

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

E. Sasser
FILED
NOV 26 1973
JAMES F. DAVEY, Clerk

IN RE GRAND JURY SUBPOENA DUCES TECUM)
ISSUED TO RICHARD M. NIXON, OR ANY)
SUBORDINATE OFFICER, OFFICIAL OR)
EMPLOYEE WITH CUSTODY OR CONTROL OF)
CERTAIN DOCUMENTS OR OBJECTS)

Misc. No. 47-73

ANALYSIS, INDEX AND PARTICULARIZED CLAIMS OF
EXECUTIVE PRIVILEGE FOR SUBPOENAED MATERIALS

Pursuant to the special court procedures issued on October 30, 1973, the President of the United States through his counsel submits herewith an analysis and an index of the subpoenaed materials, and particularized claims of executive privilege where applicable.

All materials subpoenaed are primarily identified in the subpoena as related to one of a series of specified conversations, one of which was a telephone conversation and the remainder of which were conducted in personal meetings. For each conversation, the subpoena demands production of "1. All tapes and other electronic and/or mechanical recordings or reproductions, and any memoranda, papers, transcripts or other writings, relating to" the specified conversation.

This submission treats each conversation covered by the subpoena separately, in the order of the subparagraphs of Paragraph 1 of the subpoena. (The materials covered by Paragraphs 2 and 3 of the subpoena were voluntarily provided by the President to the Special Prosecutor for the Grand Jury's use when the subpoena was issued.)

PART I

Item 1(a) of the subpoena relates to "Meeting of June 20, 1972, in the President's Executive Office Building ("EOB") office involving Richard Nixon, John Ehrlichman and H. R. Haldeman from 10:30 a.m. to noon (time approximate)."

The President's daily diary log for June 20, 1972 (Exhibit 13) shows that the President met alone with his Assistant, John D. Ehrlichman, from 10:25 to 11:20 a.m. in his "EOB" office. Subsequently, the President met with his Assistant, H. R. Haldeman from 11:26 a.m. to 12:45 p.m. in his "EOB" office.

A. Conversation between the President and John D. Ehrlichman, from 10:25 to 11:20 a.m. in the President's "EOB" office.

(1) Tape recording

This conversation was recorded on tape by the sound actuated recording system described in testimony in the evidentiary hearing held by this Court, and the tape recording is being submitted as Item I.A.1. covered by the subpoena.

(a) Analysis

This conversation relates primarily to the Higher Education Bill then under consideration by the Congress. Other subjects discussed include school busing, the Supreme Court decision (U.S. v. U.S. District Court) on national security wiretapping, press conferences and press conference formats, legislative action on proposals for welfare reform and the Stockholm Conference on environment. During the conversation, the President conversed on the telephone with a Deputy Assistant, Edward L. Morgan, about the higher education legislation.

There is no discussion or comment which relates, either directly or indirectly, to the incident at the Democratic National Committee offices at Watergate which occurred a few days prior to the conversation.

(b) Index

The playing time for the tape recording of this conversation is approximately 54 minutes and 17 seconds. Playing time of the tape preceding significant portions of the conversation are as follows:

Blank?

(a) Analysis

None necessary.

(b) Index

None necessary.

(c) Particularized Claim of Executive Privilege

Item I.A.2. are notes of the same conversation which was recorded on Item I.A.1., and subject to the same claim of Executive Privilege. It should not be submitted to the Grand Jury.

B. Conversation between the President and his Assistant, H. R. Haldeman, from 11:26 a.m. to 12:45 p.m. in the President's "EOB" office.

(1) Tape recording

This conversation was recorded on tape by the sound actuated recording system described in testimony in the evidentiary hearing held by this Court, and the tape recording is being submitted as Item I.B.1. covered by the subpoena.

(a) Analysis

This conversation relates primarily to scheduling and travel. For a portion of this recording, in lieu of any audible conversation there is a constant hum. (See "B.1.(c), below.") At one point during the meeting, the President spoke on the telephone to his daughter, Julie. None of the recorded conversation relates to Watergate.

(b) Index

Between Item I.A.1. and Item I.B.1., there is a lapsed playing time on the tape of approximately 3 minutes and 10 seconds, during which the President requests consommé and speaks to the steward about minor administrative matters. The tape records various noises of movement. The playing time of the tape recording from the point where H. R. Haldeman enters the office to his departure

is approximately 54 minutes and 49 seconds. The playing time of the tape preceding significant portions of the conversation are as follows:

<u>Event</u>	<u>Playing Time from Beginning of Recording of this Conversation</u>
Start of "hum" signal	3 minutes 40 seconds
End of "hum" signal	21 minutes 55 seconds
Telephone conversation	47 minutes 0 seconds

(c) Explanation of "hum"

It is believed that the hum which occurs approximately 3 minutes and 40 seconds from the beginning of this conversation between President Nixon and H. R. Haldeman, and which continues for approximately 18 minutes and 15 seconds was caused by the depression of a record button during the process of reviewing the tape, possibly while the recorder was in the proximity of an electric typewriter and a high intensity lamp.

The incident was detected and reported when made to the President, and shortly thereafter to White House counsel, J. Fred Buzhardt, as having occurred on a portion of the tape recording subsequent to that of the meeting between the President and John Ehrlichman, which at that time and until November 14, 1973, was believed to be the only part of that recording subpoenaed. The incident was therefore believed to be inconsequential.

The delay in discovering that the incident affected a portion of the tape containing a subpoenaed conversation was due to the ambiguity of the language of the subpoena. The applicable portion of the subpoena, dated July 23, 1973, is:

"1. All tapes and other electronic and/or mechanical recordings or reproductions, and any memoranda, papers, transcripts and other writings, relating to:

"(a) Meeting of June 20, 1972, in the President's Executive Office Building ("EOB") office involving Richard Nixon, John Ehrlichman and H. R. Haldeman from 10:30 a.m. to noon (time approximate.)"

In the remainder of the subpoena applicable to tape recordings, each separate meeting is subpoenaed as a separate item. Accordingly, item 1(a) of the subpoena was initially assumed to be applicable to only one meeting.

An examination of the President's daily log revealed that there was no meeting with the President on the morning of June 20, 1972 in which both Mr. Ehrlichman and Mr. Haldeman participated. Mr. Ehrlichman, however, met with the President from 10:25 a.m. to 11:20 a.m. This meeting most nearly coincided with the time specified in the subpoenas.

In addition, the public testimony given by Messrs. Haldeman and Ehrlichman indicated that it was Mr. Ehrlichman's conversation in which the Special Prosecutor would have an interest.

White House counsel is not aware of any testimony given by Mr. Haldeman relating to a meeting with the President on June 20, 1972.

Mr. Ehrlichman, however, was examined in some detail by the Senate Select Committee on his meeting with the President on June 20, 1972. (Senate Transcript. pp. 5363-5369, July 24, 1973; p. 5925, July 30, 1973). On July 24, 1973, Mr. Ehrlichman testified, in answer to questions by Senator Baker, that he had no recollection or notes of having discussed Watergate at this meeting

with the President, but rather, met with the President because he "needed some decisions and some marching orders" on a particular legislative subject (Tr. 5366). Subsequently, on July 30, 1973, Mr. Ehrlichman testified:

"I told Senator Baker, I believe, the other day that Watergate was not discussed at that meeting and since then I have rechecked what sketchy notes I have and I find I was in error on that. I am sure there must have been some discussion of the Watergate with the President on that occasion on the 20th.

"There were three principal subjects covered at that meeting. One of them was government wire-tapping and it is obvious to me that there must have been some Watergate discussion that led into this discussion in which I took an assignment from him to get some statistics for him about the incidents of Federal wiretapping in domestic-foreign situations, that is, situations involving U.S. citizens and foreign governments which was a statistic he did not have and which he wanted.

"Now, I am surmising and reconstructing because I have no direct notes on this, but I am just -- I am just certain that we did discuss Watergate at the outset of that meeting."

It was not until the evening of Wednesday, November 14, 1973, when copies of the subpoenaed tapes were provided for White House counsel's use in preparing the index and analysis required under the court's direction, that all materials remotely relating to the subpoenaed conversations were reviewed to assist in preparing the analysis. Among the materials then reviewed was the opinion of the United States Court of Appeals for the District of Columbia, Nixon v. Sirica, decided October 12, 1973. Appendix II, beginning at page 48 of the opinion, is a memorandum filed by the Special Prosecutor with this court on August 13, 1973. The first numbered item of that memorandum is as follows:

"1. Meeting of June 20, 1972. Respondent met with John D. Ehrlichman and H. R. Haldeman in his Old Executive Office Building (OEOB) office on June 20, 1972, from 10:30 a.m. until approximately 12:45 p.m. There is every reason to infer that the meeting included discussion of the Watergate incident. The break-in had occurred on June 17 -- just three days earlier. Dean did not return to Washington until June 18 (S. Tr. 2166). Mitchell, Haldeman and LaRue had also been out of town and did not return until late on June 19 (S. Tr. 3305, 3307, 6195). Early on the morning of June 20, Haldeman, Ehrlichman, Mitchell, Dean and Attorney General Kleindienst met in the White House. This was their first opportunity for full discussion of how to handle the Watergate incident, and Ehrlichman has testified that Watergate was indeed the primary subject of the meeting (S. Tr. 5923-5924). From there, Ehrlichman and then Haldeman went to see the President. The inference that they reported on Watergate and may well have received instructions, is almost irresistible. The inference is confirmed by Ehrlichman's public testimony that the discussion with respondent included both Watergate and government wiretapping (S. Tr. 5924-25). The contemporary evidence of that meeting should show the extent of the knowledge of the illegal activity by the participants or any effort to conceal the truth from the respondent."

Only the most careful reading of even this memorandum discloses that the Special Prosecutor seeks a recording of more than one meeting on June 20, 1972. Only two indicators are present. First, the ending time of the "meeting" in the memorandum is 12:45 p.m., rather than the approximation of "noon" as specified in the subpoena. Second, the word "then" in the sentence "From there, Ehrlichman and then Haldeman went to see the President" indicated the Special Prosecutor sought recordings of two sequential meetings.

White House Special Counsel J. Fred Buzhardt received an inquiry on September 28, 1973, as to the conversation covered by the first item of the subpoena, to which he replied that the conversation at the meeting with Ehrlichman was what was involved, and that the Special Prosecutor must have been mistaken in assuming that Haldeman also was in the meeting. This response was relayed to the President and to Mr. Steve Bull.

(d) Particularized Claim of Executive Privilege

The conversation on the tape recording of the meeting between H. R. Haldeman and the President consists of advice to the President by a senior advisor on official decisions then pending before the President. None of the conversation recorded relates to Watergate.

The President believes that the conversation is subject in its entirety to a claim of Executive Privilege in order to protect the confidentiality of advice given to the President. There is nothing in this conversation "concerning possible criminal conduct or discussions of possible criminal conduct" as to testimony concerning which the President announced he would not invoke Executive Privilege on May 22, 1973.

This particularized claim of Executive Privilege should be sustained as to Item I.B.1., and this tape recording should not be submitted by the Court to the Grand Jury.

(2) Memorandum (Notes of H. R. Haldeman)

A file search has disclosed handwritten notes of H. R. Haldeman, which from the identifying markings and the content indicate the notes were made by H. R. Haldeman during the meeting with the President on June 20, 1972, between 11:26 a.m. and 12:45 p.m. The notes are on two pages of paper from a yellow legal pad. These notes are being submitted as Item I.B.2. covered by the subpoena.

(a) Analysis

The notes to be submitted to the Court as Item I.B.2. reflect that the President gave instructions to Mr. Haldeman to take certain actions of a public relations character which related to the Watergate incident.

(b) Index

None necessary.

(c) Particularized Claim of Executive Privilege

Portions of the notes to be submitted as Item I.B.2. reflect confidential matters discussed by H. R. Haldeman and the President. As such, the President believes these portions of Item I.B.2. are subject to a valid claim of Executive Privilege, in order to protect the confidentiality of private discussions between the President and his assistants. Accordingly, only those portions of the notes which have any relationship to the Watergate matter (specifically, the first three items on page two of the notes) should be submitted to the Grand Jury.

PART II

Item 1(b) of the subpoena relates to "Telephone conversation of June 20, 1972, between Richard Nixon and John N. Mitchell from 6:08 to 6:12 p.m."

A. Dictating belt of Presidential recollection.

The only material relating to this conversation is a dictating belt of his recollections dictated by the President as a part of his personal diary on June 20, 1972, at eight-thirty p.m., in which the President referred to his telephone conversation with John N. Mitchell. That portion of the dictating belt to and including the reference to the telephone conversation with John N. Mitchell is being submitted as Item II.A. covered by the subpoena.

(1) Analysis

That portion of the dictating belt on which the President dictated recollections of the conversation with John N. Mitchell does contain references to Watergate.