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AMENABILITY OF A PRESIDENT TO JUDICIAL PROCESS AND EXECUTIVE PRIVILEGE

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I. Introduction

The term judicial process[1] may include all the acts of a court from the beginning to the end of its proceedings in a given cause; but more specifically it means the writ, summons, mandate, or other process which is used to inform the defendant of the institution of proceedings against him and to compel his appearance, in either civil or criminal cases.

As above-said, the term judicial process includes mandate.[2] A mandate is a command, order, or direction, written or oral, which court is authorized to give and the person is bound to obey. It is a judicial command or precept proceeding from a court or judicial officer, directing the proper officer to enforce a judgement, sentence, or decree. It is a precept or order issued upon the decision of an appeal or writ of error, directing action to be taken, or disposition to be made of case, by inferior court. It is an official mode of communicating judgement of appellate court to lower court, directing action to be taken or disposition to be made of cause by trial court.

Now we turn to the term "Executive privilege"[3]. It is one of the aspects of the inherent powers doctrine. A privilege of the President to withhold evidence from courts that all other citizens are required to provide is nowhere mentioned in the Constitution. It derives, as do most inherent powers theories, from arguing that certain necessities arise from the President's war, foreign affairs, and general executive responsibilities. If the President is to carry out those responsibilities, so it is argued, he must be assured of full and frank interchanges with his advisers and subordinates. He could not get frank advice if those speaking to him knew that everything they said might shortly end up on the front page. Nor could he speak freely to them under such conditions. Thus the special need of the President is to maintain the confidentiality of his conversations and papers.

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1. Black's Law Dictionary, (West Publishing Co. 1983), P. 630.
2. Ibid. at P. 495.
3. Martin Shapiro, ROCCO J. Tresolini, American Constitutional Law (Macmillan Publishing Co. Inc. 1983), P.172.

Constitution. And the American Supreme Court long ago rejected any inference from separation of power principles that executive officers are wholly immune from court orders. Indeed, the American third President Thomas Jefferson's (1801-1809) irritation about Marbury V. Madison[7] stemmed largely from Chief Justice Marshall's assertion that courts could issue mandamus against Cabinet Members in proper cases. And Cabinet Members have repeatedly been defendants before courts, as in the Steel Seizure Case.[8] The Marbury V. Madison dicta about mandamus to compel performance of ministerial acts bore fruit in Kendall V. United States.[9] The power to issue and enforce a subpoena duces tecum (subpoena to produce) against the President was first recognized by Chief Justice Marshall in United States V. Burr[10] in 1807, in accordance with two fundamental principles of American 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. In that case the subpoena duces tecum was issued to President Jefferson and the presiding judge was Chief Justice Marshall sitting on Circuit during the treason trial of Aaron Burr. Aaron Burr was none other than the rival presidential candidate of Thomas Jefferson. The background information about them was this: From the very beginning, America's first President George Washington found himself in the middle of the struggle between Republicans and Federalists. For his Secretary of State, he chose Virginia's great leader, Thomas Jefferson, head of the Republicans. For his Secretary of the Treasury, the President Chose New York's famous lawyer, Alexander Hamilton, leader of the Federalists. In 1800, Hamilton helped Jefferson become President of the United States. Although he did not share Jefferson's beliefs, he Knew that Jefferson's rival, Aaron Burr, was not a good man. Later, Hamilton again blocked Burr's political ambition. Burr never forgave Hamilton. He was so angry that he challenged Hamilton to a duel (formal fight, with weapons, between two persons). Dueling was not allowed in New York. So, Hamilton sadly crossed the Hudson River to meet Burr in Weehowken, New Jersey. In the early morning of July 11, 1804, the two men faced each other. Hamilton had no intention of Killing Burr; but Burr wasted no time. He aimed carefully and shot his enemy. The duel ended in tragedy, and Alexander Hamilton was dead

7. 5 U.S. (1 Cranch) 137 (1803).
8. Youngstown Sheet and Tube Co. V. Sawyer, 343 U.S. 579 (1952).
9. 37 U.S., (12 Pet.) 524 (1838).
10. 25 Fed. Cas. 30(C.C.Va. 1807).

at the age of 49.[11] In another version, it was said that the Federalist President John Adams (1797-1801) was defeated for re-election in 1800 and after 36 ballots in the House of Representatives, the tie between Thomas Jefferson and Aaron Burr was resolved in favour of Jefferson.[12] It may be noted here that the Federalist Party ultimately turned out to be the Democratic Party in America.

On January 3, 1818, President Monroe (1817-1825) became the second President to be served with a subpoena while in office. Monore was summoned as a witness in behalf of the defendant in the court –martial case of one Dr. William C. Barton. Monroe submitted answers to interrogatories forwarded by the court after his Attorney General informed him in a handwritten opinion that a subpoena ad testificandum (subpoena to give testimony) could properly be issued to the President.[13]

As early as 1867 Attorney General Stanberry in Mississippi V. Johnson,[14] relied on presidential immunity in arguing that "the President is beyond legal process," analogizing that the President was the ultimate sovereign of the country and should enjoy the same type of privilege as other potentates.[15] The Supreme Court dismissed the complaint on different grounds and carefully disclaimed a decision upon the assertion of total presidential immunity from process.[16]

By its decision in one Milligan[17] case, the Supreme Court became embroiled deeply in the conflict between President Johnson and Congress over Reconstruction. The decision cast serious doubts on the efforts of the Radical Republicans to impose military rule on the Southern states and strengthened President Johnson's proposals for moderation. Leading Radical Republicans launched a violent attack on the Court soon after the Milligan decision was rendered. In 1866, they pushed a law through Congress that reduced the number of justices from nine to seven; and when the Radical Republicans thought that the Court might hold the Reconstruction acts invalid in a pending case, Congress enacted a statute

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11. Katherine Lancelot – Harrington, America: Past and Present, Volume I (Newburry House Publishers, Inc., 1981) at P. 121-124.
12. Joel B. Grossman, Richard S. Wells, Constitutional law and judicial policy making (John Wiley and sons, 1980) at P. 88.
13. See Opinion of Attorney General Wirt, dated January 13, 1818, in the Records of the Judge Advocate General (Navy), Record Group 125, National Archives Building.
14. 4 Wall. 475 (1867).
15. Ibid. at 484.
16. Ibid. at 498.
17. Ex Parte Milligan, 4 Wall. 2 (1866).

that withdrew the Court's jurisdiction over the case. The Court acquiesced and subsequently dismissed the case on the ground that it had no jurisdiction.[18]

Mississippi V. Johnson also involved the Reconstruction Acts. President Andrew Johnson (1865-1869) favoured a policy of moderation, whereas the Radical Republicans in congress wished to impose strict military control over the defeated rebellious states. President Andrew Johnson opposed the Reconstruction Acts, for example; and there were repeated efforts to test their constitutionality in the courts. Soon after the basic provisions of reconstruction legislation had been passed over the President's veto, challenges in the courts were launched. The first attack on the reconstruction laws in the Supreme Court came when the State of Mississippi challenged their constitutionality. A motion was made in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying the Supreme Court perpetually to enjoin and restrain President Andrew Johnson, from executing, or in any manner carrying out the Reconstruction acts.

The Attorney General objected to the leave asked for, upon the ground that no bill which "makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in the Supreme Court -."

The single point which required consideration was that: Could the President be restrained by injunction from carrying into effect an act of Congress alleged "to be unconstitutional?"

The Supreme Court denied the motion for leave to file the bill and stayed out of the clash between the President and Congress by holding that it was without power to enjoin the President from enforcing a congressional statute.

Whatever the President's immunity from judicial control under the doctrine of Mississippi V. Johnson, it did not extend to his subordinate executive officers. The President's subordinates can be enjoined from carrying out a threatened illegal act or be compelled to perform a legal duty by a writ of mandamus. This lack of immunity on the part of the President's subordinates was demonstrated by Youngstown sheet and Tube Co. V. Sawyer[19] (The Steel Seizure Case).

The facts of Youngstown Sheet: During the Korean war, President Harry S. Truman (1945-1953) sought to avert a strike in the nation's steel mills. He therefore issued an executive order no. 10340 directing his

18. Ex Parte McCardle, 7 Wall 506 (1869).

19. 343 U.S. 579 (1952).

Secretary of Commerce Sawyer to take possession of most of the steel mills and keep them running. The Presidential order was not based on any statutory authority, but rather was premised on the national emergency created by the threatened strike in an industry vital to defense production. At that time American troops were fighting in Korea. The Secretary of Commerce issued the appropriate orders taking possession of the steel mills for the United States. President Truman reported the seizure to Congress in two separate messages, but the Congress took no action.[20] The steel companies then obtained an injunction from a federal district court restraining Secretary of Commerce Sawyer from "continuing the seizure and possession of the steel mills and from acting under the purported authority of Executive Order no. 10340." The federal district court emphatically rejected the government's contention that the executive possessed a broad residuum of "inherent" or emergency powers, which flowed from the aggregate of his constitutional powers as Chief Executive and Commander-in-Chief and fluctuated with the nature of the emergency involved.[21] The Supreme Court granted certiorari to review a Court of Appeals decision staying the injunction. The Supreme Court acted with unusual speed: it granted certiorari on May 3, heard the argument on May 12, and handed down the decision on June 2, 1952. The Supreme Court Struck down the seizure order, concluding that it was an unconstitutional exercise of the law making authority reserved to Congress. The decision was 6-3. Though the Court's order there went to the Secretary of Commerce, it was the direct order of President Truman that was reversed.

Justice Black wrote the opinion for the Court in which Justices Frankfurter, Douglas, Jackson and Burton concurred. Justice Clark concurred in the judgement of the Court. In response to the government's contention that numerous cases have found military commanders entitled to broad powers, Justice Black stated:

> Such cases need not concern us here. Even though "theater of war" be an expanding concept, we can not with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed forces has the ultimate power as such to take possession of private property in order to keep labour disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.[22]

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20. Martin Shapiro, Rocco J. Tresolini, American Constitutional Law, (Macmillan Publishing Co. Inc. 1983), P. 189-190; 343 U.S. at P. 583.
21. Joel B. Grossman, Richard S. Wells, Constitutional law and judicial policy making (John Wiley and sons, 1980) at P. 1008.
22. 343 U.S. at P. 587.

Justice Black also concluded that the executive power vested in the President by the Constitution, particularly his duty to see that the laws are faithfully executed, refutes the idea that the chief executive can make laws.[23] Congress has "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution" in the federal government.[24] The "necessary and proper" clause[25]applies to Congress, not to the executive branch. Four other majority Justices held the view that the Presidential seizure was incompatible with the expressed will of Congress in that Taft-Hartley Act of 1947 contains provisions to deal with nation-wide strikes and it was open to the executive to seek relief of injunction in accordance with the provisions of that Act.

The three dissenting Justices contended that temporary seizure was justified because of the emergency nature of the situation, and in order to preserve temporarily the status qua until Congress could act.[26]

Implied acquiescence by Congress: Congress may sometimes be found to have impliedly acquiesced in the President's exercise of power in a certain area. Where such acquiescence exists, this fact may be enough to tip the balance in favour of a finding that the President acted within the scope of his constitutional authority. The Supreme Court relied on such a theory of implied congressional acquiescence in upholding President Carter's power to take certain actions for the purpose of obtaining the release of American hostages from Iran, in Dames and Moore V. Reagan.[27]

In 1838 the United States Supreme Court considered for the first time the issue of whether the executive has an inherent power under the Constitution to impound (i.e., to refuse to spend) even in the face of congressional mandate. The case, Kendall V. United States ex rel. Stokes,[28] established that when Congress has expressly directed that sums be spent, the President has no constitutional power not to spend them. Congress had passed a private act ordering the Postmaster General to pay petitioner Kendall for services rendered. The Court considered and rejected the executive's argument that the petitioner could not sue in mandamus because the Postmaster General was subject only to the

23. Ibid. at P. 587.
24. Ibid. at P. 588-89.
25. U.S. Const. Art. I, Sec. 8, Clause 18.
26. Steven Emanuel, Constitutional Law (Emanuel law outlines, Inc. New Rochelle, New York, 1983), P. 116.
27. 453 U.S. 654 (1981).
28. 37 U.S. (12 Pet) 524 (1838).

directives of the President, not of Congress.[29] The Court found the constitutional duty of the executive to faithfully execute the law[30] made it necessary that the congressional mandate be carried out.[31]

Civil liability of President: The President is wholly immune from civil damage suits, Nixon V. Fitzgerald,[32] but his aides have only limited immunity, Harlow V. Fitzgerald.[33] Fitzgerald, the Plaintiff, contended that he had been fired from his Defense Department job in retaliation for testimony in which he had criticized military cost overruns. His suit charged Nixon and several Nixon Administration officials with violating his First Amendment (freedom of speech, or of the press) and statutory rights. The decision was 5-4.

In an opinion by Justice Powell, the Court held that the President "occupies a unique position in the constitutional scheme,"[34] that diversion of his energies by concern with private law-suits would raise unique risks to the effective functioning of government,"[35] and the fragmentary historical evidence supports the notion of presidential immunity,[36] but the "most compelling arguments" favouring presidential immunity arise from "the Constitution's separation of powers and the judiciary's historical understanding of that doctrine."[37] The Court then held that " a former President of the United States is entitled to absolute immunity from damages liability predicated on his official acts. And since the President has authority to prescribe the manner in which the business of the armed forces will be conducted, including the authority to dismiss personnel, Nixon was immune from liability for the firing of Fitzgerald even if he caused it maliciously or in an illegal manner. Justice White, joined by Justices Brennan, Marshall, and Blackmun, dissented and concluded that "the Court clothes the office of the President with sovereign immunity, placing it above the law."[38] But the majority's response was that alternative remedies protect the nation and place the president under law:

There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not

29. Ibid. at P. 612-613.
30. U.S. Court, Art. II, Sec. 3.
31. 37 U.S. at P. 613.
32. 102 S. Ct. 2690 (1982)
33. 102 S. Ct. 2727 (1982)
34. 102 S. Ct. at P. 2702.
35. 102 S. Ct. at P. 2703.
36. 102 S. ct. at P. 2702 N. 31.
37. 102 S. Ct. at P. 2703 n. 31.
38. 102 S. Ct. at P. 2711.

apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law". For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.[39]

Earlier the majority had also noted that the injunctive remedy "is still possible, and, in appropriate criminal cases, the President is subject to subpoena.[40] One might add that Congress perhaps could authorize private damage actions against the President- a point that the majority explicitly left open[41]-but even if that alternative "is not possible, perhaps Congress could authorize a damage action against the public purse. That is, so that future Fitzgeralds would not be remediless, Congress perhaps could authorize them to sue the public treasury for out of pocket losses in an action brought in the Claims Court or similar tribunal. In the companion case, Harlow V. Fitzgerald,[42] the court ruled that the scope of immunity for senior presidential aides and advisers was only qualified, not absolute.

Criminal Prosecution: There is no executive immunity, either of a common-law or constitutional nature, from criminal prosecution. However, a strong argument may be made that, at least in the case of the President, the Constitution's provision of impeachment as the means of removing federal officers[43] bars any criminal prosecution of such officials until after they have been removed from office.[44] In the case of the President, Professor Lawrence Tribe states that "the question must be regarded as an open one, but the sounder view would seem to be that a President cannot be criminally tried prior to impeachment and

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39. 102 S. Ct. at P. 2706.
40. 102 S. Ct. at P. 2704, citing Youngstown Sheet & Tube Co. V. Sawyser, 343 U.S. 579 (1952), and United States V. Nixon, 418 U.S. 683 (1974).
41. 102 S. Ct. at P. 2701 & N. 27.
42. 102 S. Ct. at P. 2727 (1982).
43. U.S. Const. Art. II, Sec.4.
44. U.S. Const. Art. I, Sec. 3, Clause 6-7.

removal."[45] In the case of the Vice-President and other federal officers, criminal prosecution prior to impeachment seems to be permissible; Vice-President Agnew was indicted by a federal grand jury on bribery and tax evasion charges prior to his resignation, although the Supreme Court did not pass on the "no prosecution prior to impeachment" argument.[46] Now we turn to the main discussion of the case United States V. Nixon.

III. Background of United States V. Nixon

This case arose out of the Watergate scandals. A Special Prosecutor, Professor Archibald Cox of Harvard, was initially appointed to investigate the events preceding, during, and after the commission of unlawful entry of the headquarters of the Democratic National Committee located in the Watergate building and the office of the psychiatrist of Daniel Ellsberg, who had been responsible for providing the "Pentagon Papers" to The New York Times. It may be remembered here that on June 17, 1972 and prior thereto, agents of the Committee for the Re-election of President Nixon of the Republican Party committed an unlawful entry into the headquarters of the Democratic Party's National Committee in Washington D. C., for the purpose of securing political intelligence. Subsequent thereto, President Nixon, using the powers of his high office, engaged, personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover-up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.[47]

As the debate over American involvement in Vietnam became increasingly bitter, the means of resisting the war became more complex. One of the more celebrated resistance efforts was Daniel Ellsberg's leaking to the press of a classified secret government study of the history of American efforts in Southeast Asia. Those documents, which became known as the "Pentagon Papers", were an elaborate account of how the United States had become involved in, and had conducted, the Vietnam War. The Nixon administration considered them sensitive national

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45. Lawrence Tribe, American Constitutional Law, (Foundation Press, 1978), P. 202.

46. Ibid. at P. 201.

47. Martin Shapiro, Rocco J. Tresolini, American constitutional Law, (Macmillan Publishing Co. Inc. 1983) PP. 197-98; Articles of Impeachment I and II against President Nixon adopted by the House Judiciary Committee on July 27 and 29, 1974 – Published in Gerald Gunther, Constitutional Law, (The Foundation Press, 1980) PP. 431-433.

security materials and took action to prevent their publication in the news media.[48]

For the proper investigation of the afore-said events, a second special prosecutor appointed from the outside and operating independently of the Justice Department appeared necessary because the former head of the Justice Department, John Mitchell, seemed to be implicated in the alleged Watergate-related offenses. Indeed it was former Attorney General Mitchell who was the criminal defendant in United States V. Mitchell[49] (to be discussed shortly). When Mr. Cox sought actually to exercise his independence, President Nixon ordered him fired. The then Attorney General, Elliot Richardson, refused to fire Cox and thus found it necessary to resign. Finally, after the second-in-command of the Justice Department also refused to carry out the President's order and was dismissed, the third-in-command fired Cox. The resulting congressional and public uproar forced President Nixon to designate a second special prosecutor, Leon Jaworski, who was provided with very special legal powers and protections designed to ensure his independence from the presidency.

IV. The Nixon case itself.

The present case arose under the following circumstances: On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals[50] with various offenses in connection with the "Watergate", including conspiracy to defraud the United States and conspiracy to obstruct justice, United States V. Mitchell. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted co-conspirator after the Watergate special prosecutor, Leon Jaworski, advised the grand jury that a president in office could not be indicted for a crime.

On April 18, 1974, upon motion of the Special Prosecutor in the Mitchell case, the District Court, pursuant to fed. Rule Crim. Proc. 17(C), issued a subpoena duces tecum to the President, directing him to produce in advance of the September 9, 1974 trial date certain tapes and documents

48. Joel B. Grossman, Richard S. Wells, constitutional law and judicial policy making, (John Welly and sons, 1980) P. 1069.

49. D.C. Crim. No. 74-110.

50. 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. Each of the defendants had occupied a position of responsibility either on the White House Staff or with the committee for the Re-election of the President.

relating to precisely identified conversations and meetings between the President and his aides and advisers. The Special Prosecutor was able to fix the time, place and persons present at those discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel filed in the District Court a "special appearance" and a motion to quash the subpoena for the actual tapes. This motion was accompanied by a formal claim of executive privilege. At a subsequent hearing, further motions to expunge the grand jury's action naming the President as an unindicted co-conspirator and for protective orders against the disclosure of confidential information were filed by counsel for the President. On May 20, 1974, the District Court denied the motion to quash the subpoena and the motions to expunge and for protective orders.[51]

It further ordered "the President or any subordinate officer, official or employee with custody or control of the documents or objects subpoenaed", to deliver to that Court for in camera inspection on or before May 31, 1974, the originals of all subpoenaed items along with an index and analysis of those items and tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. On May 24, 1974, the President asked the U.S. Court of Appeals for a writ of mandamus, seeking review of the District Court order. The same day, the Special Prosecutor filed a United States' petition in the Supreme Court for writ of certiorari before judgement. The petition was granted on May 31, 1974 with an expedited briefing schedule,[52] the effect of which was to bypass the Court of Appeals and to bring the case immediately from the district court to the Supreme Court for review. The President then filed a cross-petition in the Supreme Court for writ of certiorari before judgement challenging the grand jury's action naming the President as an unindicted co-conspirator. The cross-petition was granted.[53]

There was some question whether or not the Supreme Court had jurisdiction in the case. It is a basic rule of Procedure that denial of a

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51. 377 F. Supp. 1326 (1974).

52. 417 U.S. 927 (1974).

53. When the Supreme Court handed down the opinion in the present case, however, it announced that since it found resolution of the aforementioned "unnecessary to resolution of the question whether the claim of executive privilege is to prevail, the cross-petition for certiorari is dismissed as improvidently granted."

motion to quash a subpoena is not a "final" order of a court, and customarily, therefore, it cannot be appealed. But if that rule were applied strictly in the present case, "it would have forced the District Judge to cite the President for contempt of court." An exception "should be granted in this case", the Supreme Court said, because "it was peculiarly inappropriate to follow the contempt route." The Supreme Court noted that " to require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the government ---. The issue whether a President can be cited for contempt would itself engender protracted litigation ---."[54]

Before turning to the major issues in the case, the Supreme Court held that (1) the District Court order was an appealable order and that the case was properly in the Court of Appeals when the Supreme Court granted certiorari; and (2) the Special Prosecutor's subpoena duces tecum satisfied the requirements of Fed. Rules Crim. Proc. 17 (C) - i.e., the requisite relevancy, admissibility, and specificity were shown. The Court then addressed the key issue of executive privilege.

V. The Claim of executive privilege.

The Supreme Court then turned to the claim of the President's counsel that the subpoena "should be quashed because it demands confidential conversations between a President and his close advisers that it would be inconsistent with the public interest to produce." By that claim the President's counsel meant two contentions. The first contention was a broad claim that the separation of powers doctrine "precludes judicial review of a President's claim of privilege." The second contention was 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 ducem 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 "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,[55] that it is emphatically the province and duty of the judicial department to say what the law is."[56]

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54. 418 U.S. at P. 691-92.
55. 5 U.S. (1 Cranch) 137 (1803).
56. Ibid. at P. 177.

No holding of the Court had 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 powers by the Executive Branch and the Legislative Branch had been found invalid as in conflict with the Constitution.[57] 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 and Debate Clause.[58] And 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.[59]

Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art. III, Sec. 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. The Supreme Court therefore reaffirmed that "it is emphatically the province and the duty of this Court to say what the law is with respect to the claim of privilege presented in this case," Marbury V. Madison. Thus, the Court rejected the claim of the President's counsel that "the separation of powers doctrine precludes judicial review of a President's claim of privilege."

In support of his claim of absolute privilege, the President's counsel urged two grounds. The first ground was 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

57. Powel V. McCormack, 395 U.S. 486 (1969); Youngstown Sheet and Tube Co. V. Sawyer, 343 U.S. 579 (1952).

58. U.S. Const. Art. I, Sec. 6.

59. Enumerated powers are those powers specifically delegated by the Constitution to some branch or authority of the national government and which are not denied to that government or reserved to the states or to the people. The powers specifically given to Congress are enumerated in Art. I, Sec. 8 of the United States Constitution.

decision making process." Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II executive 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.[60]

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." There it was argued that the independence of the Executive Branch within its own sphere,[61] "insulates a president from a judicial subpoena in an on going criminal prosecution, and thereby protects confidential Presidential communications." However, the court held that 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, the Court found it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications was significantly diminished by production of such material for in camera inspection with all the protection that a district court would be obliged to provide.[62]

The Court then noted that 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 Judicial Powers. In designing the structure of the 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. 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

60. 418 U.S. at PP. 705-06.

61. Humphrey's Executor V. United Stated, 295 U.S. 602, 629-630 (1935).

62. 418 U.S. at P. 706.

interest in confidentiality of non-military and non-diplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

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 the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. 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,[63] 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 the Supreme Court emphasized that:

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 need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgements were to be founded on a partial or speculative presentation of the facts. 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 imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[64]

In the present case the President challenged a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he did so on the claim that he had a privilege against disclosure of confidential communications. He did not place his claim of privilege on the ground they were military or diplomatic secrets. As to those areas of Art. II duties the courts had traditionally shown the utmost

63. 159 U.S. App. D.C. 58, 487 F. 2d. 700 (1973).

64. 418 U.S. at P. 709 (emphasis added).

deference to presidential responsibilities.[65] No case of the Supreme Court, however, "has extended this high degree of deference to a President's generalized interest in confidentiality." Nowhere in the Constitution, "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."[66] The right to the production of all evidence at a criminal trial similarly "has constitutional dimensions." The Sixth Amendment of the United States Constitution 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 fovour. 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 the present case the Court weighed 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, the Court could not conclude that advisers "will be moved to temper the candour 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."

The Supreme Court finally concluded 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

65. C.& S. Airlines V. Waterman Steamship corp., 333 U.S. 103, III (1948).

66. 418 U.S. at P. 711.

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."

The Court earlier determined that the District Court did not err in authorizing the issuance of the subpoena. If a President "concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena." Upon receiving a claim of privilege from the Chief Executive, "it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the presidential material was essential to the justice of the pending criminal case."[67]

There the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption and ordered an in camera examination of the subpoenaed material. On the basis of the examination of the record, the Supreme Court was unable to conclude that the District Court erred in ordering the inspection. And accordingly the Supreme Court affirmed the order of the District court that subpoenaed materials "be transmitted to that court." And in an unanimous opinion written by Chief Justice Burger, the Supreme Court ordered production "forthwith" of the subpoenaed materials, affirming the District Court's denial of the President's motion to quash the subpoena.

The Nixon case was heard on July 8 and the decision was handed down on July 24, 1974, the very day the Judiciary Committee of the House of Representatives began its final, public debate on proposed articles of impeachment. At the end of July 1974, the House Judiciary Committee voted to recommend impeachment of President Nixon on three Charges. The votes in favour of impeachment were27-11, 28-10 and 21-17, respectively. Two additional counts were defeated by a vote of 12-26.One dealt with Mr. Nixon's secret bombing of Cambodia and the other with alleged violations of the income tax laws. The three charges related to: (1) Nixon's alleged obstruction of justice in covering-up the Watergate break- in; (2) his use of the Internal Revenue Service, the FBI, the Secret Service and other executive personnel to investigate and harass his enemies; and (3) his refusal to obey subpoenas issued by the Judiciary Committee calling for the production of documents relating to the impeachment inquiry. Further proceedings on the impeachment charges were abandoned when President Nixon resigned on August 9, 1974, after the release of the Watergate tapes in the wake of the Supreme Court's decision in United States V. Nixon. The release of those tapes led to revelations of presidential misconduct that destroyed Nixon's "political base in Congress."

67. United States V. Burr, 25 Fed. Cas. 30 (No. 14692) (C.C.Va. 1807).

VI. Conclusion

The foregoing discussion reveals that there does not seem to be any general doctrine making the President or other Members of the Executive Branch immune from judicial process (e.g., subpoenas). This can be seen from the issuance of subpoenas from the courts to several American Presidents while they were in office. The first subpoena duces tecum was issued to President Jefferson in United States V. Burr. The second subpoena ad testificandum was issued to President Monroe in the court-martial case of one Dr. William C. Barton. The third subpoena duces tecum was issued to President Nixon in United States V. Mitchell. It can also be seen that Cabinet Members can be enjoined from carrying out a threatened illegal act or be compelled to perform a legal duty by a writ of mandamus. In the Steel Seizure case, President Truman's Secretary of Commerce Sawyer had been made defendant before a federal district court and subsequently a restraining order had been issued against him by that court. In the same case, the Supreme Court struck down President Truman's Executive Order no. 10340 (the so-called steel seizure order), concluding that it was an unconstitutional exercise of the law making authority reserved to Congress.

As to the claim of executive privilege, the Supreme Court in United States V. Nixon held that there was indeed a privilege for confidentiality of presidential communications in the exercise of Article II executive powers ---." In the Nixon case, the Court rejected the President's claim that the executive privilege was an absolute and unqualified one. At least where the claim of privilege was (as in the Nixon case) a general one, and not related to a particular need to protect "military, diplomatic, or sensitive national security secrets," the court held that the privilege was merely a qualified one. And as such, it was outweighed by the needs of a pending criminal investigation.

The grand jury's action naming President Nixon as an unindicted co-conspirator arguably established the equivalent of a prima facie showing of his personal criminality unless the finding were set aside. The dismissal of the President's cross-petition for certiorari seeking to invalidate that finding and the reasoning of the Supreme Court in the case both indicated that the Court held, as a matter of law, that no showing of the complicity of the person claiming executive privilege was required. Reacting against the grand jury's action, the President's counsel stated that the President was not subject to the criminal process whether that process was invoked directly or indirectly. The only constitutional recourse against the President was by impeachment and through the electoral process. The naming of the President as an unindicted co-conspirator by an official body was a nullity which both prejudiced the ongoing impeachment proceeding and denied due process to the President.

The Nixon case involved serious criminal charges against high government officials. The public interest in having all competent, relevant and material evidence available in such a case was higher than in any other kind. And as the subpoena sought evidence for use upon trial of an indictment, there was already an implicit determination, based upon evidence aliunde, of probable cause to believe that the officials named as defendants had committed serious crimes.

The Nixon case highlighted the inherent conflict of interest that was presented when the executive was called upon to produce evidence in a case which called into question the executive's own action. The President could not be a proper judge of whether the greater public interest lay in disclosing evidence subpoenaed for trial, when that evidence might have a material bearing on whether he was impeached and would bear heavily on the guilt or innocence of his close aides and trusted advisers ---.

The qualified executive privilege for confidential intra-governmental 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 in Nixon, it has been abused ---."

The impeachment power has been sparingly used throughout the American history. Only Three Presidents, Andrew Johnson, Richard Nixon and Bill Clinton have been the subject of serious impeachment efforts. President Andrew Johnson was impeached by the House of Representatives, but he escaped conviction in the Senate by only one vote. As above-mentioned, President Nixon resigned after three articles of impeachment had been voted against him by the Judiciary Committee of the House of Representatives, but before the full House could vote on the impeachment issue and before the trial in the Senate. President Bill clinton (1993-2001) also has been the subject of serious impeachment efforts for his sex scandal with the White House intern Monica Lewinsky that brought Washington D.C. to a halt for a year. He was impeached by the House of Representatives, but he escaped conviction in the Senate.

The long-run significance of the Supreme Court's decision in United States V. Nixon lies in the fact that the justices did unanimously recognize the constitutional status of executive privilege, a presidential power which had not previously been recognized by the Court and which adds substantially to the President's power to put himself beyond the reach of democratic controls.

In the aftermath of Watergate, Congress passed the Presidential Recordings and Materials Preservation Act, which requires the Administrator of the General Services Administration to take possession of the President's papers and tape records when he or she leaves office and to make them available when they are properly subpoenaed.