WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : Leon Jaworski
Special Prosecutor

DATE: May 6, 1974

FROM : Philip A. Lacovara
Counsel to the Special
Prosecutor

SUBJECT: Authority to Honor Requests for Disclosure of Government Files to House Judiciary Committee

The Impeachment Inquiry Staff of the House Judiciary Committee has submitted to us a number of requests that we disclose to them material from our files that may bear upon their investigation to determine whether there are grounds for the impeachment of the President. In my judgment, your authority to accede to such requests is clear to the extent that they relate to our investigative files, including FBI materials and attorneys' work-product, but without leave of court under Rule 6(e) of the Federal Rules of Criminal Procedure there must not be any disclosure of matters actually occurring before a grand jury.

A rather full memorandum was prepared on this subject by Peter M. Kreindler dated January 11, 1974, and by memorandum dated January 14, 1974, I forwarded his research with my own comments expressing agreement with his conclusions. Apart from the question whether we would have any legitimate ground to refuse to comply with a demand for production of Justice Department files (my opinion is that a claim of "executive privilege" would be both unwise and unavailing), the relevant regulations of the Department of Justice specifically allow you as an authorized official to decide, in the exercise of your discretion, that such requests for information should be granted.

The Attorney General has promulgated regulations prohibiting any employee in the Department of Justice from producing any material contained in the files of the Department in response to a demand of a court of other authority "without prior approval of designated Department officials or the

Attorney General." 28 C.F.R. §16.22.* The Special Prosecutor is a "designated Department official." The operative order of the Acting Attorney General setting forth the duties and responsibilities of the Special Prosecutor delegates to the Special Prosecutor, with an express reference to 28 C.F.R. §§16.21-16.26, the authority to approve or disapprove "the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order, or other demand of a court or other authority." Department of Justice Order No. 551-73 (November 2, 1973), adding 28 C.F.R. §0.37. This authority, coupled with the provision that the "Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions," leaves no doubt that the Special Prosecutor has final authority within the Department to disclose confidential files relating to matters within his jurisdiction.

Of course, in exercising his authority to disclose confidential information, the Special Prosecutor should exercise discretion to protect our investigations and prosecutions, insofar as that is possible, consistent with other duties and responsibilities. The factors which should be taken into account

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* This regulation was adopted pursuant to the Attorney General's statutory power to provide for the confidentiality of Department of Justice files. 5 U.S.C. §301. The investigatory files of the Department of Justice are confidential and generally not subject to discovery in litigation. See, e.g., Westinghouse Electric Corp. v. City of Burlington, 351 F.2d 762 (D.C. Cir. 1965); Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960). They are absolutely privileged from disclosure under the Freedom of Information Act. 5 U.S.C. §552. The interests underlying these rules of confidentiality are variously stated as including: (1) protection of pending investigations and potential trials from premature disclosure; (2) protection of innocent individuals; and (3) encouragement of cooperation and candor from witnesses and informants.

The validity of a similar order prohibiting Department subordinates from disclosing investigative information was upheld by the Supreme Court in United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1950).

are the effects of premature public disclosure on continuing cooperation of informants and on effective presentation at trial. Also, precautions should be taken so that we are not responsible for generating prejudicial pre-trial publicity. Courts are more likely to dismiss a prosecution when such publicity can be traced to the prosecution. See, e.g., United States v. Abbot Laboratories, Crim. No. 3897 (E.D. N.C. December 17, 1973). These concerns, however, speak not to the responsibility of the Special Prosecutor to cooperate with the House, but to the mode of cooperation.

cc: Mr. Ruth
Mr. Kreindler

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : Leon Jaworski DATE: June 14, 1974

FROM : Richard Ben-Veniste

SUBJECT: Letter to Chairman Rodino Concerning Calling Live Witnesses Before the House Judiciary Committee on Impeachment.

In view of our desire to hold the September 9 trial date, and recognizing the possible effect the calling of live witnesses by the Judiciary Committee might have on a later motion for continuance by reason of pretrial publicity (Delaney), it might make sense to try to suggest some criteria to the Judiciary Committee concerning calling live witnesses. In this regard, you could point out to Chairman Rodino that as the Court has expressed concern about pretrial publicity, and as the grand jury report turned over to the Rodino Committee specifically requests the Committee to exert restraint in this area, some criteria might be appropriate for consideration by the Committee. For example, the Committee could set down a balancing test by which it would weigh the anticipated helpfulness of the testimony of John Dean, for example, against the fact that this would cause us pretrial problems and might not advance them beyond Dean's sworn testimony. Similarly, we could suggest that calling defendants Haldeman, Ehrlichman, and Mitchell, without some showing that their testimony would add materially to what the Committee already has under oath, would on balance, be harmful.

As Hank knows, I have already discussed this informally with John Doar and Bernie Nussbaum, who are interested in calling as few live witnesses as possible. We could send a copy of such a Rodino letter to Judge Sirica, who might find some way to endorse this balancing test. If we are going to write such a letter I think it should be done in the immediate future, before positions become solidified at the Judiciary Committee.

cc. Ruth
Neal
Lacovara
Kreindler
Feldbaum
Volner

HJC

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : Leon Jaworski
Special Prosecutor

DATE: Jan. 14, 1974

FROM : Philip A. Lacovara

SUBJECT: Production of Evidence to the House Judiciary Committee (Impeachment Inquiry)

Later than I had hoped, I am now in a position to give you written confirmation of the advice I gave you orally last week that there are no absolute legal restraints on the co-operation with the legitimately constituted committee of the House of Representatives that is inquiring whether there are grounds for impeachment of the President. I regret that you had to take public positions on related issues before I was able to provide you with the attached memorandum, which I believe accurately and thoughtfully analyzes these questions.

In particular I point out that we have the explicit responsibility for investigating and prosecuting allegations against the President. This is perhaps the principal aspect of the Department of Justice mandate to the Special Prosecutor, and reflects the deliberate determination of the Senate. Thus, we cannot properly remain neutral on this subject. Any evidence tending to show criminal complicity by the President in our possession must be dealt with either through the grand jury process -- by indictment or presentment to the House -- or by our transmission of it to the House Judiciary Committee, if it is determined as a matter of law or as a matter of policy that the President should not be subjected to the ordinary criminal justice process.

The fact that we have possession of evidence for use by the grand jury does not preclude its disclosure to the House, if disclosure is otherwise warranted. Although am not familiar with any commitments you may have personally given to the White House that go beyond what would otherwise be imposed by law, I believe that all of the material that we have obtained from the White House, under subpoena or in lieu of subpoena, could properly be disclosed to the House. They are not covered by the provisions of Rule 6(e) since they have an existence independent of the proceedings before the grand jury. Second, they relate to the lawful inquiry by a committee discharging a function of the highest importance in our government and expressly provided for by the Constitution.

Third, since at the very least these materials have been given to us, either under subpoena or in lieu of subpoena, for presentation to the grand jury (and I assume to a petit jury in a public trial) there is no remaining claim of executive privilege, since that claim has either been finally rejected by the Court of Appeals(in certain instances) or has been waived by the voluntary production of additional materials for use outside the Executive Branch.

As indicated by Henry Ruth's memorandum of this date, it seems to me that the major open question is whether you prefer to deal with this evidence through the grand jury process or through the impeachment process.

Attachment

cc: Henry Ruth
Peter M. Kreindler

1. I am already dealing with it thru grand jury process
2. Release to House absurd unless I know how they will deal with it
3. No promises to W.H. - except G.J.

WATERGATE SPECIAL PROSECUTION FORCE — DEPARTMENT OF JUSTICE

Files HJC

Memorandum

7.1

TO : William Merrill

DATE: April 4, 1974

FROM : Philip A. Lacovara

SUBJECT: The Judiciary Committee Interview with G. Gordon Liddy about Fielding Break-in, etc.

Peter Maroulis called me today and among other things expressed his concern about a telephone call he received on April 1 from Mr. Cates, a lawyer with the impeachment staff of the House Judiciary Committee. Mr. Cates allegedly told Maroulis that Liddy at that time was with him in the Congressional Hotel (which is the impeachment staff headquarters) but Cates could not explain to Maroulis the legal authority for Liddy's removal from the D. C. Jail. Maroulis stated that he had received a letter from Liddy which explained that he had been taken from D. C. Jail by three U.S. Marshals who showed him a "teletype" as their authority but did not permit him to read it. According to Liddy's letter, the Committee staff told him they wanted to discuss the Fielding break-in as well as other activities of White House staff members. Liddy told them that he was under indictment for the Fielding break-in, objected that his counsel had not been contacted prior to this interview which was being held without his consent, and relied on his Fifth and Sixth Amendment rights in refusing to talk with them.

I do not know whether the Committee obtained a writ of habeas corpus for Liddy's production. It would surprise me if they did not, since I am not aware of any other authority that would justify his removal from custody pursuant to the civil and criminal sentences he is serving. Beyond that, we must now anticipate that Maroulis will claim constitutional violations because government officers attempted to interrogate him about the subject matter of a pending indictment without protecting his right to counsel. Although there was no prejudice, since he did not make any admissions, this procedure by the Committee seems extremely clumsy and I am asking Hank Ruth, our liaison with the Committee, to make strong objections to any attempt by the Committee to interrogate criminal defendants without notice to their counsel.

cc: Mr. Ruth
Mr. Geller