The Burger Court Opinion Writing Database

United States v. Nixon

418 U.S. 683 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 30, 1974

Re: 73-1766 - U. S. v. Nixon

MEMORANDUM TO THE CONFERENCE:

Enclosed is Mr. Ginty's memo which has just reached my desk. As soon as the response comes in, it will be circulated to each of you. I have asked him to prepare a memo on the response if time permits.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 4, 1974

PERSONAL

Re: 73-1766 - U. S. v. Nixon

MEMORANDUM TO THE CONFERENCE:

Enclosed is copy of a letter from the Counsel to the Special Prosecutor to the Clerk.

The "sealed" material referred to is in the vault in Mr. Rodak's custody. It is available to any Justice under usual security procedures governing sealed matter.

We should be prepared to resolve these questions at the Friday Conference.

Regards,

WEB

Encl

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1974

CONFIDENTIAL - Single Copy

Re: 73-1834 - U. S. v. Nixon, et al

MEMORANDUM TO THE CONFERENCE:

I have now consulted with the Clerk on the above matter and the confusion is both clarified and compounded.

The hearing in the District Court began at 2:00 p.m. (not 10:00 a.m.) today. The Petitioner, the Respondent and the parties defendant in the District Court criminal case are all before that Court.

The unavailability of a quroum precluded a Conference at 3:00 p.m. In the present state of this matter any call for a response or any other action would be premature and, in my judgment, ill advised. For example, it now develops that counsel for the President informally stated to the Clerk that the motion to hear the cross petition for cert under seal was precautionary in order to avoid any possible violation of the District Court sealing order. The motion in the District Court to lift the seal was prompted by the fact that publication of the indictment yesterday let part of "the cat out of the bag", and the President's counsel desired to move swiftly to let the cat out entirely.

I now conclude we should wait for the parties to come to rest and do nothing before Monday. On Monday it may be useful to have counsel consult with the Clerk to clarify who wants what.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

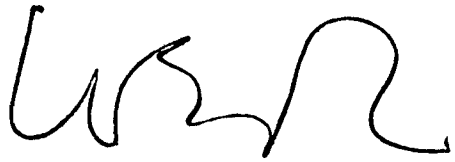
CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1974

MEMORANDUM TO THE CONFERENCE:

I think a special meeting is indicated on several matters and one pending case. I suggest we meet following the announcement of opinions on Monday, June 10.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1974

Re: No. 73-1834 - U.S. v. Nixon, et al.

MEMORANDUM TO THE CONFERENCE:

After our Conference the Clerk advised that Mr. Lacovara had informed him that the motion to lift the seal would be a joint motion and would be filed by noon today.

It is my understanding that we will ask the six defendants for expedited responses.

Unless there is a strong view that we should announce grant of the cross-petition for certiorari on a special order list, it seems to me that can wait until the regular Order List June 17 since the cross-petition was simply a precautionary measure and does not really enlarge the issues.

Absent dissent, it will be handled that way.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

73-1766

June 25, 1974

Re: NPACT Letter

Dear Bill:

I concluded that the request of the National Public Affairs Center for Television was controlled by the Court's long standing policy on the subject.

Accordingly, I referred the letter to the Marshal to say, (politely) "No". I do not intend to give a personal reply.

Regards,

Warren

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 10, 1974

Re: 73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

MEMORANDUM TO THE CONFERENCE:

As I stated at the Conference yesterday I will not await a complete draft but will send sections as they are ready.

The enclosed material is not intended to be final, and I will welcome -- indeed I invite -- your suggestions.

Regards,

WEB

More later!

CJ Draft 7/10/1974
73-1766
73-1834

Statement of Facts

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan, with various offenses, including a conspiracy to defraud the United States and to obstruct justice. At some or all of the times pertinent to the indictment, Mr. Mitchell was Chairman of the Committee for the Re-Election of the President; Mr. Haldeman and Mr. Ehrlichman were Assistants to the President. Mr. Colson was Special Counsel to the President. Mr. Mardian was employed by the President's re-election campaign; Mr. Parkinson was an attorney for that committee. Mr. Strachan was a White House Staff Assistant. The grand jury also named the President -- among others -- as an unindicted member of the conspiracy charged in the indictment. The grand jury lodged with District Court, at the time it returned the indictment, a sealed report. An accompanying memorandum recommended that the materials be submitted to the Committee on the Judiciary of the House of Representatives. The grand jury stated that it had heard evidence which, in the words of the District Court, had "a material bearing on matters within the primary jurisdiction of the Committee in its current inquiry . . . ." 370 F.Supp. 1219, 1221 (1974). At that time it was not disclosed to the District Judge or to the President's counsel that the President had been named as a co-conspirator.

Attached to WEB 7/10/1972
(As stated) 73-1766

Jurisdiction

Jurisdiction here is posited on 28 U.S.C. § 1254(1). A case must be "in" the Court of Appeals for us to exercise our jurisdiction under 28 U.S.C. § 1254. Here there may be a question whether this case was properly in the United States Court of Appeals for the District of Columbia Circuit when we granted certiorari.*/ That court's jurisdiction under 28 U.S.C. § 1291 encompasses only "final decisions of the district courts." The issue is whether the District Court's order was final, and thus properly appealable.

The finality requirement embodies a strong congressional policy against piecemeal reviews, and against the obstruction or impediment of ongoing judicial proceedings by interlocutory appeals. See, e.g., Cobbledic v. United States, 309 U.S. 323, 324-26 (1940). It promotes judicial efficien and hastens the ultimate termination of litigation.

In applying this principle to an order denying a motion to quash and requiring the production of evidence pursuant to a subpoena duces tecum it has been repeatedly held that the order is not final and hence not appealable. United States v. Ryan, 402 U.S. 530, 532 (1971); Cobbledick v. United States 309 U.S. 322 (1940); Alexander v. United States, 201 U.S. 117 (1906. This Court has

> "Consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that

---

*/ We granted expedited hearing of this case, bypassing the Court of Appeals, but it is clear that before the petition for certiorari was filed in this Court, a notice of appeal had been docketed by the President in the District Court and the certified record had been docketed in the Court of Appeals. These actions all occurred on May 24, 1974.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 11, 1974

Re: 73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

MEMORANDUM TO THE CONFERENCE:

I have received various memos in response to preliminary and partial sections circulated.

With the sad intervention of Chief Justice Warren's death, the schedules of all of us have been altered. I intend to work without interruption (except for some sleep) until I have the "privilege" section complete and the final honing complete on all parts.

I think it is unrealistic to consider a Monday, July 15, announcement. This case is too important to "rush" unduly although it is in fact receiving priority treatment.

I would hope we could meet an end-of-the-week announcement, i.e., July 19 or thereabouts.

It will take only six "presences" to do this if we are agreed on content by mid-week. My head count is that Messrs. Powell, Blackmun, Marshall, White and I are certain to be here. Only one more will be needed.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 11, 1974

Re: 73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

MEMORANDUM TO THE CONFERENCE:

Enclosed are proposed sections on Justiciability and Rule 17(c). Bear in mind the titles and numbering and sequence of parts will await the final treatment of substance.

I believe we have encountered no insoluble problems to this point.

Regards,

WEB

mc

DRAFT
7/11/74

Justiciability

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena on the ground that the matter was an intra-branch dispute not subject to judicial resolution. The argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. Flast v. Cohen, 392 83, 94-95 (1968). At the outset, the President makes clear that he does not question the jurisdiction of the Court to resolve inter-branch conflicts. Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803). Nor does he question the right of the Court to check an unconstitutional or ille assumption of powe r by the Executive Branch as in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). However, he argues, "the federal courts will not intrude into areas committed to the other branches of government." Flast, supra, at 95. He views the present dispute as essentially a jurisdictional dispute within the Executive Branch which he analogizes to a dispute between two Congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, Confiscation Cases, 7 Wall (74 U.S. 454 (1869), he argues that it follows an executive decision is final in determining what evidence is to be used in the case. Although counsel concedes the President has delegated certain specific powers to the Special Prosecutor (President's brief, p. 42), he has not "waived or delegated

DRAFT
7/11/74

[Although the parties treat the 17(c) issue last, it seems more appropriate to me to determine this matter before reaching the question of privilege. If the requirements of Rule 17(c) are not met, the subpoena duces tecum should not have been issued and the President would never have been required to interpose the claim of presidential privilege to bar its enforcement. Therefore, if the Court finds that the requirements of the Rule have not been met, it would not be necessary to reach and decide the issue of executive or presidential privilege. Cf. Arkansas-Louisiana Gas Co. v. Dept. of Public Utilities, 304 U.S. 61, 64 (1938). This section will be re-examined to accord with treatment of "presidential privilege."]

The Rule 17(c) Question

In essence, the President's counsel argues that the Special Prosecutor is attempting to use the subpoena as a discovery device, or to uncover material not yet known to him. He argues that the Special Prosecutor has requested the 64 conversations on the "bald assertion" that each "contains or is likely to contain evidence that will be relevant to the trial of this case." He also argues that the Special Prosecutor gave no factual support for his claim that some of the material may be relevant and has failed to show that each of the 64 items is evidentiary in nature. The President's counsel also notes that the Special Prosecutor contends that the statements made during the conversations may be useful to the Government for purposes of impeaching certain of the defendants should they elect to testify. In responding, counsel for the President correctly points out that the courts have generally held

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 15, 1974

Re: 73-1766 - U.S. v. Nixon
73-1834 - Nixon v. U.S.

MEMORANDUM TO THE CONFERENCE:

My effort to accommodate everyone by sending out "first drafts" is not working out.

I do not contemplate sending out any more material until it is ready. This will take longer than I had anticipated and you should each make plans on an assumption that no more material will be circulated for at least one week.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 15, 1974

Re: 73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

MEMORANDUM TO THE CONFERENCE:

In my earlier memo today on our "timetable" I should have mentioned that at Bill Douglas' urgent request I mailed him a very rough draft of what I had worked up on the weekend on the "privilege" section. On reviewing it Sunday I came to the conclusion that while it may be useful to Bill at his distance to show my "direction" it was far too rough and incomplete for circulation and I will not circulate it generally.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 17, 1974

Re: 73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

MEMORANDUM TO THE CONFERENCE:

This morning I gave a copy of the working draft of the part dealing with the claim of privilege to Mr. Justice Brennan to enable him to have it before going to Nantucket. Although it is still in rough form it is more nearly final than any of the other material previously circulated, and it may expedite our undertaking to have it in your hands now.

I hope to circulate a full opinion draft by the week's end.

Regards,

WEB

WJB made a number of suggestions, including "forthwith"!

Attached to WEB 7/17/1974 (This morn
73-1766

DRAFT
7/17/74

The Claim of Executive Privilege

A

We turn now to the issue of whether a president, by virtue of that office, ha a privilege against compliance with a judicial subpoena in a criminal case. By common law and statute various privileges against compelled testimony and compulsory production of tangible evidence have developed to protect the confiden communications, for example those between husband and wife, priest and penitent, lawyer and client, doctor and patient. The Fifth Amendment grants an absolute privilege against being required to give self incriminatory testimony. The Constitution contains an express privilege protecting members of Congress from b required "to answer in any other place" than Congress for acts and conversations i the performance of legitimate legislative duties.[1/] The term "executive privilege" i term of broad application and is asserted to be inherent in all systems of governm to ensure the confidentiality of private communications among officials concerning governmental decision and policy making. It is urged that in our system of divided powers allocated to three separate coordinate branches, the independence of each requires that internal deliberations in decision making be protected from public disclosure.

The effective functioning of the judicial system, however, requires that courts obtain evidence and only recently the Court restated an ancient proposition o the law, albeit in the context of a grand jury inquiry rather than a trial,

> " ' the public . . . has a right to every man's evidence' except for those persons protected by a constitutional, common law or statutory privilege, United States v. Bryan, 339 U.S. at 331 (1949); Blackmer v. United States, 284 U.S. 421, 438 (1932) . . . ."
> Branzburg v. U.S., ____ U.S. ____ (1973).

1/ U.S. Const. Art. I, Sec. 6; cf., United States v. Johnson, 319 U.S. 503; United States v. Brewster, 408 U.S. 501; Gravel v. United States, 408 U.S. 606.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 20, 1974

Re: 73-1766 - U.S. v. Nixon
73-1834 - Nixon v. U.S.

MEMORANDUM TO THE CONFERENCE:

Enclosed is a draft of the proposed opinion.

As you are aware, this is the first opportunity I (or anyone) have had to see the entire product. There will inevitably be rough spots, repitition and possible re-location of parts. Some differences may remain but I believe most will be semantical and stylistic.

I will continue to hold myself available for discussions but I doubt that a full scale conference at this point would be productive.

Regards,

WEB

Powell
Received 7/20/74

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73–1766 AND 73–1834

United States, Petitioner, 73–1766 *v.* Richard M. Nixon, President of the United States, et al. Richard M. Nixon, President of the United States, Petitioner, 73–1834 *v.* United States.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

14
16
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26
27

[July —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents for review the denial of a motion, filed on behalf of the President, to quash a third-party subpoena duces tecum issued by the United States District Court for the District of Columbia, pursuant to Fed. Rule Crim. Proc. 17 (c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17 (c). The President appealed to the Court of Appeals. We granted the United States' petition for certiorari before judgment,[1] and also the President's responsive cross-

[1] See 28 U. S. C. §§ 1254 (1) and 2101 (e) and our Rule 20. See, *e, g., Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 937, 579,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 22, 1974

PERSONAL

Re: 73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

MEMORANDUM TO THE CONFERENCE:

Potter's memo of July 22, 1974 enclosing a revision of Part "C" prompts me to assure you that I will work on it promptly with the hope to accommodate those who wish to get away this week.

The two versions can be accommodated and harmonized and, indeed, I do not assume it was intended that I cast aside several weeks work and take this circulation as a total substitute.

I will have a new draft of Part "C" along as soon as possible. I take it for granted voting will be deferred until the revised opinion is recirculated. There are miscellaneous changes throughout but none of great moment.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 23, 1974

Re: 73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

MEMORANDUM TO THE CONFERENCE:

Enclosed is revised Section "C", which, through informal discussions has been viewed by some members of the Court who proposed changes.

As I view this revised Section "C", it does not differ in substance from the original circulation.

Depending on mechanical problems we may be able to schedule this announcement for Wednesday if that gives time for full review. I am not aware of any separate opinions but that might cause some delay.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 23, 1974

Re: 73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

Dear Lewis:

All of your suggestions in today's memo are entirely acceptable to me. With minor verbal adjustments to "shoehorn" them in, I am accepting them -- subject always to the views of four!

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 23, 1974

MEMORANDUM TO THE CONFERENCE:

If we are to "hold a court" tomorrow we should probably have a Conference at 1:30 today. The bell will be rung at 1:25. An informal agenda is attached. Any other matters can also be taken up.

Regards,

WEB

Attachment

Pending for Conference - Tuesday, July 23, 1974 - 1:30 p.m.

Holds for 73-507 - Hamling v. U. S.

See Conference List dated June 25, 1974 - p. 1 & 2

Holds for 73-434 - Milliken v. Bradley

See Conference List dated June 25, 1974 - p. 4

A-1282 - Marshall v. Ohio

A-1283 - Kensinger v. Ohio

Applications for Stays

73-1650 - Kerner v. United States

Motion to expedite and Petition for Rehearing

73-2001 - Mitchell v. Sirica

Motion to expedite and Petition for Cert

A-1265 - Missouri Portland Cement Co. v. Cargill

Motion to Vacate Stay granted by Justice Douglas

A-1305 - Times-Picayune Publishing Corp. v. Schulingkamp

Application for Stay

Circulated Opinions

73-434 - Milliken v. Bradley
73-435 - Allen Park Public Schools v. Bradley
73-436 - Grosse Pointe Public School System v. Bradley

73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

To: File Copy

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 23, 1974

This is C.J.'s first full printed draft after changes in her draft of 7/20 were made, primarily in C of Part IV

Re: 73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

MEMORANDUM TO THE CONFERENCE:

Enclosed are two copies of the opinion NOT PROOFREAD. I send it in that form because you can evaluate the substance of any changes since the first draft.

Immediately on having seven "joins" I will order a full print -- obviously with corrections and changes, if any.

I suggest that if we need to meet it should be approximately one-half hour after delivery of this draft.

Regards,

WEB

P.S. This can be ready by 10:00 AM Wed. Milliken can also be ready. The Order List "holds" cannot be ready until perhaps Friday. For my part an Order list approved by all Justices can come down in Term or out & without Justices being on the Bench WEB

L.F.P.

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

I will join this opinion only in the interest of unanimity. In my view, while result is correct, the reasoning on basic Const. issue is unimpressive. Marbury also is misapplied, as I view it.
L F P

2nd DRAFT

From: The Chief Justice

Circulated: _____

Recirculated: JUL 23 1974

(Received at 5.40 P.M. following our Conference from 1.30 PM to 3.15 P.M.)

15

SUPREME COURT OF THE UNITED STATES

Nos. 73-1766 AND 73-1834

United States, Petitioner,
73-1766 *v.*
Richard M. Nixon, President of the United States, et al.

Richard M. Nixon, President of the United States, Petitioner,
73-1834 *v.*
United States.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit before judgment.

[July —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These cases present for review the denial of a motion, filed on behalf of the President of the United States, to quash a third-party subpoena *duces tecum* issued by the United States District Court for the District of Columbia, pursuant to Fed. Rule Crim. Proc. 17 (c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17 (c). The President appealed to the Court of Appeals (D. C. Cir.). We granted the United States' petition for certiorari before judgment,[1] and also the President's respon-

[1] See 28 U. S. C. §§ 1254 (1) and 2101 (e) and our Rule 20. See, *e. g., Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 937, 579,

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Mr. Justice Douglas; J.

SUPREME COURT OF THE UNITED STATES

Nos. 73-1766 AND 73-1834

Circulate: 7-5

Recirculated:

United States, Petitioner,
73-1766 *v.*
Richard M. Nixon, President of the United States, et al.

Richard M. Nixon, President of the United States, Petitioner,
73-1834 *v.*
United States.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Reviewed 7/5

[July —, 1974]

Memorandum from MR. JUSTICE DOUGLAS.

On April 18, 1974, at the request of the Special Prosecutor, the District Court issued a subpoena *duces tecum* to respondent Richard M. Nixon, President of the United States, directing him to produce tape recordings and documents relating to 64 conversations between the President and his advisors. These materials were sought by the Special Prosecutor for use at the impending trial in *United States* v. *Mitchell et al.*, Cr. No. 74-110 (D. D. C.); the subpoena was issued pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure.

On May 1, 1974, respondent filed a Special Appearance and Motion to Quash the subpoena, claiming that the materials sought "are within the constitutional privilege of the President to refuse to disclose confidential information when disclosure would be contrary to the public interest." On May 13, 1974, respondent further moved for an order expunging the grand jury's naming

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 5, 1974

MEMO TO CONFERENCE:

I enclose herewith an explanatory memorandum in the Nixon cases which I prepared to expedite my own resolution of the main issues.

WILLIAM O. DOUGLAS

THE CONFERENCE

pp. 1, 15, 21, 24-26, 29
and stylistic changes

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr.
Mr.
Mr.
Mr.

3rd DRAFT

From:

Circ.

Recirc.

7-5 (also)

7-5

w/ cover ltr explaining the 5 votes

SUPREME COURT OF THE UNITED STATES

Nos. 73–1766 AND 73–1834

United States, Petitioner,
73–1766 *v.*
Richard M. Nixon, President of the United States, et al.

Richard M. Nixon, President of the United States, Petitioner,
73–1834 *v.*
United States.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[July —, 1974]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 8, 1974

MEMO TO CONFERENCE:

In the Nixon cases being argued today my memo inadvertently omitted a section dealing with the adequacy of the showing under Rule 17(c).

I enclose a xerox sheet covering the point.

It goes into the memo after the 1st full sentence of the second paragraph on p. 28, taking the place of the last two sentences of that paragraph.

WO

WILLIAM O. DOUGLAS

The Conference

p. 5, 25-26 and stylistic changes

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Circulated:

Recirculated: 7-8

Nos. 73–1766 AND 73–1834

United States, Petitioner,
73–1766 *v.*
Richard M. Nixon, President of the United States, et al.

Richard M. Nixon, President of the United States, Petitioner,
73–1834 *v.*
United States.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[July —, 1974]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 11, 1974

Dear Chief:

In re the Nixon cases and your circulation of July 10th:

I

In your statement of facts p. 1, line 7, I think the Committee is the Committee to Re-Elect the President. On p. 1, line 12, after also, insert "in a second report". On p. 1, line 13 the part beginning "The grand jury lodged" through the 1st two lines on p. 2, since we are dismissing the cross-petition this material seems unnecessary. P. 2, line 11, Strachan is the one named by the Special Prosecutor, breif at 13, as the third defendant; the President's brief says it was Ehrlichman; the docket entry for April 19th says it was Parkinson. Perhaps line 11 could read: "Three defendants formally joined" etc.

II

Your treatment of jurisdiction is okay.

WOD
William O. Douglas

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 11, 1974

Dear Chief:

Bill Brennan has shown me his draft numbered Roman II, entitled "Intra-Branch Dispute" in the Nixon cases. I have gone over this proposal of his and it seems to me to be adequate and might put us quickly another rung up the ladder if the other Brethren agree.

WOD
William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 11, 1974

Dear Chief:

I join Bill Brennan's suggestion for a foot note on the Rule 17 (C) portion of the opinion dealing with the showing of "compelling need".

WOD

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 11, 1974

Dear Chief:

I have Potter's memo to you in the Nixon cases respecting the problem of appealability of the order. His proposal meets with my approval and it might be more acceptable to the Brethren than the early preliminary draft which you circulated and to which I agreed.

I'm still hoping that perhaps we can get the thing behind us and hand down the opinion on Monday.

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 12, 1974

Dear Chief:

I have your section called Justiciability in the Nixon cases and I have read and re-read the draft of Bill Brennan. As I wrote you earlier I approved of Brennan's treatment and I would, with all respect, prefer it over the version which you circulated this morning.

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 12, 1974

Dear Chief:

I have Lewis' revision of his views on the Executive Privilege under a covering letter of July 12th addressed to you. I don't think it is necessary to reach the decision of whether this is based on the Constitution. The office of the President as I read the Constitution is to execute the laws faithfully. A conspiracy to violate the laws or a conspiracy to protect people who have violated the law cannot be brought under Article 2 of the Constitution. We have here, according to the allegations, a conspiracy. The Grand Jury has found that the President was a co-conspirator and the District Judge has found that the conversations relating to the Watergate affair with the President and his aids were both relevant and presumably admissible in the criminal trials pending. What he will discover when he actually gets the tapes and examines them we do not know, but on the basis of the showing so far, conversations relating to law violations are impossible to bring within the scope of Article 2 obligations.

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 12, 1974

Dear Chief:

Byron has given me a copy of his addition to your treatment of the Rule 17 (C) questions. Byron's suggestions look fine to me.

WOD

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 12, 1974

Dear Chief:

I do not believe I can join your Rule 17 (C) section of the Nixon case opinion.

1. The last two lines on page 5 "in this process a judge must be conscious of the sensitivity of publication of presidential confidences". That seems to reintroduce a phase of "compelling need". My difficulty is that when the President is discussing crimes to be committed and/or crimes already committed with and/or by him or by his orders, he stands no higher than the mafia with respect to those confidences.

2. Note 2 on page 5 it is said that the length of time required for transcription bear on admissibility. I could not agree to that. Evidence used for impeachment might well be made available to the parties on a later time table, but it still is admissible.

3. In note 3, page 5, the correct citation is 25 Fed. Cas. 187.

William O. Douglas

The Chief Justice

cc: The Conference

July 19, 1974

Dear Chief Justice:

Byron's memo of July 13, 1974, dealing with Rule 17(c) is O.K. with me.

W. O. D. mcb

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

July 23, 1974

Dear Chief:

I agree with your opinion in 73-1766, United States v. Nixon as reflected in your first printed draft with your new Part C which is a revision of Potter's proposal. I think the opinion is ready to go and I hope we hand it down tomorrow at 10 a.m.

This is one instance when I think a rather full oral announcement should be made.

I also hope we can have a Conference today--Tuesday, July 23rd.

WOD

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 14, 1974

MEMORANDUM TO THE CONFERENCE

RE: No. 73-1766 United States v. Nixon
No. 73-1834 Nixon v. United States

Potter, Byron and I sat down yesterday and agreed to suggest to the Conference that we vacate the original order of May 31 and substitute a new order along the lines of the following:

The Court's order of May 31, 1974 is vacated sua sponte, and in lieu thereof, it is ordered that

1. The motion of the Special Prosecutor to unseal those portions of the record ordered sealed by the District Court on May 13, 1974 is granted only insofar as the records of the proceedings in the District Court and in the Court of Appeals transmitted to this Court disclose that the Grand Jury charged the President as an unindicted co-conspirator, and is otherwise denied.

2. The petition and the cross-petition for certiorari are granted and the parties will brief and argue only the following questions of law that require no reference to the materials that remain under seal.

(a) Is the District Court order of May 20, 1974 an appealable order?
(b) Does this Court have jurisdiction to entertain and decide the petition for mandamus transmitted by the Court of Appeals to this Court?
(c) Did the District Court err in determining that a dispute between the President and Special Prosecutor regarding the production of evidence is not an intra-branch controversy wholly within the jurisdiction of the Executive Branch to resolve?
(d) Under the Constitution, does a Grand Jury have the authority to charge an incumbent President as an unindicted co-conspirator in a criminal proceeding?
(e) Is the President, when he has assumed sole personal and

physical control over evidence arguendo material to the trial of charges of obstruction of justice in a federal court, subject to a judicial order directing compliance with a subpoena duces tecum issued on the application of the Special Prosecutor in the name of the United States?

(f) Is a federal court bound by the assertion by the President of an absolute "executive privilege" to withhold arguendo material evidence from the trial of charges of obstruction of justice by his own White House aides and party leaders, upon the ground that he deems production to be against the public interest?

(g) Can a claim of executive privilege based on the generalized interest in the confidentiality of government deliberations block the prosecution's access to evidence material and important to the trial of charges of criminal misconduct by high government officials who participated in those deliberations, particularly where there is arguendo a prima facie showing that the deliberations occurred in the course of the criminal conspiracy charged in the indictment.

(h) Has any executive privilege that otherwise might have been applicable to discussions in the offices of the President concerning the Watergate matter been waived by previous testimony pursuant to the President's approval and by the President's public release of 1,216 pages of edited transcript of forty-three Presidential conversations relating to Watergate?

3. The parties shall exchange and file briefs by 1:00 P.M. on June 21, 1974, and any responsive brief shall be filed by July 1, 1974. Oral argument is set for July 8, 1974 at 10:00 A.M. The Special Prosecutor and Counsel for the President are each allowed one hour for oral argument.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this order.

COMMENT:

The material that remains under seal is relevant only to the factual questions whether the "good cause" requirement of Rule 17(c) has been complied with, and whether the Grand Jury charged the President on sufficient evidence. If the Special Prosecutor prevails, those issues can be remanded to the Court of Appeals for decision. This seems advisable, not only because we should not get bogged down in factual determinations, but also because it sustains the unanimous objection of the indicted part ies to release of sealed materials.

The special provision naming the parties to argue orally is suggested because of the uncertainty whether counsel for the indicted parties expect to participate. Perhaps Mike Rodak should ask them.

W.J.B.Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM J BRENNAN JR.

73-1766

June 25, 1974

MEMORANDUM TO THE CONFERENCE

I thought I would answer the letter of the National Public Affairs Center for Television by simply stating that I would not support an exception to our Rule against filming of our proceedings. It may be that others will have a different view. May we discuss it for a moment or so before we go on the bench at tomorrow morning's session?

W.J.B.Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 8, 1974

MEMORANDUM TO THE CONFERENCE

RE: No. 73-1766 United States v. Richard M. Nixon
No. 73-1834 Richard M. Nixon v. United States

I am greatly impressed by Lewis' analysis in his memorandum, particularly by his Part III. I think, however, that his Part IV requires some expansion and I am taking the liberty of circulating the attached in the hope that it may serve to focus that problem in our conference discussion.

W.J.B. Jr.

No. 73-1766 United States v. Richard M. Nixon
No. 73-1834 Richard M. Nixon v. United States

Mr. Justice Powell
Mr. Justice Rehnquist

From: [illegible], J.

Circulated: JUL 8 1974

Recirculated: _____

Rule 17(c) of the Federal Rules of Criminal Procedure is, we believe, adequate to protect the President from unnecessary interference or harassment. That rule provides that a subpoena duces tecum may be quashed or modified "if compliance would be unreasonable or oppressive." In the case of a subpoena between parties, this limitation predicates enforcement of a subpoena only when the District Court can conclude that the application is made in good faith; that the material sought is evidentiary in character and relevant to issues likely to be raised at trial; and that the material will assist in pre-trial preparation and is not otherwise obtainable prior to trial by reasonable efforts. See Bowman Dairy Co. v. United States, 341 U.S. 214 (1951); United States v. Iozia, 13 F.R.D. 335 (SDNY 1952) (Weinfeld,J.).*

These standards were the touchstone of the District Court's decision in the present case. After the District Court had issued a subpoena duces tecum, the President moved to quash. In response to that motion, the Special Prosecutor submitted to the District Court a legal

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* The President argues that Rule 14(c) requires that the Special Prosecutor demonstrate to the District Court knowledge of the precise contents of the subpoenaed materials. Acceptance of that argument would severely impair the effectiveness of Rule 17(c). Rejecting a similar argument in United States v. Burr, 25 Fed. Cas. 187, 191 (No. 14694)(C.C.D. Va. 1807), Chief Justice Marshall persuasively reasoned: "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?"

July 10, 1974

Dear Chief;

The attached is the memo I mentioned at yesterday's conference that expresses my views of the President's claim that the subpoena involved merely a dispute between two entities within the Executive Branch. I think the analysis tracks your oral analysis yesterday of the issue. Needless to say insofar as its incorporation, or any part of it, furthers your preparation of the opinion I freely deed it to you in fee simple absolute. I don't think I presume in saying that that is also the thought of the brethren who have sent you memos on this and other issues. I think Lewis, Potter and Bill Douglas (I borrowed some of the attached from Bill's memo) have written out some particularly persuasive views.

I repeat that I enthusiastically share the view expressed I think by all yesterday that we should announce our decision in this case as promptly as the preparation of a thoughtful and comprehensive opinion will permit. To the extent you find useful what others of us have written out, that objective is of course furthered.

Sincerely,

WOVB

The Chief Justice

July 10, 1974

Dear Chief:

Enclosed is the suggested paragraph dealing with the even higher standard than the exacting one of 17(c). Frankly, I don't think it's deserving of much more than footnote treatment, perhaps in your general 17(c) discussion. I am assuming that your section on 17(c) will follow the section on Presidential privilege which will conclude that that privilege whether constitutional or common law is not applicable to the material we are concerned with here.

Sincerely,

WJB

The Chief Justice

Encl.

The district court not only concluded that the exacting standards of Rule 17(c) were satisfied, but also that the Special Prosecutor had demonstrated a "need sufficiently compelling" under Nixon v. Sirica, 487 F. 2d 700 (CADC 1973) to rebut the President's privilege. We have no occasion to decide whether common-law or constitutional principles require that the government meet a standard higher than the strictures of Rule 17(c), since in any event whatever such a standard might entail, it would not exceed that found by the district court to have been satisfied by the Special Prosecutor in this case.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 11, 1974

Dear Chief:

I agree with Potter's preference for Bill Douglas' draft on appealability revised as Potter suggests.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 11, 1974

MEMORANDUM TO THE CONFERENCE

For those to whom I have not already given a copy, attached is a copy of the "Intra-Branch Dispute" draft mentioned in Bill Douglas's memorandum to the Chief Justice of July 11. It's really an expansion of Bill Douglas's original draft.

W.J.B.Jr.

Nixon Case

II

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

Circulated: 7-11-74

Recirculated: _____

On April 16, 1974, the Special Prosecutor, on behalf of the United States, requested the District Court to issue a subpoena decus tecum to the President of the United States for production and inspection of certain evidence thought by the Special Prosecutor to be important to the government's proof at the criminal trial of United States v. Mitchell, et al. The subpoena was issued two days' later and made returnable on May 2, 1974. The President, thought his White House counsel, entered a special appearance on May 1, 1974, and moved to quash the subpoena. The President's motion was opposed by the government, and in reply to that opposition, the President contended for the first time that the court lacked "jurisdiction to consider the Special Prosecutor's request of April 16, 1974, relating to the disclosure of certain presidential documents" on the ground that the subpoena involved merely a "dispute between two entities within the Executive Branch."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 12, 1974

RE: No. 73-1766 United States v. Nixon
No. 73-1834 Nixon v. United States

Dear Chief:

I think that Harry's suggested revision of the Statement of Facts is excellent and I hope you could incorporate it in the opinion.

Sincerely,

The Chief Justice

cc: The Conference

To: The Chief Justice
✓ Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

II

From: Brennan, J.

Circulated: 7-12-74

Recirculated: _____

On April 16, 1974, the Special Prosecutor, on behalf of the United States, requested the District Court to issue a subpoena decus tecum to the President of the United States for production and inspection of certain evidence thought by the Special Prosecutor to be important to the government's proof at the criminal trial of United States v. Mitchell, et al. The subpoena was issued two days' later and made returnable on May 2, 1974. The President, thought his White House counsel, entered a special appearance on May 1, 1974, and moved to quash the subpoena. The President's motion was opposed by the government, and in reply to that opposition, the President contended for the first time that the court lacked "jurisdiction to consider the Special Prosecutor's request of April 16, 1974, relating

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 15, 1974

RE: No. 73-1766 United States v. Nixon
No. 73-1834 Nixon v. United States

Dear Byron:

I fully agree with your expanded Sec. 17(c) treatment, recirculated July 13, 1974, and hope it can serve to cover that issue in the Court's opinion.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 15, 1974

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

Circulated:

Recirculated:

OK except for change on p 20

RE: No. 73-1766 United States v. Nixon
No. 73-1834 Nixon v. United States

Dear Lewis:

May I suggest two changes in your proposed Part IV with which in all other respects I fully agree and can readily join.

First, at page 18, revise the sentence now reading "Subpoenaed materials are 'essential to the justice of the case' if they are admissible, probative, not otherwise obtainable, or merely cumulative, and relevant and material to the resolution of the issues at hand", (1) to delete the underscored words "or merely cumulative" (otherwise we'd give the appearance of accepting St. Clair's argument that Jaworski already has all the evidence he needs and convert the whole proceeding before Judge Sirica into a fight over whether he does or doesn't), and (2) to substitute for the underscored "at hand" the words "to be decided" and introduce the sentence with the words "In the context of a criminal proceeding" (this is to carry through our basic theme that what we say is confined to criminal cases).

Second, Reword that part of page 20 beginning at the middle of the page with the sentence "We think the District Court applied the correct standard" and substitute

> "We take this to be a conclusion that the Special Prosecutor has demonstrated a strong likelihood that the subpoenaed materials contain evidence that is not only relevant but also admissible with respect to the charges made in the indictment. (I wholly agree with you that there must be a constitutional standard because the presidential privilege of confidentiality has a constitutional source. But I think that this showing satisfies the constitutional standard.) On the basis of our own review of the Special Prosecutor's

> showing, we cannot say that the District Court erred in ordering the President, on the basis of that conclusion, to submit the subpoenaed material to in camera inspection. The District Court's conclusion establishes that the production is 'essential to the justice of the case', United States v. Burr, supra, and in that circumstance we hold that the presidential claim of privilege must yield."

I also attach a suggested concluding part (I've numbered it V. but that may not be the right figure). You will recognize it as a revision of pages 3 and 4 of my initial suggested Part IV circulated on July 8. I call your particular attention to the concluding sentence "The mandate shall issue forthwith." If the present timetable for trial on September 9 is maintained, I suppose we should try to the extent we can to accommodate it.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

* * * * * * * * * * * * *

Proposed Part IV

In determining whether to order the President to produce records of confidential communication for use in a criminal trial, a court should be guided by a solicitous concern for the effective discharge of his duties and the dignity of his high office. Of course, no citizen should be subjected to unwarranted inroads on his time or interruptions of his affairs, but the public interest in preserving the confidentiality of the Oval Office and in avoiding vexatious harassment of an incumbent President is of an entirely different order of importance. Consequently, we believe that "[i]n no case of this kind would a court be required to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed. Cas. 187, 191 (No. 14964) (CCD Va. 1807)(per Marshall, C.J.). Rather, courts should follow standards and procedures designed to afford appropriate protection

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
USTICE WM. J. BRENNAN, JR.

July 18, 1974

Re: Nixon Cases

Dear Chief,

This will formally confirm that your "working draft" circulated July 17, of "The Claim of Executive Privilege" reflects for me a generally satisfactory approach to the decision of that important question. I do however agree with Potter that St. Clair's argument, that the President alone has the power to decide the question of privilege, must be dealt with. Potter's suggested way is satisfactory to me. I expect also to have some suggestions and will pass them along to the Conference when I have worked them out.

Sincerely,

WJB
by TMJ

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 23, 1974

Re: Nixon Cases

Dear Chief:

May I suggest a single further change. It is in subsection IV(E) at page 27, fourth line from the bottom of the page. I suggest the substitution for the words "to be both" the single word "probably." This would make clear that the final determination of admissibility is not made until trial and therefore, that the judge need only be satisfied at this stage that the material is "probably" admissible in evidence and relevant to the issues to be decided at trial.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 14, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1766, United States v. Nixon
No. 73-1834, Nixon v. United States

Enclosed herewith are two suggested proposed orders which reflect my views of the action we should take in this matter.

It seems to me that, in view of the fact that the motion to unseal was filed several days ago and of the short time remaining for briefing and oral argument, it would be most desirable for these orders to be issued as promptly as possible.

P.S.

P. S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

July 8, 1974

MEMORANDUM TO THE CONFERENCE
(Except Mr. Justice Rehnquist)

Re: No. 73-1766, United States v. Nixon
No. 73-1834, Nixon v. United States

Enclosed herewith are two copies each of memoranda prepared in my office discussing the principal issues in the case we heard this morning. While these memoranda are primarily the work of my law clerks, they were prepared under my continuing supervision, and I basically subscribe to what is said in each of them.

P.S.

P.S.

U.S. Dist
2005

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

July 11, 1974

Re: No. 73-1766, United States v. Nixon

Dear Chief,

Responding to your circulation of yesterday, I think, will all due respect, that Bill Douglas' draft on appealability is entirely adequate, and would suggest that it be incorporated into the Court opinion with the following minor changes:

1. I would revise the first paragraph on page 3 of Bill's circulation along the following lines: The threshold question presented is whether the District Court's order of May 20, 1974 was an appealable order. If not, the appeal was not "in" the Court of Appeals and is not properly before this Court on certiorari.*

   * "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C. § 1254.

2. In the final paragraph of Part I of Bill's circulation (p. 5), I would change "I would hold" to "we hold," and would keep your suggested footnote at

the end of that sentence, with the first sentence of the footnote changed along the following lines: The parties have suggested other jurisdictional grounds upon which the Court may review this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

July 12, 1974

Re: Nixon Case

Dear Chief,

In your draft discussion of "Justiciability" I think the words "an executive" in the fifth line from the bottom on the first page should be changed to "the President's." If that change is made, I could subscribe to this draft as part of the opinion. I could equally cheerfully subscribe to Bill Brennan's version.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

July 12, 1974

Re: Nixon Case

Dear Chief,

I think Harry Blackmun's revision of the statement of facts is a fine job, and I would join it as part of the Court opinion, with a couple of minor additions:

(1) Insert a sentence after the sentence ending with the words "of Rule 17(c)" in the fourth line from the bottom on page 1, along the following lines:

> The President sought review of the District Court's order in the Court of Appeals for the District of Columbia Circuit.

(2) Insert after the sentence ending on the first line of page 8, a sentence along the following lines:

We granted this petition on May 31, 1974, ___U. S. ___.

After the sentence ending on the second line on page 8, insert a sentence along the following lines:

We granted this petition on June 15, 1974, ___U. S. ___.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

July 15, 1974

Re: Nixon Cases

Dear Chief,

I agree with Byron's revision of the discussion of the Rule 17(c) issues.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Received from J. Stewart 7/16/74 (This includes much of my memo of 7/6) Was not accepted

IV.

Having determined that the requirements of Rule 17(c) have been satisfied in this case, we must confront the President's claim that he is nonetheless entitled to have the subpoena quashed because of a constitutional privilege to refuse to disclose confidential conversations with and among his aides and advisers. The President's first and broadest contention is that the judiciary is without power to review this claim of privilege once he has formally asserted it. He argues alternatively that, even if his claim of privilege is subject to judicial review, the courts should hold as a matter of constitutional law that the privilege he has asserted must prevail over the subpoena duces tecum in this case.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

July 17, 1974

Re: Nixon Cases

Dear Chief,

While I appreciate that your circulation today of the part dealing with the claim of executive privilege is "still in rough form," there is one matter of substance about which I think it important to communicate my views to you and our colleagues promptly. I think the first sentence under "B" on page 3 is misleading. Unless I have completely misunderstood Mr. St. Clair's brief and oral argument, his primary contention on the merits is that the President alone has the power to decide the question of privilege, and that the Judicial Branch has no role to play. (See Part IV of Mr. St. Clair's opening brief, beginning on page 48.)

I strongly believe, therefore, that the Court opinion must contain an unambiguous response to this argument. It seems to me that this response should probably come at the beginning of the discussion of the claim of executive privilege. Enclosed is a draft of the kind of discussion I have in mind.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

THE CLAIM OF EXECUTIVE PRIVILEGE

Having determined that the requirements of Rule 17(c) have been satisfied in this case, we must confront the President's claim that he is nonetheless entitled to have the subpoena quashed because of a constitutional privilege to refuse to disclose confidential conversations with and among his aides and advisers. The President's first and broadest contention is that the judiciary is without power to review this claim of privilege once he has formally asserted it. He argues alternatively that, even if his claim of privilege is subject to judicial review, the courts should hold as a matter of constitutional law that the privilege he has asserted must prevail over the subpoena duces tecum in this case.

A.

We unreservedly reject the claim that the President alone, by simple assertion of privilege, had the unreviewable power to decide not to deliver the subpoenaed materials to the District Court. Under our Constitution, it is only the Judicial Branch that is ultimately empowered to determine questions of law, even though those questions may involve the scope of the other branches' powers.*/

This basic postulate of our constitutional system was strikingly confirmed a generation ago in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, where this Court held invalid the President's asserted power to seize the nation's

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*/ The only limiting principle is that expressed in Mississippi v. Johnson, 4 Wall. 475, which held that it is not for the judiciary to determine whether or not the President is faithfully executing the laws. The Court there noted that "the duty thus imposed [by Art. II] on the President is in no just sense ministerial. It is purely executive and political."

steel mills. Perhaps even more relevantly, several recent decisions of this Court have made clear that it is for the judiciary alone to delineate the scope of constitutional immunity or privilege, even the explicit immunity conferred upon members of the Legislative Branch by the Speech and Debate Clause, U. S. Const. Art. I, sec. 6. Doe v. McMillan, 412 U.S. 306, 318, n. 12; Gravel v. United States, 408 U.S. 606; United States v. Brewster, 408 U.S. 501; United States v. Johnson, 329 U.S. 503.

As the Court stated in Baker v. Carr, 369 U.S. 186, 211, and reaffirmed in Powell v. McCormack, 395 U.S. 486, 521, "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority

has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." . . ." Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." Powell v. McCormack, supra, at 549 (footnote omitted).

We hold, in short, that no part of the "judicial power of the United States" which Art. III, §1, of the Constitution vests in the federal courts can by insistence of the President on "executive privilege" be shared by him. Any other view would be false to the basic concept of the separation of powers

that lies at the very heart of our constitutional structure -- a structure whose primary purpose was to insure against tyranny.*/ As James Madison made the point, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist, No. 47, p. 313 (S. F. Mittel ed. 1938).

Under our Constitution, "no man can be judge in his own case, however exalted his station, however righteous his motives. . . ." Walker v. City of Birmingham, 388 U. S. 307, 320-321. As the Court put the matter in United States v. Lee,

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*/ In the words of Mr. Justice Brandeis, "[t]he doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." Myers v. United States, 272 U. S. 42, 293.

106 U. S. 196, 220:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

And, in the classic words of Chief Justice Marshall in Marbury v. Madison, 1 Cranch 137, 177: "It is emphatically the province and the duty of the judicial department to say what the law is."

The existence and scope of Presidential privilege is thus a judicial question for the Judicial Branch alone to decide. It is a question that must, therefore, be decided here and now.

Supreme Court of the United States
Washington, D. C. 20543

July 22, 1974

Re: Nixon Cases

MEMORANDUM TO: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Blackmun
Mr. Justice Powell

Byron, Thurgood, and I were here in the building on Saturday afternoon when the printed draft of the tentative proposed opinion was circulated. After individually going over the circulation, we collected our joint and several specific suggestions and met with the Chief Justice in order to convey these suggestions to him.

With respect to IV(C), beginning on page 22 of the proposed opinion, our joint suggestions were too extensive to be drafted on Saturday afternoon, and I was accordingly delegated to try my hand at a draft over the week-end. The enclosed draft embodies the views of Byron, Thurgood, and me, and we have submitted it to the Chief Justice this morning.

As of now, Byron, Thurgood, and I are prepared to join the proposed opinion, if the recasting of IV(C) is acceptable to the Chief Justice, and on the assumption that problems re the specificity vel non of IV(E), beginning on page 27, are resolved.

At this late stage it seems essential to me that there be full intramural communication in the interest of a cooperative effort, and it is for this reason that I send you this memorandum bringing you up to date so far as I am concerned.

P. S.

Copies to: The Chief Justice
Mr. Justice White
Mr. Justice Marshall

P. S. - As you will observe, the enclosed draft borrows generously from the draft of the Chief Justice as well as Lewis Powell's earlier memorandum.

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Beginning at the top of page 22, and ending at subsection "D" on page 26, substitute the following language:

nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of (the) courts in administering justice.

C.

Since we conclude that the legitimate needs of the judicial process may outweigh presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the judiciary from according high respect to the representations made on behalf of the President. United States v. Burr, 25 Fed. Cas. 187, 190, 191-192 (No. 14,694) (1807).

. The right of a president to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the private citizen and added to that the necessity for protection of the public interest in candid, objective and even blunt or harsh opinions in presidential decisionmaking. A president and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.* / In Nixon v. Sirica,

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* / "Freedom of communication vital to fulfillment of wholesome relationships is obtained only by removing the specter of compelled disclosure....[G]overnment...needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 FRD 318, 325 (DDC 1966). See Nixon v. Sirica, ___U.S. App. D.C. ____, _____, 487 F.2d 700, 713 (1973);

____U.S. App. D.C. ___, 487 F.2d 700 (1973), the Court of Appeals held that such presidential communications are "presumptively privileged," id., at 717, and this position is accepted by both parties in the present litigation. We agree with Chief Justice Marshall's observation, therefore, that "in no case of this kind would a court be required to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed. Cas. 187, 191 (No. 14,694) (CCD Va. 1807).

[footnote continued from preceding page]

Kaiser Aluminum & Chem. Corp. v. United States, 157 F.Supp. 939 (Ct. Cl. 1958) (per Reed, J.); The Federalist No. 64 (S.F. Mittel ed. 1938).

But we are a nation governed by the rule of law. Nowhere is our commitment to this principle more profound than in the enforcement of the criminal law, "the twofold aim of which is that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88 (1935). Conviction of the guilty and exoneration of the innocent are matters of the greatest consequence for a people devoted to equal justice under law. Individuals are subject to criminal penalties for conduct proscribed by society. The imposition of such penalties turns on what was done and by whom and with what intent. Enforcement of the criminal law requires ascertainment of these facts. It is, in short, a search for truth.

We have committed that pursuit to an adversary system in which the parties contest all issues before a court of law. To develop their opposing contentions of fact, the parties are entitled to invoke the court's authority to compel production of relevant evidence.

Because the adversary nature of our system is tempered by an overriding concern for fairness to the individual, the prosecutor has an obligation to reveal evidence that may be favorable to the defense. See Brady v. Maryland, 373 U. S. 83 (1963). In addition, the accused has the right to a fair trial by making the best possible defense on the basis of all material evidence. And the court itself has the paramount duty to ensure that justice is done, by making compulsory process available for the production of evidence needed by either the prosecution or the defense. Accordingly, the need to develop all relevant facts is both elemental and comprehensive, for the ends of the criminal law would be defeated if judgments were founded on a fragmentary or speculative presentation of the facts. To the extent that the search for truth is restrained, the integrity of the process of criminal justice is impaired. As a general proposition, therefore, the law is entitled to every man's evidence. See Branzburg v. Hayes, 408 U. S. 665, 688 (1972).

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This rule, however, is not absolute. It admits of exceptions designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And generally an attorney may not be required to reveal what his client has told him in confidence. These and other interests are recognized at law by ~~evidentiary~~ privileges against forced disclosure. Such privileges may be established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth. *

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* Because of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges. Justice Frankfurter, dissenting in Elkins v. United States, 364 U. S. 206, 234 (1960), said of this:

"Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."

In this case the President challenges a subpoena requiring the production of materials for use in certain criminal prosecutions. He claims that he has a privilege against compliance with that subpoena. He does not claim that disclosure of the subpoenaed material would compromise state secrets. There is no claim that the conversations at issue involved the President's functions under Article II as Commander in Chief, or the conduct of international relations. Compare United States v. Reynolds, 345 U.S. 1 (1952); C & S Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948). Rather, the President grounds his assertion of privilege in the generalized interest in preserving the confidentiality of his discussions with his advisers. Because maintaining confidentiality for such discussions is essential to his high office, he claims a privilege against forced disclosure.

The Constitution does not explicitly mention the President's interest in confidentiality. Yet to the extent that the interest in confidentiality pertains to the President's effective exercise of his executive powers, it is nevertheless constitutionally based. The Constitution does explicitly confer the right upon every defendant in a criminal trial "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." (Am. VI) And, of course, the Constitution also guarantees that no person shall be deprived of liberty without due process of law. (Am. V) Because the production of all material evidence in a criminal trial effectuates those guarantees, it too is a matter of constitutional import.

We must balance the importance of the privilege to the President's performance of the responsibilities vested in him against the inroads of such a privilege on the fair administration of criminal justice.*/ The interest in

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*/ We are not here concerned with the balance between the President's generalized interest in confiden-

confidentiality, as distinct from the preservation of state secrets, is a generalized concern. The goal is to promote candor by maintaining an expectation of confidentiality rather than to preserve secrecy for the substance of any particular communication. The asserted need to refuse to comply with a subpoena presumes that rare and isolated instances of disclosure would negate the general expectation of confidentiality and thus defeat the ability of the President to obtain candid advice. We think that this assumption is unfounded. The willingness to speak plainly is not so fragile that it would be undermined by some remote

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[footnote continued from preceding page]

tiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and Congressional demands for information, nor with that between the President's interest in preserving state secrets and any other concern, whether originating in Congress or the courts. We address only the conflict between the President's assertion of a privilege not to divulge confidential conversations and the constitutional need for evidence material to criminal trials.

prospect of disclosure in narrowly defined and isolated circumstances. At least this is true where the prospect of disclosure is limited to demands for evidence demonstrably material to a criminal prosecution. It requires no clairvoyance to foresee that such demands will arise with the greatest infrequency nor any special insight to recognize that few advisers will be moved to temper the candor of their remarks by such an unlikely possibility.*/ Thus,

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*/ Mr. Justice Cardozo made this point in an analogous context. Speaking for a unanimous Court in Clark v. United States, 289 U.S. 1 (1933), he emphasized the importance of maintaining the secrecy of the deliberations of a petit jury in a criminal case. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published in the world." Id., at 13. Nonetheless, the Court also recognized that isolated inroads on confidentiality designed to serve the paramount need of the criminal law would not vitiate the interests served by secrecy:

> "A juror of integrity and 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." Id., at 16.

while the general interest in confidentiality is weighty indeed, it is not significantly impaired by the demands of criminal justice.

On the other hand, an unqualified privilege against disclosure of evidence demonstrably relevant to a criminal trial would cut deeply into the guarantee of due process of law. While the President's interest in confidentiality is general in nature, the constitutional need for production of material evidence in a criminal proceeding is not. The enforcement of the criminal laws does not depend on an assessment of the broad sweep of events but on a limited number of specific historical facts concerning the conduct of identified individuals at given times. The President's broad interest in confidentiality would not be vitiated by disclosure of a limited number of confidential conversations, but nondisclosure of those same conversations could gravely impair the pursuit of truth in a criminal prosecution.

Thus, where the President's ground for withholding subpoenaed materials from use in a criminal trial is only the generalized interest in confidentiality, it cannot prevail over the needs of due process of law in the fair administration of criminal justice. Under these circumstances the generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

July 12, 1974

Dear Chief:

With respect to your draft on the Rule 17(c) question, it seems to me something more should be said with respect to the relevance and admissibility of the tapes. The attached is the bare bones of an alternative treatment which I am now embellishing to some extent.

Sincerely,

The Chief Justice

Copies to Conference

Nos. 73-1766 & 73-1834 - United States
v. Nixon

The President challenges the subpoena for the tapes and the judgment of the District Court denying the motion to quash on two general grounds. It is urged first that the special prosecutor has failed to satisfy the requirements of Rule 17(c) governing the issuance of subpoenas duces tecum in criminal proceedings and, second, that whether Rule 17(c) has been satisfied or not, the subpoenaed tapes may be withheld by the President pursuant to an executive privilege which is extended to him by the Constitution, which is assertable by him in his absolute discretion and is beyond review by the courts and which, if not absolute and if subject to judicial review, need not yield in the circumstances of this case.

Because a ruling favorable to the President under Rule 17(c) would obviate our reaching major constitutional issues with respect to the existence and scope of the claimed executive privilege, we deal first with whether the requirements of the rule have been satisfied.

The rule provides:

[Here quote the rule]

A subpoena for documents may thus be quashed if their production would be "unreasonable or oppressive," but not otherwise.

In applying that standard it has been established that it is neither unreasonable nor oppressive to require the production of documents that to a rational mind would appear to contain or constitute relevant and admissible evidence with respect to the guilt or innocence of defendants charged with a crime. Whether this is the entire reach of subpoenas issuable under 17(c), particularly where either prosecution or defense is seeking documents from a third party, we need not decide; for we are convinced that the relevance and the evidentiary nature of the subpoenaed tapes were sufficiently shown as a preliminary matter to warrant the District Court's refusal to quash the subpoena.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Nos. 73-1766 & 73-1834 - United States v. Nixon

Circulated: _____

Recirculated: 7-13-74

The President challenges the subpoena duces tecum and the judgment of the District Court denying the motion to quash on two general grounds. First, it is urged that the Special Prosecutor has failed to satisfy the requirements of Rule 17(c) governing the issuance of subpoenas duces tecum in criminal proceedings. Second, he insists that whether or not Rule 17(c) has been satisfied, the subpoenaed materials may be withheld in his absolute discretion pursuant to an executive privilege, which is extended to him by the Constitution and is beyond review by the courts and which, if subject to judicial review, need not yield in the circumstances of this case.

Because a ruling favorable to the President under Rule 17(c) would obviate our reaching major constitutional issues with respect to the existence and scope of the claimed executive privilege, we initially deal with whether the requirements of Rule 17(c) have been satisfied. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

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

A subpoena for documents may thus be quashed if their production would be "unreasonable or oppressive," but not otherwise.1/

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

July 15, 1974

Re: Nixon case

Dear Chief:

Your statement of the facts and your drafts on appealability and justiciability are satisfactory to me, although I could also subscribe to most of what is said in other versions that have been submitted to you.

My views on the Rule 17(c) issue you already have.

With respect to the existence and extent of executive privilege, I agree with Lewis Powell that there is an executive privilege based on the need for confidentiality and that the privilege is rooted in the Constitution. In my view, however, the privilege does not extend to evidence that is relevant and admissible in a criminal prosecution. The public interest in enforcing its laws and the rights of defendants to make their defense supply whatever necessity or compelling need that may be required to reject a claim of privilege when there has been a sufficient showing that the President is in possession of relevant and admissible evidence. I cannot fathom why the President should be permitted to withhold the out-of-court statements of a defendant in a criminal case, or indeed, those of any witness in such a case if they are relevant and admissible. For me, the interest in sustaining confidentiality disappears when it is shown that the President is in possession of out-of-court declarations of those, such as Colson and Dean, who have been sufficiently shown to be co-conspirators. To be admissible at all, such out-of-court declarations must be in furtherance of the conspiracy. Shielding such a conspiracy in the making or in the process of execution carries the privilege too far.

I, therefore, differ with Nixon v. Sirica insofar as it held that the Special Prosecutor must make some special

showing beyond relevance and admissibility. Necessarily, then, the trial judge, who followed Nixon v. Sirica, did not apply the correct standard in this case. I would adhere to the views of the majority of the Conference that relevant and admissible evidence in the possession of the President must be submitted for in camera inspection. Of course, this leads to an affirmance.

Sincerely,

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

July 18, 1974

Re: Nixon Case

Dear Chief:

I am in the process of considering your draft on executive privilege. I am reluctant to complicate a difficult task or to increase your labors, of which I am highly appreciative, but I submit the following comments for your consideration.

I do not object to Potter's suggestion of expanding what you have set out with respect to the judicial power to review the assertion of executive or presidential privilege.

I would rather not rely so much on the authority of the courts inherent in the Article III judicial power. It is true that neither the executive nor the legislature can emasculate the judiciary, but here it seems to me that the courts are playing their neutral role of enforcing the law already provided them, either by rule, statute, or Constitution. The Constitution provides for the enforcement of the laws, and the Special Prosecutor is enforcing criminal laws passed by Congress. The Due Process Clause provides for fair trial, the Sixth Amendment provides for compulsory processes for witnesses, and the United States is constitutionally required not to withhold exculpatory materials from defendants in criminal cases. I doubt, therefore, that we need discover or fashion any inherent powers in the judiciary to overcome an executive privilege which is not expressly provided for but which we also fashion today.

Because I am one of those who thinks that the Constitution on its face provides for judicial review, especially if construed in the light of what those who drafted it said

at the time or later, I always wince when it is inferred that the Court created the power or even when it is said that the "power of judicial review [was] first announced in Marbury v. Madison." See page 4 of your draft. But perhaps this is only personal idiosyncrasy.

On page 11 you say that the privilege yields when it is shown that the material is "required for the just resolution of the pending criminal case for which it is sought and that it is admissible and probative." You go on to imply that there must be a compelling need for the material to overcome presumptively privileged executive documents. I take it that you are suggesting that there is a dimension to overcoming the privilege beyond the showing of relevance and admissibility. This makes far too much of the general privilege rooted in the need for confidentiality, and it is not my understanding of the Conference vote. As I have already indicated, my view is that relevance and admissibility themselves provide whatever compelling need must be shown. I would also doubt that the Prosecutor has made any showing of necessity beyond that of relevance and admissibility.

Perhaps none of these matters is of earthshaking importance, but it is likely that I shall write separately if your draft becomes the opinion of the Court.

A final minor item. On page 2 you speak of presidential privilege. If it makes any difference, one of the tapes, Item No. 3, covers a conversation to which the President was not a party.

Sincerely,

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

July 15, 1974

Re: Nixon Case

Dear Chief:

1. I agree with Byron's recirculation (July 13, 1974) of the section on 17(c).

2. I agree with Harry's Statement of Facts.

3. I agree with Bill Brennan's treatment of the section on Justiciability.

4. I agree with Potter's memorandum on the question of appealability.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

July 18, 1974

Re: Nixon Cases

Dear Chief:

I was pleased to see the rough draft dealing with the President's claim of executive privilege which you circulated yesterday. I agree with its basic structure, and believe that it provides a good starting point with which we can work. I also agree with Potter's suggested addition rejecting the President's argument that it is he who finally decides whether the public interest would be served by release of the subpoenaed material; I, too, think that it is important to reject this argument firmly and unequivocally.

I would also suggest two further changes in the draft as it now stands. First, I think that footnote 5 should be eliminated. Your discussion in text seem to me quite adequate to rebut the Special Prosecutor's argument that the absence of any explicit mention of executive privilege in the Constitution is dispositive. I see no significance for this case in the lack of mention in the Constitution of subpoenas, and see no reason to raise any doubt on this score or to discuss the question at all. Additionally, it does not seem to me that the reference to McCulloch v. Maryland is relevant in this context.

I would also suggest omitting the second sentence in footnote 7. The issue raised there is too speculative to explore in the context of the narrow issue involved in this case. Your discussion also clearly indicates a view on the merits of that question, with which I disagree.

If I have any additional suggestions after further study of the draft, I will of course pass them along.

Sincerely,

T. M.

The Chief Justice

cc: The Conference

July 11, 1974

Dear Chief:

Re: No. 73-1766 - United States v. Nixon
No. 73-1834 - Nixon v. United States

This relates to your proposed pages on jurisdiction. These, generally, would be acceptable to me, provided that you remove that offensive word "posited" in the very first line and not indulge in the split infinitive on page 2! I enclose, for your consideration, a copy of my own private memorandum on jurisdiction and appealability. This gives you, I think, the approach I would have taken had I been writing the section.

Sincerely,

HAB

The Chief Justice

Enclosure

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

July 12, 1974

Dear Chief:

Re: No. 73-1766 - United States v. Nixon
No. 73-1834 - Nixon v. United States

With your letter of July 10, you recommended and invited suggestions. Accordingly, I take the liberty of suggesting herewith a revised statement of facts and submit it to you for your consideration.

Please believe me when I say that I do this in a spirit of cooperation and not of criticism. I am fully aware of the pressures that presently beset all of us.

Sincerely,

Harry

The Chief Justice

Copies to the Conference

No. 73-1766 -- United States v. Nixon
No. 73-1834 -- Nixon v. United States

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

This case presents for review the denial of a motion, filed on behalf of Richard M. Nixon, President of the United States, to quash a subpoena duces tecum. The subpoena was issued by the United States District Court for the District of Columbia, pursuant to Rule 17(c), Fed. R. Crim. P. It directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisors. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17(c). We granted the United States' petition for certiorari before judgment by the Court of Appeals,[1/] and also the President's responsive cross-petition for certiorari before judgment, because of the imperative public importance of the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

To: The Chief Justice
✓ Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

July 6, 1974

Circulated: 7-6-74

Recirculated: _____

No. 73-1766 United States v. Nixon
No. 73-1834 Nixon v. United States

MEMORANDUM TO THE CONFERENCE:

In accord with the indications by several Justices at our last Conference that exchanges of memoranda would be welcomed, I circulate herewith a memorandum stating my views. I submit this to you with all the obvious caveats: the views and conclusions stated are tentative and subject, of course, to oral argument and our discussion at Conference. It may be that my own views will change and evolve independently of these events, but for the present, at least, the attached memorandum reflects my thinking after rather intensive study for the past two weeks.

Sincerely,

L.F.P.

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

July 6, 1974

No. 73-1766 United States v. Nixon
No. 73-1834 Nixon v. United States

MEMORANDUM TO THE CONFERENCE:

This memorandum is intended to serve as a tentative proposal for portions of a draft opinion. As I envision it, an appropriate opinion would consist of five parts:

Part I - statement of facts;
Part II - jurisdiction and justiciability;
Part III- the merits of the President's assertion of absolute and unreviewable authority to withhold the tapes from in camera inspection;
Part IV - standards and procedures governing the exercise of judicial authority to order the President to comply with a subpoena duces tecum; and
Part V - application of Parts III and IV to the facts of this case and disposition.

What follows is a brief summary of the points to be covered in these sections plus a tentative draft for Parts III and IV.

Part I - This section should recount the essential facts and the procedural history of litigation and pose the issue for decision.

Part II - This section should discuss the questions of jurisdiction (appealability or mandamus) and justiciability (intra-branch controversy). My tentative conclusions are as follows:

Jurisdiction is properly grounded on 28 U.S.C. § 1291. In the normal case a third party who declines to produce subpoenaed documents in a criminal trial must proceed to a contempt judgment before he may raise his objections to the subpoena on appeal under § 1291. United States v. Ryan, 402 U.S. 530 (1971). Here the third party is the President of the United States. Irrespective of whether a court is competent to hold the President in contempt, it would be unwise to reach that issue and unseemly to require him to submit to such a judgment as a prerequisite for appellate review. There is sufficient flexibility in the phrase "final decisions" as it appears in § 1291 to find appellate jurisdiction here. The Court therefore has no occasion to consider the alternative jurisdictional basis of mandamus.

The President's contention that this case presents no "case or controversy" as required by Article III because it is at bottom only an intra-branch dispute is without merit. The Attorney General has promulgated regulations that authorize the Special Prosecutor to contest presidential claims of executive privilege. So long as those regulations remain in force, there is sufficient diversity in the interests of the parties to satisfy the requirements of Article III. Muskrat v. United States, 219 U.S. 346 (1911). Cf. United States v. Marine Bancorporation, ___U.S. ___(1974); 12 U.S.C. § 1828(c)(7)(D)(authorizing the Comptroller of the Currency to intervene as a party

defendant in a suit brought by the Department of Justice.)*

Part III - This section should address in general terms whether the President's decision to withhold confidential conversations subpoenaed for use in criminal proceedings is final and binding on the courts. The constitutional underpinnings of this question seem to me to deserve from this Court a more searching explication than they have yet received. The tentative draft of Part III states my thinking on the subject.

It will be apparent that the attached draft of this section does not rely on the Burr opinions of Chief Justice Marshall. The more I study what the Chief Justice said in his two opinions, especially the second, the less weight I think Burr deserves. The Special Prosecutor can find comforting language in it, but I find little solid guidance. In fact, it seems to me that in his second opinion Chief Justice Marshall

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* Additionally, the President's brief implies that this case should be deemed nonjusticiable because it involves the validity of a decision made by the head of a coordinate and independent branch of government. If the President suggests that his personal involvement in this matter somehow renders the case nonjusticiable, the law is to the contrary. Whether the President has an unreviewable privilege to decline to produce subpoenaed materials is a question of law, and the authority of the courts to decide the issue is unambiguously established. Marbury v. Madison, 1 Cranch 137 (1803); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

rather assiduously avoided any decision on whether a court could override a personal assertion of the confidentiality privilege by the President himself. I fear therefore that reliance on Burr to resolve the merits of the President's personal claim of unreviewable privilege would leave the Court's opinion dangerously vulnerable to criticism for bad history and careless reading of those opinions.

Part IV - My suggested resolution of the constitutional issue posed in Part III would vest in the Federal Judiciary a power over the office of the President that is plainly susceptible of abuse. Standards and procedures to govern the exercise of such power are obviously important. I have addressed this subject in the attached tentative draft of Part IV and have found that Burr is a useful precedent for this purpose.

Part V - This section should apply Parts III and IV to the facts of this case, with the view to remanding the case to the District Court for proceedings under the standards and procedures enunciated in Part IV.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

July 11, 1974

Dear Chief:

Potter's suggestion as to Bill Douglas' draft on appealability is entirely acceptable to me.

Sincerely,

L. Powell

The Chief Justice

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

July 12, 1974

From: Powell, J.

Circulated: JUN 12 1974

Recirculated:

NIXON CASE

Dear Chief:

The Special Prosecutor concedes, and we were all in accord that there is a privilege of confidentiality with respect to presidential conversations and papers. We also agreed that it is a qualified privilege and not absolute or unreviewable; and, in this case, that the Special Prosecutor has made a showing which overcomes the privilege and justifies in camera review.

We were not entirely in agreement as to the standard to be met in overcoming the privilege. According to my notes, the Justices who specifically addressed the point agreed that the standard must be of constitutional dimensions as otherwise a hostile Congress could dilute it or nullify it entirely.*

It was suggested that the requirements of Rule 17(c) would be adequate if it were made clear that these were rooted in the Constitution. Although this question came up near the end of the Conference and was not fully debated, some of us emphasized that a President of the United States (and it must be remembered that we are speaking not just of the present incumbent) must be entitled to a higher level of protection against disclosure

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* We would certainly assert, I assume, a constitutiona basis for the confidentiality privilege of this Court. Otherwise, the other Branches could take it from us.

than a citizen possessing no privilege who is charged with crime or who may be a witness in a criminal case. This is clearly implicit in Burr, and is quite explicit in the only other criminal case involving a President, Nixon v. Sirica. Moreover, the district court below did not rely on 17(c) alone. After finding that its standards were met, the DC agreed that the President's claim of privilege is "presumptively valid" and concluded that a "sufficiently compelling" showing of need had been made to overcome the presumption.

It is arguable that we could avoid this issue by saying, in effect, that as the Special Prosecutor has met the higher standard in this case, it is unnecessary to decide whether treating a President in the same category as an ordinary citizen (who possesses no privilege) would be sufficient. It would be difficult for me to join in such a disposition. Such a course would be widely recognized as an avoidance of a constitutional issue which is squarely before us. Indeed, this is the central issue before us and one of lasting importance to the preservation of the historic balance between the three branches of government.

With these thoughts in mind, I have rewritten what was Part IV of the memorandum I previously circulated. As you will note, I have eliminated entirely the "necessity" standard, and have followed essentially the path of the DC below in using only the most general language to indicate that after Rule 17(c) requirements are met, a DC must also be satisfied that the showing is sufficient to overcome the presumption in favor of the President.

I had rewritten Part IV before receiving your circulation of a draft dealing with 17(c). I would think there would be little difficulty in using your draft (substantially as written) with respect to the 17(c) requirements, and then using the substance of my Part IV at the appropriate place in the opinion.

Sincerely,

The Chief Justice

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Proposed Part IV

In determining whether to order the President to produce records of confidential communication for use in a criminal trial, a court should be guided by a solicitous concern for the effective discharge of his duties and the dignity of his high office. Of course, no citizen should be subjected to unwarranted inroads on his time or interruptions of his affairs, but the public interest in preserving the confidentiality of the Oval Office and in avoiding vexatious harassment of an incumbent President is of an entirely different order of importance. Consequently, we believe that "[i]n no case of this kind would a court be required to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed. Cas. 187, 191 (No. 14964) (CCD Va. 1807)(per Marshall, C.J.). Rather, courts should follow standards and procedures designed to afford appropriate protection

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

July 19, 1974

Nixon Case

Dear Chief:

I will deliver to you personally a "marked up" copy of your draft on Executive Privilege.

It is presumptuous on my part to have taken such liberties with your draft, especially since you circulated it in "rough" form and I have not seen the more definitive, polished draft which is to come. Yet, I thought possibly it may be helpful to you to see the sort of editing which I would undertake to accomplish the following purposes:

(i) To blend Potter's suggestion (with respect to the Special Prosecutor's first position as to the total lack of judicial power) into your draft;

(ii) to make changes necessary as a result of the "blending";

(iii) to eliminate the substantial repetition which is inevitable (certainly when I write) in a first draft; and

(iv) to sharpen, here and there, some of the points and language.

It seemed to me that accommodating Potter as far as you can is especially desirable, as both Bill Brennan and Thurgood have agreed with him. I also think it helpful to include a first section substantially along the lines of Potter's draft, although I prefer this as revised and blended into yours.

What I am delivering to you has not, of course, been seen by any other Justice. I appreciate that any reviewing "editor", of what someone else writes, will inevitably make many changes and revisions. I certainly do not submit mine as definitive in any sense, but possibly as being of assistance to you in your final draftsmanship.

If you relegate all of this to the waste basket, I will of course understand.

Sincerely,

The Chief Justice

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JSTICE LEWIS F. POWELL, JR.

July 23, 1974

Rebecca proposed by LFP and adopted by WCO with agreement — and dropped by LFP
WW

Nixon Case

MEMORANDUM TO THE CONFERENCE:

I enclose herewith several suggested changes in the language of Part C.

I may possibly have others to submit at the Conference.

Sincerely,

L.F.P.

NIXON CASE

Proposed Note to be keyed to the sentence on p. 6, ending with the words "totally frustrated".

We note the uniqueness of this case in view of the independence and authority conferred on the Speical Prosecutor. See Part II, supra. Normally, a President by virtue of his control of the Executive Branch is in a position to determine whether the greater public interest lies in preserving confidentiality with respect to certain evidence or in making it available for the prosecution of an accused person. See Confiscation Cases 7 Wall, (74 U.S.) 454 (1869), United States v. Cox, 342 F. 2nd 167, 171 (CA 5), cert denied, 381 U.S. 935 (1965).

NIXON CASE

Proposed Change in language in the last full sentence on p. 3:

The President does not place his claim of privilege on military, diplomatic or other state secrets.

LFP/gg 7-23-74 Rider

NIXON CASE

Proposed Addition to the last sentence in the paragraph ending at the top of p. 5:

It is the manifest duty of the courts to vindicate those guarantees and to do so it is essential that all relevant evidence be produced unless inadmissible because of an applicable privilege or for other valid reasons.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 28, 1974

Re: No. 73-1766 - U.S. v. Nixon

Dear Chief:

I have publicly said since coming to the Court that there is a strong policy in favor of having a full Court decide important questions of constitutional law. If importance may be judged by the amount of public attention focused on a case, this one is surely important. Therefore it is a matter of regret to me that I feel I must disqualify myself from participation.

While I would not disqualify myself because of any previous relationship with the named parties in the case before us, the petition makes clear that this discovery litigation is an offshoot of U.S. v. Mitchell, a pending criminal prosecution in the District Court. I had varying degrees of close professional association with three of the named defendants in that action, each of whom could stand to gain or lose as a result of the outcome of this Court's decision regarding discovery. It therefore seems to me that there is no doubt as to my proper course, and I have advised Mike Rodak accordingly.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

73-1766

PERSONAL AND CONFIDENTIAL

June 18, 1974

MEMORANDUM TO THE CONFERENCE

I have been advised by Phil Lacovara, of the Special Prosecutor's office, that defense counsel for John Ehrlichman has placed in the hands of the United States Marshal for service a subpoena for me to testify at his trial next week for the break-in to the office Daniel Ellsberg's psychiatrist. Mr. Lacovara said that the President, Henry Kissinger, and General Haig had also been subpoenaed, and that the Special Prosecutor's office was offering to represent all of us in an effort to quash the subpoena on the grounds that the testimony sought to be adduced was outside the scope of the issues in the case.

I have benefited from informal counsel with several of the active Brethren, and also from Tom Clark, who went through a similar experience himself. If truly broad issues of concern within the Administration for leaks of secured information are relevant in this criminal trial, I do not believe that I could say the subpoena was frivolous, since I did some work in the Justice Department along these general lines. I have mixed feelings about the Prosecutor's proposal to move to quash; on the one hand I would like to involve the Court as little as possible, and I certainly do not relish being made a football by defense counsel; on the other hand, I know John Ehrlichman, and I would not want to put myself in

the position of using every conceivable possible technique to avoid testifying at his behest.

It has never seemed to me that a sitting judge of this Court has any absolute immunity from testifying in a court of law about facts of which he has personal knowledge. Even if I felt otherwise, I think that any effort on my part to plead any absolute immunity from testimony by reason of my judicial position would be more apt to harm the Court than hurt it.

I feel I must reserve the ultimate decision to myself in this matter, but I will welcome individual or collegiate advice, and hope to have an opportunity to discuss the matter at Conference on Friday.

Sincerely,

WOD

Copy to: Mr. Justice Clark (Ret.)