This case involved the attempt by environmental groups to stop the Alaska atomic test. The plaintiffs demanded documents from the AEC, and the government invoked "true" executive privilege - offering no reasons to the Court. The Chairman of the AEC, and the heads of other affected agencies, each filed affidavits stating that "disclosure even to the judge would be contrary to the public interest". The government asserted that "this determination by the executive official is conclusive upon the court . . ." (792).

Thus, the position taken is identical with that of the President in the pending case, except here a generalized claim of confidentiality is assigned as the reason.

Recognizing that there is "no direct Supreme Court precedent" (the constitutional issue having been avoided in Reynolds), CADC found no support for the government's position:

"An essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive.
"But no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a Federal court or grand jury was investigating malfeasance in office, and this is not the law." (p. 793, 794).

The Court then went on to apply a balancing test, starting with *in camera* inspection.

*Comment:* This is a fairly strong precedent, especially since it involved a civil rather than a criminal case. The opinion is conclusory and does not discuss the underlying constitutional questions.

LTP
In a civil case to which the government was not a party, the Court issued a subpoena for the production of documents held by the Department of Justice (this was a trademark case). The Attorney General filed an affidavit stating that the documents consisted of "intra-departmental memoranda and inter-department communications", and that the AG - following a personal examination - concluded it would be contrary to the public interest to release them. The government relied, as it does here, on the Doctrine of Separation of Powers in asserting a claim of "executive privilege". It was emphasized that the documents pertained to "An appropriate exercise of the executive's decisional and policy making functions".

The opinion used the term "executive privilege", defining it as:

"Executive privilege is a phrase of release from requirements common to private citizens or organizations - an exemption essential to discharge of highly important executive responsibilities." (p. 324)

But the Court likened it to other "evidentiary privileges". After a rather full explication of the policy considerations behind the government's assertion of privilege, the Court
assumed - in effect - that it had the power to decide when the privilege may be invoked:

"... the interest [the privilege] protects [can] be outweighed in particular situations by a sufficiently strong showing of necessity for examination" (p. 327).

The Court accepted "the teaching of some of the decisions that the privilege is qualified", and proceeded to weigh the "detrimental effects of disclosure" against the necessity for production shown.

In this process, the Court noted:

"Here, unlike the situation in some cases, no charge of governmental misconduct, or perversion of governmental power is advanced" (p. 329).

The Court correctly, especially in light of Reynolds, concluded that "a court may not properly require an in camera inspection as a matter of course before accepting a claim of executive privilege. ... It is clear that an in camera examination should be afforded only where a suitable occasion therefore sufficiently appears." (p. 331)

The Court held in favor of the government, after balancing the interest and the weak showing of need by the party seeking the information.

Comment: Although this opinion does not really address the underlying constitutional issues, it is perhaps the best of the lower court decisions in terms of identifying the competing interests, recognizing that a proper showing must be made even for in camera examination.
July 6, 1974

No. 73-1766 United States v. Nixon
No. 73-1834 Nixon v. United States

MEMORANDUM TO THE CONFERENCE:

In accord with the indications by several Justices at our last Conference that exchanges of memoranda would be welcomed, I circulate herewith a memorandum stating my views. I submit this to you with all the obvious caveats: the views and conclusions stated are tentative and subject, of course, to oral argument and our discussion at Conference. It may be that my own views will change and evolve independently of these events, but for the present, at least, the attached memorandum reflects my thinking after rather intensive study for the past two weeks.

Sincerely,

LFP/gg

At one point Justices Brennan and Stewart were willing to accept the attached memo as basis for an opinion, but as the decisional process evolved it was clear that Mr. C. J. (properly, I think) wanted to write the Court's opinion.
No. 73-1766 United States v. Nixon  
No. 73-1834 Nixon v. United States

MEMORANDUM TO THE CONFERENCE:

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Sincerely,

L.F.P.

LFP/SE

As circulated prior to argument.
MEMORANDUM TO THE CONFERENCE:

This memorandum is intended to serve as a tentative proposal for portions of a draft opinion. As I envision it, an appropriate opinion would consist of five parts:

Part I - statement of facts;
Part II - jurisdiction and justiciability;
Part III- the merits of the President's assertion of absolute and unreviewable authority to withhold the tapes from in camera inspection;
Part IV - standards and procedures governing the exercise of judicial authority to order the President to comply with a subpoena duces tecum; and
Part V - application of Parts III and IV to the facts of this case and disposition.

What follows is a brief summary of the points to be covered in these sections plus a tentative draft for Parts III and IV.

Part I - This section should recount the essential facts and the procedural history of litigation and pose the issue for decision.
Part II - This section should discuss the questions of jurisdiction (appealability or mandamus) and justiciability (intra-branch controversy). My tentative conclusions are as follows:

Jurisdiction is properly grounded on 28 U.S.C. § 1291. In the normal case a third party who declines to produce subpoenaed documents in a criminal trial must proceed to a contempt judgment before he may raise his objections to the subpoena on appeal under § 1291. *United States v. Ryan*, 402 U.S. 530 (1971). Here the third party is the President of the United States. Irrespective of whether a court is competent to hold the President in contempt, it would be unwise to reach that issue and unseemly to require him to submit to such a judgment as a prerequisite for appellate review. There is sufficient flexibility in the phrase "final decisions" as it appears in § 1291 to find appellate jurisdiction here. The Court therefore has no occasion to consider the alternative jurisdictional basis of mandamus.

The President's contention that this case presents no "case or controversy" as required by Article III because it is at bottom only an intra-branch dispute is without merit. The Attorney General has promulgated regulations that authorize the Special Prosecutor to contest presidential claims of executive privilege. So long as those regulations remain in force, there is sufficient diversity in the interests of the parties to satisfy the requirements of Article III. *Muskrat v. United States*, 219 U.S. 346 (1911). Cf. *United States v. Marine Bancorporation*, ___ U.S. __ (1974); 12 U.S.C. § 1828(c)(7)(D)(authorizing the Comptroller of the Currency to intervene as a party
defendant in a suit brought by the Department of Justice.)

Part III - This section should address in general terms whether the President's decision to withhold confidential conversations subpoenaed for use in criminal proceedings is final and binding on the courts. The constitutional underpinnings of this question seem to me to deserve from this Court a more searching explication than they have yet received. The tentative draft of Part III states my thinking on the subject.

It will be apparent that the attached draft of this section does not rely on the Burr opinions of Chief Justice Marshall. The more I study what the Chief Justice said in his two opinions, especially the second, the less weight I think Burr deserves. The Special Prosecutor can find comforting language in it, but I find little solid guidance. In fact, it seems to me that in his second opinion Chief Justice Marshall

* Additionally, the President's brief implies that this case should be deemed nonjusticiable because it involves the validity of a decision made by the head of a coordinate and independent branch of government. If the President suggests that his personal involvement in this matter somehow renders the case nonjusticiable, the law is to the contrary. Whether the President has an unreviewable privilege to decline to produce subpoenaed materials is a question of law, and the authority of the courts to decide the issue is unambiguously established. Marbury v. Madison, 1 Cranch 137 (1803); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).
rather assiduously avoided any decision on whether a court could override a personal assertion of the confidentiality privilege by the President himself. I fear therefore that reliance on Burr to resolve the merits of the President's personal claim of unreviewable privilege would leave the Court's opinion dangerously vulnerable to criticism for bad history and careless reading of those opinions.

Part IV - My suggested resolution of the constitutional issue posed in Part III would vest in the Federal Judiciary a power over the office of the President that is plainly susceptible of abuse. Standards and procedures to govern the exercise of such power are obviously important. I have addressed this subject in the attached tentative draft of Part IV and have found that Burr is a useful precedent for this purpose.

Part V - This section should apply Parts III and IV to the facts of this case, with the view to remanding the case to the District Court for proceedings under the standards and procedures enunciated in Part IV.
Proposed Part III

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. "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, supra, at 88. 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. 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." And 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.

"The pertinent general principle, responding to the deepest needs of society, is that society is entitled to every man's evidence. As the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible. 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." Elkins v. United States, 364 U.S. 206, 234 (1960)(dissenting opinion of Frankfurter, J.).
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 and that his decision not to comply is final and binding on the courts. He does not contend that disclosure of the subpoenaed material would compromise state secrets. There is no claim that the conversations at issue involved matters of military planning or intelligence, sensitive aspects of foreign affairs, or any other data whose disclosure would be contrary to the national interest. Rather, the President grounds his assertion of privilege in the generalized interest in preserving the confidentiality of his discussions with his advisors. Because maintaining confidentiality for such discussions is essential to his high office, he claims a privilege against forced disclosure. The President further argues that only he can assess accurately the degree to which disclosure

1. In Nixon v. Sirica, 487 F. 2d 700, 708-712 (1973), there was some question concerning the power of the courts to compel the President to produce materials for in camera inspection. No such inquiry need detain us here, for the authority of the courts to say what the law is does not depend on their power to secure compliance. Kendal v. United States ex rel. Stokes, 12 Pet. (37 U.S.) 524, 613 (1838).
in a particular case would impair the effective performance of his constitutional duties. Thus he asserts that the decision whether to reveal such confidential conversations for use in a criminal proceeding is his alone to make.

The President's argument rests in part on the nature of government itself and in part on the tripartite division of sovereign powers within our government. All nations find it necessary to shield from public scrutiny some of the deliberations that constitute the process of government. Those selected to conduct the affairs of state must be free to speak plainly to one another and to seek honest and forthright advice on matters of national policy. Yet human experience teaches that those who expect public dissemination of their remarks may temper candor with a concern for appearances. The willingness to advance tentative ideas, to play the devil's advocate, and to reveal the ultimate basis for a particular view may succumb to public posturing and a reticence born of the fear of appearing foolish. That consequence would distort and impair the search for sound public policy. Accordingly, a general expectation of confidentiality for deliberations among the officers
of government and their advisors serves the public good. 2

The Framers of our Constitution understood this point. When they undertook to draft the Charter for a fledgling nation, they chose not to hold their debates in public. Rather, they maintained the secrecy of their discussions until well after ratification of the Constitution by the States. Modern practice reflects continued appreciation of the insight of the Framers. For example, the House-Senate Conference Committees that meet to resolve differences in bills that have passed both Houses hold their proceedings in confidence. Similarly, the deliberations of this Court are conducted in utmost secrecy. In these and other instances, officers of government need to be able to rely on an expectation of confidentiality to facilitate plain talk.

That the need for confidentiality exists in any government does not mean, however, that it must always prevail over competing societal interests. See, e.g., *Conway v. Rimmer*, 1 All E. R. 874 (1968). Some greater public good may warrant occasional inroads into the principle of confidentiality. The President does not contest this proposition but contends that he has final and unreviewable authority to decide whether competing considerations outweigh the generalized need for confidentiality in a particular instance. In a unitary government no serious question arises concerning who has authority to make this determination. There both the interest in confidentiality and whatever conflicting interests may be at stake reside in the government as a whole. In our system of limited government and diffuse powers, the inquiry is more complicated.

Under our Constitution the people have delegated their sovereignty to three coordinate but independent branches. To each the Constitution commits specified functions and lodges in each the powers essential to the effective performance of those duties. The three branches rest in a state of formal equilibrium, each
restraining the capacity of the others to work harm, for the Framers feared tyranny by those who govern more than they valued efficiency in government. As James Madison made the point, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist, No. 47, p. 313 (S.F. Mittel ed. 1938). The Framers therefore structured our Constitution around the fundamental principle of separation of powers. Definition of the precise contours of that concept in a particular case is, of course, a task for the courts. The assignment of powers among the branches and the limitations on those powers are matters of fundamental law, and "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803).

The principle of separation of powers requires us to determine at the outset, not whether in this or

3. In the words of Mr. Justice Brandeis, "[t]he doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." Myers v. United States, 272 U.S. 52, 293 (1926). (dissenting opinion).
any other case we find some greater public good outweighing the generalized need for confidentiality, but rather who is empowered under our Constitution to make that decision. That question -- who has constitutional authority to balance the competing interests in a particular instance -- is at base an issue of separation of powers.

The President contends that due regard for that concept requires us to hold that he and he alone may make that decision. Preserving confidentiality for discussions with his advisors assists him in the effective exercise of his executive powers. Article II vests those powers exclusively in him. Therefore, he argues, the decision whether to sacrifice confidentiality in a particular case is similarly committed exclusively to his discretion and cannot be reviewed or overridden by the judicial branch. With all respect, we find nothing in the concept of separation of powers that compels this conclusion.

The constitutional structure embodied in that phrase makes each of the three departments supreme in its sphere, but it also requires each to respect the authority of the others. Separation implies interaction as well as 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, 343 U.S. 579, 635 (1952)(concurring opinion of Jackson, J.).

In many respects the interaction of the powers of the branches is expressly detailed in the Constitution. So, for example, the Congress may legislate and the President may veto, only to have his veto overridden by a two-thirds vote of both Houses. In other instances, the authority of one branch or another to make a particular decision is not expressly stated. It is determined by the relationship of the matter in question to the specifically enumerated powers. This is such a case.

The Constitution explicitly mentions neither the President's interest in confidentiality nor the judiciary's need for every man's evidence in the enforcement of the criminal laws. Nor does that document expressly declare the mode of interaction between those competing concerns. 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. And because the production of
all material evidence in a criminal trial furthers the judiciary's constitutional mandate to do justice, it too is a matter of constitutional import. Both Article II and Article III are involved here. The defect in the President's argument in favor of unqualified and unreviewable discretion to withhold the subpoenaed materials is that it derives solely by inference from his enumerated powers; it ignores the countervailing demands of Article III. Far from compelling this approach, the concept of separated powers counsels against it, for preservation of the state of dynamic equilibrium implicit in our tripartite structure of government requires analysis of both aspects of the problem. It also requires that the resolution of the competing interests in this case be accomplished in a manner that accords maximum possible protection to the needs of each branch. As this analysis indicates, the ultimate authority to decide whether in a particular case confidentiality must give way to some greater public interest resides in that branch whose constitutional responsibilities are more gravely affected.
We must balance the essentiality of an unreviewable privilege to the President's performance of the responsibilities vested in him against the inroads of such a privilege on the duties committed to the Judiciary. The interest in 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 for unreviewable presidential discretion 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 prospect of disclosure in narrowly defined and

4. We wish to emphasize the narrow scope of this inquiry. We are not here concerned with the balance between the President's generalized interest in confidentiality and the Judiciary's 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 unreviewable authority to decide whether to divulge confidential conversations and the Judiciary's need for evidence material to criminal trials.
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 advisors will be moved to temper the candor of their remarks by such an unlikely possibility. Thus, while the general interest in confidentiality is weighty indeed, it is not significantly impaired by the demands of criminal justice.

5. 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 to 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 viti ate 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.
On the other hand, an unqualified privilege against disclosure of evidence demonstrably relevant to a criminal trial would cut deeply into the role of the Judiciary under Article III. While the President's interest in confidentiality is general in nature, the courts' 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, his decision is not binding on the courts. He may be ordered, in a proper case, to produce the requested
materials. We do not reach this conclusion lightly nor do we wish to suggest that courts may presume to order the President of the United States to produce confidential materials absent compelling justification. The avoidance of unnecessary harassment of our Chief Executive, the importance of the expectation of confidentiality for his discussions with his advisors, and proper deference to the head of a coordinate branch of government who is himself charged by the Constitution to "take Care that the Laws be faithfully executed" suggest that courts should be as reluctant to tread this ground as the sound discharge of their constitutional

6. No prior case from this or any other court resolves the precise issue before us. Earlier precedents cited by the parties have dealt with state secrets, e.g., United States v. Reynolds, 345 U.S. 1 (1953), with claims of executive privilege by subordinate executive officers in the context of civil trials, e.g., ibid; Committee for Nuclear Responsibility, Inc. v. Seaborg, ___ App. D.C. ___, 463 F. 2d 788 (1972); Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (CD 1965), aff'd on opinion below, 384 F. 2d 979 (CADC 1967), cert. denied, 389 U.S. 952 (1968), or with the unique responsibilities and powers of a grand jury. See Nixon v. Sirica, ___ App. D.C. ___, 487 F. 2d 700 (1973). Nevertheless, our conclusion is in full accord with the principle underlying all of those cases -- that in the final analysis it is the duty of a court to determine whether a claim of executive privilege must give way in a particular instance.
responsibilities will allow. Courts must follow certain standards and procedures to assure that the President's legitimate interests are adequately protected. It is to those requirements that we now turn.

Proposed Part IV

In determining whether to order the President to produce records of confidential communications for use in a criminal trial, a court should be guided by a solicitous concern for the effective discharge of his duties and the dignity of his high office. Of course, no citizen should be subjected to unwarranted inroads on his time or interruptions of his affairs, but the public interest in preserving the confidentiality of the Oval Office and in avoiding vexatious harassment of an incumbent President is of an entirely different order of importance. Consequently, we believe that "[n]o 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. 14964) (CCD Va. 1807) (per Marshall, C.J.). Rather, courts should follow standards and procedures designed to afford the greatest possible protection
for the legitimate interests of the presidency consistent with the overriding duty to ensure that justice is done.

Ordering the President to produce confidential records for use in a criminal proceeding involves three decisional stages: issuance of the subpoena, return of the subpoena, and in camera inspection. The decision whether to issue a subpoena duces tecum to the President is governed by the same standard applicable to citizens generally. "The guard, furnished to this high officer, is to be looked for in the conduct of the court after the subpoenas have issued; not in any circumstance which is to proceed their being issued." United States v. Burr, 25 Fed. Cas. 30, 34 (No. 14,692d) (CCD Va. 1807)(per Marshall, C.J.). The standard is stated in Rule 17 of the Federal Rules of Criminal Procedure. It requires a defined showing of relevance and forbids fishing expeditions. Faced with a judicial determination that Rule 17 has been satisfied, the President may well forego any claim of executive privilege. After all, he is charged by the Constitution with the duty to "take Care that the Laws be faithfully
executed" and will doubtless be aware of the needs of the criminal justice system. If, however, the President decides that release of the subpoenaed materials would prove injurious to the public interest, he may invoke executive privilege for his confidential communications and so indicate on the return of the subpoena.

It is at this stage that the court must require a special showing from the moving party. As Chief Justice Marshall stated, "on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case". United States v. Burr (No. 14,694), supra, at 192 (emphasis added). The standard, then, is necessity. The movant must show by extrinsic evidence that the subpoenaed materials are essential to the ends of justice. They must be not merely cumulative or duplicative of other evidence but central to the resolution of the issue at hand. This standard of necessity has been employed by other courts dealing with claims of privilege by subordinate executive officials in civil cases, Carl Zeiss Stiftung v. V.E.B. Zeiss, Jena, 40 F.R.D. 318, 321 (DDC 1966), Kaiser Aluminum & Chemical Corp. v. United States, 157,
F. Supp. 939 (Ct Cl 1958) (per Reed, J.). It is not less appropriate as the test for determining whether an assertion by the President himself of a privilege based on the legitimate interest in confidentiality must yield to requirements of criminal justice.

If the requisite showing has been made, the court should order production of the subpoenaed materials for in camera inspection. As the preceding discussion makes plain, in camera proceedings are not a substitute for a showing that production is essential to the ends of justice. Rather, "the party seeking discovery must make a preliminary showing of necessity to warrant even in camera disclosure . . . ." Committee for Nuclear Responsibility, Inc. v. Seaborg, ___ U.S. App. D.C. ___, ___, 463 F. 2d 788, 792 (1971). See Carl Zeiss Stiftung, supra, 40 F.R.D., at 331. When in camera proceedings are warranted, identification and excision will then be the court's primary function. It must identify those statements material and necessary to the criminal trial and release them for introduction in evidence. This inquiry may have to occur in stages, for instances
may arise when this determination can be made intelligently only after the issues have crystallized during the course of the trial. The court must also excise all other material and provide whatever summaries and abstracts are needed to render the whole comprehensible. Due care must be exercised to avoid release of excised material or its contents.

Finally, a court should stay any order of disclosure for a reasonable time to allow the President to appeal that decision if he so chooses. The Courts of Appeal and ultimately this Court stand ready to enter such further orders as are required to prevent unwarranted disclosure of subpoenaed materials.

* * * * * *

Part V will conclude the opinion with a remand for further proceedings under the standards enunciated above. In light of the factual context of this case, the District Court's duty would not seem doubtful.