Excerpts From Supreme Court Briefs of White House and Watergate Prosecutor

Special to The New York Times

WASHINGTON, July 1—Following are excerpts from reply briefs filed in the Supreme Court today by the White House and the special Watergate prosecutor in the cases involving President Nixon's refusal to surrender 64 tape recordings to Federal District Court and the Watergate grand jury's naming of the President as an unindicted co-conspirator:

WHITE HOUSE BRIEF

Introduction

The vitally important considerations that must control decision of this case, and that require reversal of the District Court, were expressed in the opinion of Chief Justice Chase, for a unanimous Court, in Mississippi v. Johnson, 4 Wall. (71 U.S.) 475, 500-501 (1867):

"The Congress is the legislative department of the Government, the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed are, in proper cases, subject to its cognizance.

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

"Suppose the bill filed and the injunction prayed for allowed. If the President refused obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the Court and refuses to execute the acts of Congress, it is not clear that a collision may occur between the executive and legislative departments of the Government?

May not the House of Representatives impeach the President for such refusal? And in that case could this Court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public wonder of an attempt by this Court to arrest proceedings in that Court? These questions answer themselves."

It will not do to say, as the special prosecutor does, that "the President is the head of the executive branch." (S. P. BR. 79). Instead, as the Court said in Johnson, "The President is the executive department." Or, as Chief Justice Taft, also speaking for a unanimous Court, said in Ex Parte Grossman, 267 U.S. 87, 120 1925); "The Executive power is vested in a President."

Johnson is important also for its recognition of the utter impropriety of this Court becoming involved in the constitutional process of impeachment. Surely this Court can judicially notice the fact proceedings are under way in the House Judiciary Committee looking to possible impeachment of the President.

The late Thomas Reed Powell is said to have defined the legal mind as a mind that can think without thinking about the other. Only those who would attempt this cynical view of the legal process would suppose that this case and the investigation in the Judiciary Committee are wholly unrelated, or that this Court can render a decision in this case without that decision having a heavy impact, one way or the other, in the impeachment process that is so clearly committed exclusively to the House and the Senate.

Public Interest Weighed

We shall contend, as we did in our initial brief, that, as it was so powerfully put by Judge Wilkey in his dissent in Nixon v. Sirica, 487 F 2d 700, 763-799 (D.C. Cir. 1973), the critical issue is "who decided?" and that this Court should affirm the proposition, not seriously challenged for the first 184 years of our constitutional history, that it is for the chief executive, not for the judicial branch, to decide when the public interest permits disclosure of Presidential discussions.

"It was and is the President's right to make that decision initially, and it is the American people who will be the judge as to whether the President has made the right decision, i.e., whether it is or is not in the public interest that the papers (tapes) in question be furnished or retained.

"If his decision is made on visibly sound grounds, the people will approve the action of the executive as being in the public interest. If the decision is not visibly on sound grounds of national public interest, in political terms the decision may be ruinous for the President, but it is his to make.

"The grand design has worked; the separate, independent branch remains in charge of and responsible for its own papers, processes and decisions, not to a second or third branch, but it remains responsible to the American people." (487 F. 2d at 797)

"The central point at issue here is not whether the President's judgment in this particular instance is right or wrong, but that it is his judgment. In exercising the discretion vested in him, and in him alone, the President may make a mistaken assessment of what best serves the public interest—but courts also on occasion make mistakes.

The President in his exercise or discretion may make a decision that is unpopular —but if so he must suffer the political consequences. The President may even take such action that would constitute a high crime or misdemeanor, but to quote again from Chief Justice Taft in Ex Parte Grossman, 267 U.S. 87,121 (1925): "Exceptional cases like this, if to be imagined at all, would suggest resort to impeachment rather than to a narrow and strained construction of the general powers of the President."

These are the themes we will develop in the balance of this reply brief.

1. The special prosecutor has failed to establish any basis for the jurisdiction of the District Court.

[I]

The special prosecutor has failed to establish any basis for the jurisdiction of the District Court.

In an attempt to negate the intra-executive nature of this dispute, the special prosecutor repeatedly asserts that he, as the alter ego of the Attorney General, does not represent the President or the executive branch in a criminal proceeding but rather the United States as a distinct sovereign entity. (S. P. Br. 27-29). Such an argument is without merit for there is no sovereign entity distinct from the three recognized branches of the Government.

To accept the special prosecutor's position that there is, in essence, an independent branch of the Government known as the United States, would make meaningless the delegation of authority and balance of power existing between the three branches, and destroy the tripartite form of government established by the framers. It would create an additional fourth branch of the Government with its own independently derived authority, entitled to "its own representation in court and responsible to none of he other branches. Such a proposition is without logical or constitutional merit.

First, the judiciary has never had jurisdiction to review or determine what evidence the executive branch shall or shall not use in the furtherance of its own case in a criminal proceeding, see. E. G. United States v. Cox, 342 F. 2d 167 (5th Cir), Cert. denied, 381 U.S. 935 (1965).

The responsibility for making this determination has always been within the executive branch, and includes the power to balance and determine what confidential government materials would, if disclosed, be

detrimental to the public interest. A decision by the executive branch not to use a particular document, even one which tends to support its own burden of proof in a criminal prosecution, has not been and is not a proper subject for judicial review.

In this suit, the special prosecutor is merely asking his Court to determine whether the chief executive was correct in determining that certain executive materials should not, in the public interest, be used to further this prosecution. However, neither the President, by agreement or otherwise, can foist upon the courts the executive branch's own responsibility for determining the advisability of using certain executive materials in the furtherance of its own case.

[II]

A constitutional assertion of a Presidential privilege is not reviewable by this Court.

We deem it important to emphasize three points: (1) The issue at stake is Presidential privilege, founded in the Constitution relating to conversations of the President with his closest advisers, not the concept of executive privilege as it may be generally applicable to persons in the executive branch and under other circumstances; (2) The resolution of this issue lies in an analysis of the design of our Government as a whole and its development, including but not limited to that of judicial precedents." (Pres. BR. 54-68); and (3) We repeat: "Significantly, the precise issue of the "absoluteness" of executive privilege, as applied to Presidential communications, has never been squarely confronted and definitely resolved by this Court."

Our position, contrary to that apparently assumed by the special prosecutor (S. P. 49-50), is not at odds with this court's decision in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). The touchstone of that holding was that President Truman's action in directing the seizure of the steel mills was not supported by any statutory or constitutional provision or concept; it exceeded all express and inherent power of the Presidency. In contrast, President Nixon's action, i.e., his assertion of executive privilege, is based squarely on the Constitution.

The accuracy of that observation is now a matter of common knowledge. Initially Special Prosecutor Cox subpoenaed tapes and notes of nine conversations. His successor has been furnished all existing material covering those conversations and the President has voluntarily given Special Prosecutor Jaworski tapes of many other conversations. Now the special prosecutor seeks to require production of 64 more conversations.

Should he be successful in that attemp, only a very foolhardy person would dare to predict that this would be t he end of the matter and that the demand for private Presidential material would not continue to grow insatiably.

[III]

The constitutional privilege has not been waived.

The Court is offered three theories on which the special prosecutor thinks a holding of waiver can be justified. These are the President's statement of May 22, authorizing his aides to testify about Watergate-related matters (S.P. BR. 119), the President's release to the public of transcripts from 43 Watergate-related Presidential conversations (S.P. BR. 119), and the fact that H. R. Haldeman has been permitted to hear tapes of selected conversations (S.P. BR. 122). Neither singly nor together do any of these waive the President's privilege not to disclose other conversations that are still confidential.

A constitutional-based privilege, which exists only so that the President, like the courts and like Congress, can function effectively hardly vanishes because, in Professor Black's phrase, "Little Mousetraps of 'waiver' are Sprung." Letter of Prof. Charles L. Black Jr. Cong. Rec. E5320, E5323 (Daily ed. Aug. 1, 1973).

Disclosure has been the rule and claim of privilege the rare exception. But if this Court were to accept the special prosecutor's beguiling suggestion that this case can be decided on a narrow gound of waiver, the inevitable long-term consequence must be less disclosure, not more, since Presidents will be reluctant to make public even those things that can be released without harm to the public interest, if by doing so they may be held to have waived their constitutional privilege to withhold related information that the nation's interests require to be kept confidential.

[IV]

The special nature of the Presidency.

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." (S.P. BR. 79) Instead, as we pointed out at the beginning of this brief, it was announced by this Court more than a century ago, and since reiterated, that "the President is the executive department."

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 their power to control the executive branch. This would nullify the separation of powers and the co-equality of the executive.

The ability of a President to function is severaly crippled if a grand jury, an official part of the judicial branch, can make a finding that a President has been party toa criminal conspiracy and make this in a form that does allo wthat finding to be reviewed or contested and disproved. To allow this would be a mockery 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. Wolff v. McDonnell — U.S., No. 73 679 (June 26, 1974).

If the grand jury had before it evidence competent or otherwise, United States v. Calandra, 414 U.S. 338 (1974), that led it to think that the President had been party to a crime, its oly 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.

[V]

The special prosecutor has not demonstrated a unique and compelling need for this material.

The special prosecutor makes the casual suggestion "T here is a compelling public interest in trying the conspiracy charged in United States v. Mitchell, et al., upon all relevant and material evidence." (S. P. BR. 107). Doubtless, every prosecutor in history has thought the same thing. The genius of the law, happily, has rejected that course, and in this case the special prosecutor's suggestion begs every important question before the Court.

Conclusion

Two years of Watergate have left their mark on the lives of the many men and women involved in the events, Watergate will affect practices, attitudes, and values in our political life in ways that are diverse and lasting and, it is to be hoped, fir the good. Without the passage of another law or the imposition of another sentence Watergate will have wrought a great change in American life. But the processes of the law that have been set in motion by that set of events must run their course.

What remains to be seen is whether the tides that surge about Watergate will alter the relationship among the branches of government; whether, in short, the complex and sensitive balance of our constitutional structure will be impaired.

JAWORSKI. BRIEF

1. The grand jury's action in designating the President as one of the unindicted co-conspirators was a responsible exercise of its constitutional powers.

In the District Court, counsel for the President premised his motion to expunge the grand jury's action concerning the President on the argument that an incumbent President could not be indicted. In this Court, counsel also challenges the motives that led to that action. These are false issues that should be dismissed at once so that the Court can address on the merits the question on which certiorari was granted in (the unindicted co-conspirator case).

A. The grand jury's action was taken and disclosed in good faith and was unrelated to the impeachment inquiry before the House of Representatives.

The grand jury's determination that there is evidence that the President was one of the conspirators involved in the conspiracy alleged in the indictment in United v. Mitchell, et al., D.D.C. No. 74-110 (A. 5A-14A), and the Government's reliance on that action in opposing the President's motion to quash the subpoena duces tecum were made in good faith, within the legitimate sphere of constitutional authority.

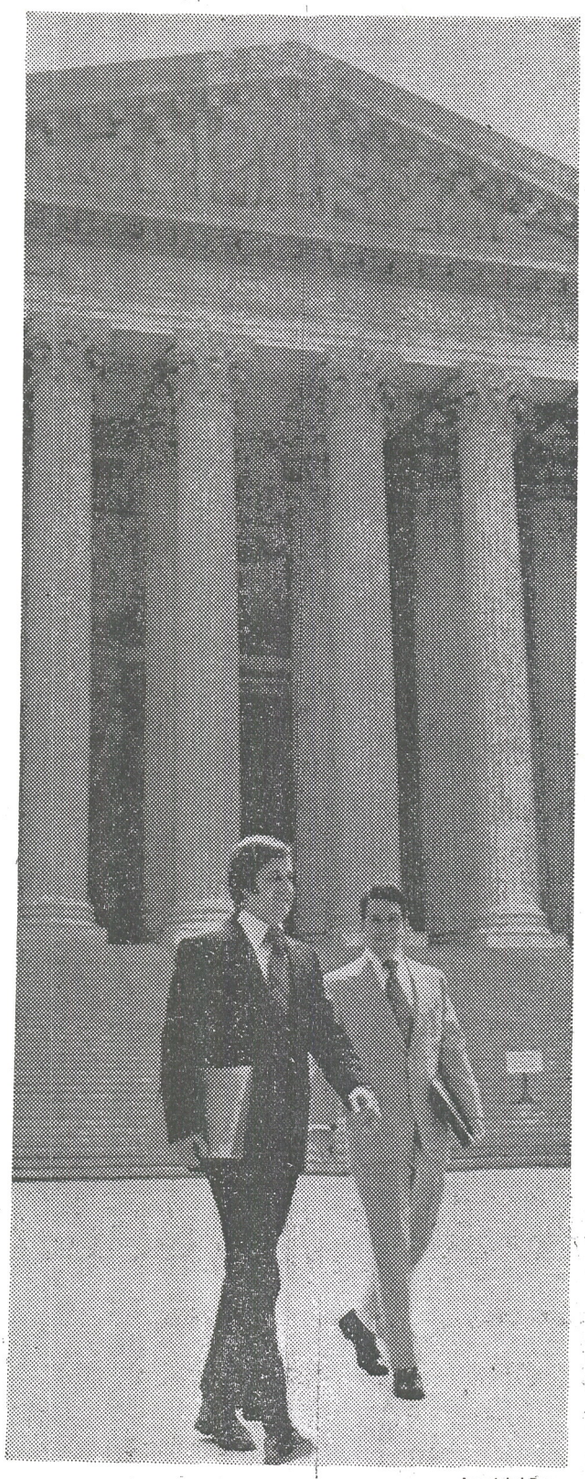
The record shows that both the grand jury and the special prosecutor have been sensitive to the President's position and have endeavored to avoid unnecessary interference with the constitutional processes being pursued simultaneously by the House Judiciary Committee.

The grand jury's action identifying the President as a co-conspirator, has made as an integral part of the grand jury's performance of its own constitutional functions. In making its determination, the grand jury was not focusing on the President qua president. Rather, it was discharging its sworn duty to determine "whether a crime has been committed and who has committed it." United States v. Dionisio, 410 U.S. 1, 15.

Counsel for the President is simply wrong in alleging that the naming of the President was a "strategem" or "device" to "nullify the President's claim of executive privilege." This claim ignores the basic principle that the grand jury's function is to return a "true bill" that fully and fairly alleges what it believes the evidence shows.

Nor is there any foundation for the insinuation that the grand jury's determination regarding President Nixon has intended to prejudice the President's position before the country or before the Judiciary Committee. As noted above, when the grand jury transmitted the material evidence concerning the President to the Judiciary Committee, it carefully disavowed any assessment of its significance insofar as the President's official status was concerned, and, as the District Court and Court of Appeals agreed, the grand jury abstained from offering the House its views on the thrust of the evidence.

B. A Federal grand jury has



Associated Press

Michael Sterlacci, left, and Jerome Murphy, White House lawyers, leaving Supreme Court yesterday after filing a brief for James D. St. Clair, the President's attorney.

the constitutional power to identify an incumbent President as an unindicted co-conspirator in connection with its return of an indictment against other persons.

Upon analysis of the merits, the Court will conclude, we believe, that counsel's assertions that an incumbent President cannot be named an unindicted co-conspirator are unpersuasive. The Federal grand jury's constitutional powers and responsibilities are sweeping. Although it is by no means clear that a President is immune from indictment prior to impeachment, conviction, and removal from office, the practical arguments in favor of that proposition cannot fairly be stretched to confer immunity on the President from being identified as an unindicted co-conspirator, when it is necessary to do so in connection with criminal proceedings against persons unquestionably liable to indictment.

[1]

The grand jury has broad and important powers as an independent institution of our government.

In our jurisdiction this body of citizens, randomly selected, beholden neither to court nor prosecutor, trusted individual against unwarranted government charges, but sworn to ferret out criminality by the exalted and powerful as well as by the humble and weak, must be able to take cognizance of all possible violators of the laws of the United States.

[2]

An incumbent President may be named as an unindicted co-conspirator.

Although we shall indicate below why it is not at all clear that an incumbent President may not be named as a defendant in a criminal indictment, this case does not turn on that issue and the court need not decide it. Even assuming arguendo that an incumbent President has some implicit constitutional immunity that prevents a Federal grand jury from indicting him, he nevertheless may be named as any unindicted co-conspirator under the traditional grand jury power to investigate and charge conspiracies that include co-conspirators who are not legally indictable.

In short, the jurisdiction of the grand jury to name unindicted co-conspirators is a necessary part of the power to charge defendants in a conspiracy case and is not restricted by any immunity a co-conspirator may enjoy not to be brought personally before the bar of justice to answer for the offense.

There is, we submit, no reason to make an exception for an incumbent President. We realize that the President is entrusted with awsesome powers and responsibilities requiring his full attention. While indictment would require the President to spend time preparing a defense and, thus, would interfere to some extent with his attention to his public duties, the course the grand jury has followed here in naming the President as an unindicted co-conspirator cannot be regarded as equally burdensome.

It is regrettable that the thrust of the evidence in the grand jury's view encompasses an incumbent President, but it would not be fair to our legal system or to the defendants and other unindicted co-conspirators to blunt the sweep of the evidence artificially be excluding one person, however prominent and important while identifying all others.

[3]

It is an open and substantial question whether an incumbent president is subject to indictment.

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" (P. Br. 114-15). It is conceded that while the king can do no wrong, a President, in the eyes of the law, is not impeccable.

If counsel for the President is correct that 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 Constitution has left a lucuna of potentially serious dimenstions.

II

This dispute between the United States, represented by the special prosecution, and the President—two distinct parties—presents a justiciable controversy.

Principles of "separation of powers," frequently quoted in the President's brief, show why on the facts of the present case there are no obstacles to the Court's authority to entertain and decide this controversy. This Court's jurisdiction to consider and resolve this dispute on the merits stems from the fundamental role of the courts in our tripartite constitutional system — the courts, as the "neutral" branch of government, have been allocated the responsibility to resolve all issues in a controversy properly before them even though this requires them to determine authoritatively the powers and responsibilities of the other branches (BR. 25-27, 48-52).

A. The special prosecutor has independent authority to maintain the prosecution in United States v. Mitchell, et al.

Counsel for the President, by accepting the proposition that the President and Attorney General can delegate certain executive functions to subordinate officers (P.Br. 10, 41, 106), implicity has conceded the vality of the regulations, promulgated with the President's consent, delegating specific prosecutorial duties and powers to the special prosecutor.

B. The assertion of executive privilege as a ground for refusing to produce evidence in a criminal prosecution does not present a political question and the validity of such a claim must be resolved by the courts.

In arguing that the judiciary, and not the executive, ultimately must determine the validity of a claim of executive privilege when it is asserted in a judicial proceeding, we rely on the fundamental principle that the courts have the power and the duty to resolve all issues necessary to a lawful resolution of controversies properly before them (Br. 48-52).

Although counsel for the President virtually has ignored all the relevant cases, this principle has been applied squarely to cases involving claims of executive privilege .See Environmental Protection Agency v. Mink, 410 U.S. 73; Roviaro v. United States, 353 U.S. 53; United States v. Reynolds, 345 U.S. 1.

III

The executive branch does not have an absolute privilige to withold evidence of confidential communications from a criminal prosecution.

A. The valid interests of the executive branch in promoting candid intra-agency deliberations are fully protected by the qualified executive privilege regularly recognized and applied by the courts.

This court is not confronted with the alternatives seemingly proposed by counsel for the President: this case does not present a choice between recognizing an absolute privilege on the one hand, or exposing the executive to repeated unwarranted intrusions on its confidentiality on the other hand. The narrow issue before the Court is whether the President, in a pending prosecution against his former aides and associates, may withhold material evidence from the Court merely on his assertion that the evidence involves confidential communications.

B. The First Amendment erects no absolute privilege for the President to withhold relevant evidence.

For the first time, in this court, counsel for the President advances the novel argument that the President's rights as an ordinary citizen to privacy and freedom of xpression support his claim of an absolute privilege to withhold physical evidence determined to be relevant to the trial of criminal prosecutions.

As shown by his unilateral action of April 30, 1974, in releasing a great quantity of edited Transcripts of Watergate-related conversations, he is free at any time to disclose as much of the recorded material in his possession as he chooses. The thrust of the President's position, however, is to preevent any dissemination of the subpoenaed aterial. Consequently, the interests asserted cannot realistically b those of freedom of expression, but rather the converse—the right to refuse to disclose what has been expressed.

IV

The subpoenaed conversations are unprivileged because a prima facie showing has been made that they occurred in the course of a criminal conspiracy involving the President.

The integrity of the administration of justice demands that all persons—no matter what their station or official status—be answerable to the law. In the context of the indictment in United States v. Mitchell, et al., which charges former high Government officials with a conspiracy to obstruct justice and defraud the United States, the demans of public justice require a trial based on all relevant and material evidence, particularly where, as here, evidence within the personal possession of the President demonstrably bears on the scope, membership and duration of the conspiracy.