

Texts of Letters and Orders on Nixon Refusal

Special to The New York Times

WASHINGTON, July 26—
Following are the texts of President Nixon's letter to Senator Sam J. Ervin Jr., declining to respond to a subpoena for tapes and papers relating to the Senate Water-gate inquiry; a colloquy on the President's letter between Senator Ervin and Senator Howard H. Baker Jr., including a resolution by Senator Baker to seek court action; President Nixon's letter to Judge Sirica declining to respond to a subpoena by the special prosecutor, Archibald Cox; a petition by Mr. Cox for a court order directing the President to show cause why he should not produce the requested material, and Judge Sirica's show cause order:

Nixon Letter to Ervin

Dear Mr. Chairman:

White House counsel have received on my behalf the two subpoenas issued by you, on behalf of the select committee on July 23.

One of these calls on me to furnish to the select committee recordings of five meetings between Mr. John Dean and myself. For the reasons stated to you in my letters of July 6 and July 23, I must respectfully refuse to produce those recordings.

The other subpoena calls on me to furnish all records of any kind relating directly or indirectly to the "activities, participation, responsibilities or involvement" of 25 named individuals "in any alleged criminal acts related to the Presidential election of 1972." Some of the records that might arguably fit within that subpoena are Presidential papers that must be kept confidential for reasons stated in my letter of July 6.

It is quite possible that there are other records in my custody that would be within the ambit of that subpoena and that I could, consistent with the public interest and my constitutional responsibilities, provide to the select committee. All specific requests from the select committee will be carefully considered and my staff and I, as we have done in the past, will cooperate with the select committee by making available any information and documents that can appropriately be produced.

Review Not Feasible

You will understand, however, I am sure, that it would simply not be feasible for my staff and me to review thousands of documents to decide which do and which do not fit within the sweeping but vague terms of the subpoena.

It continues to be true, as it was when I wrote you on July 6, that my staff is under instructions to cooperate fully with yours in furnishing information pertinent to your inquiry. I have directed that executive privilege not be invoked with regard to testimony by present and former members of my staff concerning possible criminal

conduct or discussions of possible criminal conduct. I have waived the attorney-client privilege with regard to my former counsel. In my July 6 letter I described these acts of cooperation with the select committee as 'genuine, extensive and, in the history of such matters, extra-ordinary.' That cooperation has continued and it will continue. Executive privilege is being invoked only with regard to documents and recordings that cannot be made public consistent with the confidentiality essential to the functioning of the office of the President.

I cannot and will not consent to giving any investigatory body private Presidential papers. To the extent that I have custody of other documents or information relevant to the work of the select committee and that can properly be made public, I will be glad to make these available in response to specific requests.

Sincerely,

RICHARD NIXON

Ervin-Baker Colloquy

The following colloquy took place after Senator Ervin at the outset of the morning session read the President's letter:

SENATOR ERVIN: How the President expects this committee to specify each document that he says falls within the ambit of one of these subpoenas is a very surprising thing. We are not clairvoyant since we have never seen the documents, and since even those of the White House aides who are willing to identify the documents are not allowed to copy them or any parts of them, the President puts on the committee a manifest impossibility in receiving the documents.

The way the chair construes this letter, the President flatly refuses to give us conversations between the President and John Dean. And he lays down the second condition about the documents which are impossible of fulfillment by the committee because you cannot identify a document which you have the restriction upon White House former aides that could go through these papers and identify these documents that they cannot copy them much less carry them out.

So the chair finds it a little difficult to see where very much cooperation comes

from the President in these matters. This is a serious affair that the committee is engaged in, and here is the President of the United States who has informed us that some of these recordings do have reference to the matters we are investigating but he cannot furnish them to us because we might misconstrue them. And then he tells us he will furnish us the documents that he does not consider to be Presidential papers if we can identify the specific documents, which is an impossibility.

I would just like to say I think the President could comply with the request of the committee in both of these respects, and that the Constitution would not collapse, and the heavens would not fall, but the committee might be aided by the President in determining the truth of his involvement.

Issue Is Joined

SENATOR BAKER: Mr. Chairman, as those of us who are lawyers, and that is meant to be a term of approval rather than disapproval, for those of us who are lawyers, I think the best way to summarize the present situation is to say thus, the issue was joined.

It is important to note that this committee caused two subpoenas to issue, rather than one. The first subpoena specified with, I believe, great particularity the conversations, the dates and the participants that we wanted access to on the allegation of the subpoena that such conversations might be concerned with allegedly legal or criminal activity.

The second subpoena dealt with a rather more general demand for documents. I am pleased, Mr. Chairman, that we chose to issue our subpoena in two parts rather than one because, as you pointed out, it is far more difficult to specify with particularity the documents we seek if we do not know what the documents are. But it is fairly easy to specify the tapes or the portions of the tapes that we seek.

In any event, we have arrived at the place now where it would appear that the issues are in fact joined, and that the third branch of the Government now, the judiciary, may, in fact, be called on to resolve a historic conflict between the remaining two branches.

I think, as in all litigation in this country, it is our desire, all of us, to proceed, if we choose to proceed, to permit the court to make a calm, intellectually and judicially sound judgment on the appropriateness of the request of this committee together with all of the significant and fundamental constitutional questions that are presented.

I have only one remaining comment, Mr. Chairman, notwithstanding that the issues are joined. I would still hope that there is some way to ameliorate the situation. There have been a number of suggestions in the past, I have made many suggestions, both public and in the privacy of our executive proceedings, certain suggestions have been passed on, both formally and

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informally. But notwithstanding that we have reached the point where the issues are joined, and litigation may, in fact ensue, I would still hope that we can find a way to permit this committee to have access to the relevant portions of the testimony or of the evidence that we require quickly and speedily, and without a prejudicial effect on our mandate to investigate nor on the appropriate functioning of the Presidency as an institution.

Informal Panel

I have suggested, for instance, that an informal panel of distinguished Americans not now holding a position in Government may review these tapes at the request of both the executive and the legislative departments and recommend to both the President and the Congress what portions are relevant and what portions are not relevant.

I am prepared to go even further, Mr. Chairman. I have not discussed this with you or my colleagues on the committee, and say that as an extension and elaboration of that suggestion, I would be willing to have one or two or three or a small group of distinguished non-governmental officials review the tapes and the documents and recommend to the President and to the Congress that certain documents or tapes are or are not relevant to this inquiry, and if they are so intermixed with other conversations or if they lend themselves to more than one interpretation, that such a panel give to us a finding of the net effect of that information. That may not end the controversy, it may be necessary for the committee to pursue the matter further and it may be necessary for the President to disagree but at least it would move us one space forward.

It is not idle optimism that impels me to once again urge that we find a way around this joinder of issue for the benefit of the Congress, of the presidency, of the President, for the benefit of the courts, that they may be spared the business of de-

fining two hundred years after the drafting of the charter documents implied, explicit, and overlapping apparent powers, and for the people of the country. So no matter how small the flicker of the flame of optimism may be, I continue to urge that we have an accommodating spirit and that we continue to try to find a way, in this way or any other way, that seems promising of result to produce that desired end. Thank you, Mr. Chairman.

Decision by Panel

SENATOR ERVIN: Any other member of the committee have any observations they would like to make at this time?

Then if not, it will be my purpose to call the meeting of the committee at any early time and let the committee decide what action it shall take.

There is an order of the Senate which is set forth in paragraph 77 of the Senate manual which confers upon this committee the power to bring any suit that the com-



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Lowell P. Weicker, right, with H. William Shure, assistant minority counsel, going over questions the Senator was preparing to ask John D. Ehrlichman yesterday.

mittee feels is necessary to enable it to perform duties it is required to perform by the senate.

It is a very unfortunate thing that the President didn't [did] claim that he has custody of everything, custody and control of everything, in the White House because for this committee taking a very summary proceeding against the actual custodian of these tapes, and the actual custodian of these papers. I don't believe even the President would proclaim that he had custody of all of the things in E. Howard Hunt's locker, including the alleged telegrams that he is alleged to have in his custody. But if his claim be valid that would have to be true, I would think.

Senator Weicker will resume unless there is some comment by other members of the committee.

SENATOR BAKER: Mr. Wilson [attorney for Mr. Ehrlichman] before you proceed, I don't see—if my colleagues have objection they might say so and I don't want to embarrass any of them—but I don't see any point in having an executive session, I

think we have discussed the matter and I think we are in a position to act and if you want to do that I am perfectly willing to make a motion, if a motion would be considered in order.

SENATOR ERVIN: Well, it would be considered in order unless any member of the committee would rather go into executive session, leave that up to them, and they could communicate that to me openly or privately.

SENATOR GURNEY. Speaking for myself, Mr. Chairman, I certainly have no objection to going ahead with a meeting.

SENATOR INOUE. Go ahead, call the roll.

SENATOR ERVIN. Senator Talmadge is absent but I guess we can let him record his vote when he gets here. It has been moved.

Motion by Baker

SENATOR BAKER: Mr. Chairman, let me state a motion. Since there is no objection to proceeding, I move at this time that counsel for the committee be authorized under the appropriate laws and statutes of the United States, including the Declaratory Judgments Act, present a justiciable issue to the appropriate court, based on the subpoena issued lawfully by this committee and a letter declining the honoring of the subpoena dated July 25, 1973, signed by the President of the United States, [and] take such steps as may be necessary to present such issue for adjudication.

SENATOR ERVIN: Is there any second to the motion?

Senator Inouye: I second the motion.

Senator Ervin: All favoring the motion let it be known by raising their right hand.

SENATOR ERVIN: The six Senators present vote unanimously for the motion and Senator Talmadge will be given an opportunity to record his vote when he comes in.

The chair recognizes that there is no precedent for litigation of this nature but there originally was no precedent for any litigation, and I think this litigation is essential if we are to determine whether the President is above the law and whether

the President is immune from all of the duties and responsibilities in matters of this kind which devolve upon all the other mortals who dwell in this land.

Nixon Letter to Sirica

The White House
Washington
July 25, 1973

Dear Judge Sirica:

White House counsel have received on my behalf a subpoena duces tecum issued out of the United States District Court for the District of Columbia on July 23d at the request of Archibald Cox. The subpoena calls on me to produce for a grand jury certain tape recordings as well as certain specified documents. With the utmost respect for the court of which you are chief judge, and for the branch of Government of which it is a part, I must decline to obey the command of that subpoena. In doing so I follow the example of a long line of my predecessors as President of the United States who have consistently adhered to the position that the President is not subject to compulsory process from the courts.

The independence of the three branches of our Government is at the very heart of our constitutional system. It would be wholly inadmissible for the President to seek to compel some particular action by the courts. It is equally inadmissible for the courts to seek to compel some particular action from the President.

That the President is not subject to compulsory process from the other branches of Government does not mean, of course, that all information in the custody of the President must forever remain unavailable to the courts. Like all of my predecessors I have always made relevant material available to the courts except in those rare instances when to do so would be inconsistent with the public interest. The principle that guides my actions in this regard was well stated by Attorney General Speed in 1865:

"Upon principles of public policy there are some kinds of evidence which the law

excludes or dispenses with. . . the official transactions between the heads of departments of the Government and their subordinate officers are, in general, treated as 'privileged communications.' The President of the United States, the heads of the great departments of the Government, and the Governors of the several states, it has been decided, are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient. These are familiar rules laid down by every author on the law of evidence."

A similar principle has been stated by many other attorneys general, it has been recognized by the courts, and it has been acted upon by many Presidents.

In the light of that principle, I am voluntarily transmitting for the use of the grand jury the memorandum

from W. Richard Howard to Bruce Kehrli in which they are interested as well as the described memoranda from Gordon Strachan to H. R. Haldeman. I have concluded, however, that it would be inconsistent with the public interest and with the constitutional position of the Presidency to make available recordings of meetings and telephone conversations in which I was a participant and I must respectfully decline to do so.

Sincerely,

RICHARD NIXON
Honorable John J. Sirica
United States Court House,
3rd and Constitution Avenue,
N.W.

Room 2428

Washington, D. C. 20001

cc Honorable Archibald
Cox, special prosecutor.

Enclosure: Howard/Kehrli
memorandum.

Petition By Cox

United States District Court for the District of Columbia verified petition for an offer directing Richard M. Nixon or any subordinate officer whom he designates to show cause why certain documents or objects should not be produced in response to a grand jury subpoena duces tecum.

Now comes Archibald Cox, special prosecutor, Watergate special prosecution force, on behalf of the grand jury in and for the United States District Court for the District of Columbia, and moves the court for an order pursuant to rules 17(c) and (g) of the Federal Rule of Criminal Procedure, directing Richard M. Nixon, or any subordinate officer whom he designates who has custody and control of certain documents or objects, to show cause why such documents or objects specified in a grand jury subpoena duces tecum should not be produced, and in support of this petition represents the following:

1. The grand jury in and for the United States District Court for the District of Columbia is now conducting an investigation in leged break-in and illegal electronic surveillance at Committee offices and the possible obstruction of justice following those offenses. The grand jury is also inquiring into other

possibly illegal conduct by high Government officials and others in this district. This investigation involves possible violations of 18 U.S.C. 371, 1503, 1505, 2511, 2512 and other criminal statutes of the United States.

2. On July 23, 1973, the special prosecutor, acting on behalf and through the grand jury in connection with its investigation, caused to be issued a subpoena duces tecum under the authority of this court. The subpoena was issued

to "Richard M. Nixon, the White House, Washington, D.C., or any subordinate officer, official employes with custody or control of the documents or objects" described in a schedule annexed thereto.

3. This subpoena was duly served by Philip A. Laco-var, counsel to the special prosecutor, at 6:20 P.M. on July 23, 1973, by personal delivery of a copy to J. Fred Buzhardt, special

Fred Buzhardt, special counsel to the President, who accepted service on behalf of the President and acknowledged that fact in writing. Service was made in the Old Executive Office Building, Washington, D.C.

4. A copy of the subpoena and return thereon was duly filed with the clerk of this court on July 24, 1973, and a copy is annexed hereto as "Exhibit A." A copy of this subpoena has also been marked as an exhibit by the grand jury.

5. The subpoena called for the production by Richard M. Nixon, or some subordinate officer, of documents and objects described in the schedule attached thereto. In particular, the subpoena directed the production of "all tapes and other electronic and/or mechanical recordings or reproductions, and any memoranda, papers, transcripts or other writings, relating to" eight particularly described meetings and to one particularly described telephone conversation. It also requested a two paragraph memorandum from W. Richard Howard to Bruce Kehrli, dated March 30, 1972, and original copies of "Political Matters Memoranda" (together with "tabs" and attachments) from Gordon Strachan to H. R. Haldeman between Nov. 1, 1971 and Nov. 7, 1972.

6. Production of the documents and objects was directed to be made before the grand jury at 10:00 A.M. on Thursday, July 26, 1973. The grand jury met at the above time and date and awaited response to the subpoena. The special prosecutor was advised by J. Fred Buzhardt, special counsel to the President, that the memorandum from Howard to Kehrli and the "Political Matters Memoranda" would be produced as soon as feasible but that the documents and objects relating to the conversations would not be. The special prosecutor so reported to the grand jury. The grand jury thereupon requested the special prosecutor to seek enforcement of the subpoena by this court as to the items which are to be withheld.

7. The materials, whose production is being resisted, are relevant and important evidence in the grand jury's investigation. The conversations, to which the records sought relate apparently are part of or deal with the possibly illegal activities which are subjects of the grand jury's investigation. Indeed, in a letter dated July 23, 1973, from Charles Alan Wright,

acting as legal counsel for President Richard M. Nixon, it is apparently conceded that the records relating to the specified conversations contain evidence relevant to this investigation. (Attached as Exhibit B.)

8. The apparent ground for failure to honor the subpoena is a claim that the President has power to withhold these documents and objects under "an inherent executive power which is protected in the constitutional system of separation of powers". *United States v. Reynolds*, 345 U.S. 1, 6." See Exhibit B, P. 2. It is the position of the special prosecutor that the grand jury has an enforceable right to access to the documents and objects sought, under the circumstances of this investigation. See, E.G., *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972); *United States v. Dionisio*, . . . U.S. . . ., 93 S. Ct. 764 (1973); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 759 (1952); *United States v. Burr*, 25 Fed. Cas. Nos. 14,692-14,694 (1807) (Marshall, (C.J.))
9. Pursuant to the President's statement of May 22, 1973 (PP. 7-8) (attached as Exhibit C hereto), any claim of executive privilege has been waived for purposes of the grand jury's criminal investigation, and, as a result, virtually all of the participants in the conversations which are the object of the grand jury's subpoena have already testified in one forum or another about these conversations. Thus, whatever the merits of a claim of executive privilege might otherwise have been, there is no legitimate ground for now withholding from the grand jury the direct and contemporaneous evidence of those discussions.
10. Under *United States v. Reynolds*, supra, and other decisions, it is the responsibility of the courts to determine, in light of all the facts and circumstances, whether a claim of official privilege is well-founded. The issues presented in this matter are substantial and should be resolved by

this court after a hearing.

Wherefore, the special prosecutor requests that this court issue its order:

(1) Directing Richard M. Nixon or any subordinate officer, official, or employe whom he designates or who has custody and control of the documents or objects, to show cause at a hearing on a date set by this court why the withheld documents and objects described in the subpoena should not be produced before the grand jury:

(2) Authorizing the special prosecutor to disclose matters occurring before the grand jury to the extent necessary to show the grand jury's entitlement to enforcement of the subpoena; and

(3) Directing the United States marshal or his deputy to serve a copy of the show cause order forthwith on Richard M. Nixon, J. Fred Buzhardt (as special counsel to the President), or any other person of suitable age and discretion at the White House or the Old Executive Office Building, Washington, D. C.

Respectfully submitted,
ARCHIBALD COX
Special Prosecutor

Show-Cause Order

United States District Court for the District of Columbia

Order to show cause:

Upon consideration of the verified petition of Archibald Cox, special prosecution, Watergate special prosecution force, on behalf of the grand jury in and for the United States District Court for the District of Columbia, for an order directing Richard M. Nixon or any subordinate officer whom he may designate as having custody and control of certain documents or objects, to show cause why there should not be full and prompt compliance with a subpoena duces tecum of this court, dated July 23, 1973, directing the production of certain documents and objects before the grand jury of this district at 10:00 A.M. on July 26, 1973, and it appearing to this court that various items called for by that subpoena are being withheld and that good cause has been shown why the subpoena should be enforced; it is hereby ordered:

1. That Richard M. Nixon or any subordinate officer whom he may designate as having custody or control of any of the items described in paragraph 1 of the schedule attached to the above mentioned subpoena, is ordered to show

cause at a hearing on the seventh day of August, 1973, why the documents and objects described in paragraph 1 of such schedule should not be produced as evidence before the grand jury:

2. That at the hearing, and in any affidavits, briefs, or memoranda submitted in connection with this matter, the special prosecutor is authorized to disclose matters occurring before the grand jury to the extent necessary to show the grand jury's entitlement to enforcement of the subpoena;
3. And that the United States Marshal for the District of Columbia is directed to

memoranda submitted in connection with this matter, the special prosecutor is authorized to disclose matters occurring before the grand jury to the extent necessary to show the grand jury's entitlement to enforcement of the subpoena;

3. And that the United States Marshal for the District of Columbia is directed to serve forthwith a copy of this order and the above mentioned petition on Richard M. Nixon, J. Fred Buzhardt (as special counsel to the President), or any other person of suitable age and discretion at the White House or the Old Executive Office Building, Washington, D. C. Such service on or before the 30th day of July 1973, shall be deemed good and sufficient service.

JOHN J. SIRICA
Chief Judge