Excerpts From Jaworski, St. Clair Briefs on Tapes

Following are excerpts from the Supreme Court by the final briefs filed with the Supreme Court by the Watergate special prosecutor and President Nixon's lawyers over the subpoena of White House tapes.

President's Brief

The special prosecutor states an obvious and important truth when he reminds us that "in our system *even the President* is under the law." A fundamental error that permeates his brief, however, is his failure to recognize the extraordinary nature of the presidency in our system and that the Framers, who fully understood this, provided an extraordinary mechanism for making a President subject to the law.

The President is not merely an individual, to be treated in the same way as any other person who has information that may be relevant in a criminal prosecution. He is not, as the Special Prosecutor erroneously suggests, merely "the *head* of the Executive Branch." Instead ... it was announced by this court more than a century ago, and since reiterated, that "the President is the Executive Department." Mississippi v. Johnson ... So much is apparent from the Constitution itself. Article II begins with the simple but sweeping declaration: "The executive Power shall be vested in a President of the United States of America" ... In addition, the President, as this court has recognized is, more than any other officer of government the representative of all of the people. Myers v. United States ... Chief Justice Taft went on to say that:

> as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

It was no mere happenstance that all executive power was vested in a single person, the President. This was a subject of recurring debate at the Constitutional Convention. Suggestions of a multi-member Executive were repeatedly pressed and as repeatedly rejected. It was seen, as Dr. Franklin said, as "a point of great importance."

In this respect the Executive differs from the other two great branches of government. The legislative power is vested by Article I in "a Congress of the United States" divided into two bodies and composed now of 535 members. The judicial power is, by Article III, spread among the nine Justices of this court and the hundreds of judges of the inferior courts that Congress has seen fit to ordain and establish. But one person and one person alone is entrusted by Aritcle II with the awesome task of exercising the executive power of the United States. "The President is the Executive Department." This difference, as we shall develop below, has important consequences. It serves to distinguish many of the cases relied on by the special prosecutor, involving as they do individual members of the legislative and judicial branches. Specifically, the particular position the President occupies in our constitutional scheme means that the courts cannot issue compulsory process to compel him to exercise powers entrusted to him in a certain way, that, so long as he is President, he is not subject to criminal process, and that, as a logical corollary, he may not, while Presdent, be named as an unindicted co-conspirator.

Of course ... the Framers did not want a king, and Hamilton devoted all of the 60th Federalist to demonstrating that the presidendy, as created in the Constitution, bore no resemblance to the monarchy from which the colonists had successfully rebelled. The term of the President is limited to four years. The legislative branch controls the national purse strings, the war power, and the general policy direction of government. The President is given only a limited veto, subject to being overriden, over legislative acts. He is given no role whatever in the process of constitutional amendment. Finally, and most important for present purposes, the President may be removed from office by conviction on impeachment, and after he has left office, either through expiration of his term or by conviction on impeachment, he is subject to prosecution for crimes that he may have committed.

... The language of Article I, Section 3, Clause 4, can hardly be read in any other way than that indictment of a President can only follow his conviction on impeachment. This was certainly the understanding of the delegates at Philadelphia, of the contemporary expositors of the Constitution, and of students of constitutional law from 1787 until today.

There is nothing in

United States v. Isaacs (the Kerner case) . . . that is contrary to what we have just said. A judge of a court of appeals is not the judicial branch. He is a part of that branch, but the Judiciary can function uninterrupted during those rare occasions when a single judge is forced to stand trial on a criminal charge. The presidency cannot funciton if the President is preoccupied with the defense of a criminal case, and the thought of a President exercising his great powers from a jail cell boggles the mind.

The President, as we have noted, is the Executive Department. If he could be enjoined, restrained, indicted, arrested, or ordered by judges, grand juries, or marshals, these individuals would have the power to control the executive branch. This would nullify the separation of powers and the co-equality of the Executive.

The conclusion that the President is not subject to indictment while in office is consistent also with a proper ordering of government. When this principal national leader, elected by all of the people, is to be removed, it is proper that the removal be considered and accomplished only by a body that, like the President, is politically representative of the whole nation. Impeachment is a process designed to deal with the problem of criminal conduct by the President and yet still preserve the majoritarian character of the Republic. Criminal indictments or judicial orders cannot provide the tools to remove or limit a whole branch of government, and were not contemplated by the Founders for such a purpose. Only the branch of government that represents the people who elected the President, the legislative branch, can take actions that will in any way remove or tend to remove a President from office. This is the function of Congress, not of a grand jury.

"It follows a fortiori from the non-indictability of an incumbent President that he cannot be named as an unindicted co-cospirator, and that the action of the grand jury in this case must be ordered expunged. The ability of a President to function is severely crippled if a grand jury, an official part of the judicial branch, can make a finding that a President has been party to a criminal conspiracy and make this in a form that does not allow that finding to be reviewed or contested and disproved. To allow this would be a mockey of due process and would deny to Presidents of the United States even those minimal protections that the Constitution extends to prison inmates subject to disciplinary proceedings . . .

If the grand jury had before it evidence, competent of otherwise . . . that led it to think that the President had been party to a crime, its only permissible course of action was to transmit that evidence to the House Judiciary Committee, rather than to make a gratuitous, defamatory, and legally impermissible accusation against the President.

Presumably the special prosecutor advised the grand jury to make this finding, and did so with the thought that it would strengthen his hand in litigation such as the present case . . . If the President could be considered a co-conspirator, then all of his statements would arguably come within the exception to the hearsay rule and would meet the requirement of Rule 17 (c) that subpoenaed material must be evidentiary in nature. In addition, this impermissible finding is relied on by the special prosecutor for his argument . . .that executive privilege vanishes if there is a prima facie showing of criminality Bue even if the grand jury were empowered to make this finding—and as a matter of law it cannot—we have already shown that an allegation of criminal activity does not overcome the assertion of presidential privilege . . . and that a grand jury finding, based as it is only on a showing of probable cause, falls far short of the prima facie showing of criminality that is required to defeat even the usual evidentiary privileges . . .

The special prosecutor makes the surprising suggestion that the President enjoys no privileges or immunities.

One might infer quite plausibly from the specific grant of official privileges to Congress that no other constitutional immunity from normal legal obligations was intended for government officials or papers. (S.P. Br. 77).

But it is quite clear that the privileges given to individual members of the legislative branch by Article I, Section 6, were given them for a specific and well-understood purpose. This was to protect the legislators "against possible prosecution by an unfriendly executive and conviction by a hostile judiciary . . . " United States v. Johnson. It was "designed to assure a coequal branch of government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." Gravel v. United States.

The Executive needed no protection from himself. As chief of state, chief executive, commander-in-chief, and chief prosecutor, he had no need to fear intimidation by a hostile executive or prosecution by an unfriendly executive. In addition, he was protected further by the elaborate procedure for impeachment, and by his immunity from criminal process until he had been convicted on impeach ment. Thus the Constitution says nothing about immunities of the Exeuctive comparable to what it says about members of the legislative branch because to have done so would have been to guard against an evil that could never come to pass.

Even members of the executive branch do have to fear damage actions brought by private citizens, and this court has not been slow to read into the Constitution an implied immunity to protect the Executive in this situation. The leading case in Spalding v. Vilas . . . frequently relied on in this Court and always with approval. . . .

The special prosecutor would have the court believe that the discretion about production of documents, which it has always been recognized that Presidents have, shrinks to a mere ministerial duty to produce what is demanded whenever a court disagrees with the Chief Executive's assessment of what the public interest requires. The ar-

gument seems little more than a play on words, intended to avoid the decisions, from Marbury on, that the courts may compel ministerial acts but that they cannot interfere with discretionary decisions of high executive officers.

Nothing could be clearer than that the decision to disclose or to withhold the most intimate conversations of the President with his chief advisers involves the gravest and most far-reaching possible considerations of public policy. Who can say what the long term, or even short term, public effects of the President's decision to make public transcripts of tapes of his conversations about Watergate will be? It was a difficult and monumental decision, and no man living can predict with assurance how ultimately the history of this country, and indeed of the world, may be influenced by it. It was a discretionary decision in the most important sense, and it is nonsense to call such a disclosure "ministerial" merely because the final action of disclosure can be accomplished by a messenger.

A presidential decision to release the confidential tapes or written memoranda of his meetings with his advisers involves the same basic discretion as his initial decision to make such records. Surely neither the courts not Congress could require Presidents to make such recordings on the ground that they would then be available should there be charges of misconduct against aides to some future President.

This case must be viewed in the light that the President is the executive branch, co-equal to the multi-membered legislative and judicial branches. If that co-equality is to be preserved, the President cannot be subject to the vagaries of a grand jury nor deprived of his power to control disclosure of his most confidential communications. If he misuses his great powers, he must be proceeded against by the remedy that the Constitution has provided.

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Special Prosecutor's Brief

Counsel for the President bases his argument against the constitutionality of the grand jury's action here on the premise that an incumbent President cannot be indicted . . . . We believe we have just shown that the Court's consideration of the issue actually before the Court—whether a President can be named as an *unindicted* co-conspirator—does not require consideration of the assertion by counsel for the President that it cannot be "seriously disputed" that "a President may not be indicted while he is an incumbent" . . . . Nevertheless, we cannot allow the assertion to stand uncontroverted. Thus, we outline the reasons why the President's major premise may be unsound, even though the court need not decide the issue in order to reject the contention that the district court erred in refusing to expurge the grand jury's finding.

Resort to constitutional interpretation, history, and policy does not provide a definitive answer to the question of whether a sitting President enjoys absolute immunity from the ordinary processes of the criminal law. What we believe is clear is that nothing in the text of the Constitution or its history—including close scrutiny of the background of relevant constitutional provisions and of the intent of the Framers—imposes any bar to indictment of an incumbent President. Primary support for such a prohibition must be found, if at all, in considerations of constitutional and public policy including competing factors such as the nature and role of the presidency in our constitutional system, the importance of the administration of criminal justice, and the principle that under our system no person, no matter what his station, is above the law. Whether these factors compel a conclusion that as a matter of constitutional interpretation a sitting President cannot be indicted for violations of federal criminal laws is an issue about

which, at best, there is presently considerable doubt.

The President rests his texual argument primarily on Article I, Section 3, clause 7, of the Constitution, which provides that "the Party convicted after impeachment shell *nevertheless* be liable and subject to Indictment. Trial, Judgment must *follow* impeachment by the House and conviction and removal by the Senate. A contemporary student of the subject of impeachment suggests, on the basis of his study of the relevant materials, that the purpose of the "nevertheless" clause was only to preclude the expelled civil officer from avoiding late criminal prosecution "double jeopardy." . . .

Significantly, the clause in question applies to all civil officers who are subject to impeachment, and not solely to the President. Yet, from the earliest days of the Republic, civil officers liable to impeachment have been dealt with in the criminal courts without first being impeached, convicted, and removed. Recently, as this court is well aware, a panel of the Seventh Circuit composed of three distinguished senior circuit judges specially designated to review the appeal of United States Circuit Judge Otto Kerner rejected the textual argument relied on by counsel for the President and observed that "[t]he purpose of the phrase may be to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy, or it may be to differentiate the provisions of the Constitution from the English practice of impeachment." United States v. Isaacs and Kerner . . . . In accordance with the plain thrust of the language of this clause, the court expressly refused to construe it to imply that a sitting federal judge, who is liable to impeachment under the same clause that is applicable to the President, may not be indicted and tried prior to removal from office. In language equally applicable to a federal judge or a President, the court wrote:

> We conclude that whatever immunities or priviliges the Constitution confers for the purpose of assuring independence of the co-equal branches of government they don not exempt the members of those branches "from the operation of the ordinary criminal laws." Criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government. Historically, the impeachment process has proven to be cumbersome and fraught with political overtones.

The panel made no effort to distinguish the President from the sweep and force of this statement.

The President also refers to the views expressed by the Framers as evidencing at least a clear *intent* to immunize the President from criminal prosecution. While there are some statements cited in the President's brief indicating that criminal indictment was expected to follow impeachment, these few statements cannot support the conclusion that the Framers unambiguously intended to immunize an incumbent President from criminal prosecution. They were made by the delegates to the Convention while discussing the issues of executive power, checks on presidential perrogatives, and the relationship between the impeachment remedy and the President's independence. The precise isue of Presidential immunity was not confronted by those who wrote and debated the Constitution.

The President relies heavily on Gouverneur Morris' opinion articulated at the federal Convention:

> A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachment, was that the latter was to try the President after the trial of the impeachment... . . .

All this view contemplates is that a President may commit an actw hich constitutes both an impeachable offense and an indictable crime, and it would be anomalous for the same people who try his impeachment to participate later in the adjudication of his guilt or innocence in a different proceeding but involving the same basic activity. The statement does not imply that Morris considered it mandatory that impeachment precede indictment. Moreover, there was some concern about the possible partiality of judges who had been appointed by tne President . . . One commentator has suggested that this was the prime reason for having the Senate rather than this Court serve as the tribunal for an impeachment trial.

We do not claim that any of the actual debates provide any definitive insight into the Framers' intention on the question of the President's amenability to criminal indictment. While counsel for the President states that "There is literally nothing in all of the records of the Convention to suggest that any delegate had any contrary view"... the simple fact is that the Framers never confronted the issue at all.

It is significant in this context that unlike congressmen, who were afforded an explicit, limited immunity in the Constitution with respect to their legislative duties . . . the President was provided none. And... the separation of powers doctrine does not result in an absolute immunity.

The President offers the additional argument that "[s]ince the President's powers include control over all federal prosecutions, it is hardly reasonable or sensible to consider the President subject to such prosecution" . . . However, the Special Prosecutor, under applicable regulations, has final control over the position the United States, as sovereign, asserts in cases under his defined jurisdiction. Indeed . . . the President personally agreed here to the Attorney General's promulgation of regulations (a) giving the special prosecutor "full authority for investigating and prosecuting . . . allegations involving the President," (b) specifying that "the Attorney General will not countermand or interfere with the special prosecutor's decisions or actions," and (c) pledging that "the President will not exercise his constitutional powers to affect the discharge

of the special prosecutor," or to "limit the independence that he is hereby given" or to limit "the jurisdiction of the special prosecutor" unless the consensus of eight legislative leaders approves the President's "proposed action." . . . Evidently, therefore, neither the President nor the Attorney General considered prosecution of a President by an independent special prosecutor constitutionally inconceivable. It is hardly inevitable, therefore, that future Presidents must be left with personal control over the decision whether they—or their friends and associates—should be prosecuted.

Counsel for the President suggests that the President may have a unique immunity because the "Presidency is the only branch of government that is vested exclusively in one person by the Constitution" . . . Thus, it is argued: "The functioning of the executive branch ultimately depends on the President's personal capacity: legal, mental and physical. If the President cannot function freely, there is a critical gap in the whole constitutional system established by the Framers." . . . This is a weighty argument and it is entitled to great respect. But whether it is conclusive is uncertain and need not be decided here. It is fair to note, however, that our constitutional system has shown itself to be remarkably resilient. Our country has endured through periods of great crises, including several when our Presidents have been personally disabled for long periods of time. Furthermore, although the executive power is constitutionally vested in the President, it cannot escape notice that, in practical terms, the governmental system that has evolved since 1789 depends for the day-to-day management of the nation's affairs upon the operation of the several Cabinet departments and independent regulatory agencies, without direct presidential guidance. In addition, the Twenty-fifth Amendment to the Constitution now expressly provides for interim leadership whenever a President is temporarily disabled or incapable of discharging the responsibilities of his office. And it is by no means inevitable, in any event, that the lodging of an indictment against an incumbent President would "cripple an entire branch of the national government and hence the whole system" . . .

Finally, there are very serious implications to the President's position that he has absolute immunity from criminal indictment and to his insistence that under "our system of government only the House of Representatives may determine that evidence of sufficient quantity and quality exists to try the President". . . It is conceded that while the king can do no wrong, a President, in the eyes of the law, is not impeccable. But while there is currently a great debate about whether "impeachable offenses" under the Constitution include *nno-criminal* abuses of official power, it appears that not *every* crime would justify impeachment. As both the House Judiciary Com mittee staff and the attorneys for the President seem to agree, there must be some nexus between the impeachable misconduct and the office held. As one early commentator explained about the phrase "high Crimes and Misdemeanors":

> They can only have reference to public character and official duty. * * * In general those offences which may be committed equally by a private person as a public officer are not the subjects of impeachment. Murder, burglarly, robbery and indeed all offences not immediately connected with office, except the two expressly mentioned [treason and bribery], are left to the ordinary course of judicial proceeding * * * . . . .

In his submission to the House Judiciary Committee, counsel for the President therefore argued that he is impeachable only for "great crimes against the state." . . . If counsel for the President is correct that a President is amenable to impeachment only for certain grave public offenses and that he is absolutely immune from criminal prosecution, then indeed the Constutution has lef t a lacuna of potentially serious dimensions.

Because of this purported gap and because of the virtually universal application of statutes of limitations, a President who shared complicity in such "private" crimes as burglary or assault might well be beyond the reach of the law, partaking at least in part of the royal immunities associated with a king. Perhaps this is the design of the Constitution, or a regrettable corollary of it, but we urge caution before such a proposition is accepted as inevitable.