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# Texts of Ruling by Judge Sirica and of Letter by Jaworski to Senator Eastland

*WASHINGTON, May 20 — Following are the texts of a ruling by Judge John J. Sirica ordering President Nixon to turn over 64 tape recordings to the court and of a letter by Jeon Jaworski, the special Watergate prosecutor, to Senator James O. Eastland of Mississippi, chairman of the Seuate Judiciary Committee:*

This matter comes before the court on motion of President Richard M. Nixon to quash a subpoena duces tecum issued to him by the Watergate special prosecutor with leave of this court.

On April 16, 1974, Special Prosecutor Leon Jaworski moved the court for an order, pursuant to rule 17 (C), (1) Federal Rules of Criminal Procedure, directing the issuance of a subpoena for the production of specified materials prior to trial in the case of United States v. John N. Mitchell, et al., CR 74-110, DOC. (2).

The proposed subpoena, prepared by the special prosecutor and directed to the President "or any subordinate officer, official or employe with custody or control of the documents or objects" described,. listed in 46 paragraphs the specific meetings and telephone conversations for which tape recordings and related writings were sought. Relying on the legal memorandum and affidavit of the special prosecutor in support of the motion, the court on April 18, 1974, ordered that the subpoena issue forthwith to the President commanding production before the court.

Prior to the May 2, 1974, return date of the subpoena, the President filed a special appearance and motion to quash (eo nomine) which included a formal claim of privilege against disclosure of all subpoenaed items generally as "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." (3) Thereafter within time limits fixed by the court, the special prosecutor and five defendants filed papers opposing the President's motion to quash on various grounds. (4) The Government's submission, containing a lengthy and detailed showing of its need for the subpoenaed items and their relevance, has been placed under seal as have the various reply briefs and motions for protective orders and to expunge that were subsequently filed. (5) The matter came on for oral argument in camera on May 13, 1974.

### Nixon's Arguments

In entering a special appearance, the President contends that the court lacks jurisdiction to enforce the instant subpoena on two grounds; first, courts are without authority to rule on the scope or applicablity of executive privilege when asserted by the President, and second, a dispute between the President and special prosecutor regarding the production of evidence in an intra-branch controversy wholly within the jurisdiction of the executive branch to resolve. The first contention, as the President admits, is without legal force in this circuit. (6) See Nixon v. Sirica,—U.S. App. D.C.,—487 F2D 700 (1973).

The second argument, whatever its merits in the setting of a disagreement between the President and a cabinet officer, for example, has no application to the present situation. The current special prosecutor is vested with the powers and authority conferred upon his predecessor pursuant to regulations which have the force of law. (7)

Among other prerogatives, the special prosecutor has "full authority" to determine "whether or not to contest the assertion of 'executive privilege' or any other testimonial privilege." The special prosecutor's independence has been affirmed and reaffirmed by the President and his representatives, (8) and a unique guarantee of unfettered operation accorded him: "The jurisdiction of the special prosecutor will not be limited without the President's first consulting with such members of Congress (the leaders of both Houses and the respective committees on the judiciary) and ascertaining that their consensus is in accord with his proposed action." (9) The President not having so consulted, to the court's knowledge, his attempt to abridge the special prosecutor's independence with the argument that he cannot seek evidence from the President by court process is a nullity and does not defeat the court's jurisdiction.

### The Primary Position

The President advances three principal arguments on the merits supporting his motion to quash. Primary among these is his assertion that the subpoena, together with the special prosecutor's showing of relevancy and evidentiary value filed May 10, 1974, fails to comply with the requirements of Rule 17(C). It is conceded by all parties that Rule 17(C) cannot be employed as a vehicle for discovery, and that a showing of good cause is necessary. The landmark cases interpreting Rule 17(C), Bowman Dairy Company v. United States, 341 U. S. 214 (1951) and United States v. Iozia, 13 F. R. D. 335 (SDNY 1952), are cited and relied upon by both sides.

Basically, good cause under Rule 17(C) requires a showing that (1) subpoenaed materials are evidentiary and relevant; (2) they are not otherwise procurable reasonably in advance of trial; (3) the party cannot properly prepare for trial without them, and failure to obtain them may delay the trial; and (4) the application is made in good faith, and does not constitute a "fishing expedition."

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**Leon Jaworski, special prosecutor in Watergate inquiry**

See United States v. Iozia, supra, 13 F.R.D. at 338.

It is the court's position that the special prosecutor's May 10, 1974 memorandum correctly applies the Rule 17 (C) standards, particularly in the most unusual situation of this kind where the subpoena, rather than being directed to the Government by defendants, issues to what, as a practical matter, is a third party. It is the court's conclusion as well, supported again by reference to the special prosecutor memorandum and appendix, that the requirements of Rule 17 (C) are here met. (10)

With regard to the confidentiality privilege interposed by the President, the court agrees that his claim is presumptively valid. The special prosecutor's submissions, however, in the court's opinion, constitute a prima facie showing adequate to rebut the presumption in each instance, and a demonstration of need sufficiently compelling to warrant judicial examination in chambers incident to weighing claims of privilege where the privilege has not been relinquished. (11)

**Transcripts are Cited**

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 nonexistent since the conversations are, to that extent at least, no longer confidential. See Nixon v. Sirica, supra, 48 7 F.2D at 718.

The President's third argument on the merits speaks to the defendants' contention that the subpoenaed materials are necessarily producible to them under the principles enunciated in Brady v. Maryland, 373 U.S. 83 (1963) and its progency, the Jencks Act, 18 U.S.C. Sec. 3500, and Rules of Discovery for Criminal Proceedings. The President maintains instead that defendants cannot require production under Brady of material in the possession of a noninvestigatory Government agency or items made unavailable because of their privileged character. The court finds it unnecessary, due to its disposition of the motion to quash, to reach this question.

Under Rule 17 (C), the court "may permit" the materials produced "to be inspected by the parties or their attorneys." The court intends to supply defense counsel with any and all exculpatory matter that may be found in the items produced, and to deliver any and all nonprivileged matter to the special prosecutor. It is, of course, the special prosecutor's continuing obligation to furnish defendants with Brady material that comes into his possession. Defendants' requests for access to the whole of materials produced will be more appropriately considered in conjunction with their pretrial discovery motions.

In requiring compliance with the subpoena, that is, production before the court, and in ruling on claims of privilege, the court adopts in full the procedures and criteria established by the United States Court of Appeals for this circuit in Nixon v. Sirica, supra, 48 7 F.2D at 716-721 (parts IV, V, and VI of the majority opinion). Thus, adequate time will be allowed for preparation of an index and analysis detailing particular claims of privilege the President wishes to make.

**Originals Demanded**

The originals of all subpoenaed items will accompany the index and analysis when transmitted to the court. In addition, a separate tape recording, copies from the originals, containing only those portions of conversations since transcribed and made public should be prepared and delivered along with the subpoenaed materials.

To protect the rights of individuals, various of the proceedings and papers concerning this subpoena have been sealed. Such matters will remain under seal, and all persons having knowledge of them will remain subject to restrictions of confidentiality imposed upon them pending further order of the court. The foregoing, of course, does not affect the transmittal of such materials to appellate courts under seal as a necessary part of the record in this matter. The court sees no need to grant more extensive protective orders at this time or to expunge portions of the record. Matter sought to be expunged is relevant, for example, to a determination that the presumption of privilege is overcome.

Now, therefore, it is by the court this 20th day of May, 1974,

Ordered that the President's motion to quash be, and the same hereby is, denied; and it is

Further ordered that on or before May 31, 1974, the President or any subordinate officer, official, or employe with custody or control of the documents or objects subpoenaed by the special prosecutor with leave of court on April 18, 1974, shall deliver to the court the originals of all subpoenaed items together with an index and analysis and copy tape recording as described in the foregoing opinion; and it is

Further ordered that motions for protective orders and to expunge filed or raised orally in this matter, except to the extent already granted by the court in proceedings heretofore, be, and the same hereby are, denied; and it is

Further ordered that should the President initiate appellate review of the court's order prior to 4:00 P.M., Friday, May 24, 1974, the court's order shall be stayed pending the completion of such review.

## Jaworski's Letter

When I appeared before your committee during the hearings on the nomination of the honorable William B. Saxbe to be Attorney General, I assured the committee in response to a question by Senator Byrd that I would inform the committee of any attempt by the President "to circumvent or restrict or limit" the jurisdiction or independence of the special prosecutor. I am constrained to advise you and the members of your committee, consonant with this and other promises made when I testified at hearings before your committee on the special prosecutor bill, that in recent days these events have occurred:

Following the issuance of a subpoena for White House tapes to be used as evidence in the trial of United States v. Mitchell, et al (which are needed for prosecution purposes under Supreme Court rulings), the President, through his counsel, filed a motion to quash the subpoena.

Because of sensitive matters involved in our response to the motion to quash, I joined with White House counsel in urging Judge Sirica to conduct further proceedings in camera. After the court determined to hold further proceedings in camera, White House counsel for the first time urged the court to quash the subpoena on the additional ground that the special prosecutor had no standing in court because the matter of his obtaining the tapes in question involved "an intra-executive dispute." As stated by counsel for the President in the argument before Judge Sirica, it is the President's contention that he has ultimate authority to determine when to prosecute, whom to prosecute, and with

what evidence to prosecute. Judge Sirica has now ruled and I am released from in camera secrecy.

The crucial point is that the President, through his counsel, is challenging my right to bring an action against him to obtain evidence, or differently stated, he contends that I cannot take the President to court. Acceptance of his contention would sharply limit the independence that I consider essential if I am to fulfill my responsibilities as contemplated by the charter establishing this office.

The position thus taken by the President's counsel contravenes the express agreement made with me by Gen. Alexander Haig, after consulting with the President, that if I accepted the position of special prosecutor, I would have the right to press legal proceedings against the President if I concluded it was necessary to do so. I so testified in the House Judiciary Committee hearing and in the hearings conducted by your committee.

Thereafter, at the suggestion of members of your committee, I sent a copy of my testimony on this point to counsel for the President, Mr. J. Fred Buzhardt, who acknowledged its receipt without questioning my testimony. I should add that when my appointment was announced by Acting Attorney General Bork on Nov. 1, 1973, he stated that as a part of my agreement to serve, it was "absolutely clear" that I was "free to go to court to press for additional tapes or Presidential papers," if I deemed it necessary.

You will recall Mr. Chairman that when I testified at the session of your committee on the special prosecutor bill, the following exchange took place between us:

"The chairman: You are absolutely free to prosecute anyone; is that correct?"

"Mr. Jaworski: That is correct. And that is my intention."

"The Chairman: And that includes the President of the United States?"

"Mr. Jaworski: It includes the President of the United States."

"The Chairman: And you are proceeding that way?"

Mr. Jaworski: I am proceding that way." (Part 2, page 571 )

Senator McClellan put the question to me this way:

"May I ask you now, do you feel that with your understanding with the White House that you do have the right, irrespective of the legal issues that may be involved — that you have an understanding with them that gives you the right to go to court if you determine that they have documents you want or materials that you feel ar essential and necessary in the performance of your duties, and in conducting a thorough investigation and following up with prosecution thereon, you have the right to go to court to raise the issue against the President and against any of his staff with respect to such documents or materials and to contest the question of privilege?"

"Mr. Jaworski: I have been assured that right and I intend to exercise it if necessary." (Part 2, page 573)

Senator Hruska also examined me on this point as is shown by the following questions and answers:

"Senator Hruska: And it was agreed that there would be no restrictions or limitations, that even as to those items on the tapes, whether they were asked for or not, you would be given access to them.

"However, if there would occur an impasse on that point on the availability of any material, that there was expressly, without qualification, reserved to you the right to go to the courts. so that it would be at a time when General Haig, acting on behalf of the President, or in his stead, would say no to this particular paper, I don't feel that you should have it, this has high national security and other characteristics, and if you felt constrained to differ with him at that point, you could go to court, adn there would be no limitation in that regard?"

"Mr. Jaworski: That is a correct statement."

"Senator Hruska: That is your testimony?"

"Mr. Jaworski: Yes, sir."

"Senator Hruska: So that by the charter and by your agreement and your discussions you are not to be denied access to the courts. . . ." (Part 2, Page 600)

When my deputy, Henry S. Ruth Jr., was testifying in connection with the special prosecutor bill, Senator Scott asked him the following question:

"Senator Scott: I imagine it may be clear that he has no doubt of his right to bring action in the courts against the executive if he so deems it to be proper?"

"Mr. Rush: Well, Senator, he understands his instructions are to pursue all of the evidence he needs, including to go to court if the evidence is not forthcoming." (Part 2, page 518)

At the time of the Saxbe nomination hearings, Senator Byrd exacted the assurance from me that I would "follow the evidence wherever it goes, and if it goes to the Oval Office and to the President himself, I would pursue it with all my vigor." And at the same time, he obtained the assurance from Mr. Saxbe that he would give me full support in matters that were within the performance of my duty even if "there are allegations involving the President" (Page 22 of the hearings before the committee on the nomination of William B. Saxbe, Dec. 12 and 13, 1973).

Of course, I am sure you understand, Mr. Chairman, that I am not for a moment suggesting that the President does not have the right to raise any defenses, such as confidential communications, executive privilege, or the like. It is up to the court, after hearing, to determine whether his defense is sound. But any claim raised by White House counsel on behalf of the President that challenges my right to invoke the judicial process against the President, as I am doing in an effort to obtain these tapes for use at the trial in United States v. Mitchell, et al, would make a farce of the special prosectuor's character and is in contravention of the understanding I had and the members of your committee apparently had at the time of my appointment.

### St. Clair Letter Cited

In a letter to me from Mr. St. Clair, counsel for the President, Mr. St. Clair undertakes to circumvent the clear and unmistakable assurance given me by the President by contending that: "The fact that the President has chosen to resolve this issue by judicial determination and not by a unilateral exercise of his constitutional powers, is evidence of the President's good faith." Of course, under Mr. St. Clair's approach, this would make the assurance of the right to take the President to court an idle and empty one. Counsel to the President, by asserting that ultimately I am subject to the President's direction in these matters, is attempting to undercut the independence carefully set forth in the guidelines, which were reissued upon my appointment with the express consent of the President.

It is clear to me that you and the members of your committee who were familiar with the public announcements of the President and the acting attorney general, did not construe them in so meaningless a manner (as is evident by the above referred to statements in questions that were propounded to me), and neither did I.

To adopt Mr. St. Clair's version would give rise to this anomaly—"The President has no objection to the special prosecutor filing his action against him but once filed, the President will stop the special prosecutor from proceeding with it by having his counsel move to dismiss on the ground that the special prosecutor cannot sue him."

Judge Sirica in overruling this contention of the President in an opinion made public by the court this afternoon, pointedly said:

"The special prosecutor's independence has been affirmed and reaffirmed by the President and his representatives, and a unique guarantee of unfettered operation accorded him: 'The jurisdiction of the special proscutor will not be limited without the with such members of Congress [the leaders of both houses and the respective committees on the Judiciary] and ascertaining that their consensus is in accord with his proposed action.' The President not having so consulted, to the court's knowledge, his attempt to abridge the special prosecutor's independence with the argument that he cannot seek evidence from the President by court process is a nullity and does not defeat the court's jurisdiction."

Because the members of your committee exacted from me the promise at the hearings that I would report a development of this nature, I am submitting this letter.