

Jaworski Says Nixon Subject To Court Order

Following are excerpts from a legal brief filed with the Supreme Court yesterday by Watergate Special Prosecutor Leon Jaworski:

... Throughout our constitutional history the courts, in cases or controversies before them, consistently have exercised final authority to determine whether even the highest executive officials are acting in accordance with the Constitution. In fulfilling this basic constitutional function, they have issued appropriate decrees to implement those judicial decisions. The courts have not abjured this responsibility even when the most pressing needs of the nation were at issue.

In applying this fundamental principle, the courts have determined for themselves not only what evidence is admissible in a pending case, but also what evidence must be produced, including whether particular materials are appropriately subject to a claim of executive privilege. Indeed, this court has squarely rejected the claim that the executive has absolute, unreviewable discretion to withhold documents from the courts.

The unbroken line of precedent establishing that the courts have the final authority for determining the applicability and scope of claims of executive privilege is supported by compelling arguments of policy. The executive's legitimate interests in secrecy are more than adequately protected by the qualified privilege defined and applied by the courts. But as this court has recognized, an absolute privilege which permitted the execu-

tive to make a binding determination would lead to intolerable abuse. This case highlights the inherent conflict of interest that is presented when the executive is called upon to produce evidence in a case which calls into question the executive's own action. The President cannot be a proper judge of whether the greater public interest lies in disclosing evidence subpoenaed for trial, when that evidence may have a material bearing on whether he is impeached and will bear heavily on the guilt or innocence of close aides and trusted advisers.

In the framework of this case, where the privilege holder is effectively a third party, the interests of justice as well as the interests of the parties to the pending prosecution require that the courts enter a decree requiring that relevant and unprivileged evidence be produced. The "produce or dismiss" option that is sometimes allowed to the executive when a claim of executive privilege is overruled merely reflects a remedial accommodation of the requirements of substantive justice and thus has never been available to the executive where the option could not satisfy these requirements. This is particularly true where the option would make a travesty out of the independent institution of the special prosecutor by allowing the President to accomplish indirectly what he cannot do directly—secure the abandonment of the Watergate prosecution.

There is nothing in the status of the President that deprives the courts of their constitutional power to re-

solve this dispute. The power to issue and enforce a subpoena *duces tecum* against the President was first recognized by Chief Justice Marshall in the *Burr* case in 1807, in accordance with two fundamental principles of our constitutional system: First, the President, like all executive officials as well as the humblest private citizens, is subject to the rule of law. Indeed, this follows inexorably from his constitutional duty to "take care that the laws be faithfully executed." Second, in the full and impartial administration of justice, the public has a right to every man's evidence. The persistent refusal of the courts to afford the President an absolute immunity from judicial process is fully supported by the deliberate decision of the Framers to deny him such a privilege.

Although it would be improper for the courts to control the exercise of the President's constitutional discretion, there can be no doubt that the President is subject to a judicial order requiring compliance with a clearly defined legal duty. The crucial jurisdictional factor is not the President's office, or the physical power to secure compliance with judicial orders, but the court's ability to resolve authoritatively, within the context of a justiciable controversy, the con-

flicting claims of legal rights and obligations. The court is called upon here to adjudicate the obligation of the President, as a citizen of the United States, to cooperate with a criminal prosecution by performing the solely ministerial task of producing specified, unprivileged evidence that he has taken within his sole personal custody.

The qualified executive privilege for confidential intra-governmental deliberations, designed to promote the candid interchange between officials and their aides, exists only to protect the legitimate functioning of government. Thus, the privilege must give way where, as here, it has been abused. There has been a *prima facie* showing that each of the participants in the subpoenaed conversations, including the President, was a member of the

conspiracy to defraud the United States and to obstruct justice charged in the indictment in the present case, and a further showing that each of the conversations occurred in the course of and in furtherance of the conspiracy. The public purpose underlying the executive privilege for governmental deliberations precludes its application to shield alleged criminality.

But even if a presumptive privilege were to be recognized in this case, the privilege cannot be sustained in the face of the compelling public interest in disclosure. The responsibility of the courts in passing on a claim of executive privilege is, in the first instance, to determine whether the party demanding the evidence has made a *prima facie* showing of a sufficient need to offset the presumptive validity of the executive's claim. The cases have held that the balance should be struck in favor of disclosure only if the showing of need is strong and clear, leaving the courts with a firm conviction that the public interest requires disclosure.

It is difficult to imagine any case where the balance could be clearer than it is on the special facts of this proceeding. The recordings sought are specifically identified, and the relevance of each conversation to the needs of trial has been established at length. The conversations are demonstrably important to defining the extent of the conspiracy in terms of time, membership and objectives. On the other hand, since the President has authorized each participant to discuss what he and the others have said, and since he repeatedly has summarized his views of the conversations, while releasing partial transcripts of a number of them, the public interest in continued confidentiality is vastly diminished.

The district court's ruling is exceedingly narrow and, thus, almost no incremental damage will be done to the valid interests in assuring future presidential aides that legitimate advice on matters of policy will be kept secret. The unusual circumstances of this case—where high government offi-

cials are under indictment for conspiracy to defraud the United States and obstruct justice—at once make it imperative that the trial be conducted on the basis of all relevant evidence and at the same time make it highly unlikely that there will soon be a similar occasion to intrude on the confidentiality of the executive branch.

Even if the subpoenaed conversations might once have been covered by a privilege, the privilege has been waived by the President's decision to authorize voluminous testimony and other statements concerning Watergate-related discussion and his recent release of 1,216 pages of transcript from forty-three presidential conversations dealing with Watergate. A privilege holder may not make extensive disclosures concerning a subject and then selectively withhold portions that are essential to a complete and impartial record. Here, the President repeatedly has referred to the conversations in support of his own position and even allowed defendant Hadelman access to the recordings after he left public office to aid him in preparing his public testimony. In the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has made far-reaching, but expurgated disclosures, the court may use its process to acquire all relevant evidence to lay before the jury . . .