dent, as a citizen of the United States, to cooperate with a criminal prosecution by performing the solely ministerial task of producing specified recordings and documentary evidence. This Court has defined "ministerial duty" as "one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Mississippi* v. *Johnson, supra,* 4 Wall. at 498. Judge Fahy, noting that "the word 'ministerial' is not sufficiently expressive to denote adequately every situation into which the courts may enter," added, however, that "a duty often becomes ministerial only after a court has reached its own judgment about a disputable legal question and its application to a factual situation." *Seaton* v. *Texas Co.,* 256 F. 2d 718, 723 (D.C. Cir. 1958). As we have shown above, the courts, and not the Executive, must decide the existence *vel non* of a privilege for evidence material to a criminal prosecution. A decision overruling the claim will be as fully binding on the President as it would be upon a subordinate executive officer who had custody or control of the subpoenaed evidence.[64]

III. THE CONVERSATIONS DESCRIBED IN THE SUBPOENA RELATING TO WATERGATE LIE OUTSIDE THE EXECUTIVE PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS

The President, in his Formal Claim of Privilege submitted to the court below, asserted that the items

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[64] The subpoena *duces tecum* is directed to "Richard M. Nixon *or* any subordinate officer" whom he may designate as having custody of the tape recordings and other documents.

in the subpoena, other than the portions of twenty conversations already made public:

> are confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce. Thus I must respectfully claim privilege with regard to them to the extent that they may have been recorded, or that there may be memoranda, papers, transcripts, or other writings relating to them.

The President was relying, of course, on "the long-standing judicial recognition of Executive privilege * * * [for] 'intra-governmental documents reflecting * * * deliberations comprising part of a process by which governmental decisions and policies are formulated.' "[65] *Nixon* v. *Sirica, supra,* 487 F. 2d at 713.

The President made a similar claim in response to the grand jury's subpoena *duces tecum* at issue in the

[65] We use the term "generalized claim of executive privilege" to cover a claim of privilege based on an asserted interest in the confidentiality of communications within the Executive Branch, as distinguished from more specific privileges sometimes covered by the term "executive privilege."

Thus, the courts have recognized a specific privilege for "state secrets," covering government information bearing on international relations, military affairs and the national security. See, *e.g.*, *United States* v. *Reynolds*, *supra*, 345 U.S. at 6–7; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–21; 8 Wigmore § 2378. There is also a privilege for "investigative files," including information relating to confidential informants. See, *e.g.*, *Alderman* v. *United States*, 394 U.S. 165, 184–85; *Roviaro* v. *United States*, 353 U.S. 53; *Machin* v. *Zuckert*, *supra*, 316 F. 2d at 339; 8 Wigmore §§ 2374–77; cf. *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462.

The President has not claimed any such specific type of "executive privilege" for any of the conversations described in the subpoena.

earlier litigation involved in *Nixon* v. *Sirica*.[66] His counsel argued to the court that the "threat of potential disclosure of any and all conversations would make it virtually impossible for President Nixon or his successors in that great office to function."[67] Counsel argued further that the President's absolute prerogative to withhold information "reaches any information that the President determines cannot be disclosed consistent with the public interest and the proper performance of his constitutional duties."[68] Within the contours of the instant case, counsel for the President in effect poses the following question for the Court: Shall guilt or innocence in the criminal trials of former White House aides be determined upon full consideration of all the evidence found relevant, competent and unprivileged by due process of law? Or shall the evidence from the White House be confined to what a single person, highly interested in the outcome, is willing to make available?

By urging upon the courts the absolute, unreviewable discretion of the President to withhold evidence from the trial in *United States* v. *Mitchell, et al.*,

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[66] In a letter to Chief Judge Sirica on July 25, 1973, the return date of that subpoena, President Nixon stated:

> I have concluded, however, that it would be inconsistent with the public interest and with the Constitutional position of the Presidency to make available recordings of meetings and telephone conversations in which I was a participant and I must respectfully decline to do so.

Special Appearance of Richard M. Nixon, Exh. A, *In Re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, *supra*.

[67] Brief in Opposition 2–3, *id.*

[68] Brief in Opposition 12–13, *id.*

counsel for the President seemingly ignores the principle, articulated by Justice Reed, that executive privilege is granted "for the benefit of the public." *Kaiser Aluminum & Chemical Corp.* v. *United States, supra,* 157 F. Supp. at 944. Ultimately, the public interest must govern whether or not particular items are disclosed. When the participants in Presidential conversations are themselves subject to indictment and the subject matter of the conversations is material to the issues to be tried upon the indictment, denying the courts access to recordings of the conversations impedes the due administration of justice.

Moreover, production of the evidence sought, even upon order of the court, does not threaten wholesale disclosure of Presidential documents either now or in the future. It bears repeating that this is a case in which the other participants in the conversations are subject to indictment. The conversations covered by the present subpoena are demonstrably important—as the trial court below found—to defining the extent of the conspiracy in terms of time, membership, and objectives. Surely there will be few instances, if ever, where there are similar concrete circumstances warranting intrusion into an otherwise privileged domain of conversations involving the President and his aides. Thus, any slight risk that future conversations may be disclosable under such a standard hardly will intimidate Presidential aides in giving open and candid advice. Furthermore, the desirable public policy of encouraging frank advice to governmental officials does not and cannot depend on any expecta-

tion of absolute confidentiality. It is almost commonplace in our system for former officials, including Presidents, promptly to publish their memoirs, frequently based on documents reflecting governmental deliberations.[69] This is a generally understood phenomenon, and it is unthinkable that the court's entitlement to important evidence must be relegated to a lower priority.

Under these circumstances, the district court properly rejected the claim of privilege (Pet. App. 20), holding that the "Special Prosecutor's submissions * * * constitute a *prima facie* showing adequate to rebut the presumption [of privilege] in each instance, and a demonstration of need sufficiently compelling to warrant judicial examination in chambers incident to weighing claims of privilege where the privilege has not been relinquished." The court followed the "settled rule" that "the court must balance the moving party's need for the documents in the litigation against the reasons which are asserted in defending their confidentiality." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 791. See also *United States* v. *Reynolds, supra,* 345 U.S. at 11; *Nixon* v. *Sirica, supra,* 487 F. 2d at 716; cf. *Doe* v. *McMillan, supra,* 412 U.S. at 320.

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[69] For example, Executive Order 11,652, "Classification and Declassification of National Security Information and Material," issued by President Nixon on March 8, 1972, provides for access to classified data by persons "who have previously occupied policymaking positions to which they were appointed by the President" (Sec. 12), although publication of the material is not authorized.

Although the court below followed the "settled rule" of balancing particular need against the specific interest in confidentiality, that rule becomes applicable only where the "presumptive privilege" for the materials has not been vitiated by other factors. In the present case, there are two additional grounds for overruling the asserted privilege, each of which shows that the subpoenaed material has lost its character as "presumptively privileged." First, the interest in confidentiality is never sufficient to support an official privilege where, as here, there is a *prima facie* showing that the subpoenaed materials cover conversations and activities in furtherance of a criminal conspiracy; thus, Watergate-related conversations are not even covered by the presumptive privilege recognized in *Nixon* v. *Sirica, supra,* 487 F. 2d at 717. Second, as we show in Part IV below, to the extent that the subpoenaed conversations relating to Watergate are deemed covered by some presumptive executive privilege, any claim to continued secrecy has been waived as a matter of law by the extensive testimony and public statements of participants, given with the President's consent, concerning these conversations and by the President's recent release of transcripts of forty-three Presidential conversations dealing with these issues.

Before turning to the discussion of the independent grounds for overruling the President's claim of privilege, we briefly mention two basic principles that should guide this Court's determination. First, whether particular documents or other materials are

privileged in the context of a criminal prosecution is *for judicial determination*—upon the extrinsic evidence if sufficient, but otherwise upon *in camera* inspection (see Part I(A), *supra*). Second, in making this determination, the Court must construe the privilege strictly. Evidentiary privileges generally are "an obstacle to the administration of justice" (8 Wigmore § 2192, at 73), and, as "so many derogations from [the] positive general rule" that the public has a right to every man's evidence (*id.*, at 70), they must be confined to the narrowest limits justified by their underlying policies.[70] "To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose." *Doe* v. *McMillan, supra,* 412 U.S. at 316–17. Such strictness in application of executive privilege conforms to the ideas of the Founding Fathers, who were keenly aware of the dangers of Executive secrecy.[71]

A. EXECUTIVE PRIVILEGE BASED UPON A NEED FOR CANDOR IN GOVERNMENTAL DELIBERATIONS DOES NOT APPLY WHERE THERE IS A PRIMA FACIE SHOWING THAT THE DISCUSSIONS WERE IN FURTHERANCE OF A CONTINUING CRIMINAL CONSPIRACY

As stated above, the only privilege relied upon by the President stems from his assertion that the "items sought are confidential conversations between a President and his close advisors." We freely concede that a qualified or "presumptive" privilege normally attaches to "intra-governmental documents reflecting

[70] See 8 Wigmore § 2192, at 73; Morgan, Foreword to ALI Model Code of Evidence 7 (1942).

[71] For a discussion of the intent of the Framers, see pp. 76–80, *supra.*

advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd on opinion below, 384 F. 2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952. But there can be no valid public policy affording the protection of executive privilege where there is a *prima facie* showing that the officials participating in the deliberations did so as part of a continuing criminal plan. In this case, where the grand jury has voted the Special Prosecutor the authority to identify the President himself as an unindicted co-conspirator in the events charged in the indictment and covered by the government's subpoena, there is such a *prima facie* showing and the President is foreclosed from invoking a privilege that exists only to protect and promote the legitimate conduct of the Nation's affairs.

The qualified privilege for governmental deliberations is based on "two important policy considerations * * *: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers." [72] *International Paper Co.* v. *Federal Power Commission,* 438 F. 2d 1349, 1358–59 (2d Cir. 1971), cert. denied, 404 U.S. 827. The privilege, however, whether in the context of intra-agency communications or in

[72] Only the interest in confidentiality as an encouragement to candor is involved in the present case, for there is plainly no challenge to the rationale for any governmental decision or order.

the context of deliberations at the highest level of the Executive Branch, exists only to promote the legitimate functioning of government. It cannot serve as a cloak to protect those charged with criminal wrong-doing. Executive privilege is granted "for the benefit of the public, not of executives who may happen to then hold office." *Kaiser Aluminum & Chemical Corp.* v. *United States, supra,* 157 F. Supp. at 944.

This is a familiar principle in the law of evidentiary privileges generally. For example, a client may not hide behind the attorney-client privilege and prevent his attorney from being required to disclose plans of continuing criminal activity even though told to him in confidence. See, *e.g., United States* v. *Aldridge,* 484 F. 2d 655 (7th Cir. 1973); *United States* v. *Rosenstein,* 474 F. 2d 705 (2d Cir. 1973); *United States* v. *Shewfelt,* 455 F. 2d 836 (9th Cir. 1972), cert. denied, 406 U.S. 944; *United States* v. *Bartlett,* 449 F. 2d 700 (8th Cir. 1971), cert. denied, 405 U.S. 932; *Garner* v. *Wolfinbarger,* 430 F. 2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974. Similarly, the courts have refused to recognize any privilege not to disclose communications by a patient which were not for the legitimate purpose of enabling the physician to prescribe treatment. See 8 Wigmore § 2383; McCormick, *Evidence* § 100 (2d ed. 1972). Even the privilege against disclosing marital communications or jury deliberations has been overruled when such communications were in furtherance of fraud or crime. See, *e.g., United States* v. *Kahn,* 471 F. 2d 191 (7th Cir. 1972),

cert. denied, 411 U.S. 986. See generally Note, *Future Crime or Tort Exception to Communications Privileges,* 77 Harv. L. Rev. 730 (1964).

The Speech or Debate Clause provides a compelling illustration of this principle. That clause confers an explicit constitutional privilege on members of Congress in order to promote candid and vigorous deliberations in the Legislative Branch.[73] Like executive privilege, which is based upon the same underlying policies and interests, "[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process." *United States* v. *Brewster, supra,* 408 U.S. at 507. The purpose of the Clause was to "assure a co-equal branch of the government wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States, supra,* 408 U.S. at 616. But even though the Clause protects a legislator in the performance of legislative acts, "it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts." *Gravel* v. *United States, supra,* 408 U.S. at 626. See also *Tenney* v. *Brandhove,*

[73] The Speech or Debate Clause, Art. I, Sec. 6, cl. 1, provides that no Senator or Representative may be "questioned in any other Place" for "any Speech or Debate in either House." It prohibits inquiry "into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *United States* v. *Brewster, supra,* 408 U.S. at 512.

341 U.S. 367, 376 (legislative immunity is restricted to "the sphere of legitimate legislative activity"). Thus, both the legislator and his aide may be compelled to give evidence in that situation, notwithstanding the explicit privilege. See also *Doe* v. *McMillan, supra.*

Similarly, discussions within the Executive Branch which are in furtherance of a criminal conspiracy cannot be subsumed within executive privilege. The privilege, which is limited by its underlying public purpose, see, *e.g., Halpern* v. *United States, supra,* 258 F. 2d at 44, does not extend beyond the transaction of legitimate official activities so as to protect conversations that constitute evidence of official misconduct or crime. In *Rosee* v. *Board of Trade,* 36 F.R.D. 684, 690 (N.D. Ill. 1965), for example, the court overruled a claim of executive privilege invoked in the face of a substantiated charge of official misconduct where the party seeking the evidence showed "(1) that there is a reasonable basis for his request and (2) that the defendant government agents played some part in the operative events."[74] When the governmental processes which are fostered and protected by a privilege of confidentiality are abused or subverted, the reasons for secrecy no longer exist and the privilege is lifted.

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[74] See also *Black* v. *Sheraton Corp.*, 371 F. Supp. 97 (D.D.C. 1974); *United States* v. *Procter & Gamble Co.*, 25 F.R.D. 485, 490–91 (D.N.J. 1960); *cf. Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra,* 40 F.R.D. at 329 (footnotes omitted): "Here, unlike the situation in some cases, no charge of governmental misconduct or perversion of governmental power is advanced."

Executive privilege compares in this respect to executive immunity. A government official, of course, may not be held liable for damages in a civil action for the consequences of acts within the scope of his official duties. *Barr* v. *Matteo,* 360 U.S. 564. This immunity, like privilege, has been considered necessary to foster "the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571. But the immunity does not shield him for acts "manifestly or palpably beyond his authority." *Spalding* v. *Vilas,* 161 U.S. 483, 498. See also *Doe* v. *McMillan, supra; Bivens* v. *Six Unknown Federal Bureau of Narcotics Agents,* 456 F. 2d 1339 (2d Cir. 1972). And, as in the present case, the policy underlying executive immunity does not permit it to reach "so far as to immunize criminal conduct. * * *" *O'Shea* v. *Littleton, supra,* —— U.S. at —— (42 U.S.L.W. at 4144).

The Court of Appeals for the District of Columbia Circuit vividly highlighted the essence of this principle when it explained why the courts must not feel bound by the assertion of executive privilege but must instead scrutinize the propriety of the claim. "Otherwise," the court said, "the head of any executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 794.

Justice Cardozo gave an eloquent statement of why this is not the law in *Clark* v. *United States,* 289 U.S.

1, an analogous case dealing with the secrecy normally attaching to a jury's deliberations. Speaking for a unanimous Court, he recognized that the privilege, based upon a need for confidentiality, is generally valid: "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." 289 U.S. at 13. But Justice Cardozo also held that such a privilege, like other privvileges based on the desirability of encouraging candid discourse and interplay, is subject to "conditions and exceptions" when there are other policies "competing for supremacy. It is then the function of the court to mediate between them." *Ibid.* The Court then held that where there is a "showing of a *prima facie* case" (289 U.S. at 14) that the relation has been tainted by criminal misconduct, the interest in confidentiality must yield. The Court held that the jury's privilege of confidentiality is dissipated if there is "evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote" (289 U.S. at 14). Justice Cardozo reasoned (*ibid.*):

> The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation, honestly created and honestly main- juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth.

The Court then drew an analogy to the attorney-client privilege, one of the most venerable privileges in the

law, and emphasized: "The privilege takes flight if the relation is abused." 289 U.S. at 215.[75]

1. The grand jury's finding is valid and is sufficient to show prima facie that the President was a co-conspirator

The present case is governed by these principles, as articulated in cases like *Clark*. On February 25, 1974, in the course of its consideration of the indictment in *United States* v. *Mitchell, et al.*, the grand jury, by a vote of 19–0, determined that there is probable cause to believe that Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice charged in Count I of the indictment. The grand jury authorized the Special Prosecutor to identify Richard M. Nixon (among others) as an unindicted co-conspirator in connection with subsequent proceedings in *United States* v. *Mitchell, et al.* The district court below, denying the President's motion to expunge the grand jury's finding, ruled that this finding is relevant "to a determination that the presumption of privilege is overcome" (Pet. App. 23).

[75] Recently the Court of Appeals for the Seventh Circuit held that the attorney-client privilege must yield upon a "*prima facie*" showing that the communications were made in furtherance of a continuing or future fraud or crime. *United States* v. *Aldridge*, *supra*, 484 F. 2d at 658. Other circuits agree that a *prima facie* showing that some fraud or criminal misconduct may have tainted what would otherwise have been a privileged, confidential relationship is sufficient to require that the privilege yield. See, *e.g.*, *Pfizer, Inc.* v. *Lord*, 456 F. 2d 545 (8th Cir. 1972); *United States* v. *Friedman*, 445 F. 2d 1076 (9th Cir. 1971), cert. denied, 404 U.S. 958; *United States* v. *Bob*, 106 F. 2d 37 (2d Cir. 1939), cert. denied, 308 U.S. 589. See also *O'Rourke* v. *Darbishire*, [1920] A.C. 581 (H.L.), establishing the same standard.

The grand jury's authorization to the Special Prosecutor constitutes the requisite *prima facie* showing to negate any claim of executive privilege for the subpoenaed conversations relating to Watergate and is binding on the courts at this stage of the proceedings in *United States* v. *Mitchell, et al.* As this Court held in *Ex Parte United States,* 287 U.S. 241, 250, the vote of a "properly constituted grand jury conclusively determines the existence of probable cause * * *."[76] Despite the President's contention in No. 73–1834, therefore, the district court properly refused to expunge this finding.[77]

[76] Accord, *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599; *United States* v. *King*, 482 F. 2d 768, 776 (D.C. Cir. 1973); *United States* v. *Kysar*, 459 F. 2d 422, 424 (10th Cir. 1972). The grand jury's finding cannot be challenged on the ground that it was based upon inadequate evidence. See, *e.g.*, *United States* v. *Calandra*, —— U.S. ——, —— (42 U.S.L.W. 4104, 4106, Jan. 8, 1974); *Costello* v. *United States*, 350 U.S. 359, 363 (1956).

The above decisions, of course, concern findings of probable cause which appear on the face of the indictment. The June 5, 1972 grand jury could likewise have listed every known co-conspirator in the indictment, in which case that finding of complicity in the conspiracy would have been conclusive in these pre-trial proceedings. Out of deference to the President's public position, however, the grand jury instead decided to vote *in camera* upon a finding of probable cause against each alleged co-conspirator, but not to name any formally in the indictment. The grand jury further authorized the Special Prosecutor to disclose and rely upon its determination of probable cause if and when such action became necessary. There is no reason why the same conclusive effect should not be given to the grand jury's determination in this case as would have been accorded if the grand jury had been less solicitous of the President's position.

[77] There is no reason to believe that the grand jury's finding is unconstitutional or in any sense an abuse of the grand jury's power. In the district court, the President premised the motion

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Each of the principal participants in the subpoenaed conversations has been identified by the grand jury as a co-conspirator, and, as demonstrated by the showing in the Appendix submitted to the dis-

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to expunge on the contention that the President is not subject to indictment prior to removal from office. The Constitution, however, contains no explicit Presidential immunity from the ordinary process of the criminal law prior to impeachment and removal, and there are substantial arguments that an implict imunity is likewise not warranted by the Constitution. See Berger, "The President, Congress, and the Courts," 83 Yale L.J. 1111, 1123–36 (1974); Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829). See also, *United States* v. *Isaacs and Kerner*, *supra*, holding that an impeachable officer is liable to criminal prosecution prior to impeachment and removal.

Here, however, the grand jury did not indict the President, but only named him as an unindicted co-conspirator. Therefore, the broader question of whether an indictment of a sitting President is constitutionally permissible need not be reached. None of the practical difficulties incident to indicting an incumbent President and requiring him to defend himself while still conducting the affairs of state exists when the grand jury merely names the President as an unindicted co-conspirator. This action does not constitute substantial interference with the President's ability to perform his official functions. For example, an unindicted co-conspirator need not spend time and effort in preparing his defense, time which a President may need to devote to carrying out his constitutional duties. Nor is there any inherent unfairness in such a course since an incumbent President has at his command all of the Nation's communications facilities to convey his position on the events in question. Thus, whatever may be the case with respect to indictment, there are no substantial arguments for creating an immunity for the President even from being identified as a co-conspirator when a grand jury finds it necessary and appropriate to do so in connection with an independent criminal prosecution of others.

Furthermore, even assuming *arguendo* that the grand jury's action was without legal effect, the district judge had ample discretion to refuse to expunge its finding. See *In re Grand Jury Proceedings*, 479 F. 2d 458, 460 n. 2 (5th Cir. 1973) and

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trict court below in opposition to the President's motion to quash, it is probable that each of the subpoenaed conversations includes discussions in furtherance of the conspiracy charged in the indictment. Thus, there is no room to argue that the subpoenaed conversations are subject to a privilege that exists to protect the public's legitimate interests in effective representative government. The grand jury has returned an indictment charging criminal conduct by high officials in the Executive Branch, and the public interest requires no less than a trial based upon *all* relevant and material evidence relating to the charges.

In opposing the grand jury's subpoena *duces tecum,* counsel for the President argued that despite any showing that statements in the course of Presidential conversations were made in furtherance of a conspiracy to obstruct justice, the general principle of confidentiality must be maintained in order to assure the effective functioning of the Presidential staff sys-

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Application of Johnson, 484 F. 2d 791 (7th Cir. 1973), discussing the criteria to be applied in passing upon motions to expunge grand jury reports. The grand jury's action concerns a subject of legitimate public concern. The President has neither alleged nor established any prejudice from the grand jury's action. The strong public interest in placing before the petit jury what the grand jury believed was the full scope of the alleged conspiracy to obstruct justice which forms the basis for the indictment in *United States* v. *Mitchell, et al.* made it reasonable for the grand jury to designate all participants in the conspiracy as co-conspirators. In deference to the Office of the Presidency, and sensitive to the practical difficulties in indicting an incumbent President, the grand jury named him as an unindicted co-conspirator, and there is no constitutional impediment to such action, and no compelling reason to expunge that determination.

tem. An analogous argument was made in *Clark* and decisively rejected by this Court in a passage we are constrained to quote at length (289 U.S. at 16):

> With the aid of this analogy [to the attorney-client privilege] we recur to the social policies competing for supremacy. A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney. Is there sufficient reason to believe that it will be found to be inadequate for the protection of a juror? No doubt the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.

It is hard to imagine a stronger need for piercing the cloak of confidentiality than in the present case. Requiring production of the evidence under these circumstances presents only a minimal threat to a President's ability to obtain advice from his aides with

complete freedom and candor, for surely there will be few occasions where there is probable cause to believe that conversations in the Executive Office of the President occurred during the course of and in furtherance of a criminal conspiracy. Counsel cannot seriously claim that the aides of any future President will be so "timid" in the face of such a remote danger of disclosure of their advice, or that some small risk of reticence is too great a price to pay to preserve the President's Office "against the inroads of corruption." In light of the grand jury's finding of probable cause to believe that the President was a co-conspirator in the indictment charging a conspiracy to defraud the United States and obstruct justice and the showing by the Special Prosecutor that the subpoenaed conversations in all probability occurred during the course of and in furtherance of the conspiracy, the conversations relating to Watergate cannot be shielded by a privilege designed to protect the objective, candid, and honest formulation of policy in government affairs.[78]

[78] Executive privilege still may attach, of course, to any subpoenaed material irrelevant to the issues to be tried in *United States* v. *Mitchell, et al.* The district court, in accordance with the procedures established in *Nixon* v. *Sirica, supra*, 487 F. 2d at 716–21, and followed thereafter, has ordered the President or any subordinate officer to submit the originals of the subpoenaed items to that court. Briefly, under those procedures, the President or his designee must submit an "analysis" itemizing and indexing those segments of the materials for which he asserts a particularized claim of privilege (*e.g.*, items subject to a claim of "national security") and those segments which he asserts are irrelevant to Watergate. The President may decline initially to submit for *in camera* inspection those

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B. THE PUBLIC INTEREST IN DISCLOSURE OF RELEVANT CONVERSATIONS FOR USE AT TRIAL IN THIS CASE IS GREATER THAN THE PUBLIC INTEREST SERVED BY SECRECY

Even apart from the *prima facie* showing that the President and the other participants in the subpoenaed conversations were co-conspirators, the claim of privilege cannot stand here. Executive privilege, unlike personal privileges (for example, the privilege against self incrimination) is an official privilege, granted for the benefit of the public, not of executives who may happen to hold office. Thus, when this privilege is asserted in a judicial proceeding as a reason for refusing to produce evidence, the overall public interest, as determined by the Judiciary, must control. It is now settled law "that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." *Nixon* v. *Sirica, supra,* 487 F. 2d at 716. See, *e.g., United States* v. *Reynolds, supra,* 345 U.S. at 11; *Carr* v. *Monroe Manufacturing Co., supra,* 431 F. 2d at 388; cf. *Doe* v. *McMillan, supra,* 412 U.S. at 320.

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items which he contends relate to "national defense or foreign relations." If there are any such claims, the district judge must hold a hearing to determine whether to sustain the claim of particularized privilege. As to all items for which there is no claim of particularized privilege or as to which the district judge rejects such a claim, the judge must inspect them *in camera* to determine which segments relate to Watergate and thus are not privileged. The judge may consult with the parties in determining relevancy.

These procedures are fully consistent with the principles set forth by this Court in *Environmental Protection Agency* v. *Mink*, *supra*, 410 U.S. at 92–94, and *United States* v. *Reynolds*, *supra*, 345 U.S. at 7–10.

Where the courts are left with the firm and abiding conviction that the public interest requires disclosure, particularly where disclosure does not pose any discernible threat to the interests protected by secrecy, the privilege must give way. Accordingly, even if the subpoenaed conversations here remain "presumptively privileged," despite the *prima facie* showing of the President's complicity, the privilege must yield. There is a compelling public interest in the availability of all relevant and material evidence for the trial of the charges in *United States* v. *Mitchell, et al.,* involving as they do a conspiracy to defraud the United States and obstruct justice by high government officials. The subpoenaed conversations consist of discussions by the defendants or other co-conspirators about the subject matter of the alleged conspiracy: Watergate. Such evidence is obviously of fundamental importance. Moreover, the public interest in continued secrecy is vastly diminished, if not nonexistent, in the wake of the extensive testimony on this subject permitted by the President and of the President's recent release of transcripts of parts of forty-three Presidential conversations relating to Watergate, including parts of twenty of the subpoenaed conversations.

1. The balancing process followed by the district court accords with decisions of this Court

In holding that the applicability of executive privilege depends upon a weighing of competing interests, the court in *Nixon* v. *Sirica* relied upon Chief Justice Marshall's decision in the misdemeanor trial of Aaron Burr. *United States* v. *Burr,* 25 Fed. Cas. 187 (No.

14,694) (C.C.D. Va. 1807). The Chief Justice, at the request of Burr, issued a subpoena *duces tecum* to the United States Attorney, who had possession of a letter written to President Jefferson by General Wilkinson.[79] In his return, the United States Attorney surrendered a copy of the letter "excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined." 25 Fed. Cas. at 190. In ruling that only the President could assert "motives for declining to produce a particular paper" in such a situation, the Chief Justice did recognize "that the president might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure." 25 Fed. Cas. at 191–92. The Chief Justice, however, clearly contemplated that the court could require production even though the President's showing was entitled to "much reliance": "The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on." 25 Fed. Cas. at 192.[80]

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[79] This was a different letter than the one for which the Chief Justice had issued a subpoena to the President in connection with the grand jury inquiry. *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

[80] The Chief Justice continued: "The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused."

Similarly, this Court in *Reynolds, supra,* held that a claim of privilege may be rejected upon a sufficient showing (345 U.S. at 11):

> Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted.

In reversing the lower court decisions which would have required *in camera* inspection to determine whether the privilege should be upheld, this Court held merely that there had only been a "dubious" showing of necessity for access to confidential investigative reports on the crash of a bomber testing secret equipment.[81] Since state secrets were involved, the party seeking the evidence had not made the requisite threshold showing to overcome the presumptive privilege even to justify *in camera* inspection.

More recently the Court considered the government's privilege to withhold the identity of inform-

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[81] Justices Black, Frankfurter and Jackson dissented from the decision of the Court, relying on the opinion of Judge Maris below. 192 F. 2d 987 (3d Cir. 1951). Judge Maris, as did this Court, rejected the government's contention that the determination of the executive officer claiming the privilege must be accepted. Although Judge Maris recognized a privilege for "state secrets," he rejected the availability of a "housekeeping" privilege in an instance where the government had consented to be sued. Judge Maris predicted (192 F. 2d at 995): "[W]e regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. * * * It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrasing to government officers. * * *"

ants. *Roviaro* v. *United States, supra.* This privilege, like the privilege for government deliberations, encourages candor through secrecy. Persons are thought to be more likely to provide information to law enforcement agencies if they can remain anonymous. But the privilege is not absolute. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." 353 U.S. at 60–61. See also *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.,* 459 F. 2d 303, 305 (5th Cir. 1969).

2. There is a compelling public interest in trying the conspiracy charged in United States *v.* Mitchell, et al., *upon all relevant and material evidence*

Whether one views the President's assertion of privilege as entitled to "much reliance," see *United States* v. *Burr, supra,* 25 Fed. Cas. at 192, or "presumptively" valid, see *Nixon* v. *Sirica, supra,* 487 F. 2d at 717, the privilege is overcome here. In upholding the district court's order enforcing the grand jury's subpoena *duces tecum,* the court of appeals held that the "presumption of privilege * * * must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." *Nixon* v. *Sirica, supra,* 487 F. 2d at 717. According to the court, this showing was made possible by the "unique intermeshing of events unlikely soon, if ever, to recur." 487 F. 2d at 705. It is clear that the "unique" circumstances which led to the rejection of the President's

claim of privilege in the context of a grand jury investigation have continued applicability. Indeed, now that the grand jury has returned an indictment charging a conspiracy to defraud the United States and obstruct justice, the need for full disclosure is, if anything, greater.

At the time *Nixon* v. *Sirica* was decided, the grand jury was investigating mere allegations of criminal wrongdoing by high government officials. That investigation has resulted in a finding of probable cause to believe that some of those officials have committed offenses which strike at the very essence of a "government of laws." It is precisely this type of situation where this Court has spoken of the "over-mastering" need for preserving our institutions against "the inroads of corruption," even to the extent of overcoming a privilege of confidentiality. *Clark* v. *United States, supra,* 289 U.S. at 16. The warning of the court of appeals in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 794, bears repeating:

> But no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.

That the privilege must yield regardless of the President's involvement is easily demonstrated by analogy. Justice Cardozo's opinion in *Clark* indicated that if there were direct or substantial evidence that

a juror had accepted a bribe, the veil of secrecy ordinarily surrounding a jury's deliberations would be dissipated and the arguments and votes of even the unsuspected jurors would be admissible as evidence upon whether the putatively guilty juror had in fact taken a bribe. 289 U.S. at 16. It would seem clear that, if there were a *prima facie* showing that a high executive official had accepted a bribe in consideration of his fraudulently inducing the President to grant a pardon or take other executive action favorable to the one giving the bribe, executive privilege would not be allowed to bar proof of the official's representations to the President even though the President was totally ignorant of the wrongdoing and had acted innocently in exercising his constitutional powers. So here, regardless of the President's wish, the law cannot and does not recognize a privilege that would shield a miscreant adviser from prosecution for a criminal offense in violation of the President's confidence as well as his public trust.

It is thus immaterial whether the President was actually aware that other participants in the conversations were discussing criminal activities in which they themselves were involved. The district court below found that the Special Prosecutor had made a sufficient showing of relevancy and evidentiary value with respect to the subpoenaed conversations (Pet. App. 19–20), since the conversations are material to defining the scope, membership, and objects of the conspiracy. The public interest in laying this evidence before a jury, therefore, must be considered compelling.

The President himself emphasized this interest, albeit in the context of impeachment, in discussing the factors that persuaded him to release transcripts of portions of forty-three conversations dealing with Watergate—

> I believe all the American people, as well as their Representatives in Congress, are *entitled to have not only the facts, but also the evidence that demonstrates those facts.*[82]

This judgment is highly relevant to any balance drawn by the courts. See *Nixon* v. *Sirica, supra,* 487 F. 2d at 717–18.

Counsel for the President, in his memorandum in support of the motion to quash, argued that because the Special Prosecutor signed the indictment, he must have been satisfied that there was sufficient evidence available to him to make a *prima facie* showing of guilt, thereby suggesting that the Special Prosecutor should be content with the evidence now available to him. The indictment, of course, rests upon the requisite finding of probable cause. The standard that the government now bears, however, is proof beyond a reasonable doubt, and the public is entitled to the most effective presentation of its case that can be made. Justice will be done here only if the jury hears the whole story and not just the excerpted evidence the President chooses to make available.

[82] The President's Address to the Nation, April 29, 1974, 10 Weekly Compilation of Presidential Documents 452 (May 6, 1974).

This is not a case where the government is seeking incriminating evidence which is merely cumulative or corroborative. The analysis of the released transcripts in the Appendix submitted to the district court shows that conversations not previously available to the Special Prosecutor in fact contain evidence extremely important to material issues in the indictment—evidence that would not otherwise be available to the Special Prosecutor. See *Nixon v. Sirica, supra*, 487 F. 2d at 717.[83] Two of the principal areas are discussions re-

[83] The recordings themselves are necessary for trial, and the President's release of portions of some transcripts cannot be considered adequate compliance with the subpoena. As this Court is well aware, the recordings themselves, and not the transcripts, constitute the most reliable evidence of what actually transpired. In *Lopez* v. *United States*, 373 U.S. 427, 439–40, the Court acknowledged that recordings of admissible conversations are "highly useful evidence" and the "most reliable evidence possible of a conversation." Cf. *United States* v. *White*, 401 U.S. 745, 753. In addition to providing the most accurate reflection of what was actually spoken, the recordings also are important because they reveal tone and inflection often necessary to evaluate the meaning of spoken words.

Furthermore, a comparison of the transcripts prepared by the White House and the transcripts prepared by the Watergate Special Prosecution Force of recordings previously produced by the President reveals material differences. In some cases, the transcripts differ as to the words spoken. In other cases, a comparison indicates that the White House has failed to transcribe portions without indicating that material has been deleted or is unintelligible. A number of these discrepancies were called to the attention of the district court. See Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum 40–43. The White House transcripts also indicate that "material unrelated to Presidential actions" has been deleted. The reasonable inference to be drawn is that material has been deleted that relates to other persons' actions concern-

(Continued)

lating to the future testimony of White House officials and campaign aides and discussions of how to handle executive clemency and other benefits for various individuals as charged in the indictment. As the analysis in the Appendix shows, it is likely that the forty-four subpoenaed conversations for which no transcripts have been released include additional evidence which also is not merely cumulative or corroborative. When one is considering an on-going conspiracy, evidence of each link in the conspiracy, either in terms of time or in terms of objectives, may be crucial to a successful prosecution.[84]

(Continued)
ing Watergate. Clearly, such material is important to the prosecution of defendants in *United States* v. *Mitchell et al.*

Finally, there is some question whether the transcripts, without the underlying recordings, would be admissible under the "best evidence" rule. Generally stated, that rule provides that where a party seeks to prove the terms of a "writing," the original writing must be produced unless it is shown to be unavailable. See McCormick, *Evidence* § 230, at 560 (1972). "The danger of mistransmitting critical facts which accompanies the use of written copies or recollection, but which is largely avoided when an original writing is presented to prove its terms, justifies preference for the original documents." *Id.*, § 231, at 561. Although recordings do not fall within the strict confines of the rule, "sound recordings, where their content is sought to be proved, so clearly involve the identical considerations applicable to writings as to warrant inclusion within the rule." *Id.*, § 232, at 563.

[84] In *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, *supra*, the court of appeals ruled that the Committee's "need" for the five recordings it had subpoenaed "is too attenuated and too tangential to its functions to permit

We note that there has been not as much as a suggestion from counsel for the President that any of the subpoenaed conservations are *not* relevant to the criminal trial. Moreover, we emphasize that neither the President nor his counsel is in a position to make the refined judgments as to what evidence is necessary to the Special Prosecutor's case in chief or for use on cross-examination. Neither is familiar with the evidence in the possession of the government or with the theory on which the government's case will be prosecuted. In our adversary system, the judgments of what evidence to offer and how to use that evidence must be left to the advocates. See, *e.g., Dennis* v. *United States,* 384 U.S. 855, 874–75.

The court of appeals in *Nixon* v. *Sirica* also emphasized the impact of existing contradictory testimony. *E.g.,* 487 F. 2d at 705. Since that decision, the debate over the credibility of witnesses has heightened. On May 4, 1974, during the pendency of the present motion, the White House released a memorandum based on its expurgated transcripts, attacking the credibility of a prospective government witness, John W. Dean. 32 Congressional Quarterly 1154 (May 11, 1974). Conflicts in testimony continue. The tape re-

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a judicial judgment that the President is required to comply with the Committee's subpoena" (slip op. at 17). The question the court asked was whether the recordings were "demonstrably critical to the responsible fulfillment of the Committee's functions" (slip op. at 13). Highly specific factfinding, of course, is rarely, if ever, "demonstrably critical" to the legislative function, whereas it is the very essence of the determination a trial jury is called upon to make beyond a reasonable doubt.

cordings of Presidential conversations will be critical to resolving these conflicts and weighing the credibility of trial witnesses.

3. Disclosure of the subpoenaed recordings will not significantly impair the interests protected by secrecy

It is axiomatic, of course, that once privileged communications are no longer confidential, the privilege no longer applies and the public interest no longer is served by secrecy. See, *e.g., Roviaro* v. *United States, supra,* 353 U.S. at 60. In *Nixon* v. *Sirica,* the court of appeals considered important to its calculus that "the public testimony given consequent to the President's decision [on May 22, 1973, to waive executive privilege] substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate." 487 F. 2d at 718. We argue in Part IV below that, as a matter of law, the President, as a result of his May 22, 1973, statement and the recent release of transcripts of portions of forty-three Presidential conversations, has waived executive privilege with respect to any Watergate-related conversations. There simply is no confidentiality left in that subject and no justification in terms of the public interest in keeping from public scrutiny the best evidence of what transpired in Watergate-related conversations. Whether or not this Court agrees that there has been a waiver as a matter of law, the "diminished interest in maintaining the confidentiality of conversations pertinent to Watergate" is an important consideration in this case in drawing any balance.

The enforcement of the subpoena in this case marks only the most modest and measured displacement of

presumptive privacy for Presidential conversations, and augurs no general assault on the legitimate scope of that privilege. This is not a civil proceeding between private parties or even between the United States and a private party, where masses of confidential communications might be arguably relevant in wide-ranging civil discovery. The more rigorous standards applicable in a criminal case have been satisfied here, and they sharply narrow the scope of possible future demands for such evidence. Nor is this one of a long history of congressional investigations seeking to expose to the glare of publicity the policies and activities of the Executive Branch. In such instances the evidence is often sought in order to probe the mental processes of the Executive Office in a review of the wisdom or rationale of official Executive action. Compare *Morgan* v. *United States,* 304 U.S. 1, 18; *United States* v. *Morgan,* 313 U.S. 409, 422. The threat to freedom and candor in giving advice is probably at the maximum in such proceedings; they invite bringing to bear upon aides and advisors the pressures of publicity and political criticism, the fear of which may discourage candid advice and robust debate.

The charges to be prosecuted here involve high Presidential assistants and criminal conduct in the Executive Office. Such involvement is virtually unique. Because it is—hopefully—unlikely to recur, production of White House documents in this prosecution will establish no precedent to cause unwarranted fears by future Presidents and their aides or to deter them from full, frank and vigorous discussion of legit-

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imate governmental issues. Indeed, future aides may well feel that the greatest danger they face in engaging in free and trusting discussion is the type of partial, one-sided revelations that the President has encouraged in this case.

4. The balance in this case overwhelmingly mandates in favor of disclosure

Certainly, courts should not lightly override the assertion of executive privilege. But the privilege is sufficiently protected if it yields only when the courts are left with the firm and abiding conviction that the public interest requires disclosure. The factors in this case overwhelmingly support a ruling that Watergate-related Presidential conversations are not privileged in response to a reasonable demand for use at the trial in *United States* v. *Mitchell, et al.* There is probable cause to believe, based upon the indictment, that high Executive officers engaged in discussions in furtherance of a criminal conspiracy in the course of their deliberations. The veil of secrecy must be lifted; the legitimate interests of the Presidency and the public demand this action.

IV. ANY PRIVILEGE ATTACHING TO THE SUBPOENAED CONVERSATIONS RELATING TO WATERGATE HAS BEEN WAIVED AS A RESULT OF PERVASIVE DISCLOSURES MADE WITH THE PRESIDENT'S EXPRESS CONSENT

Even if the conversations described in the subpoena could be regarded as covered by a privilege for executive confidentiality, the privilege cannot be claimed in the face of the President's decision to authorize voluminous testimony and other statements concerning

Watergate-related discussions and his recent release of 1,216 pages of transcript from forty-three Presidential conversations, including twenty covered by the present subpoena. In his Formal Claim of Privilege submitted to the district court, the President stated that because "[p]ortions of twenty of the conversations described in the subpoena have been made public, no claim of privilege is advanced with regard to those Watergate related portions of those conversations." This concession reflects inevitable recognition that there can be no generalized claim of executive privilege based upon confidentiality where, in fact, no confidentiality exists. "[T]he moment confidence ceases, privilege ceases." *Parkhurst* v. *Lowten,* 36 Eng. Rep. 589, 596 (Ch. 1819). But as we show below, the waiver in this case extends beyond those transcripts released publicly, since a privilege holder may not make extensive but selective disclosures concerning a subject and then withhold portions that are essential to a complete and impartial record. The circumstances of this case compel the conclusion that, as a matter of law, the President has waived executive privilege with respect to *all* Watergate-related conversations described in the subpoena.

The rule that voluntary disclosure eliminates any privilege that would otherwise attach to confidential information has been applied in cases dealing with claims of governmental privilege, *Roviaro* v. *United States, supra,* 353 U.S. 53; *Westinghouse Electric Corp.* v. *City of Burlington,* 351 F. 2d 762 (D.C. Cir. 1965), as well as in cases dealing with attorney-client

privilege, *Hunt* v. *Blackburn*, 128 U.S. 464; *United States* v. *Woodall*, 438 F. 2d 1317, 1325 (5th Cir. 1970); physician-patient privilege, *Munzer* v. *Swedish American Line*, 35 F. Supp. 493 (S.D.N.Y. 1940); and marital privilege, *Pereira* v. *United States*, 347 U.S. 1, 6. The general principles governing waiver are stated concisely and forcefully in Rule 37 of the Uniform Rules of Evidence.[85]

> A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he * * * without coercion and with the knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.

This is precisely the situation here. In his statement of May 22, 1973, the President announced, in light of the importance of the "effort to arrive at the truth," that "executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up." [86] As the Court can judicially notice, in the months following that statement there has been extensive testimony in several

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[85] This rule was approved by the Court of Appeals for the District of Columbia Circuit in *Ellis* v. *United States*, 416 F. 2d 791, 801 n. 26 (1969). See also *United States* v. *Cote*, 456 F. 2d 142, 145 (8th Cir. 1972).

[86] 9 Weekly Compilation of Presidential Documents 697 (May 28, 1973).

forums concerning the substance of the recorded conversations now sought for use at the trial in *United States* v. *Mitchell, et al.* The testimony, as the Court is also aware, is quite often contradictory and is pervaded by hazy recollections. See also *Nixon* v. *Sirica, supra,* 487 F. 2d at 705.

It could be argued that the express waiver of May 22, 1973, coupled with the subsequent testimony of participants in the conversations, is itself sufficient to preclude a claim of executive privilege based upon confidentiality for Watergate-related conversations. There has been a supervening event, however, which as a matter of law removes any vestige of confidentiality in the President's discussions of Watergate with Messrs. Colson, Dean, Ehrlichman and Haldeman. On April 30, 1974, the President submitted to the Committee on the Judiciary of the House of Representatives and released to the public 1,216 pages of transcript from forty-three Watergate-related Presidential conversations.[87] The conversations range over the period from September 15, 1972, until April 27, 1973.

In his address on live television and radio on the evening prior to releasing the transcripts, the President explained that he was seeking "[t]o complete the record." He further explained: "As far as what the President personally knew and did with regard to Watergate and the cover-up is concerned, these ma-

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[87] *Submission of the Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon, April 30, 1974.* This document was before the district court. See Transcript of Hearing on May 13, 1974.

terials—together with those already made available, will tell it all." [88] This statement is not literally accurate, but it is true that the broad outlines of the President's conversations and conduct throughout the relevant period may be portrayed by the transcripts that have been publicly released. These disclosures are sufficient to cede any privilege to conceal from production pursuant to the subpoena either the original tapes from which the publicly released transcripts were purportedly made or the tapes of other relevant conversations which necessarily complete the picture the public and the jury are entitled to see.

A privilege holder who opens the door to an area that was once confidential can no longer control the fact-finder's search for the whole truth by attempting to limit the ability to discern the interior fully. The boundaries of the disclosure are legally no longer within his exclusive control. For example, in cases involving the analogous privileges accorded to attorney-client and physician-patient communications, it is clear that once testimony has been received as to a particular communication, either with the consent of the holder of the privilege or without his objection, the privilege is lost. There can be no assertion of the privilege to block access to another version of the conversation. See, *e.g., Hunt* v. *Blackburn, supra,* 128 U.S. at 470–71; *Rosenfeld* v. *Ungar,* 25 F.R.D. 340, 342 (S.D. Iowa 1960); *Munzer* v. *Swedish American Line, supra,* 35 F. Supp. at 497–98; *In re Associated Gas &*

[88] 10 Weekly Compilation of Presidential Documents 451–52 (May 6, 1974).

Electric Co., 59 F. Supp. 743, 744 (S.D. N.Y. 1944); 8 Wigmore §§ 2327, 2389, at 636 and 855–61.

The same principles apply to the Fifth Amendment's privilege against self-incrimination. Once the privilege holder elects to disclose his version of what happened, a due "regard for the function of courts of justice to ascertain the truth" requires further disclosure "on the matters relevantly raised by that testimony." *Brown* v. *United States,* 356 U.S. 148, 156, 157. Once the privilege holder has opened the door, "he is not permitted to stop, but must go on and make a full disclosure." *Brown* v. *Walker,* 161 U.S. 591, 597.

There is still another dimension that the Court should consider. The President in the past has used the recordings of Presidential conversations to aid in the presentation of the White House interpretation of relevant events. For example, in June 1973, the White House transmitted a memorandum to the Senate Select Committee on Presidential Campaign Activities listing "certain oral communications" between the President and John W. Dean. Subsequently, but prior to Mr. Dean's testimony before the Committee, J. Fred Buzhardt, Special Counsel to the President, telephoned Fred D. Thompson, to relate to him Mr. Buzhardt's "understanding as to the substance" of twenty of the meetings.[89]

The President also has allowed, indeed requested, the recordings to be used in preparing public testi-

[89] Affidavit of J. Fred Thompson dated August 9, 1973, *Hearings before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong. 1st Sess., Book 4, at 1794–1800 (1973).

mony. Defendant H. R. Haldeman, one of the respondents in the case before the Court and hardly a disinterested witness, was allowed to take home the tapes of selected conversations even after he had resigned his position as Assistant to the President and to use them in preparing his testimony.[90]

The general principle that the privilege holder's offer of his own version of confidential communications constitutes a waiver as to all communications on the same subject matter governs under these circumstances. "This is so because the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." 8 Wigmore § 2327, at 638. The President time and again—even before the existence of the recordings was publicly known—has resorted to the recordings in support of his position.[91] In short, the President cannot have it both ways. He cannot release only those portions he chooses and then stand on the privilege to conceal the remainder. No privilege holder can trifle with the judicial search for truth in this way.

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[90] *Id.*, Book 7, at 2888–89; Book 8, at 3101–02.

[91] See, *e.g.*, Letter from President Richard M. Nixon to Senator Sam J. Ervin, Chairman of the Senate Select Committee on Presidential Campaign Activities, July 23, 1973, *id.*, Book 6, at 2479:

"Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth."

The high probability that the yet undisclosed conversations include information which will be important to resolving issues to be tried in *United States* v. *Mitchell, et al.* provides a compelling reason for disclosure. As the President himself recognized, the public interest demands the complete story based upon the impartial sifting and weighing of all relevant evidence. That is emphatically the province of the judicial process for it is "the function of a trial * * * to sift the truth from a mass of contradictory evidence. * * *" *In the Matter of Michael,* 326 U.S. 224, 227. And in the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has chosen to make far-reaching but expurgated disclosures, the Court must use its process to acquire all revelant evidence to lay before the jury. In the present context it can do so with the least consequences for confidentiality of other matters and future deliberations of the Executive Branch by ruling that there has been a waiver with respect to this entire affair.

V. THE DISTRICT COURT PROPERLY DETERMINED THAT THE SUBPOENA "DUCES TECUM" ISSUED TO THE PRESIDENT SATISFIED THE STANDARDS OF RULE 17(C), BECAUSE AN ADEQUATE SHOWING HAD BEEN MADE THAT THE SUBPOENAED ITEMS ARE RELEVANT AND EVIDENTIARY

Once the privilege issues are passed,[92] the only remaining question before the Court is whether the district judge properly found (Pet. App. 19–20) that the

[92] In the Formal Claim of Privilege which was submitted along with the Motion to Quash, the President expressly stated that he was not asserting any privilege with respect to the

government's subpoena satisfied the standards generally applied under Rule 17(c) of the Federal Rules of Criminal Procedure. The district court held that the standards of Rule 17(c) had been satisfied by the Special Prosecutor's submission of a lengthy and detailed specification setting out with particularity the relevance and evidentiary value of each of the tape recordings and other material being sought. This showing was submitted as a forty-nine page Appendix to the Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum included in the record before this Court.[93]

Enforcement of a trial subpoena *duces tecum* is preeminently a question for the trial court and is committed to the court's sound discretion. For this reason, the district court's determination should not be disturbed absent a finding by the reviewing court that it was arbitrary and had no support in the record. See *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993,

twenty conversations for which partial transcripts already have been released publicly by the White House. Since no privilege was asserted as to these conversations, no further inquiry was necessary by the district court into whether there would otherwise have been any privilege, or whether the government had a strong need for the evidence, or whether the government's need outweighed any available privilege. Thus, the Special Prosecutor's showing of relevancy and evidentiary value as to these conversations, which was held adequate to satisfy Rule 17(c), warranted enforcement of the subpoena (at least as to the portions of the tapes for which transcripts have been released) without more.

[93] Some of the material contained in the Appendix, and additional material relating to conversations of June 4, 1973, being sought by Item 46 of the subpoena, were also discussed at oral argument before the district court on May 13, 1974.

999 (10th Cir. 1965), cert. denied, 380 U.S. 964; *Sue* v. *Chicago Transit Authority,* 279 F. 2d 416, 419 (7th Cir. 1960); *Schwimmer* v. *United States,* 232 F. 2d 855, 864 (8th Cir. 1956), cert. denied, 352 U.S. 833; *Shotkin* v. *Nelson,* 146 F. 2d 402 (10th Cir. 1944). This is especially true where, as here, the assessment of the relevancy and evidentiary value of the items sought is primarily a determination of fact and the district judge is intimately familiar with the grand jury's investigation and the indictment in the case. Since the district court's findings are amply supported by the record and reflect the application of the proper legal criteria, those findings should not be disturbed by this Court. Indeed, in the absence of any dispute between the parties on the correctness of the legal principles applied by the district court under Rule 17(c), this essentially factual determination ordinarily would not merit review by this Court at all. In the interest of final disposition of the case, however, we urge the Court to uphold the lower court's action on this aspect of the case as well.

A. RULE 17(C) PERMITS THE GOVERNMENT TO OBTAIN RELEVANT, EVIDENTIARY MATERIAL SOUGHT IN GOOD FAITH FOR USE AT TRIAL

Rule 17(c) provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be pro-

> duced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

As all parties and the district court recognized (Pet. App. 19), the leading cases establishing the criteria for satisfaction of Rule 17(c) are *Bowman Dairy Co.* v. *United States, supra,* 341 U.S. 214, and *United States* v. *Iozia,* 13 F.R.D. 335 (S.D.N.Y. 1952). See generally 8 Moore, Federal Practice ¶ 17.07 (1973). In *Bowman Dairy,* the Court held that the government properly had been ordered, under Rule 17(c), to produce to the defendant prior to trial all documents, books, records, and objects gathered by the government during its investigation or preparation for trial which were either presented to the grand jury or would be offered as evidence at trial. The Court upheld the order to produce even though the defendant's subpoena did not further specify particular items sought.

In *Iozia,* the question presented was whether defendant properly could obtain material from the government under Rule 17(c) upon a mere showing that it might be material to the preparation of the defense. The district court, elaborating upon the *Bowman Dairy* standard, declared that a mere showing of possible use in pre-trial preparation was insufficient: the defendant must show (1) that the material was evidentiary and relevant, (2) that it was not otherwise procurable reasonably in advance of trial, (3) that the party seeking it could not properly prepare for trial

without it and failure to obtain it might delay trial, and (4) that the request was made in good faith and did not constitute a general "fishing expedition." These were the tests the district court below stated it was applying when it found that "the requirements of Rule 17(c) are here met" (Pet. App. 20).

The standard of relevancy established by these cases is clear. Material being sought under Rule 17(c) is relevant if it is "related to the charges" in the indictment, *United States* v. *Gross,* 24 F.R.D. 138, 140 (S.D.N.Y. 1959), or "closely related to the subject matter of the indictment," *United States* v. *Iozia, supra,* 13 F.R.D. at 339, even though it might not, for example, "serve to exonerate this defendant of the crime charged * * *." *Ibid.*

In contrast, the requirement that the material sought be "evidentiary" has not been as well defined in the case law. See 8 Moore, *supra,* ¶ 17.07, at 17–19. In the district court, counsel for the President asserted that under Rule 17(c) the government must show that the items sought would be admissible at trial in its case in chief. The reported decisions, however, show that the purpose of the "evidentiary" requirement articulated in *Bowman* and *Iozia* is to oblige the party seeking production to show that the items sought are of a character that they could be used in the trial itself, not simply for general pre-trial preparation. Thus, a subpoena can seek not only evidence that would be admissible in the party's direct case but can also demand material that could be used for impeachment purposes. "Rule 17(c) is applicable only

to such documents or objects as would be admissible in evidence at the trial, or which may be used for impeachment purposes." *United States* v. *Carter,* 15 F.R.D. 367, 371 (D.D.C. 1954) (Holtzoff, J.). See also 8 Moore, *supra,* ¶ 17.07, n. 16 ("the documents sought must be admissible in evidence (at least for the purpose of impeachment)").[94] For example, evidentiary material sought by the government such as prior inconsistent statements by defendants, even if not pertinent in the government's case in chief, would be admissible for purposes of impeachment if a defendant took the stand or in the government's rebuttal case.

Moreover, the "evidentiary" requirement of *Bowman Dairy* and *Iozia* has developed almost exclusively in cases in which defendants sought material prior to trial from the government in addition to that to which they were entitled by the comprehensive pre-trial discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure. Courts have, therefore, taken special care, as the *Bowman* and *Iozia* opinions show, to insure that Rule 17(c) not be used as a device to circumvent the limitations on criminal pre-trial dis-

[94] In his Reply Memorandum below, counsel for the President argued that the Special Prosecutor's reliance on *Carter* and related cases was misleading because in some of those cases *pre-trial* production of material admissible for impeachment of witness was in fact denied. In the instant case, of course, the necessity of pre-trial production is predicated on the government's showing—apparently not contested by counsel for the President—that delaying production of the recordings until trial would not allow adequate time for testing, enhancement, transcription, and preparation of the evidence that would be required for actual use at trial.

covery embodied in Rule 16. Rule 16 provides only for discovery from the parties. By contrast, in the instant case the government seeks material from what is in effect, as the district court observed, a third party. As applied to evidence in the possession of third parties, Rule 17(c) simply codifies the traditional right of the prosecution or the defense to seek evidence for trial by a subpoena *duces tecum*. Whether the stringent standards developed in *Bowman Dairy* and *Iozia* for Rule 17(c) subpoenas between the prosecution and the defense should be applied to subpoenas to third parties is a question the Court need not reach, however, since the court below correctly found that the Special Prosecutor had fully met even the higher standards.

The final requirement enunciated in *Iozia*, that the application be made "in good faith" and not "as a general fishing expedition," appears to be simply a requirement that the materials sought be sufficiently identifiable that the court can make a determination that they exist, that they are relevant, and that they would have some evidentiary use at trial. Indeed, the standard most often applied after *Iozia* in determining enforceability of subpoenas under Rule 17(c) appears to be a combination of the *Iozia* requirements of relevancy, evidentiary value, and good faith: the subpoena must be an "honest effort to obtain evidence for use on trial." *United States* v. *Gross, supra*, 24 F.R.D. at 141; *United States* v. *Solomon*, 26 F.R.D. 397, 407 (S.D. Ill. 1960); *United States v. Jannuzio*, 22 F.R.D. 223 (D. Del. 1958).

In the district court, counsel for the President took the position that a subpoena should be considered a "fishing expedition" unless the party seeking its enforcement can make a *conclusive* showing that each and every item sought is, beyond doubt, both relevant and evidentiary. As to the majority of conversations involved in the subpoena, this standard is satisfied by consideration of the transcripts made public by the White House, uncontradicted testimony, and other evidence. As to the remaining conversations, there is strong and unrebutted circumstantial evidence—the inferences from which are not denied—indicating that the standard is met.

But the position urged by counsel for the President is not supported and indeed is contradicted by the reported decisions. For instance, the subpoena held enforceable in *Bowman Dairy* was directed to all material in the government's possession that had been presented to the grand jury in the course of the investigation or that would be presented at trial, without further specificity. The subpoena held enforceable in *Iozia* was directed at certain documents, correspondence, and files of a former associate of the defendant. The defendant alleged that he had reason to believe that certain activities may have been engaged in by still other persons and that the former associate was "in the best position to know" about these if they indeed occurred. The cases realistically recognize that the party seeking production often cannot know precisely what is contained in the material sought until he has the opportunity to inspect it. The Court in *Bowman*

Dairy, for example, quoted with approval the statement of a member of the Advisory Committee on the Criminal Rules, to the effect that the purpose of Rule 17(c) was to permit a court to order production in advance of trial "for the purpose of course of enabling the party to see whether he can use it or whether he wants to use it." 341 U.S. at 220 n. 5. Common sense dictates that the party seeking production cannot tell what it "can or will use until it has had the opportunity to see the documents." *United States* v. *Gross, supra,* 24 F.R.D. at 141. As Chief Justice Marshall observed in considering a trial subpoena *duces tecum* directed to President Jefferson in *United States* v. *Burr, supra,* 25 Fed. Cas. at 191: "It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?"

Because the Special Prosecutor has been denied even preliminary access to the subpoenaed materials, it is obviously impossible for him to demonstrate *conclusively* with respect to a small number of the conversations that they are relevant and evidentiary. But Rule 17(c) and the cases interpreting it do not require that this be done. Rather, they require only that an adequate showing of relevancy and evidentiary value be made, based upon the evidence available. In short,

> A predetermination of the admissibility of the subpoenaed material is not the criterion of the validity of the process. It need only appear that the subpoena is being utilized in good faith to

> obtain evidence * * * [citing *Bowman Dairy*]. *United States* v. *Jannuzio, supra,* 22 F.R.D. at 226.

B. THERE WAS AMPLE SUPPORT FOR THE FINDING OF THE DISTRICT COURT THAT THE GOVERNMENT'S SHOWING OF RELEVANCY AND EVIDENTIARY VALUE WAS ADEQUATE TO SATISFY RULE 17(C)

1. Relevance

Transcripts released to the public by the White House, uncontradicted testimony concerning the subject matter of certain conversations, and other evidence compiled in the Special Prosecutor's showing establish beyond any question the relevancy of the vast majority of the subpoenaed conversations.[95] Indeed, the White House transcripts that have been released of twenty of the subpoenaed conversations not only show conclusively the relevancy of those conversations but also tend to prove the relevancy of the rest of the sixty-four conversations sought by the subpoena.[96]

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[95] In some instances tape recordings already obtained by the Special Prosecutor contain strong evidence of the relevancy of additional conversations sought under this subpoena. For example, it was pointed out in oral argument in the district court that the June 4, 1973, recording of the President listening to prior recordings indicates why the March 13, 1973, telephone conversations sought by Item 46 of the subpoena are important. See Transcript of Hearing on May 13, 1974, at 57.

[96] As pointed out below, the transcripts in some instances provide circumstantial evidence concerning what happened at meetings for which no transcripts were released. In addition, the Court certainly may take notice of the fact that each and every subpoenaed conversation for which a transcript was subsequently released did in fact substantially concern Watergate.

With respect to some of the conversations, particularly those listed in Items 32–40 of the subpoena, relevancy can be established at this time only by circumstantial and indirect evidence. Nevertheless, the available evidence that these conversations—all of which took place in the three days from April 18 to April 20, 1973—in fact concerned Watergate is strong. The evidence, set forth in detail in the government's Appendix below, shows that the primary subject of concern to the participants in the meetings sought over those three days—the President and defendants Haldeman and Ehrlichman—was Watergate; that Haldeman and Ehrlichman had withdrawn from their regular White House duties to work exclusively on a Watergate defense; and that meetings between these three persons very probably could have concerned only Watergate. Furthermore, with respect to these conversations, the evidence that is available is unrebutted. The Special Prosecutor argued below that since only the President was in a position to make more informed representations about the relevancy of the subpoenaed conversations, the showing made by the Special Prosecutor was at least sufficient to shift the burden to the President to demonstrate any alleged irrelevancy to the district court by providing the appropriate recordings for *in camera* inspection. In subsequent oral argument in the district court counsel to the President, responding to direct ques-

tions from the court, stated that he could make no representations whatever concerning the relevancy *vel non* of any of the subpoenaed conversations.[97]

2. Evidentiary nature

Tape recordings of conversations are admissible as evidence upon the laying of a proper and adequate foundation showing that "the recording as a whole [is] accurate and sufficiently complete." [98] This foundation may be laid by the testimony of one of the participants in the conversation that the recording accurately represents the conversation that was held.[99] Alternatively, the government could introduce a recording in its direct case even if none of the participants were available as a prosecution witness by showing the circumstances and method by which the recording was made and the chain of custody of the particular recording sought to be introduced.[100]

There can be no doubt that the tape recordings sought by the subpoena here, covering conversations of co-conspirators relating to the subject matter of

[97] Transcript of Hearing, May 13, 1973, at 61–62.

[98] *Stubbs* v. *United States*, 428 F. 2d 885, 888 (9th Cir. 1970), cert. denied, 400 U.S. 1009; *United States* v. *McKeever*, 160 F. Supp. 426 (S.D.N.Y. 1958).

[99] *United States* v. *Madda*, 345 F. 2d 400, 403 (7th Cir. 1965).

[100] See *Stubbs* v. *United States*, *supra;* cf. *United States* v. *Sutton*, 426 F. 2d 1202, 1207 (D.C. Cir. 1969) (authentication of writings); Proposed Federal Rules of Evidence, Rule 901 (b)(9).

the alleged conspiracy, are of an evidentiary character. In *Nixon* v. *Sirica, supra,* in upholding enforcement of an earlier subpoena for Presidential tapes, the court squarely held: "Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony." 487 F. 2d at 718 (footnote omitted). The same principle would apply to use of such recordings for impeachment purposes. Such materials are, therefore, amenable to a trial subpoena. In *Monroe* v. *United States,* 234 F. 2d 49, 55 (D.C. Cir. 1956), cert. denied, 352 U.S. 873, the court of appeals held that tape recordings made by a police officer of conversations between himself and defendants were "admissible as independent evidence of what occurred" and that they "were evidentiary, and therefore under the interpretation of Rule 17(c) adopted by the Supreme Court [in *Bowman Diary*] and already followed by this Court, the trial court in its discretion could have required pre-trial production."[101] See also *United States* v. *Lemonakis,* 485 F. 2d 941 (D.C. Cir. 1973), cert. denied, —— U.S. —— (42 U.S.L.W. 3541, March 26, 1974).

Statements recorded on tapes sought by the instant subpoena, while hearsay for some purposes, but see

[101] The court upheld the district court's exercise of discretion not to compel production prior to trial because the government had already played the recordings for defendant and his counsel over a period of several days.

Anderson v. *United States,* —— U.S. —— (42 U.S.L.W. 4815, June 3, 1974), would be admissible into evidence in the government's case in chief under one or more of the traditional exceptions to the hearsay rule.

First, it is settled that extra-judicial admissions made by one conspirator in the course of and in furtherance of a conspiracy are admissible against his fellow co-conspirators. *Dutton* v. *Evans,* 400 U.S. 74, 81 (1970); *Myers* v. *United States,* 377 F. 2d 412, 418–19 (5th Cir. 1967), cert. denied, 390 U.S. 929. Each of the principal participants in the subpoenaed conversations either has been indicted as a conspirator or will be named as an unindicted co-conspirator in the government's bill of particulars. As the Special Prosecutor demonstrated in his showing, the transcripts released by the White House, together with both direct and circumstantial evidence, establish a very strong probability that substantial portions of each and every one of the subpoenaed conversations occurred in the course of and in furtherance of the conspiracy alleged in the indictment. Subject to proof of this fact at trial, any recorded statements in furtherance of the conspiratorial objectives made by any one of the conspirators in the course of these conversations would be admissible under the co-conspirator exception to the hearsay rule.

Second, even absent proof *aliunde* that each and every subpoenaed conversation was held in the furtherance of the conspiracy, any relevant taped extra-judicial statements made by defendants Haldeman or

Ehrlichman would be admissible in the government's case in chief against that particular defendant. *On Lee* v. *United States,* 343 U.S. 747, 756; *United States* v. *Lemonakis, supra,* 485 F. 2d at 949.

Furthermore, other recorded statements made during these conversations may be useful to the government for the purpose of impeaching defendants Haldeman or Ehrlichman should they elect to testify in their own behalf. *E.g., Calumet Broadcasting Corp.* v. *FCC,* 160 F. 2d 285, 288 (D.C. Cir. 1947); *United States* v. *McKeever,* 169 F. Supp. 426, 430 (S.D.N.Y. 1958). And statements on the tapes by government witnesses would be admissible to show the witnesses' prior consistent statements, should the defense attack the witnesses' credibility or the truth of their testimony on cross-examination.[102]

The Special Prosecutor's showing submitted to the district court listed, by individual subpoenaed conversation, the admissions and other statements that are contained in the recordings (according to the White House transcripts released to the public) or should be found therein (according to sworn testimony and other evidence) which would be admissible for one or more of the above-stated reasons. With respect to those conversations in late April 1973 about which there has not been detailed testimony and for which

[102] See *Monroe* v. *United States, supra.* Prior consistent statements have traditionally been admissible only to rebut charges of recent fabrication or improper influence or motive, but the Proposed Federal Rules of Evidence, Rule 801(d)(1)(B), would permit use of such statements as substantive evidence as well.

transcripts have not been made public by the White House, the Special Prosecutor argued below that the rich evidentiary vein running through the conversations already released constituted a sufficient showing that similar statements are likely to be contained in those not yet disclosed. Again, this showing was at least sufficient to shift the burden to the President to demonstrate, by submission of tape recordings of these conversations to the Court for *in camera* inspection or at least by certification of counsel, that no evidentiary material was in fact contained therein.

3. Need for the evidence prior to trial

In his affidavit in connection with the Motion of the United States for issuance of the subpoena, the Special Prosecutor stated that based on experience with other Presidential recordings a considerable amount of time would be necessary to analyze and transcribe the tapes sought by the instant subpoena and that pretrial production of the tapes was therefore warranted under Rule 17(c). At no point below has counsel for the President sought to contest this showing. A considerable amount of time is required to listen and relisten to recordings and filter or enhance them where necessary, to make accurate transcripts, to select and prepare relevant portions for trial, and to make copies for defendants where appropriate under the discovery rules. Moreover, much of this work can be performed only by attorneys knowledgeable about the case who must simultaneously prepare all other aspects of the case for trial. The Court should be advised that the

Special Prosecutor's staff originally estimated that the simple physical process described above of preparing the recordings sought for trial would require at least two months.

For these reasons, the district court correctly held that the subpoenaed items were genuinely needed prior to trial for preparation of the case and to avoid delay of the trial itself.

CONCLUSION

Settled principles of law, therefore, lead inevitably to the conclusion that the order of the district court, denying the President's motion to quash the subpoena *duces tecum* and directing compliance with it, and denying the motion to expunge the grand jury's action listing him as an unindicted co-conspirator, should be affirmed in all respects.

Respectfully submitted.

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Attorneys for the United States.

JUNE 1974.

551-550—74——11

APPENDIX

Applicable Provisions of Constitution, Statutes, Rules, and Regulations

1. The Constitution of the United States provides in pertinent part—

Article II, Section 1:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows
>
> * * * * *

Article II, Section 2:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein

otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

Article II, Section 3:

* * * he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * *

2. Title 5, United States Code, provides in pertinent part—

§ 301. DEPARTMENTAL REGULATIONS.

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and perform-

ance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Title 28, United States Code, provides in pertinent part—

§ 509. FUNCTIONS OF THE ATTORNEY GENERAL.

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

(1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.;

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and

(4) of the Board of Parole.

§ 510. DELEGATION OF AUTHORITY.

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

§ 515. AUTHORITY FOR LEGAL PROCEEDINGS; COMMISSION, OATH, AND SALARY FOR SPECIAL ATTORNEYS.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand

jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

* * * * *

§ 516. CONDUCT OF LITIGATION RESERVED TO DEPARTMENT OF JUSTICE.

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

§ 517. INTERESTS OF UNITED STATES IN PENDING SUITS.

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

§ 518. CONDUCT AND ARGUMENT OF CASES.

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United

States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

§ 519. SUPERVISION OF LITIGATION.

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

3. Rule 17, Federal Rules of Criminal Procedure, provides in pertinent part—

SUBPOENA

* * * * *

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

4. Department of Justice Order No. 551–73 (Nov. 2, 1973) 38 Fed. Reg. 30,738 adding 28 C.F.R. §§ 0.37, and 0.38, and Appendix to Subpart G–1, provides

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Order No. 551–73

Establishing the Office of Watergate Special Prosecution Force

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part O of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1(a) which lists the organization units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of Criminal Justice."

2. A new Subpart G–1 is added immediately after Subpart G, to read as follows:

"Subpart G–1—Office of Watergate Special Prosecution Force

§ 0.37 GENERAL FUNCTIONS.

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecutor appointed by the Attorney General. The duties and responsibilities of the Special Prosecutor are set forth in the attached appendix which is incorporated and made a part hereof.

§ 0.38 SPECIFIC FUNCTIONS.

The Special Prosecutor is assigned and delegated the following specific functions with respect to matters specified in this Subpart:

(a) Pursuant to 28 U.S.C. 515(a), to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct, and to designate attorneys to conduct such legal proceedings.

(b) To approve or disapprove the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order, or other demand of a court or other authority. (See Part 16(B) of this chapter.)

(c) To apply for and to exercise the authority vested in the Attorney General under 18 U.S.C. 6005 relating to immunity of witnesses in Congressional proceedings.

The listing of these specific functions is for the purpose of illustrating the authority entrusted to the Special Prosecutor and is not intended to limit in any manner his authority to carry out his functions and responsibilities."

ROBERT H. BORK,
Acting Attorney General.

Date: November 2, 1973.

APPENDIX

Duties and Responsibilities of the Special Prosecutor

The Special Prosecutor

There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

—conducting proceedings before grand juries and any other investigations he deems necessary;
—reviewing all documentary evidence available from any source, as to which he shall have full access;
—determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;
—determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders;

—deciding whether or not to prosecute any individual, firm, corporation or group of individuals;
—initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals;
—coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;
—dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining

that their consensus is in accord with his proposed action.

Staff and Resource Support

1. *Selection of Staff.*—The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budget.*—The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and Responsibility.*—The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division.—Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies.—Except as otherwise herein specified or as mutually agreed between

the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be subject to the administrative regulations and policies of the Department of Justice.

Public Reports.—The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment.—The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

5. Department of Justice Order No. 554–73 (Nov. 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G–1, provides—

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part 0—Organization of the Department of Justice

Subpart G–1—Office of Watergate Special Prosecution Force

Order No. 554–73

AMENDING THE REGULATIONS ESTABLISHING THE OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, the last sentence of the fourth paragraph of the Appendix to Subpart G–1 is amended to read as follows: "In accordance

with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, (1) the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action, and (2) the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action."

ROBERT H. BORK,
Acting Attorney General.

Date: November 19, 1973.

6. The letter from the Acting Attorney General to the Special Prosecutor on November 21, 1973, stating the intention of Department of Justice Order No. 554–73, is as follows—

OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C. 20530, November 21, 1973.

LEON JAWORSKI, Esq.,
Special Prosecutor,
Watergate Special Prosecution Force,
1425 K Street, N.W.,
Washington, D.C. 20005

DEAR MR. JAWORSKI: You have informed me that the amendment to your charter of November 19, 1973 has been questioned by some members of the press. This letter is to confirm what I told you in our telephone conversation. The

amendment of November 19, 1973 was intended to be, and is, a safeguard of your independence.

The President has given his assurance that he would not exercise his constitutional powers either to discharge the Special Prosecutor or to limit the independence of the Special Prosecutor without first consulting the Majority and Minority leaders and chairmen and ranking members of the Judiciary Committees of the Senate and the House, and ascertaining that their consensus is in accord with his proposed action.

When that assurance was worked into the charter, the draftsman inadvertently used a form of words that might have been construed as applying the President's assurance only to the subject of discharge. This was subsequently pointed out to me by an assistant and I had the amendment of November 19 drafted in order to put beyond question that the assurance given applied to your independence under the charter and not merely to the subject of discharge.

There is, in my judgment, no possibility whatever that the topics of discharge or limitation of independence will ever be of more than hypothetical interest. I write this letter only to repeat what you already know: the recent amendment to your charter was to correct an ambiguous phrasing and thus to make clear that the assurances concerning congressional consultation and consensus apply to all aspects of your independence.

Sincerely,

ROBERT H. BORK,
Acting Attorney General.

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