

# Footnotes to the Ruling by Judge Sirica

5/21/74

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(1) Rule 17, Subpoena. (C) For production of documentary evidence and of objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(2) The motion asked that the subpoenaed materials be ordered produced before the court with permission granted to Government attorneys to inspect them. Three of the seven defendants in *United States v. Mitchell* have filed motions joining in that of the special prosecutor with the stipulation that materials produced be made available to the defendants in full. A fourth defendant filed a response in support of the subpoena, but in opposition to the special prosecutor's motion insofar as it failed to assure defendants access to the materials upon production.

(3) The document noted, however, that "portions of twenty of the conversations described in the subpoena have been made public and no claim of privilege is advanced with regard to those Watergate-related portions of those conversations."

(4) Defendant Strachan also filed a motion for an order directing the issuance of a subpoena identical to that of the special prosecutor in the event that enforcement of the Government subpoena is abandoned.

(5) Although initially accepted under seal, the court has released those portions of briefs relating to the jurisdictional issue of "intra-executive controversy" discussed in the text below.

The court has granted a motion of the special prosecutor made pursuant to Rule 6 (E), Federal

Rules of Criminal Procedure, for leave to disclose grand jury proceedings as necessary in support of the subpoena with the proviso urged by defense counsel that, for the present, such disclosures not be made public.

(6) The President has asserted the point to preserve it, in his words, "should it be necessary for this case to reach a court in which *Nixon v. Sirica* is not a controlling precedent."

(7) *Nader v. Bork*, 366 F. Supp. 104 (DDC 1973). Former Special Prosecutor Archibald Cox received a delegation of powers and responsibilities from the Attorney General acting by authority of 28 U.S.C. Secs. 509, 510 and 5 U.S.C. Sec. 301. The terms of this delegation were promulgated by Department of Justice Order No. 517-73, 38 Fed. Reg. 14,688 (June 4, 1973) and reaffirmed as to Mr. Jaworski in Department of Justice Order No. 551-73, 38 Fed. Reg. 30,738 (Nov. 7, 1973).

(8) See, F.G., the President's news conference of Oct. 26, 1973, weekly compilation of Presidential documents, p. 1289 (Oct. 29, 1973); letter of Acting Attorney General Robert H. Bork to Leon Jaworski, Esq. dated Nov. 21, 1973; and hearings before the Senate Committee on the Judiciary on the special prosecutor, 93d Cong., 1st Sess., pt. 2, pp. 571-753.

(9) Department of Justice Order No. 554-73, 38 Fed. Reg. 32,805 (Nov. 27, 1973).

(10) The *Nixon v. Sirica* case, arising out of the grand jury investigation which produced the indictment herein, presented circumstances warranting the court's in camera inspection of subpoenaed items. 487 F.2d at 718, 719. The need for evidence presented here is, if anything, more compelling since the matter has developed into a criminal trial where the standard of proof is not simply probable cause but proof beyond a reasonable doubt, and where defendants confront a more direct threat to their reputations and liberty. The President contends that because the special prosecutor would not have commenced this case without evidence sufficient, in his opinion, to convict the defendants,

the need for other evidence is insubstantial. Such an argument, however, ignores the fact not only that it is the special prosecutor alone, in this instance, who has the duty to determine the quantity and quality of evidence necessary to prosecute, but that the prosecutor has an obligation to obtain and present all the relevant evidence. It has never been the law that once an indictment issues, evidence beyond that at hand is unnecessary and should not be sought.

(11) In this connection, it is significant that although the special prosecutor is forced in part to rest his showing on circumstantial evidence, having been denied access to the material solicited, in the approximately 20 instances where contents of subpoenaed tapes have been made public, the prosecutor's assertions that "Watergate" was discussed have been shown accurate without exception. Counsel for the President is unable to state that other subpoenaed items are or are not relevant to this case because he has not seen or heard them. (Transcript of proceedings in camera, May 13, 1974, pp. 61, 62.) Nevertheless, he cites the President's April 29, 1974, public characterization of edited transcripts produced from tape recordings including some of those here subpoenaed:

They include all the relevant portions of all of the subpoenaed conversations that were recorded — that is, all portions that relate to the question of what I knew about Watergate or the cover-up, and what I did about it.

They also include transcripts of other conversations which were not subpoenaed, but which have a significant bearing on the question of presidential actions with regard to Watergate.

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As far as what the President personally knew and did with regard to Watergate and the coverup is concerned, these materials—together with those already made available—will tell it all.

Be that as it may, "What the President personally knew and did" is not dispositive of the issues in this case.