

the President's Refusal to Release Electronic Tapes

may cause it to lose a suit it might otherwise have won. The power of the President to withhold confidential documents that would otherwise be material in the courts comes from "an inherent executive power which is protected in the constitutional system of separation of power." *United States v. Reynolds*, 345 U.S. 1, 6n.9 (1953).

In your letter to Mr. Buzhardt of July 10th you quoted Mr. Richardson's statement to the Senate Judiciary Committee in which he concluded that it was the President's intention "that whatever should be made public in terms of the public interest in these investigations should be disclosed..."

That is, of course, the President's view, but it is for the President, and only for the President, to weigh whether the incremental advantage that these tapes would give you in criminal proceedings justifies the serious and lasting hurt that disclosure of them would do to the confidentiality that is imperative to the effective functioning of the Presidency. In this instance the President has concluded that it would not serve the public interest to make the tapes available.

Sincerely,

CHARLES ALAN WRIGHT.

Cox Statement

This afternoon I received from the White House a letter declining to furnish tapes of conversations on the President's telephone or in his office. Eight specific tapes were requested by me in a letter dated July 18, 1973, a copy of which is attached.

Careful study before requesting the tapes convinced me that any blanket claim of privilege to withhold this evidence from a grand jury is without legal foundation. It therefore becomes my duty promptly to seek subpoenas and other available legal procedures for obtaining the evidence for the grand jury. We will initiate such legal measures to secure the eight tapes and certain other evidence as soon as proper papers can be prepared.

The effort to obtain these tapes and other documentary evidence is the impartial pursuit of justice according to law. None of us should make assumptions about what the tapes will show. They may tend to show that there was criminal activity — or that there was none. They may tend to show the guilt of particular individuals — or their innocence. The one clear point is that the tapes are evidence bearing directly upon whether there were criminal conspiracies, including a conspiracy to obstruct justice, among high Government officials.

Happily, our is a system of government in which no man is above the law. Since Chief Justice Marshall's decision in *Marbury v. Madison* in 1803, the judicial branch has ruled upon the legal duties as well as the constitutional privileges of the chief executive. I dispute the constitutionality of the President's claim of privilege as applied to the administration of the criminal

laws, but I do not question its bona fides. In seeking and obeying a constitutional ruling with respect to these papers and records, we would promote the rule of law essential to both liberty and order.

Comments by Ervin

In the interest of time, I think perhaps I should read into the record the communications which I have had from the committee. The first is a letter from the White House, Washington, July 23, addressed to me.

"Dear Senator,

"In view of the intervening events since our telephone conversation on July 12, I know of no useful purpose that would be served by our having a meeting at this time. If you feel otherwise, please have Mr. Edmisten contact Mr. Timmons, and he will arrange a time for a meeting.

"Sincerely, Richard Nixon."

Well, at long last, I have got something I agree with the President on in connection with this matter. If the President does not think there is any useful purpose that be obtained by our meeting together, I will not dissent from that view, so I will not ask for the privilege of visiting the White House.

[At this point Senator Ervin read into the record the text of the letter from President Nixon refusing to turn the tapes over to the committee.]

Upon the receipt of this communication from the White House, the select committee held a meeting and unanimously voted to authorize and direct the chairman to issue two subpoenas, one requiring the President to produce the tapes which will be described in the subpoena, and the other one requiring the President to make available to the committee — I should have said requiring the President to make available to the committee the tapes which will be described in the subpoena, and the Presidential papers—that is, the White House papers—that are to be described in the subpoena.

This is a rather remarkable letter about the tapes. If you will notice, the President says he has heard the tapes or some of them, and they sustain his position. But he says he's not going to let anybody else hear them for fear they might draw a different conclusion.

In other words, the President says that they are susceptible of, the way I construe it, two different interpretations, one favorable to his aides and one not favorable to his aides.

I deeply regret this action of the committee. I have very different ideas of separation of powers from those expressed by the President. If such a thing as executive privilege is created by the doctrine of separation of powers, it has these attributes. First, if it exists at all, it only exists in connection with official duties.

Second, under no circumstances can it be invoked on either alleged illegal activities or political campaign activities.

I am certain that the doctrine of separation of powers does not impose upon any President either the duty or the power to undertake to separate a Congressional committee from access to the truth concerning alleged criminal activities.

I was in hopes that the President would accede to the request of this committee for these tapes and these papers.

I love my country. I venerate the office of the President, and I have the best wishes for the success of the incumbent, present incumbent of that office, because he is the only President this country has at this time.

A President not only has constitutional powers which require him to see to it or to take care that the laws be faithfully executed, and I think it's his duty under those circumstances to produce information which would either tend to prove or disprove that criminal activities have occurred. But beyond that, the President of the United States, by reason of the fact that he holds the highest office in the gift of the American people, owes an obligation to furnish a high standard of moral leadership to this nation and his constitutional duties, in my opinion, and undoubtedly his duty of affording moral leadership to the country place upon him some obligation under these circumstances.

We have evidence here that during the time the President was running for re-election to the highest office in the gift of the people of this nation that some of his campaign funds were found in the possession of burglars in the headquarters of the opposition political party. And I think that high moral leadership demands that the President make available to this committee any information in the form of tapes or records which will shed some light on that crucial question: How did it happen that burglars were caught in the headquarters of the opposition party with the President's campaign funds in their pockets and in their hotel bedrooms at the time? And I don't think the people of the United States are interested so much in abstruse arguments about the separation of powers or executive privilege as they are in finding the answer to that question.

I deeply regret that this situation has arisen, because I think that the Watergate tragedy is the greatest tragedy this country has ever suffered. I used to think that the Civil War was our country's greatest tragedy, but I do remember that there were some redeeming features in the Civil War in that there was some spirit of sacrifice and heroism displayed on both sides. I see no redeeming features in Watergate.

Comments by Baker

Mr. Chairman, it is difficult for me to express my disappointment that we arrive at the place where at least the leading edge of a confrontation on the question of separation of powers between the Congress and the White House is before us. You have pointed out, I am sure, that this committee

has authorized by unanimous vote the issuance of a subpoena duces tecum for certain documents and certain portions of the so-called Butterfield tapes relevant to the inquiry of this committee. As my colleagues on the committee know, I have tried as hard as I know how to find a way around this confrontation. I have suggested various and several alternative possibilities. Even now, I don't despair of hope that we can find a way to reconcile our differences in the conflict that impends between the Congress and the executive department. But I concur with my colleagues on the committee in the evaluation that there was no other practical course of action except to authorize the action which has now been described and I voted for it and I support it.

I think the material sought by the subpoena duces tecum, are essential, if not vital, to the full, thorough inquiry mandated and required of this committee.

I shall refrain from expressing my evaluation of the entire situation, that is, the totality of the testimony and the inferences to be drawn from it, until we have heard all of the information, all of the witnesses, all of the testimony, and examined all of the documents that are made available to us. On Feb. 24, 1974, or prior thereto, if the committee files its report at an earlier date, I will express my conclusions, but not before.

It is my fond hope, however, that when we do finally get to the business of writing a report, that we have all of the available information and that we can in fact write a definitive statement on Watergate—not trying to indict or punish anyone; certainly not trying to persecute anyone nor to protect anyone.

The committee has been criticized from time to time for its absence of rules of evidence, the right of confrontation, of cross-examination by counsel, a number of other legal concepts that we do not have. But we do not have defendants, either, and we are not trying to create defendants. We are trying to find fact, to establish circumstances, to divine the causes, to ascertain the relationships that make up in toto the so-called Watergate affair. I am unhappy that it is necessary for us to come to the brink of a constitutional confrontation, and although that is a hackneyed phrase, it is an accurate phrase, a constitutional confrontation between the Congress and the White House, a confrontation that has never been resolved in its totality by the courts, a principle and doctrine that has never been fully elaborated and spelled out, in order to fully discharge our obligation as a committee. But I think that is precisely where we are.

I have no criticism of any person. I will not sit in judgment of any person or the conduct of any person until all of the evidence is taken, but I can do no less than try to gain all of the information available on which to base such a conclusion later.

Thank you sir