UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 74–116

UNITED STATES OF AMERICA

v.

JOHN D. EHRLICHMAN, ET. AL., DEFENDANTS

MEMORANDUM IN SUPPORT OF THE PRESIDENT'S MOTION TO QUASH SUBPOENA DUCES TECUM

STATEMENT OF THE CASE

On April 22, 1974, defendants John D. Ehrlichman and Charles W. Colson filed applications requesting that subpoenas duces tecum be issued for the production and inspection of certain materials allegedly in the possession of Richard M. Nixon, President of the United States. These materials relate primarily to confidential notes of various presidential meetings and conversations which took place between January 1971 through and including April 30, 1973, a period covering over two years. On May 22, 1974, the requested subpoenas were issued and made returnable on May 24, 1974. The President now moves this Court to quash both subpoenas in their entirety.

INTRODUCTION

We note at the outset that we continue to believe that it is for the President of the United States, rather than for a court, to decide when the public interest requires that he exercise his constitutional privilege to refuse to produce information. We also continue to believe that a President is not subject to compulsory process from a court. We recognize that at the present stage of this case these contentions are foreclosed by the decisions in *Nixon* v. *Sirica,* —— U.S. App. D.C. ——, 487 F. 2d 700 (1973) and United States *Senate Select Committee* v. *Nixon,* Slip Op. No. 74–1258 (C.A.D.C., May 23, 1974). Thus we do not now press these points, but mention them here in order that they may be preserved should it be necessary for this case to reach a court in which the above cases are not controlling precedent.

In truth, it should be possible to decide the present matter without reference to the contentions noted in the preceding paragraph, for there are other independent reasons why the subpoenas now in issue should be quashed. As we now show each subpoena is fatally defective for failing to meet the prerequisites of Criminal Rule 17(c) as enumerated in *United States* v. *Iozia* 13 F.R.D. 335 (S.D.N.Y. 1952). In particular, each subpoena is unnecessarily broad, and no showing of relevancy and evidentiary admissibility has been made as required, before Rule 17(c) can be used to obtain even the most mundane, non-privileged material. For these reasons alone, the subpoenas must be quashed in their entirety. In addition, the defendants have failed to make the more rigorous showing required by *Nixon* v. *Sirica* and reaffirmed by *Senate Select Committee* v. *Nixon,* that must be made before any court can order the President to produce materials that the Court of Appeals has said are "presumptively privileged." 487 F. 2d at 717.

ARGUMENT

I. *The subpoenas must be quashed for failing to comply with the requirements of Rule 17(c).*

A. *Relevancy and Admissibility.*

The Defendants have obtained their subpoenas pursuant to Criminal Rule 17(c), which provides:

> 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.

Upon analysis, it is clear that the present subpoenas fail to meet the criteria for obtaining production and inspection of documents under Rule 17(c). The leading Supreme Court case discussing Rule 17(c) is *Bowman Dairy Co.* v. *United States,* 341 U.S. 214 (1951). In *Bowman,* the court plainly emphasized that "Rule 17(c) was not intended to provide an additional means of discovery." 341 U.S. at 220. On the contrary, its application was specifically limited only to production of "evidentiary" material. 341 U.S. at 219. In this regard the Court stated, "[I]n short, any document or other material *admissible as evidence,* . . . is subject to subpoena." 341 U.S. at 221 (emphasis added). By utilizing this admissible evidence standard in applying Rule 17(c), the Court rejected a conclusory request by the defendants for materials that "are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants . . .," 341 U.S. at 221. In so doing, the Court considered such a "catch-all" request as invalid for it was "not intended to produce evidentiary materials but [was] merely a fishing expedition to see what may turn up." 341 U.S. at 221. Upon examination it becomes obvious that the subpoenas in this case are identical in nature to the invalid request in *Bowman* and represent nothing more than broad fishing expeditions, requesting virtually an unlimited number of confidential Presidential memoranda. In order to foreclose just such an abuse of Rule 17(c), the courts have uniformly required that the party seeking disclosure must show that each requested document is both evidentiary

in nature and relevant to the instant proceeding. In *United States* v. *Iozia,* 13 F.R.D. 335 (S.D.N.Y. 1952), Judge Weinfeld formulated the following criteria, which have been frequently cited by other courts:

(1) That the documents are *evidentiary* and *relevant*;
(2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;
(3) That the defendant cannot properly prepare for trial without such production, and inspection in advance of trial and failure to obtain such inspection may tend reasonably to delay the trial;
(4) That the application is made in good faith and is *not intended as a general fishing expedition.* 13 F.R.D. at 338 (emphasis added).[1]

As to the burden of establishing the validity of a subpoena duces tecum, controlling case law recognizes that it is incumbent upon the party seeking disclosure to set forth each request with *sufficient specificity* to establish that each document is both "relevant" and "admissible," and that the other *Iozia* criteria are met. *United States* v. *Palermo,* 21 F.R.D. 11, 13 (S.D.N.Y. 1957). In this regard, the court in *United States* v. *Winkler,* 18 F.R.D. 213 (D. Rhode Island, 1955), held:

> The right of a defendant to the production and inspection of documents and objects prior to trial under Rule 17(c) is not absolute but *that upon objection thereto good cause for such production and inspection must be first shown by the party seeking the same.* 17 F.R.D. at 215 (emphasis added).

Similarly, in *Iozia,* where the defendant sought a subpoena, the court held that "there must be a showing of good cause to entitle the defendant to production and inspection of documents under Rule 17(c)." 13 F.R.D. at 338. "Good cause" as defined by the *Iozia* court requires a showing by the defendant that all four of the well-accepted criteria set out above have been met. In the absence of such a showing that the material has met the established criteria and "would be admissible in evidence or relevant at trial," a motion to quash must be granted. See *United States* v. *Winkler,* 17 F.R.D. at 218.

In examining the defendants' subpoenas here, it is patently obvious that they fail to meet the *Iozia* criteria, particularly, "(1) that the documents are evidentiary and relevant, . . . and (4) that the application . . . is not intended as a general fishing expedition." 13 F.R.D. at 338.

It has been firmly established in criminal cases that in seeking discovery, the requirement of a showing of materiality and admissibility is not satisfied "by a mere conclusory allegation that the requested information is material" to the preparation of a case. *United States* v. *Condor,* 423 F. 2d 904 (6th Cir. 1970). Nor is it sufficient to make a "bare allegation that the requested information would be material in the preparation of the defense." 423 F. 2d at 910. Here the defendants have not even attempted to support their requests with an unsupported allegation; thus both subpoenas are void for the defendants failure to make the necessary prerequisite showings.

It is important to emphasize that there is an essential distinction between disclosure in civil and criminal actions, for as the court in quashing a subpoena in *United States* v. *Maryland and Virginia Milk Producers, Inc.,* 9 F.R.D. 509 (D.D.C. 1949) stated:

> In this case the proposed subpoena duces tecum is not intended to be used to secure evidence to be introduced at the trial, but is intended to be employed as a broad discovery. . .
>
> * * * * *
>
> It is well settled that *in a criminal case, unlike a civil action, such a right of broad discovery does not exist* . . . 9 F.R.D. at 510 (emphasis added).

It has been judicially recognized that the test to be met by one seeking material must be met at the time that the items are sought, and the mere "probability" that the items may later become relevant is of no consequence. The court in *United States* v. *Marchisio,* 344 F.2d 653 (2d Cir. 1965) stated: "Unlike the rule in civil actions, a subpoena duces tecum in a criminal action is not intended for the purpose of discovery; the documents sought must at that time meet the tests of relevancy and admissibility." 344 F.2d at 669. See also *United States* v. *Murray,* 297 F.2d 812, 821–22 (2d Cir. 1962); *United States* v. *Palermo,* 21 F.R.D. 11, 13 (S.D. N.Y. 1957). Absolutely no attempt has been made by either defendant to establish either the admissibility or relevancy of *any* of the requested items.

Therefore we submit that neither defendant has made the requisite showing that each of the requested items *is* "evidentiary and relevant" and that his application "is not intended as a general fishing expedition."

With respect to the materials being sought by subpoena here, it is extremely important to note two additional considerations. First the materials are *not* the personal papers of the respective defendants but are official notes of Presidential meetings reflecting both the decisions and the decision-making process of the executive branch on the widest conceivable spectrum over a period of approximately two and one-third years. Thus they are highly confidential executive documents. Second, and perhaps most important, the defendants here have had and continue to have physical access to view the materials they now seek although the confidential material continues to remain in the exclusive control and possession of the White House. Consequently, there was no necessity for either defendant to frame his request for disclosure in such a manner so as to include an unspecified number of confidential executive documents, many if not all of which have absolutely no bearing on the instant proceeding.

In this regard, in *United States* v. *Bearden,* 423 F.2d 805, (5th Cir.), *cert. denied* 400 U.S. 836 (1970), the Court was confronted with a similar situation. In denying

[1] This case has been prominently cited in numerous decisions. See for example, *United States* v. *Bearden,* 423 F. 2d 805, 810 n.4 (5th Cir.), *cert. denied,* 400 U.S. 836 (1970: *United States* v. *Garrison,* 168 F. Supp. 622 (E. D. Wis. 1958); *United States* v. *Duncan,* 22 F.R.D. 28 (E.D.N.Y. 1958).

a Rule 17(c) subpoena duces tecum proposed against a non-party, the Court said:

> In view of [the defendants'] opportunity to examine the documentary evidence [sought] before trial and in view of the absence of any showing of necessity, we find the district court did not abuse its discretion in denying the motion for subpoenas duces tecum. 423 F.2d. at 810.

There is no reason that the defendants here cannot make their requests more precise and specific as to exactly what particular items are necessary and relevant in the instant proceeding. Furthermore, the defendants should and must be able to support each such request with a particular showing of good cause required under the well-established case law. Thus in the absence of a more specific request, both subpoenas must be rejected out of hand.

As to the three more particularized requests (items 2, 3, and 4) made by defendant Colson, the following should be noted. Item 2 relating to "the 10-item damage assessment" submitted *in camera* to the Court in *New York Times Co.* v. *United States,* 403 U.S. 714 (1971), does not belong either to the personal files or papers of Mr. Colson. Apparently what he is referring to is a submission prepared by Solicitor General Erwin N. Griswold and filed with the United States Supreme Court *in camera* in the so-called "Pentagon Papers" case. This document was then and is now classified as "Top Secret," and has not been released to any party by the Supreme Court. In accordance with the President's responsibility to protect a critical document relating to national security and in keeping with the procedure utilized by the Supreme Court concerning this particular document, we would be willing to submit this item to this Court *in camera,* only on the provision that the Court issue a protective order adequate to ensure that it will not be disclosed by the Court.

In regard to item 3, a "memorandum for the President's file" dated June 16, 1971, such a document does exist and is a presidential paper summarizing a confidential meeting between the President and Dr. Henry Kissinger among others. This memorandum, we submit, is in its entirety totally irrelevant to any issue in the present proceeding. Moreover even defendant Colson, who has first-hand knowledge of the contents of this document, has not asserted that this document is at all relevant in the instant case. And in the absence of such a showing by the party seeking disclosure, the subpoena must be quashed. *United States* v. *Winkler,* 17 F.R.D. 213 (D. Rhode Island 1955).

As to Item 4, concerning a "June 1971 option paper" from defendant Colson to H. R. Haldeman, this is an item, as best we can identify, which has previously been delivered by the White House to the Special Prosecutor, Leon Jaworski. Thus a request for this document must be addressed to the Special Prosecutor. Inasmuch as this document is no longer in the possession or control of the White House, the President takes no position on whether the document should be disclosed by the Special Prosecutor.

B. *Privilege Generally*

For the reasons stated above, it is not necessary for this Court to even consider the fact that a formal claim of executive privilege has been asserted as to the subpoenaed items. However, even if an evidentiary showing had been made as to each of the requested items, the defendants have failed to demonstrate the compelling need necessary to overcome the privileged nature of this material. Although a party seeking production of material pursuant to Rule 17(c) may establish that the requested items are both relevant and evidentiary, a subpoena will not issue if the requested material is subject to a valid claim of privilege. In *Mackey* v. *United States,* 122 U.S. App. D.C. 97, 351 F.2d 794 (1965), this circuit acknowledged the defense of "privilege" and held that the government may be required to produce documents in its possession unless it makes a valid claim of privilege. Courts have long recognized that the public interest in maintaining state secrets of a diplomatic or military nature will override the interests in continuing litigation. See e.g., *Totten* v. *United States,* 92 U.S. 105, 107 (1875); *United States* v. *Reynolds,* 345 U.S. 1, 11 (1953). The judiciary has also responded to Executive pleas to protect "intra-governmental documents reflecting . . . deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd on the opinion below, 128 U.S. App. D.C. 10, 384 F.2d 979, *cert. denied,* 389 U.S. 952 (1967); *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 946, 141 Ct. Cl. 38 (1958).

Similarly in *Continental Oil Co.* v. *United States,* 330 F. 2d 347 (9th Cir. 1964) the existence of a valid claim of attorney-client privilege as to the various documents requested by a grand jury, was sufficient alone to quash a subpoena duces tecum. See also *United States* v. *White,* 322 U.S. 694, 699 (1944) (privilege against self-incrimination), *United States* v. *Jacobs,* 322 F. Supp. 1299 (C.D. Cal. 1971) (attorney-client privilege); and *United States* v. *Judson,* 322 F. 2d 460 (9th Cir. 1963) (privilege against self-incrimination). Moreover, if even a portion of a requested document is subject to a valid claim of confidentiality, the privileged portions should nevertheless not be subject to disclosure by subpoena. *United States* v. *Borltek,* 119 F. Supp 425, 426 (M.D. Pa. 1954).

C. *Applicability of Executive Privilege.*

The same rationale is equally applicable to a valid claim of Executive privilege. In *Nixon* v. *Sirica,* —— U.S. App. D.C. ——, 487 F. 2d 700 (1973), this circuit expressly "acknowledge[d] the longstanding judicial recognition of Executive privilege" 487 F. 2d at 713, and agreed that Executive communications are "presumptively privileged" 487 F. 2d at 717. Only in the face of a

uniquely powerful showing of need made by the grand jury, was the court willing to order disclosure. This fact was reaffirmed again by this Circuit, in *Senate Select Committee* v. *Nixon,* Slip Op. No. 74–1258 (C.A.D.C. May 23, 1974) when the Court stated, "we think that *Nixon* v. *Sirica* requires a showing of the order made by the grand jury before a generalized claim of confidentiality can be said to fail, . . ." (Slip Op. p. 11). In *Senate Select Committee,* this circuit specifically rejected a request made by the Senate Committee for presidential materials in the absence of a justifiable showing of compelling need. We submit the same result is mandated here for "a compelling need" cannot be demonstrated for the requested materials particularly when both defendants personally have physical access to the documents they seek. Consequently neither subpoena can be sustained.

CONCLUSION

For the foregoing reasons, the subpoenas must be quashed in their entirety.

Respectfully submitted,

JAMES D. ST. CLAIR
J. FRED BUZHARDT
MICHAEL A. STERLACCI
JEROME J. MURPHY
JEAN A. STAUDT
Attorneys for the President

The White House
Washington, D.C. 20500
Telephone No.: 456–1414

Of Counsel
CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 74–116

UNITED STATES OF AMERICA

v.

JOHN D. EHRLICHMAN ET AL., DEFENDANTS

ORDER

Upon consideration of the President's Motion to Quash the subpoenas issued on the 22 day of May, 1974, requiring the production and inspection of certain materials made returnable before the Court on May 24, 1974, in the above-styled case, and the pleadings filed herein, and the Court having determined that the President's Motion to Quash should be granted, it is hereby this _____ day of May, 1974,

ORDERED that the aforementioned subpoenas be and hereby are quashed.

GERHARD A. GESELL
United States District Judge

CERTIFICATE OF SERVICE

I, James D. St. Clair, hereby certify that on the 24th day of May, 1974, I have caused to be served a copy of the foregoing Formal Claim of Privilege, Special Appearance and Motion to Quash and Memorandum of Law, and proposed Order on the counsel of record at the following addresses:

Leon Jaworski, Esq.
Special Prosecutor
Watergate Special Prosecution Force
1425 K Street, N.W.
Washington, D.C. 20005

Sidney Dickstein, Esq.
David Shapiro, Esq.
Colson & Shapiro
1735 New York Avenue, N.W.
Washington, D.C. 20006

William S. Frates, Esq.
Andrew C. Hall, Esq.
Frates Floyd Pearson Stewart
Proenza & Richman
Twelfth Floor Concord Building
Miami, Florida 33130

JAMES D. ST. CLAIR
Special Counsel to the President.

NOTE: Copies of the documents were made available to the White House Press Office.

Digest of Other White House Announcements

Following is a listing of items of general interest which were announced to the press during the period covered by this issue but which are not carried elsewhere in the issue. Appointments requiring Senate approval are not included since they appear in the list of nominations submitted to the Senate, below.

May 20

The President returned to Washington from his home in Key Biscayne, Fla.