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# What the Supreme Court Said

**Washington**

*Here are excerpts from the text of the Supreme Court decision requiring President Nixon to turn over to the Watergate special prosecutor the White House tapes and documents sought in the Watergate coverup trial:*

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Our starting point is the nature of the proceeding for which the evidence is sought — here a pending criminal prosecution. It is a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign . . .

Congress has vested in the attorney general the power to conduct the criminal litigation of the U.S. Government . . . It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties . . .

Acting pursuant to those statutes, the attorney general has delegated the authority to represent the United States in these particular matters to a special prosecutor with unique authority the tenure. The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties . . . it is theoretically possible for the attorney general to amend or revoke the regulation defining the special prosecutor's authority. But he has not done so.

So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it. Moreover, the delegation of authority to the special prosecutor in this case is not an ordinary delegation by the attorney general to a subordinate officer: with the authorization of the President, the acting attorney general provided in the regulation that the special prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress.

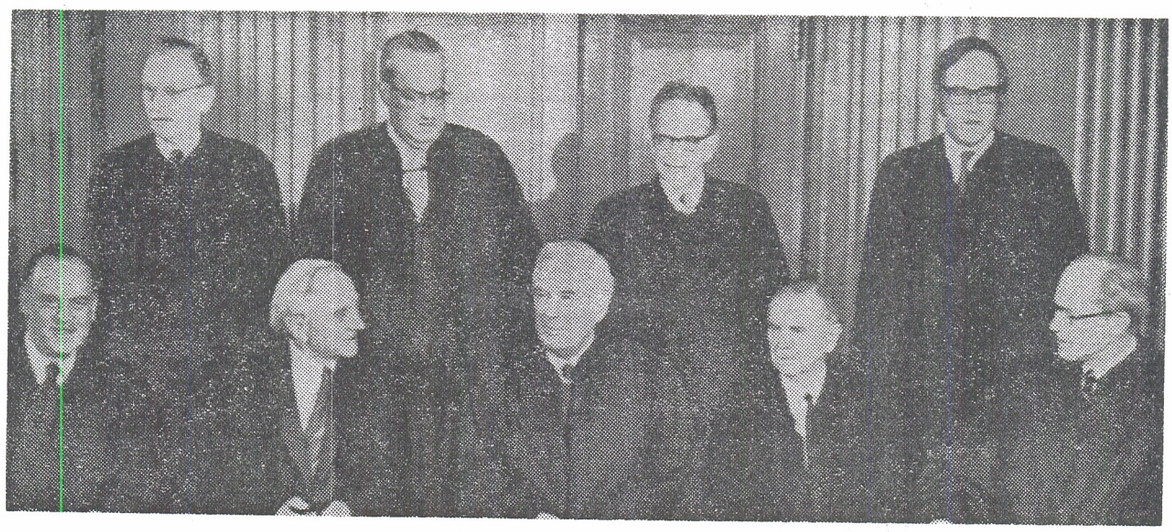
Against this background, the special prosecutor in order to carry his burden, must clear three hurdles:

1 — relevancy;

2 — admissibility;

3 — specificity.

Our own review of the



AP Wirephoto

**Yesterday's historic ruling was handed down by (front row, from left) Associate Justices Potter Stewart and William O. Douglas, Chief Justice Warren E. Burger; Associate Justices William J. Brennan Jr. and Byron R. White; (back row, from left) Associate Justices Lewis F. Powell Jr., Thurgood Marshall, Harry Blackmun. William H. Rehnquist, the ninth justice, did not participate in the ruling.**

record necessarily affords a less comprehensive view of the total situation than was available to the trial judge and we are unwilling to conclude that the District Court erred in the evaluation of the special prosecutor's showing . . .

Our conclusion is based on the record before us, much of which is under seal.

Of course, the contents of the subpoenaed tapes could not at that stage be described fully by the special prosecutor but there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment . . .

With respect to many of the tapes the special prosecutor offered the sworn testimony or statements of one or more of the participants in the conversations as to what was said at the time.

As for the remainder of the tapes, the identity of the participants and the time and place of the conversations, taken in their total context, permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment.

We also conclude there was a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment.

In a case such as this, however, where a subpoena is directed to a president of the United States, appellate review, in deference to a coordinate branch of government, should be particularly meticulous to ensure that the standards . . . have been correctly applied . . .

From our examination of the materials submitted by the special prosecutor to the District Court in support of his motion for the subpoena, we are persuaded that the District Court's denial of the President's motion to quash the subpoena was consistent . . .

We also conclude that the special prosecutor has made a sufficient showing to justify a subpoena for production before trial. The subpoenaed materials are not available from any other source, and their examination and processing should not await trial in the circumstances shown.

In the performance of assigned constitutional duties each branch of the government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.

The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all presidential communications.

Many decisions of this Court, however, have unequivocally reaffirmed the holding . . . that "it is emphatically the province and duty of the judicial department to say what the law is."

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere . . . insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances.

The President's need for complete candor and objectivity from advisers calls for great deference from the courts.

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However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises.

Absent a claim of need to protect military diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the two-fold aim of criminal justice is that guilt shall not escape or innocence suffer."

No case of the court, however, has extended this high of degree of deference to a president's generalized interest in confidentiality.

Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a president's powers, it is constitutionally based.

In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice.

The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their marks by the infrequent occassions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.

A president's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of

relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice.

Without access to specific facts a criminal prosecution may be totally frustrated.

The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.

The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial . . .

On the basis of our examination of the record we are unable to conclude that the District Court erred in ordering the inspection.

Accordingly we affirm the order of the District Court that subpoenaed materials be transmitted to that court. We now turn to the important question of the District Court's responsibilities in conducting the in camera examination of presidential materials or communications delivered under the compulsion of the subpoena . . .

It is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought.

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That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States . . .

The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment.

We have no doubt that the District Judge will at all times accord to presidential records that high degree of deference . . . and will discharge his responsibility to see to it that until released to the special prosecutor no in camera material is revealed to anyone.

This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

*Associated Press*