[Letter from Charles Alan Wright, Special Consultant to the Counsel to the President, to Archibald Cox, Special Prosecutor, 9 Weekly Comp. Pres. Doc. 921-922 (Jul. 23, 1973).]

*Dear Mr. Cox:*

Mr. Buzhardt has asked that I respond to your letters to him of June 20th, July 18th and July 20th 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 ***\*922*** 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 the Senate Committee. But in your letter of July 18th 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 from the Senate Committee. You indicated a similar position when we met on June 6th. At that time you suggested that questions 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 18th 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 consideration just stated, there is an even more fundamental reason why separation-of-powers considerations are fully as applicable to a request from you as to one from the Senate Committee. It is clear, and your letter of the 18th specifically states, that 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 prosecution 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. § 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, 6n. 9 (1953).

In your letter to Mr. Buzhardt of July 10th 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 to 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