Excerpts From Brief by Nixon's Attorneys

Special to The New York Times

WASHINGTON, Aug. 7—Following are excerpts from a brief filed today in Federal District Court by attorneys for President Nixon in support of the President's refusal to obey a subpoena requiring him to give tape-recordings of White House conversations and other documents to the Justice Department's special prosecutor, Archibald Cox:

SUMMARY OF ARGUMENT

The present proceeding, though a well-intentioned effort to obtain evidence for criminal prosecutions, represents a serious threat to the nature of the Presidency as it was created by the Constitution, as it has been sustained for years, and as it exists today.

If the special prosecutor should be successful in the attempt to compel disclosure of recordings of Presidential conversations, the damage to the institution of the Presidency will be severe and irreparable. The character of that office will be fundamentally altered and the total structure of government—dependent as it is upon a separation of powers—will be impaired.

The consequence of an order to disclose recordings or notes would be that no longer could a President speak in confidence with his close advisers on any subject. The threat of potential disclosure of any and all conversations would make it virtually impossible for President Nixon or his successors in that great office to function. Beyond that, a holding that the President is personally subject to the orders of a court would effectively destroy the status of the executive branch as an equal and coordinate element of government.

There is no precedent that can be said to justify or permit such a result. On the contrary, it is clear that while courts and their grand juries have the power to seek evidence of all persons, including the President, the President has the power and thus the privilege to withhold information if he concludes that disclosure would be contrary to the public interest.

Plea for Privacy

The breadth of this privilege is frequently debated. Whatever its boundaries it must obtain with respect to a President's private conversations with his advisers as well as to private conversations by judges and legislators with their advisers. These conversations reflect advisory opinions, recommendations, and deliberations that are an essential part of the process by which Presidential decisions and policies are formulated.

Presidential privacy must be protected, not for its own sake, but because of the paramount need for frank expression and discussion among the President and those consulted by him in the making of Presidential decisions.

The privilege with regard to recordings was not waived by the decision of the President, in the interest of having the truth about Watergate come out, to permit testimony about portions of those conversations by persons who participated in them. Testimony can be limited, as recordings cannot, to the particular area in which privilege is not being claimed.

Nor does the privilege vanish because there are claims that some of the statements made to the President by others in these conversations may have been pursuant to a criminal conspiracy by those other persons. That others may have acted in accordance with a criminal design does not alter the fact that the President's participation in these conversations was pursuant to his constitutional duty to see that the laws are faithfully executed and that he is entitled to claim executive privilege to preserve the confidentiality of private conservations he held in carrying out that duty.

In the exercise of his discretion to claim executive privilege the President is answerable to the Nation but not to the courts. The courts, a co-equal but not a superior branch of government, are not free to probe the mental processes and the private confidences of the President and his advisers. To do so would be a clear violation of the constitutional separation of powers. Under that doctrine the judicial branch lacks power to compel the President to produce information that he has determined it is not in the public interest to disclose.

The issue here is starkly simple: Will the Presidency be allowed to continue to function?

ARGUMENT

I. Introductory Statement

The extent to which the executive branch has a power or privilege to withhold documents or testimony from the other two branches of government has been correctly described as "one of the most difficult, delicate and significant problems arising under our system." Rogers, Constitutional Law: The Papers of the Executive Branch, 44 A.B.A.J. 941, 1012 (1958). There are few authoritative judicial decisions on the matter but this is because the other branches of government have respected claims of privilege by the executive branch and have recognized the inappropriateness of seeking resolution in the courts of controversies between branches of government.

Although there have been repeated clashes between Presidents and Congress over the issue from 1796 on, there is no judicial decision whatever on controversies of that kind. See Soucie v. David, 448 F. 2d 1067, 1071 N. 9 (D. C. Cir. 1971). There are decisions on the privilege as it exists against the courts, but these decisions tend to be cautious, Hardin, Executive Privilege in the Federal Courts, 71 Yale L. J. 879 (1962), and to be resolved on the narrowest possible grounds. E.g., United States ex rel. Touhy v. Ragen, 340 U.S. 462, 467 (1951); United States v. Reynolds, 345 U.S. 1, 6 (1953). Though there is a fairly substantial literature on the question, it is more argumentative than authoritative.

The question is still further clouded by the tendency of all those who have spoken on this question to lump together questions that may require separate answers. Thus courts and writers have not always been careful to distinguish between the President himself, the heads of departments, and subordinates within the executive departments. Nor is it always recognized that the scope of the privilege may be one question, who is to judge of its existence a second question, and whether a decision adverse to the executive could be enforced a third question.

This case, however, does not require a sweeping analysis of the privilege and all of its ramifications. Rather the court is faced with the narrow question of its application to the President of the United States in his most confidential conversations with his intimate advisers. On this question judicial precedents are almost nonexistent. One fact does stand out. No court has ever attempted to enforce a subpoena directed at the President of the United States. No President—and, for that matter, no department head—has ever been held in contempt for refusal to produce information, either to the courts or to Congress, that the President has determined must be withheld in the public interest.

Quite commonly Presidents have voluntarily made available information for which a claim of privilege could have been made. That happens very often—and has happened and is happening in this case. But practice throughout our history shows no exception to the rule that the President cannot be forced to disclose information that he thinks it would damage the public interest to disclose.

We do not question the power of the court to issue a subpoena to the President. In United States v. Burr, 25 F.Cas. 30, 34, No. 14, 692D (C.C.D.Va. 1807), Chief Justice Marshall, sitting at circuit, ruled that a subpoena might issue, though he immediately recognized that "difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen x x x." A subsequent Attorney General has ruled that a subpoena may be directed against the President to produce a paper, though the courts would be without

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Supporting His Refusal to Yield Tapes

power to enforce their process should the President refuse. 25 Pp. Atty. Gen. 326, 330-331 (1905). The cautious reference to the Burr ruling in Branzburg v. Hayes, 408 U.S. 665, 688 N. 26 (1972), goes no further than to note that Chief Justice Marshall had "opined" that a subpoena might issue. For present purposes, we accept that proposition.

But the power to seek information from the executive branch does not impose on the executive any concurrent obligation to disclose that information. Rather the responsibility of a Presiden to disclose information to a grand jury and to the courts is limited by the constitutional doctrine of separation of powers.

Not Above the Law

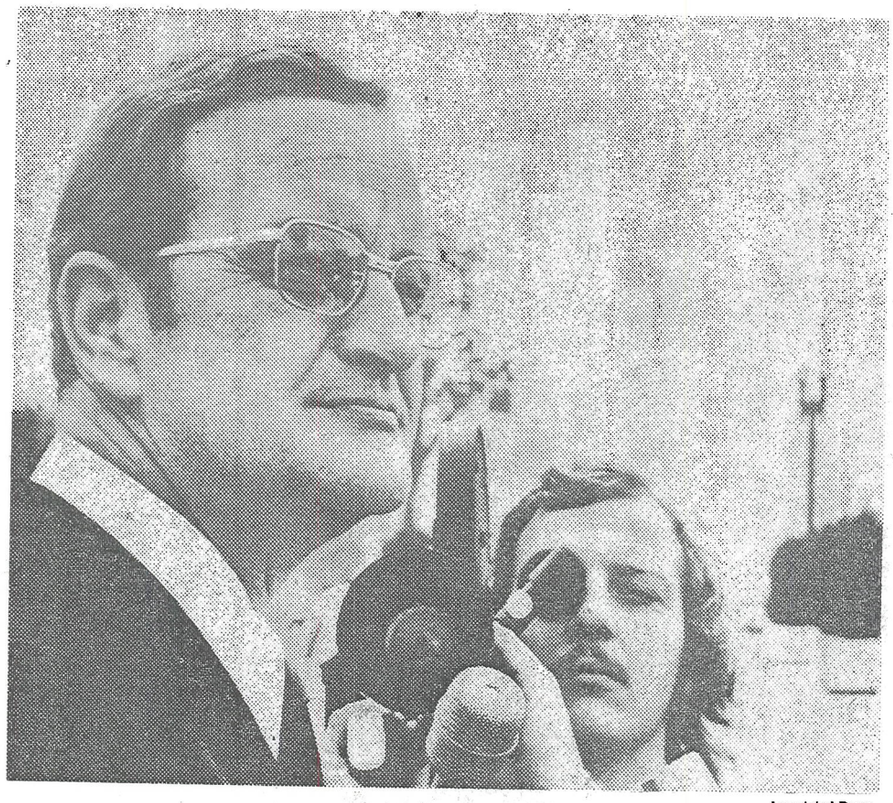
To insist on the doctrine of separation of powers is by no means to suggest that the President is above the law. This is not the case. The President is accountable under the law, but only in the manner prescribed in the Constitution. The distinction was drawn vividly by Attorney General Stanbery in his argument in Mississippi v. Johnson, 4 Wall. (71 U.S.) 475, 485-485 (1867):

It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President. There is only one court or quasi court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the Government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.

See the similar statement of position by Alexander Hamilton in Federalist No. 69.

Nor is the privilege derived from the doctrine of separation of powers one that is available only to protect the President, or the executive branch generally, from the other two branches of government. Each branch of government has claimed, and rightly so, a privilege to do its own business in its own way, without coercion from other branches of government. No other branch of government can compel disclosure of what judges of a court say to each other when the court is in conference. No other branch can require disclosure or discussions about legislative business a Congressman and his aide. Cf. Gravel v. United States, 408 U.S. 606 (1972).

All branches of the government benefit from the independence secured to them by the constitutional separation of powers. All America has benefited from the sturdy insistence of all three of the branches, over the years, on preserving that independence.



Associated Press

J. Fred Buzhardt, special counsel to the President, leaving U.S. District Court in Washington yesterday after he filed his 10,000-word brief on Presidential tapes.

II. The President Has the Power to Withhold Information if He Deems Disclosure to Be Contrary to the Public Interest

A. Privilege Against Demands by Congress. The privilege asserted here derives from the same constitutional source as, and closely parallels, the executive privilege that has consistently and successfully been asserted in response to Congressional attempts to require production by the executive branch.

This long-standing privilege of the executive to refuse Congressional demands does not require extended discussion. From the Administration of Washington to the present, Presidents have repeatedly asserted the privilege, and, when forced to a showdown, Congress has consistently yielded. Corwin, the President: Office and powers, 1787-1957/113 (4th Rev. Ed. 1957). A recent instance was the refusal of President Kennedy to disclose the names of Defense Department speech reviewers. Committee on Armed Services, U.S. Senate, Military Cold War Escalation and Speech Review Policies, 87th Congress, 2d Sess, 338, 369-370, 508-509, 725, 730-731 and 1826 (1961). The Senate subcommittee, speaking through Senator Stennis, conceded:

'We now come face to face and are in direct conflict with the established doctrine of separation of powers. . . . I know of no case where the court has ever made the Senate or the House surrender records from its files, or where the executive has made the legislative branch surrender one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field." Id. at 512.

Reference to the unbroken record of successful assertions of privilege in practice is particularly significant to the doctrine of separation of powers. Uninterrupted usage continued from the early days of the Constitution is weighty evidence of the proper construction of any clause of the Constitution.

B. Scope of the Privilege. It is well settled that the privilege applies to information relating to national security. United States v. Reynolds, 345 U.S. 1, 10 (1953). Similarly, it has been applied to information relating to diplomatic affairs. New York Times v. United States, 403 U.S. 713, 728 (1971) (Stewart, J. concurring).

But the privilege is not confined to specific kinds of subject matters nor, as discussed in the next part of this brief, to particular kinds of communications. Reason dictates a much broader concept, that the privilege extends to all of the executive power vested in the President by Article II and that it reaches any information that the President determines cannot be disclosed consistent with the public interest and the proper performance of his constitutional duties. The touchstone for a broad concept is provided by President Washington and his Cabinet, who concluded that "the executive ought to

communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion." Ford Writings of Thomas Jefferson 189-190 (1892).

Jackson Opinion Cited

An opinion in 1941 by Attorney General (Later Justice) Jackson was directed to investigative reports but rested on a broader principle:

"The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine." 40 Ppp. Atty. Gen. 45, 49 (1941).

President Eisenhower's famous letter of May 17, 1954, directing that persons employed in the executive branch were not to testify before a Congressional committee on matters occuring within the executive branch, was supported by a memorandum of Attorney General Prownell, which said in part:

"Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest; they will not interfere with the exercise of that discretion, and that Congress has not the power, as one of the three great branches of the government, to subject the executive branch to its will any more than the executive branch may impose its unrestrained will upon the Congress." 100 Cong. Rec. 6621 (1954).

More recently Assistant Attorney General (now Justice) Rehnquist made a statement in 1971 to the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee in which he asserted that the privilege of the President to withhold information "the disclosure of which he feels would impair the proper exercise of his Constitutional obligations" is "firmly rooted in history and precedent." Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, Executive Privilege: The Withholding of Information by the Executive, U.S. Senate, 92d Cong. 1st Sess., at 429 (1971). He continued:

"The President's authority to withhold information is not an unbridled one, but it necessarily requires the exercise of his judgment as to whether or not the disclosure of particular matters sought would be harmful to the national interest." Id. at 431.

C. Confidential Intra-Governmental Communications. As stated by the President on July 6, 1973, in his letter to Senator Sam J. Ervin:

"No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential."

Earlier Presidents throughout our history have taken a similar position. The principle was well stated by President Eisenhower on July 6, 1956, in connection with the Dixon-Yates controversy:

"But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere little slips, of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, and if they are, will wreck the Government.

"There is no business that could be run if it—if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to hime on a confidential basis."

A distinguished constitutional lawyer has recently observed that refusal to disclose communications of this kind is not only the President's lawful privilege "but his duty as well, for it is a measure necessary to the protection of the proper conduct of his office, not only by him but, much more importantly, by his successors for all time to come. . . . It is hard for me to see how any person of common sense could think that those consultative and decisional processes that are the essence of the Presidency could be carried on to any good effect, if every participant spoke or wrote in continual awareness that at any moment any Congressional committee, or any prosecutor working with a grand jury, could at will command the production of the verbatim record of every word written or spoken." Black, Mr. Nixon, The Tapes, and Common Sense, The New York Times, Aug. 3, 1973, P. 31. See also the fuller expression of Professor Black's view in Cong. Rec. E5320-E5322 (Aug. 1, 1973).

Confidentiality Held Vital

The wise men who wrote the Constitution of the United States surely would have agreed. On May 29, 1787, as one of their first acts at the Constitutional Convention, they adopted a resolution that their deliberations were to be kept secret. 1 Farrand, The Records of the Federal Convention of 1787 15 (1966 ed.). They knew that wise decision-making requires the kind of frank discussion for which confidentiality is essential.

United Press International

Archibald Cox, special prosecutor in the Watergate case, leaving court after hearing on the Presidential tapes.

These reasons apply with special force when recordings of Presidential conversations are sought. Recordings are the raw material of life. By their very nature they contain spontaneous, informal, tentative, and frequently pungent comments on a variety of subjects inextricably intertwined into one conversation. Disclosure of information allegedly relevant to this inquiry would mean disclosure as well as other information of a highly confidential nature relating to a wide range of matters not relevant to this inquiry.

Some of these matters deal with sensitive issues of national security. Others go to the exercise by the President of his constitutional duties on matters other than Watergate. The nature of informal, private conversations is such that it is not practicable to separate what is arguably relevant from what is clearly irrelevant. Once the totality of the confidential nature of the recordings is destroyed, no person could ever be assured that his own frank and candid comments to the President would not eventually be made public.

Nor should this court be misled by the seemingly modest request to hear recordings of a few conversations. These conversations could not be properly understood without listening also to many other conversations, and once the principle were established that the most confidential records of the Presidency can be ordered produced for a grand jury, the present subpoena would be only the first installment of requests for many more of the President's most confidential conversations. No government can function if its internal operations are to be subject to that kind of open scrutiny.

D. Privilege Not Waived. It seems to be suggested in Paragraph 9 of the petition for an order to show cause that any claim of executive privilege has been waived with regard to this investigation by the grand jury. This suggestion will not withstand analysis. In his statement on May 22d, appended to and referred to in the petition, the President said that "executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation including the Watergate affair and the alleged cover-up." It is one thing to permit testimony on a specific subject, for testimony can be confined to information that relates to that particular subject and can avoid reaching extraneous material, the disclosure of which is contrary to the public interest. With these recordings, as has been indicated, that is not possible.

Nor is there any waiver because the President has permitted a few of these tapes to be heard by a very few people. Whenever the President has confidential information, he is free to disclose it to those persons, in and out of government, in whom he has confidence and from whom he seeks advice.

E. Charges of Criminal Conduct. Executive privilege does not vanish because the grand jury is looking into charges of criminal conduct. No case so holds. There is no body of practice to this effect. Many of the celebrated instances in the past in which Presidents have refused to produce information in their custody have involved charges of criminal misconduct. It is true that the instances in the past have been refusals to give the material to Congress, but the Presidential privilege to withhold confidential information where the public interest so requires stems from the constitutional separation of powers. There is nothing in constitutional theory to suggest that the Chief Executive is separate from the legislative branch but inferior to the judicial branch.

If there were any question of Presidential involvement in the crimes the special prosecutor is investigating—and the President's statements have catgorically denied any such involvement—this would not be within the jurisdiction of this court, the special prosecutor, or the grand jury. The President of the United States is, as we have pointed out in the introductory statement, not above the law. He is liable to prosecution and punishment in the ordinary course of law for crimes he has committed but only after he has been impeached, convicted, and removed from office. U.S. Const., Art. I, S 3; Federalist No. 69 (Hamilton) Kendall v. United States ex rel. Stokes, 12 Pet. (37 U.S.) 524, 610 (1838).

But although remarks made by others in conversations with the President may arguably be part of a criminal plan on their part, the President's participation in these conversations was in accordance with his constitutional duty to see that the laws are faithfully executed. It is the President, not those who may be subject to indictment by this grand jury, who is claiming executive privilege. He is doing so, not to protect those others, but to protect the right of himself and his successors to preserve the confidentiality of discussions in which they participate in the course of their constitutional duties, and thus ultimately to protect the right of the American people to informed and vigorous leadership from their President of a sort for this confidentiality is an essential prerequisite.

It is not the President's view that refusal to produce these tapes will defeat prosecution of any who have betrayed his confidence by committing crimes. It is his expectation that the other evidence available to the special prosecutor, together with testimony from witnesses with regard to whom the President has not claimed executive privilege and documentary evidence that the President has been and will be making available to the special prosecutor, will suffice to convict any lawbreakers. But the President has concluded that even if he should be mistaken about this in some particular case, the public interest in a conviction, important though it is, must yield to the public interest in preserving the confidentiality of the President's office.

The President has concluded that it would be detrimental to the public interest to make available to the special prosecutor and the grand jury the recordings sought as Item 1 of the subpoena. That decision by the President is in itself sufficient cause for this court to proceed no further to seek to compel production of those records.

III. This Court Lacks the Power to Compel Production of the Recordings

There is no case in which the courts have actually compelled the executive to disclose information when the executive thinks it would be detrimental to the public interest to do so, nor is there any case in which the courts have undertaken to hold the President or a department in contempt for failure to make a disclosure. Admittedly, some courts have claimed the power to decide for themselves whether executive privilege has been appropriately claimed and to weigh for themselves whether the harm to the national interest from disclosure is outweighed by the need of litigants for the information, but no court has compelled production of the information itself if the executive branch disagrees with the court's ruling on that issue. Other sanctions may be imposed. Production of executive documents cannot be required.

In the present case, there is no showing whatever of necessity for production of the recordings except for the conclusory statement in the petition for an order to show cause that the recordings "are relevant and important evidence in the grand jury's investigation." Here, as in the Reynolds case, testimony of those who participated in these meetings has been made available, because of the President's disclaimer of executive privilege with regard to testimony by his aides concerning possible criminal conduct or discussions of possible criminal conduct in the matters presently under investigation. Much other evidence, both documentary and testimonial, is available to the special prosecutor, including a significant amount of material furnished him by the President.

Courts Found Powerless

Doubtless the special prosecutor would like to have the recordings to test their consistency with testimony now being given by participants in the conversations that were recorded. Doubtless the plaintiffs in Reynolds would like to have had the contemporaneous statements of the survivors of the crash, as well as the report of the Air Force investigation, to test their consistency with the testimony later made available from the survivors. That was not enough to justify even in camera inspection in Reynolds. It is not enough here, particularly when the circumstances here show that the recordings involved are of confidential conversations with the President of the United States, material raising the strongest possible claim of privilege.

Whatever may be the case with a department head, as in the Reynolds case, it is not appropriate for the courts to purport to weigh a claim of privilege by the President himself. Since the courts are without power to compel compliance with a decision overruling a claim of privilege by the President, any consideration by the courts would be a meaningless issue.

The issue was squarely presented in Mississippi v. Johnson, 4 Wall. (71 U.S.) 475 (1867). The Court there refused to entertain a bill seeking to enjoin President Andrew Johnson from enforcing the Reconstruction Arts. In his argument in that case Attorney General Stanbery discussed the Marbury and Kendall cases and noted that the writs sought in those cases ran only against Cabinet officers rather than against the President himself. He pointed out that if a Cabinet officer could be imprisoned for contempt for disobedience of a court order, his duties could be performed by a deputy or a new member of the Cabinet could be appointed. If, however, the President were to be imprisoned for contempt, he would be disabled from performing his constitutional

duties, though he would still, in the absence of impeachment, retain the office. 4 Wall. at 489-490.

The Supreme Court ruled that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties." 4 Wall. at 501. As one of the reasons for this conclusion, it had noted: "Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the Court is without power to enforce its process." 4 Wall. at 500-501.

The motion of the special prosecutor asks the court to compel the President of the United States to produce material that he has determined that the public interest requires be kept confidential. It thus asks the court to substitute its judgment for that of the President on a matter entrusted to the President by the Constitution, and calls for the court to issue an order of a sort that the judicial branch lacks power to enter against the President of the United States.

CONCLUSION

The result for which we have argued is supported by such precedent as exists. It is supported by premises that are, and have always been, at the heart of our constitutional system. It is supported by the unvarying practice of 184 years. It is supported finally, and most importantly, by the consequences that would follow if any other result were to be reached.

Were it to be held, on whatever ground, that there is any circumstance under which the President can be compelled to produce recordings or notes of his private conversations, from that moment on it would be simply impossible for any President of the United States to function. The creative interplay of open and spontaneous discussion is essential in making wise choices on grave and important issues. A President would be helpless if he and his advisers could not talk freely, if they were required always to guard their words against the possibility that next month or next year those words might be made public. The issue in this case is nothing less than the continued existence of the Presidency as a functioning institution.

For all of the foregoing reasons, the motion of the special prosecutor should be denied.