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Office of the  
Assistant Attorney General

Washington, D.C. 20530

OCT 17 1988

Memorandum for Arthur B. Culvahouse, Jr.  
Counsel to the President

Re: Constitutional Concerns Implicated by Demand for  
Presidential Evidence in a Criminal Prosecution

### Introduction

This memorandum responds to your request for advice regarding certain issues that may arise with respect to possible demands that the President provide evidence in connection with the criminal trial of Oliver North. You have specifically asked that we consider questions with respect to possible demands for presidential trial testimony (whether in person at trial, by deposition, or by written interrogatory) or for the production to the defense of excerpts from the President's personal diaries or the President's previously submitted answers to written interrogatories propounded by the Independent Counsel during his investigation.

Because we have not been informed of the contents of the diary excerpts or interrogatory answers and have only generally been informed of the potential subject of the testimony and the procedural posture of the North case, our advice necessarily focuses on general principles. In particular, our advice considers the following questions of continuing importance to the institution of the Presidency: May a President be required to provide evidence for a criminal trial? May a President be required to testify in person at a trial, or may he provide evidence through other means? What is the applicability and availability of executive privilege in the context of a criminal trial? Can executive privilege be waived with respect to a criminal trial?

#### I. May a President Be Required to Provide Evidence for a Criminal Trial?

The Supreme Court has repeatedly emphasized the principle "that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (citations omitted), quoted approvingly in United

States v. Nixon, 418 U.S. 683, 709 (1974).<sup>1</sup> Consistent with this principle, it has been the rule since the Presidency of Thomas Jefferson that a judicial subpoena in a criminal case may be issued to the President, and any challenge to the subpoena must be based on the nature of the information sought rather than any immunity from process belonging to the President.<sup>2</sup>

While United States v. Nixon of course directly stands for the foregoing proposition, the issue first arose -- and was resolved -- in the 1807 treason trial of Aaron Burr. Sitting as trial judge in the case, Chief Justice Marshall held that a subpoena duces tecum could issue to President Jefferson. United States v. Burr, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692d). Indicating that the issue was not whether the judicial process could issue, but rather whether the President could withhold particular information, the Chief Justice wrote:

If [the subpoenaed documents] contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. If they do not, and are material, they may be exhibited.

Id. at 37.<sup>3</sup> He held that all questions regarding the disclosure

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<sup>1</sup> Wigmore applies this principle directly to the situation of a chief of state:

The public (in the words of Lord Hardwicke) has a right to every man's evidence. . . . Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of chief executive of a state?

There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice.

<sup>8</sup> Wigmore, Evidence § 2370(c) at 748 (McNaughton ed. 1961) (emphasis in original).

<sup>2</sup> It may be possible to argue, however, that any specific evidentiary demand on the President must also meet a higher standard of materiality or relevance. See p. 10, infra.

<sup>3</sup> See also id. at 34 ("The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it."); id. (referring to the need to "protect [the President] from being harassed by vexatious and unnecessary subpoenas") (emphasis added).

of sensitive information "will have . . . due consideration on the return of the subpoena." Id.<sup>4</sup>

II. May a President Be Required to Testify in Person at a Criminal Trial, or May He Provide Evidence in Other Ways?

A. Historical Precedents

Although there are no judicial opinions squarely on point, historical precedent has clearly established that sitting Presidents are not required to testify in person at criminal trials. In the case of Aaron Burr, President Jefferson established the precedent of a President refusing to appear at a criminal trial. Responding to a subpoena duces tecum, President Jefferson declined to bring the subpoenaed documents to court or to testify, and offered instead to testify by written statement and to release such documents as the U.S. Attorney decided could be released consistent with the requirements of government confidentiality. President Jefferson gave the following instructions to the U.S. Attorney handling the prosecution of Burr:

As I do not believe that the district courts have a power of commanding the executive government to abandon superior duties & attend on them, at whatever distance, I am unwilling, by any notice of the subpoena, to set a precedent which might sanction a proceeding so preposterous. I enclose you, therefore, a letter, public & for the court, covering substantially all they ought to desire. If [the subpoenaed documents] may, in your judgment, be communicated without injury, you will be pleased to communicate them.<sup>5</sup>

Ultimately, the U.S. Attorney produced to the court non-confidential excerpts from the subpoenaed documents, along with

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<sup>4</sup> It is important to distinguish the issue of presidential immunity from providing evidence from the issue of presidential immunity from suit. United States v. Burr and United States v. Nixon have made it clear that the former does not exist; as to the latter, the Supreme Court has held that Presidents have absolute immunity from liability for damages based on their official acts. Nixon v. Fitzgerald, 457 U.S. 731 (1982).

<sup>5</sup> 9 The Writings of Thomas Jefferson 63 (Ford ed. 1898) (emphasis in original), quoted in Nixon v. Sirica, 487 F.2d 700, 786 n.121 (D.C. Cir. 1973) (Wilkey, J., dissenting). Judge Wilkey's opinion contains the most thorough discussion of presidential involvement in the Burr trials that we have found. See id. at 781-788.

a "certificate" from President Jefferson, stating his reasons for withholding portions of the subpoenaed documents:

I find in [the documents] some passages entirely confidential, given for my information in the discharge of my executive functions, and which my duties & the public interest forbid me to make public. I have therefore given above a correct copy of all those parts which I ought to permit to be made public. Those not communicated are in nowise material for the purposes of justice on the charges of treason or misdemeanor pending against Aaron Burr; they are on subjects irrelevant to any issues which can arise out of those charges, & could contribute nothing towards his acquittal or conviction.<sup>6</sup>

President Monroe was involved in the next example of presidential evidence being required for a criminal trial. In the 1818 courtmartial of Dr. William Barton, the court served on President Monroe a subpoena to testify at the trial. Relying on the Burr cases, Attorney General Wirt advised the President of the following:

A subpoena ad testificandum may I think be properly awarded to the President of the U.S. My reasons for this opinion are stated by the Chief Justice of the U.S. in the case of Aaron Burr. . . . But if the presence of the chief magistrate be required at the seat of government by his official duties, I think those duties paramount to any claim which an individual can have upon him, and that his personal attendance on the court from which the summons proceeds ought to be, and must, of necessity, be dispensed with . . . .<sup>7</sup>

Following the Attorney General's advice, President Monroe responded to the subpoena with a letter indicating that:

My official duties render it impracticable for me to attend the naval court-martial at the navy yard in Philadelphia; I shall however be ready and willing to communicate in the form of depositions any information

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<sup>6</sup> 9 Writings of Jefferson 64, quoted in Nixon v. Sirica, 487 F.2d at 787.

<sup>7</sup> Opinion of Attorney General Wirt, January 13, 1818, quoted in Rotunda, "Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote," 1975 U. Ill. L. F. 1, 6 (Rotunda).

which I may possess, relating to the subject matter in question there.<sup>8</sup>

Subsequently, instead of requesting a deposition, the court submitted written interrogatories to the President, which the President answered in writing and submitted to the court. Rotunda, at 6.

President Grant voluntarily gave an oral deposition for the criminal trial of his confidential secretary, General Babcock, in the so-called Whiskey Fraud Cases. Grant initially volunteered to travel to St. Louis to testify in person at the trial, but upon hearing objections from his cabinet, he instead gave a deposition in Washington. Rotunda, at 3. In our view, President Grant's submission of evidence has less precedential value than the other cases cited here because it was the result of the President initiating his involvement in the trial, rather than his involvement being requested or demanded by the parties or the court.

The final example of presidential testimony being demanded for a criminal trial concerns a subpoena for testimony that was issued to President Ford in the trial of Lynette ("Squeaky") Fromme for attempting to assassinate the President. The trial court held that the subpoena should issue, subject to the following qualification:

In recognition of the high office of the President and being mindful of the inconvenience and burden the subpoena will impose upon him, the court will not require the President to come to court to present his testimony, but rather, will "bring" the court to the President [by taking a video tape deposition of the President].

U.S. v. Fromme, 405 F. Supp. 578, 583 (E.D. Cal. 1975). President Ford acquiesced in the court's ruling and submitted to the deposition, which was presented at trial at the beginning of the defendant's case.

The foregoing demonstrates that since the time of Jefferson the historical practice has been that Presidents are not expected to attend trials as witnesses, and they have not attended. The rationale for this practice, as first developed by President Jefferson and Chief Justice Marshall during the Burr trials, and consistently followed thereafter, was perhaps most succinctly stated in Attorney General Wirt's advice to President

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<sup>8</sup> Quoted in Office of Legal Counsel Memorandum, dated February 14, 1974, Re: Historical Data Involving Subpoenaing of and Testimony by the President, at 3.

Monroe that "if the presence of the chief magistrate be required at the seat of government by his official duties . . . his personal attendance on the court . . . must . . . be dispensed with." Rotunda, at 6 (emphasis added). Indeed, in his advice to President Monroe, the Attorney General stressed "the fact that . . . Congress is now holding one of its regular sessions, during which [the President's] presence is so peculiarly necessary at the seat of the government." Id.

As stated, the controlling principle that emerges from the historical precedents is that a sitting President<sup>9</sup> may not be required to testify in court at a criminal trial because his presence is required elsewhere for his "official duties" -- or, in the vernacular of the time, required at "the seat of government."<sup>10</sup> Beyond this, executive privilege considerations may attach to specific confidential information.

B. Out-of-Court Testimony -- Considerations Relevant to Depositions and Interrogatory Answers

The above-cited historical precedents do not fully resolve whether there is also a basis for a President to refuse a demand that he submit out-of-court testimony for a criminal trial by deposition, rather than interrogatory answers. While both would be intrusive upon the time the President would otherwise devote

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<sup>9</sup> With respect to a former President, however, we do not believe that there is a complete bar to testifying in person at trial: A former President is by and large not required for "official duties." Depending on the circumstances, therefore, we believe that a court might require a former President to testify in person about events occurring during his tenure in office. It should be stressed, however, that to the extent the testimony of the former President would relate to confidential information from that President's tenure, the former President may assert executive privilege. Nixon v. Administrator of General Services, 433 U.S. 425, 448-49 (1977).

<sup>10</sup> By referring to this somewhat quaint terminology, we do not mean to suggest that the exemption from in-court testimony is somehow geographical. Rather, as Attorney General Wirt's advice to President Monroe reveals, the exemption for the sitting President is out of respect for the magnitude of the President's "official duties" and the desire to avoid interference therewith. Accord, Jefferson's comment that the district courts have not the power to command the President to "abandon superior duties," footnote 5, supra, and accompanying text; Wigmore, supra, § 2371, at 752 ("The exemption from attendance accorded to the chief executive of a state thus is based upon the priority of his official duties and is recognized as resting upon this ground.").

to official duties, we do not believe that a President could totally resist providing testimony on this basis. In this regard, Chief Justice Marshall made it clear that judicial process demanding evidence for a criminal trial may be issued to a President and any objection must be based on the particular information sought.<sup>11</sup> The historical precedents are consistent with the overriding principle, reiterated in United States v. Nixon, "that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." 418 U.S. at 709, quoting Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (citations omitted).

There is some historical practice, however, suggesting that as a general rule high government officials provide their evidence by written interrogatory answers rather than oral depositions.<sup>12</sup> Some case law also asserts this proposition.<sup>13</sup> However, to the extent the cases cite any legal (as opposed to practical) basis for this practice, it is "the rule enunciated by the Supreme Court in United States v. Morgan, 313 U.S. 409, 422 (1941), that top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985) (emphasis added).

As the underlined language suggests, the Morgan rule is more directed at the content of the information sought than the method by which it is provided. The pertinent discussion from Morgan is worth quoting at length:

The Secretary . . . appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, includ-

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<sup>11</sup> See footnotes 2-3, supra, and accompanying text.

<sup>12</sup> See generally, Memorandum to the Attorney General from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Presidential Amenability to Judicial Subpoena 7-8 (June 25, 1973).

<sup>13</sup> See, e.g., Peoples v. United States Department of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970) ("subjecting a cabinet officer to oral deposition is not normally countenanced"); Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979) ("Heads of government agencies are not normally subject to deposition . . . and the district court's order directing [the Administrator of the Small Business Administration] to answer interrogat[ories] in lieu of a deposition does not appear unreasonable.").

ing the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. . . . But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

Morgan, 313 U.S. at 422 (citations omitted).

Although various cases have cited Morgan -- without indicating the underlying rationale -- for the proposition that cabinet officers are not normally subjected to depositions,<sup>14</sup> the Morgan rationale does not represent a blanket judicial preference for interrogatories over depositions, but rather amounts to a rule that high government officials should not generally be examined (whether in live testimony at trial or by deposition or written interrogatories) about their decisionmaking process. Nevertheless, despite the analytical imprecision of the cases relying on Morgan, we believe that similar separation of powers and executive privilege considerations can be argued to favor interrogatory answers over depositions for presidential testimony. The direct adversarial questioning of a President in a deposition, combined with the more spontaneous nature of depositions, can create an unacceptable risk that sensitive governmental information might be inadvertently revealed.<sup>15</sup> In light of the high

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<sup>14</sup> See footnote 13, supra.

<sup>15</sup> President Ford's willingness to give a deposition is not an apposite precedent with respect to the North trial. Because of the nature of the case, there was no significant risk that the deposition would enter confidential areas: the issue was limited to the President Ford's knowledge of the attempted assassination. In contrast, we assume the North case directly concerns a variety  
(continued...)



degree of judicial deference that must be given to presidential determinations regarding confidential information,<sup>15</sup> and because "a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual'," Nixon, 418 U.S. at 715, we believe that direct questioning of a President in a deposition setting is inappropriate.

Insisting upon a distinction between a deposition and interrogatory answers is, of course, only an indirect means of protecting confidential executive branch information. As contemplated by Chief Justice Marshall in the Burr cases, and as explicitly recognized by a unanimous Court in United States v. Nixon, the direct or principal means of protecting such information is to assert executive privilege in response to a subpoena or other demand for evidence.

### III. What is the Applicability and Availability of Executive Privilege in the Context of a Criminal Trial?

The doctrine of executive privilege defines the constitutional authority of the executive branch to protect documents or information in its possession from public disclosure and from the compulsory process of the legislative and judicial branches. Executive privilege protects material the disclosure of which would significantly impair the conduct of foreign relations, the national security, or the performance of the Executive's lawful duties. It also may shield from compulsory disclosure confidential deliberative communications within the executive branch where there is an absence of a strong showing of need by the branch seeking disclosure that access to such communications is necessary for the fulfillment of its constitutional functions. See generally, United States v. Nixon; Nixon v. Administrator of General Services, 433 U.S. 425, 441-55 (1977); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730-31 (D.C. Cir. 1974) (en banc).

The seminal Supreme Court case on application of executive privilege in the context of a criminal trial is the unanimous decision in United States v. Nixon, which concerned the Watergate Special Prosecutor's subpoena duces tecum for the production

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<sup>15</sup>(...continued)  
of secret or confidential actions and deliberations by or within the executive branch. If this assumption is correct, governmental confidentiality considerations would be directly and substantially implicated in any deposition of the President in the North case.

<sup>16</sup> See discussion of Burr and Nixon, footnote 19, infra, and accompanying text.

before trial of tapes and documents relating to communications involving President Nixon and his aides. Although the case concerned a subpoena for documents, we are confident that its rationale also applies to a subpoena for presidential testimony as well. Applying Nixon to the present context, we believe the defendant must first meet a greater burden of justification for a subpoena directed to the President.<sup>17</sup> In this regard, the Court stated in Nixon that

where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of Government, should be particularly meticulous to ensure that the standards of Rule 17(c) have been correctly applied.

418 U.S. at 702. See generally, id. at 713-16. Based on this comment, it is reasonable to argue that the materiality, relevance, and other requirements of Rule 17 (and its case law) entail a greater burden of justification in the case of a demand for presidential evidence for a criminal trial.<sup>18</sup> How great that burden is, however, has remained unspecified beyond the Supreme Court's fragmentary comment.

Assuming that these Rule 17 considerations are met, presidential evidence still may not be required to be produced where non-disclosure is necessary to maintain the integrity of the deliberative process or protect state secrets, or both. While the Court made it clear in Nixon that it is the judiciary rather than the President which is the final arbiter on claims of executive privilege (id. at 705), the Court also stressed that considerable deference will be given to a President's determinations in this area, holding that "the Judiciary [must] accord[] high respect to the representations made on behalf of the President" (id. at 707).<sup>19</sup>

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<sup>17</sup> See footnote 2, supra.

<sup>18</sup> Rule 17 of the Federal Rules of Criminal Procedure governs the issuance of subpoenas in federal criminal cases.

<sup>19</sup> The Court supported this proposition with a citation to the opinion in the misdemeanor trial of Aaron Burr (which promptly followed Burr's treason trial in 1807), where Chief Justice Marshall recognized that:

[The President] may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. . . . I admit, that in such a case, much reliance must be placed on the declaration  
(continued...)

A. Deliberative Process Component of Executive Privilege

A qualified privilege against disclosure to the judiciary or Congress exists for executive branch deliberative process information. Although there is "a presumptive privilege for Presidential communications," Nixon, 418 U.S. at 708, "when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises." Id. at 706. In Nixon the Court "weigh[ed] the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice." Id. at 711-12. Contrasting the Executive's general interest in confidentiality and the judiciary's specific interest in a fair trial, the Court held in Nixon 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 [this] privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Id. at 713.

The Court stated throughout its opinion that, although the Executive's presumptive privilege for presidential communications must submit to the specific need for information in a criminal trial, the party seeking presidential evidence faced a high burden of "demonstrat[ing] that the Presidential material was 'essential to the justice of the [pending criminal] case.'" Id., quoting United States v. Burr, 25 Fed. Cas. at 192. The Court instructed the district court to be guided by the standard enunciated by Chief Justice Marshall in Burr:

[T]he District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded

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19 (...continued)  
of the president. . . . The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons.

United States v. Burr, 25 F. Cas. 187, 191-192 (C.C. Va. 1807) (No. 14,694).

that high degree of respect due the President of the United States. . . . It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to Presidential records that high degree of deference suggested in United States v. Burr . . . .

Id. at 714-715.

Again, we are unable to advise you specifically as to how the Nixon standards would be applied to a claim of privilege with regard to the North trial because we are not aware of the content of the potentially privileged material or of the kind of showing of need for the material that the defendant could make. We stress, however, that the Nixon holding -- that a specific need for evidence for a criminal trial outweighs the generalized need for executive branch confidentiality -- applies only to claims based on the deliberative process privilege; it does not apply to claims based on the component of executive privilege protecting military, diplomatic, and national security secrets.

B. State Secrets Component of Executive Privilege

In the hierarchy of executive privilege, the protection of national security constitutes the strongest interest that can be asserted by the President and one to which the courts have traditionally shown the utmost deference.<sup>20</sup> While the Supreme

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<sup>20</sup> The Supreme Court has expressly recognized the constitutional authority of the President to protect national security information:

The President, after all, is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art II, § 2. His authority to . . . control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

Department of the Navy v. Egan, 108 S. Ct. 818, 824 (1988). The secrecy of national security information is of elemental importance. (continued...)

Court has never explicitly so held, for the reasons set forth below we believe that this high degree of judicial deference arguably amounts to an absolute privilege.<sup>21</sup> To the extent that the privilege is viewed as absolute, no showing of need for the

20 (...continued)  
tance to the discharge of the President's constitutional authority with regard to national security:

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power [is] largely unchecked by the Legislative and Judicial branches . . . .

[I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. . . . In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . . [I]t is clear to me that it is the constitutional duty of the Executive -- as a matter of sovereign prerogative and not as a matter of law as the courts know law -- . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

New York Times Co. v. United States, 403 U.S. 713, 727-730 (1971) (Stewart, J., concurring).

21 This Office has previously made the observation that the state secrets privilege is "an arguably absolute executive privilege". 6 Op. O.L.C. 481, 482 (1982) (emphasis added). Some lower courts have gone further and actually held that the privilege is absolute. See, e.g., Halkin v. Helms, 598 F.2d 1, 7 (D.C. Cir. 1978) (holding that "[t]he state secrets privilege is absolute," and permitting the district court to examine an affidavit in camera in order to satisfy itself of the validity of the claim of privilege with respect to the underlying information); National Lawyers Guild v. Attorney General, 96 F.R.D. 390, 398 (S.D. N.Y. 1982) (state secrets privilege is "an absolute rather than a qualified privilege") (emphasis in original).

privileged material can overcome the privilege; in other words, there is no balancing of the competing needs of the judicial and executive branches.

Language in United States v. Nixon strongly suggests that even an in camera inspection of national security documents may be inappropriate when a court is satisfied that there exists a reasonable danger of disclosure of state secrets:

[President Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In C. & S. Air Lines v. Waterman S.S. Corp., 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."

In United States v. Reynolds, 345 U.S. 1 [,10] (1953), . . . 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."

418 U.S. at 710-11.

The clearest intimation from the Court that it views the state secrets privilege as an absolute privilege is contained in United States v. Reynolds:

In each case, the showing of necessity [for access to the documents] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim

of privilege if the court is ultimately satisfied that military secrets are at stake.

345 U.S. 1, 11 (1953) (footnote omitted) (emphasis added).

Based on the foregoing, we believe that if defendant North demands any presidential evidence that may legitimately be protected under the state secrets component of executive privilege,<sup>22</sup> arguably no showing of need for the evidence can overcome the privilege.

C. Effect on the Prosecution if the President Withholds Evidence on the Basis of Executive Privilege

The Supreme Court has enunciated the rule that if the government withholds evidence in a criminal case on the basis of a governmental privilege, and the information is material to the defendant's defense, the case must be dismissed:

We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to . . . produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.

Jencks v. United States, 353 U.S. 657, 672 (1957) (citation omitted). The Court relies on the following rationale:

[I]n criminal causes ". . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an

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<sup>22</sup> Perhaps because the state secrets privilege is so well-established, there have been relatively few court decisions or controversies with Congress concerning it. As a result, there is no commonly accepted definition of the scope of the privilege. We believe the most useful and controlling statement on its scope is the Supreme Court's reference in United States v. Nixon to protection of "military, diplomatic, or sensitive national security secrets." 418 U.S. at 706. See also Wigmore, supra, §2378 at 794 ("the scope of [the privilege] is limited to non-disclosure of matters relating to international relations, military affairs, and public security").

accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

Id. at 671, quoting United States v. Reynolds, 345 U.S. at 12.23

Both Jencks and Reynolds followed the holdings in this area of the Second Circuit Court of Appeals, principally the opinion of Judge Learned Hand in United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944). Judge Hand's opinion provides perhaps the best guidance on how the Jencks rule should apply with respect to the North prosecution. Writing in a case "involv[ing] the prosecution of a crime consisting of the very matters recorded in the suppressed document, or of matters nearly enough akin to make relevant the matters recorded," id., Judge Hand opined that:

While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line

23 It might be argued that the Jencks rule should not apply in the context of a prosecution by an Independent Counsel, because the prosecutor for the government in such a case is insulated to a degree from the President, see Morrison v. Olson, 108 S. Ct. 2597, 2602-2605 (1988), and therefore (applying the language of Jencks) it is technically not "the Government which prosecutes an accused . . . [that is also] invok[ing] its governmental privileges to deprive the accused" of what he needs for his defense. We do not find this argument to be compelling, however, because the Independent Counsel is an executive branch employee and in our view is not so independent from the President that what would be "unconscionable" (to again borrow from Jencks) if the prosecutor were a regular Department of Justice employee would become acceptable where the prosecutor is an Independent Counsel.



between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively.

Id. (emphasis added).

The first underlined portion of Judge Hand's opinion makes the essential point for purposes of the North prosecution. If that prosecution is "founded upon those very dealings to which [the privileged presidential evidence] relate, and whose criminality they will, or may, tend to exculpate," then the Jencks rule should come into play. Thus, "[s]o far as [the privileged evidence] directly touch[es] the criminal dealings," the government will have to choose between producing the evidence and proceeding with the prosecution, on the one hand, and withholding the evidence and dismissing the case on the other.

With respect to the second underlined portion of Judge Hand's opinion, we believe that the special treatment accorded presidential evidence under Burr and Nixon may provide a basis for drawing the line between directly and indirectly relevant evidence that Judge Hand declined to draw. In light of the arguably higher burden of justification required for a demand for presidential evidence in a criminal case, we believe that it can fairly be argued that if presidential evidence is withheld in the North case on a claim of executive privilege, the prosecution would have to be dismissed only if it is directly relevant -- i.e., only if (in Judge Hand's formulation) the prosecution is "founded upon those very dealings to which [the privileged evidence] relate, and whose criminality they will, or may, tend to exculpate."

#### IV. Can Executive Privilege Be Waived With Respect to a Criminal Trial?

You have specifically asked us to consider whether there may been a waiver of executive privilege with respect to the North trial because certain information has been provided to the congressional investigating committees and the Independent Counsel. We understand that congressional staff and representatives of the Independent Counsel have been permitted to examine and take notes on, but not reproduce, excerpts from the President's diaries. We further understand that the President has submitted written interrogatory answers to the Independent Counsel<sup>(1)</sup> since two of those answers have been produced to defense counsel as Brady

material,<sup>24</sup> the waiver issue must necessarily pertain to the diary excerpts or other interrogatory answers that need not be produced to the defense under Brady or any requirement of the Federal Rules of Criminal Procedure<sup>25</sup> or the Jencks Act.<sup>26</sup>

The legal question presented is whether a President may be precluded, on a waiver theory, from asserting executive privilege as to certain documents or information because he has previously made available related information that could have been protected by executive privilege. We do not believe that executive privilege can be waived. A doctrine of implied waiver of executive privilege would be inconsistent with the very nature of the privilege. The privilege is based on the principle that the President has the responsibility to withhold information the disclosure of which would be inconsistent with the public interest. This purpose would be jeopardized if harmful information had to be disclosed merely because the President permitted the release of related information that could be released safely. A waiver theory would have the effect of requiring the concealment of much information which would otherwise be released, merely because it is connected with sensitive information. Thus, as discussed below, the correct question with respect to particular information is not whether executive privilege has been waived, but rather whether it remains the kind of confidential information with respect to which executive privilege may be asserted.<sup>27</sup>

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<sup>24</sup> Under the Brady rule, the prosecution is required to disclose evidence favorable to the defendant. Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

<sup>25</sup> See Rule 16(a) ("Disclosure of Evidence by the Government").

<sup>26</sup> The Jencks Act makes the pre-trial statements of government witnesses discoverable for purposes of cross-examination at trial. 18 U.S.C. 3500.

<sup>27</sup> The inappropriateness of applying waiver theory to executive privilege becomes particularly evident when its application is considered in the congressional-executive branch context. It is well-established that the executive branch has a duty to seek to accommodate legitimate congressional requests for deliberative process information. See generally, Memorandum for Paul Schott Stevens, Executive Secretary, National Security Council, from Douglas W. Kmiec, Acting Assistant Attorney General, (continued...)

Neither United States v. Nixon nor any other Supreme Court opinion that we are aware of discusses whether executive privilege can be waived. However, a number of the opinions in the lower court cases leading up to Nixon did address the issue, and in our view these opinions support the view that executive privilege cannot be waived. The most thorough discussion of the issue is found in that part of the opinion by Judge MacKinnon in Nixon v. Sirica, which discusses whether President Nixon's statement authorizing his counsel and aides to testify before Congress on their conversations with the President constituted a waiver of executive privilege with respect to tape recordings of those conversations.<sup>28</sup>

Judge MacKinnon did not go so far as to say there can never be a waiver of executive privilege. Instead, he posited that "standards employed to determine [the privilege's] waiver [should] be as rigorous as those applied to protect constitutional rights generally," that "the presumption is against waiver of fundamental or constitutional rights," and that therefore "any rule on waiver of presidential privilege [should] be formulated to, at once, preserve the privilege to the greatest extent consistent with the public interest and promote as full disclosure by high public officials as possible." Id. at 759-760. Applying these principles, Judge MacKinnon concluded that:

In this case that goal would best be achieved by holding that the privilege has not been waived. The policy favoring openness in government dictates that a President should be able to disclose certain selected information relevant to topics of national concern and to permit testimony by subordinate executive officers on such topics, without being compelled to make a complete disclosure of that which is essential properly to maintain the confidentiality and integrity of advice and information furnished to the Presidency.

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<sup>27</sup> (...continued)

Office of Legal Counsel, Re: GAO Investigation Concerning Manuel Noriega 10-13 (Aug. 16, 1988). This duty of accommodation means that the Executive should attempt to satisfy the requests of Congress as completely as it can without making harmful disclosures. It is evident that if the Executive were required to operate under a "withhold or waive" regime with regard to information that might be subject to a claim of executive privilege, it would become extremely cautious concerning discretionary disclosures and thus significantly impaired in its ability to accommodate legitimate congressional requests.

<sup>28</sup> 487 F.2d 700, 758-761 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part).

Id. at 760-61.

As noted by Judge MacKinnon, the Nixon v. Sirica majority "prefer[red] not to confront this problem directly, but merge[d] what is essentially a question of waiver into its initial balancing process to determine that the need to preserve confidentiality in this case is lessened." Id. at 761. Nonetheless, we read the majority opinion to be consistent with the view that the privilege cannot be waived. In addressing the question in terms of the confidentiality of the requested information, rather than waiver, the majority takes the correct approach: Executive privilege may not be claimed for information that is not confidential; the point is not that the privilege may have been waived, but rather that the privilege does not apply to non-confidential information. Thus, the majority found that because of the public testimony on certain conversations with the President, "[t]he simple fact is that the conversations are no longer confidential." Id. at 718. It is not necessary to agree with the majority's factual conclusion to agree with its focus on confidentiality rather than waiver.

Judge Sirica's subsequent opinion concerning the trial subpoena directed at President Nixon,<sup>29</sup> United States v. Mitchell, 377 F. Supp. 1312 (1974), took a similar approach, when it referred to executive privilege as being "relinquished" rather than "waived." Judge Sirica found that he would review only those

claims of privilege where the privilege has not been relinquished. In citing relinquishment of privilege, the Court has reference to the portions of subpoenaed recordings which the President has caused to be reduced to transcript form and published. For such, the Court finds the privilege claimed non-existent since the conversations are, to that extent at least, no longer confidential. See Nixon v. Sirica, supra, 487 F.2d at 718.

377 F. Supp. at 1330. Thus, Judge Sirica focused on the fact that executive privilege does not apply to information that is no longer confidential; he did not suggest that the privilege can be waived.<sup>30</sup>

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<sup>29</sup> Nixon v. Sirica concerned the Watergate grand jury's attempt to obtain the tapes and other information.

<sup>30</sup> The view that executive privilege cannot be waived is also supported by a congressional precedent. During the Army-McCarthy hearings of the 1950s, Secretary of the Army Adams had

(continued...)

In brief, we do not believe that executive privilege can be waived. The correct inquiry does not involve waiver, but rather whether the particular information remains confidential after partial disclosure or disclosure of related material, and therefore subject to a claim of executive privilege.<sup>31</sup> Thus, the question with respect to the North case is whether the prior, limited disclosure to the Independent Counsel and congressional staff of diary excerpts and interrogatory answers destroyed their confidentiality. We necessarily must leave that determination to others more familiar with the substance of the material previously disclosed.

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30 (...continued)  
testified that a cabinet level meeting had been held in the office of the Attorney General. Special Senate Investigation, Hearing before the Special Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 83d Cong., 2d Sess., 1059 (1954). Secretary Adams testified about some of the matters discussed at that meeting. However, when Senator Symington asked for further particulars (id. at 1169-70), President Eisenhower claimed executive privilege. Id. at 1249. Chairman Mundt upheld the claim (id. at 1256), in spite of the objections by Senators Symington and Jackson that the privilege had been waived as the result of the partial disclosure of the discussion at the meeting. Id. at 1169-70, 1257, 1259.

31 Professor Alexander Bickel took this same view with regard to the Watergate tapes:

[T]he issue is not whether the President has waived his privilege to keep the tapes secret. To the extent that it exists and with respect to matter that it covers, I do not see how the privilege can be waived. Naturally, if a document or a tape is no longer confidential because it has been made public, it would be nonsense to claim that it is privileged, and nobody would trouble to subpoena it either, since it would be available. But nature and reason of the privilege are rather to repose in the President and in him alone the subjective judgment whether to maintain privacy or release information -- and which, and how much, and when, and to whom. Far from being waived, the privilege, it seems to me, is as much exercised when information is released as when it is withheld.

Bickel, Wretched Tapes, N. Y. Times, Aug. 15, 1973, at 37; quoted in Nixon v. Sirica, 487 F.2d at 761 n.128.

### Conclusion

A sitting President may be required to provide evidence for a criminal trial, but he may not be required to testify in person at the trial. While a President may be required to provide evidence by way of deposition or interrogatory answers, reasonable arguments premised on historical practice and the separation of powers favor the latter. Depending on the nature of the evidence demanded for a criminal trial, a President may assert either the deliberative process or state secrets component of executive privilege. Whether this assertion of privilege defeats the prosecution will depend on whether the evidence is directly relevant to the defense, as determined on the basis of an arguably higher burden of justification required for a demand for presidential evidence for a criminal trial. Finally, executive privilege cannot be waived; the proper inquiry is whether at the time the privilege is sought to be asserted the material remains confidential.



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