HSR:bas

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

June 28, 1974

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I received your letter, and that of Mr. Doar, requesting access for Mr. Doar to any memorandum which this office has prepared as a summary of evidence pertaining to President Nixon's conduct in the Watergate matter.

Inasmuch as your exercise of subpoena power would be appropriate in this regard, we will make available to Mr. Doar, at his convenience and for his examination, a summary memorandum prepared here in connection with our duty under the Special Prosecutor's mandate to investigate "allegations involving the President."

See Impeachment evidentiary summary 6/28/74

I suggest that Mr. Doar telephone Mr. Ruth here at the office to make the necessary arrangements.

Sincerely,

/s/

LEON JAWORSKI
Special Prosecutor

cc: File
Chron
Mr. Jaworski
Mr. Ruth
Mr. Lacovara

J. Doar Case re above 7/1/74

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

June 28, 1974

BY HAND

Mr. Leon Jaworski
Special Prosecutor
Watergate Special Prosecution Force
U. S. Department of Justice
1425 K Street, N. W.
Washington, D.C.

Dear Mr. Jaworski:

I enclose herewith a letter from Chairman Rodino requesting permission for me to examine any factual memoranda prepared by your staff summarizing the basis for naming the President as a non-indicted co-conspirator by the June 5 Grand Jury.

Chairman Rodino believes that an examination of this material is necessary to the Committee's inquiry.

H. Res 803, adopted February 6, 1974, authorized and directed the Committee on the Judiciary to investigate fully whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach the President of the United States. The Resolution also grants the Committee subpoena and other appropriate investigative powers. Chairman Rodino believes that the Committee has the right and responsibility to make an examination of the memoranda sought by his letter and to use the subpoena power if necessary in this regard.

We would hope and expect, however, that it will not be necessary to use such power, and that, consistent with your responsibilities and ours, we can obtain this relevant information in a cooperative fashion.

Sincerely,

John Doar

JOHN DOAR
Special Counsel

Enclosure

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

June 28, 1974

BY HAND

Mr. Leon Jaworski
Special Prosecutor
Watergate Special Prosecution Force
U. S. Department of Justice
1425 K Street, N. W.
Washington, D. C.

Dear Mr. Jaworski:

In the course of our evidentiary presentations in executive session, Mr. James St. Clair, Special Counsel to the President, has challenged whether the evidence before the June 5 Grand Jury of the District of Columbia was sufficient to warrant their action in naming the President as a non-indicted co-conspirator.

In view of this, I would like to request that Mr. John Doar, Special Counsel, have the opportunity to examine any memorandum that you have prepared which summarizes all of the evidence pertaining to President Nixon's conduct as it relates to the Watergate cover-up conspiracy.

I suggest it would be most convenient if Mr. Doar could come to your office and review the memorandum. If possible, I would like him to have that opportunity this weekend as we will be hearing some witnesses next week and the week following and this matter is undoubtedly likely to arise.

Thank you for your cooperation.

Sincerely,

PETER W. RODINO, JR
Chairman

Introduction

This memorandum focuses on facts, inferences and theories that demonstrate that beginning no later than March 21, 1973, the President joined an ongoing criminal conspiracy to obstruct justice, obstruct a criminal investigation, and commit perjury (which included payment of cash to Watergate defendants to influence their testimony, making and causing to be made false statements and declarations, making offers of clemency and leniency, and obtaining information from the Justice Department to thwart its investigation) and that the President is also liable for substantive violations of various criminal statutes.

The memorandum does not consider the extensive but more circumstantial evidence that the President was involved in this conspiracy much earlier on, perhaps within a few days after June 17, 1972. At the least, this evidence includes:

-- the fact that each of the President's top aides (Haldeman, Ehrlichman, Colson) is alleged to have been involved in a criminal conspiracy from shortly after June 17; his chief political associate John Mitchell is

also alleged to have been involved; his Counsel has plead guilty to such involvement; and any inferences that may legitimately be drawn from these facts on the basis of the President's ordinary practice of operating the White House staff;

-- tape recordings of meetings on June 30 and September 15, 1972, and a dictabelt of a recorded recollection on June 20, 1972 (that contains an unexplained gap) that, at the least, would permit a jury to draw the conclusion that the President was aware that high staff members in his political re-election committee were involved in Watergate and that some efforts were being made to prevent this fact from coming out;

-- the fact that a portion of the tape recording of a conversation between the President and H. R. Haldeman on June 20, 1972, during which they discussed Watergate, subpoenaed by the grand jury, was intentionally destroyed apparently by some close associate of the President, that responsibility for such destruction is unexplained, that the President apparently made no efforts to conduct his own investigation into this matter, and any inferences that can legitimately be drawn from these facts;

-- the President's refusal to provide to the District Court for trial in United States v. Mitchell, et al or to the House Committee on the Judiciary subpoenaed tape recordings of meetings prior to March 21, 1973, including a recording of March 17, 1973 which almost certainly contains incriminating discussion of the Watergate cover-up;

-- attempts by the President's aides Haldeman and Ehrlichman in June 1972, after meeting with the President, to confuse the issue of CIA involvement in Watergate in order to restrict the FBI's investigation;

-- the President's failure to heed an urgent warning by his own Acting Director of the FBI in July 1972;

-- statements by the President on and after March 21, 1973, indicating he was aware of and approved the original "containment" approach of the conspiracy prior to that time (e.g., March 21 a.m. meeting, WSPF Tr. 15, 78).

Rather, on account of the more concrete and unambiguous evidence respecting the President's actions and intentions on and after March 21, 1973, this memorandum primarily concerns that time period.

I. Under the case law, very little evidence is required to establish that the President joined an ongoing criminal conspiracy to obstruct justice in March of 1973, even if he did not act affirmatively to further the conspiracy prior to that time.

One who learns of and then associates himself with an ongoing criminal conspiracy by casting in his lot with the conspirators -- especially where he himself has a "stake in the venture" -- becomes a member of the conspiracy under existing case law. "Once the existence of a conspiracy is established, slight evidence may be sufficient to connect a defendant with it." Nye & Nissen v. United States, 168 F.2d 846, 852 (9th Cir. 1948), aff'd, 336 U.S. 613 (1949). One does not become a member of a conspiracy simply on account of receiving information about its nature and scope -- something more is required. The "something more" is generally described as having a "stake in the success of the venture." See e.g., United States v. Peoni, 100 F.2d 401 (2d Cir. 1938). The individual "must in some sense promote [the] venture himself, make it his own, have a stake in its outcome." United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940).

Although one member of the conspiracy must commit an overt act, it is not necessary that every conspirator whose participa-

tion is at issue have done so. Bannon v. United States, 156 U.S. 464, 468 (1895). In other words, there must be evidence to show that the individual whose membership in the conspiracy is alleged learned of the existence of the conspiracy and thereafter, possessing some commonality of interest in some of the goals of the conspiracy, took action sufficient to show that he had "cast in his lot" with the conspirators to help further their conspiratorial aims.

II. The evidence summarized below in parts III and IV, infra, makes out a prima facie case that the President committed violations of a number of federal criminal statutes.

The indictment returned in United States v. Mitchell, et al. charged five of the President's closest aides and associates, the political assistant to one of these persons, and the attorney for the President's re-election committee with a conspiracy to defraud the United States, to obstruct justice, and to make false statements and declarations, all in violation of 18 U.S.C. 371. The indictment charged that the conspiracy continued up until March 1, 1974. The grand jury also charged that the President conspired with those indicted.

The available evidence supports charges that the President participated in a conspiracy to violate certain other statutes in addition to those specifically charged in the indictment, and that he would be liable both as a principal and on a theory of vicarious liability for additional substantive offenses.

For example, there is evidence that the President conspired with others under 18 U.S.C. 371 to defraud the United States and to commit violations of certain federal criminal laws, to wit:

- - obstruction of justice, 18 U.S.C. 1503 (via the means set out in the indictment in United States v. Mitchell et al, which included paying of funds and offers of clemency and other benefits in order to influence the testimony of witnesses, making and facilitating the making of false statements and declarations, obtaining information about the ongoing investigation from the Justice Department for the purpose of diverting or thwarting the investigation);

- - perjury, 18 U.S.C. 1623 (including the President's direct and personal efforts to encourage and facilitate the giving of misleading and false testimony by aides such as Haldeman, Ehrlichman, Dean, Strachan, and possibly Mitchell);

- - bribery, 18 U.S.C. 201 (d), (by directly and indirectly offering something of value -- money and clemency in the case of Howard Hunt, and clemency and/or a pardon in the case of Mitchell, Magruder, and Dean -- with the intent to influence their testimony before grand juries, courts, and congressional committees);

- - obstruction of a congressional committee, 18 U.S.C. 1505 (by corruptly endeavoring to influence testimony of various persons before the Ervin Committee, including not only Hunt, Mitchell, Dean, and Magruder, but also Haldeman and Ehrlichman)

- - obstruction of a criminal investigation, 18 U.S.C. 1510 (including his personal endeavor by means of both bribery and misrepresentation -- the latter especially with respect to President's conversations with Henry Petersen -- to delay and prevent communications of information to the United States Attorneys and to Henry Petersen).

At the very least, moreover, evidence establishing that the President was a member of a conspiracy that had as its means or objects violations of these statutes would also establish violations by the President of the particular statutes themselves, on the theory of vicarious liability. E.g., Pinkerton v. United States, 328 U.S. 640, 645-48 (1946).

In addition, 18 U.S.C. 2 provides that one who "counsels, . . . induces or procures" the commission of an offense (such as bribery, obstruction of justice or of a criminal investigation,

or perjury) by another is "punishable as a principal", i.e., under the substantive statute whose violation he aided and abetted. This section, as well as the doctrine of vicarious liability, could make the President liable for offenses under all the statutes cited above. Furthermore, 18 U.S.C. 3 provides that one who learns of an offense (such as, for instance, the payment of money to Howard Hunt for the purpose of influencing his testimony or the commission of perjury by Egil Krogh and Jeb Magruder) and then acts to assist the offenders (including those who conspired to cause the perjurious statements and to make the payments) in order to prevent their apprehension is liable as an "accessory after the fact." This section fixes a maximum penalty of one-half of the penalty for the substantive offense, which makes it a felony in the case offenses such as perjury, bribery, and obstruction of justice. On a similar theory, the President would probably be liable on the same proof for misprison of felony, 18 U.S.C. 4, although there is relatively little caselaw under this provision.

In connection with the President's liability for the offense of conspiracy it is important to note the nature and breadth of traditional conspiracy law. The gravamen of the offense is, of course, the agreement itself. The agreement

must comprehend illegal means or illegal ends, or both. In addition, some overt acts must have been undertaken by some conspirator(s) to further the aims of the conspiracy. There is no requirement that each conspirator take such acts or that each conspirator play an integral part directly in each phase of carrying out the agreement. It is sufficient to show that each conspirator attached himself to the overall conspiracy knowing (or having reason to know) the scope of its various phases and that he did something to demonstrate affirmatively that he had thrown in his lot with the conspiracy.

Nevertheless, in spite of the generality of typical conspiracy law there is ample evidence in this case to demonstrate that President Nixon took personal and affirmative direct action to further the conspiracy outlined above in each of its four most important phases.

III. The President participated directly in at least four major phases of a conspiracy to obstruct justice, commit bribery, commit perjury, and obstruct a criminal investigation and, in addition, the President was a major participant in efforts to continue to conceal the existence and scope of the conspiracy, which efforts also constitute evidence of his participation in the conspiracy.

The conspiracy indictment of seven individuals in United States v. Mitchell, et al., charged that it was a purpose of the conspiracy to conceal and cause to be concealed the identities of persons who were responsible for and had knowledge about the Watergate break-in and about other illegal activities (including the Fielding break-in) by, inter alia:

- - planning, soliciting, assisting and facilitating the giving of false, deceptive, and evasive statements and testimony;

- - covertly raising and distributing cash funds for the benefit of the Watergate defendants;

- - making and causing to be made offers of leniency clemency, and other benefits; and

- - obtaining by dishonest means information from the Department of Justice to use for furthering the concealment conspiracy.

Available evidence makes out at least a prima facie case that President Nixon participated directly and personally in each of these four aspects of the conspiracy and, in addition, was a major actor in seeking to conceal the existence and then the scope of and participants in the conspiracy, which efforts themselves may be shown to have been part of the original cover-up conspiracy or, possibly, a second illegal conspiracy. See, e.g., Grunewald v. United States, 353 U.S. 391 (1957); Lutwak v. United States, 344 U.S. 604 (1953); Krulewitch v. United States, 366 U.S. 440 (1949).

A. Payment of hush money to the defendants

(1) Undisputed facts

The following undisputed facts are probative of the President's own, direct involvement in that phase of the conspiracy that involved payment of hush money to the Watergate defendants to secure their silence:

(a) In his meeting on the morning of March 21, 1973, with John Dean and H. R. Haldeman, the President learned -- if he did not already know -- most of the material facts tending to show the involvement of his highest White House and CRP aides in a cover-up effort that had begun soon after June 17, 1972, including the fact that covert cash payments had

been made to the defendants and the purpose of those payments. The President also learned of Howard Hunt's new demand for $120,000 and of the dangers that might be posed for some of the conspirators if Hunt told what he knew about the Fielding or Watergate break-ins or both. (See, e.g., WSPF Tr. 20-21, 26)

(b) The President demonstrated familiarity with the fact that payments had been made (volunteering his own belief that this had been done through a "Cuban Committee"), suggested they might have to be continued, (WSPF Tr. 25, 27), and told both Dean and Haldeman that what had already been done could be "handled" in the future, (WSPF Tr. 17, 18, 19, 36, 39) even though the President apparently recognized in suggesting that the "cover" of the "Cuban Committee" be retained for future payments that such payments probably amounted to criminal activity. (See WSPF Tr. 25)

(c) The President agreed with Dean that some "new strategy" was needed for dealing with the Watergate problem and repeatedly urged that John Mitchell be called to Washington on an urgent basis to sit down with Dean, Haldeman, and Ehrlichman and develop such a new approach. A number of possible strategies were discussed. _/

_/ See part III(A)(2), infra.

(d) During the March 21 morning meeting there was considerable discussion about the desirability and feasibility of continuing to make cash payments to the Watergate defendants indefinitely, in terms of the cash cost of such a course, political ramifications, possible course of grand jury and congressional inquiries into Watergate, etc. The President on several occasions reiterated that it would be possible to get a million dollars for this purpose, indeed that the President himself knew where it could be obtained, (WSPF Tr. 24, 54, 55, 58, 60) but there was also discussion about the difficulties of paying the money and the likely futility of such a course. The President on several occasions stated that indefinite payments to the defendants would probably simply make the situation worse or, at best, would result in their being "bled to death," especially in light of the fact that the defendants would be in jail and "delivering" on executive clemency in the near future was politically impossible. [Cites to be supplied]

(e) The President and Dean agreed that if a course of paying the defendants indefinitely were followed, Mitchell should probably be the one to arrange for the mechanics of delivering the cash. (WSPF Tr. 24)

(f) With respect to Hunt's current demand, the President on at least ten separate occasions during the meeting specifically urged, encouraged, or (possibly) instructed that Hunt's "financial problem" be "handled" and "damn soon" in order to "buy time." (WSPF Tr. 25, 26, 27, 38, 40, 46, 47, 65, 67, 71) At no time did the President state or instruct that Hunt's demand should not be made or make a statement that he believed that to pay Hunt's current demand, if necessary, would be unwise or improper.

(g) Following the March 21 morning meeting, Haldeman telephoned Mitchell in New York City. _/ Thereafter, Mitchell had a telephone conversation with Fred LaRue in which LaRue and Mitchell discussed Hunt's new demand. _/ LaRue told Mitchell that Hunt was seeking $75,000 for attorney fees, and asked what to do. Mitchell told LaRue to pay the money. That evening, LaRue caused $75,000 to be delivered to Hunt's attorney, William O. Bittman.

(h) In the late afternoon of March 21, the President met with Dean, Haldeman, and Ehrlichman. Early on in this meeting, the President again raised the question of what

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_/ For peculiarities relating to Haldeman's notes of the March 21 meeting and the phone log showing this call, see infra.

_/ Mitchell apparently now confirms LaRue's testimony about the timing of this conversation.

should be done about Hunt's demand. Either Haldeman or Ehrlichman told the President that Mitchell and LaRue were "aware of it so they know (inaudible) feeling is." There was more discussion about whether something would be done or about the fact that something would be done; inaudibility of the tape makes it impossible to determine the precise import of this conversation.

(i) The next morning, Haldeman and Ehrlichman learned from Mitchell that Hunt's "problem" had been "taken care of." Ehrlichman apprised Krogh that the possibility of Hunt talking had been alleviated.

(j) Within a short time and well before mid-April, Haldeman informed the President that Hunt had been paid. (Haldeman has so testified and the Presidential transcripts of April 14 and 16 confirm this fact, e.g., 1036.) [1]

(k) On April 16, in a conversation with John Dean, the President made a statement acknowledging that because the payment to Hunt was discussed with him and then paid shortly thereafter, that "assumes culpability on that" as to the President himself. This statement followed a discussion initiated by the President in which the President suggested

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[1] All citations to page numbers without further prefix are to the Presidential Submission of Recorded Conversations, GPO ed.

to Dean that Dean had not told the President about Hunt's threat on March 21 but only about a need by Hunt for money; Dean corrected the President and reminded the President of the true chain of events, including Dean's discovery that Mitchell had had the money paid. The President expressed pleasure that the money had been paid "on the Mitchell level."

(l) Thereafter, the President did not disclose and, indeed, apparently tried to conceal from Henry Petersen the fact that a specific threat by Hunt was discussed with him on March 21, and that he had learned shortly thereafter that money had in fact been paid in response to this demand.

(m) At about the same time, the President had a number of conversations with Haldeman and Ehrlichman in which he urged them to get a story together about their understanding of the purpose for which cash payments to the defendants had been made. (983, 994-95) On one occasion the President stated that those involved "have got to stick to their line" that they did not raise money "to obstruct justice" (639-40; see also 430), even though in fact the President had previously been informed that those who participated directly

in making and authorizing payments did it for that purpose, (677) and that Haldeman and Ehrlichman had well understood that themselves. (E.g., 493) ("it was never expressed, but it was certainly understood.")

(n) On June 4, 1973, after the President had listened to a number of his own tape recordings, he stated on several occasions that the biggest problem would be the March 21 meeting but that Haldeman had been present at that meeting and could "handle" it in his testimony.

(o) In August 1973, Haldeman testified on national television in the Ervin Committee hearings -- after reviewing his extensive detailed notes of listening to the tape recording of the March 21 meeting -- that on March 21 the President told Dean that it would be possible to raise a million dollars "but that would be wrong." This testimony is charged as perjurious in United States v. Mitchell, et al. The President not only did not correct this testimony but in fact affirmed in a public statement that he had a similar recollection. Haldeman had previously warned the President on April 17 that the President should have told Dean on March 21 that "blackmail is wrong, not that it's too costly." (1034)

(p) During and after April 1973, the President repeatedly made false and misleading public statements about his role and that of others in making cash payments to Watergate defendants and about his own knowledge of this at various times. For instance, on May 22, 1973, the President claimed that he did not know until March 21 of any efforts to provide the defendants with funds; and on August 15, 1973, he stated that he was not told on March 21 that money had been paid to procure the defendants' silence.

(2) Theory of criminal liability

The actions and statements of the President set out above are sufficient to show that the President joined and became an active participant in a conspiracy to make cash payments to Howard Hunt and others in order to influence their testimony before various tribunals.

The President's counsel has argued that the President did not specifically instruct anyone on March 21 to make the payment to Hunt and that in any event the $75,000 paid on that same night was not paid on a direct chain of instructions emanating from the President. Despite this argument, there is certainly sufficient evidence -- consisting of the undisputed facts listed above together with a single inference that a reasonable man could certainly draw therefrom in light

of all surrounding circumstances -- to permit a jury to conclude beyond a reasonable doubt that the President did instruct that Hunt be paid and that the President's instructions were communicated by a direct chain of communication from Haldeman to Mitchell to LaRue, thereby becoming the direct casual force of the payment that evening. The argument the prosecution would be entitled to make to the jury on this issue is outlined below in Point One. More important, however, is the fact that notwithstanding this proof a showing of direct casual connection between Presidential instruction and the payment of $75,000 is unnecessary to prove the President's direct participation in the hush money phase of the conspiracy. Even if a jury rejected direct casual connection, it would still be entitled on the basis of undisputed facts to find beyond a reasonable doubt that the President's actions after learning about prior payments and about Hunt's new demand were sufficient to show that with a stake in the continued success of the conspiracy he threw in his lot with the conspirators and made their purpose his own. This argument is Point Two below. Finally, even if the $75,000 had never been paid, there probably would be sufficient evidence upon which the jury could find Presidential liability. See Point Three.

(a) POINT ONE: There was a direct causal connection between the President's instructions and payment of $75,000 to Hunt.

The President himself, while claiming that he did not instruct that Hunt be paid during the March 21 morning meeting, has acknowledged with considerable understatement that the tape recording of that meeting permits "differing interpretations." [Cite] The preponderance of the evidence shows at the very least that the President repeatedly urged that Hunt be paid, expressed the opinion that Hunt should be paid, and possibly instructed that Hunt be paid, in order that the conspirators could "buy time" to work out a new approach to the entire Watergate dilemma. During the meeting, the President over and over returned to the subject of Hunt's demand. Not once did the President instruct that this particular demand for money by Hunt, made urgent by Hunt's impending sentencing, not be paid. Thus at the least the tape shows the President consistently in favor of paying Hunt. Moreover, the tape shows that the President's views were expressed throughout the conversation, including the final time the subject arose in the meeting. _/

_/ The Presidential transcripts entirely omit a crucial instruction by the President near the end of the conversation on the morning of March 21, without indicating that any deletion has been made. Compare WSPF Tr. 67 with similar portion of Presidential transcript.

The President's remarks about the undesirability of continuing indefinitely the cash payments to the defendants in jail, while they may be cited by counsel for the President, were on no occasion directed to the immediate question of whether to satisfy Hunt's current demand. It appears that the President may well have concluded that continued payments over the years in connection with a continued "stonewall" strategy would be unsuccessful because (1) that strategy had to be coupled with action to prevent long jail sentences, but "delivering" on clemency was politically impossible in the near future; (c) many people had knowledge and some of them were beginning to "look out for themselves"; and (3) eventually, the defendants would probably get tired of it all or, even sooner, might"crack." These facts evidently required a "new strategy" -- a movement away from the old pre-election "containment" approach. A number of strategies were discussed but none was adopted, and it was concluded that Mitchell should be brought to Washington immediately to help work out a new strategy. While at one point there was discussion of cutting all the defendants off immediately as one of the options, the conversation as a whole does not reflect that the President approved or adopted that strategy, rather that he seemed reluctant to assume its risks. Indeed, after this option was mentioned,

the President on a number of additional occasions reiterated the importance of satisfying Hunt's demand.

Thus the President's statements are consistent with (we would argue that they compel) the conclusion that all those present recognized the necessity of meeting Hunt's immediate demand in order to "buy time" for the conspirators to work out a new strategy for continuing the cover-up cognizant of the increasing risk that some additional facts about Watergate were inevitably going to come out. It is in this context that the connection between this particular payment of $75,000 and the discussion of possible new strategies on March 21 can be correctly understood. Of the various courses of action considered by the President on March 21 none of them involved full and complete disclosure of all the facts which would have exposed high White House and CRP officials to criminal liability. _/

_/ In considering Dean's "hang out" strategy, the President persistently coupled it with a caveat that if they decided on that route it would of course be necessary to "keep criminal liability off of" Haldeman, Ehrlichman, Dean, Strachan, Mitchell, and Magruder if possible.

The President also suggested several strategies he characterized as "middle ground" strategies, including a new grand jury, a briefing to the cabinet, and one or more public statements. It is apparent from the conversation that the President, at least, did not contemplate that any of these strategies would involve any risk of potential criminal liability for "trusted" aides. For instance, the President at one point urged Dean to consider the President's previous "scheme" of a

What they did have in common was that all required some time to implement. Thus keeping Hunt silent for at least a little

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briefing to the Cabinet. However, this was to be in "general terms": not what Dean knew to be true, but simply a repeat of the denials of those who were involved. As the President put it: "Haldeman is not involved, Ehrlichman is not involved." The public statement route, it is quite clear, involved the same deception; as Dean said the next day (March 22) when the President characterized this as a "let it all hang out" approach, it was really "a limited hang out."

The strategy initially pushed by the President most strongly, a "new grand jury", was transparently an attempt to manufacture an excuse not to have anyone testify before the Senate Watergate Committee. The President said that the "new grand jury" appealed to him because on that line of attack the President could say he demanded that all White House personnel testify and afterwards they could claim the White House had been "fully investigated." However, from the President's own characterization of this approach as a "middle ground" rather than a real "hang out," it is obvious that the President did not expect the new grand jury would discover the true facts. Rather, the grand jury would hear the familiar denials of White House involvement. In fact, this strategy was discarded at the beginning of the afternoon meeting on March 21 when the President was told it risked leads being pursued, indictments being returned, etc. (Dean's testimony about the grand jury approach being rejected by Haldeman and Ehrlichman before they all met with the President on the afternoon of March 21, and the partly inaudible beginning of the March 21 afternoon tape, are especially important evidence here.) Haldeman observed that he was thinking that the White House itself might try to leak the grand jury testimony to the press. And Dean warned that going a justice system route could cause complete loss of "control" by the White House. The President responded that Petersen might be brought in to run the investigation. At the end of the March 21 morning conversation, however, when the President tried to imagine what would happen if Magruder did not hold up in the new grand jury, it became apparent that the potential liability of Mitchell, Krogh, and others would

longer was a prerequisite for putting into action any of the new strategies for cover-up then under consideration, either a strategy involving some considerable disclosure ("limited hang out") or one involving relatively little disclosure.

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be exposed. The President then seemed to trail off into saying that that was the reason why they seemed to go "around the track," coming back again to the problem of Hunt ("do we ever have a choice on Hunt?") and to the need to get Mitchell to Washington quickly in order to work out the best way to proceed.

The strategy apparently favored in discussion on the afternoon of March 21 and adopted on March 22, that of having John Dean write a "report," was quite obviously never intended as an attempt to get all the facts out. Rather, everyone contemplated that Dean would write a report focusing heavily on the pre-June 17 events and avoiding disclosure of highly incriminating information about the obstruction of justice. Apparently this approach had a number of advantages. First, it would give the President an opportunity, should the cover-up late collapse, of saying that he had "relied" upon it and had been kept in the dark as to the truth. (See Ehrlichman's statements on March 22 that if "some corner comes unstuck" the President could say he "relied" (285) and that it would be necessary to "bottom your defense, your position on the report. The report says nobody was involved and you have to stay consistent with that." (301)) Second, it would give an appearance of de facto cooperation with the Ervin Committee while in fact narrowing the committee's focus. And third, it would explain Dean's ubiquity in the early FBI aspects of the Watergate investigation.

The President's own recollections dictated on the evening of March 21 (which contain a mysterious 59-second gap) confirm (1) the theory that the President was more concerned with the liabilities of various individuals and whether that information would get out than about any strategy that was designed to disclose any important information, and (2) that the possibility of going back to the grand jury had been rejected as too risky. The dictabelt is primarily useful because it bars any claim by the President that his concern on March 21 was to get the facts out, or that he had any doubt of what the true facts were.

After the morning meeting on March 21, Haldeman telephoned Mitchell in New York. _/ Haldeman has denied recalling any discussion with Mitchell about Hunt's threat. However, Haldeman's purported lack of recollection of such an incriminating fact can hardly be given much credence, and certainly a jury would be entitled under all the circumstances to draw an inference that the President's desire to see that Hunt did not "blow" was passed along. Indeed, on the afternoon of March 21, either Haldeman or Ehrlichman told the President that both LaRue and Mitchell were "aware of it" and "know (inaudible) feeling is." How could they have received this information except by Haldeman's discussion with Mitchell? Mitchell has not been asked under oath about the telephone call with Haldeman, but in light

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_/ Hunt's demand aside, this telephone call was in furtherance of the conspiracy in any event since it was designed to get Mitchell to Washington urgently in order to fix on a new scheme for continuing the cover-up. Indeed, the President's acquiescence in and encouragement to the conspirators to decide on some "new strategy" and to include Mitchell in the deliberations, after what the President learned on March 21, is independent and powerful evidence that he joined the conspiracy to obstruct justice at that time even if he had not joined prior thereto. The President's repeated encouragement and advice to Haldeman and Ehrlichman during March and April to conceal or minimize their role in the cover-up is not treated separately in this memo as an aspect of the President's participation in the conspiracy. It is, of course, admissible evidence, if only to show intent. Whether the President's encouragement to continue the cover-up as to the roles of Haldeman and Ehrlichman would itself constitute an obstruction of justice has not been researched. Such advice and encouragement presumably could be charged under 18 U.S.C. 2, 3, and 4. See also Part IV, infra.

of the fact that he denies ever approving any payment of hush money at any time he can be expected to deny that Hunt's demand was discussed in this particular call as well. The denials of the accused -- Haldeman and Mitchell -- still permit the jury to draw an inferende that instructions to keep Hunt quiet and pay him if necessary were indeed passed along in this telephone conversation.

The inference that Haldeman passed along to Mitchell the President's desire to keep Hunt quiet is strengthened by the non-production of Haldeman's notes of the March 21 morning meeting and the mysterious absence for more than nine months of a portion of his telephone log for March 21, showing the 12:30 p.m. call to Mitchell.

John Dean has testified that he specifically recalls Haldeman beginning to take notes soon after Haldeman entered the meeting. Those notes have never turned up. According to White House counsel, they cannot be found in the files

where all the rest of Haldeman's notes of meetings with the President during this period can be found, or anywhere else. Only Haldeman, of course, in addition to White House counsel (representing the President) have had access to these files. A jury would be entitled to infer from non-production that the notes contained some reference to Haldeman's understanding that the President wanted him to phone Mitchell and inform Mitchell of the President's desire that Hunt be paid. Moreover, when Haldeman was requested in May 1973 to turn over to the grand jury copies of his diaries and phone logs for 1970-73, the set he turned over, however, happened to be missing a page: page one" of the phone log for March 21, 1973. Only "page two" for March 21 was turned over. When the significance of this matter was discerned by the prosecution in December 1973, Haldeman claimed not to be able to locate "page one." A request for a search in White House files was then made during the course of an FBI investigation into missing and altered White House documents. Haldeman's former deputy Lawrence Higby recovered "page one" of March 21 during a search of Haldeman's files, and then only when a member of the White House counsel's office who was looking over Higby's shoulder pointed out to Higby that Higby was initially looking in the wrong place.

After Mitchell spoke with Haldeman at 12:30 p.m. on March 21, 1973, Mitchell had a telephone conversation with LaRue. _/ In this conversation, Mitchell advised LaRue to pay Hunt the $75,000 LaRue said Hunt was demanding for attorney fees and LaRue did so that evening.

The President's counsel apparently makes much of the timing and circumstances of Dean's earlier conversation with LaRue about Hunt's demand, arguing that if LaRue learned about Hunt's demand from Dean and then secured Mitchell's authorization to pay it, this "chain" of authority is a separate one from any chain containing the President. Such an argument is erroneous, because the Dean-LaRue conversation is irrelevant to the specific issue at hand. Dean and LaRue agree that Dean refused to have anything to do with paying any money and that LaRue took the position that LaRue would not make any payment unless someone higher-up authorized it. Dean would not "authorize" it and thus LaRue turned to Mitchell. Whether LaRue phoned Mitchell or Mitchell phoned LaRue on the afternoon of March 21, and whether LaRue filled Mitchell in on what Dean had told him or whether Mitchell did all the talking is beside the point.

_/ LaRue recalls that the conversation was in mid-afternoon. Apparently Mitchell now confirms that it was in "early" to mid-afternoon, following his 12:30 p.m. conversation with Haldeman.

The point is that LaRue sought Mitchell's authorization to pay Hunt, and Mitchell gave such authorization. Mitchell had talked with Haldeman just a few hours before, after Haldeman came out of the morning meeting with the President. Thus, regardless of the details of the LaRue-Mitchell conversation, if Haldeman had previously told Mitchell of the President's feeling about keeping Hunt quiet then Mitchell, in authorizing LaRue to pay Hunt, was acting at least in part on the President's desire and/or instructions. The only factual "lacuna" left by the undisputed facts which it is necessary to fill by the drawing of an inference in order to establish a direct casual chain from the President to the payment is what Haldeman told Mitchell at 12:30 p.m. on March 21 concerning the President's desire to satisfy Hunt's monetary demand if necessary. Given the entire chain of circumstances, given the President's urgent concern about Hunt's threat on the morning of March 21, and given Haldeman's role as the President's chief of staff ordinarily charged with communicating the President's desires directly to those who were required to take highly significant action, a jury could certainly draw the inference that Haldeman did pass along the President's feelings as instructions to Mitchell. Such an inference completes the causal "chain."

(b) POINT TWO: The undisputed facts show that the President was a participant in the hush money phase of the conspiracy regardless of whether there was a direct causal link between his instructions and the payment to Bittman on March 21.

The brief discussion of conspiracy law in part II, supra, shows that there is no need to prove the President himself ordered a payment of $75,000 cash in order to establish his participation in this aspect of the conspiracy, though of course such proof dramatizes the case against him.

It is undisputed that the President learned that the conspirators had been making cash payments and that this was probably an obstruction of justice; that he also learned that a new and pressing demand was on the table; that he seriously entertained paying this current demand, did not instruct that it not be paid, and understood that it might have to be paid (even if by someone else) in order to maintain the conspiracy; that the President shortly thereafter learned that it had been paid on the orders of a principal conspirator, with the apparent result of "stabilizing" Hunt; that thereafter the President did everything he could to conceal the fact that Hunt's demand was discussed with him and that it was paid, including making

false and misleading statements to the public and Henry Petersen _/ and permitting Haldeman to commit alleged perjury on the matter on public television; that the President also continued to help, advise, and encourage Haldeman and Ehrlichman in devising various "cover stories" concerning the collapse of the conspiracy and their own role in obstruction of justice; and that the President was especially concerned to aid Haldeman and Ehrlichman in maintaining a posture that they had no culpable intent in regard to the paying of money. Of course, the details as finally uncovered by the Special Prosecutor's investigation were withheld from him, the Justice Department, and the public by the President until the subpoenaed tape recordings were finally turned over in December 1973, showing the President's position on the entire issue of hush money to have been false and misleading.

The President's actions, statements, and conduct listed above -- all of which constitute affirmative actions in furtherance of a criminal conspiracy -- are more than suffi-

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_/ False exculpatory statements are admissible in evidence. See United States v. Bando, 244 F.2d 833, 842 (2d Cir.), cert. denied, 355 U.S. 844 (1957); United States v. Smolin, 182 F.2d 782, 785 (2d Cir. 1950).

to permit a finding that the President threw in his lot with the conspiracy knowing that a final payment to Hunt might have to be made and had been made to perpetuate the conspiracy, and then did everything he could to see to it that the goal of that payment and of the conspiracy as a whole would be realized. This meets the legal standard specified in part I, supra.

(c) POINT THREE: The President's concealment of past payments of hush money by his close aides and his encouragement to them to minimize criminal liability on that score probably constitutes sufficient evidence to to show that the President joined a criminal conspiracy.

Even if Hunt had never been paid on March 21, the undisputed facts still show that the President learned on March 21 of past payments of cash for silence and understood that this was illegal; that he knew that at the least Dean, Haldeman, Ehrlichman, Mitchell, LaRue, and Kalmbach were involved; that the President never took steps to inform prosecutorial authorities about these facts but instead suggested to Dean and others (and pursued) a course of "handling" those payments through a "cover" story; that the President had numerous discussions with Haldeman and Ehrlichman in which he urged them to get to-

gether a consistent innocent story about their role in making cash payments, and urged them to be sure others would also "stick to their line" of an innocent purpose; that after he learned that LaRue had confessed, the President instructed that Kalmbach be informed so that Kalmbach could meet LaRue's testimony; and that the President subsequently made false exculpatory statements concerning his own knowledge of hush money payments and the timing of such knowledge.

In an ordinary case, the President's action here would probably be sufficient to permit a jury to conclude beyond a reasonable doubt that he joined the conspiracy. Moreover, the President's role as Haldeman's and Ehrlichman's superior must also be considered. For instance, in a case in which Haldeman and Ehrlichman were corporate vice-presidents and Nixon were their chief executive officer, Nixon's role in "ratifying" past action and assisting his subordinates in concealing it or minimizing their criminal liability for it takes on special importance because he is playing a "part" in the conspiracy that only he can play. That is, when he learns of the conspiracy he is in a position to end it immediately, but instead by permitting it to continue and encouraging it to continue he is, in effect, joining up with the conspirators and lending his status and resources to it. At the least, that is what occurred here.

(B) Offers of leniency and executive clemency.

(1) Facts.

The following undisputed facts are probative of the President's direct, affirmative participation in the "clemency" aspect of the conspiracy.

(a) In January 1973, probably on the afternoon of January 4, the President had a conversation with Charles Colson in which, according to the President, he told Colson that of course clemency could be considered for Howard Hunt on the basis of his family situation.[/] On January 3 and January 4 Colson had two meetings with William Bittman. Prior to these meetings Colson discussed with Dean and Ehrlichman their desire to have Colson reassure Hunt concerning the length of time Hunt would have to spend in jail, without making any overt assurances.

[/] Dean has testified that Colson told Dean this conversation took place January 4 or possibly January 5. The President's own recollection as revealed in the Presidential transcripts (see, e.g., 419-421 and 543, as well as the March 21 conversation, WSPF Tr. 23) tends to confirm this date. Colson recalls that the conversation took place later in January 1973. Colson's recollection, however, is inconsistent with the President's own admissions that the President definitely told Colson clemency "of course could be considered." Thus Colson's testimony could reasonably be given relatively lesser weight.

(b) Prior to March 21, the President had a conversation with Dean in which the President asked if the defendants were keeping quiet because they expected or anticipated clemency, to which Dean replied in the affirmative. The President asked Dean what Dean would advise on that; Dean said the situation would have to be watched closely. [cite to be supplied]

(c) On March 21, the President learned that Colson had conveyed assurances to Hunt via Bittman that Hunt would get out of jail within a year or at least that Hunt so understood what Colson had told Bittman. The President took no issue with this information and indeed later during the meeting told Haldeman that, "as you know," Colson had "gone around" on the "clemency thing" with Hunt "and the others."

(d) During the March 21 morning meeting, the President at no point repudiated or rejected the propriety of the offer of clemency about which he had heard. The President did agree with Dean's assessment that clemency was "impossible" prior to the 1974 elections, as a political matter, and questioned Dean about Dean's view that it would never be possible because of the political climate.

(e) On March 27, Haldeman mentioned to the President that a "super-panel" idea had merit because it would drag out the

Watergate matter and, since the President could pardon everyone anyway after the 1974 elections, no one involved would be subject to more than a two-year prison liability. (341)

(f) On April 14 the President, Haldeman, and Ehrlichman determined that the latter should meet separately with John Mitchell and Jeb Magruder. The President urged Ehrlichman to express the President's "personal affection" for Magruder in meeting with him, since "(t)hat's the way the so-called clemency thing's got to be handled . . . ." Haldeman then added, "Do the same thing with Mitchell." (503)

Later that day, after meeting with Mitchell, Ehrlichman reported back to the President that he had conveyed the message of good feelings to Mitchell (as the tape of their conversation shows he did), to which the President responded, "He got that, huh?" (524) Then, as Ehrlichman was leaving the President to meet with Magruder, the President reiterated, "Be sure you convey my warm sentiments." (578) Later Ehrlichman reported back that he had done exactly that. (590)

(g) On the evening of April 14, the President had an extensive conversation with Ehrlichman about how Ehrlichman might "move" John Dean around from a position of throwing

off on Haldeman and Ehrlichman. The President stated that the only thing that was likely to be effective in such an effort was Dean's realization that if things went wrong "down the road" only the President could pardon Dean and restore Dean's license to practice law. (664-667)

(h) On April 15, the President told Dean that the President had been "foolish" to talk to Colson about clemency for Hunt.

(i) Throughout his conversations with Henry Petersen, the President failed to communicate to Petersen the President's knowledge that Colson (whether on the President's instructions or in excess of them) had in effect promised clemency to Hunt, and of course failed to tell Petersen that the President himself had urged Ehrlichman to make veiled offers of clemency to others.

(j) After April 1973, the President repeatedly made false or misleading public statements concerning his knowledge of this aspect of the conspiracy. For instance, on May 22, 1973, the President said: "At no time did I . . . know about any offer of Executive Clemency for the Watergate defendants." On August 15 the President again stated that he had consistently

maintained a position that "under no circumstances could executive clemency be considered for those who participated in the Watergate break-in." And on November 17, 1973, the President claimed that although clemency was raised with him by his aides he "turned it down whenever it was suggested."

(2) Theory of criminal liability

To prove the President's complicity in this aspect of the conspiracy it is, of course, unnecessary to show that the President personally made or authorized explicit "offers" of executive clemency to anyone in exchange for their continued silence. It is sufficient to show that with knowledge that such attempts had been made or might be made as a part of the effort to conceal the truth from coming out in congressional hearings or a grand jury the President took affirmative action to assist such action and to conceal that it was being taken by others. _/

Nonetheless, the Presidential transcripts come close to meeting the much more stringent standard (just as, in the case of the payment of hush money, the evidence certainly permits a conclusion that as a direct result of the President's instructions $75,000 was paid to Howard Hunt to encourage

_/ See, e.g., pp 682-83, where the President observes that they can count on Colson to protect them with Hunt by protecting himself.

his continued cooperation and silence). The transcripts show that the President instructed Ehrlichman on two and possibly three occasions to make veiled commitments of clemency or other future benefits (a pardon in the case of Dean) in order to limit the extent to which important culpable figures would implicate those closest to the President (Haldeman and Ehrlichman) and the President himself if they "came forward" and admitted their own complicity in the Watergate matter. Indeed, the strategy of having Mitchell and Magruder come forward, thus taking the heat off the White House, was integral to the plan of conspirators Haldeman and Ehrlichman in early and mid-April. Obviously, that plan would be thwarted if in coming forward Mitchell and Magruder not only revealed their own role in the pre-Watergate break-in activities but also made extensive disclosures about the ensuing obstruction of justice that implicated Dean, Haldeman, Ehrlichman and others in the White House. (See, e.g., p. 503.) Thus veiled assurances that if these individuals limited their disclosure they would be taken care of in the long run were extremely important to the overall approach at this time, and only assurances emanating directly from the President would be thought adequate to suffice in this regard.

Based on the evidence concerning the President's role in Colson's initial conversations with Hunt -- which is certainly contradictory -- there is certainly sufficient evidence for a jury to conclude that the President authorized Colson to hold out clemency as one way of "reassuring" Hunt and preventing Hunt from implicating others. The President's own admission to Haldeman and Ehrlichman that the President's remarks to Colson came in the context of Colson's appreach to the President about "reassuring" Hunt support such an inference, and are consistent with Dean's testimony. Colson's testimony would tend to support a much less exculpatory theory favorable to the President here. However, the President's subsequent false exculpatory public statements, which are admissible evidence against him showing he believed he had something to hide or at least that one or more of the conspirators had something to hide which the President was helping them to hide, are probative on this issue. Moreover, the President's concealment of the whole area of clemency in his discussions with Henry Petersen itself may rise to the level of obstruction of justice and obstruction of a criminal investigation; at the least, this concealment is evidence

that he was acting affirmatively to further the conspiracy of his aides which he well knew at that time involved an effort to reassure Hunt to influence Hunt's testimony.

(C) Making and causing to be made false statements and declarations

(1) Facts

The following undisputed facts are probative of the President's involvement in that aspect of the conspiracy that comprehended the counseling, facilitating, assisting, and giving of false statements and testimony:

(a) The President in a public press conference on August 29, 1972, falsely stated that his counsel John Dean had conducted an investigation for the White House into Watergate and had found that no one there was involved.

(b) Prior to March 21, 1973, the President learned from John Dean that Gordon Strachan had "stonewalled" investigators in a number of interviews and would continue to do so.

(c) On March 21, the President learned from John Dean precise details of how Egil Krogh, Jeb Magruder, and Herbert Porter had committed perjury. The President then engaged in a

conversation with Dean concerning the question of whether Krogh's perjury could be detected and/or proved. (WSPF Tr. 9, 26).

(d) On the morning of March 21, in a discussion of the possibility of White House aides going to the grand jury and of the risk of perjury in case that route were pursued, the President followed up a suggestion by Haldeman that to avoid perjury one can "say you forgot" by stating:

> If you're asked, you just say, "I don't remember, I can't recall, I can't give an answer to that, that I can recall. (WSPF Tr. 53)

(e) On March 27, Haldeman suggested to the President that Magruder might be convinced to admit that he'd perjured himself on his "own motive" not as a part of a conspiracy. (351)

(f) In the period April 14 - 17, the President urged Haldeman and Ehrlichman to get their story together about what their position would be on the payment of hush money, since they would have to acknowledge at the least that they knew money was being paid. (983, 994-95) On another occasion, the President stressed that the important thing was for all those involved in raising money to "stick to their line" that money was not paid to obstruct justice (639-640; see

also 430); this was after Haldeman and Ehrlichman had told the President that those directly involved had done it for that purpose, (677) and that Haldeman and Ehrlichman had also known that. (439) On more than one occasion, the President actually urged that such a story be put forth. (E.g., 628)

(g) In the period April 14-17, the President had a number of conversations with Haldeman and Ehrlichman about what Gordon Strachan would testify to, in which among other things the President urged that Strachan be given full information about Magruder's testimony in order to be prepared to "meet those points." ( )

(h) On April 15, the President learned that Robert Mardian had participated in the cover-up by helping to "coach" witnesses to lie in the grand jury. (687)

(i) On the evening of April 17, in a conversation with Haldeman and Ehrlichman, the President learned that Dean had in fact told Kalmbach the purpose of the raising of cash funds for the Watergate defendants, and that Dean had admitted this to Ehrlichman. The President replied: "You can say that he told you on such and such a date that he did not tell Herb Kalmbach what the money was for." (1201)

(j) On the morning of April 16, the President in a meeting with John Dean led Dean through the President's "recollections" of a number of important events, which recollections did not coincide with the facts; in some (but not all) instances Dean corrected the President. For example, the President suggested that he had called Dean in for a "report" in late March, but Dean corrected him as to the timing (pre-McCord letter) and circumstances of that meeting. The President claimed Dean had told him only "fragmentary" information on March 21 and had not told him about Hunt's explicit threat to "bring Ehrlichman to his knees." The President repeatedly told Dean to be sure to testify that the President had asked Dean for an investigation and that Dean had reported back to the President that no one was involved. The President several times mentioned that problems with clemency seemed to be "solely Mitchell," to which Dean reiterated that that was primarily Ehrlichman and Colson.

(k) As set out in the grand jury's report to the House Judiciary Committee, the President made a variety of false and misleading public statements beginning on April 17 and continuing into November 1973 concerning his own knowledge and involvement in Watergate-related events.

(l) On June 4, 1973, the President had a number of conversatins with Ron Ziegler and Alexander Haig in which he stated that Haldeman could "handle" the March 21 meeting in testimony. Subsequently, Haldeman testified before the Ervin Committee on that meeting and his testimony has been charged as perjurious in a number of critical respects in the indictment in United States v. Mitchell, et al. The President did not correct this testimony; in fact, he later stated that he had a similar recollection of this meeting.

(m) Throughout the President's conversations in late April with Henry Petersen, the President made a number of false or misleading statements concerning, inter alia, what had happened on March 21 and what the President was or was not doing with the information Petersen was giving him about testimony being obtained by the United States Attorney.

(2) Theory of criminal liability

Based on the above facts, the President participated in the "perjury" aspect of the conspiracy in a variety of different ways, each of which was designed to further the aims of the conspiracy to "cut losses" at as low a level as possible, to conceal the scope of and participants in the conspiracy,

and to minimize the liability of the President's own closest White House aides.

First, the President learned in intimate detail that a number of persons (Magruder, Krogh, Porter, possibly Mitchell, possibly Strachan) had committed perjury and that two (Robert Mardian and John Dean) had suborned perjury and he failed at any time to seek to bring this to the attention of prosecutive authorities himself.

Second, a jury could certainly conclude beyond a reasonable doubt that the President urged various individuals to commit perjury himself: his "perjury lesson" to Haldeman and Dean on March 21, his April 16 meeting with Dean in which it could be concluded that he coached Dean about what to say regarding Dean's contacts with the President, and his encouragement of Haldeman and Ehrlichman to develop an exculpatory version of money payments are the main examples.

Third, the President was instrumental in developing a "cover story" respecting the collapse of the conspiracy in late March and April 1973 which he himself put out in several public statements, beginning on April 17. The cover story -- that implied that the President had broken the case after an investigation by Dean and Ehrlichman and then "gotten in" the Justice Department and given them his information -- was

demonstrably false. The President also made false exculpatory statements about his knowledge of hush money and clemency and his attempts to get the truth out.

Fourth, the President at best condoned and probably encouraged Haldeman's perjury on national television concerning the March 21 meeting. From the President's conversations on June 4 and from his refusal to turn over tapes of a telephone conversation he had with Haldeman the same day a jury would certainly be entitled to conclude that the President urged Haldeman to "handle" the March 21 meeting falsely as part of the overall conspiracy. This inference is strengthened by a conversation which Haldeman and the President had on April 17 in which Haldeman warned the President that the President would be criticized for telling Dean on March 21 not that "blackmail is wrong" but that "it's too costly." (1034)

Fifth, the President directly made false and misleading statements to Henry Petersen. These statements might constitute an offense under 18 U.S.C. 1001 and current caselaw interpreting it.[/]

[/] More research must be done from the transcripts and from questioning Petersen to isolate the clearest false statements.

(D) Obtaining information from the Justice Department for use in thwarting the investigation and aiding those under suspicion.

The indictment in United States v. Mitchell, et al. charges that it was a part of the conspiracy that the conspirators would obtain information from the FBI and Department of Justice for the purpose of using it in furtherance of the conspiracy. During the summer of 1972, John Dean obtained information about the progress of the investigation from Henry Petersen and L. Patrick Gray that Dean passed on to Mitchell, Magruder, LaRue, Ehrlichman, and others for the purpose of assisting those under suspicion and avoiding -- by anticipation -- discovery by investigators of criminating evidence. Dean told Petersen and Gray that he was conducting an "investigation" for the President; that was false, for Dean was not conducting any investigation and, indeed, never saw the President during this period and was never instructed by anyone to conduct any investigation. In late August 1972, however, the President stated that his counsel John Dean had conducted a thorough investigation and exonerated everyone in the White House. There are two possibilities: the President intentionally made a false statement or the President was misled by Ehrlichman. On the basis of evidence from the tapes and transcripts post-August 1972, a jury could certainly find that the President

intentionally lied in August 1972, and could infer that he knew Dean was getting information in order to thwart the legitimate investigation. This evidence includes the President's knowledge and approval on September 15 about Dean's having been the one to "handle" Watergate in the White House, and the President's concern in March and April 1973 to find even at that time an explanation for the spurious "Dean report" and for Dean's "ubiquity" (Dean characterized his involvement as being present "like a blanket") in the early stages of the investigation.

On and after April 15, the President began a series of almost daily meetings with Henry Petersen in which the President himself played a role echoing that of Dean in summer 1972. The President repeatedly sought information from Petersen about the progress of the investigation and, especially, about the evidence being accumulated against Haldeman and Ehrlichman. On one occasion, according to Petersen's testimony, the President pressed for a written summary of the evidence against his top aides, but Petersen refused to provide it. The President justified his desire for this detailed information on the ground that he needed it to make policy and to decide what should be done about

Haldeman and Ehrlichman. In truth, the President was passing on this information to Haldeman and Ehrlichman in order to protect their interests and those of his other aides and the President himself.—/

In addition to giving information to Haldeman and Ehrlichman to help them protect themselves, the President had them pass along information to three others for the protection of those other persons -- all of whom in fact were eventually charged with conspiracy or alleged to be co-conspirators in United States v. Mitchell, et al.

(A) Kalmbach. The President instructed Haldeman and Ehrlichman to notify Kalmbach that LaRue had made a full confession to the prosecutors before Kalmbach's impending grand jury appearance in April 1973. Ehrlichman did in fact have a telephone conversation with Kalmbach and inform him of this fact.

(B) Colson. The President discussed on the evening of April 14 the need to give Colson a "touch up" on events that were rapidly unfolding in order to permit Colson not to perjure himself unnecessarily / .

/ This memorandum does not treat and this office has not researched the possibility that the President's unauthorized disclosure to potential target defendants Haldeman and Ehrlichman of grand jury information relating to them (which he had received in the course of his duties), might be punishable as contempt of the District Court or under federal criminal statutes. See, e.g., 18 U.S.C. 401, 402.

Strachan. It is obvious from the White House transcripts that the President on April 14 - 16 was extraordinarily concerned with the testimony that Gordon Strachan would provide with respect to allegations by Jeb Magruder that wiretap material had been sent to Strachan for transmission to Haldeman. On the 14th Haldeman reported to the President that Magruder was cooperating with the prosecution, that Magruder implicated Strachan in connection with the transmission of wiretap materials to the White House, and that, according to Magruder, Fred LaRue was also about to confess. Repeatedly over the next several days the President, Haldeman, and Ehrlichman discussed how to handle this situation -- for example, the President urged that Ehrlichman meet with Magruder on the 14th "particularly" to learn "what the hell he is going to say about Strachan," agreed that what Strachan "has to do is prove the defense that . . . [m]eets these points," and advised that Ehrlichman "should put [Strachan] through a little wringer there" in preparing him for interrogation by the prosecutors.

This effort to alert Strachan to the Government's progress in uncovering the truth about the break-in and cover-up had two important effects. First, Strachan had appeared before the Grand Jury on April 11, 1973, and, as set forth in Count 13 of the present indictment against him, perjured himself with

respect to the transfer of the $350,000 fund from White House control after the 1972 election. After learning, as a result of the President's efforts, that Magruder, probably LaRue, and possibly Dean were cooperating with the Government, Strachan attempted to "recant" these lies. In addition, Strachan told the prosecutors an exculpatory version of his conduct that, in fact, was tailored to "meet" Magruder's allegations -- Strachan said that the intelligence documents that Magruder had sent him were "Sedan Chair" (non-wiretap), not "Gemstone" (wiretap) materials. This version, which Strachan repeated before the Senate Select Committee in July 1973, we believe can be shown to be false.*/

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*/ The facts with respect to Strachan's perjury and attempted recantation, as well as the relevant pages from the recently released White House transcripts, are set forth in the Government's Memoranda in Opposition to Strachan's Taint and Recantation Motions, filed in Criminal No. 74-110.

IV. Actions by the President since March 21, 1973, to mislead, hinder, and obstruct legitimate investigations into Watergate and to refuse to cooperate with such investigations are all probative evidence of his participation in a continuing conspiracy to obstruct justice and to obstruct a criminal investigation. At the least, these actions would be admissible evidence upon which a jury could judge the President's intent. They may also constitute substantive obstruction.

Without going into great detail concerning either factual history or theories of culpability, it seems clear that all of the following actions by the President would be admissible evidence of his participation in a conspiracy to obstruct justice and to obstruct a criminal investigation, and probably would in addition form a basis for substantive obstruction of justice charges:__/

(A) Between March 21 and April 15, 1973, the President made absolutely no attempt to bring to the attention of legitimate prosecutorial authorities the knowledge he had acquired that was highly incriminating of many of his top aides and associates. (See, e.g., Ehrlichman's statement of concern at 438.) In fact, the President on two occasions authorized public statements on his behalf of his continued confidence in

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__/ This office has not researched the latter point.

John Dean, who had admitted to the President being involved in obstruction of justice.

(B) On March 21 and 22, 1973, the President and his aides decided upon development of a new strategy to continue the Watergate cover-up that included preparation of a written report focusing on pre-June 17 events that was plainly calculated both to conceal highly incriminating evidence of post-June 17 activities and to influence the Ervin Committee and grand jury investigations by narrowing their likely ground of inquiry, thus preserving White House officials including Haldeman, Ehrlichman, Dean, Strachan, and Colson from criminal liability.

(C) After McCord's letter of March 23, Dean's reluctance to produce a written report, and the beginning of the collapse of the cover-up, the President was a central figure in developing a different "limited hang out" strategy to accord with the developing situation. This included sacrificing Mitchell and Magruder and developing a cover-story that the President himself had broken the case by ordering an investigation by Dean and then Ehrlichman the results of which (the President would claim) he then made available to the Justice Department. Even after Dean began cooperating with the prosecution, this false "scenario" rehearsed over and over again in the Presidential transcripts

(e.g., 820-826) was put into effect in the President's April 17 statement and adhered to thereafter.[/]

(D) After it became clear that Dean was cooperating, the President had numerous conversations with Henry Petersen during which the President obtained information from Petersen that he then related to Haldeman and Ehrlichman in order that they could be prepared to meet the testimony of those who were cooperating. The President misled Petersen during these conversations. The President also attempted to prevent Petersen from giving Dean use immunity for fear that Dean could then testify fully against Haldeman, Ehrlichman, and possibly the President himself.

(E) In response to developing information and public pressure, the President repeatedly made false public statements about Watergate and made no move to correct alleged perjury by Haldeman in the Ervin Committee.

(F) From the outset of the appointment of Archibald Cox as Special Prosecutor, the President cooperated with him in obtaining documents and other evidence only grudgingly, if at all.

[/] Not until April 17, apparently, did the President "select" March 21 as the relevant date. (See 1121)

(G) When existence of White House tape recordings came to light, the President invoked executive privilege and refused to turn over tapes subpoenaed by the grand jury, even those such as the tape of March 21 about which conversation Dean and Haldeman had already testified and thus no legitimate interest in confidentiality remained.

(H) When ordered by the District Court and Court of Appeals to turn over the subpoenaed tapes, the President refused to do so and sought to impose a solution on Special Prosecutor Cox which precluded access by him to original recordings and required him not to seek additional evidence from the White House. When the Special Prosecutor refused to accede to this demand, the President instructed him to be fired. His firing was later held illegal.

(I) The President subsequently failed to inform the District Court that a number of the conversations had not been recorded, a number of notes and documents called for by the subpoena were missing or could not be found, and that part of one recording had been intentionally destroyed.

(J) The President continued to refuse to cooperate in numerous respects with the second Special Prosecutor and with the House Judiciary Committee.

(K) A number of other documents and tapes have unexplainably turned out to be missing, or to have mysterious gaps or deletions.

The point of listing these factors is not so much to demonstrate that in themselves they constitute an offense -- though that may be the case -- as to stress that they would be admissible evidence to show intent which a jury could consider on the question of whether the President was a member of the conspiracy outlined above in part III.

V. On the basis of the undisputed facts and reasonable inferences therefrom outlined above, there is ample evidence upon which a jury could conclude beyond a reasonable doubt that the President participated in a criminal conspiracy.

On the basis of the facts and argument set out in parts III and IV, supra, a jury certainly could conclude beyond a reasonable doubt that the President joined an ongoing criminal conspiracy no later than March 21, 1973. With full knowledge of the conspiracy's contours and of the problems it faced in the immediate future, the President advised the conspirators to "buy time" by making a final payment of cash to Hunt and, in consultation with them, settled on a scheme to prepare a false report respecting the facts he had learned tending to incriminate his closest aides and advisors in obstructing justice. The President aided the conspirators in concealing the existence (and then the scope of and participants in) this conspiracy. He learned that a payment had been made after having been discussed with him, but attempted to conceal this fact and many other facts from investigators and the public. The President assisted and counseled his aides to give misleading or false testimony, in part by instructing veiled offers of clemency to be extended and in part by obtaining information from Henry Petersen that the President passed on to

those under investigation. Thereafter the President continued to attempt to delay and obstruct all legitimate investigations into Watergate, and crucial evidence under his sole control was intentionally destroyed. Other crucial evidence has not been produced.

This was not the gratuitous aid and advice of a disinterested bystander. The President's stake in the success of the venture is clear. The President was well aware, as tapes and transcripts demonstrate, that the primary purpose of the conspiracy prior to the election (the "containment theory") was to protect the President's own political future. If the cover-up and obstruction of justice that had already occurred came to light in the spring of 1973, not only would all the President's close advisors be subject to criminal liability but the President himself would have had to shoulder ultimate responsibility (moral, if not legal) for their actions. The President could well expect that the failure of the conspiracy at that stage (at least at its center) would jeopardize his ability to continue successfully in office and to remain an effective political force in the country and Republican Party. The course of action the President ratified, counseled, and assisted was plainly designed to perpetuate as much of the conspiracy as the situation at a given time made possible.

Thus, it is clear that it would be proper to conclude that the President knowingly, deliberately, and for his own benefit, adopted and promoted the unlawful venture and made it his own.

VI. The President has few effective defenses.

[Any prosecutive summary or summary argument must include as an integral part a section setting out the President's asserted and possible defenses and the answers that can be made (both factually and legally) to those defenses. This is necessary out of fairness -- to assess the true strength of the case by making certain incriminating evidence is not overstated and that exculpatory evidence is taken into account -- and out of proper prosecutorial strategy to anticipate and rebut defenses in advance.

[While some defenses are rebutted in the body of the summary itself, all defenses should in addition be dealt with in a separate section. Here, examples are offered of rebuttal to defenses or alleged defenses that may be offered in the areas of hush money and perjury.]

A. Hush money defenses

The President's counsel has contended that the President did not authorize a payment to Hunt on March 21 and that a direct causal chain between the March 21 a.m. meeting and the payment that night has not been established, indeed, is rebutted by the facts. As set out above, however, sufficient evidence exists to permit a jury to conclude beyond a reasonable doubt that the President's urgings on March 21 constituted what was understood by Haldeman as an instruction and that there was a causal chain leading to the payment of

$75,000 that evening. The only inference that need be drawn is that Haldeman made Mitchell aware of the President's feelings at 12:30 p.m. that day. This inference may be drawn from the circumstances, the payment itself, Haldeman's missing notes, and the circumstances of non-production of his telephone logs, despite the denials of those directly accused that they passed the information along.

Moreover, a conclusion of a causal chain is not necessary to establish the President's participation in this aspect of the conspiracy; the other evidence is enough.

The President's counsel has also argued that the payment was intended for attorney fees and therefore was not criminally culpable. This, of course, is a false issue. Much of the money paid the Watergate defendants was concededly to cover attorney fees. The ultimate designation of or need for the money (and the use to which it was put) are, however, irrelevant to the culpability of those who paid it. What is crucial is the intent of the payors. Payment of another's attorney fees for the purpose of influencing his testimony is an obstruction of justice. There can be no question here that Hunt was seeking money under a threat that, if it were not paid, he would implicate higher-ups in Watergate and/or White House horrors, and that this was fully understood by the President, Haldeman, and Dean. The jury would be entitled to conclude that money was paid for the purpose of keeping Hunt silent. Indeed, it is

incredible that it would have been paid simply for humanitarian purposes when those discussing its payment recognized a substantial risk that it would be discovered and held to be an obstruction of justice. The jury should be asked if it believes the President would have suggested they had to pay Hunt to "buy time" because this was desirable on a humanitarian basis alone. That is the issue.

Third, the President's counsel has argued that the fact that the payment was in the amount of $75,000 rather than $120,000 insulates the President from liability. This defense properly goes to the "no causal chain" argument which, we have already pointed out, would still permit a conclusion of Presidential culpability even if it were successful. Moreover, the amount of the payment does not rebut the existence of a direct causal chain. LaRue has testified that he told Mitchell only $75,000 was needed at that time because LaRue simply took it upon himself to reduce what LaRue regarded as an exorbitant figure. A jury could certainly conclude that Haldeman told Mitchell the President was desirous of satisfying Hunt's demand for a large amount of money and Mitchell, upon learning that LaRue believed that what was immediately required was $75,000, acted on those instructions in authorizing LaRue to pay that amount right away.

Fourth, the President may argue that since there was further discussion about Hunt's demand on the afternoon of March 21, it could not have been authorized that morning.

However, the conversation at the beginning of that meeting can be interpreted to mean that Haldeman or Ehrlichman informed the President that Mitchell and LaRue were now aware of the President's own "feelings on it" (i.e., that he wanted it done) and would presumably do it if necessary (or even that they were going to do it).

Fifth, the President may append to his hush money argument a claim that his idea of going to the grand jury on the morning of March 21 showed he really wanted to get the facts out. However, the evidence (as pointed out in a lengthy footnote above) shows that the President contemplated this step as a "middle course," that he did not contemplate that it would disclose the most incriminating information, that he himself was discouraged about its chances of success even as an instrument of continuing the cover-up, and that this course was rejected on the afternoon of March 21 (as the tape of that conversation and the March 21 dictabelt show). Moreover, it is clear that even had this course been adopted the President viewed paying Hunt as a pre-requisite to such a course (to "buy time") in order that that course could be worked out in a way that would keep criminal liability off of as many of those implicated as possible.

B. Perjury defenses

The President could conceivably argue that he never explicitly urged anyone to lie and, in fact, urged Dean to "tell the truth," and urged Haldeman and Ehrlichman to make

sure neither Strachan nor Colson perjured themselves.

The President cannot rebut his own knowledge that many others had already perjured themselves and his failure to inform prosecutorial authorities. Indirectly urging Magruder to "purge himself" (after three weeks of doing nothing) could not suffice in this regard in light of the fact that the President took other steps to try to limit Magruder's eventual testimony (such as having Ehrlichman offer him clemency in a veiled way), and in light of the fact that this step was by then an instrumental part of the conspiracy, Magruder having been publicly identified as a principal in the conspiracy in newspaper stories.

Whatever the President's arguments about what he "intended" in his conversations with Haldeman and Ehrlichman about their putting forward an innocent version of the cash payments to the defendants (after learning that such payments were made to buy silence) and in his conversation on April 16 with Dean, a jury would certainly be entitled to consider and conclude that these efforts by the President amounted to subornation of perjury, or at least participation in a conspiracy in which perjury, if necessary, was condoned and contemplated.

The President's desire that Colson and Strachan not commit "unnecessary" perjury was, of course, a part of the conspiracy itself. If either testified in a way flatly contradictory to those already cooperating, that would signal the prosecutors that they too were involved. Thus the need of the conspirators

was to have witnesses like Strachan and Colson "meet the points" of those who were cooperating and still appear not to be complicitous themselves. This, evidently, was accomplished at least in the case of Strachan.