MEMORANDUM TO THE CONFERENCE:

Potter's memo of July 22, 1974 enclosing a revision of Part "C" prompts me to assure you that I will work on it promptly with the hope to accommodate those who wish to get away this week.

The two versions can be accommodated and harmonized and, indeed, I do not assume it was intended that I cast aside several weeks work and take this circulation as a total substitute.

I will have a new draft of Part "C" along as soon as possible. I take it for granted voting will be deferred until the revised opinion is recirculated. There are miscellaneous changes throughout but none of great moment.

Regards,

[Signature]

July 22, 1974
PERSONAL
MEMORANDUM TO: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Blackmun
Mr. Justice Powell

Byron, Thurgood, and I were here in the building on Saturday afternoon when the printed draft of the tentative proposed opinion was circulated. After individually going over the circulation, we collected our joint and several specific suggestions and met with the Chief Justice in order to convey these suggestions to him.

With respect to IV(C), beginning on page 22 of the proposed opinion, our joint suggestions were too extensive to be drafted on Saturday afternoon, and I was accordingly delegated to try my hand at a draft over the week-end. The enclosed draft embodies the views of Byron, Thurgood, and me, and we have submitted it to the Chief Justice this morning.

As of now, Byron, Thurgood, and I are prepared to join the proposed opinion, if the recasting of IV(C) is acceptable to the Chief Justice, and on the assumption that problems re the specificity re non of IV(E), beginning on page 27, are resolved.

At this late stage it seems essential to me that there be full intramural communication in the interest of a cooperative effort, and it is for this reason that I send you this memorandum bringing you up to date so far as I am concerned.

P.S.

Copies to: The Chief Justice
Mr. Justice White
Mr. Justice Marshall

P.S. - As you will observe, the enclosed draft borrows generously from the draft of the Chief Justice as well as Lewis Powell's earlier memorandum.
Beginning at the top of page 22, and ending at subsection "p" on page 26, substitute the following language:

nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of courts in administering justice.

C.

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, 25 Fed. Cas. 187, 190, 191-192 (No. 14,694) (1807).
The right 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 private citizen and added to that 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*,

*/* "Freedom of communication vital to fulfillment of wholesome relationships is obtained only by removing the specter of compelled disclosure....[G]overnment...needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 FRD 318, 325 (D.D.C. 1966). See *Nixon v. Sirica*, U.S. App. D.C. __, __, 487 F.2d 700, 713 (1973);
U.S. App. D.C., 487 F.2d 700 (1973), the Court of Appeals held that such presidential communications are "presumptively privileged," id., at 717, and this position is accepted by both parties in the present litigation. We agree with Chief Justice Marshall's observation, therefore, that "in no case of this kind would a court be required to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed. Cas. 187, 191 (No. 14,694) (CCD Va. 1807).

[footnote continued from preceding page]

But we are a nation governed by the rule of law. Nowhere is our commitment to this principle more profound than in the enforcement of the criminal law, "the twofold aim of which is that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88 (1935). Conviction of the guilty and exoneration of the innocent are matters of the greatest consequence for a people devoted to equal justice under law. Individuals are subject to criminal penalties for conduct proscribed by society. The imposition of such penalties turns on what was done and by whom and with what intent. Enforcement of the criminal law requires ascertainment of these facts. It is, in short, a search for truth.

We have committed that pursuit to an adversary system in which the parties contest all issues before a court of law. To develop their opposing contentions of fact, the parties are entitled to invoke the court's authority to compel production of relevant evidence.
Because the adversary nature of our system is tempered by an overriding concern for fairness to the individual, the prosecutor has an obligation to reveal evidence that may be favorable to the defense. See Brady v. Maryland, 373 U.S. 83 (1963). In addition, the accused has the right to a fair trial by making the best possible defense on the basis of all material evidence. And the court itself has the paramount duty to ensure that justice is done, by making compulsory process available for the production of evidence needed by either the prosecution or the defense. Accordingly, the need to develop all relevant facts is both elemental and comprehensive, for the ends of the criminal law would be defeated if judgments were founded on a fragmentary or speculative presentation of the facts. To the extent that the search for truth is restrained, the integrity of the process of criminal justice is impaired. As a general proposition, therefore, the law is entitled to every man's evidence. See Branzburg v. Hayes, 408 U.S. 665, 688 (1972).
This rule, however, is not absolute. It admits of exceptions 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." Generally, an attorney may not be required to reveal what his client has told him in confidence. These and other interests are recognized at law by evidentiary privileges against forced disclosure. Such privileges may be 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.*

* Because of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges. Justice Frankfurter, dissenting in Elkins v. United States, 364 U.S. 206, 234 (1960), said of this: "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."
In this case the President challenges a subpoena requiring the production of materials for use in certain criminal prosecutions. He claims that he has a privilege against compliance with that subpoena. He does not claim that disclosure of the subpoenaed material would compromise state secrets. There is no claim that the conversations at issue involved the President's functions under Article II as Commander in Chief, or the conduct of international relations. Compare United States v. Reynolds, 345 U.S. 1 (1952); C & S Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948). Rather, the President grounds his assertion of privilege in the generalized interest in preserving the confidentiality of his discussions with his advisers. Because maintaining confidentiality for such discussions is essential to his high office, he claims a privilege against forced disclosure.
The Constitution does not explicitly mention the President's interest in confidentiality. Yet to the extent that the interest in confidentiality pertains to the President's effective exercise of his executive powers, it is nevertheless constitutionally based. The Constitution does explicitly confer the right upon every defendant in a criminal trial "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." (Am. VI) And, of course, the Constitution also guarantees that no person shall be deprived of liberty without due process of law. (Am. V) Because the production of all material evidence in a criminal trial effectuates those guarantees, it too is a matter of constitutional import.

We must balance the importance of the privilege to the President's performance of the responsibilities vested in him against the inroads of such a privilege on the fair administration of criminal justice. The interest in

* We are not here concerned with the balance between the President's generalized interest in confiden-
confidentiality, as distinct from the preservation of state secrets, is a generalized concern. The goal is to promote candor by maintaining an expectation of confidentiality rather than to preserve secrecy for the substance of any particular communication. The asserted need to refuse to comply with a subpoena presumes that rare and isolated instances of disclosure would negate the general expectation of confidentiality and thus defeat the ability of the President to obtain candid advice. We think that this assumption is unfounded. The willingness to speak plainly is not so fragile that it would be undermined by some remote

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tiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and Congressional demands for information, nor with that between the President's interest in preserving state secrets and any other concern, whether originating in Congress or the courts. We address only the conflict between the President's assertion of a privilege not to divulge confidential conversations and the constitutional need for evidence material to criminal trials.
prospect of disclosure in narrowly defined and isolated circumstances. At least this is true where the prospect of disclosure is limited to demands for evidence demonstrably material to a criminal prosecution. It requires no clairvoyance to foresee that such demands will arise with the greatest infrequency nor any special insight to recognize that few advisers will be moved to temper the candor of their remarks by such an unlikely possibility. Thus,

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Mr. Justice Cardozo made this point in an analogous context. Speaking for a unanimous Court in *Clark v. United States*, 289 U.S. 1 (1933), he emphasized the importance of maintaining the secrecy of the deliberations of a petit jury in a criminal case. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published in the world." Id., at 13. Nonetheless, the Court also recognized that isolated inroads on confidentiality designed to serve the paramount need of the criminal law would not vitiate the interests served by secrecy:

"A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice." Id., at 16.
while the general interest in confidentiality is weighty indeed, it is not significantly impaired by the demands of criminal justice.

On the other hand, an unqualified privilege against disclosure of evidence demonstrably relevant to a criminal trial would cut deeply into the guarantee of due process of law. While the President's interest in confidentiality is general in nature, the constitutional need for production of material evidence in a criminal proceeding is not. The enforcement of the criminal laws does not depend on an assessment of the broad sweep of events but on a limited number of specific historical facts concerning the conduct of identified individuals at given times. The President's broad interest in confidentiality would not be vitiated by disclosure of a limited number of confidential conversations, but nondisclosure of those same conversations could gravely impair the pursuit of truth in a criminal prosecution.
Thus, where the President's ground for withholding subpoenaed materials from use in a criminal trial is only the generalized interest in confidentiality, it cannot prevail over the needs of due process of law in the fair administration of criminal justice. Under these circumstances, the generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.
Beginning at the top of page 22, and ending at subsection "D" on page 26, substitute the following language:

nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and
gravely impair the role of courts in administering justice.

C.

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*, 25 Fed. Cas. 187, 190, 191-192 (No. 14,694) (1807).
The right 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 private citizen and added to that 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,

[*]"Freedom of communication vital to fulfillment of wholesome relationships is obtained only by removing the specter of compelled disclosure....[G]overnment...needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 FRD 318, 325 (D.D.C. 1966). See Nixon v. Sirica, 573 F.2d 700, 713 (1973);
U.S. App. D.C., 487 F.2d 700 (1973), the Court of Appeals held that such presidential communications are "presumptively privileged," id., at 717, and this position is accepted by both parties in the present litigation. We agree with Chief Justice Marshall's observation, therefore, that "in no case of this kind would a court be required to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed. Cas. 187, 191 (No. 14,694) (CCD Va. 1807).

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But we are a nation governed by the rule of law. Nowhere is our commitment to this principle more profound than in the enforcement of the criminal law, "the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). Conviction of the guilty and exoneration of the innocent are matters of the greatest consequence for a people devoted to equal justice under law. Individuals are subject to criminal penalties for conduct proscribed by society. The imposition of such penalties turns on what was done and by whom and with what intent. Enforcement of the criminal law requires ascertainment of these facts. It is, in short, a search for truth.

We have committed that pursuit to an adversary system in which the parties contest all issues before a court of law. To develop their opposing contentions of fact, the parties are entitled to invoke the court's authority to compel production of relevant evidence.
Because the adversary nature of our system is tempered by an overriding concern for fairness to the individual, the prosecutor has an obligation to reveal evidence that may be favorable to the defense. See *Brady v. Maryland*, 373 U.S. 83 (1963). In addition, the accused has the right to a fair trial by making the best possible defense on the basis of all material evidence. And the court itself has the paramount duty to ensure that justice is done, by making compulsory process available for the production of evidence needed by either the prosecution or the defense. Accordingly, the need to develop all relevant facts is both elemental and comprehensive, for the ends of the criminal law would be defeated if judgments were founded on a fragmentary or speculative presentation of the facts. To the extent that the search for truth is restrained, the integrity of the process of criminal justice is impaired. As a general proposition, therefore, the law is entitled to every man's evidence. See *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).
This rule, however, is not absolute. It admits of exceptions 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." Generally, an attorney may not be required to reveal what his client has told him in confidence. These and other interests are recognized at law by evidentiary privileges against forced disclosure. Such privileges may be 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. *

*Because of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges. Justice Frankfurter, dissenting in Elkins v. United States, 364 U.S. 206, 234 (1960), said of this: "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."
In this case the President challenges a subpoena requiring the production of materials for use in certain criminal prosecutions.

He claims that he has a privilege against compliance with that subpoena.

He does not claim that disclosure of the subpoenaed material would compromise state secrets. There is no claim that the conversations at issue involved the President's functions under Article II as Commander in Chief, or the conduct of international relations. Compare United States v. Reynolds, 345 U.S. 1 (1952); C & S Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948). Rather, the President grounds his assertion of privilege in the generalized interest in preserving the confidentiality of his discussions with his advisers.

Because maintaining confidentiality for such discussions is essential to his high office, he claims a privilege against forced disclosure.
The Constitution does not explicitly mention the President's interest in confidentiality. Yet to the extent that the interest in confidentiality pertains to the President's effective exercise of his executive powers, it is nevertheless constitutionally based. The Constitution does explicitly confer the right upon every defendant in a criminal trial "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." (Am. VI) And, of course, the Constitution also guarantees that no person shall be deprived of liberty without due process of law. (Am. V) Because the production of all material evidence in a criminal trial effectuates those guarantees, it too is a matter of constitutional import.

We must balance the importance of the privilege to the President's performance of the responsibilities vested in him against the inroads of such a privilege on the fair administration of criminal justice. The interest in confidentiality...
confidentiality, as distinct from the preservation of state secrets, is a generalized concern. The goal is to promote candor by maintaining an expectation of confidentiality rather than to preserve secrecy for the substance of any particular communication. The asserted need to refuse to comply with a subpoena presumes that rare and isolated instances of disclosure would negate the general expectation of confidentiality and thus defeat the ability of the President to obtain candid advice. We think that this assumption is unfounded. The willingness to speak plainly is not so fragile that it would be undermined by some remote

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"A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice." Id., at 16.
while the general interest in confidentiality is weighty indeed, it is not significantly impaired by the demands of criminal justice.

On the other hand, an unqualified privilege against disclosure of evidence demonstrably relevant to a criminal trial would cut deeply into the guarantee of due process of law. While the President's interest in confidentiality is general in nature, the constitutional need for production of material evidence in a criminal proceeding is not. The enforcement of the criminal laws does not depend on an assessment of the broad sweep of events but on a limited number of specific historical facts concerning the conduct of identified individuals at given times. The President's broad interest in confidentiality would not be vitiated by disclosure of a limited number of confidential conversations, but nondisclosure of those same conversations could gravely impair the pursuit of truth in a criminal prosecution.
Thus, where the President's ground for withholding subpoenaed materials from use in a criminal trial is only the generalized interest in confidentiality, it cannot prevail over the needs of due process of law in the fair administration of criminal justice. Under these circumstances, the generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.
I write separately to emphasize my view that the President's position in this case plainly has a constitutional basis. We write today not just to resolve narrowly the present controversy, however we may wish to limit the scope of our opinion, its impact may extend for decades to come. No member of this Court wishes to denigrate the office of the President of the United States, or to cast a shadow upon the future exercise of the legitimate responsibilities of that office.

The fundamental issue is the claim of executive privilege, which I analyze within a somewhat different framework of that of the Court — although I reach the same result. The President's argument has three aspects. His first and broadest contention is that the Judiciary lacks authority to review this matter at all. Because the case involves the scope of the President's powers under Article II, it is said to be removed from the purview
of Judicial consideration. Second, he argues that even if the courts have authority to act, the correct resolution under the Constitution is that the President has the power to withhold confidential materials in his possession from use in a criminal trial. In other words, the President contends that even if the courts are competent to decide this case, they are required as a matter of constitutional law to hold that he is entitled to an absolute privilege to refuse to disclose confidential conversations with and among his aides. Finally, as a fallback position, the President contends that whatever the scope and nature of his privilege, it should prevail over the demands of the Special Prosecutor in this case.

*Marbury v. Madison* decides the first argument against the President, but as I read that decision it does not resolve the second question. As to that, the essence of what the President is saying is as follows: It is reasonable to conclude that the Framers, in setting up with such deliberate care a system of separated powers,
chose to lodge in the President the authority to determine what evidence in the control of the Executive Branch is to be released for use in a criminal trial. Indeed, aside from the ambiguity of *Burr*, this is exactly the way the system normally works. If the Executive Branch chooses not to release privileged materials, it must suffer the loss of the trial if the defendant's rights under the Fifth and Sixth Amendments are thereby infringed.

The President is not contending here that the case is nonjusticiable (the issue resolved against him by *Marbury*). Rather, he is arguing that the courts in defining the powers of the presidency must conclude that the President himself is the official that the Framers chose as the agency of government to decide what to make available in a criminal trial, and that the courts must abide by his decision. This argument is grounded on the "take Care that the Laws be faithfully executed" revision of Article II, and it presumes that the country will have
a President who is faithful to the duties of his high office. The long history of our country suggests that this argument is not frivolous. Putting it differently, if the President faithfully executed the laws in light of his total responsibilities as Chief Executive, evidence relevant to a criminal prosecution would be made available unless the official in the best position to know better than anyone else determined that an overriding public interest required protection of confidences. The long history of our country prior to the present controversy lends support to the view that such an allocation of power has not been abused.
Re: 73-1766 - U. S. v. Nixon
73-1834 - Nixon v. U. S.

Dear Lewis:

All of your suggestions in today's memo are entirely acceptable to me. With minor verbal adjustments to "shoehorn" them in, I am accepting them -- subject always to the views of four!

Regards,

[Signature]

Mr. Justice Powell
Copies to the Conference
D.C. 487 F. 2d 700 (1973), the Court of Appeals held that such presidential communications are "presumptively privileged," id. at 717, and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that "in no case of this kind would a court be required to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed. Cas. 187, 191 (No. 14, 694) (CCD Va. 1807).

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." Berger v. United States, 295 U.S. 78, 88 (1935). 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 the criminal justice are defeated if judgments 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 courts that compulsory process be available for the production of evidence needed either by the prosecution or 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, physician or 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 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

Because of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges. Justice Frankfurter, dissenting in Elkins v. United States, 364 U.S. 206, 234 (1960), said of this: "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."
Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities. In *C. & S. Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (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." *Id.*, at 111

In *United States v. Reynolds*, 345 U.S. 1 (1952) dealing with a claimant's demand for evidence in a damage 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 cases of the Court, however, have 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
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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 evidence be produced.

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. Although the interest in preserving

confidentiality is weighty indeed and entitled to great respect, 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

We are not here concerned with the balance between the

President's generalized interest in confidentiality and the need for

relevant evidence in civil litigation, nor with that between the confidentiality

interest and Congressional demands for information, nor with the

President's interest in preserving state secrets. We address only the

conflict between the President's assertion of a generalized privilege of

confidentiality against the constitutional need for relevant evidence in a

criminal trial.
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 court, 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. 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.

Mr. Justice Cardozo made this point in an analogous context. Speaking for a unanimous Court in Clark v. United States, 289 U.S. (1933), he emphasized the importance of maintaining the secrecy of the deliberations of a petit jury in a criminal case. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published in the world." Id., at 13. Nonetheless, the Court also recognized that isolated inroads on confidentiality designed to serve the paramount need of the criminal law would not vitiate the interests served by secrecy:

"A juror of integrity and reasonably firmness will not fear to speak his mind if the confidences of debate barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive powers is too remote and shadowy to shape the course of justice," Id., at 16.
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.
MEMORANDUM TO THE CONFERENCE:

Enclosed are two copies of the opinion NOT PROOFREAD. I send it in that form because you can evaluate the substance of any changes since the first draft.

Immediately on having seven "joins" I will order a full print -- obviously with corrections and changes, if any.

I suggest that if we need to meet it should be approximately one-half hour after delivery of this draft.

Regards,

P.S. This can be ready by 10:00 AM Wed.

Milliken can also be ready.

The Order for "hold" cannot be ready until perhaps Friday. For my part an Order first approved by all justices can come down in form or not at whatever Justice being on the Bench. WBJ
NIXON CASE

Proposed Note to be keyed to the sentence on p. 6, ending with the words "totally frustrated".

We note the uniqueness of this case in view of the independence and authority conferred on the Special Prosecutor. See Part II, supra. Normally, a President by virtue of his control of the Executive Branch is in a position to determine whether the greater public interest lies in preserving confidentiality with respect to certain evidence or in making it available for the prosecution of an accused person. See Confiscation Cases 7 Wall, (74 U.S.) 454 (1869), United States v. Cox, 342 F. 2nd 167, 171 (CA 5), cert denied, 381 U.S. 935 (1965).
Proposed Change in language in the last full sentence on p. 3:

The President does not place his claim of privilege on military, diplomatic or other state secrets.