

NYTimes JUN 22 1974 Excerpts From Briefs Filed for Nixon and

WASHINGTON, June 21—Following are excerpts from briefs filed in the Supreme Court today by President Nixon's attorneys and by the special prosecutor, Leon Jaworski, on the issues of whether the President must surrender 64 tape recordings and whether the Watergate grand jury had authority to name Mr. Nixon as an unindicted co-conspirator:

WHITE HOUSE BRIEF Introduction

In a very real sense, every case that comes before this Court is unique; but few in the nation's history have cut so close to the heart of the basic constitutional system in which our liberties are rooted.

Thus the stakes are enormously high, from a constitutional standpoint. At the same time, and making the Court's judgment more difficult, the case comes wrapped in the passions of a dramatic conflict which has dominated more than a year. This is a conflict which now has involved all three branches of the Government, and pits their constitutional rights and responsibilities one against another.

Just as the first allegiance of this Court is to the Constitution, the first responsibility of this Court must now be to decide the case before it in a way which preserves the balances that are central to the Constitution.

At its core, this is a case that turns on the separation of powers.

All other considerations are secondary, because preserving the integrity of the separation of powers is vital to the preservation of our Constitution as a living body of fundamental law. If the arguments of the special prosecutor were to prevail, the Constitutional balance would be altered in ways that no one alive today could predict or measure.

The questions presented reach beyond the exigencies of the moment; beyond the needs of any particular criminal prosecution; beyond the interests of any particular Administration.

The extraordinary nature of this case stems partly from the issues directly presented, and partly from the coloration placed on those issues by the surrounding circumstances.

It would do justice neither to the parties nor to the issues if this were treated as just another case, or simply as an appeal from a discovery procedure in a criminal action against private individuals. It is, in fact, an extraordinary proceeding intrinsically related to the move now pending in the Congress to impeach the President of the United States.

Courts Called Misused

In effect, court process is being used as a discovery tool for the impeachment proceedings — proceedings which the Constitution clearly assigns to the Congress, not to the courts. This is so because of the particular re-

lationship which has evolved among the special prosecutor, the District Court and the House Judiciary Committee, and because of the impact which any Presidential action with regard to the subpoenas issued would inevitably have on the impeachment proceedings.

As a result of the history of the so-called Watergate cases in the District Court, the special prosecutor is well aware that the District Court feels obligated to turn over to the Judiciary Committee any information that might bear on the pending Congressional action.

Thus the effect, whatever the intent, of the discovery procedures being passed by the special prosecutor would be to produce evidence for the Congress that the Congress could not obtain by its own procedures.

As a result, there has been a fusion of two entirely different proceedings: one, the criminal proceeding involving various individual defendants, and the other the impeachment proceeding involving the president. The first lies in the courts; the second lies in the Congress.

The special prosecutor strengthens this fusion by utilizing the unsubstantiated, unprecedented and clearly unconstitutional device of naming the President as an unindicted co-conspirator in the criminal cases, with the apparent purpose of strengthening his claim to recordings of Presidential conversations as potential evidence in the criminal cases.

Action in Normal Times

The process—each with an entirely different history, function and structure—have become intertwined, and the resulting confusion, both conceptual and procedural, is manifestly unfair to the President as an individual and harmful to the relationship between his office and the legislative branch.

To place the present events in perspective, it is useful to reflect on how this case would have been viewed in normal times. If there were no impeachment pending, and if the special prosecutor used the device of naming the President as an unindicted co-conspirator in order to obtain recordings of private Presi-

dential conversations, on which the President had interposed a claim of executive privilege, the special prosecutor's request would be given short shrift.

If this procedure were allowed to go forward, inevitably affecting the impeachment inquiry, it would represent an expansion of the Court's jurisdiction into the impeachment process that the Constitution assigns solely to the House of Representatives.

Whatever the combination of circumstances producing it, the result would be clear: an expansion of the Court's jurisdiction into a realm that the Constitution clearly prohibits. It follows necessarily that the courts may not be used, either deliberately or inadvertently, as a back-door

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route to circumvent the constitutional procedures of an impeachment inquiry, and thus be intruded into the political thicket in this most solemn of political processes.

Anyone who has practiced before this Court is familiar with the observation of Justice Holmes that "great cases, like hard cases, make bad law." This is true if the pressures of the moment allow the courts to be swayed from their rigid adherence to great principles; if remedies for the perceived passing needs of the moment are allowed at the expense of those enduring constitutional doctrines that have preserved our system of ordered liberty through the ages.

Of those doctrines, none is more fundamental to our governmental structure itself than the separation of powers—with all of its inherent tensions, with all of its necessary inability to satisfy all people or all institutions all of the time, and yet with the relentless and saving force that it generates toward essential compromise and accommodation over the longer term even if not always in the shorter term.

Often a price has to be paid in the short term in order to preserve the principle of separation of powers, and thereby to preserve the basic constitutional balances, in the longer term. The preservation of this principle, the maintenance of these balances, are at stake in the case now before this Court.

Summary of Argument

The District Court order of May 20, 1974, is an appealable order under 28 U.S.C. 1291, for unless review is granted now the President's claimed right will be irremediably lost. This Court also has jurisdiction to entertain and decide the petition for mandamus transmitted by the Court of Appeals under 28 U.S.C. 1651 because the lower court's decision exceeded that court's jurisdiction.

Under the doctrine of separation of powers, the judiciary is without jurisdiction to intervene in the intra-branch dispute between the President and the special prosecutor. The duty to determine whether disclosure of confidential Presidential communications is in the public interest has not been, and cannot be, delegated to the special prosecutor.

Under the standards set forth in *Baker v. Carr*, 369 U.S. 166 (1962), this intra-branch dispute raises a political question which the Federal courts lack jurisdiction to decide. The District Court does not have the power to substitute its judgment for that of the President on matters exclusively within the President's discretion.

Inherent in the executive power vested in the President under Article II of the Constitution is executive privilege, generally recognized as a derivative of the separation of powers doctrine. The powers traditionally asserted by the other branches support the validity of the claim of confidentiality invoked by the President.

Even if the Court were to determine that a Presidential privilege is subject to judicial supervision the lower court erred in refusing to quash the subpoena since the special prosecutor failed to demonstrate the "unique and compelling need" required by *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), to overcome the presumptively valid claim of Presidential privilege.

However, even before a determination can be made as to whether the President's assertion of executive privilege is overcome, the special prosecutor has the burden of proving that his subpoena meets the requirements of Rule 17(c), Federal Rules of Criminal Procedure.

An analysis of the showing made by special prosecutor in the court below demonstrates that he failed to meet the case law criteria developed to prevent abuse of Rule 17(c). For this reason alone the District Court erred in refusing to quash the subpoena.

The President is not subject to the criminal process whether that process is invoked directly or indirectly. The only constitutional recourse against the President is by impeachment and through the electoral process. The naming of the President as an unindicted co-conspirator by an official body is a nullity which both prejudices the ongoing impeachment proceeding and denies due

process to the President. The grand jury's action does not constitute a prima facie showing of criminality and is without legal effect to overcome a Presidential claim of executive privilege.

JAWORSKI BRIEF

The narrow issue presented to this court is whether the President, in a pending prosecution against his former aides and associates being conducted in the name of the United States by a special prosecutor not subject to Presidential directions, may withhold material evidence from the Court merely on his assertion that the evidence involves confidential government deliberations.

The Court clearly has jurisdiction to decide this issue. The pending criminal prosecution in which the subpoena duces tecum was issued constitutes a "case or controversy," and the Federal courts naturally have the duty and, therefore, the power to determine what evidence is admissible in that prosecution and to require that evidence be produced.

This is only a specific application of the general but fundamental principle of our constitutional system of government that the courts, as the "neutral" branch of government, have been allocated the responsibility to resolve all issues in a con-

troversy properly before them, even though this requires them to determine authoritatively the powers and responsibilities of the other branches.

Any motion that this controversy, arising as it does from the issuance of a subpoena duces tecum to the President at the request of the special prosecutor, is not justifiable is wholly illusory.

In the context of the most concrete and vital kind of case—the Federal criminal prosecution of former White House officials—the special prosecutor, as the attorney for the United States, has resorted to a traditional mechanism to procure evidence for the Government's case at trial. In objecting to the enforcement of the subpoena, the President has raised a classic question of law—a claim of privilege—and the United States, through its counsel and in its sovereign capacity, is opposing that claim. Thus, viewed in practical terms, it would be hard to imagine a controversy more appropriate for judicial resolution.

Adverse Parties in Court

The fact that this concrete controversy is presented in the context of a dispute between the President and the special prosecutor does not deprive this Court of jurisdiction. Congress has vested in the Attorney General, as the head of the Department of Justice, the exclusive authority to conduct the Government's civil and criminal litigation, including the exclusive authority for securing evidence.

The Attorney General, with the explicit concurrence of the President, has vested that authority with respect to Watergate matters in the special prosecutor. These regulations have the force and effect of law, and establish the functional independence of the special prosecutor. Accordingly, the special prosecutor, representing the sovereign authority of the United States, and the President appear before the Court as adverse parties in the truest sense.

The President himself has ceded any power that he might have had to control the course of the pending prosecution, and it would stand the Constitution on its head to say that this arrangement, if respected and given effect by the courts, violates the "separation of powers."

I

Throughout our constitutional history the courts, in cases or controversies before them, consistently have exercised final authority to determine whether even the highest executive officials are acting in accordance with the Constitution. In fulfilling this basic constitutional function, they have issued appropriate decrees to implement those judicial decisions. The courts have not abjured this responsibility even when the most pressing needs of the nation were at issue.

In applying the fundamental principle, the courts have determined for themselves not only what evidence is admissible in a pending case, but also what evidence must be produced, including whether particular materials are appropriately subject to

a claim of executive privilege. Indeed, this Court has squarely rejected the claim that the executive has absolute, unreviewable discretion to withhold documents from the courts.

This case highlights the inherent conflict of interest that is presented when the executive is called upon to produce evidence in a case which calls into question the executive's own action. The President cannot be a proper judge of whether the greater public interest lies in disclosing evidence subpoenaed for trial, when that evidence may have a material bearing on whether he is impeached and will bear heavily on the guilt or innocence of close aides and trusted advisers.

In the framework of this case, where the privilege holder is effectively a third party, the interests of justice as well as the interests of the parties to the pending prosecution require that the courts enter a decree requiring that relevant and unprivileged evidence be produced.

The "produce or dismiss" option that is sometimes allowed to the executive when a claim of executive privilege is overruled merely reflects a remedial accommodation of the requirements of substantive justice and thus has never been available to the executive where the option could not satisfy these requirements.

This is particularly true where the option would make a travesty out of the independent institution of the special prosecutor by allowing the President to accomplish indirectly what he cannot do directly—secure the abandonment of the Watergate prosecution.

II

There is nothing in the status of the President that deprives the courts of their constitutional power to resolve this dispute. The power to issue and enforce a subpoena duces tecum against the President was first recognized by Chief Justice Marshall in the *Burr* case in 1807, in accordance with two fundamental principles of our constitutional system: first the President, like all executive officials as well as the humblest private citizens, is subject to the rule of law. Indeed, this follows inexorably from his constitutional duty to "take care that the laws be faithfully executed." Second, in the full and impartial administration of justice, the public has a right to every man's evidence.

The persistent refusal of the courts to afford the President an absolute immunity from judicial process is fully supported by the deliberate decision of the framers to deny him such a privilege.

Although it would be improper for the courts to control the exercise of the President's constitutional discretion, there can be no doubt that the President is subject to a judicial order requiring compliance with a clearly defined legal duty. The crucial jurisdictional factor is not the President's office, or the physical power to secure compliance with judicial orders, but the Court's ability to resolve authoritatively, with the context of a just-

cial controversy, the conflicting claims of legal rights and obligations.

The Court is called upon here to adjudicate the obligation of the President, as a citizen of the United States, to cooperate with a criminal prosecution by performing the solely ministerial task of producing specified, unprivileged evidence that he has taken within his sole personal custody.

III

The qualified executive privilege for confidential intragovernmental deliberations, designed to promote the candid interchange between officials and their aides, exists only to protect the legitimate functioning of government. Thus, the privilege must give way where, as here, it has been abused.

There has been a prima facie showing that each of the participants in the subpoenaed conversations, including the President, was a member of the conspiracy to defraud the United States and to obstruct justice charged in the indictment in the present case, and a further showing that each of the conversations occurred in the course of and in furtherance of the conspiracy. The public purpose underlying the executive privilege for governmental deliberations precludes its application to shield alleged criminality.

But even if a presumptive privilege were to be recognized in this case, the privilege cannot be sustained in the face of the compelling public interest in disclosure. The responsibility of the courts in passing on a claim

of executive privilege is, in the first instance, to determine whether the party demanding the evidence has made a prima facie showing of a sufficient need to offset the presumptive validity of the executive's claim. The cases have held that the balance should be struck in favor of disclosure only if the showing of need is strong and clear, leaving the courts with a firm conviction that the public interest requires disclosure.

It is difficult to imagine any case where the balance could be clearer than it is on the special facts of this proceeding. The recordings sought are specifically identified, and the relevance of each conversation to the needs of trial has been established at length.

The conversations are demonstrably important to defining the extent of the conspiracy in terms of time, membership and objectives. On the other hand, since the President has authorized each participant to discuss what he and the others have said, and since he repeatedly has summarized his views of the conversations, while releasing partial transcripts of a number of them, the public interest in continued confidentiality is vastly diminished.

The District Court's ruling is exceedingly narrow and, thus, almost no incremental damage will be done to the valid interests in assuring future Presidential aides that legitimate advice on matters of policy will be kept secret.

The unusual circumstances of this case—where high government officials are under indictment for conspiracy to defraud the United States and obstruct justice—at once make it imperative that the trial be conducted on the basis of all relevant evidence and at the same time make it highly unlikely that there will soon be a similar occasion to intrude on the confidentiality of the executive branch.

IV

Even if the subpoenaed conversations might once have been covered by a privilege, the privilege has been waived by the President's decision to authorize voluminous testimony and other statements concerning Watergate-related discussion and his recent release of 1,216 pages of transcript forty-three from Presidential conversations dealing with Watergate.

A privilege holder may not make extensive disclosures concerning a subject and then selectively withhold portions that are essential to a complete and impartial record. Here, the President repeatedly has referred to the conversations in support of his own position and even allowed defendant Haldeman access to the recordings after he left public office to aid him in preparing his public testimony.

In the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has made far-reaching, but expurgated disclosures, the Court may use its process to acquire all relevant evidence to lay before the jury.

V

The District Court, correctly applying the standards established by this Court, found that the Government's showing satisfied the requirements of Rule 17(c) of the Federal Rules of Criminal Procedure that items subpoenaed for use at trial be relevant and evidentiary.

The enforcement of a trial subpoena duces tecum is a question for the trial court and is committed to the Court's sound discretion. Absent a showing that the finding by the Court is arbitrary and had no support in the record, the finding must not be disturbed by an appellate court. Here, the special prosecutor's analysis of each of the 64 conversations, submitted to the District Court, amply supports that Court's finding.