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Excerpts From Opinion of Court of Appeals on Examination of Presidential Tapes

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WASHINGTON, Oct. 12 — Following are excerpts from the opinion of the United States Court of Appeals for the District of Columbia on the issue of court examination of Presidential tapes and opinion of Judges George E. MacKinnon and Malcolm R. Wilkey concurring and dissenting in part:

Opinion of the Court

We deem it essential to emphasize the narrow contours of the problem that compels the court to address the issues raised by this case. This central question before us is, in essence, whether the President may, in his sole discretion, withhold from a grand jury evidence in his possession that is relevant to the grand jury's investigations. It is our duty to respond to this question, but we limit our decision strictly to that required by the precise and entirely unique circumstances of the case. . . .

We turn, then, to the merits of the President's petition. Counsel for the President contend on two grounds that Judge Sirica lacked jurisdiction to order submissions of the tapes for inspection. Counsel argue, first, that, so long as he remains in office the President is absolutely immune from the compulsory process of a court; and, second, that executive privilege is absolute with respect to Presidential communications, so that disclosure is at the discretion of the President.

If it is true that the President is largely immune from court process, this case is at an end. The judiciary will not, indeed cannot, indulge in rendering an opinion to which the President has no legal duty to conform. We must, therefore, determine wether the President is legally bound to comply with an order endorsing a subpoena.

Constitutional Silence

The Constitution makes no mention of special Presidential immunities. Indeed, the executive branch generally is afforded home. This silence cannot be ascribed to oversight. James Madison raised the question of executive privleges during the constitutional convention, and Senators and Representatives enjoy an express, if limited, immunity from arrest, and an express privilege from inquiry concerning "speech and debate" on the floors of Congress. Lacking textual support, counsel for the President nonetheless would have us infer immunity from the President's political mandate, or from his vulnerability to impeachment, or from his discretionary powers. These are invitations to refashion the Constitution and we reject them.

Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the executive be under the law . . ." Sovereignty remains at all times with the people and they do not forfeit through elections the right to have the law construed against and applied to every citizen.

Immunity Rejected

Nor does the impeachment clause imply immunity from routine court process. While the President argues that the clause means that impeachability precludes criminal prosecution of an incumbent, we see no need to explore this question except to note its irrelevance to the case before us. The order entered below, and approved here in modified form, is not a form of criminal process. Nor does it compete with the impeachment device by working a constructive removal of the President from office; the impeachment clause itself reveals that incumbency does not relieve the President of the routine legal obligations that confine all citizens.

That the impeachment clause may qualify the court's power to sanction noncompliance with judicial orders is immaterial. Whatever the equally present in Youngstown: Commerce Secretary Sawyer, the defendant there, was an impeachable "civil officer" but the injunction against him nontheless affirmed. The legality of judicial orders should not be confused with the legal consequences of their breach; for the courts in this country always assume that their orders will be obeyed, especially when adressed to responsible government officials. Indeed, the President has, in this case, expressly abjured the course of setting himself above the law.

'Unreviewable Discretion'

Finally, the President reminds us that the landmark decisions recognizing judicial power to mandamus executive compliance with "ministerial" duties also acknowledged that the executive branch enjoys an unreviewable discretion in many areas of "political" or "executive" administration.

While true, this is irrelevant to the issue of Presidential immunity from judicial process. The discretionary-ministerial distinction concerns the nature of the act or omission under review, not the official title of the defendant. No case holds that an act is discretionary merely because the president is the actor. If the Constitution or the laws of evidence confer upon the President the absolute discretion to withhold material subpoenaed by a grand jury, then of course we would vacate, rather than approve with modification, the order entered below. However, this would be because the order touched upon matters within the President's sole discretion, not because the President is immune from process generally. We thus turn to an examination of the President's claim of an absolute discretion to withhold evidence from a grand jury.

Principle of Evidence

There is, as the Supreme Court has said, a "longstanding principle" that the grand jury "has a right to every man's evidence" except that "protected by a constitutional, common law, or statutory privilege." The Persident concedes the validity of this principle. He concedes that he, like every other citizen, is under a legal duty to produce relevant, nonprivileged evidence when called upon to do so.

The President contends, however, that whenever, in formal claim of privilege, that claim without more disables the courts from inquiring by any means into whether the privilege is applicable to the subpoenaed evidence. The President agrees that, in theory, the privilege atached to his office has limits; for example, he explicitly states that it "cannot be claimed to shield executive officers from prosecution for crime." Nonethe less, he argues that it is his responsibility, and his alone, to determine whether beyond the scope of the privilege. In effect, then, the President claims that, at least with respect to conversations with his advisers, the privirather than the courts, his has final authority to decide whether it applies in the circumstances.

Court Precedents

It is true, as counsel for the President stress, that Presidents and Attorneys General have often said that the President's final and absolute assertion of executive privilege is conclusive on the courts. The Supreme Court in United States v. Reynolds, however, went a long way toward putting this view to rest. The Reynolds court, considering a claim strongly asserted: "The court itself must determine whether the circumstances are appropriate for the claim of privileges" "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." It is true that, somewhat inconsistently with this sweeping language, the court formally reserved decision on the Government's claim that the executive has an absolute discretion constitutionally founded in separation of powers to withhold documents. However, last term in Committee for Nuclear Responsibility, Inc. v. Seaborg, we confronted directly a claim of absolute privilege and rejected it: "Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will."

Aphere to Decision

We aphere to the Seaborg decision. To do otherwise would be effectively to ignore the clear words of Marbury v. Madison, that "it is emphatically the province and duty of the Judicial Department to say what the low is."

Seaborg is not only consistent with, but dictated by, separation of powers doctrine. Whenever a privilege is asserted, even one expressed in the Constitution, such as the speech and debate privilege, it is the courts that determine the validity of the assertion and the scope of the privilege.

That the privilege is being asserted by the President against a grand jury subpoena does not make the task of resolving the conflicting claims any less judicial in nature. Throughout our history, there have frequently been conflicts between independent organs of the Federal Government, as well as between the state and Federal governments. When such conflicts arise in justiciable cases, our constitutional system provides a means for resolving them—one Supreme Court. To leave the proper scope and application of executive privilege to the President's sole discretion would represent a mixing, rather than a separation, of executive and judicial functions. A breach in the separation of powers must be explicitly authorized by the Constitution, or be shown necessary to the harmonious operation of "workable government." Neither condition is met here. The Constitution mentions no executive privileges, much less any aboslute executive privileges.

Not Required

Nor is an absolute privilege required for workable government. We acknowledge that wholesale public access to executive deliberations and documents would cripple the executive as a co-equal branch, but this is an argument for recognizing executive privilege and for according it great weight, but for making the executive the judge of its own privilege.

If the claim of absolute privilege was recognized, its mere invocation by the President or his surrogate could deny access to all documents in all the executive departments of all citizens and their representatives, including Congress, the courts as well as grand juries, state governments, state officials and all state subdivisions. The Freedom of Information Act could become nothing more than a legislative statement of unenforceable rigts. Support for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers.

Any contention of the President that records of his personal conversations are not covered by the Seaborg holding must be rejected. As our prior discussion of United States v. Burr makes clear, Chief Justice Marshall's position supports this proposition. At issue in Burr was a subpoena to President Jefferson to produce private letters sent to him—communications whose status must be considered equal to that of private oral conversations. We follow the Chief Justice and hold today that, although the views of the Chief Executive on whether his executive privilege should obtain are properly given the greatest weight and deference, they cannot be conclusive.

The President's privelege cannot, therefore, be deemed absolute. We think the Burr case makes clear that application of executive privilege depends on a weighing of the public interests that would be served by disclosure in a particular case. We direct our attention, however, solely to the circumstances here. With the possible exception of material on one tape, the President does not assert that the subpoenaed items involve military or state secrets; nor is the asserted privilege directed to the particular kinds of information that the tapes contain. Instead, the President asserts that the tapes should be deemed privileged because of the great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties. This privilege, intended to protect the effectiveness of the executive decision-making process, is analogous to that between a Congressman and his aides under the speech and debate clause; to that among judges, and between judges and their law clerks; and similar to that contained in the fifth exemption to the Freedom of Information Act.

Unique Circumstances

Our conclusion that the general confidentiality privilege must recede before the grand jury's showing of need is established by the unique showing possible. In his pubcircumstances that made this lic statement of May 22, 1973, the President said: "Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, inthe matters presently under investigation, including the Watergate affair and the alleged cover-up." We think that this statement and its consequences may properly be considered as at least one factor in striking the balance in this case. Indeed, it affects the weight we give to factors on both sides of the scale.

On the one hand, the President's action presumably reflects a judgment by him that the interest in the confidentiality of White House discussions in general is outweighed by such matters as the public interest, stressed by the special prosecutor, in the integrity of the level of the executive branch closest to the President, and the public interest in the integrity of the electoral process—an interest stressed in such cases as Civil Service Commission v. National Association of Letter Carriers and United States v. United Automobile Workers. Although this judgment in no way controls our decision, we think it supports our estimation of the great public interest that attaches to the effecive functioning of the present grand jury. As Burr makes clear, the courts approach their function by considering the President's reasons and determinations concerning confidentiality.

At the same time, the public testimony given consequent to the President's decision substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate. The simple fact is that the conversations are no longer confidential. Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testi-

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The President's Oval Office in the White House, one of the places where automatic recording devices were installed

mony. There is no "constitutional right to reply on possible flaws in the [witnesses'] memory. . . . No other argument can justify excluding an accurate version of a conversation that the [witness] could testify to from memory." In short, we see no justification, on confidentiality grounds, for depriving the grand jury of the best evidence of the conversations available.

The district court stated that, in determining the applicability of privilege, it was not controlled by the President's assurance that the conversations in question occurred pursuant to an exercise of his constitutional duty to "take care that the laws be faithfully executed." The district court further stated that while the President's claim would not be rejected on any but the strongest possible evidence, the court was unable to decide the question of privilege without inspecting the tapes.

This passage of the district court's opinion is not entirely clear. If, however, the district judge meant that rejection of the claim of privilege requires a finding that the President was not engaged in the performance of his constitutional duty, we cannot agree. We emphasize that the grand jury's showing of need in no sense relied on any evidence that the President was involved in, or even aware of any alleged criminal activity. We freely assume, for purposes of this opinion, that the President was engaged in performance of his constitutional duty."

May Order Disclosure

Nonetheless, we hold that the District Court may order disclosure of all portions of the tapes relevant to matters within the proper scope of the grand jury's investigations, unless the court judges that the public interest served by nondisclosure of particular statements or information outweighs the need for that information demonstrated by the grand jury.

The question remains whether, in the circumstances of this case, the District Court was correct in ordering the tapes produced for in camera inspection, so that it could determine whether and to what extent the privilege was properly claimed. Since the question of privilege must be resolved by the court, there must be devised some procedure or series of procedures that will, at once, allow resolution of the question and, at the same time, not harm the interests that the privilege is intended to protect.

Two days after oral argument, this court issued a memorandum calling on the parties and counsel to hold conversations toward the objective of avoiding a needless constitutional adjudication. Counsel reported that their sincere efforts had not been fruitful. It is our hope that our action in providing what has become an unavoidable constitutional ruling, and in approving, as modified, the order of the District Court, will be followed by maximum cooperation among the parties. Perhaps the President will find it possible to reach some agreement with the special prosecutor as to what portions of the subpoenaed evidence are necessary to the grand jury's task.

'Residual Problem'

Should our hope prove unavailing, we think that in camera inspection is a necessary and appropriate method or protecting the grand jury's interest in securing evidence directly relevent to its decisions. The residual problem of this case derives from the possibility that there are elements of the subpoenaed recordings that do not lie within the range of the exception that we have defined.

This may be due, in part, to the fact that parts of the tape recordings do not relate to Watergate matters at all. What is apparently more stressed by the President's counsel is that there are items in the tape recordings that should be held confidential yet are inextricably interspersed with the portions that relate to Watergate. They say, concerning the President's decision to permit testimony about possible criminal conduct or discussions thereof, that testimony can be confined to the relevant portions of the conversations and can be limited to matters that do not endanger national security. Recordings cannot be so confined and limited, and thus the President has concluded that to produce the recordings would do serious damage to Presidential privacy and to the ability of that office to function.

The argument is not confined to matters of national security, for the underlying importance of preserving candor of discussion and Presidential privacy pertains to all conversations that involve discussion or making ofpolicy, ordinary domestic policies as well as matters of national security, and even to personal discussion with friends and advisers on seemingly trivial matters. Concerning the inextricability problem, the Presiden't counsel say:

"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 interwined into one conversation. The nature of informal, private conversations is such that it is not practical to separate what is arguably relevant from what is clearly irrelevant."

'An Appropriate Means'

The "inextricable intermingling" issue may be potentially significant. The district court correctly discerned that in camera inspection is permissible, even though it in involved what the President's counsel agree is a "limited infraction" of confidentiality, in order to detmine whether there is inextricable intermingling. In E.P.A. v. Mink, the Sppreme Court declared that in camera inspection was an appropriate means of determining whether and to what extent documents sought in litigation were disclosable as factual information even though the Government argued that the documents "submitted directly to the President by top level Government officials" were, by their very nature, a blending of factual presentation and policy recommendations that are necessarily "inextricably interwined with policy-making processes."

The Supreme Court stated that it had no reason to believe that the district judge directed to make in camera inspection "would go beyond the limits of the remand and in any way compromise the confidentiality of deliverative information." The Court acknowledged that "the encouragement of open expression of opinion as to government mental policy is homewhat impaired by a requirement to submit the evidence even (in camera)." Yet the Court stated: "Plainly, in some situations, in camera inspection will be necessary and appropriate." It further noted: "A representative document of those sought may be selected for in camera inspection." And it suggested that the agency may disclose portions of the contested documents and attempt to show by circumstances, "that the excised portions constitute the bare bones of protected matter."

Differences Noted

In this case the line of permissible disclosure is different from that in Mink, since even policy and decisional discussions are disclosable if they relate to Watergate and the alleged cover-up, but Mink confirms that courts appropriately examine a disputed item in camera, even though this necessarily involves a limited intrusion upon what ultimately may be held confidential, where it appears with reasonably clarity that some access is appropriate, and in camera inspection is needed to determine what should and what should not be revealed.

Mink noted that the case might proceed by the Government's disclosing portions of the contested documents, and also noted an instance in which the "United States offered to file an abstract of factual information contained in the contested documents [F.B.I. reports]." We think that the district judge and counsel can illuminate the key issue of what is "inextricable" by cultivating the partial excision and "factual abstract" approaches noted in Mink.

The District Court contemplated that "privileged portions may be excised so that only unprivileged matter goes goes before the grand jury." Even in a case of such intermingling as, for example, comment on Watergate matters that is "pungent," once counsel, or the district judge, has listened to the tape recording of a conversation, he has an ability to present only its relevant portions, much like a bystander who heard the conversation and is called to testify. He may give the grand jury portions relevant to Watergate, by using excerpts in part and summaries in part, in such a way as not to divulge aspects that reflect the pungency of candor or are otherwise entitled to confidential treatment. It is not so long ago that appellate courts routinely decided cases without an exact transcript, but on an order of the trial judge settling what was given as evidence.

Procedure Outlined

We contemplate a procedure in the district court, following the issuance of our mandate, that follows the path delineated in *Reynolds*, *Mink*, and by this court in *Vaughn v. Rosen*. With the rejection of his all-embracing claim of prerogative, the President will have an opportunity to present more particular claims of privilege, if accompanied by an analysis in manageable segments.

Without compromising the confidentiality of the information, the analysis should contain descriptions specific enough to identify the basis of the particular claim or claims.

1. In so far as the President makes a claim that certain material may not be disclosed because the subject matter relates to national defense or foreign relations, he may decline to transmit that portion of the material and ask the district court to reconsider whether in camera inspection of the material is necessary. The special prosecutor is entitltd to inspect the claim and showing and may be heard thereon, in chambers. If the judge sustains theprivilege, the text of the Government's statement will be preserved in the court's record under seal.

2. The President will present to the district court all other items covered by the order, with specification of which segments he believes may be disclosed and which not. This can be accomplished by itemizing and indexing the mateial, and correlating indexed items with particular claims of privilege. In request of either counsel, the district court shall hold a hearing in chambers on the claims. Thereafter the court shall itself inspect the disputed items.

Given the nature of the inquiry that this inspection involves, the district court may give the special prosecutor access to the material for the limited purpose of aiding the court in determining the relevance of the material to the grand jury's investigations. Counsels' arguments directed to the specifics of the portions of material in dispute may help the district court immeasurably in making its difficult and necessarily detailed decisions.

Moreover, the preliminary indexing will have eliminated any danger of disclosing peculiarly sensitive national security matters. And, here, any concern over confidentiality is minimized by the Attorney General's designation of a distinguished and reflective counsel as special prosecutor. If, however, the court decides to allow access to the special prosecutor, it should, upon request, stay its action in order to allow sufficient time for application for a stay to this court.

Following the in camera hearing and inspection, the District Court may determine as to any items (a) to allow the particular claim of privilege in full; (b) to order disclosure to the grand jury of all or a segment of the item or items; or, when segmentation is impossible, (c) to fashion a complete statement for the grand jury of those portions of an item that bear on possible criminality. The District Court shall provide a reasonable stay to allow the President an opportunity to appeal. In case of an appeal to this court of an order either allowing or refusing disclosure, this court will provide for sealed records and confidentiality in presentation.

'Extraordinary Nature'

We end, as we began, by emphasizing the extraordinary nature of this case. We have attempted to decide no more than the problem before us—a problem that takes its unique shape from the grand jury's compelling showing of need. The procedures we have provided require thorough deliberation by the District Court before even this need may be satisfied. Opportunity for appeal, on a sealed record, is assured.

We cannot, therefore, agree with the assertion of the President that the District Court's order threatens "the continued existence of the Presidency as a functioning institution." As we view the case, the order represents an unusual and limited requirement that the President produce material evidence. We think this required by law, and by the rule that even the Chief Executive is subject to the mandate of the law when he has no valid claim of privilege .

The petition and appeal of the United States are dismissed. The President's petition is denied, except in so far as we direct the district court to modifyits order and to conduct further proceedings in a manner not inconsistent with this opinion.

The issuance of our mandate is stayed for five days to permit the seeking of supreme court review of the issues with which we have dealt in making our decision.

Judge Mackinnon

Mackinnon, Circuit Judge, concurring in part and dissenting in part: I concur in the decision on the jurisdiction of this court as expressed in Part II of the per curiam opinion, but I respectfully dissent from its conclusion on the principal issue. I also concur in the result reached by Judge Wilkey's dissent and concur generally in his reasoning. However, I rely on some points not discussed by Judge Wilkey and as to points that are common to our two dissenting opinion there are at times differences in emphasis.

I
Introduction

This case presents for consideration an important constitutional question which has not confronted the courts in the 186 years since the Constitution was written. While the issues involved have arisen many times in the relations between the Congress and the President, there are no controlling judicial precedents. The immediate issue involves the requested disclosure of confidential discussions between the President and his close advisers, but the ultimate issue is the effect that our decision will have upon the constitutional independence of the Presidency for all time.

Qualified Privilege

The majority relies on a line of cases which recognize a qualified "executive privilege" where a civil litigant seeks disclosure of relevant Government documents. In formulating this qualified privilege, the courts concluded that the interest in confidentiality to insure a free deliberative process is weaker than that recognized as necessary to protect military or state secrets. Consequently, the courts have recognized only a qualified, not an absolute, privilege where the Government has resisted disclosure solely on the ground of protecting the confidentiality of the deliberative process.

However, none of the "executive privilege" cases involved personal communications between a President and his closest advisers. There is a great distinction between the office of the President and the myriad other agencies and departments that comprise the executive branhc. Virtually every decision emanating from a President's office has a direct and immediate effect on the entire, or a substantial part of, the nation. Lesser executive departments and agencies do not hold such awesome responsibility and power. Each has responsibility for and operates upon only a small segment of the nation. As important as the lesser executive departments and agencies are, their decisions do not have the sweeping and immediate impact which characterizes the decisions and policies of a President.

The National Interest

The national interest in maintaining Presidential confidentiality to insure that a President's deliberative process remains completely unfettered is at least as strong as the national interest in protecting military or state secrets. As explained earlier, secrecy is not the ultimate goal of the Presidential communications privilege. The ultimate goal is to guarantee that Presidents will remain comprehensively informed throughout their decision-making processes. The importance of the military or state secrets privilege is most apparent when, for example, it prevents disclosure of emergency defense or invasion plans, foreign espionage programs or summit meeting strategy. But if a President is unable to conduct thorough and unfettered deliberations with his advisers, these plans, programs and strategies may never be formulated.

Furthermore, whereas the confidentialty of military or state secret is important primarily with respect to this country's international relations, the Presidential privilege promotes informed decisions in both the international and domestic spheres. In view of the immediate national and world-wide impact which accompanies Presidential decisions, the ned to protest the Presidential deliberagreat as the need to protect

uve process is at least as military and state secrets. If military and state secrets are absolutely privileged based on the need for confidentiality, then conferences between a President and his close advisers should enjoy a similar absolute provilege based on the need for confidentiality.

The effective discharge of the Presidential duty faithfully to execute the laws requires a privilege that preserves the integrity of the deliberative processes of the executive office. It would be meaningless to commit to the President a constitutional duty and then fail to protect and preserve that which is essential to its effective discharge.

Judge Wilkey

The critical issue on which I part company with my five colleagues is, in the shortest terms, who decides?

I thus reach the conclusion differing from the majority of my colleagues, that the privilege asserted by the President here derives both from the consitutional principle of separation of powers and from the common sense-common law, statutory of governmental decision-making, whatever the branch. The latter may be subject to weighing and balancing of conflictin public interests, as many of the cases have done, but never in a case involving the President as a party. But where the privilege of the Chief Executive is derived from the constitutional principle of separation of powers, it is no more subject to weighing and balancing than any other constitutional privilege can be weighed and balanced by extraneous third parties.

Sought Protection

The Founding Fathers were not looking for the most efficient government design. After all, they had been subject to and rebelled against one of the most efficient governments then existing. What the Founding Fathers designed was not efficiency, but protection against oppression. Leaving the three branches in an equilibrium of tension was just one of their devices to guard against oppression.

This healthy equilibrium of tension will be destroyed if the result reached by the per curiamis allowed to stand. My colleagues cannot confine the effect of their decision to Richard M. Nixon. The precedent set will inevtiably on the have far reaching implications on the vunerability of any Chief Executive to judicial process, not merely at the behest of the special prosecutor in the extraordinary circumstances of Watergate, but at the behest of Congress. Congress may have equally plausible needs for similar information. The fact that Congress 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.

This may seemingly frustrate the role of the special prosecutor in part of his work, it may frustrate what a Congressional investigative committee conceives to be its role, but in my judgment this was the way the Constitution was intended to work.

To put the theoretical situation and possibilities in terms of "absolute" privilege sounds somewhat terrifying —until one realizes that this is exactly the way matters have been for 184 years of our history, and the republic still stands. The practical capacity of the three independent branches to adjust to each other their sensitivity to the approval or disapproval of the American people have been sufficient guides to responsible action, without imposing the authority of one co-equal branch over another. The American constitutional design may look like sloppy craftsmanship, it may upset tidy theoreticians, but it has worked— a lot better than other more symmetrical models.

At the least, this is a point in favor of its continuance unchanged; at the most, this may be all the answer we need.