

Special Prosecutor's Powers

Following are excerpts from a brief filed with the Supreme Court yesterday by White House special counsel James D. St. Clair:

In a very real sense, every case that comes before this court is unique; but few in the nation's history have cut so close to the heart of the basic constitutional system in which our liberties are rooted.

Thus the stakes are enormously high, from a constitutional standpoint. At the same time, and making the court's judgment more difficult, the case comes wrapped in the passions of a dramatic conflict which has dominated the nation's headlines for more than a year. This is a conflict which now has involved all three branches of the government, and pits their constitutional rights and responsibilities one against another.

Just as the first allegiance of this court is to the Constitution, the first responsibility of this court must now be to decide the case before it in a way which preserves the balances that are central to the Constitution.

At its core, this is a case that turns on the separation of powers.

All other considerations are secondary, because preserving the integrity of the separation of powers is vital to the preservation of our Constitution as a living body of fundamental law. If the arguments of the special prosecutor were to prevail, the constitutional balance would be altered in ways that on one alive today could predict or measure. . . .

In effect, court process is being used as a discovery tool for the impeachment

proceedings — proceedings which the Constitution clearly assigns to the Congress, not to the courts. This is so because of the particular relationship which has evolved among the special prosecutor, the district court and the House Judiciary Committee, and because of the impact which any presidential action with regard to the subpoenas issued would inevitably have on the impeachment proceedings. As a result of the history of the so-called Watergate cases in the district court, the special prosecutor is well aware that the district court feels obligated to turn over to the Judiciary Committee any information that might bear on the pending congressional action. Thus the effect, whatever the intent, of the discovery procedures being pressed by the special prosecutor would be to produce evidence for the Congress that the Congress could not obtain by its own procedures.

As a result there has been a fusion of two entirely different proceedings: one, the criminal proceeding involving various individual defendants, and the other the impeachment proceeding involving the President. The first lies in the courts; the second lies in the Congress. The special prosecutor strengthens this fusion by utilizing the unsubstantiated, unprecedented and clearly unconstitutional device of naming the President as an unindicted co-conspirator in the criminal cases, with the apparent purpose of strengthening his claim to recordings of presidential conversations as potential evidence in the criminal cases. . . .

To place the present events in perspective, it is useful to reflect on how this case would have been viewed in normal times. If there were no impeachment pending, and if the special prosecutor used the device of naming the President as an unindicted co-conspirator in order to obtain recordings of private presidential conversations, on which the President had interposed a claim of executive privilege, the special prosecutor's request would be given short shrift.

If this procedure were allowed to go forward, inevitably affecting the impeachment inquiry, it would represent an expansion of the Court's jurisdiction into the impeachment process that the Constitution assigns solely to the House of Representatives. Whatever the combination of circumstances producing it, the result would be clear: an expansion of the court's jurisdiction into a realm that the

Constitution clearly prohibits. It follows necessarily that the courts may not be used, either deliberately or inadvertently, as a back-door route to circumvent the constitutional procedures of an impeachment inquiry, and thus be intruded into the political thicket in the most solemn of political processes.

Anyone who has practiced before the court is familiar with the observation of Justice Holmes that "(great) cases, like hard cases, make bad law." This is true if the pressures of the moment allow the courts to be swayed from their rigid adherence to great principles; if remedies for the perceived passing needs of the moment are allowed at the expense of those enduring constitutional doctrines that have preserved our system or ordered liberty through the ages. Of those doctrines, none is more fundamental to our governmental structure itself than the

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separation of powers—with all of its inherent tensions, with all of its necessary inability to satisfy all people or all institutions all of the time, and yet with the relentless and saving force that it generates toward essential compromise and accommodation over the longer term even if not always in the shorter term. Often a price has to be paid in the short term in order to preserve the principle of separation of powers, and thereby to preserve the basic constitutional balances, in the longer term. The preservation of this principle, the maintenance of these balances, are at stake in the case now before this court.

The district court order of May 20, 1974, is an appealable order under 28 U.S.C. 1291, for unless review is granted now the President's claimed right will be irremediably lost. This court also has jurisdiction to entertain and decide the peti-

tion for mandamus transmitted by the Court of Appeals under 28 U.S.C. 1651 because the lower court's decision exceeded that court's jurisdiction.

Under the doctrine of separation of powers, the judiciary is without jurisdiction to intervene in the intra-branch dispute between the President and the special prosecutor. The duty to determine whether disclosure of confidential presidential communications is in the public interest has not been, and cannot be, delegated to the special prosecutor.

Under the standards set forth in *Baker v. Carr*, 369 U.S. 186 (1962), this intra-branch dispute raises a political question which the federal courts lack jurisdiction to decide. The district court does not have the power to substitute its judgment for that of the President on matters exclusively within the President's discretion.

Inherent in the executive

power vested in the President under Article II of the Constitution is executive privilege, generally recognized as a derivative of the separation of powers doctrine. The powers traditionally asserted by the other branches support the validity of the claim of confidentiality invoked by the President.

Even if this court were to determine that a presidential privilege is subject to judicial supervision, the lower court erred in refusing to quash the subpoena since the special prosecutor failed to demonstrate the "unique and compelling need" required by *Nixon v. Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), to overcome the presumptively claim of presidential privilege.

However, even before a determination can be made as to whether the President's assertion of executive privilege is overcome, the special prosecutor has the burden of proving that his subpoena meets the require-

ments of Rule 17(c), Federal Rules of Criminal Procedure. An analysis of the showing made by special prosecutor in the court below demonstrates that he failed to meet the case law criteria developed to prevent abuse of Rule 17 (c). For this reason alone the district court erred in refusing to quash the subpoena.

The President is not subject to the criminal process whether that process is invoked directly or indirectly. The only constitutional recourse against the President is by impeachment and through the electoral process. The naming of the President as an unindicted co-conspirator by an official body is a nullity which both prejudices the ongoing impeachment proceeding and denies due process to the President. The grand jury's action does not constitute a *prima facie* showing of criminality and is without legal effect to overcome a presidential claim of executive privilege.