




1974

## 40. Minority Memorandum on Law and Evidence

Don Edwards

Follow this and additional works at: <http://digitalcommons.law.scu.edu/watergate>

 Part of the [Administrative Law Commons](#), [Ethics and Professional Responsibility Commons](#), [Legal History, Theory and Process Commons](#), and the [Politics Commons](#)

### Automated Citation

Edwards, Don, "40. Minority Memorandum on Law and Evidence" (1974). *Watergate Hearings*. Book 41.  
<http://digitalcommons.law.scu.edu/watergate/41>

This Book is brought to you for free and open access by the Law Library Collections at Santa Clara Law Digital Commons. It has been accepted for inclusion in Watergate Hearings by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).



## THE HUSTON PLAN

### A. Facts

On June 5, 1970, the President held a meeting with FBI Director J. Edgar Hoover, Defense Intelligence Agency Director Donald Bennett, National Security Agency Director Noel Gayler, and Central Intelligence Agency Director Richard Helms. (Book VII, Part 1, p. 375) Also present were H. R. Haldeman, John Ehrlichman, and Presidential Staff Assistant Tom Huston. (Book VII, Part 1, p. 375) The President discussed the need for better domestic intelligence operations in light of an escalating level of bombings and other acts of domestic violence. (Book VII, Part 1, p. 22) The President asked the Intelligence Agency Directors for their recommendations on whether the government's intelligence services were being hampered by restraints on intelligence gathering methods. Huston has testified that it was the opinion of the Directors that they were in fact being hampered. (Book VII, Part 1, p. 378) The President appointed Hoover, General Bennett, Admiral Gayler, and Helms to be an ad hoc committee to study intelligence needs and cooperation among the Intelligence Agencies, and to make recommendations. Hoover was designated Chairman and Huston served as White House liaison. (Book VII, Part 1, p. 22)

On June 25, 1970 this ad hoc committee completed its report, entitled "Special Report Interagency Committee on Intelligence (Ad Hoc)" (hereafter "Special Report").

The first page of the Special Report, immediately following the title page, bore the following notation:

"June 25, 1970

This report, prepared for the President, is approved by all members of this committee and their signatures are affixed hereto.

/s/ J. Edgar Hoover  
Director, Federal Bureau of Investigation  
Chairman

/s/ Richard Helms  
Director, Central Intelligence Agency

/s/ Lt. General D. V. Bennett, USA  
Director, Defense Intelligence Agency

/s/ Vice Admiral Noel Gayler, USN  
Director, National Security Agency "

(Book VII, Part 1, p. 385)

Part One of the Special Report, entitled "Summary of Internal Security Threat," was a lengthy threat assessment, including assessments of the current internal security threat of various domestic groups, of the intelligence services of communist countries, and of other revolutionary groups. (Book VII, Part 1, pp. 389 - 410)

Part Two, entitled "Restraints on Intelligence Collection," was a discussion of official restraints under which six types of United States intelligence collection procedures operated, and of the advantages

and disadvantages of continuing or lifting such restraints. (Book VII, Part 1, pp. 411 - 429)

Part Three, entitled "Evaluation of Interagency Coordination," assessed the degree of coordination between the Intelligence Agencies and recommended means to improve it. (Book VII, Part 1, pp. 430 - 431)

Although the Special Report took no position with respect to the alternative decisions listed, it included statements in footnotes that the FBI objected to lifting the restraints discussed, except those on legal mail coverage (keeping a record of the return address of communications addressed to an individual) and National Security Agency communications intelligence. (Book VII, Part 1, pp. 416, 419, 421, 424, and 427)

During the first week of July, 1970, Huston sent the Special Report, together with a memorandum entitled "Operational Restraints On Intelligence Collection," to Haldeman. In the memorandum Huston recommended that most, although not all, of the present procedures imposing restraints on intelligence collection activities should be changed. Huston's recommendations included the following:

"Electronic Surveillances and Penetrations.

Recommendation:

Present procedures should be changed to permit intensification of coverage of individuals and groups in the United States who pose a major threat to the internal security.

. . . Mail Coverage.

Recommendation:

Restrictions on legal coverage should be removed.

ALSO, present restrictions on covert coverage should be relaxed on selected targets of priority foreign intelligence and internal security interest.

Rationale: . . . . Covert coverage is illegal and there are serious risks involved. However, the advantages to be derived from its use outweigh the risks. This technique is particularly valuable in identifying espionage agents and other contacts of foreign intelligence services.

Surreptitious Entry.

Recommendation:

Present restrictions should be modified to permit procurement of vitally needed foreign cryptographic material.

ALSO, present restrictions should be modified to permit selective use of this technique against other urgent and high priority internal security targets.

Rationale:

Use of this technique is clearly illegal: it amounts to burglary. It is also highly risky and could result in great embarrassment if exposed. However, it is also the most fruitful tool and can produce the type of intelligence which cannot be obtained in any other fashion.

The FBI, in Mr. Hoover's younger days, used to conduct such operations with great success and with no exposure. The information secured was invaluable."

(Book VII, Part 1, pp. 438 - 440)

On July 14, 1970, Haldeman sent a memorandum to Huston stating,

"The recommendations you have proposed as a result of the review have been approved by the President. . . . The formal official memorandum

should, of course, be prepared and that should be the device by which to carry it out." (Book VII, Part 1, p. 447)

On July 23, 1970 Huston sent a "decision memorandum" entitled "Domestic Intelligence" to each of the Directors of the four Intelligence Agencies, informing them of the options approved by the President. (Book VII, Part 1, p. 454)

Shortly after the decision memorandum of July 23, 1970 had been received by Mr. Hoover, Huston received a telephone call from Assistant FBI Director William Sullivan indicating that Hoover had been very upset by the decision memorandum, and that Hoover either had talked or intended to talk to the Attorney General to undertake steps to have the decisions reflected in the memorandum reversed. (Book VII, part 1, p. 470) On or before July 27, 1970, Director Hoover met with Attorney General Mitchell, who joined with Hoover in opposing the recommendations contained in the memorandum of July 23, 1970. (Book VII, Part 1, p. 463)

Shortly after his telephone conversation with Sullivan, Huston received a call from Haldeman indicating that the Attorney General had talked to the President, or that Haldeman had talked to the Attorney General and then to the President, but that, in any event, Huston was instructed to recall the decision memorandum; that the President desired to reconsider the matter, and that Haldeman, Hoover, and the Attorney General would have a meeting in the near future to discuss the matter. (Book VII, Part 1, p. 470)

Huston arranged for the recall of the document through the White House Situation Room. (Book VII, Part 1, p. 470) Copies of the decision memorandum on "Domestic Intelligence" were returned by each of the four Intelligence Agencies to the White House Situation Room on or about July 28, 1970. (Book VII, Part 1, pp. 472, 474) Although Huston continued to press for adoption of his recommendations (Book VII, Part 1, pp. 480-85), the plans for lifting operational restraints on intelligence collection activities were not reinstated.<sup>1/</sup>

B. Discussion.

1. With respect to electronic surveillances and penetrations, the Special Report of the Interagency Committee stated, "The President historically has had the authority to act in matters of national security. In addition, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides a statutory basis." (Book VII,

---

<sup>1/</sup> In or before December, 1970, when John Dean had assumed responsibility for matters of domestic intelligence for internal security purposes, an Intelligence Evaluation Committee was created to improve coordination among the intelligence community and to prepare evaluations and estimates of domestic intelligence. (Book VII, Part 1, pp. 487, 497) This step may be seen as an outgrowth of the recommendations in Part Three of the Special Report, entitled "Evaluation of Interagency Coordination." (Book VII, Part 1, pp. 430-31)



Part 1, p. 415) The Special Report also stated that routine mail coverage was legal. (Book VII, Part 1, p. 417) Other intelligence collection activities, such as development of campus sources, appeared to present political rather than legal questions.

However, with respect to both covert mail coverage and surreptitious entry, both the Interagency Committee's Special Report and the "Operational Restraints" memorandum prepared by Huston stated that such intelligence collection activities were illegal. (Book VII, Part 1, pp. 418, 420, 439 and 440) The President's approval of Huston's recommendations in these areas may consequently be viewed as approval of otherwise illegal actions by government agencies.

2. The Special Report was prepared by a committee consisting of intelligence professionals from each of the four Intelligence Agencies. Although it did not make recommendations, it listed as options the relaxation or removal of restrictions on all categories of intelligence collection activities. The recommendations made by Huston in the "Operational Restraints" memorandum are taken verbatim from among the options listed by the Special Report of the Interagency Committee; they do not go beyond options listed by the Committee. The Special Report was approved by all members of the Committee, consisting of the Directors of the four Intelligence Agencies, and their signatures were affixed to the first page. This approval might have been taken by Haldeman or by the President to indicate that the options listed were not regarded as improper by

the professional United States intelligence community, despite the footnoted objections of Mr. Hoover contained in the body of Part Two of the Special Report.

3. The options of lifting restraints on intelligence gathering activities, listed in Part Two of the Special Report, were intended to be taken in the context of the threat assessment contained in Part One of the Special Report. There had been a substantial number of bombings and riots in the spring and summer of 1970. (Book VII, Part 1, p. 377) Part One stated that communist intelligence services possessed a capability for actively fomenting domestic unrest, although it also stated that there had been no substantial indications that this had yet occurred. (Book VII, Part 1, p. 402)

4. The recommendations by Huston contained in the memorandum entitled "Operational Restraints on Intelligence Collection" are cast in general terms, e.g., "present procedures should be changed" (electronic surveillance), or "relaxed" (mail coverage), or "modified" (surreptitious entry). (Book VII, Part 1, pp. 438-39) Much might have depended upon how the modifications might have been implemented.

5. The President's approval in principle of modifying some operational restraints which had been in existence since 1966 was withdrawn within five days after the circulation of Huston's decision memorandum, which was the device for carrying out the recommendations. (Book VII, Part 1, pp. 447, 472, 474) There is no

evidence before the Committee that any illegal mail coverage, surreptitious entry, or electronic surveillance or penetration was ever undertaken, during these five days, under the authority of the decision memorandum.

6. It has occasionally been urged that the formation and operation of the "Plumbers" group is evidence that the Huston Plan was not actually rescinded. This is untenable. The two matters were handled by entirely different groups of White House staff members and they arose a year apart. The problem to which the Huston Plan was directed was, essentially, domestic violence, whereas the "Plumbers" were concerned with news leaks and the theft of the Pentagon Papers. It strains the facts to find any connection between the two.



## KLEINDIENST CONFIRMATION HEARINGS

### A. Facts\*

On February 15, 1972, the President nominated Deputy Attorney General Richard G. Kleindienst to be Attorney General of the United States to succeed John N. Mitchell, who was leaving the Department of Justice to campaign for the re-election of the President. The Senate Committee on the Judiciary held brief hearings on the nomination and quickly voted to recommend that the nomination be confirmed. (HJC, Statement of Information, Book V, Part 1, 605. Hereinafter cited by book, part and page number.)

On February 29, 1972, Jack Anderson, a newspaper columnist, published the first of three articles alleging that three antitrust cases, commenced by the Department of Justice in 1969, had been settled favorably to the defendant, the International Telephone & Telegraph Corporation (ITT), in 1971 in return for a large financial

---

\*/ The Committee's investigation of the ITT case was originally focused on allegations that the Administration and the President had settled the three ITT antitrust cases in exchange for an ITT pledge of financial support for the 1972 Republican National Convention. However, during the course of the Staff's investigation the focus shifted to Presidential involvement in the 1972 Kleindienst Confirmation Hearings. The Special Prosecutor has also concluded that no impropriety existed during the 1971 period but is investigating possible offenses in connection with the 1972 hearings. Thus there will be no discussion herein of the 1971 events except as they specifically relate to the testimony of the witnesses during the 1972 hearings.

contribution to the 1972 Republican National Convention in San Diego. Kleindienst immediately asked that the Senate Judiciary Hearings be reconvened in order that he might answer these allegations. (Book V, Part 2, 633)

On March 2, 1972, pursuant to Kleindienst's request, the hearings reconvened. The purpose of the hearings was to determine what connection, if any, existed between the settlement of the ITT antitrust cases and the ITT convention contributions. In connection with the investigation, the Senate Committee on the Judiciary inquired into several areas including: (1) the extent of involvement of the White House in the filing, handling and settling of the ITT antitrust cases; (2) the circumstances under which the ITT convention pledge was obtained; and (3) the actions of the Department of Justice personnel in the ITT antitrust cases. Several of the witnesses before the Committee were questioned specifically in regard to those areas. (Book V, Part 2, 677-904, passim)

Richard Kleindienst testified that he had never been interfered with by anyone at the White House in the exercise of his responsibilities in the ITT antitrust cases. (Book V, Part 2, 677-80, 729-34, 755-58, 849-53) That testimony was untrue, in that on April 19, 1971, the day before an appeal was due to be filed in the Supreme Court in the ITT-Grinnell case, the President telephoned Kleindienst and ordered that the appeal not be filed. (Book V, Part 1, 311) Further, in his Senate testimony, Kleindienst described the circumstances of

the decision to delay this appeal without mentioning the President's phone call. (Book V, Part 2, 729-34, 751-54)

On May 16, 1974 Kleindienst pleaded guilty to an information charging a failure to answer accurately and fully questions pertinent to the Senate Judiciary Committee's inquiry, in violation of 2 U.S.C. §192. (Book V, Part 2, 965)

John N. Mitchell testified in part as to his involvement in the handling of the ITT antitrust cases. Mitchell testified that he had recused himself in the ITT cases. (Book V, Part 2, 771) In fact, Mitchell had been involved in contacts with ITT officials concerning the cases during 1970 and had various discussions with White House staff members about the ITT antitrust cases. (Book V, Part 1, 143) In his Senate testimony, Mitchell denied that he had ever discussed the ITT antitrust cases with the President, although he had specifically discussed the ITT-Grinnell appeal with the President on April 21, 1971, two days after the President's order to Kleindienst. (Book V, Part 1, 371-76; Part 2, 771-75) In that discussion Mitchell had persuaded the President not to interfere with the appeal of ITT-Grinnell to the Supreme Court. (Book V, Part 1, 371)

#### Evidence Relating to Presidential Involvement

Whatever evidence of Presidential involvement in and knowledge of the events of the Senate Judiciary Committee Hearings in March and April, 1972 may exist is entirely circumstantial.

The President returned from China on the evening of February 28, 1972. After spending a few days in Key Biscayne the President

began his first full day in the White House on Monday, March 6. (Book V, Part 1, 141-42) Four days earlier, on the evening of March 2, several politically embarrassing documents had been delivered by an ITT representative to a White House aide, Wallace Johnson, who in turn gave them to John Mitchell and Charles Colson. (Book V, Part 2, 681) Three days earlier, on March 3, Richard Kleindienst had testified about the circumstances surrounding the delay of the appeal of the ITT-Grinnell case a year earlier. (Book V, Part 2, 729-34)

On Monday, March 6, the President met, and talked by telephone, with three of his top aides, Haldeman, Ehrlichman and Colson.<sup>1/</sup> After a noon-hour meeting with the President, John Ehrlichman met with SEC Chairman Casey, apparently in an attempt to shortcut an SEC subpoena of the politically sensitive documents that had been delivered by ITT to the White House on March 2. (Book V, Part 2, 735) Also on March 6, Richard Kleindienst's diary reflects the fact that he was at the White House for a Cabinet meeting with the President. (Richard Kleindienst diary, submitted to the Inquiry staff after the initial presentation to the Committee of information regarding the ITT matter.) The next day Kleindienst in a detailed statement to the Senate Committee described the events of April 19, 1971 without mentioning the President's order to him not to file the ITT-Grinnell appeal. (Book V, Part 2, 751)

---

<sup>1/</sup> On June 24, 1974 the Committee issued a subpoena to the President for tapes, dictabelts, memoranda and other records of these meetings and conversations. Such materials, if they exist, have not yet been furnished to the Committee.



On March 14, 1972, John Mitchell appeared before the Senate Judiciary Committee and twice testified that there had been no communications between the President and him with respect to the ITT antitrust litigation or any other antitrust litigation.<sup>1/</sup> That evening the President and Mr. Mitchell had their only telephone conversation during March of which the Committee staff is aware. (Book V, Part 2, 771) Mr. Mitchell has denied in an unsworn interview with the Inquiry staff that he discussed his testimony, or the testimony of any other witness before the Senate Committee with the President, with Mr. Kleindienst, or with any members of the President's staff.

According to Charles Colson's calendar, he spent the morning of March 18, 1972 on "ITT" matters. He had three telephone conversations with Mr. Mitchell during the morning. In his interview with the staff Mr. Mitchell did not recall any conversations with Colson. That afternoon the President and Colson met for over two hours.<sup>2/</sup>

On March 24, 1972, the President held his only press conference of this period. He said that:

. . . as far as the [Senate Judiciary Committee] hearings are concerned, there is nothing that has happened in the hearings to date that has in one

---

<sup>1/</sup> On June 24, 1972, the Committee issued a subpoena to the President for tapes, dictabelts, memoranda, and other records of that conversation. Such materials, if they exist, have not yet been furnished to the Committee.

<sup>2/</sup> On June 24, 1972 the Committee issued a subpoena to the President for tapes, dictabelts, memoranda, and other records of that meeting. Such materials, if they exist, have not yet been furnished to the Committee.

way shaken my confidence in Mr. Kleindienst as an able, honest man, fully qualified to be Attorney General of the United States.

In this press conference, the President also said that, "We moved on [ITT]. We moved on it effectively . . . Mr. McLaren is justifiably very proud of that record . . . [and he] should be." He said that Administration action had prevented ITT from growing further and quoted Solicitor General Griswold as to the excellence of the ITT settlement. (Book V, Part 2, 799)

Charles Colson testified before the Committee as to a meeting during this time period that he attended with the President and Haldeman. Colson testified that the President recalled that he had made a telephone call to Kleindienst:

Mr. Colson. I recall one instance when the President was basically talking to Haldeman, but I was in the room and obviously the question of his involvement in the ITT Settlement had somehow come up.

Mr. Jenner. When you say his you are referring to who?

Mr. Colson. The President.

Mr. Jenner. All right.

Mr. Colson. Because he said do you, he said to Haldeman, he said do you remember the time I called Kleindienst and got very agitated or very excited with Dick and did I discuss the ITT case or was I talking about policy. And Bob said no you were talking about policy, you weren't discussing the case.

And the President said are you sure?

And Haldeman said yes, either I was there while you called or Ehrlichman was there and heard your call and the President said, thank God I didn't discuss the case.

Mr. Jenner. Do you have a recollection with better certainty that this conversation you have now described took place during the span of the ITT-Kleindienst hearings.

Mr. Colson. Yes, I think it did. I can't imagine why it would come up at another time. I think it must have -- I know it is the first time I ever knew the President talked to Kleindienst about this matter at all. And I don't think I learned about it until late in the month and I remember learning about it in that fashion, that the President was trying to recall what he had said to Kleindienst. (Charles Colson testimony, House Judiciary Committee (HJC), T.4341-43) 1/

Colson also testified that on March 27 and 28, 1972 he and Clark MacGregor met with the President and presented to him the reasons why they felt the nomination of Kleindienst should be withdrawn. 2/ Colson testified that he left that meeting feeling that the President was inclined to agree that the nomination should be withdrawn. (Colson testimony, HJC, T 4344-46)

On March 29, Colson and MacGregor met with H. R. Haldeman who informed them that the President was going to meet with Kleindienst that afternoon to determine whether or not Kleindienst would withdraw his name from consideration. (Colson testimony, HJC, T 4346-47)

Colson also testified that on the morning of March 30, he and MacGregor met with Haldeman who described the President's meeting with Kleindienst

---

1/ Citations to testimony are to the typewritten transcripts; at this writing printed transcripts are not yet available.

2/ Tapes of that meeting have neither been requested nor subpoenaed by the Committee, because the Staff was unaware of their relevance until Colson's testimony was received.

in which Kleindienst convinced the President that the nomination should not be withdrawn. (Colson testimony, HJC, T 4348-51) However, in an unsworn interview with the staff, Kleindienst stated that he had no contact with anyone at the White House during March, April and May of 1972.

Colson took notes of his meeting with Haldeman and MacGregor (Exhibit 22 to Charles Colson testimony, HJC, T 4349) and later returned to his office to dictate a memorandum to Haldeman that argued that the nomination should be withdrawn. (Colson testimony, HJC, T 4352) His reasons included the fact that he had reviewed documents that would tend to contradict Mitchell's testimony to the Senate Committee. (Book V, Part 2, pp. 805-09) Later that day Colson met with the President and informed him that he had written such a memorandum. <sup>1/</sup> After meeting with the President, Colson sent the memorandum to H. R. Haldeman. Colson testified that by normal practice the memorandum would be given by Mr. Haldeman to the President. (Colson testimony, HJC, T 4356-57)

Mr. Mitchell has told the Inquiry staff that, near the end of March, he recalls generally that he conveyed to the President, either directly, or through Mr. Haldeman, his view that the Kleindienst

---

<sup>1/</sup> On June 24, 1974, the Committee issued a subpoena to the President for tapes, dictabelts, memoranda and other records of meetings and conversations on March 30, 1972, between the President and Haldeman, Ehrlichman, Colson or any of them. Such materials, if they exist, have not yet been furnished to the Committee.

nomination should not be withdrawn but that he recalls no specific conversations.

On April 4, 1972 the President met four times with Haldeman and talked once by telephone with Colson. During the afternoon the President met with Haldeman and Mitchell and discussed, among other things, changing the convention site from San Diego to Miami.<sup>1/</sup> An edited transcript of this conversation has been supplied to the Committee.<sup>2/</sup> This edited transcript indicates no evidence of Presidential knowledge of the testimony of Kleindienst or Mitchell, and indeed shows that there was very little discussion of the hearings.

On June 8, 1972, Kleindienst was confirmed by the Senate. On June 12, 1972, Kleindienst was appointed to the Office of the Attorney General, and was sworn in at a ceremony at the White House attended by the President. (Book V, Part 2, 901)

During the period that the Kleindienst nomination was pending before the Senate, the press provided extensive coverage of the hearings, the debates and the final vote. (Book V, Part 2, 855)

---

<sup>1/</sup> On June 24, 1974 the Committee issued a subpoena to the President for tapes, dictabelts, memoranda and other records of all but the last meeting. Such materials, if they exist, have not yet been furnished to the Committee. On May 15, 1974, the Committee subpoenaed the tape and other materials relating to the April 4 meeting between the President, Haldeman and Mitchell.

<sup>2/</sup> The President has invited the Chairman and ranking member to verify that this transcript accurately reflects the discussion. To this date this invitation has not been accepted.

This press coverage was reflected in the news summaries prepared daily by the White House staff for the President. <sup>1/</sup>

On January 8, 1974 the Office of the White House Press Secretary issued a "White Paper" entitled, "The ITT Antitrust Decision", describing the President's role in the ITT antitrust cases and their settlement. The White Paper denied that the President had any involvement in the ITT settlement and denied that the settlement was made in exchange for an ITT convention pledge, but admitted the telephone call to Kleindienst. (Book V, Part 2, 956)

---

<sup>1/</sup> On June 24, 1974, the Committee issued a subpoena for the President's copies of the news summaries compiled during the period February 22, 1972 through June 2, 1972, inclusive. On July 12, 1974, the President's Special Counsel responded by letter to the subpoena and in part agreed to furnish the Committee copies of summaries which were actually presented to the President. Mr. St. Clair has informed the Committee that the news summaries show no notation by the President on those portions dealing with the ITT/Kleindienst Hearings, and offered to allow the Chairman and Ranking Minority Member to examine the summaries to verify that fact. To date that invitation has not been accepted.

B. Theories of the Evidence

1. Summary of Information: Constitutional Theory

The Summary of Information argues that a President has a duty to transmit information to the Senate about his nominee's testimony given to a Senate Committee considering the nominee's qualification to hold office. This duty rests on the Senate's power to advise and consent to the nomination. The theory behind this duty is that the constitutional safeguard of Senate confirmation could be frustrated if the President permitted the Senate to act on the basis of any information which is untrue, even in part. As this case is included under the general category of abuse of power, the Summary of Information also argues that a President abuses his power by appointing the nominee after his confirmation has been tainted.

2. Applicable Criminal Law

Title 18 U.S.C. §4, entitled "Misprision of Felony."

provides:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than \$500 or imprisoned not more than three years, or both.

3. Questions of Fact

Whatever view of the evidence is taken, certain preliminary questions of fact must be answered before wrongful conduct on the part of the President may be established.

(a) Was the Testimony of Kleindienst and Mitchell perjury?

In the course of their testimony before the Senate Committee on the Judiciary, Kleindienst and Mitchell appear to have given incorrect or misleading testimony several times. Kleindienst apparently misled the Committee about the nature of his contacts with the White House in the filing, handling and settlement of the ITT antitrust cases. Mitchell apparently misled the Committee about his contact with the White House and with ITT officials regarding the ITT cases, and he further was evasive about his involvement in the Administration's decision to select San Diego as the site of the 1972 Republican National Convention. Certain statements by Kleindienst and Mitchell appear to be clearly incorrect. On March 7, 1972, Kleindienst described the reasons for the decision to delay the ITT-Grinnell appeal on April 19, 1971, without mentioning the President's telephone call of that day in which the President ordered the appeal to be dropped. On March 14, 1972, Mitchell stated that he never discussed the ITT antitrust cases with the President, whereas actually he had discussed the appeal with the President on April 21, 1971.<sup>1/</sup>

A factual issue may be raised as to the intent of Kleindienst and Mitchell in these misstatements. In his interview with the Inquiry staff, for example, Mr. Mitchell indicated that what he meant when he denied talking to the President about the ITT cases, was that he had never talked to the President about the merits of those cases.

---

<sup>1/</sup> To date, neither Kleindienst nor Mitchell has been prosecuted for perjury in connection with the ITT hearings. Kleindienst has pleaded to the lesser offense of failure to fully respond under 2 U.S.C. §192. Mitchell has not been prosecuted for any act relating to the ITT/Kleindienst hearings.



The question to which Mr. Kleindienst directed his attention and misstatements, by way of contrast, was specifically why the ITT-Grinnell appeal to the Supreme Court in April 1971 was delayed. However, the misstatements of Kleindienst may be subject to the defense of "literal truth." The lengthy statement which Kleindienst read to the Committee on March 7, 1972, omitting any mention of the President's telephone call, may be misleading but not in fact false. Kleindienst's statement related only actual events of April 19 minus the telephone call, and therefore it may be literally true but incomplete. Under the recent decision in Branston v. United States, 409 U.S. 352 (1973), in which the Court held that testimony that is literally true but arguably misleading by negative implication is not perjury, it could be argued that Kleindienst's remarks on March 7 did not constitute perjury.

It is also possible that the misstatements were not perjury because they were not material. The test of materiality is simply whether the testimony has a natural effect or tendency to influence, impede or dissuade the investigative body from pursuing its investigation, United States v. Morgan, 194 F. 2d 623 (2d Cir. 1952), cert. denied, 343 U.S. 965 (1952). The Senate Committee on the Judiciary was charged with evaluating the qualifications of Richard Kleindienst to be Attorney General. In the exercise of this constitutional responsibility the Senate Committee was investigating the connection between the ITT antitrust cases and the ITT convention pledge. The fact that the President had intervened in the handling of the ITT cases might have been of substantial interest to the Committee, if only because it specifically involved the nominee before the Committee and his predecessor in office.

On the other hand, it may be argued that the Senate Committee's investigation into the ITT scandal was focused properly only on the settlement of the ITT cases and the reasons for the settlement, so that a misstatement about the appeal would not be material to the Committee's inquiry. It may be questioned, furthermore, whether disclosure of the President's telephone call to Kleindienst, and the latter's successful resistance, would have had any adverse impact upon the Committee's judgment as to Mr. Kleindienst's qualifications.

- (b) Did the President have knowledge of the testimony of Kleindienst and Mitchell?

Evidence Supporting Presidential Knowledge of Testimony

The evidence of Presidential knowledge comes first from the fact that the testimony of the witnesses before the hearings was extensively reported in the press and broadcast media. Second, the President had a telephone conversation with Mitchell on the evening of March 14, the day of Mitchell's perjured testimony. Third, the President indicated in his March 24 press conference that he was familiar with the hearings and the testimony of the witnesses. Fourth, Colson has testified that Haldeman informed him on March 29 and 30 that the President intended to, and did in fact, meet with Kleindienst on the afternoon of March 29. It could be inferred from this meeting that the President learned of and discussed Kleindienst's misleading testimony. Fifth, Charles Colson's March 30 memorandum to Haldeman

cites certain documents in White House files that contradicted Mitchell's testimony and tended to show that the President was involved in the ITT case in 1971. If the President read this memorandum, he might have realized that evidence existed that contradicted the testimony of Mitchell before the Committee.

Evidence Negating Presidential Knowledge of Testimony

First, no direct evidence of actual Presidential knowledge exists. Except for the President's general statement in his press conference of March 24, the evidence is entirely inferential. Second, Kleindienst's testimony concerning the appeal was not generally reported in the press. The focus of the news media was on the allegations concerning the settlement of the ITT cases, not the appeal of the ITT-Grinnell case. It is, therefore, unlikely that the President learned of Kleindienst's perjury by way of the media. Third, the press conference of March 24 does not indicate specific knowledge of the actual testimony of either Kleindienst or Mitchell. Charles Colson and other witnesses have informed the staff that the President does not prepare for news briefings by studying primary news sources. Instead he utilizes a briefing book prepared by his staff. There is no evidence before the Committee as to what the briefing book for the President's March 24 press conference contained. Nor has the Committee requested this briefing book. Fourth, although H. R. Haldeman may have told Charles Colson that Kleindienst and the President met on the afternoon of March 29, Kleindienst has

specifically denied this to the staff. Kleindienst also said that he had had no conversations with anyone at the White House during March, April and May of 1972. Fifth, although Colson's memo of March 30 does indicate that documents contradicted Mitchell's testimony, Charles Colson testified that he does not know whether the President received or read the memo. In addition, Colson has testified to the Committee that he never discussed either his memo, the documents described therein, or the testimony of Mitchell or Kleindienst with the President. Nor did the President ever indicate to Colson any awareness that Kleindienst had not told the truth to the Senate Committee. (Colson testimony, HJC, T. 4369)

(c) Did the President know or believe that the testimony of Kleindienst and Mitchell was false?

The issue of whether the President would have known the testimony of Kleindienst and Mitchell was false depends on whether the President would have correctly recollected his contact with the two about the ITT-Grinnell appeal in April 1971, ten and one-half months earlier.

Evidence Supporting Presidential Recollection of 1971 Events

The President was in fact a participant in the events of April 19 and 21, 1971. The Summary of Information submitted to the Committee suggests that the strident tone of the telephone call to Kleindienst, and the fact that the President's conversation on April 21, 1971 caused him to rescind his order to drop the ITT-Grinnell

appeal, make it seem likely that the President had such knowledge. (Summary of Information re Kleindienst Appointment-ITT, p. 8) In addition, Charles Colson has testified that he was present at a meeting in which the President recalled that he had made a phone call to Kleindienst and "blew up at him."

Evidence Negating Presidential Recollection of 1971 Events

The Kleindienst call lasted no more than three minutes; the Mitchell discussion less than five. The conclusion is hardly compelled that the President, in 1972, after the passage of ten and a half months filled with events of the order of importance of his trip to China, would advert to and recall the conversations.

Moreover, the evidence supports the conclusion that in fact the President inaccurately recalled the substance of that telephone call. Colson testified that the President was assured by Haldeman that the call was not about the ITT case but rather was about the antitrust policies of McLaren. According to Colson, the President responded, ". . . thank God, I didn't discuss the case."

4. Constitutional Theory: Interference with Power of Advice and Consent; Abuse of Power of Appointment

The Summary of Information contends that in connection with nominations the President has a duty to come forward and correct the record. As authority for this proposition, the arguments of James Iredell relating to the treaty-making process, made in the North Carolina Ratifying Convention, are cited:

[The President] must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them, -- in this case, I ask whether upon an impeachment for a misdemeanor upon such an account, the Senate would probably favor him. 1/

However, Iredell's remarks were directed to the treaty-making process, where the Senate has a larger role than it does in the appointment process. In advising and consenting to treaties, the Senate has a role nearly co-extensive with that of the President. The intent of the Framers was that the President would meet with the Senate and consult on treaty projects. 2/ Consequently, the Senate has conferred

---

1/ 4 Elliot 127.

2/ Pierce Butler, a member of the Constitutional Convention, is quoted as follows: "Treaties to be gone over clause by clause, by the President and Senate together . . . ." cited in John Adams' Writings (ed. C.F. Adams, 1851), III, p. 409. See Haynes, George F., The Senate of the United States - Its History and Practice, (Houghton Mifflin Co., Boston, 1933)

with the President throughout all stages of the treaty process - from preliminary negotiations with foreign powers through supplementary negotiations caused by reason of Senate amendments to treaties submitted for ratification.<sup>1/</sup>

With respect to confirmation of nominees for office, by way of contrast, substantive consultation between the Senate and the President has been the exception rather than the rule:

In the early history of the country several committees of the Senate sought to confer with the President concerning his nominations. Both John Adams and James Madison sent a message to the Senate maintaining that it was contrary to the Constitution. Thereafter no further attempt was made by a Senate committee to confer formally with the President about a nomination, though informal consultations between the President and members of Congress are common and it has never been contended that they are in any way improper.

Requests for information about nominees are usually made to the departments concerned, and ordinarily such information is supplied. Presidents, however, have consistently asserted the right to withhold confidential information. <sup>2/</sup>

---

<sup>1/</sup> Eleven different Presidents from Washington to Harding have formally requested the Senate's advice before entering upon proposed negotiations. Moreover, after submission, the President and the Senate have negotiated amendments to treaties which were subsequently ratified by foreign governments. Haynes, The Senate of the United States, *supra*, pp. 590, 608.

<sup>2/</sup> Harris, The Advice and Consent of the Senate (University of California Press, 1953), pp. 240-41.

Abuse of Power: Need for a Standard

Whether or not a President is legally capable of committing a misprision within the meaning of 18 U.S.C. §4,<sup>1/</sup> it is submitted that he must have known of and concealed perjury in order to be liable in impeachment under the facts of the Kleindienst confirmation case.

The bureaucratic considerations in favor of delineating the bounds of "abuse of power" in the Kleindienst context by reference to the elements of criminal misprision are, arguably, roughly analogous to those which gave rise to the longstanding Federal policy in this area, namely, the avoidance of reporting burdens.

The significant practical ramifications of holding any President accountable for his failure to correct the record when testimony or other information supplied to Congress by Executive branch officers is not perjurious, but only misleading, should be obvious. No formulation of the "abuse of power" charge as general as that set out in the Summary of Information should be adopted by the Committee without reflecting upon these ramifications.

---

<sup>1/</sup> See discussion, subsection (c), pp. 22-24, infra.



5. Criminal Law: Misprision of Felony

The statutory offense of misprision of felony has four elements:

To sustain a conviction . . . for misprision of felony it [is] incumbent upon the government to prove beyond a reasonable doubt

(1) That . . . the principal had committed and completed the felony alleged prior to [the date of the alleged misprision];

(2) That the defendant had full knowledge of that fact;

(3) That he failed to notify the authorities; and

(4) That he took [an] affirmative step to conceal the crime of the principal. <sup>1/</sup>

(a) "Affirmative act" requirement

The basic reason for the affirmative act requirement seems to be that to punish mere nondisclosure would impose an undue burden on the citizen:

To suppose that Congress reached every failure to disclose a known federal crime, in this day of myriad federal tax statutes and regulatory laws, would impose a vast and unmeasurable obligation. It would do violence to the unspoken principle of the criminal law that "as far as possible privacy should be respected." United States v. Worcester, 190 F. Supp. 548, 565-67, (D. Mass. 1960) (dictum) (Wyzanski, J.).

In State v. Michaud, 114 A. 2d 352, 355 (Me., 1955) the court similarly suggested that the requirement of an affirmative act was necessary to prevent overbroad application of the statute:

---

<sup>1/</sup> Neal v. United States, 102 F. 2d 643, 646 (8th Cir. 1939); Lancey v. United States, 356 F. 2d 407, 409 (9th Cir. 1966), cert. den. 385 U.S. 922; United States v. King, 402 F. 2d 694, 695 (9th Cir. 1963).

The act of concealment must be alleged. Otherwise, a person could be tried and erroneously convicted on slight evidence that was only to the effect that he was in the vicinity of where a felony was "actually" committed, and from that improperly argue [sic] that he must have "known," and that he concealed because he knew and did "not disclose." He might not have seen. He might not have known or understood all the facts.

A dictum of Chief Justice Marshall also reflects the reluctance of the judiciary to construe misprision statutes so as to punish bare non-disclosure of information:

It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man. Marbury v. Brooks, 7 Wheat. 556, 575-76 (1822).

(b) Degree of knowledge required

Several Federal cases state that in order to support a conviction for misprision, it is necessary to prove that the defendant had "full knowledge" of the commission of the crime by the principal. Neal v. United States, 102 F. 2d 643, 646 (8th Cir. 1939); Lancey v. United States, 356 F. 2d 407, 409 (9th Cir. 1966), cert. den. 385 U.S. 922; United States v. King, 402 F. 2d 694, 695 (9th Cir. 1968). In Commonwealth v. Lopes, 318 Mass. 453, 458-59 (1945), the court intimated that mere "suspicion" that a felony had been committed could not render the defendant's silence criminal.

(c) Duty of a President of the United States under the misprision statute

The federal misprision statute requires that felonies be reported to "some judge or other person in civil or military authority under the United States." The President of the United States is the

chief officer of the executive branch of the federal government. U. S. Constitution, Article II, Section 1, clause 1. He is the Commander in Chief of the Army and Navy of the United States. U. S. Constitution, Article II, Section 2, clause 1. In view of the plain language of the statute, it is difficult to resist the conclusion that the President is a "person in civil or military authority under the United States,"<sup>1/</sup> within the meaning of the statute.

It is difficult to contend that all persons in civil or military authority under the United States are, simply by virtue of their positions, incapable of committing the offense of misprision of felony. Law enforcement officers have been prosecuted under 18 U.S.C. §4 -- although admittedly they were State, rather than Federal, officials. Bratton v. United States, 73 F. 2d 795 (10th Cir. 1934); United States v. Daddano, 432 F. 2d 1119, 1122 (7th Cir. 1970), cert. dismissed 401 U.S. 967, cert. den. 402 U.S. 905.

In a case in which it is claimed that a United States official has discharged his duty under 18 U.S.C. §4 by making a decision not to prosecute a person known to have committed a felony, the appropriate inquiry would seem to be whether his decision not to prosecute constituted the exercise of a function assigned to him by the Constitution or laws of the United States.

---

<sup>1/</sup> In England, the offense of misprision could be avoided by making a report to the King. Concerning the punishment for concealment of felonies, Coke wrote:

From which punishment if any will save himself he must follow the advice of Bracton, to discover it to the King, or to some judge or magistrate that for the administration of justice supplieth his place, with all speed that he can.



GOVERNMENT EXPENDITURES AT SAN CLEMENTE AND KEY BISCAYNE

A. Facts

The report submitted to the Committee by the Inquiry staff on July 19, 1974, contains a detailed chronology of facts regarding the initiation of, installation of and payment for fifteen categories of government expenditures totaling over \$92,000<sup>1/</sup> at President Nixon's private properties at San Clemente and Key Biscayne in the

1/ San Clemente

Fireplace Exhaust Fan	\$ 388.78
Heating System	12,988.00
Sewer System	3,800.00
Landscape Construction* and Maintenance	27,018.00
Den Windows	1,600.00
Boundary and Structural Surveys	5,472.59
Paving	5,866.66
Point Gazebo	4,981.60
Handrails	988.50
Beach Cabana and Railroad Crossing	<u>3,500.00</u>
	\$66,614.03

Key Biscayne

Landscape Construction*	3,414.00
Landscape Maintenance*	7,991.00
Fence and Hedge Screen	12,679.00
Shuffleboard	<u>1,600.00</u>
	\$ 25,684.00

\*The Internal Revenue Service found \$58,954.77 of government expenditures at San Clemente and \$8,433.76 of government expenditures at Key Biscayne to have constituted taxable income to the President for the same period. The items marked with an asterisk\* were found by the

years 1969 through 1972. The Joint Committee on Internal Revenue Taxation found that these expenditures constituted taxable income to the President. These expenditures were brought into question on one or more of the following grounds:

(1) Although an expenditure was requested by the Secret Service, either (a) substantial increases in cost were incurred because of the personal aesthetic desires of the President or his representatives, or (b) the item primarily benefited the President and only secondarily served a security function.

(2) An expenditure which primarily benefited the President was requested by the President or his representatives rather than by the Secret Service.

(3) Although an expenditure had a security justification, the expenditure was one that any homeowner would likely and routinely make at his own expense.

Various expenditures on the President's private properties were also questioned in the course of hearings before the Subcommittee on Treasury, Postal Service, and General Government Appropriations of

---

1/ [cont'd]

Joint Committee staff, but not by the IRS, to constitute taxable income to the President. Taxable income attributable to improvements for the year 1969 were found by the Joint Committee staff to be \$62,441.75 and by the IRS to be \$31,844.58. The President has not yet paid tax deficiencies attributable to 1969. Any such payment would be voluntary because the applicable Statute of Limitations has run in respect to that year.

the House Appropriations Committee in June 1973; in hearings before the Government Activities Subcommittee of the House Government Operations Committee in October 1973; in a report by the Comptroller General to the Congress in December 1973; and in a report by the House Government Operations Committee in May 1974. Each investigation concluded that some significant amount of nonprotective improvements on the President's private properties was improperly financed by the Government. This memorandum does not purport to review the accuracy of those determinations, although none of the reports, of course, is conclusive upon the Members of this Committee as to any issue.

The evidence tending to show Presidential knowledge of the character of these expenditures, the manner in which they were procured, and the source of their financing is as follows:

San Clemente

1. The President visited San Clemente from March 21 to March 23, 1969.<sup>1/</sup> During that period, he and his family had discussions with Harold Lynch, the President's private architectural consultant, regarding the design of the swimming pool to be constructed. Mrs. Nixon also walked the grounds with Lynch and expressed her desire that the renovation work be done in a manner that would preserve the informal atmosphere of the estate.<sup>2/</sup>

---

<sup>1/</sup> Library of Congress, Congressional Research Service, "President Nixon's Visits to the Western White House, San Clemente, California" (Source: Agnes Waldron, White House, August 28, 1973); Lynch and Kalmbach staff interviews.)

<sup>2/</sup> Lynch staff interview.

2. The President visited San Clemente over the period June 4 to June 7, 1969 in conjunction with a trip to Honolulu.<sup>1/</sup> During this period discussions were taking place among representatives of the President and Secret Service and GSA personnel regarding work to be performed on the estate.

3. The President visited San Clemente for a month between August 9 and September 8, 1969.<sup>2/</sup> This period immediately followed the completion of the major renovation work undertaken on the estate.

On August 11, 1969 the President, Ehrlichman, and Kalmbach met in the President's office at the Western White House. Kalmbach's diary notes of that meeting state, "[President] was extremely complimentary re the job that was done on the homesite and . . . [will] host a reception from 6-7 p.m. on Tuesday afternoon. I'm to invite people largely responsible for the success of the project[,]"<sup>3/</sup> including all government as well as non-governmental personnel.<sup>4/</sup>

This reception was held the following day and the President expressed his appreciation to many of those attending on an individual basis.<sup>5/</sup>

---

<sup>1/</sup> Library of Congress, Congressional Research Service, "President Nixon's Visits to the Western White House, San Clemente, California" (Source: Agnes Waldron, White House, August 28, 1973).

<sup>2/</sup> Id.

<sup>3/</sup> Herbert W. Kalmbach diary, August 11, 1969 (received from Watergate Special Prosecution Force).

<sup>4/</sup> Herbert W. Kalmbach testimony, House Judiciary Committee July 17, 1974, transcript, 4830.

<sup>5/</sup> Id., 4830-31; Inquiry staff interviews of Hathaway and Lynch.



4. Alexander Butterfield has testified that the President was "very interested in the grounds at Key Biscayne, Camp David, San Clemente, the cottage, the house, the grounds . . ."<sup>1/</sup> Kalmbach testified that there was "a great interest [by the President] in all things relative to that [San Clemente] property," and related that on one occasion when he walked the San Clemente grounds with President and Mrs. Nixon the President indicated that he wished the arrangement of various rose bushes to be changed.<sup>2/</sup>

The normal and more frequent procedure was for the President to discuss the details of the work and operations at San Clemente with Ehrlichman or H. R. Haldeman, who would pass along instructions.<sup>3/</sup> Kalmbach testified, "I had a standard procedure to run all questions relative to matters pertaining to San Clemente past Mr. Ehrlichman and Mr. Haldeman for their approval and direction."<sup>4/</sup>

5. The President visited San Clemente from December 30, 1969, to January 8, 1970.<sup>5/</sup>

---

<sup>1/</sup> Alexander Butterfield testimony, House Judiciary Committee, July 2, 1974 transcript, 2442.

<sup>2/</sup> Herbert W. Kalmbach testimony, House Judiciary Committee, July 17, 1974 transcript, 4824.

<sup>3/</sup> Inquiry staff interview of John Dean.

<sup>4/</sup> Herbert W. Kalmbach testimony, House Judiciary Committee, July 17, 1974 transcript, 4827.

<sup>5/</sup> Library of Congress, Congressional Research Service, "President Nixon's Visits to the Western White House, San Clemente, California" (Source: Agnes Waldron, White House, August 28, 1973).

On January 15, 1970 Kalmbach talked to Ehrlichman by telephone and it was agreed, apparently with the President's assent,<sup>1/</sup> that GSA should be given responsibility for the upkeep of the residence.

6. In total, the President spent 47 days at San Clemente in 1969, 53 days in 1970, 54 days in 1971 and 41 days in 1972.<sup>2/</sup>

7. In the February 28, 1973 tape recorded conversation between the President and Dean, the following exchange occurred:

P. They can't get his [Kalmbach's] records with regard to his private transactions?

D. No - that's privileged.

P. That's right.

D. Anything to do with San Clemente and the like - that is just so far out of bounds.

P. Yeah. Did they ask for that?

D. No, no, no - No indication.

P. Good. Oh, well, even if it is [unintelligible]<sup>3/</sup>

8. On August 20, 1973 Coopers and Lybrand gave to President and Mrs. Nixon a specific breakdown of the amount and manner of expenditure of their personal funds at San Clemente.<sup>4/</sup>

9. On December 8, 1973 the President announced his intention to donate his San Clemente residence to the Nation after his and Mrs. Nixon's death.<sup>5/</sup>

---

<sup>1/</sup> See Inquiry staff report, pp. 61-63.

<sup>2/</sup> Library of Congress, Congressional Research Service, "President Nixon's Visits to the Western White House, San Clemente, California" (Source: Agnes Waldron, White House, August 28, 1973).

<sup>3/</sup> "Transcripts of Eight Recorded Presidential Conversations," House Judiciary Committee, Serial No. 34, May-June, 1974, at p. 43.

<sup>4/</sup> Statement on President and Mrs. Nixon's finances - January 1, 1969, to May 31, 1973, White House Press Release, December 8, 1973, 9 Presidential Documents 1438.

<sup>5/</sup> President Nixon's statement, White House Press Release, December 8, 1973, 9 Presidential Documents 1413.

Key Biscayne

1. The President spent 32 days at Key Biscayne in 1969, 34 days in 1970, 47 days in 1971, and 44 days in 1972.<sup>1/</sup>
2. In December 1968 the President personally designated the type of fence which he wished to surround the Key Biscayne compound.<sup>2/</sup>
3. Construction at the Key Biscayne compound was delayed because of the President's April 2-6, 1969, visit there. GSA documents reflect that during this time the President designated that certain landscape construction be undertaken.<sup>3/</sup>
4. On August 20, 1973 Coopers and Lybrand gave President and Mrs. Nixon a specific breakdown on the amount and manner of the expenditure of their personal funds at Key Biscayne.<sup>4/</sup>

---

<sup>1/</sup> Library of Congress, Congressional Research Service, "President Nixon's Visits to the Florida White House, Key Biscayne, Florida" (Source: Agnes Waldron, White House, August 28, 1973).

<sup>2/</sup> See Inquiry staff report, pp. 71-72.

<sup>3/</sup> Id. at pp. 66-67.

<sup>4/</sup> Statement on President and Mrs. Nixon's finances - January 1, 1969 to May 31, 1973, 9 Presidential Documents 1438.

B. Theories of the Evidence

1. Constitutional Theory

Article II, Section 1 of the Constitution provides in part:

The President shall, at stated Times, receive for his services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States or any of them. 1/

2. Criminal Law

Title 18, §641 of the U. S. Code, entitled "Public money, property or records," states:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted -

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both . . .

---

1/ Black's Law Dictionary defines "emolument" as "any perquisite, advantage, profit, or gain arising from the possession of an office."

C. Discussion

The fact that requests for a number of questionable items or costs were initiated by the President personally or by his representatives may be thought to support an argument that the President was aware the Secret Service had not made an independent professional judgment that such an item was necessary for security. Ehrlichman's instructions given prior to the installation of some improvements provide details as to what portions of those expenditures he thought should be publicly financed (as well as displaying some sensitivity to tax implications),<sup>1/</sup> and it can be argued that it is unlikely that Ehrlichman did not discuss such personal financial matters with a President whom both Butterfield and Kalmbach described as highly interested in the details of operations at San Clemente.<sup>2/</sup> Finally, it can be argued that the effect of the President's announced intention to donate San Clemente to the Federal government has illusory impact on the emoluments issue, since (a) many of the expenditures, such as landscape maintenance costs, can never be recovered, and (b) the use and benefit of the "permanent" improvements will continue to be enjoyed for some years by either the President or his family (in some cases perhaps throughout the useful life of the improvement).

---

<sup>1/</sup> See Appendix A to Inquiry staff report.

<sup>2/</sup> See supra pages 6-7. It should be noted that Ehrlichman has never been interviewed in connection with the Impeachment Inquiry.

On the other hand, it may be felt that most of these expenditures had a sufficiently plausible security purpose that the President (himself not a technical security expert) would not have been automatically alerted to any potential impropriety. Moreover, even as to items that had no apparent security purpose, it amounts to no more than speculation to say that the President was informed at the time that payment for these items had come out of public rather than personal funds.<sup>1/</sup> The President's announced intention to donate his San Clemente property to the United States, after his own and Mrs. Nixon's death, could be regarded as effecting a reimbursement of any emolument he might have received relative thereto.

More fundamentally, it may be thought that the duties and circumstances of a modern President demand that a certain amount of protective benefit be conferred on his person by the government,<sup>2/</sup> and that to impeach a modern President for receipt of such benefit, without a prior demonstration of public or national dissatisfaction with the practice, would represent the imposition of a sanction for breach of a standard of which he did not have fair notice.

---

<sup>1/</sup> The Summary of Information states, at p. 3: "The President knew of the improvements as they were being made from his visits to San Clemente and Key Biscayne; presumably he also knew that he was not personally paying for them." (emphasis supplied)

<sup>2/</sup> In this regard it should be noted that the GAO Report cited significant nonprotective government expenditures in connection with an airstrip located on the LBJ Ranch in Texas, including \$34,000 relating to alterations on President Johnson's airplane hangar there. GAO Report, 87-88. Total expenditures in connection with President Nixon's private properties total approximately \$17 million in comparison with approximately \$5.9 million spent in connection with President Johnson's private properties. See Inquiry staff report, page 83.

The arguments relevant to the legal theory of knowing receipt of converted United States funds are largely the same as those applicable to the Emoluments Clause, except that it would also be necessary to demonstrate that the President had a criminal intent to convert the public property in question to his own use. The existence of such intent tends to be negated by the openness with which the improvements were made; there is no suggestion of the furtiveness commonly associated with conscious efforts to embezzle or convert.





V.

TAX DEDUCTION FOR GIFT OF PAPERS

B. 1. Facts.

As stated by the Staff Report of the Joint Committee on Internal Revenue Taxation, "Examination of President Nixon's Tax Returns for 1969 through 1972":

On his tax return filed for 1969, President Nixon claimed a deduction for a charitable contribution to the United States. The tax return indicated that the gift consisted of personal papers, manuscripts, and other materials; that the date of the gift was March 27, 1969; and that the value of the gift was \$576,000. The tax return also indicated that there were no restrictions on the gift and that the gift was free and clear, with no rights remaining in the taxpayer.

The amount of this gift allowed as a deduction in 1969 was \$95,298. The deductions for this gift carried over and taken in subsequent years [were] as follows: in 1970, \$123,959; in 1971, \$128,668; and in 1972, \$134,093. Accordingly, the President has taken deductions totaling \$482,018. Since the gift is valued at \$576,000, presumably deductions of \$93,982 remain for subsequent years.

A deed for this gift of papers, dated March 27, 1969, was delivered to the General Services Administration shortly after

April 10, 1970. This deed was not signed by President Nixon but rather by Edward L. Morgan, a deputy counsel to the President who was on John Ehrlichman's staff. Questions have been raised whether Mr. Morgan had the authority to sign the deed, whether the deed was backdated, and also whether a deed was necessary for this gift.

The President also made a gift of papers to the United States in 1968. Since in 1968 the amount of the gift was in excess of the maximum charitable contribution deduction available in that year, a carryover was available to be used in future years, but it has not been used because the amount of the charitable contribution by the President in 1969 was large enough to account for the maximum allowable charitable contributions through 1972.

In 1969, the Congress passed, and the President signed, the Tax Reform Act of 1969 which contained amendments which, in effect, repealed provisions of the Internal Revenue Code allowing charitable contribution deductions for gifts of papers. The 1969 Act repealed these provisions retroactively as of July 25, 1969. This had the effect of allowing a charitable contribution deduction for gifts of papers if they were made on or before July 25, 1969, but not if they were made after that date. The question has arisen whether the gift of papers for which President Nixon claimed a deduction was completed prior to July 25, 1969. (Joint Committee Report, p. 9.)

On December 7, 1973, the Internal Revenue Service formally notified the President and Mrs. Nixon that their federal income tax return for the years 1970, 1971 and 1972 would be reexamined. (HJC, Statement of Information, Book X, "Report Respecting Deduction Taken by the President for Years 1969 through 1972 for Gift of Papers Claimed to be made on March 27, 1969" (hereafter "Tax Report"), Appendix 3.) The next day the President made public a full accounting of his financial transactions since his assumption of office in 1969, including his income tax return for the years 1969-72, and he requested the Joint Committee on Internal Revenue Taxation of the United States Congress to examine certain items therein to determine if they had been correctly reported.<sup>1/</sup>

The Joint Committee and the IRS thereafter conducted an examination of the President's returns, and concluded in part that the President's deduction on the 1969 and subsequent returns of the gift of pre-presidential papers should not be allowed. The IRS stated the issue as follows:

Did the taxpayer make a completed gift of certain pre-presidential papers to the United States between January 1, 1969 and July 25, 1969, so that he could avail himself of a charitable deduction under section 170 of the Code? (IRS Audit Report, Exhibit 1, p. 1.)

1/

The Summary of Information states, "only after the President learned that the IRS was going to re-audit his returns did he request the Joint Committee on Internal Revenue Taxation to examine his deduction for the gift of papers." (p. 11) It seems possible that if the matter had not been referred to Congress, questions such as those raised in the Summary of Information, concerning the thoroughness of the examination conducted by personnel of the Executive branch, might have remained.

The Joint Committee concluded as follows:

The charitable deductions (\$482,018) taken for gift of papers from 1969-1972 should not, in the staff's view, be allowed because the gift was made after July 25, 1969, the date when the provisions of the Tax Reform Act of 1969 disallowing such deductions became effective. The staff believes that in view of the restrictions and retained rights contained in the deed of the gift of papers, that the deed is necessary for the gift. The deed (dated March 27, 1969) which purportedly was signed on April 21, 1969, was not signed (at least by all parties) until April 10, 1970 and was not delivered until after that date. It should also be noted that this deed was signed by Edward Morgan (rather than the President), and the staff found no evidence that he was authorized to sign for the President. In addition, the deed stated that its delivery conveyed title to the papers to the United States and since the deed was not delivered until after April 10, 1970, it is clear that title could not have been conveyed by way of the deed until after July 25, 1969. Furthermore, because the gift is so restricted, in the opinion of the [Joint Committee] staff, it is a gift of a future interest in tangible personal property, which is not deductible currently under the law, even if the gift was valid in all other respects: that is, it had been made and the deed delivered prior to July 25, 1969. (Joint Committee Report, p. 5)

The Joint Committee disavowed any attempt to "draw any conclusions whether there was, or was not, fraud or negligence involved in any aspect of the returns, either on the part of the President or his personal representatives." (Joint Committee Report, p. 4) This disavowal was predicated on the fact that this Committee was then involved in an investigation of whether grounds exist for the impeachment of the President.

The IRS, on the other hand, in the course of the investigation, concluded that "inconsistencies abound[ed]" between the various stories of the President's representatives involved in the gift of papers, and that a grand jury investigation was warranted to determine whether fraud had been committed by these representatives. (Tax Report, Appendix 7) However, like the Joint Committee, the IRS made no allegations of fraud against the President.

On April 2, 1974, the fraud investigation was formally referred to the Special Prosecutor in the names of three of the President's representatives: Frank DeMarco, his attorney; Ralph Newman, the appraiser of the papers; and Edward L. Morgan, formerly Deputy Counsel to the President. (Tax Report, Appendix 8) The Special Prosecutor has recently begun a grand jury investigation.

The evidence with respect to Presidential involvement is as follows:

In a meeting between then President-elect Nixon and President Lyndon Johnson in 1968, President-elect Nixon became aware of the possibility of making a gift of his historical papers, and taking a charitable

deduction on his federal income tax return for their fair market value. (Tax Report, ns. 1 and 2) In mid-December, 1968 the President had discussions with Richard Ritzel, then his tax attorney, concerning the feasibility and requirements of such a gift, and on December 27 or 28, 1968 he received from Ritzel two versions of the 1968 deed of gift and a covering explanatory memorandum. (Tax Report, ns. 3-5) On the evening of December 28, 1968, the President telephoned Mr. Ritzel, and they discussed Ritzel's memorandum and the restrictions on public access to the papers contained in one or both deeds. (Tax Report, n. 6) Mr. Nixon signed the 1968 deed, which was transmitted back to Mr. Ritzel, who then completed arrangements for the 1968 gift. (Tax Report, n. 7) The President signed his 1968 tax return, which included a deduction of \$70,552.00 for the 1968 gift. The remaining \$2,447.73 was made available as a deduction carryover for future years. In accordance with IRS regulations, a statement was attached to the return including information as to the existence of any restrictions on the gift. It said in substance that the gift was free and clear, with no rights remaining in the taxpayer. (Tax Report, ns. 8, 9)<sup>1/</sup>

On February 6, 1969, John Ehrlichman sent a memorandum to the President in regard to gifts and charitable contributions. In this memorandum, Ehrlichman recited the 1968 gift of papers, and suggested that the President could continue to obtain the maximum charitable deduction of 30 percent of his adjusted gross income by first contributing to

---

<sup>1/</sup> It may be argued that the facts in this paragraph indicate that the President was involved in and was aware of the requirements and procedures for the 1968 gift of papers; and that the President had had experience of at least one method of executing a gift of his papers.

charity proceeds from the sale of the President's writing in an amount equal to 20 percent of his adjusted gross income. With respect "to the remaining 10%," Ehrlichman's memorandum noted that it would "be made up of a gift of your papers to the United States. In this way we contemplate keeping the papers as a continuing reserve which we can use from now on to supplement other gifts to add up to the 30% maximum." There is a notation on the memorandum, apparently in the President's handwriting, which states "1. Good 2. Let me know what we can do on the foundation idea-." There is no reference in this memorandum to making a bulk gift of papers in the year 1969 which would be sufficient for the President's 30 percent charitable deduction for 1969 and succeeding years. (Tax Report, n. 10) On June 16, 1969, Ehrlichman sent two memoranda to Deputy Counsel Morgan dated June 16, 1969. One of these memoranda mentioned the full 30 percent deduction for the 1969 tax year and posed questions purportedly raised by the President himself in regard to his taxes. (Tax Report, n. 34)<sup>1/</sup>

On November 7, 1969 Ralph Newman sent a preliminary appraisal to the President, valuing the President's pre-Presidential papers at slightly over two million dollars. (Tax Report, n. 38) On November 16, 1969 Newman attended a White House prayer breakfast. Newman stated to the staff at his interview that as he stood in the receiving line and introduced himself to the President, he asked the President if he had received the preliminary appraisal. The President replied that he did

---

<sup>1/</sup> It may be argued that the facts in this paragraph are probative of the proposition that the President did not have an intention in 1969 of making a bulk gift of papers with carryover consequences.

receive the appraisal, and stated that he did not believe that the figure could be so high. Newman told the President that the figure was a conservative estimate. (Tax Report, n. 39)<sup>1/</sup>

On December 30, 1969 the President signed the Tax Reform Act of 1969. This extremely complex statute<sup>2/</sup> contained a provision retroactively establishing a cut-off date of July 25, 1969 for effective charitable donations of papers. (Tax Report, n. 45)

The final instance of Presidential involvement in the events leading to the gift of papers is the President's signing of his 1969 tax return on April 10, 1970. On that date, the President's attorney, Frank DeMarco, met with the President and explained the tax return to him, including the deduction for the gift of papers. Herbert Kalmbach was present at that meeting, and has testified before the Committee that the President and DeMarco went over the return page by page<sup>3/</sup> and discussed the tax consequences of the gift of papers deduction (Kalmbach testimony, 7/17/74, T 4864-65). In his interview with the Staff, DeMarco said that his explanation to the President consisted of DeMarco's pointing to the appraisal by Newman and stating, "This, of course, is

---

1/ It may be argued that the facts in this paragraph are probative of the proposition that, as of November, 1969, the President did not have an understanding that a gift of his papers had been made in April of that year.

2/ Based on the President's signature of this statute, which takes up more than 300 pages in the U.S. Code Congressional and Administrative News, the Summary of Information concludes, "There can be no doubt that the President knew that the Tax Reform Act required that, for the claim of a deduction to be valid, a gift must be completed by July 25, 1969." (Summary of Information, p. 2)

3/ The statement that the gift had been made on March 27, 1969 was contained in an attachment to the return. (Summary of Information, p. 1)



the appraisal supporting the deduction for the papers which you gave away." According to DeMarco, the President's response was "That's fine." DeMarco has said there was no discussion about the deed giving the gift of papers to the United States. DeMarco told the President that the gift of papers would be a tax shelter for several years. DeMarco has stated that there was no in-depth analysis of the tax return while he was with the President, but he said there was no question that the President knew he was getting a refund and that a basis for the refund was the deduction taken for the gift of papers. Shortly thereafter, DeMarco met with Mrs. Nixon and obtained her signature on the return. (Tax Report, n. 68)

## 2. Theories of the Evidence.

The Minority staff submit that the issue with respect to the President's taxes is not whether the deduction for the gift of papers was valid or invalid.<sup>1/</sup> Nor is the issue whether any personal representative of the President committed fraud in connection with the gift of papers or the preparation of the return. The primary issue is whether the President committed acts constituting willful tax evasion.<sup>2/</sup>

Section 7201 of the Internal Revenue Code, entitled "Attempt to Evade or Defeat Tax," provides:

---

<sup>1/</sup> Under applicable law, the burden of establishing the validity of the deduction falls upon the President. The burden of proof in this Inquiry is not with the President.

<sup>2/</sup> As the Summary of Information states, "Mere mistake or negligence by the President in filing false tax returns would clearly not provide grounds for impeachment." (Summary of Information, pp. 3-4)

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000.00, or imprisoned not more than five years, or both, together with cost of prosecution.

3. Discussion.

In order to establish a case of willful tax evasion under Section 7201, there must be proof not only of willfulness on the part of the taxpayer, but also of affirmative acts of wrongdoing, such as deceit, concealment, misrepresentation, and the other usual "badges of fraud." In Spies v. United States, 317 U. S. 492 (1943), the Supreme Court stated:

By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Other cases are instructive on the character of acts necessary to constitute fraudulent deductions. Such fraudulent deductions include the fraudulent taking of unjustified deductions based on false inventory, United States v. Kelley, 105 F.2d 912 (2d Cir. 1939); the claiming of extensive deductions for losses on sales of securities where the securities were sold to close friends at "bargain prices" and very shortly bought back by the taxpayer, United States v. Schenck, 126 F.2d 702 (2d Cir. 1942) cert. denied sub. nom. Moskowitz v. United States,

316 U.S. 705 (1942); and the claiming of a loan made by the taxpayer and taken as a deduction for "purchases," thus reducing income, Barshop v. United States, 192 F.2d 699 (5th Cir. 1951), cert denied, 342 U.S. 920 (1952).

It may be argued that the 1970 events reveal affirmative acts of wrongdoing on the part of the President's personal representatives, Newman, DeMarco and/or Morgan.<sup>1/</sup> However, it is difficult to see how the President could be charged with willfulness or with an affirmative act of wrongdoing unless he knew of any fraudulent acts by his personal representatives. The evidence does not seem to bear out Presidential knowledge of fraudulent acts by his subordinates in connection with his tax returns.

On the one hand, it can be argued that it is doubtful that DeMarco, Newman and Morgan would undertake a coordinated scheme of falsification on their own without checking with the taxpayer or one of his close advisors. The gift of papers was of enormous importance to the President's financial posture and was also of some historical significance. The three men involved herein were not customarily handling personal affairs of the President of such magnitude without some guidance.

---

<sup>1/</sup> The President has stated that he relied on his lawyer, tax accountant, and other subordinates to handle the gift. A White House press statement dated April 4, 1974 states that any errors committed by the President's tax consultants were done without the President's approval.

The Summary of Information does not address this issue. Good faith reliance on one's attorney is a defense to the criminal charge. Reliance is a factual issue to be determined by a finder of fact. In a criminal trial if the defendant raises the defense that he relied on someone else to prepare the return, he is entitled to an instruction on that issue, since the doctrine of respondeat superior applicable to a civil case would not apply in a criminal case. It should appear from the circumstances that the advisor had an apparent competence in the tax field. In addition there must be a showing that the taxpayer actually believed and followed the advice.

In addition, when the President signed his 1969 tax return, he knew that he had signed a deed in connection with the 1968 gift: and yet he had signed no deed for the 1969 gift -- although since assuming the Presidency in January, 1969, the President had probably grown more accustomed to acting through agents in his personal affairs.

The short answer to the case of imputed knowledge and inferred intent upon which any fraud allegations would have to rest in this instance, is that the mere fact that a taxpayer has signed his tax return is not enough. If the burden is on the Committee to establish the elements of Presidential fraud, that burden simply is not carried by the evidence recited above, which falls far short of demonstrating on the part of the President, any act of deceit, concealment, misrepresentation, or the other usual "badges of fraud." Although the Committee and staff have interviewed two of the participants in the meeting of April 10, 1970 at which the President signed his 1969 tax return, neither witness stated that the President was informed or even asked about the details of the gift. Indeed, none of the witnesses in the case interviewed by the staff has indicated that the President had any awareness of the details of the circumstances surrounding the gift of papers.<sup>1/</sup>

---

<sup>1/</sup> In regard to the absence of evidence of Presidential knowledge, the failure of the staff to submit interrogatories to the President must weigh heavily in considering whether the Committee is acting on a complete record. Such written questions can be narrowly drawn to elicit narrow responses, as the interrogatories drafted by the Joint Committee demonstrate. The President has indicated that he would submit written responses under oath to such interrogatories if submitted by this Committee, but to date the Committee has not seen fit to avail itself of that opportunity.

The Summary of Information argues that willfulness and knowledge "may be inferred from all the events and circumstances surrounding the making of the gift and the preparation and execution of the tax return." (Summary of Information, p. 4) Willfulness and knowledge on the part of the President cannot be inferred merely from the evidence before this Committee concerning essentially the acts of other individuals.



INTERNAL REVENUE SERVICE

A. Facts

The following discussion concerns whether the President has committed acts of abuse of power in connection with the misuse of the Internal Revenue Service by obtaining confidential tax information from the IRS, and endeavoring to have the IRS initiate or accelerate investigation of taxpayers.

1. Report on Gerald Wallace Investigation

On or about March 21, 1970, Special Counsel to the President Clark Mollenhoff transmitted to H. R. Haldeman material obtained by Mollenhoff from the IRS and dealing with the taxes of Governor George Wallace's brother, Gerald Wallace. (Book VIII, p. 35) Mollenhoff had been instructed by Haldeman to obtain a report from the IRS on an investigation relating to Governor George Wallace and Gerald Wallace, on assurances by Haldeman that the report was to be obtained at the request of the President. Mollenhoff states that he neither gave copies to anyone else nor discussed the substance of it with anyone else until after the appearance of a news article on April 13, 1970, that described confidential field reports and the IRS's investigation of charges of corruption in the Wallace Administration and the activities of Gerald Wallace. (Book VIII, pp. 38-39).

Former Commissioner of Internal Revenue Randolph Thrower has stated that an IRS investigation of the leak of information concluded that the material had not been leaked by the IRS or the Treasury Department. In an affidavit submitted to the Committee, Thrower has also stated that thereafter he and the IRS Chief Counsel met with Haldeman and Ehrlichman at the White House and discussed with them the seriousness of the leak and the fact that unauthorized disclosure of IRS information constituted a criminal act. Neither Haldeman nor Ehrlichman indicated to Thrower the source of the leak, but they did appear to take the complaint seriously and assured Thrower that they would cooperate in undertaking to prevent such incidents in the future. Further, Haldeman and Ehrlichman assured Thrower that they would call the gravity of the situation to the attention of those in the White House who might from time to time have access to such information. (Book VIII, pp. 40-42)

2. Enemies List

In an affidavit submitted to the Committee, Johnnie Walters, former IRS Commissioner, has stated that on September 11, 1972, at Dean's request, he went to John Dean's office where he received from Dean a list of



McGovern staff members and campaign contributors. Dean requested that the IRS begin investigations or examinations of the individuals named on the list. Dean said he had not been asked by the President to have this done, and that he did not know whether the President had asked this action to be undertaken. (Book VIII, p. 240) Walters advised Dean that compliance with such a request would be disastrous for the IRS and the Administration -- "would make the Watergate affair look like a 'Sunday school picnic'" -- and that he intended to discuss the matter with Secretary of the Treasury George Shultz and recommend to Shultz that nothing be done on the request. (Book VIII, pp. 275-79) Dean has testified that he was instructed to give this list to Walters by either Murray Chotiner or John Ehrlichman. Dean testified that he learned that Chotiner had collected the names of all the principal contributors in the McGovern campaign from which a list of names would be compiled that Dean would in turn submit to Walters for IRS audits. (Dean testimony, HJCT pp. 3522-23)

On September 13, 1972 Walters showed Shultz the list and advised him that he believed they should not comply with Dean's request to commence examination or investigation of the people named on the list. Shultz told Walters to do nothing with respect to the list and Walters put it in his office safe. (Book VIII, pp. 275-79)

On September 15, 1972, during a conversation with the President, Haldeman mentioned, among other things, "Dean working through the IRS." The transcript prepared by the Inquiry staff reflects the following exchange:

PRESIDENT: [Unintelligible]

HALDEMAN: John, he is one of the quiet guys that gets a lot done. That was a good move, too, bringing Dean in. But it's --

PRESIDENT: Yeah.

HALDEMAN: It -- He'll never, he'll never gain any ground for us. He's just not that kind a guy. But, he's the kind that enables other people to gain ground while he's making sure that you don't fall through the holes.

PRESIDENT: Oh. You mean --

HALDEMAN: Between times, he's doing, he's moving ruthlessly on the investigation of McGovern people, Kennedy stuff, and all that too. I just don't know how much progress he's making, 'cause I --

PRESIDENT: The problem is that's kind of hard to find.

HALDEMAN: Chuck, Chuck has gone through, you know, has worked on the list, and Dean's working the, the thing through IRS and, uh, in some cases, I think, some other [unintelligible] things. He's -- He turned out to be tougher than I thought he would, which is what

PRESIDENT: Yeah. (HJCT 1)

Soon thereafter Dean entered the Room. Dean has testified that in the last seventeen minutes of that meeting, he, the President and Haldeman discussed the use of the IRS. <sup>1/</sup> (Dean testimony, Transcript, pp. 3522-24) As Dean recalled the conversation, they talked about the problem of having the IRS conduct audits; Dean told the

---

<sup>1/</sup> On May 28, 1974 the Watergate Special Prosecutor moved that the recording of the last portion of this meeting be turned over to the appropriate grand jury because that recording was relevant to the alleged White House attempts to abuse and politicize the IRS, including unlawfully attempting in August and September 1972 to instigate an IRS investigation of O'Brien. On July 12, 1974 Judge Sirica granted the motion and ordered that the recording of the conversation from 6:00 to approximately 6:13 p.m. be made available to the Special Prosecutor. The order was stayed pending appeal by the President. (Book VIII, pp. 340-49) On June 24, 1972 the Committee subpoenaed tapes, dictabelts, memoranda and other records of the conversations. Such materials have not yet been furnished to the Committee.

President and Haldeman of his difficulty in getting Walters to commence audits; and the President complained that Shultz had not been sufficiently responsive to White House requirements. (Dean testimony, HJCT pp. 3523-24; Book VIII, pp. 334-36)

On or about September 25, 1972, Dean telephoned Walters and inquired as to the progress regarding the list of McGovern campaign workers and contributors. Walters informed Dean that no progress had been made. Dean asked if it might be possible to develop information on 50, 60 or 70 of the names, and Walters responded that, although he would reconsider the matter with Secretary Shultz, any activity of this type would be inviting disaster. On September 29th, Walters discussed Dean's request with Shultz and they agreed that nothing be done with respect to the list. Thereafter, there were no further discussions by Walters about this matter during his tenure as IRS Commissioner and no actions were taken by the IRS in regard to the list. (Book VIII, p. 274-79)

On July 11, 1973, Walters turned the list over to the Joint Committee on Internal Revenue Taxation. On December 20, 1973, the staff of the Joint Committee issued a report stating that it found no evidence that the returns of any persons on the list were screened as a result of White House pressure. (Book VIII, pp. 280-85)

3. Investigation of Lawrence O'Brien

During the summer of 1972, Commissioner Walters was asked by Secretary Shultz to check on a report by Ehrlichman that Democratic National Committee Chairman Lawrence O'Brien

had received large amounts of income which might not have been reported properly. Ehrlichman had received a sensitive case report on the O'Brien investigation sometime earlier and had asked Roger Barth, Assistant to the IRS Commissioner, to check O'Brien's tax returns. Barth did so and reported to Ehrlichman that the returns seemed in order. (Book VIII, pp. 223-25; Barth testimony, SSC Exec. Sess., June 5, 1974) Walters reported to Shultz on the IRS's examination of O'Brien's returns for 1970 and 1971, and later learned from Shultz that Ehrlichman was not satisfied with the report on the status of O'Brien's returns. Because of Ehrlichman's inquiries, O'Brien was interviewed during the summer of 1972, although it was generally the IRS's policy to postpone investigations involving sensitive cases, to the extent possible without loss of position or revenue, until after the election. A copy of the taxpayer conference report was submitted to Shultz. (Book VIII, pp. 217-25)

A short time thereafter Shultz informed Walters that Ehrlichman was not satisfied and that he desired further information about the matter. Ehrlichman has testified that he called Shultz to complain that the IRS was delaying the audit until after the election. Ehrlichman told Shultz of his concern that the IRS bureaucracy, in its timing of audits, might be moving more quickly on Republicans than Democrats. (Book VIII, pp. 224-25) Walters advised Shultz that the IRS had checked the filing of the return and the examination status of those returns, which were closed, and that there was nothing else the IRS could do. (Book VIII, pp. 217-27)

On or about August 29, 1972, at the request of Shultz, Walters went to Shultz's office with Barth to conclude the review of the O'Brien matter. The three discussed the matter and agreed that the IRS could do no more, and thereafter they jointly telephoned Ehrlichman. Shultz and Walters informed Ehrlichman that the IRS had verified that O'Brien had filed returns which reflected large amounts of income, that the IRS had already examined and closed their returns, and that the three were all agreed that there was nothing further that the IRS could do. Ehrlichman indicated disappointment and said to Walters that he was "goddamn tired of his foot-dragging tactics." (Book VIII, pp. 227-35)

Haldeman and Dean have testified that during their September 15, 1972 meeting with the President there was a discussion of taking steps to overcome the unwillingness of the IRS to follow up on complaints.<sup>1/</sup> (Book VIII, pp. 333-36) According to an affidavit by SSC Minority Counsel Fred Thompson, J. Fred Buzhardt, Special Counsel to the President, has stated that during the September 15, 1972 meeting Dean reported on the IRS investigation of Lawrence O'Brien. (Book VIII, pp. 337-39)

---

<sup>1/</sup> Both this Committee and the Special Prosecutor have attempted to obtain a tape of the last 17 minutes of this conversation. See footnote 1, supra, p. 4.

4. Other Tax Information

The Summary of Information briefly adverts to a number of instances in which a member of Dean's staff obtained confidential information and attempted to have audits performed on certain individuals. There is no competent evidence of Presidential knowledge of, or involvement in, any of these cases,<sup>1/</sup> although there is an apparent reference to securing information from the IRS in the transcript of the conversation between John Dean and the President on March 13, 1973:

PRESIDENT: Do you need any IRS [unintelligible] stuff?

DEAN: Uh -- Not at the --

\*\*\*

DEAN: . . . Uh, there is no need at this hour for anything from IRS, and we have a couple of sources over there that I can go to. I don't have to fool around with Johnnie Walters or anybody, we can get right in and get what we need. (HJCT 50)

---

<sup>1/</sup> Dean's Executive Session testimony before the Senate Select Committee (Book VIII, p. 154) suggests that the President wanted the IRS "turned off on friends of his." A subsequent staff interview with Dean has indicated that Dean learned of this not from the President, but from Higby.

B. Discussion

Many of the alleged instances of IRS abuse, e.g., the Gerald Wallace case, are very weak in terms of Presidential knowledge.<sup>1/</sup> With respect to the O'Brien investigation, the evidence in hand does not show that the President urged or ordered Ehrlichman to obtain tax information on O'Brien, or to encourage an audit of his taxes. There is a suggestion of Presidential knowledge of those activities, however, in the affidavit of Fred Thompson, Minority Counsel to the SSC, in which Thompson states that J. Fred Buzhardt had informed him that the September 15, 1972 conversation between the President and Dean concerned a report by Dean on the tax investigation of O'Brien.<sup>2/</sup>

The Enemies List is a stronger case for Presidential knowledge. The tape in the possession of the Committee shows that Haldeman informed the President that Dean was moving "ruthlessly" on the investigation of McGovern people, and working the "thing" through the IRS. Dean's testimony indicates that the President urged him to use the IRS to conduct audits, and that Dean thereafter contacted Johnnie Walters a second time to ask if there had been any action on

---

<sup>1/</sup> A potentially applicable criminal statute is 26 U.S.C. § 7213 which prohibits the unauthorized disclosure of tax information by any officer or employee of the United States.

<sup>2/</sup> A criminal statute which might apply to this situation is 26 U.S.C. § 7212, entitled "Attempts to interfere with administration of internal revenue laws." However, this statute is usually applied to persons who attempt to prevent the execution of the Revenue Code.

the list of McGovern staff and contributors that he had given Walters several days earlier.

Even if the President did not instruct Dean to go back to Walters, if he had knowledge of any attempt to use the IRS for political purposes, acquiescence would appear indefensible. If it is believed that the President knew of or encouraged Dean's activities with respect to the IRS, perhaps the best that can be said is that a minute examination of five years of any President's tenure, involving hundreds of thousands of governmental decisions, would probably reveal a certain irreducible minimum of error. Without in any way attempting to justify or excuse an isolated or limited example of misuse of a government agency, it may yet be suggested that one or two, or even three or four such examples in the course of five years, do not establish a "pattern" of gross abuse of power sufficient to warrant the removal of a President. In the heat of politics, it may be that men make errors of the heart as well as of the head; but perhaps the fact that the context is political should not rule out the possibility of a locus poenitentiae.





## II.

### WATERGATE CASE

#### A. Criminal Law Analysis

The June 5, 1972 Grand Jury of the United States District Court for the District of Columbia voted on February 25, 1974, to name Richard M. Nixon, President of the United States, as an unindicted member of the conspiracy to defraud the United States and to obstruct justice charged in Count I of the indictment returned by that Grand Jury on March 1, 1974, in the case of United States v. Mitchell, et al.<sup>1/</sup> Simultaneously with the issuance of this indictment, the Grand Jury filed with the court a Report and Recommendation requesting that certain evidentiary materials obtained by the Grand Jury in the course of its investigation of the circumstances surrounding the Watergate burglary be forwarded to the Committee on the Judiciary of the House of Representatives. On March 26, 1974, by order of Chief Judge John J. Sirica, the Report and Recommendation and accompanying evidentiary materials were conveyed to the Committee pursuant to the Grand Jury's request.

The action of the Grand Jury served to sharpen what had already become a central question of this Impeachment Inquiry:

---

<sup>1/</sup> Cr. No. 74-110

Did the President, at any time between June 17, 1972 and the present day, become a knowing and intentional participant in a criminal conspiracy to obstruct justice in connection with the official investigation of the Watergate break-in?

Law of Conspiracy: General

Essentially, a criminal conspiracy is a combination, concert, or agreement of two or more individuals for the purpose of committing a criminal act, or to do a lawful act by criminal or unlawful means.<sup>2/</sup>

It is generally accepted by the federal courts that circumstantial evidence may be used to establish the existence of a conspiratorial agreement, particularly since such an agreement, by its very nature, is characterized by secrecy, and therefore rarely is there direct evidence establishing the existence of a conspiracy.<sup>3/</sup> No particular form of agreement or express assent is required to constitute a criminal conspiracy under 18 U. S. C. §371, as long as the necessary purpose of the agreement is the commission of some federal offense, even though all the elements of the substantive offense are not covered by

---

<sup>2/</sup> Pettibone v. U.S., 148 U.S. 197, 203; U.S. v. Perlstein, 126 F.2d 789, certiorari denied, 316 U.S. 678.

<sup>3/</sup> Ingram v. U.S., 360 U.S. 672; Blumenthal v. U.S., 332 U.S. 539, 557; Baker v. U.S., 329 F.2d, 786, certiorari denied, 379 U.S. 853; U.S. v. Lutwak, 195 F.2d, 748, 753, aff'd, 344 U.S. 604; U.S. v. Mack, 112 F.2d 290.

the agreement.<sup>4/</sup> It well established that a "tacit understanding" as demonstrated by a certain course of conduct is sufficient to establish an agreement.<sup>5/</sup> A conspiracy may be deduced from the conduct of the parties.<sup>6/</sup>

It is not necessary to prove that a particular defendant was aware of all the aims of the conspiracy or of the identity of all its participants. The requisite agreement may exist without knowledge on the part of all the conspirators of all the details of the conspiracy or of the identity of all the co-conspirators.<sup>7/</sup> To convict one as a conspirator, however, it is necessary to show that he knew or understood the essential nature or the purpose of the conspiracy, and that he intended to violate the criminal statute or commit the substantive crime which was the object of the conspiracy.<sup>8/</sup> Furthermore, the

---

<sup>4/</sup> U.S. v. Roselli, 432 F.2d 879, 892, certiorari denied, 401 U.S. 924; U.S. v. Tuffanelli, 131 F.2d 890, certiorari denied, 318 U.S. 772.

<sup>5/</sup> Direct Sales Co. v. U.S., 319 U.S. 703, 714.

<sup>6/</sup> Babb v. U.S., 27 F.2d 80, certiorari denied, 278 U.S. 624.

<sup>7/</sup> Blumenthal v. U.S., 332 U.S. 539, 557; U.S. v. Projansky, 465 F.2d 123, 135, certiorari denied, 409 U.S. 1006; U.S. v. Agueci, 310 F.2d 817, 826, certiorari denied, 372 U.S. 959.

<sup>8/</sup> U.S. v. Cardi, 478 F.2d 1362; Miller v. U.S., 382 F.2d 533, certiorari denied, 390 U.S. 984; U.S. v. Sheiner, 273 F. Supp. 977, aff'd 410 F.2d 337, certiorari denied, 396 U.S. 825; U.S. v. Gisenhaltz, 278 F. Supp. 434.

requisite criminal intent must be at least of the degree of criminal intent which would be necessary to sustain a conviction for the substantive offense itself.<sup>9/</sup> It has been held that a critical inquiry in any conspiracy case involves a determination of the kind of agreement or understanding that existed as to each defendant as he understood it.<sup>10/</sup>

It should be noted that 18 U.S.C. §371, relating to conspiracies to "defraud the United States" or any agency thereof, in any manner or for any purpose, is not confined to fraud as that term had been used in the common law, and it reaches any conspiracy for the purpose of impairing, obstructing, or defeating any lawful governmental function by deceit, craft or trickery, or by means which are dishonest.<sup>11/</sup> Neither pecuniary loss to the United States nor receipt of consideration is essential to a finding of a violation of Section 371 relating to conspiracy to defraud the United States.<sup>12/</sup>

The conspiratorial agreement is a crime in itself under 18 U.S.C. §371, independent of the commission of the particular offense

---

<sup>9/</sup> Ingram v. U.S., 360 U.S. 672; Carter v. U.S., 333 F.2d 354.

<sup>10/</sup> U.S. v. Cirillo, 468 F.2d 1233, certiorari denied, 410 U.S. 989.

<sup>11/</sup> Dennis v. U.S., 384 U.S. 855; U.S. v. Johnson, 383 U.S. 169; U.S. v. Sweig, 316 F. Supp. 1148.

<sup>12/</sup> U.S. v. Peltz, 433 F.2d 48, certiorari denied, 401 U.S. 955.

which is the object of the conspiracy. Since the gravamen of the crime of conspiracy is the agreement, the substantive crime itself need not be effectuated.<sup>13/</sup> However, Section 371 requires an "act to effect the object of the conspiracy". Thus, the unlawful plan or agreement must be followed by at least one overt act or some conduct in furtherance of the plan or agreement, before there can be a maturation of the crime of conspiracy.<sup>14/</sup> The overt act need not be a criminal act; it may be an act of preparation, and it need be done by only one of the conspirators.<sup>15/</sup>

As the foregoing discussion indicates, the elements of a criminal conspiracy include:

- 1) a criminal objective to be accomplished, or a lawful objective to be accomplished by criminal means;
- 2) some form of an agreement or understanding between two or more individuals whereby they become definitely committed to cooperate for the attainment of the objective pursuant to an express or implied plan or scheme embodying the means for its attainment (or by any effective means);
- 3) knowledge or understanding by participating conspirators of the nature or purpose of the conspiracy and a criminal intent to violate the criminal statute or commit the substantive offense which is the object of the conspiracy; and

---

<sup>13/</sup> Callanan v. U.S., 364 U.S. 587, 593; Pinkerton v. U.S., 328 U.S. 640, 643.

<sup>14/</sup> U.S. v. Skillman, 442 F.2d 542, 547, certiorari denied, 404 U.S. 833; Cross v. U.S., 392 F.2d 360.

<sup>15/</sup> Braverman v. U.S., 317 U.S. 49, 53.

- 4) an overt act in furtherance of the objective of the conspiracy. 16/

Once a conspiracy becomes "complete" with the commission of the first overt act, in the sense that the word is ordinarily used to represent the establishment of a conspiracy, it continues in existence until the final objective of the conspiracy is accomplished or until there is shown some affirmative act of abandonment or termination. 17/

#### Joining an Ongoing Conspiracy

One need not be a member of a conspiracy from its inception, but can join a continuing conspiracy at any time. 18/ Those who join a conspiracy during its progress and cooperate in the common effort to obtain the unlawful results become parties thereto and assume responsibility for all preceding acts in furtherance of the scheme, as well as subsequent acts. 19/ As in the case of an original conspiracy, it is not essential that the individual joining an existing conspiracy have

---

16/

Pinkerton v. U. S., 145 F.2d 252; U. S. v. Bostic, 480 F.2d 965; U. S. v. Guterma, 189 F. Supp. 265.

17/

U. S. v. Perlstein, 126 F.2d 789, certiorari denied, 316 U. S. 678; Nyquist v. U. S., 2 F.2d 504, certiorari denied, 267 U. S. 606.

18/

Phelps v. U. S., 160 F.2d 858; certiorari denied, 396 U. S. 1060; U. S. v. Lester, 282 F.2d 750; U. S. v. Dardi, 330 F.2d 316.

19/

Lefco v. U. S., 74 F.2d 66.

knowledge of all the details of the conspiracy, nor even of the identity  
of all his co-conspirators.<sup>20/</sup>

Knowledge and Intent

Criminal conspiracy involves more than a general mens rea:  
a showing of specific intent is required.<sup>21/</sup> Mere association with the  
conspirators is not enough.<sup>22/</sup> Nor is mere knowledge of the criminal  
aspects of the enterprise sufficient, even though knowledge must be  
shown.<sup>23/</sup>

In addition to proof of actual knowledge, there must be a  
showing of an "intent to participate."<sup>24/</sup> To establish membership in  
an ongoing conspiracy, it must be demonstrated (either through direct  
or circumstantial evidence) that the individual had knowledge of the  
conspiracy, and in some fashion contributed his efforts, participated  
in an act in furtherance of the conspiracy, or otherwise manifested his

---

<sup>20/</sup> U.S. v. Bolin, 423 F.2d 834; U.S. v. Thomas, 468 F.2d 442, certiorari denied, 410 U.S. 935; U.S. v. Cimini, 427 F.2d 129, certiorari denied, 400 U.S. 911.

<sup>21/</sup> Baywood v. U.S., 232 F.2d 220, 225, certiorari denied, 351 U.S. 982 (1956); U.S. v. Mack, 112 F.2d 290, 292 (1940).

<sup>22/</sup> U.S. v. Stromberg, 268 F.2d 256 (1959); Dennis v. U.S., 302 F.2d 512 (1962); U.S. v. Steele, 469, F.2d 165, 168 (1972).

<sup>23/</sup> Thomas v. U.S., 57 F.2d 1039, 1042 (1932).

<sup>24/</sup> U.S. v. Aviles, 274 F.2d 179, 189 (1959), certiorari denied, 362 U.S. 974 (1960).



his intent to participate,<sup>25/</sup> The defendant must in some sense promote the venture himself, make it his own, have a stake in the outcome.<sup>26/</sup> There must be some affirmative action, but a single act may be sufficient to draw an individual within the ambit of conspiracy.<sup>27/</sup>

In order to determine the President's criminal liability according to the law of conspiracy, as of any given moment in time, the Committee must determine whether the President has, by any affirmative action, including words, manifested an intent to associate himself with others in an enterprise whose criminal purpose is known to him.

#### Duty to Act

There is a line of cases suggesting that one who has an official duty to act to prevent the achievement of the aims of a criminal conspiracy may be liable as a co-conspirator if he learns of the

---

<sup>25/</sup> Nassif v. U.S., 370 F.2d 147, 152 (1966).

<sup>26/</sup> U.S. v. Falcone, 109 F.2d 579, aff'd, 311 U.S. 205 (1940). This "stake in the outcome" or "stake in the venture" test applied in Falcone has been utilized by some courts to establish the requisite specific intent. The test has been particularly popular with the Second Circuit Court of Appeals. However, it has not won universal acceptance. See: Direct Sales Co. v. United States, supra; United States v. Tramaglino, 197 F.2d 928, 930 (1952); Johns v. United States, 195 F.2d 77, 79-80 (1952); 72 Harv. L. Rev. 920, 931 (1959).

<sup>27/</sup> U.S. v. Carminati, 247 F.2d 640, certiorari denied, 355 U.S. 883 (1957); U.S. v. Aviles, supra.

conspiracy but fails to act to thwart it.<sup>28/</sup> In each of these cases, the criminal liability of a law enforcement officer was at issue; in Jezewski (see fn. 28), the conviction of a mayor was also upheld.

It is important to note, however, that even under the Burkhardt analysis (see fn. 28), the intent to participate must be proved. The officer will not be held criminally liable for his own inaction unless it is proved that his failure to act did not stem from mere indecision or from some innocent motive but was intended by him to be his contribution to the success of the conspiracy.

Based partly on the Burkhardt principle, the Model Penal Code of the American Law Institute includes a provision for criminal liability predicated upon failure to perform a legal duty to prevent crime:

. . . (3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he . . .

. . .

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so. . . .

(Section 2.06 (3) (a) (iii) of the Model Penal Code (1962).)

---

<sup>28/</sup>

U.S. v. Burkhardt, 13 F.2d 841 (6th Cir. 1926); Jezewski v. U.S., 13 F.2d 599 (6th Cir. 1926); Lutheran v. U.S., 93 F.2d 395, 400 (8th Cir., 1937), cert denied, 303 U.S. 644, reh. denied, 303 U.S. 668.

Obstruction of Justice Statutes

a. Title 18, U.S. Code, §1503 provides:

Influencing or injuring officer, juror or witness generally.

Whoever corruptly, or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit jury, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any part or witness in his person or property on account of his attending or having attended such court or examination before such officer, magistrate, or other committing magistrate or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

b. Title 18, U.S. Code, §1505, provides:

Obstruction of proceedings before departments, agencies, and committees.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

\* \* \*

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress --

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

c. Title 18, U.S. Code, §1510, provides:

Obstruction of criminal investigations.

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator -

Shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigation of or prosecutions for violations of the criminal laws of the United States.

Discussion

Guided by the general principles of conspiracy law outlined above, one must review the evidence in the Watergate area with special sensitivity to any showing of facts or circumstances tending to prove or disprove Presidential knowledge of the conspiracy or intent to join it.

The President's words, as well as his other actions, at each step of the way from June 17, 1972 until the present day must be scrutinized to determine whether they manifest his knowledge, suspicion or ignorance about critical facts.

It should be noted that, strictly speaking, if the President became a party to an ongoing conspiracy at any time after the Watergate break-in, his criminal liability under 18 U.S.C. §371 would immediately attach. Any discussion of events occurring after the point (if any) at which a Member of the Committee might conclude that the President had joined the conspiracy, would therefore be pertinent to the establishment of additional liability for substantive offenses committed after his entry. Similarly, a Member's perception of the duration and nature of the President's involvement, if any, could be thought pertinent either in aggravation (if the involvement was early and active) or mitigation (if the involvement was later and passive) of Presidential culpability. As is often true in ordinary criminal cases, some facts and dates may be thought not only probative of whether the President joined the conspiracy at all, but also relevant to the question whether it is appropriate for the Congress to impose in this case

the sole sanction available to it, namely, removal from office.

There follows, accordingly, a general overview of the evidence, intended to offer, for purposes of analysis only, an explanation of the President's words and actions which differs from the theory of criminal conspiracy adopted in principle, if not in terms, in the Summary of Information prepared by the Majority staff. The hypothesis is that of an upward cover-up, that is, a pattern of activity on the part of many of the President's close aides and associates designed to shield him from, as well as to conceal from the American people, the true facts regarding the involvement of themselves and others in the planning and execution of the burglary and bugging of the Democratic National Committee headquarters and other activities which the conspirators desired to keep secret.