature of the President who appointed him, the answer would be "You're fired."

MR. ST. CLAIR: If it goes that far.

QUESTION: If it goes that far -- that's right.

But aren't we here met both factually and, I suggest, legally, with quite a different situation?

MR. ST. CLAIR: I think not, in terms of separation of powers, if I may. My brother 's point of view is he views himself as the United States as distinguished from a member of the executive branch. And in his brief he invokes the United States as really a fourth entity. Constitutionally-, a Special Prosecutor, with the power that my brother suggests he has, is a constitutional anomaly. We have only three branches, not three-and-a-third or three-and-half, or four. There is only one executive branch. And the executive power is vested in a President. Now if for political reasons the President wants to dole out some of those powers, he may so do, and has done in this case. But he cannot vest jurisdiction in a court

that otherwise the court would not have. Nor should the court accept jurisdiction.

QUESTION: But hasn't your client also inhibited himself from the ultimate sanction that you suggested he could impose with respect to your hypothetical United States Attorney, i.e., the sanction of dismissing the Special Prosecutor.

MR. ST. CLAIR: That is correct.

QUESTION: And as a matter of law -- regulations that have the force of law.

MR. ST. CLAIR: That is correct. And he has not been dismissed. Nor is he likely to be.

QUESTION: And until and unless he is, we have a case in controversy of a very real kind.

MR. ST. CLAIR: The point is, if I may make it, the only issue here is whether the President gave up his right to protect the confidentiality of his conversations. No claim is made that he did.

QUESTION: You are living testimony to the fact that he did not give up his right to defend his position in court.

MR. ST. CLAIR: And my brother concedes that.

QUESTION: The fact that the delegation to Mr. Jaworski gave him the right to contest the President's claim of privilege presupposed that the President had a

right to assert the privilege -- not the right to assert it necessarily with complete finality. That is what we are really arguing about here today, isn't it?

MR. ST. CLAIR: If we get beyond the subject matter situation. Now, if this were the Nixon against Sirica case, where we didn't have what I think is a dispositive problem in this case, namely the lack of jurisdiction of the judicial branch to determine this intra-executive matter -- if we had a Grand Jury subpoena, as was true in the Nixon against Sirica case, then you have intra-branch, and the Court would have a better standing in its responsibility to see the Grand Jury's return under its jurisdiction to have such evidence as they thought appropriate. But we are well beyond that stage. 17(c) requires much more restrictive form of evidence. It has got to be relevant and admissible. It is nothing like a Grand Jury.

QUESTION: Mr. St. Clair?

MR. ST. CLAIR: Yes, sir.

QUESTION: In reference to your point of our three branches are three and some fraction, is not the Comptroller General something of an autonomous factional more than a third branch figure.

MR. ST. CLAIR: Well, I don't think, if Your Honor please, that the Attorney General represents that the basic constitutional structure has been changed. He may have executive and he may have legislative functions.

QUESTION: He may proceed with reference to the Executive Branch and I would assume with reference to expenditures of the Legislative Branch and without consulting either one of them. Is that not so?

MR. ST. CLAIR: I understand. He is created by a legislative -- It is very much like a semi-independent agency. In one aspect he's an agent of the legislature and in the other aspect he's an agent of the executive. But we dont have anymore than Legislative, Judicial, and the Executive Branches.

QUESTION: Mr. Jaworski, as I understand it is claiming that he is somwhat like -- not necessarily precisely like -- but somewhat like the Comptroller General. He may make decisions and Congress cannot recall him short of I believe it is a fifteen year term for the Comptroller General, and the President, no President can fire the Comptroller

General and I suppose the Court could not fire him.

MR. ST. CLAIR: Well, I'm sure the Court couldn't. I'm not too clear about the President. In the Meyers case I really haven't thought that much of it. It could be that he could be fired. But I think that is really somewhat beside the point because this issue really turns on an admission that as to the element of executive power here involved, namely, presidential conversations, they weren't delegated. So whatever else may have been delegated those were not. And this Court has no jurisdiction to resolve a dispute as to whether or not they should be given up. Because that would involve this Court in the prosecution of the case and the judicial --

QUESTION: Doesn't the Court decide what is necessary for a trial of a criminal case.

MR. ST. CLAIR: It can, sir, with respect to third parties but it should not involve itself with the executive function of prosecuting the case.

QUESTION: My only question was that this is a subpoena duces tecum that was issued by a judge. Right?

MR. ST. CLAIR: Yes, sir.

QUESTION: Slightly judicial.

MR. ST. CLAIR: Entirely.

QUESTION: And that's what is before us. And that you move to quash. But that's what is before us.

MR. ST. CLAIR: Our motion to quash is one of the

issues before us. That's right.

QUESTION: The only thing before us is as to whether or not the subpoena should issue.

MR. ST. CLAIR: I guess it's about the same thing as whether or not it should be quashed.

QUESTION: That's right.

MR. ST. CLAIR: I think it amounts to the same thing.

QUESTION: So that's not political.

MR. ST. CLAIR: Well, it is not in the context of the proceedings here but in the context of whether or not it is in fact involved in this case it is, I suggest, political in the sense of information being sought. Admittedly it then becomes available to the House.

QUESTION: Well, I don't see where the House has got anything to do with the point that I'm talking about. You say this is political and not judicial and I submit it could be judicial because it involves the issue of subpoena.

MR. ST. CLAIR: Well, the question is is it a proper issue of subpoena.

QUESTION: That's right.

MR. ST. CLAIR: Judges make mistakes and lawyers and even presidents so far as I know. The point I want to make to you, sir, is that this is an executive function and executive decision one not delegated --

QUESTION: The executive function, as I understand

your discussion as to whether you should voluntarily turn them over to the special prosecutor. We are passed that stage. We are now at the stage where the prosecutor has asked the Court to assist him and the Court has assisted him. Does that not take it a step beyond pure political or executive?

MR. ST. CLAIR: We submit if the Court had properly assisted him but the Court has no right to determine what the executive will offer in evidence.

QUESTION: I see.

MR. ST. CLAIR: And this is a function of the President. No one has contended that the president has given up his executive responsibilities under the Constitution and certainly the prosecution of criminal cases is an executive function.

QUESTION: Absolute. Now you're arguing absolute privilege, even though every day you issue other ones.

MR. ST. CLAIR: I beg your pardon.

QUESTION: You turn tapes loose everyday or so don't you?

MR. ST. CLAIR: No, we don't turn them loose everyday but we have turned a number loose in the President's discretion in which he thought was the right thing to do.

QUESTION: And you're getting ready to turn twenty more tapes loose.

MR. ST. CLAIR: That is repetitious, Your Honor, of

what has already been made public.

QUESTION: I thought you said you believed you would turn twenty loose.

MR. ST. CLAIR: Those would be the tapes of the twenty conversations already made public.

QUESTION: And you released those tapes.

MR. ST. CLAIR: We provided a means whereby their accuracy can be verified. We release the whole reel of tape involving a number of conversations --

QUESTION: You are still saying the absolute privilege to decide what shall be released and what shall not be released is vested in one person and nobody can question it.

MR. ST. CLAIR: Insofar as it relates to the presidential conversations, that is correct, sir.

QUESTION: Mr. St. Clair, with the jurisdictional question, as I further understand it, that argument of yours -- at least I got it from the brief -- involves at least two separate concepts, maybe three. One is that this is an intra-branch dispute and that argument would be fully valid under the analogy you use in your brief if this were a dispute between let's say two committees in one of the Houses of the Congress. And one committee sued the other for jurisdiction of a particular matter you suggest, probably quite correctly, that that would not be a matter for the judiciary to determine. That's one argument. But this is purely an intra-

executive branch controversy as it would be between two congressional committees. This is intra -- Article 2, the hypothetical case would be intra-article 1 branch. That's one argument.

Then you have quite a separate argument it seems to me, i.e. that the President constitutionally is the chief prosecutor since he is the executive. And that it is not for the courts to decide what a prosecutor shall use in prosecuting a case. Now, aren't those two separate arguments? You bring both of them under this rubric?

MR. ST. CLAIR: That's correct, sir. I don't know how separate they are but it certainly --

QUESTION: It seems to me like they are quite separate.

MR. ST. CLAIR: Well, if they're making both of them separate, fine. Now, as with respect to --

QUESTION: Now, the second argument would have no relevance at all to your analogy of the legislative branch.

MR. ST. CLAIR: Well, I don't want to mislead the Court into thinking that I believe Mr. Jaworski has no right to determine any evidence that he can use.

QUESTION: But ultimately you tell us that constitutionally the President has the chief executive and whereas, constitutionally the chief prosecutor -- whatever the statutes might provide -- has unrsstricted discretion in

determining whatever he will or will not use in prosecuting the case.

MR. ST. CLAIR: That is correct.

QUESTION: Which is quite a different concept from the other concept. You make them both under the same rubric as I say. But it seems to me they are quite separate arguments.

MR. ST. CLAIR: And I think they are well founded.

QUESTION: I know you do or you wouldn't make them.

MR. ST. CLAIR: Now, I would like to move if I may to briefly the suggestion that the issue here is non-justiciable on the grounds other than I have already mentioned, namely, the context in which this case unfortunately now finds itself.

It seems to us briefly that cases non-justiciable for somewhat more technical reasons. First, this is an issue where someone has to exercise some indiscretion. There are no real bounds or standards by which that discretion should be exercised. And by traditional standards of this Court where that exists then this Court should not take the case. Secondly, it seems to me there is a textual constitutional grant if we assume that the grant of executive power includes the means by which that can be effectively exercised. That's the second ground. The third, of course, there is a political involvement which I have suggested. Therefore, I suggest quite briefly that even if there is subject matter jurisdiction

the case is non-justiciable for these additional reasons.

The standards of Baker v. Carr and Powell are not applicable here. There is no individual's rights who have been protected against the onslaught of Government. The President is not here as an individual, he is here as the constitutional officer in whom the executive power is vested. There is no philosophy that would support a finding of justiciability on the grounds that we are strengthening the democratic processes as true in Powell and also to a greater extent in Baker and Carr.

If anything, a dicision in this case against the President would tend to diminish the democratic process. This President was elected on the theory that he would have all the powers, duties, and responsibilities of any other president. And if it is determined that he doesn't, there is a certain amount of diminution of the political aspect of the case insofar as constituents who voted for him are concerned. This President ought not to have any less powers than any other president ought to have. One of the necessary results as I view them from my brother's argument is that because of the circumstances of this case Richard Nixon is let's say an 85% president, not a 100% president. And that can't be constitutionally. The framers of the Constitution had in mind a strong presidency. As we know they considered a number of alternatives. A presidency consisting of three

members all of which suggestions were discarded and a strong presidency was decided upon, may I say, to the distinctive management of this country as history has developed.

Now by reason of the action of a grand jury the special prosecutor suggests that this President has something less than any other president would have. I would only call your attention to the action of the framers of the constitutional convention when the issue was raised as to whether or not a president who was under impeachment should be suspended during the pendency of the impeachment proceeeding. And the decision was definitely he should not because the framers envisioned a strong, active president even in the course of impeachment proceedings. They did not want this country to be led by someone who didn't have those full powers even if he was under impeachment. And indeed, this President continues to function as President, as he should, even though there are impeachment inquiries underway.

QUESTION: If I may interrupt you again, is what you're telling us now directed to your point, that this is a non-justiciable political question or is it directed to your point that the executive privilege is absolute and that the determination of it is to be --

MR. ST. CLAIR: I think that it involves both. It is non-justiciable, if I may, because it does involve the Court in a political matter.

Now, the mere fact that politics is involved is, of course, not preventing the court from taking appropriate action under the cases where individual rights are involved or where the franchise of voters could be strengthened by a decision of the Court. I am suggesting in this case the converse is true. Therefore, the justification between Baker and Carr and the Powell case is not available and not applicable here. Furthermore, however, the argument still in my view has force with respect to the consequences of the grand jury action in naming him as a co-conspirator which we suggest they were not qualified to do. The President is not above the law by any means. But law as to the President has to be applied in a constitutional way which is different than anyone else. Namely, we suggest that he can only be impeached while in office and cannot be indicted until such time as he no longer is in office.

QUESTION: Well, let's assume that we accept that proposition. What follows from it?

MR. ST. CLAIR: Well, then the naming of the President by a grand jury as a co-conspirator. If that has the effect of diminishing the President's rights it is a pro tanto impeachment.

QUESTION: I should think you could run the argument the other way, saying that since the President cannot be indicted then all that can happen to him is that he be, can be

named as an unindicted co-conspirator.

MR. ST. CLAIR: That could be said. But by the naming of him as an unindicted co-conspirator we suggest is an intrusion by the grand jury on a function that is solely legislative and not judicial.

QUESTION: A president could be sued, couldn't he, for back taxes or penalities or what not?

MR. ST. CLAIR: Well, in questions of immunity I think individually he could be.

QUESTION: The Constitution speaks of persons, any person.

MR. ST. CLAIR: That's correct. I think the President could be sued for back taxes in his individual capacity. But in terms of his power to effect the responsibilities of his office, to protect the presidency from unwarranted intrusions into the confidentiality of his communications, that's not a personal matter.

QUESTION: It may be that one of these defendants might be completely exonerated from something in one of those tapes.

MR. ST. CLAIR: As I have suggested, if that defendant will satisfy a Court that there is such a tape and will identify it or will even come close to it and persuade a Court that that would exonerate him or there's reason to believe it might I don't believe we'll have a question. But

that's not what my brother here is asking for. He's asking for a set number of tapes, not for that purpose, although he throws that in but he really wants them he says for prosecution. And I would like to review with the Court the question of the necessity shown for this because he went on his theory of a qualified privilege. There has to be a showing of some necessity.

Now we should understand -- and I am sure the Court knows -- that all of these individuals here involved have testified before the Senate Select Committee, with exception I believe of either Mr. Colson who now has plead guilty under plea bargain where he has agreed to cooperate so that the special prosecutor has the full benefit of his testimony. They have testified on one or more occasions before a grand jury. In addition, the President has furnished to the special prosecutor the transcripts and tapes of the critical conversations involved in this alleged conspiracy and I might review those very briefly with you. Mr. Dean in his Senate Committee testimony suggested that on September 15 the President acknowledged a cover up. He changed that later to testimony that he believed that was so and it was an inference. In any event the President furnished that portion of that tape of the conversation with Mr. Dean.

Mr. Dean also testified that on March 13, 1973, he discussed the cover up with the President in efforts to

blackmail the President by one of the defendants who broke into the Democratic National Headquarters. Later it developed that that was a mistake in that it was actually on March 21 and the grand jury indictment proceeds on the theory of March 21st. The tape of the conversation of March 13 was furnished, all of the conversations between the principals, being two in number, on March 21st were furnished. The conversations between the individuals and the President on the next day in the afternoon of March 22nd was furnished. And a large number of additional conversations were furnished.

Now if Reynolds means anything -- and Reynolds in addition to the Kaiser Aluminum case noted a constitutional question, as I think one of the learned Justices suggested -- one of the reasons for not facing that issue in that case was it was not necessary because in the case there was a crash of a bomber that was on a secret mission, and the Court said that the parties had the testimony of the witnesses, the survivors and other testimony that it wasn't necessary to get to the constitutional question. I suggest that's true here. It is difficult for me to conceive a prosecutor who has more evidence than this prosecutor has. He has full benefit of a Senate Select Committee investigation which staff had 50-odd lawyers, existed for a year, he has the benefit of his own investigation of a grand jury that sat for nineteen months with an investigative staff of similar proportions; he simply

says I need this because I want to present all of the evidence in the case. He does not say --

QUESTION: I don't understand that. Do you think that a prosecutor could get this from a normal third party witness, he can't get it from the President because of executive privilege; that there must be a further showing beyond the relevance shown in 17(c)?

MR. ST. CLAIR: As we point out in our brief, the tape of the conversation is very --

QUESTION: The answer is "yes" isn't it, that there is a further showing necessary?

MR. ST. CLAIR: That's right. Does he really need it. What does he say he needs it for?

QUESTION: How does a District Court go about deciding a question like that in advance of trial without a prosecutor lays out his entire evidence and says "It is my judgment that this is evidence and without this evidence I might lose the case."

MR. ST. CLAIR: He doesn't say that. He made a showing to the Court below. The showing is available to you here.

QUESTION: But you would suggest that he would have to do that?

MR. ST. CLAIR: He has the burden under Reynolds, under Kaiser Aluminum, and so forth, to show that he needs it.

And what does he say he needs it for? He doesn't say he needs it to obtain conviction.

QUESTION: Mr. St. Clair, while I've got you let me interrupt and ask you something else.

MR. ST. CLAIR: Yes, sir.

QUESTION: And it is related to this. No matter how absolute the executive privilege is that you claim on behalf of the President I assume you're talking about conversations to which the privilege would apply.

MR. ST. CLAIR: Yes, sir.

QUESTION: Now, is it --

MR. ST. CLAIR: We have to make such a showing and I say that is our only burden.

QUESTION: You wouldn't suggest that every conversation the President had has, while he's in office would be subject to executive privilege?

MR. ST. CLAIR: No. It would have to be a confidential communication.

QUESTIONS: Well, it has to be in the course of his duties as President.

MR. ST. CLAIR: Yes, but it private --

QUESTION: It would be in carrying out his duties as President, under the Constitution?

MR. ST. CLAIR: Yes, sir.

QUESTION: Now, I don't suppose if he was talking

with one of his aides, Mr. Haldeman, Mr. Ehrlichman about an investment of his out in California, you know, or some other place --

MR. ST. CLAIR: Or a tennis game or whatever.

QUESTION: Yes. You wouldn't suggest that that --

MR. ST. CLAIR: My brother doesn't suggest that that is what he wants either.

QUESTION: Well, how about conversations about a campaign, about the Nixon campaign?

MR. ST. CLAIR: That's getting a little closer.

QUESTION: It isn't closer to the executing of the laws of the United States, is it, running of a political campaign?

MR. ST. CLAIR: I don't think it is very close, no.

QUESTION: Conversations about that subject matter.

MR. ST. CLAIR: My brother isn't seeking any such conversations.

QUESTION: I know. But shouldn't the President have to say at least, even if the privilege is as absolute as you say it is, shouldn't he at least have to say I believe or assert that the executive privilege applies to this tape because this conversation is in the course of his performance of his duties as President?

MR. ST. CLAIR: As I read some of --

QUESTION: You haven't done that either, have you?

MR. ST. CLAIR: We have not done that. We have simply responded to an assertion that these all relate to Watergate. Assuming that to be the facts --

QUESTION: Would you automatically that every conversation about Watergate is in the course of the performance of the duties of the President of the United States?

MR. ST. CLAIR: I would think it would be, yes, sir.

QUESTION: Why is that, Mr. St. Clair?

MR. ST. CLAIR: Because he has the duty, A: to enforce the laws; that is, to prosecute these cases; and B: he has to take care to see that the laws are enforced; that is, to investigate. And much of this material does relate to the investigation as 1,200 and some pages of the public transcript fully discloses. But I would be ready to concede -- and I don't think that it is a difficult problem between us -- that the President should show that the circumstances are appropriate for the claim of such a privilege and I think such language appears in Mink and perhaps even in Reynolds and Kaiser Aluminum. Simply it has to be a confidential communication first of all and --

QUESTION: How about -- Do you concede or what is your view of the privilege with respect to whether it reaches a factual assertions in a conversation, the difference that was made in the Mink case and in others with respect to opinions and judgments as distinguished from facts?

MR. ST. CLAIR: Well, of course, Mink, I believe, was a --

QUESTION: Statutory case.

MR. ST. CLAIR: -- statutory case. But that was one of the exceptions.

QUESTION: Well, what is your view, would you say if conversation is merely a recitation of fact it is still covered by executive privilege?

MR. ST. CLAIR: Yes, it is. If it's confidential and it is between the President and some advisor with respect to --

QUESTION: Well, that hasn't got much to do with the decision making process, just pure cold facts.

MR. ST. CLAIR: It might well have to do with the decision making process if the facts are such as were developed in the course of an investigation with regard to the existence of an obstruction of justice charge much of which the President was involved in. But the fact against opinion decisions really relate to another situation as I suggest in the statute but the conversations that the President has with his advisors which we suggest is absolutely privileged. It is a discretionary matter that he has to exercise in what he is going to release and not release. And since Marbury and Madison, Mississippi and Johnson, it has been clear that the Courts will not direct a President to exercise his discretion in any manner. This is

not to say the Courts won't strike down as in Sawyer excessive action on the part of the President where excessive action on the part of the legislature that has happened a number of times. But it's a far different thing to suggest that the Court undertake to direct the President to exercise his discretion in a certain manner.

It is not a ministerial duty by any means. It is a matter of discretion. There are some things he feels he probably should under the circumstances make available and others he shouldn't.

QUESTION: In that particular instance, the one here involves the relevancy of materials to a criminal trial. And that normally has been a part of the judicial power under Article III and not executive power.

MR. ST. CLAIR: Well, I would like to discuss very briefly Gregoire if I may, for example. I think this raises a very important question.

There is, of course, an explicit speech and debate immunity provided in the Constitution. As our brief indicates the reason for this is quite clear. It is to protect the legislature from unwarranted invasion from the executive and perhaps even the judicial. It does not mean the executive is not entitled to substantially the same thing by implication. And at least in the civil field, as we have pointed out, the Courts have worked out by implication as a necessary

ingredient to the function of the duties of the executive an absolute immunity from civil liability for actions taken within the sphere of the official. Spalding and Vilas I guess is the leading case cited in Barr and Matteo and other case.

If such a matter can be worked out with respect to the executive on civil matters we suggest there is no reason why in fact the court should spell out a similar exemption in criminal matters especially as they relate to the President himself. Because while I said the President is not above the law, the law can only be made applicable to him in a certain way while he is in office.

Now, if a junior congressman can commit a crime on the floor of the house as apparently is possible under Gravel and Johnson (?) is it to be said that the President of the United States has less immunity than a junior congressman? I think not. So I suggest to you that common sense and the proper construction of the Constitution imply within the plan of executive power all those necessary ingredients to make it work to be effective which would include immunity and criminal immunity. The President we suggest cannot be indicted, cannot be named as a co-conspirator because that is an assumption of a legislative function under the Constitution. And therefore we suggest that even if this is criminal the President is immune from ordinary criminal process. He is not

immune from process. But that process that is available to the President is the process of impeachment which does not include the function of the judiciary branch. And therefore we say that if under Gravel the congressman is entitled to immunity even from criminal conduct for actions taken within the legislation sphere of his conduct then it would be very hard to support a proposition that the President as the chief executive of the country is entitled to less.

QUESTION: Except they didn't put it in the constitution.

MR. ST. CLAIR: Right. And the reason they didn't was it was not found to be necessary. They didn't put civil immunity into the Constitution either for the executive branch and this Court has found --

QUESTION: I'm not talking about that. I'm talking about the Gravel case. The Gravel case was on the constition, wasn't it?

MR. ST. CLAIR: It was a speech and debate case and it even forbade, as I understand the Gravel case, grand jury inquiry into motiviations and actions of the senator and his aide.

QUESTION: Because the Constitution said so.

MR. ST. CLAIR: Right. And I suggest the Constitution by clear implication provides the same not only for the executive but for the judicial as well. And certainly for the

executive.

QUESTION: And if we can't find it in the Constitution what happens to your argument?

MR. ST. CLAIR: Well, I would suggest you should find it in the Constitution. And it need not be explicit. It can well be implied.

QUESTION: My question is if we can't find it what happens to your argument?

MR. ST. CLAIR: If you cannot find it?

QUESTION: Yes, sir.

MR. ST. CLAIR: Then, if Your Honor please, that portion of the argument is lost as far as this Court is concerned.

QUESTION: Don't you -- You haven't lost your other point because this Court can set up the same kind of privilege that they've set up in other ones.

MR. ST. CLAIR: THat's correct. And we're suggesting that it should in this case. Not necessarily because a great deal is now left to be gained by expunging the grand jury action. My brother is right, the damage has been done and we think quite improperly so. We think the tactics involved with the prosecutor in seeking to enlarge the scope of admissible testimony is hardly worth what has been done here but it has been done.

But it seems to me history would be served by granting

of the relief we have prayed for below, namely, to expunge this; secondly, seems to me the American people would feel better about the fairness of the issues now pending before the House if that were expunged.

Insofar as the mechanisims of this case are concerned, it destroys or removes a basis on which they contend they are entitled to these documents. And I would like to address that for a moment.

QUESTION: We have been asked many times to do that in other cases with respect to grand juries, and up to today I don't think we have ever come anywhere near doing it.

MR. ST. CLAIR. And up to today you have never had a President of the United States named as a co-conspirator either, sir.

QUESTION: That is very true.

MR. ST. CLAIR: And the President of the United States -- I don't mean to be facetious about it -- but the President of the United States, we suggest, can be proceeded against only by impeachment while in office. And his powers are unabated until such time as he leaves that office.

Now with respect to this suggestion that a grand jury finding is prima facie evidence --

QUESTION: That of course has never been decided either.

MR. ST. CLAIR: No. This case is unusual in many respects.

This suggestion that a grand jury finding is prima facie evidence and therefore the President has lost whatever

privilege he otherwise would have had, isn't borne out either by the facts or the legal issues and principles involved. A grand jury finding is not prima facie evidence.

Even if it is mentioned in an opening argument in the criminal trial, there is a grave risk of a mistrial. The cases cited by my brother, particularly the Clark case, are clearly cases which require a showing in court, or in Clark a showing to the judge that there was prima facie evidence of wrong doing.

You may recall that is a case involving an investigation into a juror as to whether or not the juror had performed properly. And the juror, it had been shown, had testified falsely in the qualifications, that she had never had any business relations with one of the parties when in fact she had. The court said, well, there is a finding of wrong doing, and based on that now I will look into the jury's deliberations to see what she did.

But Justice Cardozo made it very clear that if he hadn't been able to make a prima facie showing of wrong doing by evidence before him, there would have been no cause for letting in the light as he put it.

In the Euclid case, and other cases, which are relied on by my brothers, are all cases where there was a prima facie showing in a courtroom. Now a grand jury charge is not prima facie. In the first place it is only accusatory.

It is not even admissible in, nor can it be referred to in a trial.

Secondly, it can well involve incompetent evidence as this Court has recently decided. And it is totally inappropriate to suggest that a President who otherwise would have a very valuable privilege, and I think I should emphasize the value of this privilege because it is a valuable privilege.

All you have to do is read Justice Reed's decision in Kaiser Aluminum, and he spells it out quite clearly, the importance and value of this privilege. To simply say to have a grand jury make a charge, that destroys that privilege, is an argument that I don't think can be sustained.

QUESTION: Mr. St. Clair, you have not mentioned in your argument, a few moments ago, on the absence of any provision for immunity for judges or presidents -- you haven't mentioned the holding of this Court in Pearson against Ray whereas recall it the Court assumed with a sentence or two that there was absolute privilege for the Judiciary but that the privileges of the Executive, in that case a policeman, was qualified. The Court had no difficulty in concluding that it did not require an expressed constitutional provision to spell out an absolute privilege for judges. These were state judges in that case, of course.

MR. ST. CLAIR: That's right. If Your Honor please, I don't believe that simply because the constitution does not

explicitly state --

QUESTION: Your immunity.

MR. ST. CLAIR: As it does in the Speech and Debate Clause, should this Court hold it does not exist in criminal matters.

I would like to make one point with the Court, however because I am sure the point will be raised concerning Justice Kerner, for example; there is a distinct difference, as we point out in our reply brief, as we view it, between a President of the United States, a single individual in whom the entire Executive function is vested. A President serves seven days a week, 24 hours a day. And only he, or those under him perform his functions, can exercise the Executive functions of our government.

Now if a congressman or a senator, or even if a judge

QUESTION: Or a Vice President?

MR. ST. CLAIR: Or a Vice President, is removed from his duties, matters go on. But a President doesn't have that opportunity to take a vacation. It is vested in one individual and deliberately so.

QUESTION: This is pretty far afield from the basic question here which is the testimonial privilege --

MR. ST. CLAIR: We say it's a constitutional privilege

QUESTION: Not prosecutorial immunity, but testimonial privilege is what we are dealing with here basically.

MR. ST. CLAIR: That is correct. I think so.

I want to make the point with you that we think that the privilege we are arguing for is both common law and constitutional law.

QUESTION: I understand that.

MR. ST. CLAIR. It is constitutional because it is inherent in the Executive power, and

QUESTION: I understand your argument. But this matter of whether or not a judge can be prosecuted criminally has nothing to do with testimonial privilege, does it?

MR. ST. CLAIR: Well, my brothers seem to think it does, because they say because of the implications of criminality here, the President has lost something he otherwise would not have had.

QUESTION: I understand that. Since I have already interruped you, may I prevail upon your good nature --

MR. ST. CLAIR: Please do.

QUESTION: -- Mr. St. Clair, to ask you whether it is your claim that any of these materials have to do with what have sometimes been called matters of state, i.e. matters of international relations or national defense? Mr. Jaworski assured us that they did not involve matters of state. But I would like to hear what you have to say about that. Because as you well know, both the commentators and court decisions have made a dichotomy between the privilege that exists with respect

to general confidentiality on the one hand of the Executive, and matters of state, on the other, to which a higher privilege is sometimes been thought to have been accorded.

MR. ST. CLAIR: Well, I think if a higher privilege has been accorded, it should not -- but in any event the privilec of confidentialty is not unimportant, however --

QUESTION: I know that.

MR. ST. CLAIR: Let me direct myself to your question. The answer to your question is no one knows. You won't know until you listen to these tapes as to what subjects are discussed. My brother can only state that it is probable that they relate at least in part to whatever he says, Watergate, or it's likely that it might. And I have had the experience, for example, where circumstances were such that the House committee felt that it was likely that a conversation took place between the Attorney General, Mr. Mitchell, and the President regarding plans for surveillance of the Democratic party. When you looked at the conversation, it wasn't there at all.

So I have no way of knowing, nor does the Prosecutor know, what additional matters may be interwoven into these conversations. One thing is certain --

QUESTION: Am I mistaken in believing, Mr. St. Clair, in understanding, Mr. St. Clair, that in this case to date no representation has been made by affidavit or professional

representation or otherwise that any of these materials have to do with national defense or international relations?

MR. ST. CLAIR: No. And no representation can be made to the contrary either.

QUESTION: And that would be therefore a matter to be, under the existing order now under review of Judge Sirica, that would be submitted to him later in camera.

MR. ST. CLAIR: If this court finds --

QUESTION: I say under his existing order.

MR. ST. CLAIR: Yes, that is right. And the President presumably if he were to comply with that order, would make such a representation in an appropriate case. But the fundamenta point is that we believe for reasons stated that the President's right to confidential advice is important --

QUESTION: I understand that.

MR. ST. CLAIR: And it is actually fundamental to the proper functioning of his government. And in many instances I suggest it is even more important in military matters and matters of state, so to speak, because no matter what the conversation is of course, it is the thought that it might become public that involves then this chilling effect we have made reference to in our brief under the first amendment. But as a practical matter, and I can see it myself, the communications are not free and open because who is to say that you won't be called before a grand jury. Most everyone in the White House has been

called before a Grand Jury sometime several times. The FBI has interviewed every secretary that had any knowledge of any aspect of this case.

This Prosecutor has a plethora of information. He says he wants to try the case with all the evidence. Well, he knows better than that. Nobody tries any case with all the evidence. You would be buried in minutiae. You select the evidence that you think most appropriate to your case. You don't try it with all the evidence.

And this Special Prosecutor has mountains of information.

QUESTION: Who is to determine how much evidence the prosecutor needs? Only the prosecutor.

MR. ST. CLAIR: That's correct.

QUESTION: Don't you agree?

MR. ST. CLAIR: That's correct. Not the Court.

QUESTION: Don't you agree?

MR. ST. CLAIR: And if that evidence constitutes presidential confidential communications, then I suggest, if Your Honor please, the President determines that.

QUESTION: Many a case has been lost because the prosecutor had too much evidence.

MR. ST. CLAIR: Well, I suggest that's probably the fact here.

So when the government says, I don't need this

evidence to win these cases, in my opinion, but I need them so I can present all the evidence.

QUESTION: But you're still --

MR. ST. CLAIR: I've been trying cases long enough to know, and so has he. That's not what he is really after.

QUESTION: Yes, I've tried a few, too.

[Laughter.]

Mr. St. Clair, I was just wondering, where do you see the burden here -- is on the prosecution?

MR. ST. CLAIR: The burden under 17(c) is clearly on the prosecution, and the burden is clearly on the prosecution on every other aspect.

QUESTION: Right. And now, how much is enough for our phrase we've been kicking around, Prima facie?

MR. ST. CLAIR: Well, I suggest whatever was considered by this Court in Reynolds to be enough, is more than enough in this case. We have the testimony of every individual involved, a number of them have pled guilty. Dean has pled guilty. Colson has pled guilty. Kalmbach has pled guilty, et cetera, et cetera. All under plea bargains, where they are under obligation to fully cooperate.

This Prosecutor is not, nor does he say at any point that he needs this information to prosecute successfully these cases.

QUESTION: Mr. St. Clair, just to pinpoint another

issue, let's assume for the moment that we didn't agree with you on your test of privileged, and let's just assume that the only issue that was left in the case was the 17(c) issue.

Now, --

MR. ST. CLAIR: Then the President wins, in my view.

QUESTION: Well, because?

MR. ST. CLAIR: Because the Prosecutor cannot show that the evidence he seeks is relevant and admissible. Because of the nature of the circumstance, he doesn't know what's in there.

QUESTION: Well, I suppose there are two parts to the question: one, how much of a showing does he have to make as to what might be on the tape; and, secondly, if that matter that he claims is on the tape is on the tape, is that relevant and admissible under 17(c)?

MR. ST. CLAIR: You would have to know what the matter was, what the issues in the case were, but under Bowman and Iozia, it's not enough to show that it probably is or it might be or is likely to be; it must be shown to be relevant, and must be shown to be admissible.

QUESTION: But, Mr. St. Clair, --

MR. ST. CLAIR: That's why it's not a third-party --

QUESTION: Mr. St. Clair, you can't put an impossible task on someone who wants to subpoena against a

third-party witness, or against anybody else, as to showing what is precisely in some documents, I would suppose.

MR. ST. CLAIR: Well, if you want to utilize 17(c), then I suggest that's what you have to do.

QUESTION: He's never listened to the tapes. He doesn't know precisely what's on them. You would say that he could never subpoena a tape unless he had already gotten it.

MR. ST. CLAIR: As a prosecutor, that's right.

QUESTION: Well, that's --

MR. ST. CLAIR: As a Grand Jury, that's another matter. If he had sought these under a Grand Jury subpoena, we would then be directly faced with Nixon v. Sirica, which we happen to think was improperly, incorrectly decided.

But under 17(c) we're dealing with the Prosecutor's subpoena. The decided cases make it quite clear there must be a specific showing of relevance and admissibility.

Now, if he can't do it because of the nature of --

QUESTION: Well, that isn't what 17(c) --

MR. ST. CLAIR: That's his problem, not mine.

QUESTION: The cases you're talking about are cases where a defendant sought discovery of evidence from the -- or sought material in the prosecutor's files.

MR. ST. CLAIR: Most of those cases are, but there is

at least one-case, I think it's Grossman, that says the rules are equally applicable to the prosecution; it's cited in one of the footnotes in our brief.

But a 17(c) subpoena is conceptually a subpoena for known information, conceptually, if the prosecutor is looking for things, he should utilize a Grand Jury subpoena. In that case, I think in Bowman they wanted the prosecutor to produce each document he was going to use in the presentation of his case. That's specific.

It's obviously relevant and admissible.

QUESTION: So once he gets through with the Grand Jury he can't, he shouldn't be using a subpoena to develop his case?

MR. ST. CLAIR: That's correct.

And certainly not under these circumstances.

QUESTION: Do you think that's the practice in the federal courts --

MR. ST. CLAIR: I think it is the practice. I think that the Grand Jury practice is far, far greater perhaps than the Constitution has envisioned. It's really used today, frankly, as an effective discovery tool.

QUESTION: Mr. St. Clair, may I get back to what seems rather fundamental to me. Let us assume that it had been established that the conversations we are talking about here today did involve a criminal conspiracy, would you still

be asserting an absolute privilege?

MR. ST. CLAIR: Yes, quite clearly. Under the analogy with Gravel that I made.

QUESTION: Right. And as I understand it, the public interest behind that privilege is the preservation of candor in discussions between the President and his closest aides.

MR. ST. CLAIR: Quite clearly so. The simple reason, sir, --

QUESTION: Right. May I follow that up?

MR. ST. CLAIR: I'm sorry.

QUESTION: What public interest is there in preserving secrecy with respect to a criminal conspiracy?

MR. ST. CLAIR: The answer, sir, is that a criminal conspiracy is criminal only after it's proven to be criminal.

QUESTION: But my --

MR. ST. CLAIR: And we're not at that point yet.

QUESTION: My question was based on the assumption that it had been established that the conversation did relate to a criminal conspiracy.

MR. ST. CLAIR: That is, the case has been tried and the defendant found guilty.

QUESTION: No. Well, it could have been established in various ways, as you just said, a number of people have already confessed, and these people were participants in some

of these conversations.

MR. ST. CLAIR: But the fact that one defendant confessed does not make the other defendant guilty.

QUESTION: Of course. But, anyway, your answer is that you would still assert absolute privilege.

MR. ST. CLAIR: The answer is yes, even if it is criminal. But, more importantly, it is yes, because criminality is something that is not necessarily determined at the time that you must resolve the issue. And that you should not destroy the privilege in the anticipation of a later finding of criminality which may never come to pass.

It is quite conceivable that a number of these defendants will be found innocent. And, in fact, in theory, they are innocent right now.

QUESTION: What is the public interest in keeping that secret?

MR. ST. CLAIR: To avail the President, if Your Honor please, of a free and untrammeled source of information, and advice, without the thought or fear that it may be reviewed at some later time, when some Grand Jury in this case, or some other reason, suggests there is criminality.

For example, --

QUESTION: But you --

MR. ST. CLAIR: -- it's very important -- I'm sorry.

QUESTION: You did release them for the Grand Jury

in this case.

MR. ST. CLAIR: Yes. In the President's discretion, he did that. And it's a discretionary matter.

But, for example, the simple matter of appointments, if I may, an appointment of a judge, it's very important to the judiciary to have good judges. It's not at all unheard-of for lawyers to be asked their opinion about a nominee.

Now, if that lawyer wants to be sure that he's going to be protected in giving candid opinions regarding a nominee for the bench, it's absolutely essential that that be protected. Otherwise, you're not going to get candid advice.

Now, this isn't a State secret, it isn't national defense; I suggest it's more important, because that judge may sit on that bench for thirty years.

QUESTION: Well, don't you think it would be important if the judge and the President were discussing how they were going to make appointments for money?

MR. ST. CLAIR: I'm sorry, sir, I didn't understand your question.

QUESTION: Don't you think it would be important in a hypothetical case if an about-to-be-appointed judge was making a deal with the President for money?

MR. ST. CLAIR: Absolutely.

QUESTION: But under yours it couldn't be. In public

interest you couldn't release that.

MR. ST. CLAIR: I would think that that could not be released, if it were a confidential communication. If the President did appoint such an individual, the remedy is clear, the remedy is he should be impeached.

Let me give you an example --

QUESTION: How are you going to impeach him if you don't know about it?

MR. ST. CLAIR: Well, if you know about it, then you can state the case. If you don't know about it, you don't have it.

QUESTION: So there you are. You're on the prongs of a dilemma, hunh?

MR. ST. CLAIR: No, I don't think so.

QUESTION: If you know the President is doing something wrong, you can impeach him; but the only way you can find out is this way; you can't impeach him, so you don't impeach him. You lose me some place along there.

[Laughter.]

MR. ST. CLAIR: Well, this is, I think, what was suggested in the Seborg case, where the Court said, Well, gee, if that is so, then fraud could be all covered over and so forth.

Human experience has not demonstrated that's a fact, very few things forever are hidden.

Secondly, however, this case is not that case. As I pointed out, there is a plethora of information. This is not a case where there is no information. If anything, there is more than enough.

QUESTION: Well, what you're telling us also could be argued the other way, that there's been a waiver and neither you --

MR. ST. CLAIR: That has been suggested by my brother.

QUESTION: -- nor your brother have talked about waiver. I don't suggest that it's --

MR. ST. CLAIR: My brother suggests a waiver, but this privilege is not like Fifth Amendment privilege or attorney-client privilege, where if you let out one word you've lost the whole thing. That would defeat the purpose of it.

QUESTION: Yes.

MR. ST. CLAIR: As we've pointed out in our brief, public policy requires as much publicity as the President, in his discretion, determines would be appropriate and the more information the better. And if you require -- if you rule that one utterance constitutes a waiver --

QUESTION: Right.

MR. ST. CLAIR: -- you're not going to get it; you're not going to have that thing. This is a discretionary

privilege that the Constitution, by implication of necessity and history, has shown is inherent in the executive function, as indeed it is in other functions.

We've cited in our brief similar examples of the Legislature insisting upon such a privilege, even against subpoenas from courts, Executive, and from the courts themselves.

MR. CHIEF JUSTICE BURGER: Mr. St. Clair, you are cutting into your rebuttal time now.

MR. ST. CLAIR: I know. I do appreciate being reminded of that, and I think I would preserve it, which I think is ten more minutes of it.

MR. CHIEF JUSTICE BURGER: Mr. Lacovara.

REBUTTAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. LACOVARA: Thank you, Mr. Chief Justice.

If I may, I would like to advert first to procedural questions that Mr. Justice Blackmun and Mr. Justice Stewart have raised about whether the mandamus case is properly here.

Mr. Justice, we did, in our certiorari petition, refer to the fact that we were trying to bring before the Court, for review before a judgment in the Court of Appeals, the order of the District Court, which we said the President had tried to obtain review of in two ways in two cases in

the District Court -- in the Court of Appeals, rather. And we gave the docket numbers of those two cases.

That certiorari petition was filed on the 24th of May, and Judge Sirica, who is the respondent, as Justice Stewart properly notes, in the mandamus case in the Court of Appeals, was served with a copy of the certiorari petition, as he had been served with the mandamus petition, as, indeed, had all the respondents who were otherwise before the court, the defendants in the United States v. Mitchell.

On May 28th, in accordance with a motion that was filed in the Court of Appeals, a copy of which, I believe, is in the files of this Court, the Court of Appeals transmitted to this Court the records in both of those cases, the appeal and the mandamus cases.

Now, Mr. Justice Stewart, with respect to Judge Sirica's appearance here, he is a party before this Court, and I believe there is a letter on file with the Clerk of this Court from Judge Sirica, in which he states that he will not appear separately, the United States, through the Special Prosecutor, is appearing on behalf of Judge Sirica, as, indeed, we would have in the Court of Appeals, to uphold his decision enforcing our subpoena.

So the case, procedurally, is properly before the Court, both with respect to the appeal and the mandamus proceeding.

I would like to --

QUESTION: Mr. Lacovara, before you get too far, let's assume you get by the jurisdictional matters and also the standing question, the intra-Executive dispute matter, and we get to the executive privilege or get to the merits, so-called --

MR. LACOVARA: Yes.

QUESTION: -- which end of this case should we, would we normally start at, anyway? At the 17(c) end or the executive privilege end?

MR. LACOVARA: Well, I think -- normally -- I think normally you might start at the 17(c) end, because that would provide for a,conceivably for a disposition on non-constitutional grounds if you found that we had not made a sufficient showing to satisfy the ordinary requirements of that rule.

So, in accordance with the Court's normal jurisprudence --

QUESTION: Mr. Lacovara, Judge Sirica found that you had satisfied the requirements.

MR. LACOVARA: Absolutely.

QUESTION: Well, then what's the scope of our review?

MR. LACOVARA: We have made the suggestion that any appellate court reviewing this kind of determination applies

a standard of whether the district judge, who is intimately familiar with this indictment and with the 49-page appendix, showing that we submitted, in demonstrating why each of these 64 subpoenaed conversations was material, he made the finding that we had clearly demonstrated relevance and an evidentiary nature, and --

QUESTION: What's our standard of appellate review?

MR. LACOVARA: And your standard should be whether he has abused his discretion.

QUESTION: Clearly erroneous?

MR. LACOVARA: Clearly erroneous standard, yes, sir.

QUESTION: What about the standard, though?

MR. LACOVARA: I'm sorry, it's the basis standard, he called it.

QUESTION: What about the basic standard of 17(c)?

MR. LACOVARA: I think the parties are in agreement that Bowman Dairy and Iozia, that District Court decision, established the basic criteria.

QUESTION: Are you -- the government is in agreement that the standards of Iozia must be satisfied in this case under 17(c).

MR. LACOVARA: Well, we have suggested that it's possible that a lower standard can be applied.

QUESTION: Well, that's what I'm asking you. What

is your position?

MR. LACOVARA: Well, my position would be that when you are talking about a subpoena to a third party, as distinguished from an intra-case subpoena between government and defendant, a lower standard of relevancy or materiality should --

QUESTION: So the parties are not in agreement at all?

MR. LACOVARA: Well, we have suggested that even if the proper standard is applied, that we meet that standard because of the showing that we made that each of these items is --

QUESTION: Is a necessity standard?

MR. LACOVARA: Necessity in the sense of being relevent to the issues to be tried, and being of an evidentiary nature.

Now, the necessity standard comes in more in determining whether the executive privilege claim should be overridden if, apart from the waiver fact and what we call the Clark point --

QUESTION: It was Mr. St. Clair's argument that under 17(c) you can't possibly satisfy its requirements, because you don't know what's in the tapes.

MR. LACOVARA: Oh, well, that obviously we don't think is a proper legal standard, and the courts have said --

in fact we go back to Chief Justice Marshall's opinion in the Burr case, where exactly the same suggestion was made by the United States Attorney in opposing the subpoena, that Burr hadn't specified which portions of General Wilkinson's letter were really going to be material, and Chief Justice Marshall replied, with his eloquent common sense, "Of course not, because he hasn't seen the letter yet. But he's made a sufficient averment that it does contain something material, that at least it should be brought into court."

Now, we, as I say, have gone much further than Colonel Burr did.

QUESTION: You think Iozia just means only evidentiary and relevant, is that what you -- is that your reading of that case?

MR. LACOVARA: When you're talking about a subpoena between the parties, yes, sir. They talk about other criteria, which I think are really assumed, whether it's a fishing expedition, whether you're going off on a frolic.

But, as the later cases, as, I believe, Judge Sirica indicates, seem to have distilled that --

QUESTION: So you don't think Iozia and those -- and Bowman requires any showing that this particular evidence be something more than evidentiary and relevant?

MR. LACOVARA: That it be critical?

QUESTION: Yes.

MR. LACOVARA: No, sir, I don't believe so.

QUESTION: Yes.

MR. LACOVARA: I think that, as you were suggesting before, and as Judge Sirica held, it's never been the law that once an indictment is returned, the prosecution is not entitled to continue gathering evidence. The burdens of proof before a Grand Jury and a trial jury are clearly different. It's an abuse of the Grand Jury process that has been held, to use a Grand Jury subpoena, as Mr. St. Clair suggested, to continue gathering evidence after an indictment is returned.

QUESTION: Yes, but you apparently concede that you can't use it just for discovery?

MR. LACOVARA: Yes, sir.

QUESTION: And you say that the evidence you're seeking by a subpoena, you must make some kind of a minimal showing of admissibility, you can't, for example, seek something that would admittedly be inadmissible hearsay?

MR. LACOVARA: Well, I hope I'm not conceding more than I should, but the rule does talk about subpoenaing material from a person on a showing that it will be relevant.

It's Rule 17, and I'm taking a position which is narrower than of course you're suggesting, Mr. Justice, that I might take. But, in all candor, the rule talks about subpoenaing documents from a person, not only from a party,

Mr. Justice Douglas, I believe you earlier mentioned that the rule applied only to subpoenas to parties. But the rule specifically provides for subpoenas to persons who are not parties to the case.

But it says, and this was the clause that we were relying on here, the Court may direct that the books or papers be produced before the Court at a time prior to the trial or prior to the time when they are to be offered in evidence.

So there does seem to be some natural focus about the evidentiary nature of this case.

QUESTION: I just wanted to get the government's position, because it is a rather important part of the case.

MR. LACOVARA: Yes, sir.

We insist, as Judge Sirica found, that the citation of chapter and verse, if I may, in our 49-page showing before the District Court, with references to sworn testimony, as well as with representations about what witnesses will testify at trial, we demonstrated why each of these subpoenaed conversations satisfies the Bowman Diary, Iozia, Rule 17(c) standard.

Now, that leads me into the related point -- what is the relevance of the Grand Jury's finding that the President was a co-conspirator in this case?

It has been alleged that we did this in order

to prejudice the President's rights. I think we have sought to demonstrate in our reply brief that that was --

QUESTION: Mr. Lacovara, I don't think it would be very hard to understand the developments of a showing at the trial, for purposes of evidence, that certain people are co-conspirators, for purposes of introduction of evidence. But that's a little different question than the relevance of the Grand Jury having come to that conclusion.

MR. LACOVARA: Yes. Normally I would concede it is not the practice, as anyone who has been a prosecutor knows, for the Grand Jury, if it is not identifying the co-conspirators in the body of its indictment, to place them on the record. It is fairly common practice, however, for an indictment to say "In addition to the defendants, the named persons are unindicted co-conspirators." This is not an ordinary case.

QUESTION: That may be so. But even if t hey named them in the indictment, that is not enough on which to base the introduction of out-of-court statements by an unindicted co-conspirator.

MR. LACOVARA: Yes. That was the point that I wanted to get to in discussing what we call our clause argument. We have never argued, and of course there would be no basis for arguing, that the mere Grand Jury finding, whether on the face of the indictment or in the Grand Jury's

minutes, that the President or any of the other 18 unindicted co-conspirators were members of this conspiracy would itself be enough at trial to warrant the judge's admission of extra-judicial statements given by those co-conspirators. We are not making that contention here. The issue arises because a motion to quash a subpoena was filed prior to trial. And the basis for that motion was a claim of executive privilege, a governmental privilege that exists for the benefit of legitimate governmental processes.

We countered that apart from Nixon vs. Sirica and the balancing process, and apart from the waiver argument that we also developed at some length, this President, as difficult as it was to say this -- not because of the evidence but because of the inherent awkwardness of it -- this President is not in a position to claim this public privilege, for the reason that a prima facie showing can be made that these conversations were not in pursuance of legitimate governmental processes or the lawful deliberation of the public's business. These conversations, as we showed in our 49-page appendix, and as the Grand Jury alleged, were in furtherance of a criminal conspiracy to defraud the United States and obstruct justice.

We did not rely, even before Judge Sirica,

and we do not rely here, merely on the fact that the Grand Jury made this determination. We do submit that for purposes of a pre-trial consideration of a subpoena that is challenged on grounds of executive privilege, we are not confronted with the need that we will be confronted with at trial, which we fully intend to discharge, of showing by evidence to the trial judge that the President and the other co-conspirators were members of the co-conspiracy.

QUESTION: One of your grounds for the non-applicability of the privilege is that these conversations were in the course of the conspiracy.

MR. LACOVARA: Yes, sir.

QUESTION: And that you say is satisfied by merely the Grand Jury?

MR. LACOVARA: No, sir -- absolutely not.

QUESTION: Just a moment. It is not satisfied merely by the Grand Jury finding. So a court must go on and make its own determination -- if they were going to agree with you on this ground.

MR. LACOVARA: Let me back up a little. I see the point that you are making. We are taking the position that the Grand Jury's determination is conclusive on the Court on two issues: (a) that a conspiracy existed, and (b) that President Nixon was a member of the conspiracy. That is not enough, we concede, to override a claim of

executive privilege -- because, as Mr. St. Clair well says, he is still the President, and he is still in a position to invoke executive privilege. Where we have said we must bear an evidentiary burden to the satisfaction of the Court is on drawing the nexus between the subpoenaed conversations and the conclusively determined prima facie showing that there is a conspiracy of which the President is a member. We made that evidentiary showing to Judge Sirica. That showing is before this Court. Judge Sirica found that that showing was sufficient. And for that reason, as I believe his opinion -- although it had to be guarded because these items were placed under seal -- reflects that he did make the showing.

QUESTION: Well, that showing, or such a showing could arguably have been made whether or not the Grand Jury had named the President, could it not?

MR. LACOVARA: Yes, sir, it could have been made as an evidentiary matter.

QUESTION: Exactly.

QUESTION: Isn't it your position that it was independently of the naming of the President?

MR. LACOVARA: Yes, sir. The evidence that was placed before Judge Sirica we would submit would be sufficient to make that showing. And we have said that that is not legally necessary; that we didn't have to

prove a conspiracy, in effect prove the whole case that may take three months to try in order to defeat a claim of executive privilege before trial.

This Court has frequently said the criminal process would be burdened down unduly if proceedings were preceded by mini-proceedings. That is exactly what we have here. We submit the evidence is sufficient. Judge Sirica - this is a situation in which the showing that we did submit, intrinsically, we submit, tracks the allegations of the indictment and provides independent evidentiary support for those allegations.

We have said, though, that it is not legally necessary in a proceeding like this for a court independently to decide whether the Grand Jury had enough evidence before it to say there is a conspiracy, or that a particular individual was a member of the conspiracy. We said all you need to find is that we have shown that these conversations were in furtherance of this conspiracy.

QUESTION: Mr. Lacovara, let's back up a minute. Do you concede that an incumbent President of the United States could not be indicted and tried for a crime?

MR. LACOVARA: No, sir.

QUESTION: You do not. Do you think he could be?

MR. LACOVARA: We have not expressed a position on that, Mr. Justice Powell.

QUESTION: Let's assume for the moment that he could not be. Would you still argue that the Grand Jury had the power or the right, and if so by virtue of what?

MR. LACOVARA: Yes. We --

QUESTION: To name him as an unindicted co-conspirator.

MR. LACOVARA: We do in fact make that argument at some length. I guess all of our arguments are made with too much length. But we do argue at length, sir, seriously, that the question of Presidential indictability, which we offer some views on, just to show that the question is an open one, because of our obligation we believe to the law and to the courts, is not really determinative of the question that is really in this case, to the extent that the Court reaches the expungement argument advanced by counsel or to the extent that the Court does not reach the so-called Clark argument -- that is executive privilege just cannot be invoked here.

The issue of Presidential indictability does not determine the issue which an incumbent President can be named as an unindicted co-conspirator by a Grand Jury.

We have shown in our brief why even persons who do have some constitutional immunity -- and counsel argues that implicitly under the framework of the

Constitution, the President should have an implicit immunity from prosecution -- even such persons can be and frequently are named by Grand Juries as unindicted co-conspirators.

The practical arguments that may militate in favor of a judicial recognition of some unique immunity for the President alone -- not for Circuit Judges, not for Supreme Court Justices, not for Members of Congress, but the President alone it may be held at some later date is immune from prosecution - but that by no means suggests the answer to the question here. And the Grand Jury elected not to test that issue.

QUESTION: The thing that I was wondering about is that there is only one President, and executive power is vested in him. And I do wonder whether or not the precedents you set with respect to other people would vest the authority in a Grand Jury, either on its own motion or because of what some prosecutor suggested, while the President is in office to name him as an unindicted co-conspirator. With Grand Juries sitting all over the United States, and occasionally you find a politically-motivated prosecutor -- that's a rather far-reaching power, if it exists.

MR. LACOVARA: It is, Mr. Justice, and there is no doubt about it. We are conscious of the

delicacy of the issue. We have suggested, however, that although there is some conceivable opportunity for abuse, our judicial system, our democratic system is based on several fundamental propositions, one of which is that Grand Juries usually are not malicious. Even prosecutors cannot be assumed to be malicious. We also assume, as this Court regularly holds in first amendment cases dealing with public officials, that we have a resilient society where people can be trusted to sort out truth from falsehoods. We have a robust debate.

I submit to you, sir, that just as in this case a Grand Jury would not lightly accuse the President of a crime, so, too, the fear that, perhaps without basis, some Grand Jury somewhere might maliciously accuse a President of a crime is not necessarily a compelling reason for saying that a Grand Jury has no power to do that. I think the system may be vibrant enough to deal with that. And I think the inherent dignity of the Presidential office , on any incumbent provides him with a notable check against being defeated, or as my colleague says, impeached by the action of a Grand Jury. This is perhaps the most notorious event, notorious case in recent times. When the Grand Jury's action was disclosed, I venture to say that although it was a difficult time for all concerned, including the prosecutors as well as other counsel and

the country -- the President has not been displaced from office, he still is President, he still functions in accordance with his constitutional powers.

QUESTION: Mr. Lacovara, I wanted to get to this mechanical question that Mr. St. Clair brought up. Assume for the moment that a given tape, one of the 64 tapes is in fact one-eighth of the total time, which might be several hours, apparently, because they are long tapes -- but one-eighth of it involves discussions of the people who are under indictment here, but that seven-eights of it in fact now -- we have to assume this -- includes conferences with the Secretaries of the Cabinet, with the Joint Chiefs of Staff, the Chairman of the Atomic Energy Commission, very high-level people, and perhaps some staff people as well -- including in those conversations some highly sensitive material; not sensitive in the sense that it is national military secrets or diplomatic secrets, but sensitive in the sense of confidentiality. Would you not think that some mechanism ought to be available that if the particips are identified, as you have got them all identified by the voluntary submission of the President, as to the 64 -- that if the particips are identified and the time frame specified that the certificate of the major persons present, that the subject was atomic energy, all sorts of other things, would be sufficient to foreclose

a court from examining it in camera?

MR. LACOVARA: Well --

QUESTION: I am asking would you think so.

MR. LACOVARA: The answer to the question, Mr. Chief Justice, is yes, because these are the procedures that have been set up in the Court of Appeals decision in Nixon vs. Sirica, which were found to be eminently practical when the tapes subpoeaned by the Grand Jury were submitted. These are six-hour reels. And under the so-called index and analysis which the Court of Appeals in that case required tobe submitted, and which Judge Sirica here has required to be submitted, counsel for the President says this is a six-hour reel; the Watergate portions are minutes 312 -- no, that's too many -- 112 through 146. Prior to that there is a meeting between the President and the Secretary of Health, Education and Welfare on the school bill. After the Watergate-related discussions there is a meeting between the President and representatives of the National Association of Manufacturers.

What has happened is that White House counsel has come to Judge's chambers with the original reels. They have marked the beginning of the Watergate-related portions on those reels for the Court to make an independent determination this is Watergate-related and therefore offset by whatever overcoming of the privilege

has been held -- and after that is done, a copy of the Watergate-related portions is made. The Judge does not listen to the non-Watergate-related portions which are still covered by a presumptive executive privilege, which we have freely conceded from the time the Grand Jury began this process in July of '73 to our brief in this Court.

QUESTION: Then as to this hypothetical seven-eighths, there is, you suggest, no disagreement between you and Mr. St. Clair and Mr. Jaworski and you, on the one hand?

MR. LACOVARA: That's correct, sir. And I might say that under the procedure that was worked out, this may predate Mr. St. Clair, so you will have to rely solely on my representation, the President indicated a willingness to allow the judge to listen to a few moments of conversation on either end of the portion of the tape that had been listed in this index and analysis as being Watergate-related, just so he would have an assurance that there was a transition from one subject to another subject.

That was agreed to by the President as being, if a minimal intrusion on the confidentiality privilege for an unrelated subject, then certainly by no means an excessive one.

QUESTION: Mr. Lacovara, you have only a very few minutes. Are you going to address Mr. St. Clair's opening argument that the pendency of the House Judiciary impeachment inquiry either should lead the Court to conclude that this whole business before us is a nonjusticiable matter, therefore, necessarily, that Judge Sirica's order should be quashed. Or, in any event, that because of the possible effect of a decision on the issue presented, upon the impeachment inquiry, that the Court should stay its hand.

MR. LACOVARA: That was to be my last point, sir, and I will make it right now.

The notion that because there is concurrently underway an impeachment inquiry before the House of Representatives, that somehow makes this a nonjusticiable political question is, we think, a remarkable notion which is not supported by sound constitutional law or by any of the decisions of this Court, and, indeed, I submit that to the extent that the Court has discretion in the matter, and although this Court has now been given discretionary certiorari power, District Courts have no such option, it would not even be a wise exercise of discretion for this Court to stay its hand.

This case before the Court is not a request for an opinion between two congressional committees as to who has jurisdiction over a particular bill. It's not even a request for a dispute between Cabinet officers, or the President and a Cabinet officer, over what proper executive policy ought to be.

This is a criminal proceeding, a federal criminal case against six defendants. A subpoena has been issued to obtain evidence for use at the trial which is scheduled to begin on September 9th.

The Court cannot escape the fact that this is a trial of tremendous national importance, but a trial that was brought

to a head without regard to the impeachment inquiry. This is an independent, separate constitutional process that is under way, and a traditional, ordinary, prosaic remedy, a subpoena has been utilized to obtain evidence for that trial.

There is some debate about whether the evidence is critical to our prosecution. I noted in Justice Rehnquist's opinion a few weeks ago, in Michigan v. Tucker, that he echoed, or presaged, perhaps, the same point that Judge Sirica made, that it's really the obligation of the prosecution to present all of the material evidence for the jury, for the fact-finder to pass upon.

That's what this case involves.

Now, to say that there will be public consequences, even political consequences to the Court's action does not mean that this is a political question, so that the Court must regard it as nonjusticiable.

The same argument would have prevented this Court from deciding Marbury and Madison. It's common knowledge that Chief Justice Marshall, himself, was threatened with impeachment if he decided the case against President Jefferson. He went ahead and did his duty on behalf of this Court.

Later, in connection with the Burr trial, --

QUESTION: But he really decided it in favor of

President Jefferson, didn't he?

MR. LACOVARA: No, sir.

QUESTION: He didn't?

MR. LACOVARA: No, sir. He said it expressly --

QUESTION: He surely decided it, Jefferson won the case -- the battle, but lost the war.

MR. LACOVARA: Well, if you --

QUESTION: Of judicial supremacy.

MR. LACOVARA: Well, the case is normally thought of as being solely concerned with original jurisdiction, but if --

QUESTION: But in that sense --

MR. LACOVARA: -- if one reads the case again, sir, I submit, Chief Justice Marshall got to the original jurisdiction point only after he had been very decisive in saying that a lower court could issue and should issue and would be obliged to issue the mandamus to Secretary Madison, because the President had no legal power to order Secretary of State Madison not to issue that commission.

He held that -- it might be called dictum, but it certainly at the time was a courageous act.

QUESTION: But the basic ruling in the case related to the original jurisdiction of the Court under Article III, did it not?

MR. LACOVARA: I concede that, sir.

Later, however, when he did go on, in 1807, to issue the subpoena to President Jefferson, that was an act of profound political consequences, but he stated, again eloquently, that it was the Court's duty to obtain evidence if it were material to the trial.

The notion that political consequences should stay the hand of the Court is a notion that, again speaking through Marshall, the Court rejected in Cohens v. Virginia?, and the Cherokee Nation case, where it was common knowledge that the States, the State Legislatures in Virginia and Georgia would interpose themselves and defy this Court, and Marshall uttered the words, which I think are justly famous, that just as the Court can't reach out for jurisdiction it doesn't have, it has an obligation to exercise the jurisdiction it does have, whatever may be the political consequences of that act.

The Court's action in Ex Parte Milligan?, in telling President Lincoln that he did not have the power to conduct the Civil War the way he wanted to conduct it; again profound political consequences.

We come to the War Power cases in World War II, the Japanese Exclusion cases, this Court did not say that because of the consequences for the President, or because of the political reaction to a decision one way or the other the Court should stay its hand.

In Youngstown, where our colleague's brief closes by quoting Justice Frankfurter's brilliant concurring opinion, saying how the Court should, as an institution, be reluctant to decide great constitutional questions. But he went on to say: "We have an obligation to look into an assertion of presidential power. And even if the embarrassment to be caused to the President by our disagreeing with him would be profound, it is still the duty of the Court to tell him when he's wrong."

This Court, in Powell v. McCormack, how could there be a more political case than telling a house of Congress that it had to seat a member that it had excluded? But the Court said the Constitution forbade it, it's up to the Court to decide what the Constitution allows. And even though the Court interprets the Constitution differently from another branch, that's the judicial process.

So, separation of powers here, with the notion of political question, whether something is committed to the final determination of another branch, far from supporting the President's position, demands that the Court affirm the action that Judge Sirica has taken. This is emphatically the province of this Court to decide.

Not to belabor the point, but perhaps the finest chapter in the Court's recent history has come -- the finest chapters have come in the fields of reapportionment, civil

rights, and the procedural rights of the criminally accused. It would be naive to say that those were not profoundly, politically important decisions. But they were made as decisions of constitutional law, despite the consequences that political branches might face, despite the public reaction, the Court understood its duty to interpret the Constitution.

That's all we ask for today. That's all Judge Sirica has done. We believe he has done it correctly. We believe the case is fully justiciable. We believe the principles that have been briefed by the parties support the correctness of the decision below. And we submit that this Court should fully, explicitly, and decisively, and definitively uphold Judge Sirica's decision.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lacovara.

Mr. St. Clair, you have fifteen minutes left.

SURREBUTTAL ARGUMENT OF JAMES D. ST. CLAIR, ESQ.,

ON BEHALF OF THE PRESIDENT

MR. ST. CLAIR: Thank you, Mr. Chief Justice. Members of the Court:

In response to my brother's most recent argument: Of course, Sawyer was an important case, with political implications. Of course, the other cases were, in and of themselves, important cases, with political implications.

But this case is different, in that the decision in

this case will have an undeniable impact on another proceeding. And another proceeding which the Constitution says is essentially a political proceeding, from which the Court is excluded.

And for this Court to be drawn into that thicket, if I may call it that, seems to me highly inappropriate, at least at this time.

As I indicated at the outset, the House Committee has made certain political decisions, the President has made certain political decisions. They will each have to bear the responsibility of those decisions with the American people.

This Court should not impair, interfere with, or otherwise participate directly or indirectly in that proceeding. And it's inevitable that it would happen. This courtroom wouldn't be full today if this were simply a suit on a subpoena brought by the Special Prosecutor against the President, even though that would be an important political matter because the President is involved.

But this is important for other reasons, quite apart from that, other reasons which, I suggest, indicate quite clearly that this Court ought to, in its discretion and in its judgment, stay its hand, at least until such time as those proceedings have run their course.

Because those are political decisions being made,

they should not bear the burden either way of a judicial decision.

QUESTION: Well, under that theory, all the criminal trials that are going on should stop, then.

MR. ST. CLAIR: That would not be the first time, Mr. Justice Douglas, that a criminal trial was delayed. And in balancing the importance to this nation, I would suggest that that is clearly indicated, and I don't believe the defendants would be crying very bitter tears.

But, in any event, the justiciability of this case seems to me to be the single, important, obvious matter that my brother would prefer not much to talk about, but there can be no doubt about it if you read page 59 in his brief, he says he, the President, is now the subject of an inpeachment inquiry by the Committee on the Judiciary of the House of Representatives, and the subpoenaed evidence may have a material bearing on whether he is impeached; and, if impeached, whether he is convicted and removed from office.

And I suggest the Constitution and all of the history of the Framers makes it quite clear that the Framers conceived impeachment as a legislative process, the Court was excluded specifically from that function.

Marbury v. Madison itself, I agree with the Chief Justice, that it decided the case in favor of the President.

The rule was discharged and the commission was not issued.

But it also held, and it's been the law since that case, that the Courts will not interfere with or direct a discretionary act on the part of the President or any other branch of government. And that's been confirmed in Mississippi v. Johnson and any case since that time.

And the discretion that the Constitution, by implication and by necessity, that has been vested in the President in determining which of his confidential communications shall be made public or released is a discretionary act that this Court ought not, by its decision, undertake to do for him. Because this Court is not equipped in knowledge, background, and any other way, to exercise that discretion for the President of the United States.

This is not a ministerial act.

Finally, I observe a slight, but significant shift in my brother's position with respect to the prima facie nature of the naming of the President as a co-conspirator. They say it can be made prima facie. I take it that is by examining the evidence before the grand jury in order to determine whether or not that evidence in fact supports that determination.

We have invited this court and Judge Sirica to do just that. The Special Prosecutor has opposed in each instance this or any other court looking behind that to see whether in fact the evidence can be made, as he now states the position, to support a charge of criminality.

Before the Argument, the argument was that because it was a finding or a vote, it was prima facie. Now it is, I take it, somewhat different.

But in any event, the action by a grand jury purporting to assess criminality to a President of the United States is a clear intrusion upon the legislative function and power with respect to impeachment.

As I said earlier, the President is not above the law. Nor does he contend that he is. What he does contend is that as President can be applied to him in only one way, and that is by impeachment, not by naming as a co-conspirator in a grand jury indictment, not by indictment or in any other way. And therefore in this case I urge that this court take

3M2 such action as is appropriate to overrule Judge Sirica's decision in order that this case be dismissed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. St. Clair. Thank you, Mr. Jaworski and Mr. Lacovara.

The case is submitted.

(Whereupon, at 1:04 o'clock p.m. the case was submitted.)