



Executive Privilege

Is it in the Constitution? What is it? Is it necessary?

UNITED STATES *v.* NIXON

SUPREME COURT OF THE UNITED STATES

418 US 683

July 24, 1974

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OPINION: MR. CHIEF JUSTICE BURGER...On March 1, 1974, a grand jury...returned an indictment charging **seven named individuals** with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President...as an unindicted coconspirator. On April 18, 1974,...a *subpoena duces tecum*² was issued...to the President...[that] required the production...of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others...On April 30, the President publicly released **edited transcripts** of 43 conversations; **portions of 20 conversations subject to [the] subpoena...were included**. On May 1, 1974, the President's counsel filed a...motion to quash the subpoena under Rule 17(c). This motion was accompanied by a formal claim of privilege...

The **seven defendants** were...

John N. Mitchell...

H. R. Haldeman...

John D. Ehrlichman...

Charles W. Colson...

Robert C. Mardian...

Kenneth W. Parkinson...and

Gordon Strachan.

...[T]he District Court denied the motion to quash and...ordered the President or any subordinate...to deliver...the originals of all subpoenaed items...The District Court rejected...the contention that the Judiciary was without authority to review an assertion of executive privilege by the President...

The District Court held that the judiciary, not the President, was the final arbiter of a claim of executive privilege. The court concluded that, under the circumstances of this case, the

¹Justice Rehnquist did not take part.

²An order requiring a witness to bring described documents or things to be examined at a certain time and place.

presumptive privilege was overcome by the Special Prosecutor's... "demonstration of need sufficiently compelling to warrant judicial examination in chambers..." The court held... that the Special Prosecutor had satisfied the requirements of Rule 17(c). The District Court stayed its order pending appellate review...

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. Under the authority of **Art. II, §2**, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government... [He] has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and 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... 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...

The *subpoena duces tecum* is challenged on the ground that the Special Prosecutor failed to satisfy the requirements of [Rule 17(c) of the Federal Rules of Criminal Procedure], which governs the issuance of *subpoenas duces tecum* in federal criminal proceedings. If we sustained this challenge, there would be no occasion to reach the claim of privilege asserted with respect to the subpoenaed material. Thus we turn to the question whether the requirements of Rule 17(c) have been satisfied. Rule 17(c) provides:

"A subpoena may... command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

A subpoena for documents may be quashed if their production would be "unreasonable or oppressive," but not otherwise... [I]n order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Against this background, the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) **relevancy**; (2) **admissibility**; (3) **specificity**...

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 with Rule 17(c)...

Having determined that the requirements of Rule 17 (c) were satisfied, we turn to the claim that the subpoena should be quashed because it demands "**confidential conversations** between a President and his close advisors that it would be inconsistent with the public interest to produce." The first contention is a broad claim that the **separation of powers** doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the *subpoena duces tecum*.

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 of *Marbury v. Madison*³, that "it is emphatically the province and duty of the judicial department to say what the law is."

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. *Powell v. McCormack* (1969); *Youngstown Sheet & Tube Co. v. Sawyer* (1952)⁴. In a series of cases, the Court interpreted the explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause, U.S. Const. Art. I, §6. Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers...

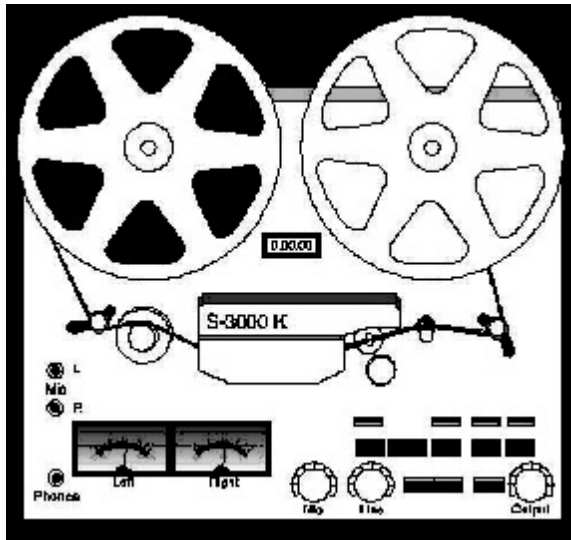
Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege

³Case 6-2 on this website.

⁴Case 2-13 on this website.

presented in this case. *Marbury v. Madison*.

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. **The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties;** the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with



a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

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. 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.**

You remember the phrase “*in camera*” — a procedure whereby the judge takes a look at the material in chambers before ruling on what he turns over to the other side.

The impediment that an absolute, unqualified privilege would place in the way of the primary

constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*.

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President. *United States v. Burr*.⁵

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. **A President and those who assist him** must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. In *Nixon v. Sirica (1973)*, the Court of Appeals held that such Presidential communications are "presumptively privileged" and this position is accepted by both parties in the present litigation...

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 twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law...The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is

⁵Case 3-2 on this website.

imperative...that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial, "that 'the public...has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege."

The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. **He does not place his claim of privilege on the ground they are military or diplomatic secrets.** As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In *C. & S. Air Lines v. Waterman S. S. Corp. (1948)*, dealing with Presidential authority involving foreign policy considerations, the Court said:

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

In *United States v. Reynolds (1953)*, dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said:

"It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the **judge alone**, in chambers."

No case of the Court, however, has extended this high 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.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced. In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's 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 remarks by the infrequent occasions 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...[W]e 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 duces tecum*.

...[T]he matter of implementation will rest with the District Court. "[The] guard, furnished to [the President] to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a [district] court after those subpoenas have issued; not in any circumstance which is to precede their being issued." Statements that meet the test of admissibility and relevance must be isolated; all other material must be excised. At this stage the District Court is not limited to representations of the Special Prosecutor as to the evidence sought by the subpoena; the material will be available to the District Court. 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. 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. Mr. Chief Justice Marshall, sitting as a trial judge in the *Burr* case, was extraordinarily careful to point out that "[in] no case of this kind would a court be required to proceed against the president as against an ordinary individual." Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. **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 suggested in *United States v. Burr*, 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... *Affirmed...*

I am not nearly as concerned for the "privilege of the President" as I am for the "privilege of his advisors and foreign diplomats, etc." We learn at the outset that "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." Of course, criminal prosecutions may proceed without the need to obtain privileged information if other sources produce sufficient evidence — privileged information is not the only potential source of that evidence. What is more important? Evidence available for the criminal prosecution of one or a few or that the leader of the free world get the best advice he can get undiminished by his advisors' concerns that their discussions might be publicly revealed? I opt for the latter and fully believe that any rule of law that pierces the protection of candor that "executive privilege" affords seriously undermines its valid and absolutely necessary purpose, regardless of who is in office.