(9)/3

RICHARD NIXON - DEPOSITION MATTERS / Kreindler file

Central files

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : John Barker DATE: August 20, 1975

FROM : Kenneth Geller KG

SUBJECT: Nixon Deposition

An item on WTOP radio this morning quoted from part of Nixon's testimony in the deposition held last month in connection with the civil suit. This leads me to believe that the full transcript of Nixon's testimony has been released or is about to be released.

There is one area in the deposition which might lead to your receiving some calls. In answer to a question about whether Nixon still agrees with his statement of April 29, 1974 that the public is entitled to the full story of his involvement in the Watergate cover-up, Nixon said that he has fulfilled his obligation by cooperating with the Special Prosecutor's requests for documents and by testifying before the grand jury. This, of course, is deceptive, since none of our recent requests for documents or the grand jury's questioning concerned the cover-up.

If there are any inquiries, you might quote from the memorandum we filed on July 16, 1975 in opposition to release of the grand jury deposition to John Mitchell. "An examination of the [grand jury] transcript," we wrote, "would show beyond peradventure that there is nothing in Mr. Nixon's testimony, which focused primarily on pending grand jury investigations, that 'might have led the jury to entertain a reasonable doubt about [defendant's] guilt' in the Watergate cover-up case".

cc: Mr. Ruth
Mr. Kreindler
Mr. Davis

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Memorandum

TO : Peter Kreindler DATE: July 21, 1975

FROM : Frank Martin FM

SUBJECT: Criminal Division Request for Access to Nixon's Testimony

Shortly after it was announced that Nixon's testimony had been taken by this Office, I received a phone call from Edward Christenbury of the Criminal Division requesting that the Department be given access to Nixon's testimony to the extent that it relates to the issues involved in the Halperin v. Kissinger litigation. On July 17, 1975, I called Christenbury and asked that he re-evaluate his need for access to Nixon's testimony. I also stated that this Office felt that there were some serious problems of abuse of the grand jury process if information developed by the grand jury was to be used for civil litigation purposes.

Christenbury stated that his original request was made merely for the purpose of aiding him in preparation for the possible taking of Nixon's deposition in the Halperin case. He also stated that after his call to me he himself began to realize that there might be some problem in using Nixon's grand jury testimony to prepare his civil case. Christenbury went on to state that he ~~felt~~ he would probably not need access to Nixon's testimony and certainly would not need such access if the Halperin court upholds Nixon's executive privilege claim and refuses to order his deposition. He noted that the executive privilege claim was due to be argued in late July and that it was possible the court might not rule until September.

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The following background should be noted. The Halperin case was filed in May or June of 1973 and thus, throughout the period of our investigations, certain issues have arisen with regard to that litigation. The principal issue has been the appropriateness of Justice Department representation of the federal defendants in that case. We have advised the Department of the nature of our investigations into the removal of records and they have declined to represent any of the civil defendants who were viewed by this Office as potential conspirators in our investigation. More relevant to Christenbury's present request is the extent to which we have exchanged information with the Criminal Division on this subject. In two instances our investigation uncovered FBI documents which were relevant to the Halperin litigation. Since the District

Judge in the Halperin case had ordered the Department to produce all such FBI documents we accordingly forwarded copies of these documents to the Department which then submitted them to the Court. In one instance, the so-called "Clark Clifford letter," the FBI document in question, was attached to a number of related White House documents received from Jeb Magruder and copies of these White House documents were also forwarded to the Department. Almost all the documents involved to date in the Halperin litigation are FBI documents and, accordingly, this Office has had access to those documents directly through the Bureau. In May, 1975, we requested access to the sealed deposition in the Halperin case. Approximately a month later the Department agreed to provide us with access to the sealed depositions. It should be noted that most of the depositions are not sealed and that the reason for sealing portions of these depositions is that they discuss FBI documents which are under seal. We, of course, have independent access to all of these FBI documents.

It should be noted that prior to the request for Nixon's testimony, the Department had never requested access to any of our grand jury testimony, or White House tapes and documents, or the results of FBI investigations performed at our direction. In other words, it is clear that this request is not "in the normal course" and, in fact, comes close to being based in part on curiosity. To be sure, there is a legitimate interest on the part of the Department in getting Nixon's story, especially since he will cite executive privilege in resisting any efforts to take his deposition. A second factor should be noted. Turning over Nixon's testimony would provide a precedent for opening up all of our files, including White House tapes and documents, for use by the Department in its defense of the Halperin case. This tends to make it even clearer that such disclosure would be an abuse of the grand jury process and, if the Department reflects at all upon this possibility, they might well realize that it would be a tactical mistake to inject the results of our investigations into the Halperin litigation.

As a legal matter, it appears that technically Nixon's testimony can be disclosed to the Department since Rule 6(e) provides for disclosure to "attorneys for the Government for use in the performance of their duties." I have found no cases, and doubt that any exist, where

one branch of the Justice Department has sought to compel another branch to disclose grand jury testimony. There is, however, some useful language in a few of the main cases. The leading case is United States v. Proctor and Gamble Company, 356 U.S. 677 (1958). That case dealt with a civil anti-trust action wherein the defendants sought discovery of grand jury testimony developed during a prior criminal anti-trust investigation of the defendants. The Supreme Court held that such discovery was not warranted, especially since no "compelling necessity" or "particularized need" was shown by the defendants. In reversing the lower Court's order to produce the grand jury transcripts the Court stated, "It (the District Court) also seemed to have been influenced by the fact that the prosecution was using criminal procedures to elicit evidence in a civil case. If the prosecution were using that device, it would be flouting the policy of the law." The Court, however, concluded that, "There is no finding that the grand jury proceeding was used as a shortcut to goals otherwise barred or more difficult to reach." (At p. 683) It seems clear that this is precisely what the Department is seeking to accomplish, i.e. to get Nixon's testimony before the grand jury because it knows that, due to Nixon's executive privilege claim, it may be barred from getting that testimony in the civil suit. Justice Whittaker, in his concurring opinion in Proctor and Gamble, would have gone further and barred use of the grand jury testimony in a civil case by either the Government or the defendants except where there has been a showing of "exceptional and particularized need." In his view, grand jury secrecy "may be as fully violated by disclosure to and use by the Government counsel, agents and investigators as by the defendant's counsel in such a civil suit." (At p. 685)

The situation in the Halperin case is further complicated by the fact this Office and the Justice Department are on opposite sides with regard to the main factual issue in our investigation -- i.e. the legitimacy of the removal of records. This is not like the anti-trust or tax situations where the Government is the plaintiff in both the criminal and civil litigation. Here, the Government, in the form of the Special Prosecutor, is the potential plaintiff in the criminal action while the Justice Department is the defendant in the civil action. One-sided disclosure to the Department in a case such as this would lend further weight to the argument that such disclosure would constitute an abuse of the grand jury process. It should be noted that if the Halperin

court later ruled that disclosure of Nixon's testimony to the Department was in fact an abuse of the grand jury process, the likely remedy would be to order that the testimony also be disclosed to the private litigant. In all likelihood this would also lead the Court to order public disclosure of Nixon's testimony.

In several civil anti-trust cases involving the National Deposition Program disclosure of grand jury testimony to private litigants has been ordered where there has been a showing of a "particularized need." In these cases the deposition judge has been allowed to examine the grand jury testimony in camera in order to determine whether or not "material discrepencies" between the witness' grand jury testimony and his deposition give rise to a "particularized need" for disclosure. (See, e.g. Consolidated Edison Co. v. Allis-Chalmers Manufacturing Co., 217 F. Supp. 36 (S.D.N.Y. 1963).) In the Halperin case such "particularized need" will not arise until such time as Nixon has in fact been deposed. (The cases are clear that such disclosure to a private litigant is not warranted merely for discovery purposes, which is the present posture of the Department's request for Nixon's testimony.) In the event that Nixon's executive privilege claim is not sustained and if he is in fact deposed, it may become necessary to consider the use of such an in camera proceeding. If such a proceeding does become necessary, it is considered sound policy to notify the witness whose testimony is to be disclosed and to allow him a hearing if he objects to such disclosure. (See, Corona Construction Co. v. Ampress Brick Co., 376 F. Supp. 598 (D.C. Ill. 1924).)

I would suggest that I contact Christenbury and ask that he reassess the Department's need for access to Nixon's testimony. If he still feels such a need exists, I would suggest that the matter be taken directly to the Assistant Attorney General and/or Deputy Attorney General. Even if Christenbury decides that the testimony is not necessary, the issues of Departmental use of our grand jury and other investigative files for civil litigation purposes should be resolved prior to the merger of this Office's functions into the Criminal Division.

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Memorandum

Hank: I agree w/ projected course — perhaps Frank & I should meet w/ Christenbury

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Cellen notes of references in Nixon deposition to Watergate cover-up

June 23

p. 62 "terrible tragedy of Watergate which occurred during that same period"

p. 73-4 June 4, 1973 - Nixon listened to Dean tapes. Didn't listen to March 21 tape -- relied on Haldeman's notes.

75 Nixon - Haldeman rode on plane from Florida after break-in.

76 Nixon doesn't recall content of June 20 HRH conversation.

77 Nixon - HRH plane discussion about "terribly wrong" break-in.

78 No discussion on June 20 re pre-June 17 knowledge.

82 Nixon doesn't have notes on June 20 mtg. to his knowledge.

91 Woods told Nixon that the Nixon - HRH conversation had to do w/ scheduling.

105 Haldeman's "rather benign" notes of June 20, 1972 conversation.

116 Nixon knows of no motive to erase 18½ min. from the HRH June 20 conversation

119 Kleindienst called Nixon on April 15, 1973 and said he had to see Nixon about an urgent matter. March 21 conver. w/Dean.

120 Kleindienst told Nixon on April 15 that Haldeman and Ehrlichman were criminally involved & should be fired.

121 Nixon talked w/Rebozo about this on April 15. Rebozo said they should resign.

125 Nixon asked Woods on March 21 to see how much the Andreas contribution was.

150-51 March 21 conver. w/Dean re raising $1 million.

152 Nixon decided not to pay Hunt any money.

June 24

295 "silly, incredible Watergate break-in"

296 RN reference to Gray's burning of papers from Hunt's safe.

PMK Notes

NIXON DEPOSITION

June 23, 1975

HSR listed 5 areas of inquiry [5-6]

RMN stated he was waiving privilege only for purposes of GJ investigation [10-11]

HSR stated that deposition would be subject to Rule 6(e) [14]

RMN stated that 6/20 mtg w/ HRH was 1st in WH. He met w/ HRH several times before return from Key Biscayne on 6/19. [75-76].

RMN does not recall what was said in 6/20 conversation. [76]

RMN discussed w/ HRH on plane that break-in was "terribly wrong" and "utterly stupid". Sure all topics were discussed, but no recollection [77]

No independent recollection of conversation. [79]

No recollection of particular conversations w/ Bryhardt or Haig about subpoena. [79]

RMN never listened to 6/20 conversation. [80-81]

RMN did not review any personal notes of conversation; does not know whether they exist. [81-82]

Purpose of RMW transcripts was to get "gist" of conversations [82-84] in connection w/ Stennis compromise

RMN listened to tape RMW was working on at Camp David [86-87] Discussed difficulty of transcribing.

RMW rec'd a phone call from D.C. that only JDE portion had been subpoenaed [88] Haig called RMW [88-89] Sloppily drawn subpoena. [89-90]
RMN does not recall telling Bull or RMW to do HRH mtg [90]
Only thing RMW ever told RMN about exacting portions of HRH conversation was that there was a discussion of scheduling. [91]. This was on 10/1 back at WH [91]

RMW came in on 10/1 distraught saying she had made a mistake [92] She said she was listening to Haldeman - a discussion about scheduling a Ely, Nevada, - and she there heard a buzz [92] RMN said to forget it because it was not subpoenaed [92-93] RMW said buzz was brief. [93]
RMW did not indicate how it [redacted] had happened.
RMN did not talk to Ziegler about buzz [95] RMN told Haig about "mistake." [95-96] Does not recall talking to Buchanan [96]

RMN does not recall talking to RMW about her testimony. [98].
Bull never came in to talk about his testimony [99]

Does not recall a conversation w/ Haig or Bruhndt about RHW testimony or "what she would say about "accidental erasure." [99-100]

RHN does not recall seeing RHW working on 6/20 tape in her office [101] or other tapes [102]

After RHW testified for 1st time RHN 1st became aware of gap of greater dimensions [103] Haig brought it to his attention [103] RHN blew stack that non-subpoenaed tape was turned over. [103-04] Bruhndt informed RHN that lawyers had concluded HRH tape was subpoenaed [104]. They could not reconstruct anything in addition to what way on HRH notes [105].

Speculation + discussions on what caused beep all occurred after disclosure in court [107-08]

RHN does not know how it happened. [109]

RHN does not recall talking to HRH to get his recollection of 6/20 mtg [110]

RHW never told RHN she was responsible for entire gap [111] nor that anyone else did it.

Bull never indicated responsibility [112]

No one conferred responsibility [112]

RHN has no information as to who might have caused erasure [113]

RHN does not know how it happened. [115]

Returning to 4/17 transcript (5:20 to 7:14 p.m.), RMN recalled discussing possibility of making fund available to HRH and JDE for legal fees [118] Recalls amt. of $2-300,000 [118]
In conversation w/ HRH + JDE, RMN referred to conversation on 4/15 [118]
RMN described activities of 4/14 and 4/15. [118-19]
Kleindienst hit RMN w/ "bombshell of massive proportions." [119].
RMN had been concerned w/ Watergate since 3/21 when he learned for 1st time of demands for money [119].
From 3/21 to 4/15, JWD + JDE were conducting an investigation [120]. On 4/15 Kleindienst informed him new evidence ~~showed~~ showed HRH + JDE criminally involved [120]
RMN shocked + surprised [120]
Later talked to HRH, probably JDE, + then Rebozo [120].
Met w/ Rebozo on Sequoia. Rebozo advised that HRH and JDE should resign [121]
Nixon said they should not have to resign merely because of charges [121]
RMN asked Rebozo how much RMN had in the bank — RMN said if they were to resign he thought he had an obligation to help them out w/ legal fees [122]
Rebozo said not to use personal money — there was money left from '72 campaign [122-23] He said between himself + Abplanalp there was $300,000 [123]

In 4/17 conversation, RMN was telling HRH + JDE that they could count on RMN [123]

Discussion of Kalmbach - Rebozo contact on 4/30 re Hughes money [144-45] RMN asked Rebozo to contact Kalmbach [146] Rebozo wanted to know what to do w/ the funds.

RMN recalls telling [redacted] JWD on 3/21 that he could raise $1M-2M in cash [150-51] RMN was referring to funds that could be raised [151]
"We decided not to do it." [151]

151 Referring to 4/25 (4:40-5:30) RMN-HRH conversations, RMN recalled reference to RMN having $100,000. Returned to Andreas money [151-52].

On 3/21 had made tentative decision could not go forward w/ raising Hunt's attorneys fees [152].
RMN then went to RMW to check options. She told him of $100,000 Andreas found. [152]
RMW counted money on 3/21. [154]