Excerpts of Supreme Court Arguments

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

John Mitchell, one of the defendants, was a former Attorney General of the United States, and also chairman of the Committee to Re-elect the President. Another, H. R. Haldeman, was the President's chief of staff. Another, John Ehrlichman, was assistant to the President for domestic affairs. The others were either on the President's staff or held responsible positions on the re-election committee.

In the course of its deliberations, the grand jury voted unanimously with 19 members concurring, that the course of events in the formation and continuation of a conspiracy was such that President Nixon, among a number of others, should be identified as an unindicted co-conspirator in the bill of particulars to be filed in connection with the pretrial proceedings.

Now, although this particular decision and determination on the part of the grand jury occurred in February, it was a well-kept secret for 2½ months. The grand jury, of course, knew it; the members of the prosecution staff knew it.

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

And it was so kept during these 2½ months until it became necessary to reveal it as a result of the President's motion to quash the subpoena, as I will indicate subsequently in my argument.

Now, to obtain additional evidence, which the special prosecutor has good reason to believe is in the possession of and under the control of the President, and which it is believed by the special prosecutor is quite important to the development of the government's proof in the trial in United States vs. Mitchell et al, the special prosecutor, on behalf of the United States, moved for a subpoena duces tecum. And it is the subpoena here in question.

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

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

Now, for the United States to conduct a full and appropriate hearing [on]a motion to quash the subpoena, it became necessary to reveal the grand jury's finding regarding the President. And this was first done by the special prosecutor calling on the chief of staff, Gen. Alexander Haig, and the President's counsel, Mr. St. Clair, and advising them of what had occurred in 2½ months period. And then on the following morning advising Judge Sirica of what had occurred, in camera, and pointing out the necessity of this being used in connection with the arguments on a motion to quash because of their relevance and the necessity of these matters being made a part of the proceedings.

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

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

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

Douglas: 17 (c) presupposes the subpoena running against the party. The President is not a party. He is not a defendant in one of these cases.

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

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

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

Douglas: The grand jury sent it to the House committee, didn't they?

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

Now, in its opinion and order of May 20, the District Court—

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

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

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

Jaworski: There is no question about that.

Stewart: And you would still be here.

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

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

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

Jaworski: No.

White: That will never get you over the—

Jaworski: And we don't so contend.

White: That was the direction of your—

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

White: I understand that.

Jaworski: Yes, sir.

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

Jaworski: No, sir. Of course not.

White: You don't suggest that the grand jury finding is binding on the court or not?

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

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

Jaworski: No, sir.

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

Jaworski: What I was really doing in pointing to that—

Brennan: Well, could we?

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

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

Jaworski: Well, we certainly—

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

Jaworski: We certainly make that as one of the points which I intend to discuss at a later point.

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

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

Marshall: But only prima facie.

Jaworksi: Prima facie—that is correct. But when you get to the matter, Mr. Justice Powell, of balancing interests, we do feel that that particular situation is a factor that is important. And this is why we lay stress on it.

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

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

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

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

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

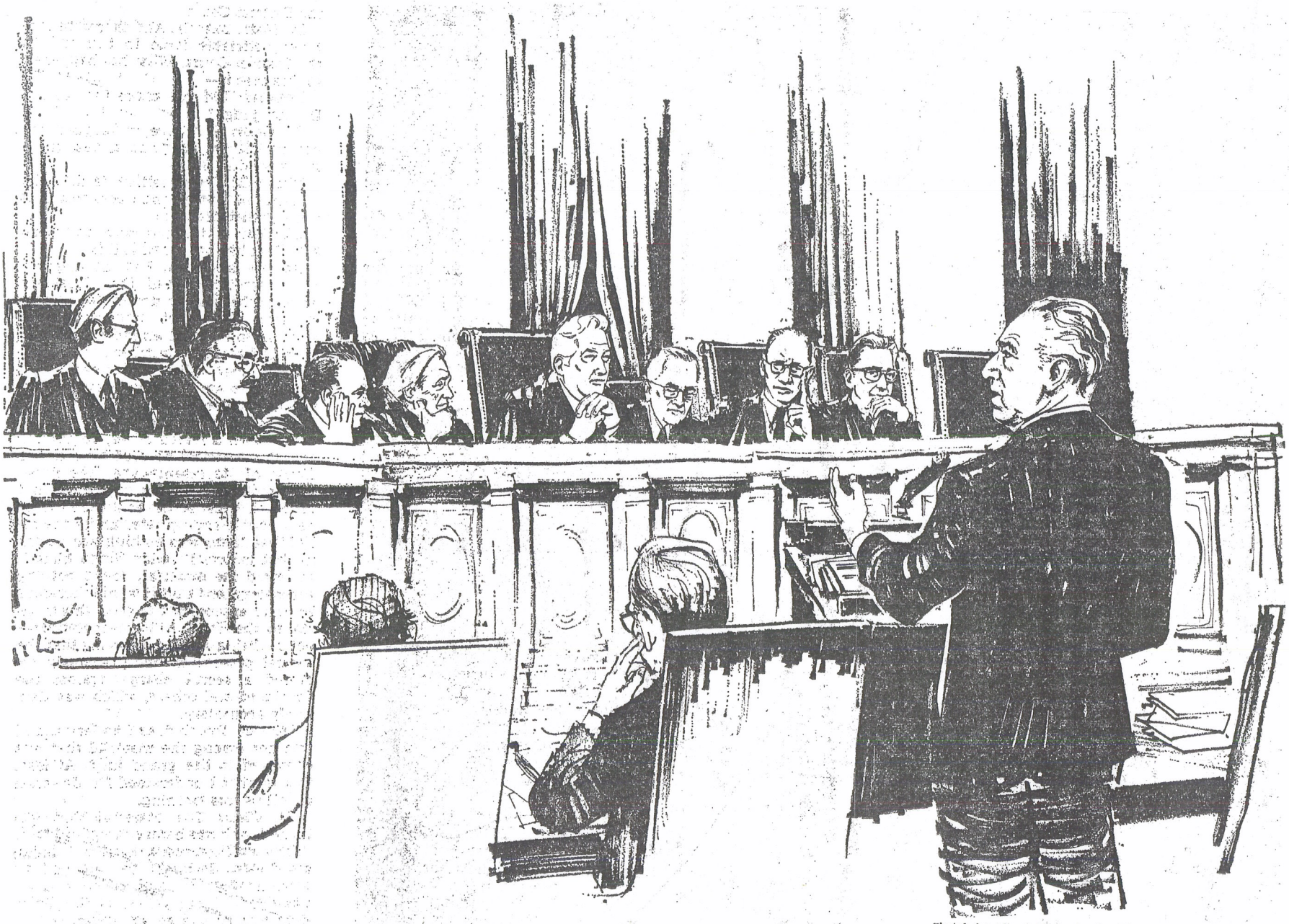
In refusing to produce the evidence sought by a subpoena duces tecum in the criminal trial of the seven defendants — among them former aides and devotees, the President invokes the provisions of the Constitution. His counsel's brief is replete with references to the Constitution as justifying his position.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

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

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

Stewart: Mr. Jaworski, the President went to a court. He went to the District Court with his motion to quash. And then he filed a cross-petition here. He is asking the court to say that his position is correct as a matter of law, is he not?

Jaworski: He is saying his position is



Sketch by Albert M. Leahy for The Washington Post

Watergate Special Prosecutor Leon Jaworski presents his oral argument to the Supreme Court.

correct because he interprets the Constitution that way.

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

Jaworski: Well, that is not entirely correct, Mr. Justice.

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

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

Stewart: As a matter of law — he is making that argument to a court; that as a matter of constitutional law he is correct.

Jaworski: So that of course this court could then not pass upon the constitutional question of how he interprets the Constitution, if his position were correct. But I —

Stewart: As a matter of law — his position is that he is the sole judge. And he is asking this court to agree with that proposition, as a matter of constitutional law.

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

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

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

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

Jaworski: Well, I can't —

Burger: You take one position and he takes another.

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

Burger: I think this matter may be one of semantics. Each of you is taking a different position on the basic question, and each of you is submitting for a decision to this court.

Jaworski: That may be, sir.

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

Jaworski: That is right, sir.

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

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

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

Jaworski: That is correct, sir. And we do point to the authorities to show that there is a difference in the situation here. I do think that it is proper, as much as I regret to have to do it, to point out that the President's interpretation of what his action should be in this particular set of circumstances is one that really requires judicial intervention perhaps moreso than a normal one would. I think that we realize that there is at stake the matter of the supplying of evidence that relates to two former close aides and devotees. I think we are aware of the fact that the President has publicly stated that he believed that these two aides of his, Mr. Haldeman and Mr. Ehrlichman, would come out all right in the end. Added to that the fact that the President has a sensitivity of his own involvement, is also a matter that calls for the exercise of the question to which Mr. Justice Douglas alluded as one that is somewhat unusual.

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

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

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

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

Let me say first that we stand upon two bases: first, that actually the orders that were entered creating the Office of the Special Prosecutor and delineating his authority, even the original order at the time that my predecessor was acting as special prosecutor, had the force and effect of law. We also point to the fact that the arrangement made itself with the acting Attorney General that I made, if I may point to it—and one reason I have no reticence in discussing the facts is because the facts are undisputed. There has been no dispute raised as to just what actually transpired.

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

We set this out in the appendix, of course, pointing precisely to what the authority and the responsibilities and the obligations of the special prosecutors are. One of the express duties that is delegated to the special prosecutor is that he shall have full authority for investigating and prosecuting—among others—allegations involving the President. And the delegation of authority expressly stated in particular the special prosecutor shall have full authority to determine whether or not to contest the assertion of executive privilege, or any other testimony of privilege.

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

Now, at the time—

Blackman: What does "consensus" mean—unanimous?

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

Blackman: I take it when you make reference to this, you are in effect suggesting that your position is certainly different than if a United States Attorney were prosecuting this case.

Jaworski: That is correct, sir. I think we have what might be termed a quasi-independent status, where there were delegated to this particular office performance of certain functions. And

there is no reason why the President could not have delegated those to us.

As a matter of fact—

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

Jaworski: Yes, sir. For instance, the comptroller of the currency—he has a status somewhat similar to that. And we know that there are suits brought between the Department of Justice and the Comptroller . . .

Jaworski: Now, I should say that it is interesting when the case of Nixon vs. Sirica was before the Court of Appeals, Professor Charles Alan Wright, who was then arguing that case, and who was not on the original brief, but I observe was on the reply brief filed on behalf of the President — at that time argued with respect to the particular Office of the Special Prosecutor: "Now, in this instance we have a division of function within the Executive in that my friend Mr Cox" — referring to Archibald Cox — "has been given absolute independence. It is for him to decide whom he will seek to indict. It is for him to decide to whom he will give immunity . . ." a decision that would ordinarily be made at the level of the Attorney General or in an important enough case at the level of the President.

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

Stewart: Well, Nixon against Sirica was different in that the parties there were the grand jury on the one hand, represented, to be sure, by the special prosecutor — the grand jury, which is an adjunct of the judicial branch of government, on the one hand — and the Chief Executive, on the other. And here, now that an indictment has been returned, the two parties are both members of the executive branch. Isn't that correct — that there is that difference?

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

Stewart: You are a member — you are the United States — the people of the United States, who you represent. You are not a member of the judicial branch, unlike the grand jury in Nixon against Sirica — you are a member of the executive branch of government, are you not?

Jaworski: That is correct, sir, yes.

Stewart: There is that difference.

Jaworski: There is that difference, yes.

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

Jaworski: But I don't think the description to which I pointed as to the independent status of the [special prosecutor] would be any different in the Sirica case than it would be in this case. And I was merely —

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

Jaworski: That is correct, sir.

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

Jaworski: Yes, sir. I realize that.

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

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

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

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

The President's chief of staff at the time that this appointment was accepted, and at the time that the new regulations were then drafted by the acting Attorney General, had assured me — and this is a part of the record, because a letter was written at the request of Senator Hugh Scott to the White House as a result of discussions that he had with Gen. Haig, in which I sent a copy of the testimony that I had given to the congressional committees to the White House so it would be fully aware of it and the receipt of it was acknowledged without any change in the testimony.

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

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

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

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

Thus, to argue, as has been done in these briefs, that the separation of powers preclude the courts from entertaining this action because it is the exclusive prerogative of the executive branch. not the judiciary, to determine whom to prosecute, on what charges, and with what evidence, we think misses the point.

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

See TEXT, A13, Col. 1

TEXT, From A12

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

Now, I want to make it clear that the President at no point of course delegated to the special prosecutor the exclusive right to pass on the question of executive privilege or any other privilege — attorney/client privilege, or any other testimonial privilege. What we are merely saying is that we have the clear right to test it in this court. And this is on what we stand. . . .

Passing to the merits, we would say

if there is any one principle of law that Marbury vs. Madison decides is that it is up to the court to say what the law is. And almost to the point of redundancy, but necessary because it was a landmark decision, Chief Justice Marshall reasoned we think with clarity and emphasis that it is emphatically the province and the duty of the judicial department to say what the law is. And this court, of course, through the years has reaffirmed, consistently applied that rule. It has done it in a number of cases — in Powell v. McCormack, in the Youngstown Steel seizure case, in Doe v. McMillan, and a footnote, I think a very important one, appears in that opinion, when Mr. Justice White pointed out that, "While an inquiry such as involved in the present case, because it involves two coordinate branches of government, must necessarily have separation of power implications, the separation of powers doctrine has not prevented this court from reviewing acts of Congress, even when, it is pointed out, the executive branch is also involved."

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

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

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

Brennan: Is the term "executive privilege" an ancient one? . . .

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

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

Jaworski: No, sir.

Stewart: I didn't think so.

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

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

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

Burger: In Scheuer against Rhodes [Kent State case] I thought we held that there is a common law privilege in the executives dealing at the state level, but that it is a qualified privilege, is that no so?

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

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

Jaworski: That is what I mean, yes, sir.

Marshall: Didn't this court say that it did have constitutional overtones?

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

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

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

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

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

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

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

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

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

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

Of course—

Douglas: That certainly would not be true if a case of the Fifth Amendment were involved. But that is not present here.

Jaworski; Not present, Mr. Justice Douglas. And there is no question but what the Fifth Amendment is very plainly written out in the Constitution and is invoked as a clear constitutional privilege.

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

if the courts are the ultimate interpreters of the Constitution and can restrain Congress to operate within constitutional bounds, they certainly shouldn't be empowered any less to measure presidential claims of constitutional powers.

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

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

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

Jaworski: That is also another issue. But I merely wanted to point out that I believe that this court would not go into the grand jury's findings. But it's a prima facie matter. And that this court would not go into it for the purpose of determining a matter of that kind.

White: I thought we had put that issue aside. I just don't understand what the relevance of that is to this case.

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

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

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

Stewart: Except part of the grounds on which you rest in subpoening this material is the fact that the President has himself been named as a co-conspirator, an indicted one. That's true, isn't it? That is part of the grounds on which you rest in subpoenaing this material. And the response to that is that the President cannot constitutionally be named as an unindicted co-conspirator. So to that extent it is in this case—the question is in this case.

Jaworski: I don't think it is a matter that, very frankly, has any particular basis to it, because I don't see how this court could be asked to substitute its judgment for that of a grand jury.

Stewart: Well, that is something quite different again—whether or not there was sufficient evidence before the grand jury to justify the grand jury in naming the President. That is quite different, and, as the Chief Justice suggested, a collateral issue.

Jaworski: That is right.

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

Jaworski: Not only that. I think it has been pinpointed in our view in materiality because it does relate to the question of the proof that we are seeking, the relevance of the proof that we are seeking. And this gets into, of course, a discussion of matters that are sealed and which I cannot discuss with the Court . . .

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

Jaworski: That is, I think, correct . . .

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

Burger: Mr. St. Clair.

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

May I quote from page —

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

St. Clair: I think, sir, they really are. First, by way of factual—

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

St. Clair: That is correct.

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

St. Clair: Right. And the court shall not be used to implement or aid that process, which is what is happening in this case. This case wouldn't be here on July 8 —

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

St. Clair: I would like to review some of the facts for you in this regard.

Marshall: Which are in the record?

St. Clair: Yes. My brother has mentioned them to you-.

Marshall: But are they in the record?

St. Clair: Yes, sir.

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

St. Clair: Exactly right, sir. Not only that, it makes the case unjusticiable, at least.

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

St. Clair: No. The case should be dismissed, sir.

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

St. Clair: Then I would retract what I said. This case should be dismissed.

Stewart; The case would be on appeal in the Court of Appeals.

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

St. Clair: No, sir. I am talking about the proceeding before the District Court, through the Court of Appeals, to this court.

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

St. Clair: Well, as I say, I think this case should be dismissed—period.

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

St. Clair: That is right, sir.

Brennan: That is quite different from dismissing the case.

St. Clair: I agree.

Douglas: That's deciding it on the merits.

St. Clair: That's right. That is what I am trying to get across to this court, perhaps unartfully—this case should be disposed of, be it by vacating the order below or not. In any event, it is improper in our view that this case should be heard in the context it is now being heard. We wouldn't be here on July 8, before a crowded courtroom if it was not recognized generally—

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

St. Clair: Exactly. And therefore it is a nonjusticiable issue in this and in the District Court. What has happened in this case is—

Douglas: Did you argue that to the

District judge?

St. Clair: I believe we argued the nonjusticiability argument, yes, sir. I know we did. But—

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

St. Clair: In this context at this time, sir. What has happened is this.

As you know, on Feb. 24 a grand jury secretly named the President among others as an unindicted co-conspirator. That fact was not made known. On March 1 an indictment was returned against a number of the President's chief aides. Coincident with that, and in an open courtroom, the assistant prosecutor—special prospecutor, handed up to the judge a bag, together with a sealed letter, requesting that this material be sent over to the House of Representatives. The President took no position regarding that proposal, because he considered it to be probably appropriate, under the belief that there was nothing accusatory in that material. Judge Sirica himself reviewed the material, found nothing accusatory, and said it would therefore be quite appropriate to send this material to the House of Representatives—not realizing and not knowing that the special prosecutor had previously obtained a secret charge against the President and others, which was definitely accusatory.

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

St. Clair: The material that was turned over was before the grand jury.

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

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

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

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

Stewart: Followed in what form?

St. Clair: By a newspaper leak.

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

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

Burger: I am not sure—perhaps you can help me—are you suggesting that there was some duty on the part of the special prosecutor to disclose to the District judge that there was this secret indictment before the judge passed on whether the material should be sent to the House?

St. Clair: I think it would have been quite appropriate, because the judge's decision was based on the proposition there was nothing accusatory; that under the circumstances absolute fairness was appropriate and required insofar as the President was concerned. No one could argue that the indictment as a co-conspirator, naming him as a co-conspirator, does anything but impair the President's position before the House of Representatives. That should in my judgement, have been made known to the judge. I don't know what he would have done under those circumstances. His decision was based solidly on the proposition there was nothing accusatory in the material.

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

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

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

St. Clair: No, Justice Stewart, I am not. The subject matter of these two matters is the same subject matter.

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

St. Clair: Right.

Burger: The prosecutor is preparing for that trial. He is trying under Rule 17 of the Federal Rules of Criminal Procedure to adduce matters to be used in evidence at that trial. You say that cannot go forward because of some tangential effect, or you say a direct effect, upon some other matter going on in another branch of the government.

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

Marshall: What in those tapes involves the impeachment proceedings?

St. Clair: Pardon?

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

St. Clair: Well, if Your Honor please, the House of Representatives has subpoeaned —

Marshall: I don't know what is in the tapes. I asume you do.

St. Clair: No, I don't.

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

St. Clair: Well, I do know that there is a preliminary showing that they are conversations between the President and his close aides.

Marshall: Regardless of what it is?

St. Clair: Regardless of what it is. They may involve a number of subjects.

Marshall: But you don't know.

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

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

Douglas: If his claim is honored by this court, all that would happen is the evidence would go to Judge Sirica 3ho would examine it in camera, I assume.

St. Clair: I presume that is so. And it would then be made available to the special prosecutor, the special prosecutor says this of course would then become part of the impeachment proceedings, and there we are . . .

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

Marshall: Why were you willing to give up 20-some of them?

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

Marshall: I'm talking about this case. You say he will give up 20 of them in this case.

By Joe Heiberger—The Washington Post

Hopeful spectators wait in line for seats at Supreme Court hearing.

St. Clair: Yes, we will—because they have already been made public.

Marshall: The tapes, or transcriptions?

St. Clair: As soon as the judge approves some method of validating the accuracy of these tapes, they can have the tapes. But you have to understand, the tape is a part of a reel. A reel may cover a dozen conversations. So there is a mechanical problem of trying to validate or be sure that this is correct. But it is only a mechanical problem. Once that is solved, subject to the approval of the judge below, they have the availability of that.

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

St. Clair: We think so. That is why we made them available.

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

St. Clair: No, sir.

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

St. Clair: I say this. I say the President should decide as a political matter what should be made available to the House.

Marshall: Oh.

St. Clair: That the court ought not to be drawn into that decision.

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

St. Clair: The House takes a different view. The House has subpoenaed something in the neighborhood of 145 tapes. And that is a political decision.

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

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

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

St. Clair: The impact of a decision in this case undeniably, Mr. Justice Brennan, in my view, cannot have — will not be overlooked.

Brennan: Any decision of this court has ripples.

St. Clair: I think it would be an inappropriate thing to do at this time because there is pending —

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

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

Burger: Have you at any time tendered or proferred a statement that a particular tape from eighteen minutes after eleven until three o'clock that af-

See TEXT, A14, Col. 1

TEXT, From A13

ternoon, including the lunch hour, included a conference with the Secretary of State, the Secretary of Defense and someone else having to do with totally unrelated matters. Has that kind of a tender been made?

St. Clair: No. We simply published the portion of that conversation which does not relate to that with the notation that a portion had been left out.

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

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

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

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

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

St. Clair: Other than the 20 that are already published, no effort has been made as yet, sir.

Marshall: Why not?

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

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

St. Clair: No, sir, we did not. We filed a motion to quash it.

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

St. Clair: Well, if Your Honor please, we are submitting the matter—

Marshall: You are submitting the matter to this court—

St. Clair: To this court under a special showing on behalf of the President —

Marshall: And you are still leaving it up to this court to decide it.

St. Clair: Yes, in a sense.

Marshall: In what sense?

St. Clair: In the sense that this court has the obligation to determine the law. The President also has an obligation to carry out his constitutional duties.

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

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

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

St. Clair: No, sir.

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

St. Clair: This is being submitted to this court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution.

Marshall: Are you submitting it to

this court for this court's decision?

St. Clair: As to what the law is, yes.

Burger: If that were not so, you would not be here.

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

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