Excerpts From Oral Arguments by Jaworski and St. Clair Before Supreme Court

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WASHINGTON, July 8 — Following are excerpts from the oral argument before the Supreme Court by Leon Jaworski, Watergate special prosecutor, James D. St. sel, and Philip A. Lacovara, assistant special prosecutor, in the cases of Uinted States of America v. Richard M. Nixon et al and Richard M. Nixon v. Uinted tSates of America. The unofficial stenographic transcript did not identify the Justices asking questions. Their names have been provided, wherever possible, from news reporters' notes. Where there is uncertainty, the names have been omitted.

JAWORSKI ARGUMENT

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 pre-trial proceedings.

It was a well-kept secret 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 prosection 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.

Release of Transcripts

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 subpoenaed conversations were included among the 43. Then on May 1, [he] 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 two-and-a-half months prior. 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 to the material that we seek to subpoena.

QUESTION: 17(C) presupposes the subpoena 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, in order to provide all of the links in the conspiracy, to show that the President was named as an unindicted co-conspirator. It became very important, Mr. Justice, for us to have that as a part of the proceedings so that we could use the various links in the testimony so as to show that the conversations were such as to make one admissible as against a co-conspirator.

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.

STEWARD: 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.

QUESTION: 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. And we

don't so contend. In other words, this was in connection with showing that we have the right to this evidence.

QUESTION: I understand that.

JAWORSKI: Yes, sir.

QUESTION: 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.

BRENNAN: 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: 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: 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?

One Fundamental Issue

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.

JAWORSKI: 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 subpoenaed 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 chief 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 his 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 notion 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 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 subpoenas 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.

QUESTION: 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."

JAWORSKI: That is right, sir.

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

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 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 more so 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.

We are standing upon not only the matter that this is an appeal that properly had been in the Court of Appeals, and for that reason has been moved up here properly under 1254.1. We also say that the Court has jurisdiction over the petition and cross-petition under 1254.1 because they present for review all questions raised by the petition—by the President's petition for writ of mandamus. And then we also say that in addition to that the All Writs Act gives this Court the jurisdiction to proceed.

The Intra-Executive Issue

Now, I would like to pass to the intra-executive dispute.

We 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 with the Acting Attorney General, 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.

One of the express duties that is delegated to the special prosecutor is that he shall have full authority for investigating and prosecuting — allegations involving the President. And the delegation of authority expressly states 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 or 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 improprieties 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.

QUESTION: 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 the case.

JAWORSKI: That is correct, sir. I think we have what might be termed a quasi-independent status.

QUESTION: Mr. Jaworski, quasi-independent in the sense of an agency?

JAWORSKI: Yes, sir. For instance, the Controller 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 Controller.

Now, I should say that it is interesting when the case of Nixon v. Sirica was before the Court of Appeals, Prof. Charles Alan Wright, who was then arguing that case, 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."

But the President's present counsel in his motion to quash, as he does here—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—represented, to be sure, by the special prosecutor—the grand jury, which is an adjunct of the judicial branch of govern-

ment, 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.

JAWORSKI: Yes, sir, that is correct. But I don't think it is a distinction as to the substance. I don't think the description to which I pointed as to the independent status of the independent executor would be any different in the Sirica case than it would be in this case.

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 just what did transpire with respect to how 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, General Haig.

[Acting Attorney General Robert H.] 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 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 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 this is a part of the record, because a letter was written at the request of Senator Hugh Scott.

I [was] assured to the right to judicial process by him after he had reviewed the matter with the President and [he] 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.

Thus, to argue, as has been done in these briefs, that the separation of powers precludes 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 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.

Right to Court Action

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 v. Madison decides is that it is up to the Court to say what the law is. And this Court, of course, through the years has reaffirmed, consistently applied that rule.

It is done 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, but it is not one that I find any basis for in the Constitution.

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

JAWORSKI: No, sir.

QUESTION: 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 v. Rhodes 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 not so?

JAWORSKI: Yes, Mr. Chief Justice, that is exactly the point. This Court has examined a number of situations. And in some situations, where

military secrets were involved, or national secrets of great importance, the Court has taken a good close look, and has upheld privilege.

QUESTION: 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.

QUESTION: Didn't this Court say that it did have constitutional overtones?

JAWORSKI: Yes, sir, but it certainly has never placed it in the Constitution so far as I am aware of.

QUESTION: That was in Kaiser Aluminum and Chemical Corporation case in the Court of Claims that phrase was used?

JAWORSKI: Yes, sir.

POWELL: Is it your view that there are no influences to be derived from the doctrine of separation of powers?

JAWORSKI: What I am saying is that the separation of powers doctrine, as was pointed out in the Doe v. McMillan 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.

QUESTION: 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.

JAWORSKI: On the issue of executive privilege, I should point out here, it is a very narrow one. 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.

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. But if the courts are the ultimate interpreters of the Constitution and can restrain Congress to operate within constitutional bonds, 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 findings 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 pre-trial 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, must be considered as being valid and sufficient to show continuation of the particular conspiracy that was charged.

BURGER: Well, is that the 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.

STEWART: Except part of the grounds on which you rest in subpeoenaing this material is thef cat that the President has himself been named as a con-conspirator, an unindicted one. That's true, isn't it? And the response to that is that the President cannot constitutionally be named as an unindicted co-conspirator.

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 sufficent 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.

DOUGLAS: I thought the heart of this case was the rights of defendants in a criminal trial to that evidence. It may be exculpatory and free them of all liability.

JAWORSKI: Well, certainly it is true that this material, as we have pointed out in our communications to the President, may well invove exculpatory matters, and time and again pointed out we wanted them simply because we felt that there were matters that needed to be developed in connection with the prosecution, but that they could well contain exculpatory matter.

BURGER: The Brady question really lurks just in the background, does it not? That is, if you get information, whatever you get will be available to any defendant who can make a showing.

JAWORSKI: Correct, sir.

STEWART: And the question of whether or not the defendants, under the Brady doctrine, are entitled to subpoena information and material that is not now in your possession but is in the possession of the President, was an issue that was left undecided by the District Court.

JAWORSKI: That is correct, sir.

St. Clair Argument

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. It is improper in our view that this case should be heard in the context it is now being heard.

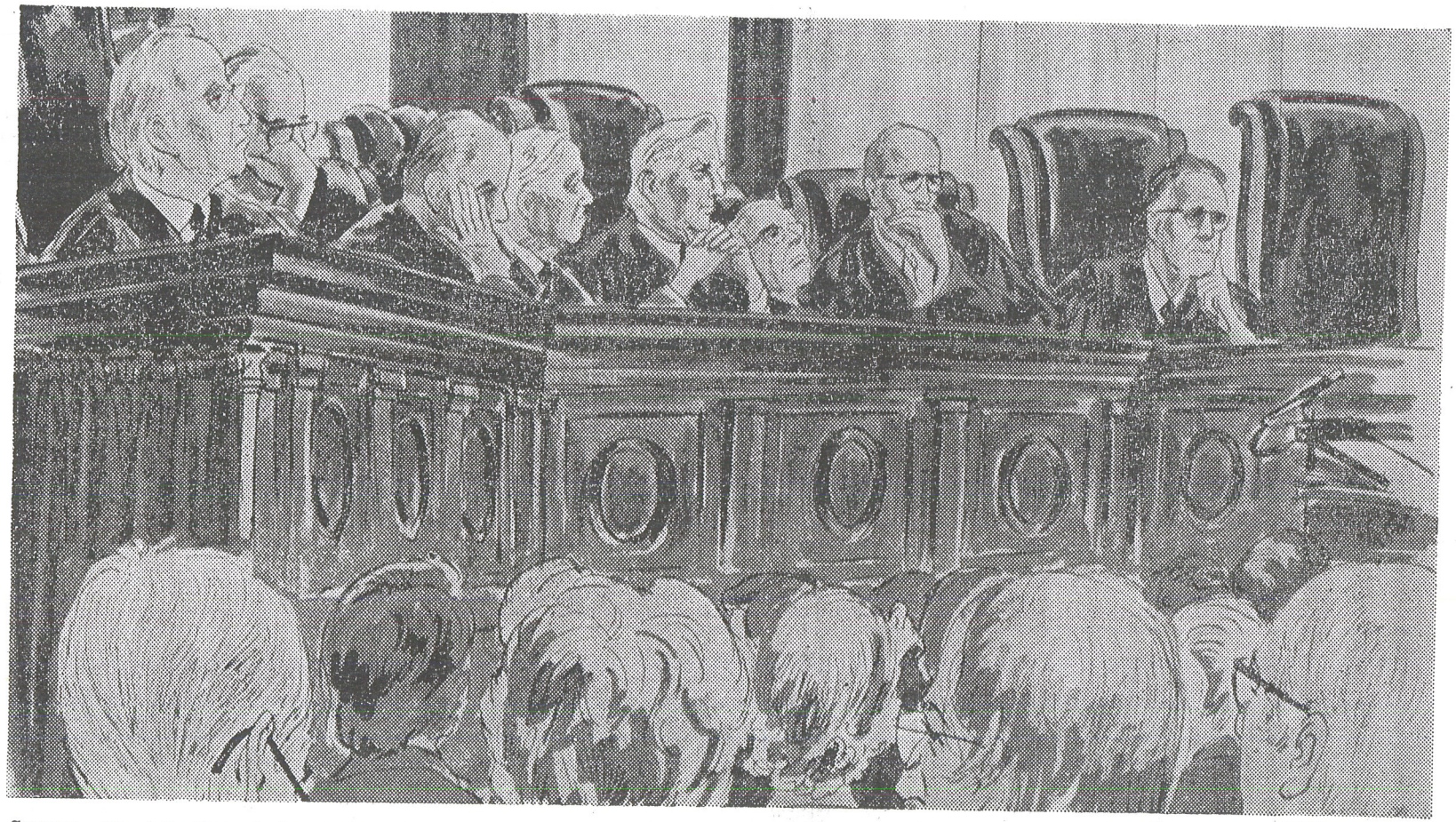
QUESTION: It is a political question here, and it was a political question in the District Court.

ST. CLAIR: Exactly. And therefore it is a nonjusticiable issue in this and in the District Court.

QUESTION: Your position is thatthe 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 prosecutor, 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 Presi-



NBC News/Betty Wells

Supreme Court Justices during Watergate arguments. From left: Lewis F. Powell Jr.; Thurgood Marshall; Potter Stewart; William O. Douglas; Chief Justice Warren E. Burger; William J. Brennan Jr.; Byron R. White and Harry A. Blackmun. William H. Rehnquist is not sitting in the case.

dent 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.

BURGER: 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; naming him as a co-

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conspirator does anything but impair the President's position before the House of Representatives. That should in my judgment have been made known to the judge. I don't know what he would have done under those circumstances.

Now, my brother says in his brief that this material 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, 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: Well, how far does your point go? Let's assume that murder took place on the streets of Washington of which the President happened to be one of the very few eyewitnesses. And somebody was indicted for that murder. And the President was subpoenaed as a witness. Would you say he cannot be subpoenaed now, because there is an impeachment inquiry going on and the courts absolutely have to stop dead in their tracks from doing their ordinary judicial business?

ST. CLAIR: I would not say that. I don't think he could be necessarily subpoenaed. I don't think the President is subject to the process of the Court unless he so determines he would give evidence.

STEWART: You are saying that the courts 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. I say it should not go forward at this time, because the subject matter being inquired before the House committee is exactly the same subject matter being involved in this argument — namely, should the President produce the tapes.

QUESTION: What in those tapes involves the impeachment proceedings? I don't know what is in the tapes. I assume you do.

ST. CLAIR: No, I don't.

QUESTION: 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.

QUESTION: Regardless of what it is.

ST. CLAIR: Regardless of what it is.

BURGER: Mr. St. Clair, going back to this murder witness situation, if the President, any President, witnessed an automobile accident, was the sole witness, or a murder, as Mr. Justice Stewart suggested, you are not indicating that his testimony, his evidence would not be available to the Court, but merely that he cannot be subpoenaed, but might give it by deposition, as several Presidents have in the past.

ST. CLAIR: That is quite correct. It really is a matter of accommodation, not as a matter of assertion of a right of one branch over another. But the point I want to make is that the same subject matter is inexorably involved in both proccedings now proceeding at the same time.

MARSHALL: Why were you willing to give up twenty-some of them?

ST. CLAIR: I say the President should decide as a political matter what should be made available to the House. That the Court ought not to be drawn into that decision.

QUESTION: 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 f 145 tapes. And that is a political decision.

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

ST. CLAIR: The President has not honored any of the subpoenas other than the first ne 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.

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, will not be overlooked.

BRENNAN: Any decision of this court has ripples.

DOUGLAS: But as I said before the beneficiaries here are six defendants being tried for criminal charges. And what the President has may free them completely. Is that true? Theoretically?

ST. CLAIR: But I do not believe it is before this Court at this time. What is before this Court is a prosecutor's demand for evidence. And I direct my remarks for a moment to that problem. He

says that in effect we have no right to be here, that we have delegated the who, the when, and with what issues to him. We have delegated the who and the when, and pursuant to that he has indicted a number of people. And he has indicted them at such time as he thought appropriate. But even he contends that we did not delegate to him what Presidential conversations would be used as evidence. That was reserved. And he concedes that he is the fact. And that is what is at issue here. Not when and who is to be indicted, but what Presidential communications are going to be used as evidence. And that is what the issue is in this case.

The Right to Challenge

Now, my brother says I have no right to even challenge his right to be here. And I would like to deal with that.

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.

If this was a United States Attorney, this case would not be here, of course. It is here only because certain things were delegated to the special prosecutor. But the special prosecutor was not delegated the right to tell the President what of his conversations are going to be made available as evidence.

QUESTION: If the United States Attorney brings a prosecution, and in the course of that prosecution he subpoenas material in the custody of the President, what happens?

ST. CLAIR: The President says to the Attorney General, "I am not going to produce this material."

QUESTION: No. It's the United States Attorney subpoenaing it under your hypothetical case.

ST. CLAIR: In my view the President would instruct the Attorney General to instruct the United States Attorney to withdraw his motion.

QUESTION: And the United States Attorney says, "I'm not going to do that because I am sworn to uphold justice."

ST. CLAIR: Then you would have a new United States Attorney. Well, I'm being a little facetious.

QUESTION: I'm being serious, because I think—

ST. CLAIR: I think the United States Attorney, with all respect, would and should be removed from that case.

QUESTION: By whom?

ST. CLAIR: The executive power of the Government is not vested in the United States Attorney. It is vested on one man and that man is the President of the United States.

QUESTION: By statute it is vested—law enforcement is vested in the Attorney General.

ST. CLAIR: Yes. But that statute which my brother cites in his brief does not deprive, nor could it deprive, the President of his constitutional authority to be the chief law enforcement officer. He shall take care to see that the laws are enforced. The executive power is vested in him, in one man. And the Attorney General is nothing but a surrogate for the President of the United States.

QUESTION: Your argument is a very good one as a matter of political science, and it would be a very fine one as a matter of constitutional and probably statutory law —except hasn't your client dealt himself out of that argument by what has been done in the creation of the special prosecutor? You have just pointed out that the special prosecutor is quite different from the United States Attorney.

ST. CLAIR: Right. Perhaps with respect to everything except—the President did not delegate to the special prosecutor the right to tell him whether or not his confidential communications should be made available as evidence.

The right to order the President to give up confidential communications. That was not delegated.

A special prosecutor, with the power that my brother suggests he has, is a constitutional anomaly. We have only three branches, not three-and-a-third or three-and- a-half or four. There is only one executive branch. And the executive power is vested in a President. Now if for political reasons the President wants to dole out some of those powers, he may do so, and has done in this case. But he cannot vest jurisdiction in a court that otherwise the court would not have. Nor should the court accept jurisdiction.

QUESTION: So that's not political.

ST. CLAIR: Well, it is not in the context of the proceedings here but in the context of whether or not it is in fact involved in this case it is, I suggest, political in the sense of information being sought. Admittedly it then becomes available to the House.

STEWART: Mr. St. Clair, with the jurisdictional question, as I further understand it, that argument of yours—at least I got it from the brief—involves at least two separate concepts, maybe three. One is that this is an intrabranch dispute and that argument would be fully valid under the analogy you use in your brief if this were a dispute between, let's say, two committees in one of the houses of the Congress. And one committee sued the other for jurisdiction of a particular matter, you suggest, probably quite correctly, that that would not be a matter for the judiciary to determine. That's one argument. But this is purely an intra-executive branch controversy as it would be between two Congressional committees.

Then you have quite a separate argument it seems to me, i.e., that the President constitutionally is the chief prosecutor since he is the executive. And that it is not for the courts to decide what a prosecutor shall use in prosecuting a case. Now, aren't those two separate arguments?

STEWART: You make them both under the same rubric as I say. But it seems to me they are quite separate arguments.

ST. CLAIR: And I think they are well founded. Now I would like to move if I may to briefly the suggestion that the issue here is nonjudiciable on the grounds other than I have already mentioned. There is a textual constitutional grant if we assume that the grant of executive power includes the means by which that can be effectively exercised. That's

the second ground. Therefore, I suggest that even if there is subject matter jurisdiction the case is nonjusticiable for these additional reasons.

The standards of Baker v. Carr and Powell are not applicable here. There is no individual's rights who have been protected against the onslaught of government.

If anything, a decision in this case against the President would tend to diminish the democratic process. This President was elected on the theory that he would have all the powers, duties, and responsibilities of any other President. And if it is determined that he doesn't, there is a certain amount of diminution of the political aspect of the case insofar as constituents who voted for him are concerned. This President ought not to have any less powers than any other President ought to have. One of the necessary results as I view them from my brother's argument is that because of the circumstances of this case Richard Nixon is let's say a 35 per cent President, not a 100 per cent President. And that can't be constitutionally.

I would only call your attention to the action of the framers of the constitutional convention when the issue was raised as to whether or not a President who was under impeachment should be suspended duringth e pendency of the impeachment proceeding. And the decision was definitely he should not because the framers envisioned a strong, active President even in the course of impeachment proceedings.

ST. CLAIR: The President is not above the law by any means. But law as to the President has to be applied in a constitutional way which is different than anyone else. Namely, we suggest that he can only be impeached while in office and cannot be indicted until such time as he no longer is in office.

QUESTION: I should think you could run the argument the other way, saying that since the President cannot be indicted then all that can happen to him is that he be, can be named as an unindicted co-conspirator.

ST. CLAIR: That could be said. But the naming of him as an unindicted co-conspirator we suggest is an intrusion by the grand jury on a function that is solely legislative and not judicial.

DOUGLAS: A President could be sued, couldn't he, for back taxes or penalties or what not?

ST. CLAIR: I think the President could be sued for back taxes in his individual capacity. But in terms of his power to effect the responsibilities of his office, to protect the Presidency from unwarranted intrusions into the confidentiality of his communications, that's not a personal matter.

QUESTION: Would you say if conversation is merely a recitation of fact it is still covered by executive privilege?

ST. CLAIR: It might well have to do with the decision-making process if the facts are such as were developed in the course of an investigation with regard to the existence of an obstruction of justice charge, much of which the President was involved. But the fact against opinion decisions really relate to another situation as I suggest in the statute but the conversations that the President has with his advisers which we suggest is absolutely privileged. It is a discretionary matter that he has to exercise in what he is going to release and not release. And since **Marbury** and **Madison, Mississippi** and **Johnson** it has been clear that the courts will not direct a President to exercise his discretion in any manner.

It is not a ministerial duty by any means. It is a matter of discretion. There are some things he feels he probably should under the circumstances make available and others he shouldn't.

QUESTION: $n that particular instance, the one here involves the relevancy of materials to a criminal trial. And that normally has been a part of the judicial power under Article III and not executive power.

ST. CLAIR: Well, I would like to discuss very briefly **Gregoire** if I may, for example. I think this raises a very important question.

An 'Explicit' Immunity

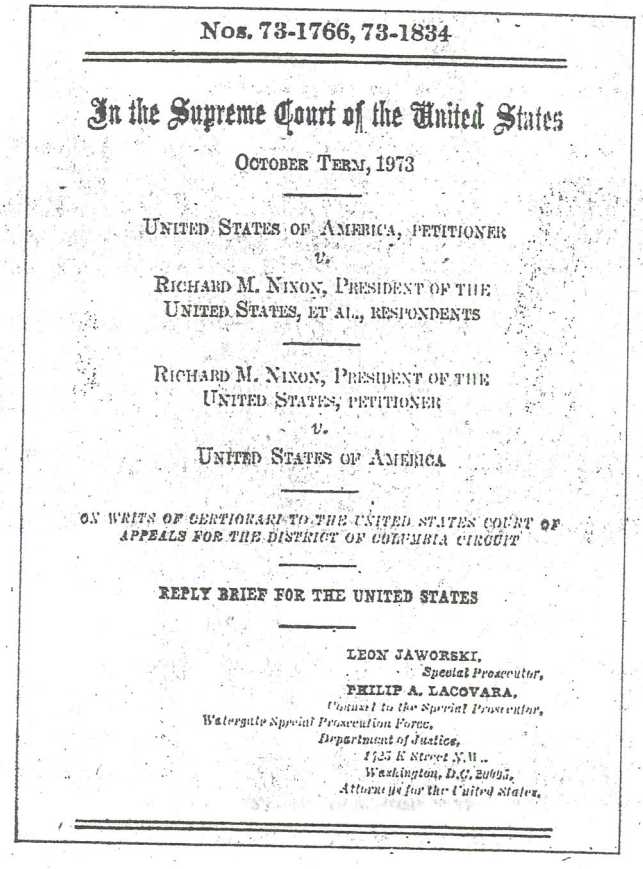
There is, of course, an explicit speech and debate immunity provided in the Constitution. The reason for this is quite clear. It is to protect the legislature from unwarranted invasion from the executive and perhaps even the judicial. It does not mean the executive is not entitled to substantially the same thing by implication. And at least in the civil field, as we have pointed out, the courts have worked out by implication as a necessary ingredient to the function of the duties of the executive an absolute immunity from civil liability for actions taken within the sphere of the official. Spalding and Vilas I guess is the leading case cited in Barr and Matteo and other cases.

If such a matter can be worked out with respect to the executive on civil matters we suggest there is no reason why in fact the Court should spell out a similar exemption in criminal matters especially as they relate to the President himself. Because while I said the President is not above the law, the law can only be made applicable to him in a certain way while he is in office.

Now, if a junior Congressman can commit a crime on the floor of the House, as apparently is possible under Gravel and Johnson, is it to be said that the President of the United States has less immunity than a junior Congressman. I think not.

QUESTION: Except they didn't put it in the Constitution.

QUESTION: Mr. St. Clair, you have not mentioned the



Nos. 73-1766, 73-1834

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER
v.
RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER
v.
UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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PHILIP A. LACOVARA,
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holding of this Court in Pearson against Ray, where, as I recall it, the Court assumed with a sentence or two that there was absolute privilege for the judiciary but that the privilege of the executive, in that case a policeman, was qualified. The Court had no difficulty in concluding that it did not require an expressed constitutional provision to spell out an absolute privilege for judges. These were state judges in that case, of course.

ST. CLAIR: That's right. I would like to make one point with the Court, however. A President serves seven days a week, 24 hours a day. And only he, or those under him performing his functions, can exercise the executive functions of our Government.

QUESTION: This is pretty far afield from the basic question here which is the testimonial previlege—

ST. CLAIR: We say it's a constitutional privilege.

QUESTION: Not prosecutorial immunity, but testimonial privilege is what we are dealing with here basically.

ST. CLAIR: That is correct. I think so. I want to make the point with you that we think that the privilege we are arguing for is both common law and constitutional law.

STEWART: Mr. St. Clair, [I] ask you whether it is your claim that any of these materials have to do with what have sometimes been called matters of state, i.e. matters of international relations or national defense? Mr. Jaworski assured us that they did not involve matters of state. But I would like to hear what you have to say about that. Because as you well know, both the commentators and court decisions have made a dichotomy between the privilege that exists with respect to general confidentiality on the one hand of the executive, and matters of state, on the other, to which a higher privilege is sometimes been thought to have been accorded.

ST. CLAIR: Well, I think if a higher privilege has been accorded, it should not. The answer to your question is no one knows. You won't know until you listen to these tapes as to what subjects are discussed. My brother can only state that it is probable that they relate at least in part to whatever he says, Watergate, or it's likely that it might. And I have had the experience, for example, where circumstances were such that the House committee felt that it was likely that a conversation took place between the Attorney General, Mr. Mitchell, and the President regarding plans for surveillance of the Democratic party. When you looked at the conversation, it wasn't there at all.

So I have no way of knowing, nor does the prosecutor know, what additional matters may be interwoven into these conversations. One thing is certain—

STEWART: Am I mistaken in understanding, Mr. St. Claiir, that in this case to date no representation has been made by affidavit or professional representation or otherwise that any of these materials have to do with national defense or international relations?

ST. CLAIR: No. And no representation can be made tot he contrary either. No matter what the conversation is, of course, it is the thought that it might become public that involves this chilling effect we have made reference to in our brief under the First Amendment.

QUESTION: Let's just assume that the only issue that was left in the case was the 17(C) issue.

ST. CLAIR: Then the President wins, in my view. Because the prosecutor cannot show that the evidence he seeks is relevant and admissible. Because of the nature of the circumstance, he doesn't know what's in there.

QUESTION: Well, I suppose there are two parts to the question: one, how much of a showing does he have to make as to what might be on the tape; and, secondly, if that matter that he claims is on the tape is on the tape, is that relevant and admissible under 17(C)?

ST. CLAIR: Under 17(c) we're dealing with the prosecutor's subpoena. The decided cases make it clear there must be a specific showing of relevance and admissibility.

QUESTION: Well, that isn't what 17(c)—St. Clair: That's his problem, not mine.

QUESTION: Mr. St. Clair, may I get back to what seems rather fundamental to me. Let us assume that it had been established that the conversations we are talking about here today did involve a criminal conspiracy, would you still be asserting an absolute privilege?

ST. CLAIR: Yes, quite clearly. Under the analogy with Gravel that I made.

QUESTION: Right. And as I understand it, the public interest behind that privilege is the preservation of candor in discussions between the President and his closest aides.

ST. CLAIR: Quite clearly so. And we're not at that point yet.

QUESTION: My question was based on the assumption that it had been established that the conversations did relate to a criminal conspiracy.

ST. CLAIR: That is, the case has been tried and the defendant found guilty.

QUESTION: No. well, it could have been established in various ways, as you just said, a number of people have already confessed, and these people were participants in some of these conversations.

ST. CLAIR: But the fact that one defendant confessed does not make the other defendant guilty.

QUESTION: Of course. But, anyway, your answer is that you would still assert absolute privilege.

ST. CLAIR: The answer is yes, even if it is criminal. But, more importantly, it is yes, because criminality is something that is not necessarily determined at the time that you must resolve the issue. And that you should not destroy the privilege in the anticipation of a later finding of criminality which may never come to pass.

It is quite conceivable that a number of these defendants will be found innocent. And, in fact, in theory, they are innocent right now.

QUESTION: What is the public interest in keeping that secret?

ST. CLAIR: to avail the President, if your honor please, of a free and untrammeled source of information, and advice, without the thought or fear that it may be reviewed at some later time, when some grand jury in this case, or some other reason, suggests there is criminality.

For example, the simple matter of appointments, an appointment of a judge. It's not at all unheard of for lawyers to be asked their opinion about a nominee.

Now, if that lawyer wants to be sure that he's going to

be protected in giving candid opinions regarding a nominee for the bench, it's absolutely essential that that be protected. Otherwise, you're not going to get candid advice.

Now, this isn't a state secret, it isn't national defense; I suggest it's more important, because that judge may sit on that bench for 30 years.

QUESTION: Don't you think it would be important in a hypothetical case if an about-to-be-appointed judge was making a deal with the President for money? ST. CLAIR: Absolutely.

QUESTION: But under yours it couldn't be. In public interest you couldn't release that.

ST. CLAIR: I would think that that could not be released, if it were a confidential communication. If the President did appoint such an individual, the remedy is clear, the remedy is he should be impeached.

QUESTION: How are you going to impeach him if you don't know about it? ST. CLAIR: Well, if you know about it, then you can state the case. If you don't know about it, you don't have it.

QUESTION: If you know the President is doing something wrong, you can impeach him; but the only way you can find out is this way; you can't impeach him, so you don't impeach him. You lose me some place along there.

ST. CLAIR: Human experience has not demonstrated that's a fact. Very few things forever are hidden.

Secondly, this case is not that case. As I pointed out, there is a plethora of information. This is not a case where there is no information. If anything, there is more than enough.

Lacovara Argument (Rebuttal)

We have never argued, and of course there would be no basis for arguing, that the mere grand jury finding, whether on the face of the indictment or in the grand jury's minutes, that the President or any of the other 18 unindicted co-conspirators were members of this conspiracy would itself be enough at trial to warrant the judge's admission of extra-judicial statements given by those co-conspirators.

We are not making that contention here. The issue arises because a motion to quash a subpoena was filed prior to trial. And the basis for that motion was a claim of executive privilege, a governmental privilege that exists for the benefit of legitimate governmental processes.

We countered that this President, as difficult as it was to say this—not because of the evidence but because of the inherent awkwardness of it—this President is not in a position to claim this public privilege, for the reason that a prima facie showing can be made that these conversations were not in pursuance of legitimate governmental processes or the lawful deliberation of the public's business. These conversations, as we showed in our 49-page appendix, and as the grand jury alleged, were in furtherance of a criminal conspiracy to defraud the United States and obstruct justice.

We did not rely, even before Judge Sirica, and we do not rely here, merely on the fact that the grand jury made this determination. We do submit that for purposes of a pre-trial consideration of a subpoena that is challenged on grounds of executive privilege, we are not confronted with the need that we will be confronted with a trial, which we fully intend to discharge, of showing by evidence to the trial judge that the President and the other co-conspirators were members of the co-conspiracy.

POWELL: Mr. Lacovara,, let's back up a minute. Do you concede that an incumbent President of the United States could not be indicted and tried for a crime?

LACORVA: No sir.

POWELL: You do not. Do you think he could be?

LACOVARA: We have not expressed a position on that, Mr. Justice Powell.

POWELL: Let's assume for the moment that he could not be. Would you still argue that the grand jury had the power or the right, and if so by virtue of what?

LACOVARA: Yes, we—

POWELL: To name his as an unindicted co-conspirator.

LACOVARA: The issue of Presidential indictability does not determine the issue which an incumbent President can be named as an unindicted co-conspirator by a grand jury.

We have shown in our brief why even persons who do have some constitutional immunity—and counsel argues that implicity under the framework of the Constitution, the President should have an implicit immunity from prosecution—even such persons can be and frequently are named by grand juries as unindicted co-conspirators.

The practical arguments that may militate in favor of a judicial recognition of some unique immunity for the President alone—not for circuit judges, not for Supreme Court Justices, not for members of Congress, but the President alone it may be held at some later date is immune from prosecution—but that by no means suggests the answer to the question here. And the grand jury elected not to test that issue.

POWELL—The thing that I was wondering about is that there is only one President, and executive power is vested in him. And I do wonder whether or not the precedents you set with respect to other people would vest the authority in a grand jury, either on its own motion or because of what some prosecutor suggested, while the President is in office, to name him as an unindicted co-conspirator. With grand juries sitting all over the United States, and occasionally you find a politically motivated prosecutor—that's a rather far-reaching power, if it exists.

LACOVARA: It is, Mr. Justice, and there is no doubt about it. We are conscious of the delicacy of the issue. We have suggested, however, that although there is some conceivable opportunity for abuse, our judicial system, our democratic system is based on several fundamental propositions, one of which is that grand juries usually are not malicious. Even prosecutors cannot be assumed to be malicious. We also assume, as this Court regularly holds in First Amendment cases dealing with public officials, that we have a resilient society where people can be trusted to sort out truth from falsehoods. We have a robust debate.

I submit to you, sir, that just as in this case a grand jury would not lightly accuse the President of a crime, so, too, the fear that, perhaps without basis, some grand jury somewhere might maliciously accuse a President of a crime is not necessarily a compelling reason for saying that a grand jury has no power to do that. I think the system may be vibrant enough to deal with that. And I think the inherent dignity of the President office of any incumbent provides him

with a notable check against being defeated, or as my colleague says, impeached by the action of a grand jury.

This is perhaps the most notorious event, notorious case in recent times. When the grand jury's action was disclosed, I venture to say that although it was a difficult time for all concerned, including the prosecutors as well as other counsel and the country — the President has not been displaced from office, he still is President, he still functions in accordance with his Constitutional powers.

BRENNAN: Mr. Lacovara, you have only a very few minutes. Are you going to address Mr. St. Clair's opening argument that the pendency of the House Judiciary impeachment inquiry either should lead the Court to conclude that this whole business before us is a nonjusticiable matter, therefore, necessarily, that Judge Sirica's order should be quashed. Or, in any event, that because of the possible effect of a decision on the issue presented, upon the impeachment inquiry, that the Court should stay its hand.

LACOVARA: That was to be my last point, sir, and I will make it right now.

The notion that because there is concurrently under way an impeachment inquiry before the House of Representatives, that somehow makes this a nonjusticiable political question is, we think, a remarkable notion which is not supported by sound contitutional law or by any of the decisions of this Court, and, indeed, I submit that to the extent that the Court has discretion in the matter, and although this Court has now been given discretionary certiorari power, district courts have no such option, it would not even be a wise exercise of discretion for this Court to stay its hand.

This case before the Court is not a request for an opinion between two Congressional committees as to who has jurisdiction over a particular bill. It's not even a request for a dispute between Cabinet officers, or the President and a Cabinet officer, over what proper executive policy ought to be.

This is a criminal proceeding, a Federal criminal case against six defendants. A subpoena has been issued to obtain evidence for use at the trial, which is scheduled to begin on Sept. 9.

The Court cannot escape the fact that this is a trial of tremendous national importance, but a trial that was brought to head without regard to the impeachment inquiry. This is an independent, separate constitutional process that is under way, and a traditional, ordinary, prosaic remedy — a subpoena — has been utilized to obtain evidence for that trial.

There is some debate about whether the evidence is critical to our prosecution. I noted in JUSTICE REHNQUIST'S opinion a few weeks ago, in Michigan v. Tucker, 5-5 he echoed, or presaged, perhaps, the same point that JUDGE SIRICA made, that it's really the obligation of the prosecution to present all of the material evidence for the jury, for the fact-finder to pass upon.

That's what this case involves.

Now, to say that there will be public consequences, even political consequences, to the Court's action does not mean that this is a political question, so that the Court must regard it as nonjusticiable.

Not to belabor the point, but perhaps the finest chapter in the Court's recent history has come—the finest chapters have come in the fields of reapportionment, civil rights, and the procedural rights of the criminally accused. It would be naive to say that those were not profoundly, politically important decisions. But they were made as decisions of constitutional law, despite the consequences that political branches might face, despite the public reaction, the Court understood its duty to interpret the Constitution.

That's all we ask for today. That's all Judge Sirica has done. We believe he has done it correctly. We believe the case is fully justiciable. We believe the principles that have been briefed by the parties support the correctness of the decision below. And we submit that this Court should fully, explicitly, and decisively, and definitively uphold Judge Sirica's decision.

St. Clair (surrebuttal)

In response to my brother's most recent argument: Of course, the other cases were, in and of themselves, important cases, with political implications.

But this case is different in that the decision in this case will have an undeniable impact on another proceeding. And another proceeding which the Constitution says is essentially a political proceeding, from which the Court is excluded.

And for this Court to be drawn into that thicket, if I may call it that, seems to me highly inappropriate, at least at this time. As I indicated at the outset, the House committee has made certain political decisions, the President has made certain political decisions. They will each have to bear the responsibility of those decisions with the American people.

This court should not impair, interfere with, or otherwise participate directly or indirectly in that proceeding. And it's inevitable that it would happen. This courtroom wouldn't be full today if this were simply a suit on a subpoena brought by the special prosecutor against the President, even though that would be an important political matter because the President is involved.

But this is important for other reasons, quite apart from that, other reasons which, I suggest, indicate quite clearly that this Court ought to, in its discretion and in its judgment, stay its hand, at least until such time as those proceedings have run their course.

The action by a grand jury purporting to assess criminality to a President is not above the law. Nor does he contend that he is. What he does contend is that as President it can be applied to him in only one way, and that is by impeachment, not by naming as a co-conspirator in a grand jury indictment, not by indictment or in any other way. And therefore in this case I urge that this Court take such action as is appropriate to overrule Judge Sirica's decision in order that this case be dismissed.