

W. Post

7-24-73

Texts of Statements

Text of a letter from Charles Alan Wright, the office of the White House legal counsel, J. Fred Buzhardt, to special Watergate prosecutor Archibald Cox, dated July 23:

Dear Mr. Cox:

Mr. Buzhardt has asked that I respond to your letters to him of June 20, July 18 and July 20 in which you make certain requests with regard to tape recordings of or about conversations between the President and various members of the White House staff and others.

The President is today refusing to make available to the Senate committee material of a similar nature. Enclosed is a copy of his letter of this date to Senator Ervin stating his position about the tapes. I am instructed by the President to inform you that it will not be possible to make available to you the recordings that you have requested.

In general the reasons for the President's decision are the same as those that underlie his response to Senate committee. But in your letter of July 18 you state that furnishing the tapes in aid of an investigation into charges of criminal conspiracy raises none of the separation of powers issues that are raised by the request of the Senate committee. You indicated a similar position when we met on June 6.

At that time you suggested that the question of separation of powers did not arise since you were within the executive branch, though, as I recall, you then added that your position is a

little hard to describe, since in your view, you are not subject to direction by the President or the Attorney General.

I note that in your subsequent letters and particularly that of July 18 in which you argue that the separation-of-powers argument is inapplicable, there is no suggestion that you are a part of the executive branch. Indeed, if you are an ordinary prosecutor and thus a part of the executive branch as well as an officer of the court, you are subject to the instructions of your superiors, up to and including the President, and can have access to presidential papers only as and if the President sees fit to make them available to you.

But quite aside from the considerations just stated there is an even more fundamental reason why separation-of-powers considerations are fully as applicable to a request from you as one from the Senate committee. It is clear, in your letter of the 18th specifically states, the reason you are seeking these tapes is to use some or all of them before grand juries or in criminal trials. Production of them to you would lead to their use in the courts, and questions of separation-of-powers are in the forefront when the most confidential documents of the presidency are sought for use in the judicial branch. Indeed, most of the limited case law on executive privilege has arisen in the context of attempts to obtain executive documents for use in the courts.

The successful prosecu-

tion of those who have broken the laws is a very important national interest, but it has long been recognized that there are other national interests that, in specific cases, may override this. When Congress provided in the Jencks Act, 18 U.S.C. (Subsection) 3500 (D), that the United States may choose to refuse to disclose material that the court has ordered produced, even though in some instances this will lead to a mistrial and to termination of the prosecution, it was merely recognizing that, as the courts had repeatedly held, there are circumstances in which other legitimate national interests requiring that documents be kept confidential outweigh the interest in punishing a particular malefactor. Similarly in civil litigation the United States may feel obliged to withhold relevant information, because of more compelling governmental interests, even though this 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, 6 N. 9 (1953).

In your letter to Mr. Buzhardt of July 10 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 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.

Statement By Cox On Subpoenaing Tapes

Special Prosecutor Archibald Cox issued the following statement yesterday: 23 July

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 be-



Associated Press

Charles Alan Wright, consulting White House counsel, in a letter to special Watergate prosecutor Archibald Cox said President Nixon would not turn over the tapes sought by both Cox and the Ervin Committee.

Regarding Presidential

Dear Mr. Chairman:

I have considered your request that I permit the Committee to have access to tapes of my private conversations with a number of my closest aides. I have concluded that the principles stated in my letter to you of July 6th preclude me from complying with that request, and I shall not do so. Indeed the special nature of tape recordings of private conversations is such that these principles apply with even greater force to tapes of private Presidential conversations than to Presidential papers.

If release of the tapes would settle the central questions at issue in the Watergate inquiries, then their disclosure might serve a substantial public interest that would have to be weighed very heavily against the negatives of disclosure.

The fact is that the tapes would not finally settle the central issues before your Committee. Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. However, as in any verbatim recording of informal conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways. Furthermore, there are inseparably interspersed in them a great many very frank and very private comments, on a wide range of issues and individuals, wholly extraneous to the Committee's inquiry. Even more important, the tapes could be accurately understood or interpreted only by reference to an enormous number of other documents and tapes, so that to open them at all would begin an endless process of disclosure and explanation of private Presidential records totally unrelated to Watergate, and highly confidential in nature. They are the clearest possible example of why Presidential documents must be kept confidential.

Accordingly, the tapes, which have been under my sole personal control, will remain so. None has been transcribed or made public and none will be.

On May 22nd I described my knowledge of the Watergate matter and its aftermath in categorical and unambiguous terms that I know to be true. In my letter of July 6th, I informed you that at an appropriate time during the hearings I intend to address publicly the subjects you are considering. I still intend to do so and in a way that preserves the Constitutional principle of separation of powers, and thus serves the interests not just of the Congress or of the President, but of the people.

Sincerely,

/s/ Richard Nixon

Honorable Sam J. Ervin, Jr.
Chairman
Select Committee on Presidential
Campaign Activities
United States Senate
Washington, D.C. 20510

Associated Press

Here is a copy of President Nixon's letter, Sam Ervin (D-N.C.), rejecting a request to Senate Watergate committee chairman for tapes recorded in the White House.

comes 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, ours is a system of government in which no man is above the law. Since Chief Justice Marshall's decision in *Marbury vs. Madison* in 1803, the judicial branch has ruled upon the legal duties as well as the constitutional privileges of the Chief Executive. I dis-

pute 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.

Cox's Letter Requesting Presidential Tapes

This is the text of the letter sent to the President's counsel, J. Fred Buzhardt, requesting access to the President's tapes.

J. Fred Buzhardt, Esquire
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Buzhardt:

I am writing to request access to the recordings of certain conversations between the President and various members of the White House staff and others whose conduct is under investigation in connection with the alleged cover-up of the break-in at the Democratic National Committee offices. The conversations are listed below.

May I emphasize three

essential aspects of this request:

First, the request is part of an investigation into serious criminal misconduct — the obstruction of justice. The tapes are material and important evidence — quite apart from anything they show about the involvement of the President — because the conversations recorded in all probability deal with the activities of other persons under investigation. Indeed, it is not implausible to suppose that the reports to the President on these occasions may themselves have been made pursuant to a conspiracy and as part of a cover-up.

Second, furnishing the tapes in aid of an investigation into charges of criminal conspiracy plainly raises none of the separation-of-powers issues you believe to be involved in furnishing so-called "Presidential Papers" to the Select Committee. The Select Committee is seeking information — as I understand the position — solely in order to recommend legislation. Whatever fears you may entertain that furnishing the tapes in aid of the Select Committee's legislation function would

Tapes

set a precedent for furnishing presidential papers to other legislative committees are plainly irrelevant to my request. For my request involves only a grand jury investigation resulting from highly extraordinary circumstances. No question of precedent arises because the circumstances almost surely will never be repeated.

Third, I would urge that the tapes be furnished for use in my investigation without restriction. This procedure strikes me as the method of establishing the truth which is most fair to everyone concerned, including the President. It is proper to point out, however, that if you thought it essential to furnish the papers only to the grand jury under the rules pertaining to grand jury documents, an appropriate procedure could be devised. This is an additional circumstance distinguishing the present investigation from the situation before the Select Committee.

The particular conversations to which my present request pertains have been carefully selected as those material to the investigation, to wit:—

1. Meeting of June 20, 1972, in the President's EOB Office between the President and Messrs. Ehrlichman and Haldeman from 10:30 a.m. to 1:00 p.m. (time approximate).
2. Telephone conversation of June 20, 1972, between the President and Mr. Mitchell from 6:08 to 6:12 p.m.
3. Meeting of June 30, 1972, in the President's EOB Office between the President and Messrs. Haldeman and Mitchell from 12:55 to 2:10 p.m.
4. Meeting of September 15, 1972, in the President's Oval Office between the President and Mr. Dean from 5:15 to 6:17 p.m. Mr. Haldeman joined this meeting at 5:27 p.m.
5. Meeting of March 13, 1973, in the President's Oval Office between the President and Mr. Dean from 12:42 to 2:00 p.m. Mr. Haldeman was present from 12:43 to 12:55 p.m.
6. Meeting of March 21, 1973, in the President's Oval Office between the President and Messrs. Dean and Haldeman from 10:12 to 11:55 a.m.
7. Meeting of March 22, 1973, in the President's EOB Office between the President and Mr. Dean from 1:57 to 3:43 p.m. Mr. Ehrlichman joined this meeting at 2:00 p.m., and Messrs. Haldeman and Mitchell joined at 2:01 p.m.
8. Meeting of April 15, 1973, in the President's EOB Office between the President and Mr. Dean from 9:17 to 10:12 p.m. (you will recall that this is the conversation the recording of which I requested as early as June 11 and which you declined to furnish under the misapprehension that

this was only a subsequent memorandum.)

You will realize that as the investigation proceeds it may be necessary to request additional recordings.

Sincerely,
Archibald Cox
Special Prosecutor