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President's Letter to Rodino

Following is the text President Nixon's letter to House Judiciary Committee Chairman Peter W. Rodino:

Dear Mr. Chairman:

In your letter of May 30, you describe as "a grave matter" my refusal to comply with the committee's subpoenas of May 15. You state that "under the Constitution it is not within the power of the President to conduct an inquiry into his own impeachment," and add that "committee members will be free to consider whether your refusals warrant the drawing of adverse inferences concerning the substance of the materials . . ."

The question of the respective rights and responsibilities of the executive and legislative branches is one of the cardinal questions raised by a proceeding such as the one the committee is now conducting. I believe, therefore, that I should point out certain considerations which I believe are compelling.

First, it is quite clear that this is not a case of "the President conduct (ing) an inquiry into his own impeachment." The committee is conducting its inquiry; the committee has had extensive and unprecedented cooperation from the White House. The question at issue is not who conducts the inquiry, but where the line is to be drawn on an apparently endlessly escalating spiral of demands for confidential presidential tapes and documents. The committee asserts that it should be the sole judge of presidential confidnetiality. I cannot accept such a doctrine; no President could accept such a doctrine, which has never before been seriously asserted.

What is commonly referred to now as "executiv e privilege" is part and parcel of the basic doctrine of separation of powers—the establishment, by the Constitution, of three separate and co-equal branches of government. while many functions of government require the concurrence or interaction of two or more banches, each branch historically has been steadfast in maintaining its own independence by turning back attempts of the others, whenever made, to assert an authority to invade, without consent, the privacy of its own deliberations.

Thus each house of the Congress has always maintained that it alone shall decide what should be provided, if anything, and in what form, in response to a judicial subpoena. This standing doctrine was summed up in a resolution adopted by the Senate on March 8, 1962, in connection with subpoenas issued by a federal court in the trial of James Hoffa, which read: "Resolved, that by the privileges of the Senate of the United States no evidence under the control and in the possession of the Senate of the United States can, by the mandate of process of the ordinary courts of justice, be taken from the control or possession, but by its permission . . ." More recently, in the case of Lt. William Calley, the chairman of the House Armed Services subcommittee refused to make available for the court-martial proceeding testimony that had been given before the subcommitete in executive session—testimony which Lt. Calley claimed would be exculpatory. In refusing, the subcommittee chairman, Representative Herbert, explained that the Congress is "an ingovernment, separate from but equal to the executive and judicial branches," and that accordingly only Congress can direct the disclosure of legislative records.

Equally, the judicial branch has always held sacrosanct the privacy of judicial deliberations, and has always held that neither of the other branches may invade judicial privacy or encroach on judicial independence. In 1953, in refusing to respond to a subpoena from the House Un-American Ac- Tom C. Clark cited the fact that "the independence of the three branches of our government is the cardinal principle on which our constitutional system is founded. This complete independence of the judiciary is necessary to the proper administration of justice." dentiality of the court to that of the executive, and said: "No statute gives this court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the court to protect the confidentiality of its internal operations by whatever judicial means may be required."

These positions of the courts and the Congress are not lightly taken; they are essential to maintaining the balances among the three branches of government. Equal firmness by the executive is no less essential to maintaining that balance.

The general applicability of the basic principle was summed up in 1962 by Senator Stennis, in a ruling upholding President Kennedy's refusal to provide information sought by a Senate Stennis held: "We are now come face to face and are in direct conflict with the established doctrine of separation of powers . . . I know of no case where the court has ever made the Senate or the House surrender records from its files, or where the executive has made the legislative branch surrender records from its files—and I do not think either one of works three ways. Each is supreme within its field, and each is responsible within its field."

If the institution of an impeachment inquiry against a President were permitted to override all restraints of would spell the end of the doctrine of separation of powers; it would be an open invitation to future Congresses to use an impeachment inquiry, however frivolously, as a device to assert their own supremacy over the executive, and to reduce executive confidentiality to a nullity.

My refusal to comply with further subpoenas with respect to Watergate is based, essentially, on two considerations.

First, preserving the principle of separation of powers—and of the executive as a co-equal branch—requires that the executive, no less than the legislative or judicial branches, must be immune from unlimited search and seizure by the other co-equal branches.

Second, the voluminous body of materials that the committee already has—and which I have voluntarily provided, partly in response to committee requests and partly in an effort to round out the record—does give the full story of Watergate, insofar as it relates to presidential knowledge and presidential actions. The way to resolve whatever ambiguities the committee may feel still exist is not to pursue the chimera of additional evidence from additional tapes, but rather to call live witnesses who can place the existing evidence in perspective, and subject them to cross-examination under oath. Simply multiplying the tapes and transcripts would extend the proceedings interminably, while adding nothing substantial to the evidence the committee already has.

Once embarked on a process of continually demanding additional tapes whenever those the committee already has fail to turn up evidence of guilt, there would be no end unless a line were

drawn somewhere by someone. Since it is clear that the committee will not draw such a line, I have done so

One example should serve to illustrate my point. In issuing its subpoena of May 15, the committee rested its argument for the necessity of these additional tapes most heavily on the first of the additional conversations subpoenaed. This was a meeting that I held on April 4, 1972, in the Oval Office, with then Attorney General Mitchell and H. R. Haldeman. The committee insisted that this was necessary because it was the first meeting following the one in Key Biscayne between Mr. Mitchell and his aides, in which, according to testimony, he allegedly approved the intelligence plan that led to the Watergate break-in; and because, according to other testimony, an intelligence plan was mentioned in a briefing paper prepared for Mr. Haldeman for the April 4 meeting. Committee members made clear their belief that the record of this meeting, therefore, would be crucial to a determination of whether the President had advance information of the intelligence activities that included the break-in.

As it happens, there also was testimony that the ITT matter had been discussed at that April 4 meeting, and the committee therefore also requested the April 4 conversation in connection with its ITT investigation. On June 5, 1974, a complete transcript was provided to the committee for the purposes of the ITT probe, together with an invitation to verify the transcript against the actual tape. This transcript shows that not a word was spoken in that meeting about intelligence plans, or about anything remotely related to Watergate—as the committee can verify.

I cite this instance because it illustrates clearly—on the basis of material the committee already has—the insubstantiality of the claims being made for additional tapes; and the fact that a committee demand for material does not automatically thereby convert the requested material into "evidence."

As for your declaration that an adverse inference could be drawn from my assertion of exeutive privilege with regard to these additional materials, such a declaration flies in the face of established law on the assertion of valid claims of privilege. The Supreme Court has pointed out that even allowing comment by a judge or prosecutor on a valid constitutional claim is "a penalty imposed by courts for exercising a constitutional privilege," and that "it cuts down on the privilege by making its assertion costly." In its deliberations on the proposed Federal Rules of Evidence, the House of Representatives—in its version—substituted for specific language on the various forms of privilege a blanket rule that these should "be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience...." But as adopted in 1972 by the Supreme Court—the final arbiter of "the principles of the common law as ... interpreted by the courts," and as codification of those principles—the proposed federal rules clearly state: "The claim of a privilege, whether in the present proceeding or in a prior occasion, is not the proper subject of comment by judge or counsel. No inference may be drawn therefrom."

Those are legal arguments. The common-sense argument is that a claim of privilege, which is valid under the doctrine of separation of powers and is designed to protect the principle of separation of powers, must be accepted without adverse inference—or else the privilege itself is undermined, and the separation of powers nullified.

A proceeding such as the present one places a great strain on our constitutional system, and on the pattern of practice of self-restraint by the three branches that has maintained the balances of that system for nearly two centuries. Whenever one branch attempts to press too hard in intruding on the constitutional prerogatives of another, that balance is threatened. From the start of these proceedings, I have tried to cooperate as far as I reasonably could in order to avert a constitutional confrontation. But I am determined to do nothing which, by the precedents it set, would render the executive branch henceforth and forevermore subservient to the legislative branch, and would thereby destroy the constitutional balance. This is the key issue in my insistence that the executive must remain the final arbiter of demands on its confidentiality, just as the legislative and judicial branches must remain the final arbiters of demands on their confidentiality.

Sincerely,
Richard Nixon