July 11, 1974

Dear Chief:

In re the Nixon cases and your circulation of July 10th:

I

In your statement of facts p. 1, line 7, I think the Committee is the Committee to Re-Elect the President. On p. 1, line 12, after also, insert "in a second report". On p. 1, line 13 the part beginning "The grand jury lodged" through the 1st two lines on p. 2, since we are dismissing the cross-petition this material seems unnecessary. P. 2, line 11, Strachan is the one named by the Special Prosecutor, brief at 13, as the third defendant; the President’s brief says it was Ehrlichman; the docket entry for April 19th says it was Parkinson. Perhaps line 11 could read: "Three defendants formally joined" etc.

II

Your treatment of jurisdiction is okay.

William O. Douglas

The Chief Justice
July 11, 1974

Re: No. 73-1766, United States v. Nixon

Dear Chief,

Responding to your circulation of yesterday, I think, will all due respect, that Bill Douglas' draft on appealability is entirely adequate, and would suggest that it be incorporated into the Court opinion with the following minor changes:

1. I would revise the first paragraph on page 3 of Bill's circulation along the following lines: The threshold question presented is whether the District Court's order of May 20, 1974 was an appealable order. If not, the appeal was not "in" the Court of Appeals and is not properly before this Court on certiorari.*

* "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C. § 1254.

2. In the final paragraph of Part I of Bill's circulation (p. 5), I would change "I would hold" to "we hold," and would keep your suggested footnote at
the end of that sentence, with the first sentence of the footnote changed along the following lines:
The parties have suggested other jurisdictional grounds upon which the Court may review this case.

Sincerely yours,

The Chief Justice

Copies to the Conference
July 11, 1974

Dear Chief:

I have Potter's memo to you in the Nixon cases respecting the problem of appealability of the order. His proposal meets with my approval and it might be more acceptable to the brethren than the early preliminary draft which you circulated and to which I agreed.

I'm still hoping that perhaps we can get the thing behind us and hand down the opinion on Monday.

William O. Douglas

The Chief Justice

cc: The Conference
July 11, 1974

Dear Chief:

In re the Nixon cases and your circulation of July 10th:

In your statement of facts p. 1, line 7, I think the Committee is the Committee to Re-Elect the President. On p. 1, line 12, after also, insert "in a second report". On p. 1, line 13 the part beginning "The grand jury lodged" through the lst two lines on p. 2, since we are dismissing the cross-petition this material seems unnecessary. P. 2, line 11, Strachan is the one named by the Special Prosecutor, brief at 13, as the third defendant; the President's brief says it was Ehrlichman; the docket entry for April 19th says it was Parkinson. Perhaps line 11 could read: "Three defendants formally joined" etc.

II

Your treatment of jurisdiction is okay.

William O. Douglas

The Chief Justice
July 11, 1974

Dear Chief:


There may be one or two mildly disturbing aspects in this, but I, nevertheless, vote to grant the petition to expedite and to deny the petition for certiorari.

Sincerely,

[Signature]

The Chief Justice

Copies to the Conference
MEMORANDUM TO THE CONFERENCE

For those to whom I have not already given a copy, attached is a copy of the "Intra-Branch Dispute" draft mentioned in Bill Douglas's memorandum to the Chief Justice of July 11. It's really an expansion of Bill Douglas's original draft.

W.J.B. Jr.
MEMORANDUM TO THE CONFERENCE:

Enclosed are proposed sections on Justiciability and Rule 17(c). Bear in mind the titles and numbering and sequence of parts will await the final treatment of substance.

I believe we have encountered no insoluble problems to this point.

Regards,

[Signature]

July 11, 1974
In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena on the ground that the matter was an intra-branch dispute not subject to judicial resolution. The argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. Flast v. Cohen, 392 U.S. 83, 94-95 (1968). At the outset, the President makes clear that he does not question the jurisdiction of the Court to resolve inter-branch conflicts. Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803). Nor does he question the right of the Court to check an unconstitutional or illegal assumption of power by the Executive Branch as in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). However, he argues, "the federal courts will not intrude into areas committed to the other branches of government." Flast, supra, at 95. He views the present dispute as essentially a jurisdictional dispute within the Executive Branch which he analogizes to a dispute between two Congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, Confiscation Cases, 7 Wall (74 U.S.) 454 (1869), he argues that it follows an executive decision is final in determining what evidence is to be used in the case. Although counsel concedes the President has delegated certain specific powers to the Special Prosecutor (President's brief, p. 42), he has not "waived or delegated"
to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer." Ibid. Therefore, the Special Prosecutor's demand for the items presents, in his view, a political question since it involves a textually demonstrable grant of power under Article II. Gilligan v. Morgan, 413 U.S. 1 (1972); Baker v. Carr, 369 U.S. 186 (1962).

The mere assertion of "intra-branch dispute," without more, has never operated to defeat federal court jurisdiction. Justiciability does not turn on such a surface inquiry. In United States v. Interstate Commerce Commission, 337 U.S. 426 (1949), the Court observed "courts must look behind the names that symbolize the parties to determine whether a justiciable case or controversy is presented." 337 U.S., at 430. See also: Powell v. McCormack, 395 U.S. 486 (1969); ICC v. Jersey City, 322 U.S. 503 (1944); ex rel. Chapman v. FPC, 345 U.S. 153 (1953) (Secretary of Interior against FPC); Secretary of Agriculture v. United States, 347 U.S. 645 (1954) (Secretary of Agriculture against the ICC); Federal Maritime Board v. Isbrandsten Co., 356 U.S. 481, 482 n.2 (1958) (FMB against the Justice Department and Secretary of Agriculture).

In resolving this question, an essential starting point is the nature of the proceeding for which the evidence is sought - a pending criminal prosecution. It is a judicial proceeding in a federal court for the alleged violation of federal laws; such criminal actions are brought in the name of the United States. *Berger v. United States*, 295 U.S. 78 (1935). Under the authority of Article II, section 2, Congress has vested in the Attorney General the power to conduct the government's criminal litigation. 28 U.S. C. 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S. C. 509, 510, 515, 533. Acting pursuant to that authority, the Attorney General has delegated the authority to represent the United States in these particular matters to a special prosecutor with unique authority and tenure. 1/

1/ Regulations issued by the Attorney General pursuant to his authority under 5 U.S. C. §501, vest in the Special Prosecutor plenary authority to control the course of investigations and litigation related to "all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General." 38 Fed. Reg., at 30739. In particular, the Special Prosecutor was given full authority, *inter alia*, "to contest the assertion of 'Executive Privilege' . . . and handle all aspects of any cases within his jurisdiction." *Ibid*. The regulations then go on to provide:

"In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney-General's statutory account-

(cont'd. next page)
regulations of the Attorney General specifically give him the power to contest the invocation of executive privilege in his attempt to procure material deemed relevant to the performance of these duties. 2/

38 Fed. Reg., at 30739.

1/ cont'd.

ability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and Minority Leaders and Chairman and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action."

2/ That this was the understanding of Acting Attorney General Robert Bork, the author of the regulations establishing the independence of the Special Prosecutor is shown by his testimony before the Senate Judiciary Committee

"Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that he has the power to use judicial processes to pursue evidence if disagreement should develop."

(cont'd. next page)
So long as these regulations are extant they have the force of law and as long as the President leaves the Attorney General in office and as long as the incumbent Attorney General leaves the current regulations in force, the Executive Branch is bound by them. Accardi v. Shaughnessy, 347 U.S., at 265-67 (1954); Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959). Here the President has explicitly shared with eight designated leaders of the Legislative Branch the power to alter the Special Prosecutor's authority or to dismiss him.

In moving to quash the subpoena for the material in his personal possession, the President is not acting simply as a participant in the prosecutorial function of the Executive Branch, but rather as a party with a particular, individual interest. See: United States v. ICC, 337 U.S. 426, 430 (1949); Secretary of Agriculture v. United States, 350 U.S. 1962 (1956). In short, for the narrow and limited purpose of determining the proper use of these materials in the particular criminal action now pending, the President's expressed legal

position is realistically and concretely "adverse" to that of the Government, as advanced by its specially constituted attorney. There is thus "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional question," Baker v. Carr, 369 U.S. 186, 204 (1962).

Since it is a matter arising in the ordinary course of a federal criminal prosecution it is a matter within the traditional scope of Article III power. Id., at 217. In light of that genuine adverseness, the mere formality that both parties are officers of the Executive Branch is not to be viewed as rising to the level of a jurisdictional bar. It would be inconsistent with the applicable law and regulations and the unique facts of this case to conclude other than that the Special Prosecutor has a standing to bring this action and that a justiciable case or controversy is presented for decision.
Although the parties treat the 17(c) issue last, it seems more appropriate to me to determine this matter before reaching the question of privilege. If the requirements of Rule 17(c) are not met, the subpoena duces tecum should not have been issued and the President would never have been required to interpose the claim of presidential privilege to bar its enforcement. Therefore, if the Court finds that the requirements of the Rule have not been met, it would not be necessary to reach and decide the issue of executive or presidential privilege.

Cf. *Arkansas-Louisiana Gas Co. v. Dept. of Public Utilities*, 304 U.S. 61, 64 (1938). This section will be re-examined to accord with treatment of "presidential privilege."]

**The Rule 17(c) Question**

In essence, the President's counsel argues that the Special Prosecutor is attempting to use the subpoena as a discovery device, or to uncover material not yet known to him. He argues that the Special Prosecutor has requested the 64 conversations on the "bald assertion" that each "contains or is likely to contain evidence that will be relevant to the trial of this case." He also argues that the Special Prosecutor gave no factual support for his claim that some of the material may be relevant and has failed to show that each of the 64 items is evidentiary in nature. The President's counsel also notes that the Special Prosecutor contends that the statements made during the conversations may be useful to the Government for purposes of impeaching certain of the defendants should they elect to testify. In responding, counsel for the President correctly points out that the courts have generally held
that materials useful to challenge the credibility of witnesses cannot be obtained in advance of trial and that discovery of such evidence must await the occasion when a defendant testifies.

The Special Prosecutor, emphasizing that the enforcement of a subpoena duces tecum is committed to the trial court's sound discretion, argues that the District Court's determination should not be disturbed in the absence of a decision on review that the District Court's action was arbitrary and unsupported in the record. This is especially true, he argues, where the assessment of the relevancy and of the evidentiary value of the items is primarily a determination of fact and the District Judge is intimately familiar with the grand jury's investigation. He argues that the material sought is relevant if it is related to the charges in the indictment; it is evidentiary if it would be admissible in the party's direct case or can be used to impeach a witness. As to the majority of conversations involved in the subpoena, the Special Prosecutor argues that the specificity standard is satisfied by consideration of the transcripts already made public by the White House, by uncontradicted testimony and other evidence. As to the remaining conversations, he argues that there is strong circumstantial evidence indicating the standard is met. Common sense dictates, he submits, that the parties seeking production cannot tell precisely the contents until the documents are examined.
that materials useful to challenge the credibility of witnesses cannot be obtained in advance of trial and that discovery of such evidence must await the occasion when a defendant testifies.

The Special Prosecutor, emphasizing that the enforcement of a subpoena duces tecum is committed to the trial court's sound discretion, argues that the District Court's determination should not be disturbed in the absence of a decision on review that the District Court's action was arbitrary and unsupported in the record. This is especially true, he argues, where the assessment of the relevancy and of the evidentiary value of the items is primarily a determination of fact and the District Judge is intimately familiar with the grand jury's investigation. He argues that the material sought is relevant if it is related to the charges in the indictment; it is evidentiary if it would be admissible in the party's direct case or can be used to impeach a witness. As to the majority of conversations involved in the subpoena, the Special Prosecutor argues that the specificity standard is satisfied by consideration of the transcripts already made public by the White House, by uncontradicted testimony and other evidence. As to the remaining conversations, he argues that there is strong circumstantial evidence indicating the standard is met. Common sense dictates, he submits, that the parties seeking production cannot tell precisely the contents until the documents are examined.
Rule 17(c) provides:

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

The leading case in this Court interpreting Rule 17(c) is Bowman Dairy Co. v. United States, 341 U.S. 214 (1950). This case established certain fundamental characteristics of the subpoena duces tecum in criminal cases: (1) it was not intended to provide additional means of discovery in criminal cases, 341 U.S., at 220; (2) its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials, Id., at 220. The Court quoted a statement of a member of the advisory committee that the purpose of the Rule was to bring the documents into court "in advance of the time that they are offered in evidence, so that they may then be inspected in advance, for the purpose . . . of enabling the party to see whether he can use it or whether he wants to use it." 341 U.S., at 220 n. 5. Both parties agree with the District Court that the cases decided in the wake of Bowman have basically adopted Judge Weinfeld's formulation of the required showing in United States v. Iszia, 13 F.R.D. 335, 338 (D.C. N.Y. 1965). Under this test, in order to require production

- 3 -
prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; (4) that the application is made in good faith and is not intended as a general fishing expedition. Moreover, the District Court properly relied on the fact that the materials were being sought from a third party rather than from an opposing party, and thus the subpoena could not be regarded as an impermissible attempt to circumvent the discovery limitations applied to parties by Rule 16.

In reviewing the determination of the District Court that the requirements of Rule 17(c) are met in this case, a good starting place is the purpose of the Rule as seem by this Court, i.e., to expedite the trial by permitting advance access and selection of evidence to be proffered at trial. Bowman, supra at p. 220. 1/

It seems clear that the Special Prosecutor cannot obtain this particular evidence in any other way. Likewise, it seems reasonable

1/ The Manual for Complex and Multi-district Litigation published by the Administrative Office of the United States Courts recommends that Rule 17(c) be encouraged in complex criminal cases in order that each party may be compelled to produce its documentary evidence well in advance of trial in advance of the time it is to be offered. P. 142, CCH Ed.
to assume that the analysis and possible transcription of the tape recording, if obtained, would take a significant period of time. 2/

Against this backdrop, the Special Prosecutor must, in order to carry his burden, clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity. Our own review of the record necessarily affords a less comprehensive view of the total situation available to a trial judge and we are unwilling to conclude that the District Court's evaluation of the Special Prosecutor's showing under Rule 17(c) was clearly erroneous.

It goes without saying that our holding that the District Court was not "clearly erroneous" in ordering in camera inspection does not dispose of all Rule 17(c) problems. When the material is received by the District Judge he will be obliged to examine it to make his final appraisal under the Rule 17(c) requirements of relevancy and admissibility; and, of course, in this process a judge must be conscious of the sensitivity of publication of presidential confidences.

2/ The Special Prosecutor estimates 2 months (brief p. 139). This factor seems especially relevant in determining whether the statements are admissible for impeachment purposes.


In regard to the secrecy of these parts which it is stated are improper to give out to the world, the Court will take any order that may be necessary.
July 11, 1974

Dear Chief:

Bill Brennan has shown me his draft numbered Roman II, entitled "Intra-Branch Dispute" in the Nixon cases. I have gone over this proposal of his and it seems to me to be adequate and might put us quickly another rung up the ladder if the other Brethren agree.

William O. Douglas

The Chief Justice

cc: The Conference
Dear Chief:

I join Bill Brennan's suggestion for a footnote on the Rule 17 (C) portion of the opinion dealing with the showing of "compelling need".

Sincerely,

William O. Douglas

The Chief Justice

cc: The Conference
July 11, 1974

Dear Chief:

I have Potter's memo to you in the Nixon cases respecting the problem of appealability of the order. His proposal meets with my approval and it might be more acceptable to the Brethren than the early preliminary draft which you circulated and to which I agreed.

I'm still hoping that perhaps we can get the thing behind us and hand down the opinion on Monday.

William O. Douglas

The Chief Justice
cc: The Conference
On April 16, 1974, the Special Prosecutor, on behalf of the United States, requested the District Court to issue a subpoena duces tecum to the President of the United States for production and inspection of certain evidence thought by the Special Prosecutor to be important to the government's proof at the criminal trial of United States v. Mitchell, et al. The subpoena was issued two days later and made returnable on May 2, 1974. The President, thought his White House counsel, entered a special appearance on May 1, 1974, and moved to quash the subpoena. The President's motion was opposed by the government, and in reply to that opposition, the President contended for the first time that the court lacked jurisdiction to consider the Special Prosecutor's request of April 16, 1974, relating to the disclosure of certain presidential documents on the ground that the subpoena involved merely a "dispute between two entities within the Executive Branch."
In light of the independence granted the Special Prosecutor by a Justice Department Regulation to investigate and prosecute Watergate-related crimes, the District Court rejected the President's "intra-branch dispute" argument as a "nullity." ___ F. Supp. ___ (1974).

On appeal, the President has renewed his assertion that the intra-branch character of the present dispute deprives the courts of jurisdiction to resolve the matter. The President argues that his disagreement with the Special Prosecutor over what evidence will be used by the government in a criminal prosecution, is merely a dispute between the Chief Executive, alone vested by Article II of the Constitution with the obligation to see "that the Laws be faithfully executed," and his subordinate executive officer. In that circumstance, "[T]he clearly enunciated doctrine of separation of powers adopted by the Framers of the Constitution [confutes] the authority of the court or any branch of the government to intervene in a solely intra-branch dispute,"
even at the request of a disputant, whether an individual member of that branch, an established committee, or a recognized department. • • • • [A]n intra-branch dispute, regardless of the context in which it arises, is within the exclusive jurisdiction of that body alone and can properly be resolved, if necessary, only by the constitutionally designated official or body vested with the ultimate responsibility for that branch of government." Brief for the Respondent 29-30.

We disagree. The mere incantation of "intra-
branch dispute," without more, has never talismanically defeated federal court jurisdiction. To be sure, the allocation of governmental power among three separate but co-ordinate branches of government is a fundamental (see pp. , infra.) tenant of our constitutional democracy. But it has long been settled that within that governmental structure "it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government . . . have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void."
while this judicial obligation "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch[;] [t]he alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." Powell v. McCormack, 395 U.S. 486 (1969).

The fact that the opposing parties in a particular dispute are members of the same branch of government is not sufficient to negate the courts' duty of adjudication. Justiciability does not turn on such surface anomaly. Thus, for example, the Court has not shied from exercising jurisdiction over congressional intra-branch disputes, Powell v. McCormack, 395 U.S. 486 (1969), or executive intra-branch disputes, ICC v. Jersey City, 322 U.S. 503 (1944) (Price Administrator intervened against the ICC); United States v. ICC, 337 U.S. 426 (1949) (United States as ship owner represented...
by the Attorney General against the ICC; United States, ex rel. Chapman v. FPC, 345 U.S. 153 (1953) (Secretary of Interior against FPC); Secretary of Agriculture v. United States, 347 U.S. 645 (1954) (Secretary of Agriculture against the ICC); Federal Maritime Board v. Isbrandsten Co., 356 U.S. 481, 482 n.2 (1958) (FMB against the Justice Department and Secretary of Agriculture). As recently as this term the Court resolved disputes between Anti-trust Division of the Justice Department and the Comptroller of the Currency in United States v. Marine Bank, ___ U.S. ___ (1974) and United States v. Connecticut National Bank, ___ U.S. ___ (1974). These cases teach that "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented," United States v. ICC, supra, at 430.
Considered in this light, it would seem that there is the requisite "adversity" here between the parties presenting a genuine case or controversy, and the underlying issue, whether a trial subpoena under Rule 17 (c) of the Federal Rules of Criminal Procedure ought to be quashed, is clearly "a question of the type which we traditionally consider justiciable." There is certainly no doubt that each party is vigorously represented. If this case is different, therefore, it must be because the Special Prosecutor somehow stands on a different footing than the Interstate Commerce Commission, an independent agency. Close examination of this point, however, compels the contrary conclusion.

The Special Prosecutor is not an appointee of the President, but of the Attorney General, and the Attorney General's authority to create and fill this position derives directly from Congress rather than the President. See 28 U.S.C. §§ 509, 510, 515, 533, and 535. This is in accord with the Congress' constitutional authority under Art. II, § 2, "to vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Congressional power over these "inferior officers" is rather complete, and this Court has held that when exercising its power under this clause the Congress may, for example, provide restraints on the Department Head's power to remove the officer. United States v. Perkins, 116 U.S. 483. Additionally, because the power to appoint has
been placed in the Department Head, he only has the power to remove absent any contrary rule established by Congress. \textit{Myers v. United States}, 272 U. S. 52, 151-162, disapproved on other grounds, \textit{Humphrey's Executor v. United States}, 295 U. S. 622, 628.

Thus, although the President has the constitutional obligation to see that the laws are faithfully executed, he does not have the power directly to remove an inferior officer appointed by the Attorney General under his statutory authority; nor does he have the authority to direct the course of any individual litigation, for Congress has explicitly vested that authority in the Attorney General. 28 U. S. C. § 516. This reality was demonstrated in rather practical terms when the President sought the termination of Special Prosecutor Archibald Cox; his only means of obtaining it was to secure an Attorney General who would carry out his wishes. The famous battle of President Jackson over the Bank of the United States illustrates the same point; the President sought withdrawal of deposits from the Bank, but Congress had entrusted that function to the Secretary of the Treasury, and Jackson went through three secretaries before finding one who would follow his wishes. Van Deusen, \textit{The Jacksonian Era}, 1828-1848, at 80-82 (1959).

In the present case the Attorney General has explicitly exercised his authority under 28 U. S. C. § 510, authorizing him to delegate any of his functions, to make a very broad delegation to the Special Prosecutor. That delegation is spelled out in regulations issued by the Attorney General pursuant to his authority under 5 U. S. C. § 501, and vest in the Special Prosecutor virtually all of the Attorney General's statutory authority to control the course of investigations and litigation related to "all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and ap-
appropriate to assume responsibility, allegations involving
the President, members of the White House staff, or
Presidential appointees, and any other matters which he
consents to have assigned to him by the Attorney-
General." 38 Fed. Reg., at 30739. In particular, the
Special Prosecutor was given full authority, inter alia,
freed from the Attorney General to contest the assertion
of "Executive Privilege" or any other testimonial privilege.
Ibid. The regulations then go on to provide:
"In exercising this authority, the Special Pro-
secutor will have the greatest degree of independence
that is consistent with the Attorney-General's statu-
tory accountability for all matters falling within the
jurisdiction of the Department of Justice. The At-
torney General will not countermand or interfere
with the Special Prosecutor's decisions or actions.
The Special Prosecutor will determine whether and
to what extent he will inform or consult with the
Attorney General about the conduct of his duties
and responsibilities. In accordance with assurances
given by the President to the Attorney General that
the President will not exercise his Constitutional
powers to effect the discharge of the Special Prose-
cutor or to limit the independence he is hereby
given, the Special Prosecutor will not be removed
from his duties except for extraordinary impropi-

ties on his part and without the President's first
consulting the Majority and Minority Leaders and
Chairman and ranking Minority Members of the
Judiciary Committees of the Senate and the House
of Representatives and ascertaining that their con-
sensus is in accord with his proposed action."
A subsequent amendment to the regulations added at
the end of the above quoted paragraph that "the jurisdic-
tion of the Special Prosecutor will not be limited
without the President's first consulting with such mem-
bers of Congress and ascertaining that their consensus
is in accord with his proposed action." 38 Fed. Reg.
32,805. Thus not only has the Attorney General vested
broad authority in his appointee, the Special Prosecutor,
but he has provided by regulation, "in accordance with
assurances given the Attorney General by the President,"
that the President will not direct him to terminate or
limit the authority of the Special Prosecutor without
first obtaining the approval of specified members of
Congress.
Duly promulgated federal regulations, such as

the one involved in this case, have the force and effect

of law and will be vigorously enforced by the federal

courts. 3/ See e.g., Accardi v. Shaughnessy, 347

U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957);

Vitarelli v. Seaton, 359 U.S. 535 (1959). Thus, as long

as the regulation establishing the Special Prosecutor's

independent prosecutorial powers remains operative, the

President is powerless to halt the Special Prosecutor's

pursuit of relevant evidence in the President's possession.

As the District Court correctly observed, in the context

of Watergate related litigation the President, "as a

practical matter, is a third party." ___ F. Supp. ___

(1974). To be sure, the President, acting through his

Attorney General, could alter the Special Prosecutor's

legal authority and re-establish his own by revoking the

relevant regulation and then discharging the Special

Prosecutor. But the simple fact is that the President
Duly promulgated federal regulations, such as the one involved in this case, have the force and effect of law and will be vigorously enforced by the federal courts. See e.g., Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959). Thus, as long as the regulation establishing the Special Prosecutor's independent prosecutorial powers remains operative, the President is powerless to halt the Special Prosecutor's pursuit of relevant evidence in the President's possession.

As the District Court correctly observed, in the context of Watergate related litigation the President, "as a practical matter, is a third party." ___ F. Supp. ___ (1974). To be sure, the President, acting through his Attorney General, could alter the Special Prosecutor's legal authority and re-establish his own by revoking the relevant regulation and then discharging the Special Prosecutor. But the simple fact is that the President
has not elected to follow such a course. Rather he has chosen to contest the Special Prosecutor’s authority in the courts. In that circumstance, the courts must respect the executive branch’s voluntary distribution of its prosecutorial authority in Watergate-related cases, by strictly enforcing the executive regulation currently in force.

Once the legal relationship, established by regulation, of the President to the Special Prosecutor is grasped, it is not difficult to perceive that the present case involves a live controversy over issues "of the type which are traditionally judicable." United States v. ICC, supra, at 430. In the context of pending criminal trial, the issues have been sharply joined over the production or non-production of specific evidence subpoenaed in accordance to Rule 17(c) of the Federal Rules of Criminal Procedure.

The Special Prosecutor’s demonstration of need for the evidence has been answered by the President’s claim that production would undermine the confidentiality of
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chosen to contest the Special Prosecutor's authority in the
courts. In that circumstance, the courts must respect
the executive branch's voluntary distribution of its pro-
secutorial authority in Watergate-related cases, by
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trial, the issues have been sharply joined over the
production or non-production of specific evidence relevant
to the government's case. Such evidence is in accordance to
Rule 17(c) of the Federal Rules of Criminal Procedure.
The Special Prosecutor's demonstration of need for the
evidence has been answered by the President's claim that
production would undermine the confidentiality of
executive branch deliberations. Manifestly, the Special
Prosecutor has "such a personal stake in the outcome of
the controversy as to assure that concrete adverseness
which sharpens the presentation of issues upon which the
court so largely depends for illumination of difficult
constitutional questions." Baker v. Carr, 369 U.S.
185, 204 (1962).

In light of that genuine
the concrete adverseness, apparently present in this case.
the technical formality that both parties are officers of
the executive branch simply cannot be elevated to the level
of a jurisdictional bar.

As Justice Frankfurter once said, "So strongly were the framers
of the Constitution bent on securing a reign of law that they endowed
the judicial office with extraordinary safeguards and prestige. No
one, no matter how exalted his public office or how righteous his
private motive, can be judge in his own case. That is what courts
are for. And no type of controversy is more peculiarly fit for ju-
dicial determination than a controversy that calls into question the
power of a court to decide." United States v. Mine Workers, 330
U. S. 258, 308-309.
This is the only conclusion which comports with the
realities of the situation. The office of the Special Prose­
cutor was established explicitly to be an independent
agency in response to the public demand for a prosecutor
who was not subject to the direction of the President
whose activities are intertwined with the investigations
which need be conducted. Following the prior history
of the previous Special Prosecutor, Nader v. Bork, supra,
various bills were introduced in the Congress to re-estab­
lish the office as agency which by law would be wholly
independent of the President, see S. Rep. No. 93-595
and No. 93-596, 93d Cong., 1st Sess. That legislation
was dropped on the basis of assurances to the Congress
that the current regulations would provide the same re­
sult, and that this Special Prosecutor would be wholly
independent under them. See Hearings before the Senate
Committee on the Judiciary on the Special Prosecutor,
93d Cong., 1st Sess., pt. 3, at 671-673. On this basis the
regulations included the extraordinary provisions requir­
ing the President to obtain the consent of specified Mem­
ers of Congress before exercising his authority to direct
the Attorney General to terminate or limit the Special
Prosecutor’s authority. See letter from Acting Attorney
General Bork to Special Prosecutor Leon Jaworski,
November 21, 1973. Indeed, the central concern was to
guarantee the Special Prosecutor’s freedom to determine
on his own authority if there was evidence in the Pres­
ident’s possession which was necessary to carry on his
duties and his right to seek judicial process if necessary
to secure that evidence. See Hearings, supra. The At­
torney General has repeatedly given assurances that the
Special Prosecutor is wholly independent in this regard.

The regulations were carefully drafted to ensure the
Special Prosecutor’s independence in response to these
concerns, and they are unambiguous. It would be in­
consistent with the law, those regulations, and the facts
of this case to conclude anything other than that the
Special Prosecutor has standing to bring this action on
behalf of the United States, and that a justiciable case
or controversy is presented for the Court’s decision.

6 C.J. Humphrey’s Executor v. United States, 295 U. S. 602, and
Wisner v. United States, 357 U. S. 349, limiting the power of the
President to remove a commissioner who has been confirmed by
the Senate and performs adjudicatory functions.

7 See p— and note —, supra.