PARDON OF RICHARD M. NIXON, AND RELATED MATTERS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

BILLS AND RESOLUTIONS THAT SEEK TO INSURE PUBLIC ACCESS TO INFORMATION RELATIVE TO WATERGATE AND ITS RELATED ACTIVITIES

SEPTEMBER 24, OCTOBER 1 AND 17, 1974

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PARDON OF RICHARD M. NIXON, AND RELATED MATTERS

TUESDAY, SEPTEMBER 24, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Kastenmeier, Edwards, Mann, Holtzman, Smith, Dennis, Mayne, and Hogan.

Also present: Representatives Conyers and Fish.

Staff present: Robert J. Trainor, counsel; Michael W. Blommer, associate counsel.

Mr. HUNGATE. The committee will be in order.

Today, the Subcommittee on Criminal Justice of the Committee on the Judiciary begins hearings on bills and resolutions that seek to insure public access to information relative to Watergate and its related activities.

Within the last several days, 19 bills and resolutions concerning Watergate-related events have been referred to this subcommittee for its consideration. Sixty-three Members, Democrats and Republicans, have sponsored or cosponsored one or more of these measures. Because of the importance of preserving the public's right to know the full and complete story of Watergate, and the privileged nature of certain of these resolutions of inquiry, it is necessary to proceed promptly in considering these legislative measures.

Recent events caused many responsible citizens and Members of Congress serious concern that the complete story of Watergate may never be recorded. The pardoning of former President Nixon has certainly jeopardized the opportunity for full public disclosure of information gathered by the Office of the Special Prosecutor bearing on former President Nixon's role in the Watergate affair. Moreover, the agreement entered into between the former President and the General Services Administration has caused many to fear that additional information relevant to Watergate will be forever withheld from public scrutiny. Unless the complete story of Watergate is known, history may incorrectly record the events of these times.

The Congress has dealt responsibly with Watergate, but Watergate will not be behind us until the record of Watergate is complete.

We now proceed to review the proposals before the subcommittee designed to guarantee that the public's right to know is protected.

Before Congress and the Nation are important questions of ownership and access to tapes, materials, and related documents prepared and created by public officials while on the public payroll. Many of the resolutions before us touch these problems. We must see to it that there is full public access to all information concerning Watergate, its cover-up, and all related events.

Today, we hear from Members of Congress who have introduced resolutions pertaining to these issues. Generally, the proposals to be considered relate to the pardon of former President Nixon, the issuance of additional pardons to persons involved in Watergate-related activities, the desirability of the Watergate Special Prosecution Force to make public information it has compiled relating to the alleged criminal conduct of former President Nixon, and the public disclosure of all Watergate-related documents and tapes in the custody of the U.S. Government.

Mr. Smith—are there other opening statements?

Mr. SMITH. Mr. Chairman. I do not believe there are any other opening statements on this side.

Mr. HUNGATE. If there are no further opening statements, the committee questioning will be done under the 5-minute rule and witnesses are urged so far as possible to confine their oral statements to 10 minutes so we may hear and question the maximum number of witnesses. No limit will be placed on the length of the statements that may be filed with the committee for consideration and inclusion in the record.

The committee will now call the first witness, Congressman Gude.

TESTIMONY OF HON. GILBERT GUDE, A REPRESENTATIVE IN CONGRESS FROM THE EIGHTH CONGRESSIONAL DISTRICT OF THE STATE OF MARYLAND

Mr. GUDE. Mr. Chairman, I would like to express my appreciation for the opportunity to testify this morning on House Joint Resolution 1118, which I introduced on September 11, 1974, and House Joint Resolutions 1126 and 1139, which I subsequently introduced with 19 cosponsors. Congressman Frenzel has also subsequently introduced an identical resolution.

At his first news conference after assuming office, President Ford indicated that while he thought that former President Nixon had suffered enough, the legal proceedings in the Watergate affair should be allowed to run their course before any consideration of a Presidential pardon. I fully supported that policy for three reasons. First, it reaffirmed the people's commitment to equal justice under the law regardless of power or position. Second, it insured the right of former President Nixon and the country to have a judgment by the courts of Mr. Nixon's involvement, if any, in any offense against the United States. Third, it preserved the President's options if Mr. Nixon by fair and due processes had been found guilty of any crime.

As a result of the decision to pardon former President Nixon, the courts now will not be able to make a judgment in this matter, and the people will not have the normal judicial resolution of this matter as is appropriate to the American way.

The American people are entitled to all the evidence on both sides in this case. They can then intelligently examine the evidence and

make an informed judgment if they so desire. It was in furtherance of the objective of making all the facts known that I introduced my resolution. Basically, it would require the Watergate Special Prosecutor to present to the public an objective report on all of the evidence in his possession concerning former President Nixon's involvement in any offenses against the United States. It is my intention that all exculpatory evidence as well as any incriminating evidence be reported. The resolution would not expand Mr. Jaworski's authority to obtain additional evidence. It would merely require that he make public the evidence he has in his possession.

Having conducted an extensive investigation and published volumes of evidence as part of the Judiciary Committee's impeachment proceedings, some may question the necessity for the Watergate Special Prosecutor to publish such a report. While I applaud the outstanding work of the Judiciary Committee throughout the course of the impeachment proceedings, I submit that there are two reasons for requiring Mr. Jaworski to issue such a report.

First, it appears that the standard for impeachment and the standard for an offense against the United States may not be identical. Indeed, in following your committee's deliberations during the impeachment proceedings there appeared to be some disagreement among committee members as to what constitutes an impeachable offense, some arguing that a crime was not necessary and others maintaining that only certain crimes were sufficient to prove an impeachable offense. Thus, in view of the fact that the committee was focusing on an impeachable offense rather than a criminal offense, the evidence which was marshaled during the impeachment proceedings may not include some evidence which reflects upon Mr. Nixon's involvement in some Federal offenses.

Second, there appears to be a substantial body of evidence that was not available to the committee during the course of the impeachment proceedings. As all of you are aware, this past summer the Supreme Court required Mr. Nixon to furnish certain tapes to the Special Prosecutor which were never made available to the Judiciary Committee. In addition, the impeachment investigation included only limited testimony by witnesses while Mr. Jaworski appears to have extensive testimonial evidence which was never made available to Congress.

Since I believe that the American people are entitled to consider all of the evidence in this matter, I think it is apparent that they should not rely solely on the impeachment evidence and report, even though it was a complete and thorough compilation of the evidence with regard to the commission of an impeachable offense by Richard Nixon.

Some may also question the propriety of making public testimony and evidence presented to a grand jury. While I am not a lawyer, it is my understanding that the Federal Rules of Criminal Procedure manifests a long-established policy of secrecy for grand jury proceedings.

Such a policy is not completely sacrosanct, however. The Supreme Court has long held that "disclosure is wholly proper where the ends of justice require it." [*United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150, 234 (1940).] I submit that there could not be more

compelling circumstances "where the ends of justice require" disclosure than in the present case.

I readily admit that the question of protecting the rights of those yet to be tried is of great concern to me. However, my resolution provides that the Special Prosecutor will have 90 days from the date of enactment to publish his report. This period should be more than ample time to impanel and sequester the jury in the impending conspiracy trial. Any future prosecutions would not have the same potential for prejudicing defendants' rights as the conspiracy trial. The report would only focus on Mr. Nixon, and any future prosecutions would not likely include a conspiracy involving the former President in which his acts could be attributed to any coconspirators.

In any event, I would have to say that the American people's right to have the evidence necessary to judge Mr. Nixon's involvement in any Federal offense is of such overriding importance that it should take precedence, and the Judiciary Committee's decision to televise its impeachment proceedings and the Senate Watergate Committee's decision to televise its hearings clearly support my judgment on this matter.

It seems clear to me that enactment of this resolution is necessary to obtain the goals it is designed to meet. At the present time, there is some doubt as to whether Mr. Jaworski has the authority to issue such a report. In a letter dated September 10, 1974, to Mr. Jaworski, eight members of the Senate Judiciary Committee expressed the opinion that his final report to Congress should include "a full and complete record detailing any involvement of the former President in matters under investigation by you." In his response of September 17, Mr. Jaworski stated that it was his "tentative belief that the existing authority for the issuance of reports, to which your letter alludes, most likely does not justify the inclusion of a detailed report on the matters you suggest."

My resolution would clarify any ambiquities and insure that Mr. Jaworski has the authority to issue a report on former President Nixon's involvement in Watergate.

For over 2 years the Nation has been confronted by the series of events we refer to as "Watergate". It has had a deep impact on our national conscience. It is now time to make all of the evidence available to the American people so that they can make their own judgment.

I am certain that members of this committee agree that the American people are capable of good judgment if given all of the evidence. They have demonstrated their fortitude and strength of character throughout the past 2 years, and I am confident that they will reinforce those qualities in their examination of the evidence in this case.

In my opinion, this report will serve as a completion and closing of the record so that the Nation can go forward with its other business.

Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you.

Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I would like to commend the gentleman from Maryland, Mr. Gude, for his initiative. I certainly think he has raised in this legislative forum a very important question. He deserves commendation. How do you assess Judge Richey's comments in light of your legislative initiative?

Mr. GUDE. I would only say to the extent that there was a court ruling that would provide for the release of additional evidence, that this could further supplement Mr. Jaworski's report. However, I would think with the evidence that he evidently has at hand and which he has indicated he has at hand the report would be adequate for the American people.

Mr. KASTENMEIER. To clarify your statement, I gather that you feel that the evidence that Mr. Jaworski has, which has not heretofore been made public by this committee or by other sources, which bears on Mr. Nixon and his participation in the Watergate, to the extent that it does offend the rights of others, it ought to be made public. That is the thrust of it, is it not?

Mr. GUDE. That is the thrust of the statement.

Mr. KASTENMEIER. What about those tapes which may still be in the possession of the White House and are not in Mr. Jaworski's possession? Is there any way to contemplate those, because clearly I think it is a well-known fact Mr. Nixon had resisted mightily the turning over of tapes either to Mr. Jaworski or this committee or, in fact, any other source. What about those tapes? Might they not reveal a great deal about the truth of the matter and is there any way that you contemplate that they ultimately end up in the public domain so as to reveal some ultimate truth with respect to participation?

Mr. GUDE. As I stated, I think Mr. Jaworski, from what he has indicated, has ample evidence on both sides to give the American people a picture of the President's involvement in any offenses against the United States. I should think that if any additional evidence were to be obtained from the Executive that this would have to be through court action. I am not sure what legislative vehicle we could use to obtain the type of material to which you allude.

Mr. KASTENMEIER. Well, I appreciate that because I am a little perplexed, too.

I think the point is to what extent are we able to learn the truth and to what extent do we go? Do we merely look at the material in terms of assessing it as far as the public is concerned that may be in Mr. Jaworski's possession or—in fact, of course, there was a great deal of material never turned over to this committee, presumably for good and sufficient reasons, in Mr. Nixon's defense, which may bear on his role in Watergate and which Mr. Jaworski does not have either, and are you not curious as to what that might ultimately reveal?

Mr. GUDE. I would only say that in any legal determination of guilt or innocence, there is always the question whether all of the evidence was brought forward, and I think that there is adequate evidence at hand for Mr. Jaworski to make a report to the American people that would give them satisfaction of having seen both sides of the case. If additional evidence could be forthcoming through the court proceedings, then this could further supplement the report.

Mr. KASTENMEIER. You do not foresee any action by the Congress in terms of additional supplemental inquiry by the Congress itself in these matters, do you?

Mr. GUDE. The Congress could reinstitute impeachment proceedings but the leadership has indicated that they do not think this is appropriate and, of course, as I said in my statement, this does not get to other offenses which are considered by many as not being impeachable offenses.

Mr. KASTENMEIER. I thank the gentleman for his answers and for his initiative.

Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Smith?

Mr. SMITH. Mr. Gude, I, too, commend you for initiating this proposed legislation and those for whom you have also spoken.

I was interested in your statement in the question as to—in the statement that there is at the present time some doubt as to whether Mr. Jaworski has already the authority to issue a report. Among the regulations and order setting up the authority for Mr. Jaworski is one that says, and I quote:

> Public Reports. The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Now, Mr. Jaworski apparently in his response of September 17 to members of the Senate Judiciary Committee stated that it was his tentative belief that the existing authority for the issuance of reports most likely does not justify the inclusion of a detailed report on the matters suggested by the members of the Judiciary Committee. Would you say, Mr. Gude, that under the present powers and authorities of the public—of the Special Prosecutor that he now might have the authority that your proposed legislation would give him?

Mr. GUDE. He may well have the authority to make just the type of report that we are asking for in this resolution, but he is not directed to make the report and, therefore, I believe we should specifically direct him to make this report.

In addition, I think it should be the clear direction from Congress that this report contain all evidence on both sides of the case and, therefore, that is why I think this resolution is important. Even though he may have this authority already, I think there should be a clear direction by Congress that a report be given to the American people giving the evidence on both sides of the case.

Mr. SMITH. Another thing, Mr. Gude, that interested me is that you call for—your proposal calls for this report to be printed and made available to the public no later than 90 days after the adoption of the resolution, and I believe the President has stated that the indications are that the investigative process and the bringing of former President Nixon to trial, were he not pardoned, might take as long as a year and I am wondering whether you feel then that the 90 days would be sufficient to give the Special Prosecutor time to present all the evidence that might be forthcoming in a complete investigation.

Mr. GUDE. It is my belief that the preparation and execution of legal proceedings would take a longer period of time than the preparation and publication of a report.

Mr. SMITH. One other question that interested me and that is, if the Special Prosecutor were to issue—publish a full and complete report stating in detail all the evidence in his possession, and so forth, the likelihood is that a prosecutor would have in his possession mostly evidence tending perhaps toward the establishment of guilt of the person that he was investigating or would like to indict or anything else, whereas exculpatory evidence to a great extent might not be available to the Special Prosecutor.

Mr. GUDE. That is true to an extent. Although I'm not an attorney, I understand that a good prosecutor is well aware or makes himself aware of the evidence that points to the innocence of a defendant as well as the guilt. In addition, the intent of this resolution is that we have explicit instructions from Congress that the prosecutor give evidence on both sides of the case. Also, I point out that Mr. Jaworski was selected by the former President and he is known to be a decent and honorable man. I think these are the guarantees of a fair report, these three items that I have.

Mr. SMITH. I thank the gentleman.

Mr. HUNGATE. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

Mr. Gude, in the Agnew case the prosecutor apparently had the permission of Mr. Agnew and his attorneys to issue a very important statement without which a great injustice would have been done to the criminal justice system. I think we all agree with that. To not have the very important statement by the prosecutor outlining in detail the alleged crimes going back a great number of years would have been an error, do you agree?

Mr. GUDE. That is right.

Mr. EDWARDS. In this case we had the beginnings of the impeachment, the pardon, but no permission by Mr. Nixon himself or no alleged confession. Is that also correct?

Mr. GUDE. That is right. I think that in this instance this report would well be comparable to the report that was released in regard to the former Vice President, there are similarities.

Mr. EDWARDS. Yes. There are certain similarities but it is different in that the Special Prosecutor, Mr. Jaworski, would not have the permission of ex-President Nixon.

Now, it is also different from the Judiciary Committee's report and inquiry in that in all the proceedings, President Nixon was represented by counsel and Mr. St. Clair was given the opportunity to call his own witnesses and agree to cross-examine other witnesses.

Here in the issuance of a report by Mr. Jaworski, ex-President Nixon would have none of those protections.

Mr. GUDE. As I stated earlier, I think we clearly instruct the Special Prosecutor that he is to be as even handed in his report as he possibly can, and his selection by the former President himself I think is a factor. And also his performance as Special Prosecutor I think demonstrates that this would be as even handed a report as could possibly be achieved under the circumstances.

Mr. EDWARDS. Well, I agree with you it is very important that this information be made available to the public but I think it is equally important that the exculpatory information be provided by ex-President Nixon and his attorneys so that there is no misunderstanding that it was just a job being done. There are a number of people in our country that still think President Nixon should not have resigned and indeed President Nixon himself claims that he is innocent of any impeachable offense or criminal offense.

Mr. GUDE. I think that the committee should take into consideration how much time should be put into the preparation of this report, that the report is made to the American people within a reasonable period of time, so they can make their own determination. I do not

know that we would want to be in the position of starting proceedings where there would be delays after protracted delays in receiving certain evidence which the former President would feel should be in the report. I think that the committee probably should carefully explore what would be involved timewise if this type of proceeding were followed.

Mr. EDWARDS. Thank you, Mr. Gude.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. Gude, as I understand you, you agree that under the regulations issued by the Department of Justice and read to you by Mr. Smith, the probability is that Mr. Jaworski now has full power to make the type of report suggested in your resolution if he sees fit to do so. Is that correct?

Mr. GUDE. That is right. He may have the authority as stated in the resolution. At the same time I quoted from his letter of September 10, his response of September 17 to the Senators questioning whether he did have that authority, and so I believe that we should clearly direct to him to make such a report——

Mr. DENNIS. The regulation——

Mr. GUDE [continuing]. So that there is no question.

Mr. DENNIS. The regulation to which Mr. Smith referred does say that the Special Prosecutor may "make public such statements or reports as he deems appropriate and shall, upon completion of his assignment, submit a final report to the approriate persons or entities of the Congress."

Mr. GUDE. That is what it states, but I think there should not only be the clear direction that such a report be published but that report refer specifically to the question of evidence regarding the former President's guilt or innocence and it also be as even handed as possible. I do not believe the latter specification is in that original direction.

Mr. DENNIS. Well, do you not think that if he submits a final report as he is instructed under this regulation to do that it surely would include his views as to the participation or nonparticipation of the late President? It seems to me it would be like writing him and leaving him out if the report did not touch on that subject.

Mr. GUDE. The directions that are given to the Special Prosecutor are permissive. It says he shall make a final report. It says he, from time to time, may make interim reports but it does not specify a specific report as to the Federal offenses and also there is the matter that I think we should clearly direct, that exculpatory evidence as well as incriminating evidence be set forth. So this is the reason for my resolution.

Mr. DENNIS. Now, you agree, as I understand it, that we are no longer faced with the practical possibility of any impeachment proceeding.

Mr. GUDE. That is it, and as I indicated, this resolution goes beyond the question of impeachable offenses.

Mr. DENNIS. And you would agree also, I am sure, that under the pardon we are not faced with the possibility of future criminal prosecution insofar as Mr. Nixon is concerned for these past transactions.

Mr. GUDE. That is my understanding of the law.

Mr. DENNIS. Therefore, the only thing to be gained at this point is the facts. Is that a fair statement?

Mr. GUDE. That is right, that may be the only thing but it is a most important thing.

Mr. DENNIS. So the differences, if any, in the standard of proof or standard of definition between a criminal offense and an impeachable offense, and so on, are really not important at this point so long as we get the facts, whatever they may be. Is that not true?

Mr. GUDE. That is right.

Mr. DENNIS. And you do have the complete report, of course, of the full Judiciary Committee and you will have the results of the upcoming criminal trials, and you will have the report which Mr. Jaworski is already instructed to make. And you will have all of these things whether or not we adopt your resolution. Is that not true?

Mr. GUDE. We will have those things; we have the report from your committee which, of course, directly relates to the President and impeachable offenses. But in regard to the trials that are going to be held, they are of a peripheral nature as far as the President is concerned and indeed, to be even handed in the matter, events could proceed in these trials so that the former President, would be put in a shadow of guilt in regard to certain matters and that guilt might not be appropriately attributed if all the facts were known through the publication of this report. So, therefore, I feel a report that directly relates to the Federal offenses of the former President is a move in the direction of fairness to the former President on both sides.

Mr. HUNGATE. Your time has expired.

The gentleman from South Carolina, Mr. Mann.

Mr. MANN. Thank you. Mr. Chairman.

Mr. Gude, you are, of course, aware of the fact that the Special Prosecutor has explored many areas of Presidential involvement concerning some of which his staff and he may have already concluded that there was not evidence sufficient to support a proposed indictment, matters that might involve ITT, dairy, foreign gifts, any number of things.

Is it your intention by this resolution to direct the Special Prosecutor to release the evidence on these, or at least a synopsis of the evidence in all of the matters investigated involving the Presidential involvement?

Mr. GUDE. Yes. I think this idea is a continuation of Mr. Dennis' question, that in fairness, where there would, be a question as to the President's involvement and these were rumors and allegations about what had occurred, that a report of the Special Prosecutor could lay out a synopsis of these affairs and report in a particular instance that the evidence is such that it would lead a reasonable man to believe that he was innocent. I think this is a clearing of the air that is so very important insofar as we are able to do it through this device.

Mr. MANN. As we know, there is still a large segment of the American people who think that what the impeachment was all about was solely matters related to the Watergate break-in. Of course, this would disclose much information that they are really not aware of, or the gravity of it.

Now, you put a 90-day limit. You would have no objection to our modifying that language so as to provide for the appropriate protection based on the opinion of this committee, or the Attorney General

or some such source, for the protection of the other persons involved, insofar as pending cases were concerned?

Mr. GUDE. I would certainly respect the judgment of a group of fine attorneys.

Mr. MANN. I believe that is all.

Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you.

The gentleman from Iowa, Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

Mr. Gude, I just wanted to return to the point raised by Mr. Edwards, that the testimony in the Special Prosecutor's file has not been subject to any cross-examination. Of course, cross-examination is generally considered to be the greatest fact-finding and truth-finding weapon which our Anglo-American system of justice has developed.

Were you aware of this absence of the protection of cross-examination when you prepared this resolution?

Mr. GUDE. Well, Mr. Mayne, I am aware that by this resolution we are trying in the best means available to us to obtain for the American people what they deserve. I am aware also that if the prosecution had proceeded without the pardon intervening, that a fuller picture might be attained. But I see no way to retrieve that and I think this is the very best way to get a resolution which would satisfy the American people and insure that the evidence has been presented, insofar as possible, in the American way.

As I said, I think the Special Prosecutor is a good man to do this, judging on his past performance.

Mr. MAYNE. We have many excellent prosecutors in the United States but I am sure you would agree with me that it is not their primary function to seek out exculpatory material or to prepare an even-handed presentation of defensive as well as the prosecutorial information, would you not?

Mr. GUDE. That is, of course, not their prime mission but as I understand the work of a prosecutor, he certainly has to become aware of exculpatory evidence if he is going to prepare himself for a case. He has to be aware of the arguments on the other side. In the course of collecting evidence, a prosecutor may be after evidence that ascertains guilt but he is certainly going to find evidence as he proceeds that goes to the innocence of the accused. I am sure as the Special Prosecutor gathered evidence he did not throw the exclupatory evidence in the wastebasket. It also became part of the file.

Mr. MAYNE. Well, I do not want to prolong the matter but I do want the record to make clear that we are in agreement that this Special Prosecutor's report, if used in the way you suggest, would be lacking the assurance of accuracy which is given by cross-examination.

Mr. GUDE. I would only add that under the circumstances, because the pardon intervened before the legal process was allowed to take its full course, that this is the best device by which we can give the American people what they are entitled to.

Mr. MAYNE. Do you agree with my question?

Mr. GUDE. There is that possibility but there are also things that lean in favor of Mr. Nixon in this resolution.

Mr. MAYNE. Thank you, Mr. Chairman.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I gather, Mr. Gude, that your resolution reflects a disturbance that you have about the manner in which the pardon was issued and its failure to take into account the need for disclosure of information regarding criminal or other misconduct by Richard Nixon, aside from any other problems that may be found with the pardon. I share that concern as well, and I think the questioning here has reflected a desire to explore the most appropriate ways to seeing that the fullest sort of disclosure take place within the bounds of due process.

To my mind, one method of assuring disclosure might be that suggested by Judge Richey this morning; namely, to permit the Special Prosecutor or others to challenge the validity of the pardon. I am wondering if your resolution could be interpreted or designed to preclude the Special Prosecutor from signing any indictment returned by a grand jury against Mr. Richard Nixon or could be designed in any respect to limit the prosecutorial judgment in any prosecution against Richard Nixon.

Mr. GUDE. I do not believe that the resolution which I and others have sponsored would be a barrier to court proceedings moving as you have outlined, but as we have seen, there have been protracted delays in the production of evidence and going back into the courts leads to further delay. I think that Mr. Jaworski has the evidence at hand and I think that he can make a report that would be of satisfaction to the American people in this case. But this would not preclude the type of proceedings you have outlined.

Ms. HOLTZMAN. Well——

Mr. GUDE. In fact, I do not think this in any way conflicts with that. Perhaps the committee can make this clear in a report.

Ms. HOLTZMAN. Well, the 90-day provision might, and I am troubled about that because it is my understanding that the Special Prosecutor may not have yet reached the bottom of these investigations that have been carried out in a number of different areas, and that requiring a report in that period of time, aside from the question of affecting ongoing trials, may really limit the scope of the disclosure that ought to be made regarding Richard Nixon's misconduct in office.

Mr. GUDE. In my judgment, and I of course, could not speak for the other sponsors, if the committee in its wisdom felt that additional time were needed, then certainly that 90 days could be extended.

Ms. HOLTZMAN. Do you have the same sense of flexibility about allowing the Special Prosecutor to make a report with regard to materials that are not presently in his possession—tapes, for example—but that are in possession of the White House at this time?

Mr. GUDE. Certainly any additional evidence that came to hand during the period in which he was compiling the report should be part of the report, on both sides.

Ms. HOLTZMAN. Thank you, Mr. Chairman. I have no further questions.

Mr. HUNGATE. The gentleman from Maryland, Mr. Hogan.

Mr. HOGAN. Thank you, Mr. Chairman.

I would like to welcome my good friend and colleague from the State of Maryland here today but I really have to confess that I am not overly enthusiastic about his bill. I am troubled by a number of things, the rights of the other defendants who are being prosecuted

by Mr. Jaworski being one of them. Since the existing statute under which the Special Prosecutor is working gives him the discretion to issue a report, interim reports, and mandates that he issue a final report, it seems to me that that really meets the needs of the public's right to know. I would ask my friend why he feels that it is necessary to issue this information sooner than Mr. Jaworski will in due course issue it.

Mr. GUDE. I think Mr. Jaworski should be instructed to issue a specific report in regard to any Federal offenses that might have been committed by the former President and we should direct him to be as even handed as possible under the circumstances in the issuance of this report. Also, our resolution specifically directs that this report will be to the public.

Mr. HOGAN. Well, I am sure that the report which he ultimately is required to make would also be made public, but I am wondering when we consider the rights of litigants involved in other prosecutions by the Special Prosecutor whether or not the public's right to know, which in this case really does not have any possibility of affecting the events that have occurred—the President has pardoned the former President. The former President, because of the impeachment proceeding, resigned from office. So it seems to me that that problem really is moot at this point and this report would not in any way change those events.

I am also troubled by some of the things that Mr. Mayne and others have said. While I have great respect for Mr. Jaworski as an individual and as a prosecutor, it is not his prime function to gather exculpatory information and I agree with Mr. Edwards that it is very important that the kind of report that you are contemplating include exculpatory information. It seems to me that only the President's defense lawyers would have this information.

So I wonder if you feel that there ought to be some amendment to your resolution if it is going to be passed to allow President's counsel to file some kind of a dissenting view.

Mr. GUDE. Over the period of time that the Watergate affair has gone on, there have been protracted and prolonged delays in obtaining evidence from the Executive and I wonder by such a mechanism if you are not again triggering further and further delays and drawing out the whole affair.

This is the question I raise and as I stated before, a Special Prosecutor does undoubtedly gather much information on both sides of the case in the course of his work.

As far as the rights of the other defendants are concerned, as I indicated, the 90 days I really think is more than ample time to impanel and sequester the jury in the pending conspiracy trial. To the extent that some of the defendants would avoid trial through information that would come forth in this 90-day report, I think the American people's right to have this function of justice carried out as they see it is of overriding importance. I know that following the resignation of the former President, there was a great deal of satisfaction among the American people and I think that satisfaction in part went to the fact that they were satisfied that there would be a prosecution.

At the same time the American people were not demanding that the former President be put behind bars. I think they all felt that clemency was appropriate. But this question of justice was short circuited. I think the question of justice is very basic to the feeling of the

American people and to the extent that maybe some defendants might possibly escape through the workings of this resolution, I think this constitutional question as far as the American people are concerned is overriding.

Mr. HOGAN. But my feeling is it is not going to change any of the facts as they exist or any of the events as they have evolved, and I really have to confess that I do not share the feeling that the American people are going to be persuaded by the issuance of any report. All throughout our great State of Maryland I ran into a tremendous number of people who in spite of the numerous volumes published by this committee feel that the former President was hounded out of office by the liberals in the news media and the facts as they have been spread on the public record have not in any way influenced their judgment on that.

Mr. GUDE. I do not think in a democracy we ever obtain a consensus and I would be very suspicious of a time when we seem to have unanimity on any question in this country, unless it be on such a question as a resolution on motherhood. I do not see this as producing a unanimous feeling of satisfaction from the American people. Americans can judge the evidence as they see fit but this does give them the same opportunity as they have in regard to other legal procedures in this country.

Mr. HUNGATE. Your time has expired.

I think the members of the subcommittee have covered the ground with your assistance very well, Mr. Gude, and we appreciate your offering the resolution and the testimony you have given us today dealing with a rather thorny problem. Frequently the first witness is asked all the good questions, so we are very appreciative of your efforts here today.

Mr. GUDE. I appreciate your courtesy and thank you, Mr. Chairman.

Mr. HUNGATE. Thank you.

The next witness to be called is Congressman McKinney. We are pleased to have you with us and if you have a prepared statement you may proceed as you see fit, sir.

TESTIMONY OF HON. STEWART B. McKINNEY, A REPRESENTATIVE IN CONGRESS FROM THE FOURTH CONGRESSIONAL DISTRICT OF THE STATE OF CONNECTICUT

Mr. MCKINNEY. Mr. Chairman, I appreciate the opportunity to testify before your committee on my bill, H.R. 16619, and companion measures introduced by my colleagues.

This opportunity to testify before you means all the more to me because I feel strongly that in the past months the concern expressed by many Americans about the integrity and durability of our governmental and judicial institutions was answered by the visibly thorough, deliberate, relentless and, for the most part, nonpartisan pursuit of the truth by the members of this particular committee throughout the impeachment proceedings. Your deliberations, seen as they were by all America, were a source of renewed confidence for the American people.

However, this confidence in our institutions and in the concept of equal justice has once again been brought into question by the controversial pardon of former President Nixon. I believe the interests of

justice and mercy would have been better served if the question of a pardon had been held until a more complete account of the facts, attitudes, and events which produced Watergate had been made public. However, this decision was the President's and his alone, and it is now fact.

It is my concern that the pardon may prematurely close the book on Watergate, thereby denying the American people their right to view and evaluate the firsthand data now in the possession of the Special Prosecutor and in the Nixon tapes. H.R. 16619 would instruct the Office of the Watergate Special Prosecutor to turn over to the Congress for inspection and eventual publication all materials, documents, and reports obtained, prepared, and compiled by that Office in the course of its investigation of the administration of the former President. I have introduced this legislation in order to guarantee that the American people will be apprised of the facts as discovered by the Special Prosecutor regarding affairs in the White House from 1969 through August 8, 1974.

I consider the American people to be mature, wise, and fully deserving of complete and accurate information. When reliable data exists, as a result of intensive Government investigation, we cannot ask the American people to accept secondhand reports or historical interpretations of the events of this incredible period in our history. It is our responsibility and even more importantly, our duty to provide every possible opportunity for each citizen to confront the unscreened facts not just to prevent the reoccurrence of these tragedies but also to enable each citizen to draw his own conclusion about the guilt or innocence of every participant.

Of course, I am aware that the rights of individuals who have been named or cited in the data sought to be made public must be protected. There are a number of legal actions which are now or will be before the courts, and we must be vigilant in assuring that the release of the data will not compromise the constitutional rights of the parties. Thus, I have included a provision in my bill which would provide for the release of this data to Congress only upon such time as the Attorney General of the United States shall determine that the parties who are named or any parties in related litigation have the full protection of the law. The factors which I hope would be taken into consideration in making this determination include the status of any criminal or civil litigation, its progress through the appellate process, and a final determination by the highest court in which a litigant can proceed. These safeguards will refute claims that the release of this report will prejudice the rights of those who are currently on trial for the offenses discovered by the Special Prosecutor.

The Office of the Special Prosecutor was established to investigate and prosecute offenses committed against the United States by those including, but not limited to, the White House staff, from 1969 to 1974. The Office was formally established by the President; however, it was authorized and funded by the Congress. And any information discovered by such an investigation should be disclosed to the Congress. We are the watchdogs of this democracy. It is our responsibility to be aware of the activities of other branches of Government and insure that these activities are in the best interest of the Nation. This was the desire of the framers of the Constitution when they included the sys-

tem of checks and balances as a guiding principle for our Government. Thus, the information gathered must be revealed in order to allow us to properly accomplish this function.

I am not a lawyer but I am advised that Congress has the power to request this information from the Special Prosecutor under its investigatory powers which include the authority to make inquires concerning surveys into defects in our social and political system for the purpose of enabling Congress to remedy them. In 1959, Justice Harlan stated, "The power of inquiry has been employed by Congress throughout our history over the whole range of national interests concerning which Congress might legislate or decide upon due to investigation, not to legislate. The scope of the power, in short, is as penetrating and as far reaching as the potential power to enact and appropriate under the Constitution." *Watkins* v. *U.S.* (354 U.S. 178 (1957)).

In another case involving Congress' power to investigate into a situation such as exists today, the Supreme Court stated that the power of Congress to inquire into the administration of an executive department and sift the charges of malfeasance in that administration was ratified in sweeping terms. *McGrain* v. *Daugherty*, (237 U.S. 135, 1771 178 (1927)).

Experts on the subject of congressional power further state that:

> The administrative function, that is, the function of direction, supervision, and control of the administrative activities of the Government resides in the Legislative Branch of the Government. Upon it falls the legal obligation to take such action as is necessary to insure that the several administrative organs shall be properly directed, supervised and controlled. (W. F. Willoughby, Director, Brookings Institution).

In *Kendall* v. *U.S.* (12 Peters 524, 1838), the Supreme Court affirmed a lower court case which gave Congress the power to impose certain duties upon the executive branch. The Court stated:

> But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty that they may think proper that is not repugnant to the Constitution, and in such case that duty and responsibility grow out of and are subject to the control of the law and not the President.

Thus, Mr. Chairman, I submit that the actions which this bill require are not beyond the powers of Congress. The legislative power of Congress encompasses the ability to seek information for the purpose of making the laws and for determining if the laws have been properly exercised. This bill will allow us to perform this important function.

Mr. Chairman, I would like to suggest two amendments to my bill which would eliminate any misunderstanding of its mechanical requirements. First, I think it should be made quite clear that the Congress does not expect the Special Prosecutor to turn over any grand jury minutes. This, I believe, would be a gross invasion of the constitutional rights of the individuals who testified before the grand jury. The secrecy of the grand jury testimony must be maintained if we are to feel secure in our rights under our judicial system. But I would add this would certainly not prohibit the Special Prosecutor from releasing material that he has handed to the grand jury. It would simply protect the testimony of those others.

Second, it is not necessary for the Special Prosecutor to release to Congress the original documents which he might have acquired through his investigation. Copies of such documents or tapes certified

by him can be submitted in their place. This will prevent any litigation in the courts on the question of whether the Congress can maintain control of private property, such as private papers and tapes.

Finally, Mr. Chairman, I would like to stress the necessity for a bill which provides for congressional action. I firmly agree with former Chief Justice Warren, who stated in *Watkins* v. *U.S.* (1957) that "There is no congressional power to expose for exposure's sake." Given the circumstances which exist today, I believe that exposure which I have proposed is necessary not solely because Congress will be exercising its oversight function by being informed of what is happening in our Government, but more importantly, to inform the American people of these acts in order to help identify and deal with them in the future, and I might add, make sure that they do not happen again.

Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you, Mr. McKinney, for your usual good job. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Your resolution differs somewhat from the resolution just offered by the gentleman from Maryland, Mr. Gude. It does not, for example, mention or name the former President, Mr. Nixon. I am wondering what the purpose is.

Now, once—if this were enacted, this bill, these papers, documents, turned over to the Congress, what precisely would the Congress do with them? Would they conduct—as you see it—would they conduct a public investigation based on these documents to a certain end or precisely what would they do with the documents? What would they do with the documents once we received them?

Mr. MCKINNEY. Well, as I said, I do not think that Congress can responsibly investigate just to investigate. I think we are doing two things here. One, I think that we are putting information in front of the American people. And the reason the President's name is not mentioned, by the way, is that we are dealing with something far bigger than former President Richard Nixon. We are dealing with circumstances and events within the executive branch of Government that took place totally outside our laws, our Constitution, and I think what the American people expect. I think that by putting all this information forth, Congress and the people will have a fuller idea of how power was abused and what we can do to stop the abuse of power. Certainly there are some good questions I think brought forth by the behavior of Messrs. Haldeman and Ehrlichman perhaps suggesting the necessity for the Senate to confirm anyone who will have such vast and wide ranging powers within the executive branch of the Government. All of these things, I think, can only be determined with all of the facts and how this, you will pardon the expression, "cancer" grew within the White House.

Mr. KASTENMEIER. Yes. Of course, we have the rather long extensive and I think fruitful investigation by the Select Senate Committee in the context of campaign reform, the outgrowth of the 1972 campaign which revealed a good share of this.

What precisely do you recommend that we pursue further in terms of investigation? I take it it is not merely, if I can go back to the words of your bill, that documents—"materials, documents and reports be

transmitted to the Speaker," and so forth, "to be available for inspection by all Members of Congress."

Now, that does not mention the public or the press. "Available for our inspection." To what end?

Mr. McKINNEY. Well, in my short career in Congress I found that it does not pay for me to instruct Congress about what to do with materials it has. But it would be my hope that Congress as a body, once the materials were available would publish them and make them available to anyone that wanted to pay the customary document fees to receive them.

Mr. KASTENMEIER. Your bill does not specify any time certain that the Special Prosecution force transmit these materials. When did you have in mind that Mr. Jaworski might do this? At the time he thinks appropriate or what?

Mr. McKINNEY. When he feels that he is not going to endanger any court case and that the Attorney General agrees that this will not endanger the normal processes of law involving any individual. I think that if we were to endanger the normal process of law concerning any individual we would probably be making the same mistake it appears to me, the executive branch of Government made in their determination of law.

Mr. KASTENMEIER. Again, of course, you have called on the Office of Watergate Special Prosecutor force to do this. You have not called upon the White House to turn over copies of the tapes and other materials that Mr. Nixon has left there which may or may not also reveal facts on the same basic question presumably as may be involved here. What do you think about that?

Mr. McKINNEY. Well, I think we have the specific right as I tried to review, to do this now. I certainly would not be opposed, in fact, I would be delighted to propose a bill which would make all of those tapes public property, but as I said at the end of my statement, I think there are grave constitutional questions there and I would hate to let this particular part of our job slip by because we get ourselves into another constitutional discussion as to the individual tapes.

My concern is simply that we instruct the Special Prosecutor to give us all of the information. At present, he is only required to give us a report as he sees fit.

Mr. KASTENMEIER. I thank the gentleman.

Mr. HUNGATE. Mr. Smith.

Mr. SMITH. Mr. McKinney, I commend you for beginning this legislation before the House, before this committee.

I have two questions for you. On page 2, your statement says that H.R. 16619 would instruct the Office of Watergate Special Prosecutor to turn over to the Congress for inspection and eventual publication. I do not find in the bill itself anything about eventual publication.

Mr. McKINNEY. You are quite right. As I said, in passing a piece of law, I would be loath to instruct the Congress when it is going to have general access or as to what to do. I am basically stating my desires as to what I would like to see done. I think, first of all, we are talking about a strictly investigatory process that ends at the Congress—the congressional level in the House and Senate. And then it becomes their obligation as to what they would like to do with the investigatory material they have.

Mr. SMITH. That might be so. On the other hand, because this is special legislation, not general legislation, it might be required that eventual publication might have to be specified.

The other question I wanted to ask you was that you suggest that your bill be amended to make it clear that Congress does not expect the Special Prosecutor to turn over any grand jury minutes because this would be a gross invasion on the constitutional rights of individuals who testified. But if you strip the Special Prosecutor of grand jury minutes in this report, you are going to have sort of a skeleton coming up to the Congress.

Mr. MCKINNEY. I do not really think so. I think that we have to be very careful on this point. A great many people testify in front of our grand juries all over the country and I think to get anywhere near the point that their particular testimony could be exposed by any branch of the Government would deal a devastating blow to our legal system and to the willingness of people to testify in front of a grand jury.

I do think that all of the information that the Special Prosecutor put before the grand jury was taken through his investigatory role and certainly could be put in the report.

Mr. SMITH. But this material that the Special Prosecutor may have given to the grand jury depends on individual's testimony, by deposition, by individuals, by whatever—affidavits, whatever means it might be. It is not just something that the Special Prosecutor says.

Mr. MCKINNEY. No. I think the Special Prosecutor is certainly equipped, or the Attorney General is equipped to decide which material was knowingly, individually produced in front of the grand jury and is protected, and which depositions are merely a free deposition or one given outside of the grand jury and therefore suitable for publication.

Mr. SMITH. Your bill does leave that escape hatch, leaving it to the determination of the Attorney General.

Mr. MCKINNEY. Right.

Mr. HUNGATE. Mr. Edwards.

Mr. EDWARDS. I have no questions, Mr. Chairman.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Mr. McKinney, your bill, like Mr. Gude's, would, of course, require the production of all material that the Special Prosecutor might have on this subject including matters which he had investigated and had determined as a result of his investigation not to pursue any further, is that correct?

Mr. MCKINNEY. That is absolutely right, yes.

Mr. DENNIS. Do you think that in the case of matters which the Special Prosecutor has examined and perhaps submitted to a grand jury and on which he and the grand jury have determined that nothing further be done that it is fair to spread all of that material on the record?

Mr. MCKINNEY. I would think so, with a clear statement from the Special Prosecutor that there was no indictment or further action. It probably would almost have a cleansing effect quite frankly, in that aspect.

Mr. DENNIS. Have what kind of an effect?

Mr. McKinney. It might also have a cleansing effect if the Special Prosecutor stated that neither he nor the grand jury had seen any reason for prosecution because I think what we are dealing with here, Mr. Dennis, is a vast feeling of unease and suspicion on the part of the American people one way or the other. What I am trying to do is to put forth legislation that will put as much information as possible out and let Congress make up its mind, let people make up their minds, and far more important than that, see what legislation we have to pass to make sure that there is no recurrence of these events.

Mr. Dennis. I would like to call to your attention the fact—you may know of it, you may not know it—that under the Organized Crime Control Act which is title 18, section 3333, that I am referring to, the Code, it is provided that grand juries file special reports of noncriminal activity when they do not return an indictment, but which activity is of an organized crime nature, and so on. But it is very carefully provided in that section that these reports shall not be filed or shall not be made public until the persons named have had an opportunity to testify, to produce witnesses before the grand jury who shall testify, to file an answer to the report, and in case of a prejudice to other possible criminal defendants who may be mentioned, that it should not be made public.

Now, all those safeguards are missing in your bill and I suggest that the reason they are there is (a) fairness, and (b) constitutional requirements of due process of law.

Mr. McKinney. Well, I think I very clearly covered in my testimony at the end that the Attorney General and the Special Prosecutor should be very wary and I would like the bill amended to protect the grand jury hearings in any way that this committee, which is composed of lawyers, sees fit. I am not a lawyer, Mr. Dennis, and I do not know what the appropriate move would be. But I have, I think, very clearly stated that I would like it to be amended to totally protect the rights of individuals in the grand jury. The fact is that the Special Prosecutor has done a great deal of work outside of the grand jury and a great deal of investigatory work. He has purview over a great deal of material which I think should be made available to the American people through their representatives and their representatives' desires.

Mr. Dennis. Your bill, of course, says that the Attorney General should make a determination but that is a far cry from the elaborate precautions of an adversary nature which Congress has provided in the Organized Crime Control Act that I have just referred to.

Mr. McKinney. Well, I am not so totally sure that we are in all necessities talking about a criminal proceeding. We may be talking about civil violations. Certainly that would not be as contentious. I would admit that the criminal aspect of it is a contentious problem but I think this committee can protect the individuals who testify at grand juries from exposure and from meaningless incrimination, let us put it that way.

Mr. Dennis. My time has expired and I thank you.

Mr. Hungate. Mr. Mann, from South Carolina.

Mr. Mann. Mr. McKinney, I think we can agree that the sooner this information could be available to the American people, the more the settling effect would be.

I questioned Mr. Gude about his 90-day release of this material. Perhaps it would be premature in some situations.

I have an equal concern about the timetable as established by your language. "Following a determination by the Attorney General of the United States that the rights of the parties named therein will not be compromised." I can visualize where there will be some extremely long drawn-out litigation and that is where it implies civil litigation.

I do not have a suggestion, but it would appear to me that a beginning timetable with perhaps a triggering mechanism in the hands of the House or Congress ought to be established with the Judiciary Committee determining possibly, when that deadline arrives, and if the Attorney General reports that it cannot be released at this time because of thus and so and thus and so and thus and so, then the committee perhaps can make a determination that a portion of it can be released that would not jeopardize those rights or that those rights were not serious enough to delay further the issuance of that report.

Have you any reaction to that thought?

Mr. McKINNEY. Well, I specifically covered myself as generally as possible, again not being a lawyer. And I think, however, if you want a personal opinion, that this should be an ongoing process and that this committee should be given the power, if this bill is passed, to instruct the Special Prosecutor to start turning over material as soon as he determines in any instance it is not going to violate individual rights. There is probably some material, for instance, right now that could come forth. After that, he might be required, say, on a 90-day basis or every 6 months, to report to a committee of this overall committee saying why he has not released any more or what he thinks he can release. And I think that probably would be a very good idea.

I know what you are getting at. I think it needs some force to push it along. I just simply did not want to put a wording into the bill that I thought perhaps would be unconstitutional or that would violate rights. One of the things that bothers me is that the Special Prosecutor's role was not accusatory basically. It was an investigatory process and everybody, when you bring the subject up, thinks you are trying to accuse the President of something.

Basically, what I am trying to say is let us get the information out so that if it is accusatory, so be it. Other than that, his role was investigatory and then it became—when there were obvious implications of crimes—a job of prosecuting.

Mr. MANN. As an old prosecutor I have to agree that you have the capacity to be objective.

Thank you.

Mr. HUNGATE. The gentleman from Iowa, Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman. I have no questions but I do want to commend Mr. McKinney on his fine statement.

Mr. McKINNEY. Thank you, Mr. Mayne.

Mr. HUNGATE. Ms. Holtzman, please.

Ms. HOLTZMAN. I do not have any questions, Mr. Chairman. I want to thank Mr. McKinney for coming.

Mr. McKINNEY. Thank you.

Mr. HUNGATE. The gentleman from Maryland, Mr. Hogan.

Mr. HOGAN. Thank you, Mr. Chairman. I would like to welcome my good friend from Connecticut and I wonder if he thinks it would be

desirable if the Congress does publish this information, if it is given to us under the kind of legislation the gentleman has sponsored, to afford the ex-President an opportunity of rebuttal or to comment.

The thing that troubles me is that obviously in any kind of investigation, there will be gathered information that will remain forever uncorroborated and there will be many areas of investigation where there is insufficient evidence to support the prosecution.

Now, under your proposed legislation all of this material would be made available to Congress and presumably published and it would give, it seems to me, a distorted view where much of it would be accepted as fact.

If I could digress just for a minute to illustrate the problem that I foresee, this Judiciary Committee, as you know, thoroughly investigated the background of the former Vice President, now President, Gerald R. Ford. One of the witnesses we had at that time was an individual who made scurrilous charges against the Vice President, a man named Winter-Berger. He came before this committee and was totally discredited. I do not think there was one person on this 38-member committee that gave even the slightest scintilla of credence to the testimony of Mr. Winter-Berger. He maligned the character of the Vice President.

He has now published a new book which is available in paperback form where he repeats all of these faults, scurrilous, defamatory charges against the President and I am concerned that the same thing could happen with uncorroborated allegations and information in the hands of the Prosecutor.

How would you foresee us avoiding this difficulty?

Mr. McKinney. Well, I agree with you. I would again emphasize I am leaning on the investigatory aspects but I would have no objection to this committee amending my bill to add funding and the proper right for the President to reply to any investigatory charge which is unfair or is accusatory to the President. In fact, it might be generally worthwhile for the American people and this Congress.

What I am trying to get at here is I think quite frankly that we came awfully close to losing a lot of things in this country. I want to know how we got that close. I want to know why these things happened. Why do you have a milk fund, an ITT, and all of the abuses that have been supposedly inferred. And I would think it might be a very good idea to let the President reply to these things if he thought they were accusatory and give the historians and the Congress and give the people both sides of the picture that may give us a firm dedication that we have got to change something rather quickly.

Mr. Hogan. I have no further questions, Mr. Chairman.

Mr. Hungate. Thank you. I have no questions, Mr. McKinney. I commend you for your bill and your appearance here today. We appreciate the contribution you made.

Mr. McKinney. Thank you very much, Mr. Chairman.

Mr. Hungate. The Chair will now call Ms. Abzug who has a privileged resolution. We would hope to reach our colleague, Mr. Koch, this morning or the first thing this afternoon. I appreciate his courtesy. He is a cosponsor of the privileged resolution.

Ms. Abzug.

TESTIMONY OF HON. BELLA S. ABZUG, A REPRESENTATIVE IN CONGRESS FROM THE 20TH CONGRESSIONAL DISTRICT OF THE STATE OF NEW YORK

Ms. ABZUG. Good morning.

In behalf of myself and 13 cosponsors, including members of the Judiciary Committee, I welcome this opportunity to appear before you to testify for our resolution of inquiry with respect to the unconditional pardon of Richard M. Nixon.

Not since the storm of public reaction to the Saturday night massacre and the Nixon tape disclosure of August 5 that led to his forced resignation a few days later, has there been such a overwhelmingly negative response by the American people to a White House action.

President Ford says the pardon was motivated, at least in part, by his desire to heal the wounds of Watergate. He clings to this rationale despite the clear evidence that this totally premature, confusing, and unprecedented pardon is opposed by a majority of Americans and is viewed as a further coverup of Watergate.

The wounds have, in fact, been reopened, leaving to fester suspicions of White House deals, deception, abuse of Presidential power, and perhaps further blanket pardons of the Watergate culprits. Most wounding of all is what Mr. Ford's action has done to our concept of equal justice for all and the belief that the President is accountable for his actions and not above the law. This is the very concept that was supposed to have been reaffirmed by this committee in its impeachment proceedings and vindicated in Mr. Nixon's forced resignation.

It would be a disservice to that concept to leave unchallenged the many contradictory and self-serving statements that have been issued by the principals, their subordinates, and others in this affair. Further, I believe the legality of both the pardon itself and the arrangement under which the tapes are to be returned to Mr. Nixon should be challenged.

The Congress and the Committee on the Judiciary have a primary responsibility to act in behalf of the American people on all aspects of these issues. I am aware that a number of resolutions dealing with these matters are before the committee. I will address myself here primarily, however, to my resolution of inquiry, which is privileged and can be called up on the floor of this House within 7 legislative days after introduction, and I will also address myself to some observations on the legality of the pardon.

I believe approval of the resolution of inquiry is a necessary step in an investigation this committee should conduct to determine all the facts in the events leading up to the issuance of the pardon. The American people have a right to know these facts. They have a right to get answers to their questions in an appropriate forum from witnesses under oath, instead of in speculative news stories and columns, television interviews, and other publicized unsupported and contradictory comments by a host of people who have been involved in the pardon controversy in one way or another.

The response of the President to the questions propounded in the Resolution of Inquiry which was sent to him by the chairman of this subcommittee reveals a nonserious and trifling attitude that demeans the authority and dignity of this committee and this parliamentary

procedure. It is totally inadequate for Mr. Ford to respond by sending a batch of White House press releases and an accompanying letter.

I have in the past introduced a number of resolutions of inquiry which have been addressed either to the President or to members of his Cabinet. This is the first time in my experience that there has not been a point by point specific response to specific questions even though in some cases in the past I have felt the answers were not always satisfactory.

It should also be noted that this committee is still operating under House Resolution 803, adopted on February 6, 1974, which authorized and directed the Judiciary Committee "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon," and other matters.

The committee has not been discharged of this duty. The articles of impeachment voted out by the full committee were never debated or voted upon by the full House, despite its vote to accept the committee report. Incidentally, I said at the time that the House should vote on approving the articles of impeachment, instead of evading this issue, and I believe that events since then have shown it was a mistake not to do so. I would also note in passing that the House can still vote on impeachment, and if there is no other way to enter on the record books the political crimes for which Richard Nixon was forced to resign, then I believe the House should proceed to a vote.

Under Resolution 803, this committee is fully empowered to determine whether there is any new evidence relevant to the conduct in office of the former President.

My Resolution of Inquiry requires the President to answer specific questions about the circumstances leading up to the pardon proclamation. There are, of course, many other questions that can and should be asked of the President and others involved in this affair, and I have submitted to the chairman a list of those who I believe should be called before this committee, including: President Gerald Ford; Attorney General William Saxbe; Special Prosecutor Leon Jaworski; Alexander Haig; Benton Becker; Philip Buchen; Herbert J. Miller; Ron Ziegler; Dr. Walter Tkach; Dr. John C. Lundgren; Julie Nixon Eisenhower, and Richard M. Nixon.

But as a preliminary, it is vital that we get answers to the following questions from Gerald Ford:

1. Did you or your representatives have specific knowledge of any formal criminal charges pending against Richard M. Nixon prior to issuance of the pardon? If so, what were these charges?

2. Did Alexander Haig refer to or discuss a pardon for Richard M. Nixon with Richard M. Nixon or representatives of Mr. Nixon at any time during the week of August 4, 1974, or at any subsequent time? If so, what promises were made or conditions set for a pardon, if any? If so, were tapes or transcriptions of any kind made of these conversations or were any notes taken? If so, please provide such tapes, transcriptions, or notes.

3. When was a pardon for Richard M. Nixon first referred to or discussed with Richard M. Nixon, or representatives of Mr. Nixon, by you or your representatives or aides, including the period when you were a Member of Congress or Vice President?

4. Who participated in these and subsequent discussions or negotiations with Richard M. Nixon or his representatives regarding a pardon, and at what specific times and locations?

5. Did you consult with Attorney General William Saxbe or Special Prosecutor Leon Jaworski before making the decision to pardon Richard M. Nixon and, if so, what facts and legal authorities did they give to you?

6. Did you consult with the Vice Presidential nominee, Nelson Rockefeller, before making the decision to pardon Richard M. Nixon, and if so, what facts and legal authorities did he give to you?

7. Did you consult with any other attorneys or professors of law before making the decision to pardon Richard M. Nixon, and, if so, what facts or legal authorities did they give to you?

8. Did you or your representatives ask Richard M. Nixon to make a confession or statement of criminal guilt, and, if so, what language was suggested or requested by you, your representatives, Mr. Nixon, or his representatives? Was any statement of any kind requested from Mr. Nixon in exchange for the pardon and, if so, please provide the suggested or requested language.

9. Was the statement issued by Richard M. Nixon immediately subsequent to announcement of the pardon made known to you or your representatives prior to its announcement, and was it approved by you or your representatives?

10. Did you receive any report from a psychiatrist or other physician stating that Richard M. Nixon was in other than good health? If so, please provide such reports.

We need direct answers to these direct questions, answers that the committee can corroborate in the course of an inquiry and hearings. There are suspicions that Richard Nixon may have made a deal on the pardon with Gerald Ford before nominating him to the Vice Presidency. If Richard Nixon made Ford's elevation to Vice President conditional upon the promise of a pardon or even if Mr. Nixon conditioned his own resignation on a promise of receiving a pardon, then conceivably Mr. Ford could be charged with accepting a bribe, which is an impeachable offense. Grim as this possibility may be, it is nonetheless the duty of this committee to investigate the facts and make a determination.

There are suspicions that General Haig, who reportedly was instrumental in convincing Mr. Nixon to resign, may have held out to him the promise of a pardon. There are suspicions arising from the belief that in the negotiations for the pardon, the roles appear to have been switched, with Mr. Ford acting as supplicant and Mr. Nixon dictating the terms of the pardon, the so-called statement of contrition, and the agreement on the tapes. There are grave questions as to whether, in issuing a pardon before Mr. Nixon was indicted, tried or signed a statement of guilt, Mr. Ford abused his pardon powers. And, of course, there are a multitude of questions about whether Mr. Nixon's physical or mental condition justified such an unprecedented pardon.

I make no judgment here as to whether these suspicions are justified. It is a fact, however, that they are widespread and only a full investigation by the committee can either confirm some or any of them, or lay them to rest.

For more than 2 years the American people suffered the consequences of having a President who lied and misled them at every opportunity throughout the course of the Watergate investigations. The stability of our Nation requires that the citizens be able to believe that their President is telling them the truth, at least most of the time. In the wake of the pardon, Gerald Ford has created an enormous credibility problem for himself and the Presidency. He is in a particularly vulnerable position because he is the first nonelected President in the history of our Nation and because he was named to the Vice-Presidency by a discredited and impeachable President. The Committee on the Judiciary which recommended confirmation and the Congress which confirmed his nomination also have a responsibility to the American people to investigate and report to them on the conduct of President Ford in connection with the pardon and the agreement on the tapes.

President Ford's own actions and many conflicting statements have added to his credibility problem. On August 28, 1974, in his first news conference as President, he advised the American public that he was not going to make any comment on a pardon "during the process of whatever charges were made." He further stated that it would be "unwise and untimely" for him to pardon Nixon before any charges had been brought against him. Yet, just 2 days later, on August 30, he asked Philip Buchen formally to study the Presidential power of pardon. Furthermore, according to a report in the September 22 Washington Post, as early as Friday, September 6, Ford had revealed to his staff his intention to pardon the ex-President. Thus, it presumably took the White House less than a week to make a study of and reach a decision on this highly controversial and explosive issue.

The question naturally arises as to whether the President consulted fully on this question with Attorney General Saxbe and Special Prosecutor Jaworski to find out whether they considered legally valid a pardon, issued before indictment or trial, a pardon that the President himself described as unprecedented, and that did not specify the offenses for which the pardon was issued. The question also arises as to whether the President asked Saxbe or Jaworski what effect the pardon would have on the pending Watergate trial and other possible investigations, indictments and trials, or did he already have in mind what he later hinted at—a wholesale pardon for the entire Watergate gang.

In his pardon proclamation, President Ford made the prior judgment that Richard Nixon would be unable to obtain a fair trial, implicitly an attack on our judicial system, and also expressed his belief that "ugly passions would again be aroused" during the long period of delay before Mr. Nixon could be brought to trial. As we know, Mr. Ford has accomplished the reverse of what he said he intended to do.

Finally President Ford inserted in his statement a sentence which said that "serious allegations and accusations . . . hang like a sword over our former President's head and threaten his health as he tries to reshape his life . . ." It is this factor that has become the subject of the widest speculation and conflicting reports. Did President Ford receive any new evidence in the interval between August 28 and August 30 indicating a change in Nixon's health—physical or mental?

I regret, of course, that Mr. Nixon is ill and has had to be hospitalized. The gravity of his illness can no doubt be determined by court-appointed physicians, as may be requested by Special Prosecutor

Jaworski. Certainly, no one wishes Mr. Nixon ill health or physical punishment, and clearly he is suffering over his fall from enormous power. How could he feel anything but regret and anguish? But it is a mark of the man and his reputation for trickery and deceit that even now people are questioning whether he is seriously ill or whether he has taken refuge in a hospital to escape testifying at the Watergate defendants' trial, or to develop sympathy as a rationale for the pardon.

Most of the facts respecting Nixon's health were released following the pardon. They appeared to be a well-orchestrated after-the-fact attempt to protect the vitality of the pardon by promoting the notion that Nixon was grievously ill. We are all familiar with the alarming statements issued by Dr. Tkach, Mr. Nixon's personal physician. According to Dr. Tkach, the former President was a ravaged man who had lost his will to fight. However, after Dr. Tkach left San Clemente, Communications Director Kenneth Clausen spent 3 hours with the former President and said he seemed animated and in no visible pain.

Did Mr. Nixon's condition suddenly worsen after the pardon? Or did Mr. Ford receive new information about Mr. Nixon's health after his first news conference? The American people have a right to know all this. Certainly, their deep sense of compassion and fair play should not be played upon, if the facts do not warrant it.

Finally, beyond the questions raised in my Resolution of Inquiry, I believe the Judiciary Committee should support efforts to obtain a legal test of the validity of the pardon. I have already called upon Attorney General Saxbe and Mr. Jaworski to make such a test possibly by proceeding with an indictment of Mr. Nixon, if the evidence so warrants, and I would like to state my reasons.

I disagree with those who claim the pardon was a constitutional exercise of Presidential power and cannot be overturned. President Ford himself asserted in his statement announcing the pardon that "there are no historic or legal precedents to which I can turn in this matter," and there is already serious debate within the legal community as to the constitutionality of Ford's granting a pardon before formal charges were filed and without a formal admission of guilt from Mr. Nixon.

Defenders of the pardon are on weak ground in citing as authority for it an 1867 case—*Ex parte Garland* 71 U.S. 33—a 5-to-4 U.S. Supreme Court decision in which the written opinion explaining the ruling said:

> That a President's discretion to pardon is unlimited and extends to every offense known to the law, and may be exercised at any time after . . . commission (of the crime) either before legal proceedings are taken, or during their pendency or after conviction and judgment.

This language is dictum, was not crucial to the decision in the case, and does not constitute a precedent.

Moreover, the impact of the *Garland* case has been eroded for a number of reasons, principal among them being that Garland received a grant of amnesty rather than a pardon. As you will recall, Garland, who had been a Senator in the Confederate Government during the Civil War, was granted a blanket Presidential amnesty, which applied to all crimes that may have been committed during the war.

The courts have come to draw a distinction, not drawn by the Garland court, between amnesty and pardon, and this is a significant distinction as it relates to individual admission of guilt.

The phrase "reprieves and pardons" as used in article II, section 2 of the Constitution, has been interpreted as a phrase of art including within its purview, reprieves, commutations, pardons, both conditional and unconditional, and amnesties (*Lupo* v. *Zerbst*, 92 F. 2d 362 (CA 5th 1937)).

The Supreme Court has recognized that "amnesty and pardon" are distinct and different. In an 8 to 0 ruling in *Burdick* v. *United States*, 236 U.S. 79, 94–95, it stated that they "are of different character and have different purposes. The one—amnesty—overlooks offense; the other—pardon—remits punishment. The first is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infraction of the peace of the State. Amnesty is usually general, addressed to classes or even communities, a legislative act . . . the act of the supreme magistrate," said the Court.

When the *Burdick* case went to the Supreme Court, the Justices were asked to rule on whether the President had the authority to pardon Burdick before he had been indicted. The Court, however, did not rule on this issue. They ruled on another issue, whether Burdick could decline the pardon. Stating that a grant and acceptance of a pardon "carries an imputation of guilt; acceptance a confession of it," the Court held that an individual does not have to accept a pardon.

The need for either a confession or judgment in a pardon case is evident from the language of the Constitution itself: the power to grant pardons only goes to "offenses." Without either a confession or at the very least an indictment, there is no offense. Richard Nixon has made no confession or admission of guilt and there has been no indictment. Instead, in collaboration with President Ford, he has made a statement of "contrition" which is a religious rather than a legal concept.

The first case examining the power of the President to pardon was *United States* v. *Wilson*, 32 U.S. 150 (1833). The question involved there was whether it was necessary for an individual to accept the pardon in order for it to become effective. The Court held that it was, and that a pardon was without effect if the person refused it. Under this decision, it was also held that a court cannot take judicial notice of a pardon unless it is pleaded in court.

It would appear from this ruling that the Watergate grand jury is free to proceed with an indictment of Richard Nixon, as it had indicated earlier that it wished to do. The court does not have to take notice of President Ford's pardon of Richard Nixon unless Mr. Nixon pleads it in court. If he should plead that he has been pardoned, he would have to state for which offenses he has been pardoned.

Now, there has, of course, been reference this morning in the press, to the statement of U.S. District Judge Charles R. Richey, who said yesterday that it might be desirable to have at least one trial court resolve the questions with respect to the validity of the agreement, referring to the tape agreement, and the validity of the pardon. The issue arose, as you know, before Judge Richey in two remaining unsettled civil cases growing out of the original Watergate break-in.

It seems to me that the capacity to test the legality of the pardon and the actions that have been taken relating to the agreement on the tapes, and so on, is a very significant development, one that has been in my opinion, inherent in the situation from the outset. Apparently, there has now begun to grow a greater opinion among legal scholars and Members of Congress, as well as the bench, that this appears to be rather significantly critical to dealing with this situation.

It would appear that Special Prosecutor Jaworski has stated that the Presidential pardon of Mr. Nixon preempts any Federal legal action against him for the period covered by the pardon. However, as I have indicated, not only is the legality of the pardon open to serious doubt, but also the pardon itself neither precludes nor preempts grand jury action. Consequently, I would strongly urge that the grand jury proceed with an indictment, if the facts warrant it, and that Special Prosecutor Jaworski or Attorney General Saxbe sign it, so that the American people may be assured that the system of equal justice prevails and so that the groundwork may be laid for a court test of the constitutionality of President Ford's action.

I think that the pardon itself should be challenged based upon the fact that it may have interfered with the charter which had been agreed to in setting up the office of the special prosecutor, which required that the President not exercise his constitutional powers to either affect or discharge the prosecutor or to limit his independence without the involvement and consent of various Members of Congress. This is also very much involved in this discussion here today and the matters before this Judiciary Committee.

If it is shown that the pardon was intended to prevent an indictment or a trial, contrary to President Ford's stated reasons for the pardon, and if it is shown that the agreement on the tapes was intended to prevent further information from becoming public, then these are very serious actions which might well be construed to be an abuse of power by President Ford and/or an obstruction of justice.

In view of the President's unresponsive reply, it seems to me that the subcommittee has no alternative but to act favorably in reporting this resolution of inquiry to the full committee with the recommendation that the full committee likewise report it out favorably to the floor of the House.

I would also hope that the full committee would support and initiate efforts to investigate the validity of the agreement concerning the tapes and take appropriate steps to preserve this valuable evidence in whatever way it deems possible.

The committee should also support the resolution which suggests that the House go on record favoring the grand jury going forward with the indictment and Mr. Jaworski signing it.

The committee should also consider lending its support to a legal challenge as to the validity of the pardon.

In any case, I wish to thank this committee for its kind consideration of this resolution of inquiry and for agreeing to have me come before it to testify this morning.

Mr. HUNGATE. We appreciate the appearance of the gentlelady from New York.

Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I, too, appreciate the splendid testimony of the gentlewoman from New York. I saw for

the first time yesterday President Ford's letter to our chairman, Mr. Hungate, in response to his letter suggesting that he answer in detail the questions proposed in your resolution of inquiry and I, too, found his response not only cavalier but very close to being disrespectful of the House of Representatives and this committee. Instead of answering the questions one by one, he really just packaged up a bunch of old press releases without numbers, without any comment whatsoever, and shot it back and then in his letter to Mr. Hungate just said let's get the pardon behind us and bind up the wounds.

Now, this committee has heard this before in relation to the subject of our communications with President Nixon over the past year. In the event you have all the information you need let us bind up the wounds and get Watergate behind us. So I agree that a strong argument can be made for approval of your resolution just by the unsatisfactory answer by the President.

Now, Ms. Abzug, do you agree with that?

Ms. ABZUG. Yes, I do. As a matter of fact, that is the reason I made the statement that I did in my testimony. Frankly, I was really quite surprised by it.

Mr. EDWARDS. It is not the way we would write to the White House or to anybody in the other body or to any department of the U.S. Government; indeed, not to a private citizen.

Ms. ABZUG. No, I think not.

Mr. EDWARDS. Is that correct?

Ms. ABZUG. And I am really quite surprised, frankly, in view of the fact that this hearing has been undertaken by the subcommittee in the best interests of Congress, the country, and indeed the Presidency. One would expect that in order to deal with what has been a very serious criticism of this action, as I said before, it would require the utmost of cooperation in order to come to some conclusions which can soothe and heal the wounds that people justly, I think, feel in this country about this pardon.

Mr. EDWARDS. Well, in ordinary legislative business we have a choice as to whether or not to consider a bill. Here we have no choice. We have no choice but to consider the bill, really, assuming we still want to have some control over the legislative process of the Judiciary Committee. In our letter to Mr. Ford we were not doing anything but what was polite and what we had to do under the rules of the Congress.

Well, you are not attacking the constitutional power that President Ford has to pardon. You are suggesting perhaps that this constitutional power has been abused?

Ms. ABZUG. Yes. I am not sure that it was a proper exercise of constitutional power. I question the legality of the exercise of that power.

Mr. EDWARDS. Well, again I thank you, and, Mr. Chairman, I yield back the balance of my time.

Mr. HUNGATE. Mr. Smith.

Mr. SMITH. Ms. Abzug, I want to commend you on your statement. I do not agree with you in every respect in the statement and that is probably natural but I think that you have done a great deal of background work and have presented some very interesting propositions of law for our consideration.

I would like to say in regard to the President's reply in this connection, I have not seen Mr. Hungate's letter to the President but I

understand that it contained some of the questions that the chairman thought were going to be included in House Resolution 1367 and then later I understand the chairman did send a copy of H.R. 1367, House Resolution 1367 to the President. And I have got to say that personally, I would have answered it in a different way, but I think the record ought to show that the answer of the President in this case consisted of the Proclamation of Pardon dated September 8, 1974, and the remarks that the President made in connection with that dated September 8, 1974, and the Presidential press conference No. 2 dated September 16, 1974, the press conference of Mr. Philip Buchen dated September 8, 1974, the press conference of Philip Buchen dated September 10, 1974. I went through those in detail and I did find the answers to a great many of the questions asked in House Resolution 1367, perhaps not in the form in which many of us would have preferred, but I think there has been an effort on the part of the President to answer the questions that our chairman has asked of the President. Whether that—whether the supplying of information by the President has been as full and complete as we would like is another question.

Ms. ABZUG. May I comment on that, Mr. Smith?

Mr. SMITH. I wish you would.

Ms. ABZUG. The right to request information from the President or a Cabinet member is in my opinion, one of the most important prerogatives of this House. This is one of the few methods that we have, of obtaining vital facts from the executive branch. I do not believe that press releases or press statements that are thrown out to the public, are serious answers in response to serious questions propounded in the exercise of one of the highest prerogatives of this House by this privileged resolution of inquiry. If the questions that are propounded in the resolution are taken seriously and if real evidence is presented by either a statement signed by the President indicating his answers, and subsequently, by the oral testimony of the President and others voluntarily, it would show a response that is essential to quiet the concerns that the public and the Congress have at this time and would show a respect for the procedure.

I must compliment the chairman, Mr. Hungate, and your committee for going into this matter, painful as I know it must be. It is painful for all of us, having been through what we have just been through with the impeachment process, and so on, to have to question the actions of an executive. But we have to do so especially here because I think that a nonelected President must abide by the highest standards of responsibility possible. A President that is nonelected has to respond both to the Congress and to the public in the manner which is in the highest manner of performance. Therefore, I cannot believe that you would agree that the use of press releases—you said you did not think you would answer it that way—to answer questions that have been initiated by a resolution in this House of Representatives conforms to this high standard.

Moreover it cannot go unnoticed that the White House materials contain numerous contradictions. However, in any case, I do not choose to conduct a trial of the facts in my testimony. I think it is the responsibility of the committee to determine what facts it thinks it can elicit and whether it favors this resolution in order to secure this

information. We must proceed with the resolution and after the resolution is passed then the President will have to decide whether or not he will specifically respond to each of the 10 questions contained in the resolution.

Mr. SMITH. I appreciate the gentlelady's thoughts in this matter.

Mr. HUNGATE. Mr. Mann.

Mr. MANN. Thank you. I have no questions, Mr. Chairman.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Ms. Abzug, have you read the transcript of the press conference of Mr. Buchen, the President's counsel, of September 8, 1974, which is one of the documents he sent up to this committee?

Ms. ABZUG. Yes, I believe I have, Mr. Dennis.

Mr. DENNIS. Is it not true that that document contains the answer or an answer to a great many of the questions asked in your resolution?

Ms. ABZUG. Well, as far as I know, Mr. Buchen is not the President of the United States and as far as I know, Mr. Buchen cannot answer this resolution of inquiry since the resolution of inquiry has to be directed by the rule itself, as I am sure you know, directly to the President or in other instances it may be directed to members of the Cabinet. It is a very serious resolution.

We want to find out, you know, directly from the executive department what is up, and I think that to suggest to me that Mr. Buchen should present that information since this has not been addressed to him is probably not really what you mean because I know that you take very seriously the process of this Congress and this committee.

Mr. DENNIS. You suggest that the President cannot answer through an agent if he would?

Ms. ABZUG. Of course he can. He could have answered through this agent by sending a letter to this committee as a preliminary step and suggested that he or his agent would be available for further testimony before this committee but not saying, as was said here, that I happen to have here some little press releases that I am going to give you for your consideration.

Mr. DENNIS. You also read the transcript of the President's own press conference, have you?

Mr. ABZUG. Yes, I have.

Mr. DENNIS. All right. Now, you say on page 4 of your prepared statement:

> There are suspicions that Richard Nixon may have made a deal on the pardon with Gerald Ford before nominating him to the Vice Presidency. If Richard Nixon made Ford's elevation to Vice President conditional upon the promise of a pardon or even if Nixon conditioned his own resignation on a promise of receiving a pardon, then conceivably Mr. Ford can be charged with accepting a bribe.

Do you have any evidence whatsoever to support those suspicions?

Ms. ABZUG. No, and I make it very clear, Mr. Dennis, that I make no judgment here as to whether these suspicions are justified. I have stated that in my testimony. I am merely attempting to bring before this Congress, as it is my responsibility as a Member of this Congress to do, the reasons why I think having a resolution of inquiry, getting specific answers directly from the President with respect to these questions, can settle these suspicions one way or another.

Mr. DENNIS. Is it your original opinion that the President has no constitutional right to issue a pardon before a charge is brought?

Ms. ABZUG. I tend to view this issue along with other legal scholars and constitutional experts that there should be either an indictment or an admission of guilt before the granting of a pardon, yes.

Mr. DENNIS. Now, in *Ex parte Garland* which you discuss in your statement, is it not a fact that Mr. Garland had not been charged with any offense at the time the pardon was issued to him?

Ms. ABZUG. Well, I explained to you what I think of *Ex parte Garland*. Actually *Ex parte Garland* was not a pardon case, but rather a general amnesty case and I believe it is an entirely different issue than the granting of a pardon. I also believe that the language in *Garland* respecting the limitless nature of the pardon is mere dicta and not the holding of the case. The judge added a lot of words with respect to the broadening of a pardon but that is not the holding of the case. Moreover, subsequent decisions of the court have eroded and to some extent overruled the dicta which you refer to.

Mr. DENNIS. Is it not a fact that Mr. Garland specifically pled and relied upon in so many words a pardon issued to him by President Andrew Johnson?

Ms. ABZUG. Yes, that is true. He did that.

Mr. DENNIS. And the courts upheld that contention in part of the language quoted by you on page 7 of your statement. Is that not true?

Ms. ABZUG. Yes, but as I said, we can differ and legal scholars, I am sure, will differ, as to the meaning of that decision, but it is my view that *Ex parte Garland* does not stand for that proposition. It certainly contains strong dicta with lots of words backing it up, perhaps too many words as we lawyers sometimes tend to fall into.

Mr. DENNIS. Let me——

Ms. ABZUG. In any case, I think that the cases that I have subsequently discussed, including the Burdick case and some other cases, including the Carlesi case that I have not referred to here, would seem to indicate that there is some considerable limitation as to the breadth of the pardon. I hold the view that it is an issue that should be tested. I believe there is considerable difference of opinion, as our colleague has demonstrated so well.

Mr. DENNIS. You hold one view.

Ms. ABZUG. That is correct.

Mr. DENNIS. And the Supreme Court of the United States holds another view.

Ms. ABZUG. No. I differ with the dicta of a 19th century Supreme Court, and you differ with holdings of a 20th century Supreme Court. Even the President in granting this pardon suggested that this was an unprecedented pardon and indeed, I believe it is. But I tend to agree with those legal authorities who believe a pardon requires first either an indictment or admission of guilt. The purpose of a pardon is to remit punishment. The Constitution itself says that the President may pardon for offenses against the United States. What is the meaning of offenses? As you read this whole record, you have no evidence whatsoever that President Ford has stated that he had acted based upon an indictment or an admission of guilt.

And I suggest if you remit punishment it has to be for something which may very well exist. I am not suggesting it does not, but only that it has not fully flowered in the legal processes of our judicial system.

Mr. DENNIS. The chairman tells me my time has expired, so you and I will have to defer to a later date our interesting legal discussion.

Thank you.

Mr. HUNGATE. I thank the gentleman. I thank the gentlelady.

The bells have rung for a vote. The committee will be in recess until 1:30, at which time we will complete this questioning.

[Whereupon, at 12:20 p.m., the committee was recessed, to reconvene at 1:30 p.m., this same day.]

AFTERNOON SESSION

Mr. HUNGATE. The committee will be in order.

We will resume our consideration of various resolutions. When we left we were questioning the gentlewoman from New York, Ms. Abzug, concerning a privileged resolution of inquiry.

TESTIMONY OF HON. BELLA S. ABZUG, A REPRESENTATIVE IN CONGRESS FROM THE 20TH CONGRESSIONAL DISTRICT OF THE STATE OF NEW YORK—Resumed

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

Mr. Chairman, I, too, was disappointed that the President did not choose to answer the questions set out in your letter of September 17 point by point, but rather he forwarded the text of the Presidential proclamation and text of press conferences of the President and Mr. Buchen. It is true, of course, that the answers to your questions, or most of them, can be found in the documents furnished. I still think it would have been much better for the President to answer the questions in the same manner as they were stated, so it would not be left to a matter of our interpretation of those minutes of the press conferences, but that we could have the kind of forthright and explicit answer that we have come to expect and to recognize as characteristic of President Ford.

I think, under all of the circumstances, I would hope that the President will reconsider and still submit a point-by-point answer for our consideration. It is not too late for him to do so and I hope that he will before we conclude our sessions on this important subject.

Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you, Mr. Mayne.

I would thank the gentlelady from New York for bringing this problem before us and there has been a considerable response, as she knows, and a great deal of interest and concern in this matter. I would inquire, do you think that—what is your view on whether any of your questions are answered in the documents furnished assuming that it was not a presumption to force you to look through them?

Ms. ABZUG. Well, I do appreciate the chairman asking me that question. I have read that batch of releases that were sent by the White House, not studied them thoroughly as yet, and I ask permission of the chairman, by the way, to introduce some additional statements with respect to those statements after the conclusion of this hearing, if that would be all right. I ask unanimous consent——

Mr. HUNGATE. The gentlelady requests permission to introduce some further statements relating to these questions and matters discussed here today and without objection it is so ordered.

Ms. ABZUG. Thank you, Mr. Chairman, but I might point out that regarding these statements, I not only object to the procedure in which they are presented, but more importantly, I do not think they directly answer any of the questions. For example, the first question asked, "Did you or your representatives have specific knowledge of any formal criminal charges pending against Richard Nixon prior to the issuance of the pardon?"

Now, if you recall, on page 1, I think, of Mr. Buchen's September 10 press release, he indicated that he had gotten a list of 10 possible——

Mr. HUNGATE. Offenses.

Ms. ABZUG [continuing]. Charges in confidence from Mr. Jaworski, but we have no knowledge as to the delineation of these charges. There is no specific answer really with respect to whether the President or his representatives had specific knowledge of the formal charges and what they were—I use this as one example—even from reading the material that is presented to us.

The second question:

> Did Alexander Haig refer to or discuss a pardon for Richard M. Nixon, with Richard M. Nixon or representatives of Mr. Nixon at any time during the week of August 4th or any subsequent time? If so, what promises were made or conditions set for a pardon, if any? If so, were tapes or transcriptions of any kind made of these conversations or were any notes taken? If so, please provide such tapes, transcriptions, or notes.

Clearly, in the press releases that we have received and the press statements made by the President and his counsel, there is virtually no mention of Mr. Haig, so we do not have an answer to this question. We know about some committee of transition that was involved in negotiations. We certainly do not have the answer to the rest of the questions there.

I do not know whether you want me to go through all of them, Mr. Chairman, but I am presenting these as illustrations.

Mr. HUNGATE. Well, let me inquire, do you find any of the 10 to be dealt with in the press release?

Ms. ABZUG. I think not, Mr. Chairman. As a matter of fact, as a result of the question that was raised by Mr. Dennis, I reread the White House materials very quickly in our recess; I can now say that not a single question has been fully answered; most of them are not answered at all by the material that is provided. There may be one or two which are answered partially. For example; question 5 asked the following: "Did you consult with Attorney General William Saxbe or Special Prosecutor Leon Jaworski before making the decision to pardon Richard M. Nixon and, if so, what facts and legal authorities did they give you?" We know from the press material that the President had said that Mr. Jaworski advised him of the length of time before a jury could be impaneled and the length of the trial itself. But we do not know anything beyond that. So that, even that question is not fully answered. This is the one that had some answer in it, but is not really fully answered.

Mr. HUNGATE. And the Chair recognizes—of course, there is a shortage of time for everybody in the 7-day resolution and there is a shortage when the gentlelady gets the mass of material not individually directed. It would be the Chair's thought——

Mr. DENNIS. Mr. Chairman——

Mr. HUNGATE. Just a moment—subject, of course, to the will of the subcommittee and the author of the privileged resolution that it might be quite well to continue these hearings a week from today and in the meantime to make some effort to get a more satisfactory response to these, and perhaps to have a flesh and blood witness to attend to the needs of the committee and seek to provide us with answers. And I am inquiring of the gentlelady if she would think that was an orderly and proper procedure.

Ms. ABZUG. Well, I think, Mr. Chairman, although it is, as you know, a privileged resolution which can be called up within 7 days after it is filed, if this committee wants to proceed to get more information before acting upon this resolution, the proper procedure would be to act either for or against the resolution which would enable it then to secure more information. But if you wish in a preliminary way to continue with the hearings and seek witness testimony, certainly I think at this stage it would be very useful and very important.

Let me make sure that I have made myself clear, Mr. Chairman. As you know, committees are required under the procedure here to report resolutions of inquiry back within 1 week of the reference.

Mr. HUNGATE. Seven legislative days.

Ms. ABZUG. That is correct, sir. Seven legislative days. The procedure here could well be that the subcommittee, as I indicated in my earlier testimony, would report the resolution favorably to the full committee with a recommendation that it report it favorably to the floor. What does that mean? It merely means that the committee is saying we would like the answers to this question. We agree with you we want answers to these questions.

The chairman had originally sent a letter including the resolution of inquiry questions to the President seeking answers, but we received no answers to the questions. Therefore, I am suggesting that the subcommittee is in a position if it determines so to actually act on the resolution itself by approving it and sending it to the full committee for subsequent similar action. If the chairman is asking me whether I think it is within my interpretation of a resolution of inquiry for him merely to hold these hearings open or to continue them and secure additional information without action on the resolution of inquiry, I think that is a procedure that the committee could follow and I would seek to cooperate as much as I could, provided I felt that the committee was proceeding to secure the information that is being requested in the resolution.

Mr. HUNGATE. The Chair appreciates that because as various members of the subcommittee have noted here today, the form, if nothing more, the form of the response is not satisfactory to the committee, it would seem from our discussions, and the Chair would try to be slow to insult, although some would find insult in the answer. But we can always have confrontations and we would seek to cooperate and accommodate because we are really seeking information and we are seeking it not just for ourselves but for the public. So that is why I wanted to get that colloquy in the record with the gentlelady, and the legislative days would expire as to her resolution, I think, on Yom Kippur, for example, which would not be the most fortunate day to call it up.

Ms. ABZUG. Although it is the Day of Atonement.

Mr. HUNGATE. All right. Yes. That is a touché.

But getting to the work of the Congress, it seems that Tuesday would be about as reasonable a time before we could get together and complete our work in an orderly way and the Chair would think we would—we exercise in a sense the rather awesome power of the Congress and the committee and in doing so we would want to be very careful and if we could proceed in this fashion next Tuesday and seek to have more information, further information from the gentlelady and follow up on this, it would seem to be an orderly procedure.

Does the gentleman from Indiana seek recognition?

Mr. DENNIS. Thank you, Mr. Chairman. I merely want to make an observation. I certainly would like to see the gentlewoman from New York have an opportunity to present anything else she wants to present, but I just want to make a couple of observations.

Question 1, which says "Did you or your representatives have specific knowledge of any formal criminal charges pending against Richard Nixon prior to issuance of the pardon?" I would respectfully suggest that it is a matter of common knowledge that no formal criminal charges were pending and it seems to me that question answers itself.

And as to the second question, "Did Alexander Haig refer to or discuss a pardon for Richard M. Nixon at any time during the week of August 4?", that question, it seems to me, ought to be addressed to Mr. Haig or General Haig rather than to President Ford.

And if the gentlewoman will take the time when she has the document available again to go through the transcript of Mr. Buchen's press conference of September 8, and I think some of the other documents, including the President's statement also—but I happened to go rather carefully through Mr. Buchen's conference of September 8—I think that the gentlewoman will find that there are answers given there to every question she asks with the exception of No. 2 about General Haig and No. 6 about Governor Rockefeller. I merely make these observations for the record at this time.

Ms. ABZUG. May I respond to that, Mr. Chairman?

Mr. HUNGATE. The gentlelady may.

Ms. ABZUG. Mr. Dennis, it is my understanding as a lawyer that charges can be pending before a grand jury without an indictment having been issued and my question, No. 1, was directed to that issue. Before you came in, Mr. Dennis, I indicated that I have made some review of the press releases and press conferences that were included in the President's answer, although not as thorough a one as I would like to have made, given the time I had, I answered previous to your coming in that on that question, for example, there is only one statement related to that question. Mr. Buchen—in his September 10 press conference stated—that he received a listing of some charges from Mr. Jaworski in confidence and we know nothing else about that. So that there is certainly not a complete answer to No. 1 from the materials which we have been given.

I also explained to the chairman before you came in that after having reviewed my questions in the resolution of inquiry as against the material that I reviewed, I could find no question that was answered fully, one or two questions were only partially answered, and most of them were not really answered at all by the materials that were presented. I asked permission of the Chair to include some additional analysis of that before you came in. So I disagree with that.

And with respect to Haig, I think that he played a role in both President Ford's short administration and Mr. Nixon's, and there is some indication that he played some role in the transition and further, I think it is a very critical question and Mr. Ford can ask Mr. Haig what role he played or this committee can ask Mr. Haig what role he played by bringing him before them. So this question has not been answered.

Mr. HUNGATE. I thank the gentlelady and the gentleman from Indiana and I suppose it will be for the subcommittee ultimately to determine those questions.

Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I want to commend my colleague from New York for introducing this resolution of inquiry which I have cosponsored, because I share the concern that is reflected in this resolution of inquiry; namely, that the suspicions that have been generated in the public about the integrity of governmental processes ought to be laid to rest and that confidence of the public in the integrity of governmental process is important for this Congress to preserve.

I am glad to see that you will be introducing for the record an analysis of President Ford's press statements in terms of whether or not they respond to the questions asked by the resolution. I just wanted to draw your attention——

Ms. ABZUG. I just want to say, if I may interrupt you, Ms. Holtzman, that is without prejudice to my position that this is not the way one should respond to these questions.

Ms. HOLTZMAN. Well, in light of that I wondered if you reviewed the question that is posed in your resolution of inquiry regarding health and the role that it played in the pardon and the answers given by President Ford in his news conference. I refer you to a statement on page 3 in which President Ford in response to a question regarding the reports that he, Mr. Ford, received on Mr. Nixon's health—said "I have asked Lukash to keep me posted in the proper channels." I am just quoting portions. "And I am not at liberty to give any information as to the reports I have received." Subsequently in this news conference, he states that basically the information on health was received from press reports that he had read in the newspapers. For example, on page 4 he said "I could not be oblivious, however, to the news accounts I had concerning the President's health."

Would you agree that even this conflicting statement regarding the information that Mr. Ford had respecting Mr. Nixon's health, gives further impetus to the need for the passage of this resolution of inquiry?

Ms. ABZUG. Well, yes, I do very definitely. The thing that struck me was that it was unclear to me on what basis Dr. Lukash, who I believe is Ford's physician, made the statement he did about some general reports, having not examined Mr. Nixon or anything.

The report generally is replete with statements on the health issue in a very strange way, that the President says he put in some statements on health on his own. The basis for this appears to be merely some statements that he has read in the paper. So the whole issue is a very, very critical issue and very much in doubt because as far as I can tell, the pardon is grounded on a theory of mercy. I do not see many other factors in it and I am not too sure what was the compelling reason. The health issue is a very confused one and I think

you are quite right in pointing that out, nor do the documents which have been presented to us by President Ford in any way clarify this issue.

Ms. HOLTZMAN. Are there any other questions respecting the Presidential pardon that you think ought to be inquired into, aside from the questions contained in your resolution of inquiry?

Ms. ABZUG. Well, they are primarily legal in nature. Most of the other things that I think I have referred to I have already mentioned in today's testimony.

Ms. HOLTZMAN. I again want to thank you for your testimony and for the contribution that you have made. I think it is especially important that we in the Congress get the facts respecting the pardon, especially in view of the nature of the agreement that was made with the former President in which additional information will have difficulty in being exposed, and in view of the fact that there was apparently no attempt to deal with the Special Prosecutor to insure that he would have the right to disclose materials or would have the right and access to review all Presidential documents and the like. So I again want to commend you and thank you for your contribution.

Ms. ABZUG. Thank you.

Mr. HUNGATE. If there are no further questions, we thank the gentlelady very much.

Mr. CONYERS. Pardon me, Mr. Chairman. I arrived late but I would like to inquire——

Mr. HUNGATE. The gentleman from Michigan.

Mr. CONYERS. I appreciate the opportunity to sit on this subcommittee, even though I am not a member and it is my view that the gentlewoman from New York has presented the clearest examination of the problems that we are confronted with and I think has very logically analyzed each of them.

She has no doubt noted that my resolution of inquiry differs from hers in that it does not specifically set forth the questions. I think that between the two of them they would form a very adequate basis for an inquiry that is apparently necessary—necessarily must come forth from this particular committee and the Congress.

I am especially impressed by your evaluation of the areas of concern, the agreement of the tapes, the methods by which you suggest that we review the legitimacy of the pardon, especially in connection with the urging of the Special Prosecutor to sign the indictment that has already—that was already attempted by citizens perhaps less informed of the law but more determined that the facts would be brought forward. That would be to me a very important and significant step forward in this whole matter. And so I would ask you, have you considered additionally—the only thing that you have left out, as I review your testimony and additional comments, was the fact that eight Senators had sent unanimously a letter to I believe it was the Special Prosecutor. Do you not think we might want to consider that even among this committee or among Members of the Congress who share your view?

Ms. ABZUG. Sending a letter with respect to the agreement on the tapes, are you now saying, or with respect to proceeding with the indictment?

Mr. CONYERS. Well, I am in the process of securing the letter that the Senators sent. It was to Jaworski and I believe it was concerning

itself with the method of preserving the evidence from his work as Special Prosecutor.

Ms. ABZUG. Well, let me just tell you what I have done. I have myself written a letter to both Attorney General Saxbe and Mr. Jaworski indicating that it was my view that it was their responsibility to allow the grand jury to proceed with its indictment if one was forthcoming and for them to sign it. I do not believe that the pardon is legally sustainable, but if it is, then Mr. Nixon would want to plead this pardon as a bar to the indictment. This would provide the courts with an opportunity to determine this important constitutional question.

I also believe that the agreement on the tapes should be set aside. I think that the GSA lacked the jurisdiction to sign away property belonging to the United States. There has been no legal determination that it is the property of the President and until such time the tapes are the property of the United States and thereby the Congress has power over them.

The legality of the pardon is a serious question that ought to be determined by the courts. I have indicated this to both Attorney General Saxbe and the Special Prosecutor. Therefore, I concur with what District Judge Richey has said, that the pardon itself may raise a very important legal question as to whether the President by virtue of having issued this pardon is in excess of his authority under the Constitution. Moreover, he may have also interfered with the charter establishing the Office of Special Prosecutor which provides that the President cannot interfere with the discharge of the duties of the Special Prosecutor without the consent of certain named persons, the majority, minority leaders, and I think this committee chairman and other chairmen. So I think these are the three areas of very considerable concern that the committee should address itself to. The answers to many of these questions may produce further questions of the abuse of power, obstruction of justice, and issues of that kind.

Now, I have not raised this but I have heard others raise the question and answer if I may, Mr. Conyers, one other question as to whether or not the action on this pardon represented any form of conflict of interest on the part of the President in having granted a pardon to somebody that made him the President of the United States. You know, there are other questions like that, in answer to you, Mr. Conyers, and to, Ms. Holtzman, in your question that I have not gone into. I have tried to outline what I thought factually and legally were the propositions that this committee should consider in connection with the resolutions before it. But as far as the resolution of inquiry is concerned, which is the resolution that I have introduced, my objective there is to see to it that once and for all we have a right in the Congress to address, and it is our highest prerogative to address, the executive branch, to address our President and say we are concerned, we want to have these specific facts answered by you. This is a very serious resolution and I think that we have a serious responsibility to get answers to these questions and that is why I favor this committee acting to favorably report this resolution to the full committee.

Mr. CONYERS. My time is just about up, if it is not. Would you object if the resolution that I have introduced would be accepted by this committee and then we would use those questions that you have framed so brilliantly in your own resolution? I mean, would that not be con-

sistent with the whole idea of what we are working toward because we would then be able to go even beyond those questions?

Ms. ABZUG. Well, I do not—the committee has before it this resolution of inquiry and it has your resolution of inquiry. I think as far as the procedure is concerned, Mr. Conyers, the committee, of course, has a right to vote for any resolution it chooses, whether it is in this form or the form in which you have it. It is not within my province.

The question was raised before you came in, I think, Mr. Conyers, as to a procedure. I recommended that there be favorable action by this committee on this resolution of inquiry, because the questions have to be asked. When the resolution is acted on, you have then a directive, a request to the President to answer the questions. Right now we are in an informal preliminary stage. The committee should act favorably on the resolution and recommend that the full committee do likewise and then report it to the floor.

If, on the other hand, the chairman proceeds in the way that he suggested, I may not have to reach your question yet. The chairman has asked me whether it would be consistent with my view or the process of the resolution for him to continue these proceedings next Tuesday and try to get additional testimony, perhaps witness testimony, in addition to some questions answered from the White House. I said that, of course, if I felt that the matter was being processed vigorously I would not—I added "vigorously" now; I did not say that before, Mr. Chairman; I do not want to trap you as to what I said or did not say; but I meant that—that, of course, I would try to cooperate as much as possible. But I do not know whether or not I want to exchange resolutions at this point, if you do not mind, Mr. Conyers, but based upon our respect for each other as colleagues and our common objective I am sure those problems can be solved as we go along.

Mr. CONYERS. That is the spirit. Thank you very much.

Ms. ABZUG. But I give up no rights.

Mr HUNGATE. The time of the gentleman has——

Ms. ABZUG. It is a privileged resolution which enables me to call it up to the floor after 7 legislative days following its introduction.

Mr. HUNGATE. The Chair understands the gentlelady's statement and I had a partner of whom the judge used to say he never lost a suit. He did not win them all but he never lost one. I understand the position.

We are anxious to proceed along. I would say, Mr. Conyers, that we do hope to go forward again on the next—a week from today and in the exercise of the duties entrusted to this committee and mindful of the fact that resolutions are sometimes voted down as well as up, we want to show that we have proceeded in a thorough and careful manner before making any demands on the committee again to exercise what I would consider an awesome power in the Congress, although if we find ourselves next week where we find ourselves today I would not hesitate to use it.

I thank the gentlelady for her testimony.

Ms. ABZUG. Thank you, Mr. Chairman. I appreciate very much your courtesy and the time and consideration on this important matter.

Mr. HUNGATE. Thank you.

The next witness, and we thank him for his patience and the good work he brings to the committee, is Mr. Koch of New York.

All right, Mr. Koch. We will be pleased to hear you. You have a prepared statement. It will be, without objection, accepted and made a part of the record at this point and you may proceed as you see fit.

TESTIMONY OF HON. EDWARD I. KOCH, A REPRESENTATIVE IN CONGRESS FROM THE 18TH CONGRESSIONAL DISTRICT OF THE STATE OF NEW YORK

Mr. KOCH. Thank you, Mr. Chairman. I appreciate the courtesy the committee has extended to me by inviting me to participate in today's proceedings. I would, with your permission, rather than read my formal statement have it filed as you suggest and then merely comment on it.

Mr. HUNGATE. You may proceed as you see fit.

Mr. KOCH. Fine.

The statement, Mr. Chairman, covers four points. It covers public access to the Watergate tapes. It covers continuation of the Jaworski investigation of the former President. It covers a court test of the Nixon pardon and it covers a resolution on no further Watergate pardons.

Two of those items, public access to the Watergate tapes and no further Watergate pardons, are the subject of a resolution and a bill which I prepared and which has been cosponsored by a number of our colleagues.

First, let me address myself to those two items.

Public access to the Watergate tapes is addressed in H.R. 16750. This bill provides for public access to all Watergate-related facts produced by any investigation conducted by any Federal executive office and to all Watergate-related documents which were produced from January 20, 1969, through August 9, 1974, and which were in the custody of the United States on August 9, 1974.

It seems to me, Mr. Chairman, that we cannot tolerate the current situation which if it continues will permit an erasure of the historical facts in this matter. This has occurred in other governments, such as Nazi Germany and the Soviet Union, where people became nonpersons depending on their political position at that particular moment in time. But our country I think should not emulate that and if we permit the tapes from Watergate and the other records to be destroyed as appears to be permissible under the agreement entered into by the GSA and former President Nixon, we will be permitting the erasure of history.

I think it is incumbent upon us to terminate that agreement. I believe that agreement is possibly a violation of the Constitution. In any event, I believe it to be illegal and not binding. While the Government may enter into an arrangement with respect to the preservation of property held by it, there is nothing under the law that permits it to enter into an arrangement for the destruction of such property. And, therefore, I would urge that H.R. 16750 be adopted by the subcommittee and reported out. I would urge just one modification of the bill and that appears on page 2 and comes about as a result of a suggestion by a member of the full committee. To the phrase on page 2 which provides that access shall be given as soon as practicable in

an adequate and effective manner, the phrase "subject to due process" should be added.

The reason that that additional language is added to the bill——

Mr. HUNGATE. Pardon me, Mr. Koch. Would you go over that change again on page 22? What line?

Mr. KOCH. The bill is very short so with your permission, I will read it.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that (a), the President of the United States shall, except with regard to matters clearly vital to the national security interests of the United States, provide as soon as practicable full public access, in an adequate and effective manner,

and I am suggesting that the words "subject to due process" be inserted at that point. And then it goes on.

Mr. HUNGATE. You are at the top of page 2, line 1?

Mr. KOCH. Yes.

Mr. HUNGATE. And after the word——

Mr. KOCH. "Manner", insert "subject to due process" and the purpose is to make certain that possible prospective or current defendants are not having their rights violated as a result of information which would be adverse to them. Materials related to current or prospective trials should not be available publicly until after the regular trial procedures.

The second matter to which I want to address my remarks concerns House Concurrent Resolution 632. That is the original number. It is the same as House Concurrent Resolution 643 which has 20 cosponsors.

This resolution expresses "the sense of the Congress", and I am now reading, "that the pardon of Richard M. Nixon was wrongful and premature, and that no further Watergate-related pardons should be granted prior to indictment, prosecution, and conviction, and then only on an individual basis where warranted by special circumstances."

A comparable resolution was adopted in the Senate on September 12.

Now, with respect to other resolutions which are before you, I support the Gude resolution which would urge continuation of the Jaworski investigation. I am for the resolution of inquiry that Ms. Abzug has described. I am a cosponsor of that and I support that as I would the Conyers resolution in the same vein.

Now, I think a key point, Mr. Chairman and members of the committee, is this. There is a myth in the making that will in fact become accepted unless this committee takes action. The myth is that the former President was driven out of office. I was here earlier today when our colleague, Mr. Hogan, made reference to the fact that in the State of Maryland many people do not believe that the former President was guilty of impeachable offenses, and that in fact he was driven out of office by a small band of radicals.

This committee, having been the operative committee which came in unanimously on at least one of the articles of impeachment, knows how far from the truth that is. But the fact that something is not true does not mean it will not be accepted by the public. I think it is our job in the Congress to make certain that the public learns the truth by having access to the facts. We have a situation now where the President is receiving all of the emoluments of office as though he had done a good job and had left office not under a severe cloud. Indeed, I suspect that he would not only have been impeached but he would have

been indicted and I think that may still yet occur. The Congress retains the power of impeaching Mr. Nixon and the Watergate grand jury can still indict him. Instead of being viewed as someone who left office unwillingly, he and his followers are now creating the myth that he was driven out of office.

We have to stop that and we can stop that by pursuing a number of courses of action. If we do not stop it, two things will occur aside from the myth. One is that he will get his pension. I consider it an absolute outrage that the former President should get a Presidential pension after having violated his oath of office grossly and having left under the circumstances that he did. We must undertake action to prevent that.

Secondly, Mr. Nixon can run for office again, and I believe, knowing him and his band of followers, that it is conceivable that he would run for office in 4 or 6 years. I do not know what office that would be. Maybe it would be Senator from California. I suspect and hope that the people in California would reject such a candidacy, but at this time there is nothing that would prevent it. The fact is that we have permitted this possibility because we did not pursue the impeachment proceedings to the very end. If we had done that, then he would not be eligible to hold any public office.

I am suggesting that we should pass the bill which relates to the preservation of the material. If there is a legalism raised that this is private property, I do not accept that legalism because it was done on Government time by Government employees with Government money. But assuming for a moment that we were to accept that argument, let us exercise the power of eminent domain. We have done that in the past in the Kennedy assassination. The U.S. Government, as I understood it, took possession of the rifle which belonged to the widow of the assassin who did not want to relinquish it. The United States took possession of the rifle under its power of eminent domain. Therefore, assuming for a moment that the President has some legal title to these tapes, which I deny, let us pay him for it. In any event, we ought to exercise that power.

And then, even though we believe that President Ford has no thought of further pardoning other convicted or current defendants in the Watergate proceedings, we ought to go on record—the Senate has already gone on record—as being opposed to such future pardons. My resolution, while not denying that the President has the right of pardoning after prosecution and conviction, states that such action should not be taken except on an individual basis and when warranted by special circumstances.

So, Mr. Chairman, and members of the committee, just to conclude my own testimony, I am honestly concerned about the possibility of history carrying a false story 20 or 100 years from now. The memory of man fades. It is the written record that prevails. That is what history is. It is the written record of mankind. I am afraid that history will not carry the truth unless these records are preserved.

On that I would conclude my testimony, Mr. Chairman.

Mr. HUNGATE. Well, on behalf of the committee, I thank the gentleman for his contribution and constructive suggestions and I think it is helpful to the committee to have before it various remedies to deal with what seems to be a somewhat unique and certainly complex problem.

Let me ask one question before I yield to Mr. Kastenmeier.

Congressman McKinney, in his testimony said something to the effect that you might make copies of tapes, copies of documents, and then the fellow can keep the originals. How does that suggestion strike you or is there a flaw somewhere?

Mr. KOCH. I would have no objection myself but I think for historical purposes it is better to keep the original and I think that can be done while providing him with the copies.

Mr. HUNGATE. He was seeking to avoid the determination of property ownership.

Mr. KOCH. I do not think it is really a problem under the power of eminent domain.

Mr. HUNGATE. Yes. That is a separate remedy. Yes.

Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

In your resolution, House Concurrent Resolution 643, you state that the Senate adopted a similar resolution. In what respect does it differ and why is it different than the Senate resolution which was passed?

Mr. KOCH. It is my understanding, a member of my staff tells me, that it makes no reference to the pardoning of the former President but addresses itself to future pardoning in the Watergate situation.

Mr. KASTENMEIER. That is the Senate resolution?

Mr. KOCH. Yes, sir.

Mr. KASTENMEIER. Because that would seem to be—a resolution either of the character of the Senate or the one you have would seem to be a reasonable undertaking by the House, the Senate by at least 2 to 1 margin having passed that, I believe; is that not correct?

Mr. KOCH. That is correct. The vote was 55 to 24 on September 12.

Mr. KASTENMEIER. I understand you to say that you thought the court challenge of the Presidential pardon was a desirable end.

Mr. KOCH. Yes.

Mr. KASTENMEIER. But you had not provided for it in either of the—in either of the bills, apart from the two bills you have introduced?

Mr. KOCH. I think the thrust of the Gude resolution is the continuation of the Special Prosecutor's investigation and I would assume that would include the testing of the pardon. But I have not introduced a separate resolution. I think it is very key that we do test that, and as has been related by the prior witnesses, Judge Richey announced that he may very well do that in the *McCord* case.

Mr. KASTENMEIER. Yes. I referred to that this morning. In other words, no bill or resolution before us provides for that challenge but nonetheless, you feel it is either under the resolutions or quite apart from the resolutions a proper course of action.

Mr. KOCH. I do, indeed.

Mr. KASTENMEIER. I thank you. I want to commend the gentleman for his initiative.

Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Koch, I thank you for your statement. I was very interested in your suggestion of using the power of eminent domain to acquire tapes and documents, and so forth, in case it should be held that President Nixon was the owner of them. It is an interesting thought.

I thank the chairman.

Mr. HUNGATE. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

Mr. Koch, I am pleased to have you here. You always make a great contribution. I certainly have no problem with House Concurrent Resolution 632 and I certainly think we should enact that right away. It would be very important if the President should decide to go ahead with a basketful of pardons with Watergate-related people.

However, Mr. Koch, when you express alarm that down the road people are going to say that President Nixon was railroaded and he might run for office, I am afraid I might leave you there. The report of the House Judiciary Committee was total and thorough insofar as his guilt was concerned, as far as the 38 members are concerned, and the Watergate portion of the impeachment was in the view of some of us not the most important part, that the impeachable offenses that were not included in Watergate were even more serious than Watergate itself.

Speaking as a Californian as to whether or not he might run for office, I broached that to one of the incumbent Senators and he said I am going to lick my lips looking forward to such a contest, and I certainly think we can trust the people of California or any other State.

There is a certain atmosphere here today that disturbs me a little bit and that is, and I like your observations on it, not just with your bills because they are good bills and so are the others, but, yes, I think most of us would agree that it is unfortunate the House did not go ahead with the impeachment, the Senate did not go ahead with the trial, because we found out that we are sorry now because of the pardon that President Ford gave to Mr. Nixon. But those two affairs were disconnected and we are stuck with history.

Now there is a very real effort to go back and avoid the constitutional processes again and ordinary procedures, taking steps which have no precedents, and even perhaps having a minitrial, a minicriminal trial. That is what one of the bills really has in mind, having Jaworski issue a report that finds him guilty without any defense lawyers, and so forth. And I am not saying it is all bad because I think public officials should be held to a much, much higher standard and especially in this case where the efforts to hide were so terribly important.

Now, insofar as H.R. 16751, you are just interested in the Watergate-related documents and tapes. Now, what about all the thousands of other tapes that are around somewhere?

Mr. KOCH. Well, obviously, I would want to preserve all materials related to the Presidential record which ultimately caused this committee to recommend articles of impeachment. Obviously, I am not privy to the other matters which this committee is and I certainly would support the inclusion of any other relevant documents that this committee in its good judgment believe should also be preserved.

Mr. EDWARDS. What would you think of a proposition where all of the evidence from Mr. Jaworski's office and all of the tapes would be turned over to a committee, either this committee or another committee for appropriate consideration and for appropriate release to the public? Would that satisfy you?

Mr. KOCH. That certainly would. I would like to comment on something that you said earlier. If I understood you correctly, you do not believe that there is a myth growing with respect to former President Nixon. I believe there is. I have talked to people who have conveyed such feeling. Mr. Hogan attested to it earlier this morning. But I want to give you an even better illustration of how convinced I am that this myth is growing.

It has already started with former Vice President Agnew. If you interviewed people across this country and asked them if he were convicted of crimes warranting his removal from office, I do not know the percentage but it would be a substantial number who would say no, that he had been railroaded, that he did not even plead guilty, because they do not understand the nature of the nolo contendere plea. And the fact is that Spiro Agnew is running around this country a very busy businessman. I am sure he is being retained because people think he has great contacts. I hope it is not true, but the fact is, that is what people undoubtedly assume because he was the Vice President.

This attitude will occur to an even greater extent with respect to former President Nixon who, one, was not even subject to the court process as Agnew was, and two, when granted the pardon refused to acknowledge criminal guilt. If he had done so, it would not have influenced my views on the legalistic arguments in the case, but from a compassionate sympathetic point of view, it might have. However, he did not. When President Ford held his press conference I hoped he would say categorically that Nixon was guilty. He did not. I listened to his words very carefully. He really skirted that point by saying, yes, there are reasons for taking such a position. It was a very ambiguous statement. Five years from now how many people will have read the enormously important report of this committee? Very few. Very few. It is quite a comprehensive report, very tough to get through.

All I am saying is that this Congress did not even accept the report in the sense that it should have by saying we affirm its conclusions. We should have done that. Such an action would have marked it but we did not do that, if you will recall. All we did in effect was to say, well, we could print it. I am on the committee which permits the printing and authorizes it, House Administration. That is really what this Congress did. It said you can reprint the committee's report.

I think we have to do something much more solid and a number of these resolutions and bills have a similar objective.

Mr. EDWARDS. Thank you.

Mr. HUNGATE. If I understand the gentleman from California correctly, he does not believe we will have Dick Nixon to kick around any more politically and my hopes are with him and my fears are with your mythical proposals.

Mr. Dennis, please.

Mr. DENNIS. Mr. Koch, you are familiar, of course, with the opinion of the Attorney General of September 8 of this year in which he holds that both practice from time immemorial by all three branches of the Government and recognition thereof in effect by the Presidential Libraries Act establishes that these documents, tapes, papers, et cetera, are in fact the private property of Mr. Nixon, are you not?

Mr. KOCH. I am familiar with it. He is not the court of last resort. It is a practice and not legislation.

Mr. DENNIS. He points out, however, that it has been the practice since the early days of the Republic and that practice is recognized in the terms of the Presidential Library Act, a rather recent statute. You recall that.

Mr. KOCH. All I am saying, Mr. Dennis, is that there is no definitive court decision or legislation on that matter, or we would not be here today. It is of sufficient import that this question be decided. More importantly—assuming that everything that you say is correct and those are his papers, you will agree with me that under the power of eminent domain, the United States has the right to seize them and pay him for it.

Mr. DENNIS. I certainly agree with you that the Government can condemn public property in a proper case under the power of eminent domain, private property, I mean, and on the payment of adequate compensation. In doing so you would, of course, recognize that they were in fact private property.

Mr. KOCH. If the court so decides then we should pay him.

Mr. DENNIS. You say in your resolution here that the pardon was wrongful and premature. Premature, I can understand the meaning of. By wrongful do you mean illegal or merely that you do not think it ought to have been done?

Mr. KOCH. I believe the pardoning of the former President prior to indictment, prosecution and conviction was wrongful in two senses. One is really not the subject of debate because it is a question of how you view it from a moral point of view and we could come to different conclusions on that.

I take the position that it was an immoral act. That is No. 1.

With respect to the legality of it, I am saying that it is a questionable act which can only be disposed of ultimately by the Supreme Court deciding in this case whether the pardoning power was exercised in a manner consonant with its constitutional prerogatives. So I say that question is open.

Mr. DENNIS. Would you not agree that the Supreme Court in *Ex parte Garland* did hold that it was legal to issue a pardon before any conviction or indeed, any charge?

Mr. KOCH. There are two responses that I would have to that. One is, I would refer you to what the prior witness, Ms. Abzug, said in discussing the legal aspects and other matters and drawing a distinction between pardoning and amnesty. That is her answer and I concur with it.

I will give you a second answer. The Supreme Court has never considered itself infallible to the point where it has never taken a position—where in fact it has changed its position in various matters.

Mr. DENNIS. Well, the court can reverse itself.

Mr. KOCH. Yes.

Mr. DENNIS. We all know that.

Mr. KOCH. Right.

Mr. DENNIS. Until it does it supports the law.

Mr. KOCH. Right, but the question I am raising here is whether under these very special circumstances the President exercised a duly authorized constitutional power or whether he abused it. I believe he abused it but it would take the Supreme Court to make that ultimate decision and all that I am suggesting is that they be given that opportunity.

Mr. DENNIS. Let me ask you as a liberal and a man of good will if you do not feel that in advocating the idea that the former President should be legally, if I understood you, prevented in some fashion from running for office should he wish to, that you are practically advocating what we call a bill of attainder.

Mr. KOCH. Oh, no. I am advocating that we do to him what we would have done had he been formally impeached and convicted, which should have occured, in my judgment. I am also saying that under the existing state of the facts that is not beyond the power of the Congress today. It may be that the Congress will not bring itself to exercise that power. I believe we should. But I am not promoting an argument that violates our Constitution. Indeed, just the antithesis. The Constitution provides that when a President is impeached and convicted he shall not be eligible for public office. Would it not be an outrage if Richard Nixon ran again?

Mr. DENNIS. I think in my reading that the Constitution provides that the Senate on a conviction could, if they wished, attach an ineligibility for future office but that they do not have to, and while it seems to me unlikely that Mr. Nixon will be elected to office again, if the people of the State of California or some other State wanted to return him, it might be that they would be equally entitled to do that, that the people of New York were to return Adam Clayton Powell, for instance, which was very eloquently argued before the House by people who said we had no right to determine for the people of the State of New York that matter.

The chairman says my time is up. I would love to talk to you further.

Mr. HUNGATE. The chairman would love to listen to it for that matter. The legal caliber of the discussion between you two gentlemen on the Supreme Court is so great I think you are probably separate but equal.

Ms. Holtzman, please.

Ms. HOLTZMAN. Thank you very much, Mr. Chairman, and thank you, Mr. Koch, for the very forceful and incisive testimony that you have given.

I want to ask you a question about your concurrent resolution because I basically agree with it, and, for purposes of legislative history, I want to ask you what you mean by the word "wrongful" in that resolution, 632.

Mr. KOCH. The word "wrongful" there is the sense of the Congress that it was both wrongful in a moral sense and in a legal sense.

Ms. HOLTZMAN. You mean that he should not have done it.

Mr. KOCH. Yes.

Ms. HOLTZMAN. That is what you mean.

Mr. KOCH. Yes.

Ms. HOLTZMAN. But you are not implying that there was any so-called deal?

Mr. KOCH. No. That is not what I am suggesting. I am not suggesting base motives in this resolution.

Ms. HOLTZMAN. I just wanted to clarify that for the record.

Mr. KOCH. Yes.

Ms. HOLTZMAN. Second, with respect to the bill that you have introduced, do you view it as overriding the agreement that President Ford entered into with Richard Nixon?

Mr. KOCH. Yes, I do.

Ms. HOLTZMAN. And when you use the terms "Watergate" and "Watergate-related matters" in here, are you referring to the whole spectrum of misconduct that took place in the Nixon administration by him and his aides?

Mr. KOCH. I am referring to——

Ms. HOLTZMAN. Specifically?

Mr. KOCH (continuing). Every item that was the subject of your original inquiry on the subject of impeachment.

Ms. HOLTZMAN. Is there any reason, then, that you allow for the continued nondisclosure of matters dealing with national security interests?

Mr. KOCH. Well——

Ms. HOLTZMAN. The reason I raise that is because one of the things we did see in our impeachment inquiry was the abuse of that term by Richard Nixon and, in fact, the use of that term for the purposes of coverup. It is hard to see where national security interests are related or affected by disclosures in the Watergate case: Tax matters, campaign contributions, the plumbers, and the like.

Mr. KOCH. Of course, I did not hear every tape and, therefore, I am not privy to the information which you have because you did hear every tape. But I was concerned that there have to be safeguards for the vital interests of the United States. I am not talking about the criminal acts of the President in any of the matters that came before your committee. I am talking about possible matters of which I have no knowledge and which ought to be protected. Of course, you come to the question of can you protect against an abuse of power.

I have to work on the premise that every law can be abused by bad legislators or bad executors because they are the ones who enforce the law. I also have to work on the premise that unless and until you are convinced that that individual is a base person or desirous of violating the law, that you have to proceed in good faith. You have to say that those who are duly elected to office with certain constitutional prerogatives deserve our good faith. While you will question them when you think you should, unless there is a pattern which causes us to initiate a new impeachment proceeding, I believe that to take the position that we can never permit national security to be a consideration because the President and his administration decide what national security is would mean that we could not function.

Ms. HOLTZMAN. When you said your bill would abrogate the agreement entered into between Mr. Ford and Richard Nixon, you are saying also that all aspects of that agreement will be abrogated, including the transfer of materials from the White House——

Mr. KOCH. Yes.

Ms. HOLTZMAN [continuing]. To this so-called vault in San Clemente?

Mr. KOCH. Yes. All aspects. Permission to destroy them, turning them over to him—all aspects would be abrogated.

Ms. HOLTZMAN. I have no further questions. Mr. Chairman.

Mr. HUNGATE. Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

Mr. Koch, you expressed considerable concern about what would be the eventual judgment of history in this case and are afraid that the

historic record might be distorted in some way. Are you familiar with the interview in depth with the distinguished majority counsel of the impeachment committee, Mr. John Doar, which appeared on this subject in the New York Times about 10 days ago?

Mr. KOCH. I did not have occasion to read it, so I cannot comment on it.

Mr. MAYNE. Well, to reassure you, I think I am paraphrasing what Mr. Doar said correctly, but he had a very strong feeling that the record which had been made before this committee and which has been published together with the admissions which were made by the former President on August 5, 1974, are irrefutable and are so clearly established as the historic record that to his mind, at least, he has no misgivings that there could be a distortion subsequently which would lead people to believe that the President, former President Nixon, would not have been impeached if brought—if the matter had been brought to the floor of the House and would not have been convicted in the Senate. And, of course, he is quite an eminent authority with members of this committee, at least, and had reached that judgment apparently after very considerable and deliberate thought.

Mr. KOCH. May I comment on that, Mr. Mayne?

Mr. MAYNE. Surely.

Mr. KOCH. I know John Doar. In fact, I consider him an old friend and I worked with him in the city of New York in a number of areas. He is a brilliant lawyer and he is a scholar. But he is not someone who runs for public office and has the feeling for what people are thinking. He may very well be right, and I suspect he is, that those people who have read the 43 volumes of published Judiciary Committee evidence, the scholars who will go to the libraries, they know what Richard Nixon did. They know that he would have been impeached had we continued the impeachment proceedings.

But there are so many people who never read the proceedings, who really do not have a conception of what it was all about. Harking back to former Vice President Agnew—people are accepting Agnew's statement. Some people will also accept the statements of former President Nixon's supporters.

I would be surprised if you have not received mail like this because I know I have and my district I think is like any other district. Letters come from people who support former President Nixon today and who attack me for my having been for his impeachment.

I would be surprised if there are members who are sitting here on this committee who today are not yet receiving such mail from at least a limited number who believe that the President was railroaded by a small group of people in this Congress.

Mr. MAYNE. My memory may be playing me tricks but is not your district the one which at least used to be referred to as the silk stocking district?

Mr. KOCH. Yes. My district was Republican until I came along.

[Laughter.]

Mr. MAYNE. Well, at the risk of losing the Republican character of my district, I would like to invite you out there sometime to see northwest Iowa and I think you would find that there are some differences with advantages both ways between our two districts.

Thank you.

Mr. HUNGATE. I thank the gentleman.

Mr. Conyers?

Mr. CONYERS. Mr. Chairman, I wanted to make an observation which our distinguished colleague from New York might want to comment on because in his arguments he has raised I think very clearly an honest difference of opinion that my good friend Don Edwards has some hesitancy about, but I think it is very important, that there is a myth that is developing. The Maryland elections are clearly demonstrative of that fact. So is my mail and so are the kinds of conversations that I get.

Of course, our accolades to John Doar have piled higher than the Rayburn Building but it is a little bit understandable that John Doar would think the matter ought to be sufficiently closed. It is not surprising. I would be shocked if I were to read that he felt that an incomplete job had been done and that there was something else required.

But you raise a very fundamental consideration and it is what brings this subcommittee back into action. It is gnawing in different aspects away at many of the members, that this job has not been completed and we are saying that without any detriment to this Judiciary Committee and the impeachment work.

The door has been opened by the hand of the President and I am a little bit worried. I do not know California. I know some of the vagaries of the politics of California. Maybe Nixon cannot get elected out there. But if he had been impeached he would not be able to run. If he had been indicted there would be no real possibility of him standing for office again. And I think, in closing, your notion about eminent domain has some great merit and I think you have argued in behalf of your resolution most ably.

Mr. KOCH. Thank you.

Mr. HUNGATE. I thank the gentleman from Michigan and the gentleman from New York for his contribution.

The committee has one witness to complete this afternoon. We will now recess until 3:15. Thank you, Mr. Koch.

Mr. KOCH. Thank you.

[The prepared statement of Hon. Edward I. Koch follows:]

STATEMENT OF HON. EDWARD I. KOCH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman and colleagues, former President Nixon is fast being granted all the benefits and honors of a national hero. Despite the circumstances under which he resigned, Mr. Nixon is receiving all the emoluments of a chief executive who has left office after distinguished service. I hope that your subcommittee will initiate swift action by the Congress that will make clear to future generations that crimes against the Constitution and the people by any President or other high officials will not be swept under the rug, as though they never occurred.

In your full committee's final report on impeachment, you stated your unanimous view that Mr. Nixon committed at least one impeachable offense, and a majority voted articles of impeachment on two other grounds. There is little question that he would have become the first impeached and convicted President in our history, and this is precisely why he was the first President in our history to resign. There also was the strongest probability that, in upcoming months, he would have been indicted for criminal activities.

The pardon by the President at this time was an affront to our judicial system. Your hearings on the pardon and related questions are a great service to the American people. I agree with Professor Philip Kurland of the University of Chicago Law School, acknowledged as one of the Nation's leading constitutional

authorities, who has argued that the constitutionality of granting the pardon prior to conviction should be challenged in the court. Professor Kurland argues that an individual cannot be pardoned before it is legally determined that he committed some crime for which he has been convicted. U.S. District Court Judge Charles B. Richey, in the McCord case now before him, has indicated that he may test the validity of the Nixon pardon.

It is incumbent on the Congress to take action. In pursuit of that, I have introduced a concurrent resolution (H. Con. Res. 643) stating the sense of the Congress that the pardoning of Richard Nixon was "wrongful and premature", and that "no further Watergate-related pardons should be granted prior to indictment, prosecution, and conviction, and then only on an individual basis where warranted by special circumstances." Twenty House colleagues have joined in cosponsoring this resolution, and the Senate adopted a similar resolution on September 12.

I also suggest that legislation be enacted directing the special prosecutor to proceed with his investigation of Presidential activities both in order to bring out the facts and to raise before the court the constitutionality of the timing of the pardon. Professor Kurland contends that if Mr. Nixon used his pardon as a defense against specific charges, this would define the crimes covered by the pardon. Kurland believes that the judge in the case would then be required to rule if the pardon were applicable, as he would rule on any defense motion. Upon the judge determining that the pardon is applicable Nixon would then be deemed guilty as a matter of record of the crime to which the pardon applies.

I also believe that as soon as consistent with fair justice, materials from Watergate-related investigations, including that of the Special Prosecutor, should be made public. I have introduced legislation, H.R. 16750, now before your subcommittee, co-sponsored by twenty-eight Members of Congress, to provide public access to all Watergate-related facts, documents, papers, and tapes produced by investigations by any Federal Executive Office, department, or agency, and all other related materials at the time of Mr. Nixon's resignation. Only by full knowledge of and availability to all the facts and records will the American people be assured that an administration cover-up has really stopped and that government officials are sincere in attempting to avoid the mistakes of the past. The only exception to full public disclosure allowed by the bill relates to materials clearly vital to the National Security interests of the United States and required for valid purposes to be sealed.

I believe that the Nixon Administration papers and documents belong to the United States, not to private citizen Nixon. The extraordinary factors behind his involuntary resignation from office mandate public access to the materials. I do not believe that resignation from office negates public access to the materials. I do not believe the agreement between G.S.A. and Mr. Nixon disposing of the Watergate materials to be constitutional or legally binding. Under articles IV of the Constitution, Congress has express power to "make all needful rules and regulations respecting the property of the United States." The materials in question were produced completely with public funds. In addition, the U.S. Code (44 U.S. Code Sec. 2108) states that although G.S.A. has authority to accept presidential papers and other historical materials, it shall negotiate "the right to have continuous and permanent possession of the materials." Nowhere is there mentioned any right to negotiate the destruction of materials, as in the Nixon–G.S.A. Agreement.

In the *Washington Post* of September 21, 1974, Professor Arthur Miller argues that "the agreement about destruction is a legal nullity." He also points out that Attorney General Saxbe's contention that there is a custom of past presidential ownership does not make such a custom legally binding.

If these tapes and other documents, for any present legalistic reason, cannot be subjected to public access, the U.S. Government should exercise the power it presently has of eminent domain and retain them, even if due process requires a payment to the former president for their value. That payment, if any, could be offset against what Mr. Nixon owes the Government on monies illegally spent on his estates. Such a procedure of eminent domain was used by Federal authorities to obtain the gun assertedly used by Lee Harvey Oswald to kill President Kennedy in 1963. The Government paid the value of the gun to a private individual who had bought it, retaining the weapon for U.S. Archives.

Above all, we must not allow the tapes and documents to be destroyed, selectively or collectively. Totalitarian nations, including Nazi Germany, have burnt

books and documents in an effort to distort the truth. In the United States, no one should have the right to erase the facts of history.

The reasons given by President Ford for the pardon shed insufficient light on the matter. First and foremost is the question, specifically what crimes was Nixon pardoned for? Mr. Chairman, I was pleased to learn of your recent letter to President Ford asking for elaboration on the matter and posing additional questions which must be answered. The resolution of inquiry introduced by Congresswoman Bella Abzug, if answered without evasion by the President, will provide the Congress and the people with information vital for them to make informed decisions and judgments in crucial matters. She deserves our congratulations for her initiatives, and I am delighted to be a co-sponsor of that resolution. I hope that the resolution is passed with rapidity. If the President responds to the committee's letter, the purpose of the resolution will have been served. This is a matter which requires immediate action and will not tolerate delay.

History must record the truth before the memory of man fades. The presidential pardon before conviction was, in my judgment, wrong, if not illegal. The Congress must reaffirm that no man is above the law, not even a President and his advisors. I am hopeful that you will report out legislation stating the sense of the Congress in this matter, and guaranteeing access to all the facts and records about this, one of the saddest episodes in our history.

I am reminded of the statement in the Gettysburg Address of 1863 which says we are a Government of the people, by the people, for the people. Today, the people want the facts surrounding Watergate, they are owed the facts, and it is the obligation of the Government to provide them. The President's constitutional power of pardon, is not, I submit, unlimited, and those who abuse it must be called to task.

[A recess was taken.]

Mr. HUNGATE. The committee will be in order and resume its sitting. We will now hear from Mr. Bingham. We welcome you Mr. Bingham. We appreciate your patience. And you have a prepared statement.

TESTIMONY OF HON. JONATHAN BINGHAM, A REPRESENTATIVE IN CONGRESS FROM THE 22D CONGRESSIONAL DISTRICT OF THE STATE OF NEW YORK

Mr. BINGHAM. I do, Mr. Chairman. I would like to summarize the first 3 pages and then possibly read the latter part.

Mr. HUNGATE. All right. Without objection, the complete statement will be made a part of the record and you may proceed. Anybody who waits this long we give him whatever he needs. Go ahead.

Mr. BINGHAM. Thank you, Mr. Chairman.

First of all, I would like to compliment you and the subcommittee for holding these hearings on what I consider to be a most vital matter.

The resolution which I have introduced and which is before this committee is one that would simply urge that the President not consider additional pardons until the criminal justice system has disposed of the various Watergate cases. While it is true that the President has indicated now that he will not do that it might be well for the Congress to proceed with some indication and expression of opinion of this sort. The President has changed his mind on these pardon matters in the past and might again, and I think it would be useful to have an expression of congressional opinion on the subject.

That is all I want to say on the subject of House Concurrent Resolution 629, which I introduced and is before this committee.

I would like to pass now to page 3 of my statement. The question which your committee and the Congress must now answer is how we should proceed to make the record totally clear and to have all the

facts brought before the American people of the Watergate affair and its related matters. There are some who argue that the House should impeach Richard Nixon and send his case to the Senate for trial. I have had some suggestions of that sort from my own constituents and it is not without merit since it would at least insure a definitive constitutional judgment of Richard Nixon's responsibility for high crimes and misdemeanors.

However, in my judgment, resumption of the impeachment process is not only unlikely, but it is also worth pointing out that it would provide a completed record of misconduct in only those areas covered by the articles of impeachment, when in fact the areas of wrongdoing are far more extensive.

It would be most useful, I believe, for the House Judiciary Committee to insist that its outstanding subpenas be answered and submit a supplementary report based on that evidence. As I have said since Mr. Nixon resigned, this relatively simple step would produce answers to a number of open questions about corruption and other misdeeds in the Nixon administration and about Nixon's personal responsibilities therefor.

A national commission of inquiry similar to the Warren Commission which investigated the assassination of President Kennedy has also been suggested as a means of completing the record of Watergate and related matters. I fear, however, that such a commission would mean long and unnecessary delays while its members and staff became familiar with all the details already revealed by prior investigations. Moreover, its findings might not achieve widespread acceptance. This, you will recall, was the fate of the Warren Commission report.

Most importantly, there are the Special Prosecutor and the Watergate grand jury with the capability of carrying through with a comprehensive review of Nixon's alleged offenses. Two weeks ago, a group of Senators led by Senator Edward Kennedy, urged the Special Prosecutor to include in the final report he must submit to Congress "a full and complete record detailing any involvement of the former President in matters under investigation by you." The Special Prosecutor responded to this suggestion by citing "substantial legal and ethical questions as to the statutory authority for the issuance of a detailed report on the matters you suggest."

I urge this committee to take immediate steps to grant the Special Prosecutor whatever authority he needs to present such a comprehensive report. However, I urge you not to take any action which might preclude the Watergate grand jury from issuing an indictment of Richard Nixon for any crimes he might have committed while holding the Office of President.

I believe that the grand jury not only has the power to issue an indictment of the former President, but also that it should issue such an indictment if the evidence justifies it, despite the pardon granted by President Ford. Although the public seems generally unaware of this point, the Presidential pardon power is nothing more than "an act of grace * * * which exempts the individual from the punishment the law inflicts for a crime he has committed" (*U.S.* v. *Wilson*, 32 U.S. 150 (1933)). In 1867, the Supreme Court ruled that a pardon, if granted before conviction, "prevents any of the penalties and disabilities consequent upon conviction, from attaching; if granted after conviction, it removes the penalties and disabilities." There is no legal

precedent, to my knowledge, for a Presidential pardon precluding a properly constituted grand jury from issuing an indictment.

If the Watergate grand jury were to issue an indictment of Richard Nixon, as it reportedly wanted to do many months ago, he could then come into court and plead the pardon to block further court proceedings. This would allow a court test of the legality of the pardon, as was only yesterday suggested by a U.S. district court judge.

Grand jury action and the Special Prosecutor's report together could tie up all the loose ends left hanging by earlier truncated investigations. These steps would provide the opportunity for filing formal criminal charges against the former President and a comprehensive statement of the evidence which supports those charges. Parallel action by the Congress to insure necessary access to the Presidential tapes and documents currently in the custody of the White House would also be desirable.

I would like to interpolate there that, since I have heard considerable discussion of that matter before this subcommittee this afternoon, I have introduced a bill which is before the House Administration Committee. This is H.R. 16454 and is similar to a bill introduced in the Senate by Senator Bayh and others which would require that all public documents of all elected officials, and that would include Members of Congress as well as the President and the Vice President, be turned over to the GSA within 180 days after they leave office.

I understand that a subcommittee of the House Administration Committee is going to have hearings on bills of this type early next week. I also understand that just today there was reported from the Senate Government Operations Committee a bill introduced by Senators Nelson, Ervin, and Javits, which would direct the GSA to obtain or retain all Nixon papers, which would prohibit destruction, provide for payment to Mr. Nixon if a Federal court were to decide the documents are the property of Mr. Nixon, direct the GSA to issue reasonable regulations permitting public access after all court proceedings have been completed, and giving Nixon unrestricted access and copying rights.

Difficult questions arise in connection with these various resolutions, questions which it may not be easy to resolve. I do not know that the law is clear that these papers and tapes, and so on, belong to the former President. I think by tradition they are turned over to him, but I do not know that that creates a property right; and I think that is something that will have to be determined at the appropriate time. But I am clear on this, that it is most essential that the Government continue to have control and custody of these tapes and the documents and that they not be turned over to Mr. Nixon in accordance with the agreement reached between him and President Ford; and to that end I believe that whatever legislation is appropriate to achieve that objective should be enacted.

Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you very much, Mr. Bingham.

If the committee will indulge me, I will read into the record a letter we just received from the White House and I think it is quite pertinent to the work you are carrying on.

The President has asked me to reply to your second letter to him of September 17, 1974, which concerns the disposition of tapes and documents compiled by former President Nixon and currently within the custody of the Federal Government.

These materials, as you know, are the subject of various subpoenaes and court orders and of request for disclosure by the Office of the Special Prosecutor. As a result, no further action is being taken to affect the disposition of such materials until after the issues raised by the pendency of the subpoena, court orders, and Special Prosecutor's requests are resolved. The period of time involved in resolving such issues will of itself operate to assure adherence to the request in the second paragraph of your letter. (See p. 187 for entire letter.)

And it continues with greetings.

I think that is relevant to our attempt to preserve the Government's rights—on availability of tapes.

Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

Thank you, Mr. Bingham, for your excellent testimony. Perhaps now would be the time to establish title to those things and data. Would you agree that in view of the letter read by the chairman that perhaps we should move ahead and clear the air? Or do you think it should be up to the court? I do not think so.

Mr. BINGHAM. No, I—well, I think, title should be established and I think title should be in the Government of the United States, in the people, with custody in the GSA. I suppose that any action by the Congress to that end could be challenged in the courts on the basis that the Congress cannot deprive Mr. Nixon of property which is his without due process of law. And if the legislation in question did not do that, then that presumably could be challenged.

So I think that the determination has to be made first by the Congress and then ultimately would probably come before the court. Although my bill frankly does not do that, I think it is a wise inclusion in any legislation on the subject to provide that, if the courts find that there is a property right in the former President, then he should be compensated for surrendering that right.

Mr. EDWARDS. I would agree with you and I think that we should have no problem with House Concurrent Resolution 629. It is a well written bill and one that we should enact right away.

Do you think that the committee should move ahead with Ms. Abzug's resolution?

Mr. BINGHAM. I prefer not to comment on that since I am not too familiar with it. I was not here to listen to her testimony.

Mr. EDWARDS. Very good. Thank you.

Mr. HUNGATE. Mr. Smith.

Mr. SMITH. Mr. Chairman, in view of the fact that we have a vote, I am not going to ask Mr Bingham any questions. I think it was a good statement, Mr. Bingham. Thank you for making it.

Mr. BINGHAM. Thank you.

Mr. HUNGATE. Ms. Holtzman.

Ms. HOLTZMAN. I just want to welcome my colleague from New York and I think his testimony is excellent and I appreciate his contribution.

I yield back my time, Mr. Chairman.

Mr. HUNGATE. Thank you very much.

Mr. Dennis.

Mr. DENNIS. I yield likewise, Mr. Chairman, in view of the lateness of the hour, not necessarily conceding that I agree with everything my colleague has stated.

Mr. HUNGATE. Mr. Bingham, I wonder if we might have this understanding, that any members of the subcommittee that would like to

propound questions in view of our difficult circumstances should submit them in writing by noon tomorrow and you would respond by next Tuesday?

Mr. BINGHAM. Surely.

Mr. HUNGATE. We appreciate your patience and your contribution is very helpful to the committee.

Mr. BINGHAM. Thank you.

[The prepared statement of Hon. Jonathan Bingham follows:]

STATEMENT BY HON. JONATHAN BINGHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Richard Nixon's forced resignation and subsequent pardon have stymied an historic attempt to reassert the Constitutional principles on which this nation was founded and the concept of equal justice under the law which has been its hallmark. In the months ahead this nation must decide whether or not it will accept this abrupt and incomplete ending or whether it will refuse to close the book on the most corrupt chapter in American history until the full story is known.

President Ford has chosen the former course, and in pardoning Richard Nixon of any and all crimes which he may have committed while in office he hopes to put Watergate behind us. For the sake of consistency the White House at one point indicated that pardons for other Watergate figures were also being considered, but the national uproar which followed that announcement led to its immediate cancellation. I believe now the President will not consider such additional pardons at least until the criminal justice system has disposed of the various Watergate cases presently before the courts. However, a formal expression of Congressional opposition to further pardons might strengthen his resolve, and I call your attention to H. Con. Res. 629 which I introduced on September 11 as one vehicle for such a statement.

The Nixon pardon and the possible pardons for his close associates have appalled the nation for two reasons. They make a mockery of the principle of equal justice under the law for all citizens, regardless of rank or station, and they are premature, since they precede action by the courts. The nationwide outcry over the Nixon pardon has focused principally on the former because the favoritism and dual standard it implies do violence to our sense of fair play. But I submit that the second reason for opposition to the pardon is equally important.

The pardon of Nixon put the cart before the horse, by absolving the former President of the consequences of his wrongdoing even before he has been formally charged with any offenses. Millions of people are outraged by the pardon not simply because it seems to prevent Nixon from being summoned before a court to answer for his conduct, but because it might forever protect the full story of the Nixon administration's violations of the law and the Constitution from full disclosure.

This is no picayune matter, no petty vengeance against a fallen leader. The American people still do not have all the facts about the Nixon administration's misconduct, and without those facts we cannot know their true magnitude and significance. Each investigation of Nixon's administration has been limited or aborted. The Senate Watergate investigation focused principally on the Watergate affair, election campaign abuses and their coverup, and we now know that Presidential wrongdoing was not confined to these abuses. Further, the Senate Committee was denied access to the best evidence, Nixon's own tapes and documents.

The Special Prosecutor is not hampered by these limitations, but his prosecutions to date have not covered the full range of Nixon's offenses. The formal court actions initiated by the Special Prosecutor do not charge Richard Nixon himself with any offenses, and Nixon's role is obviously central to any inquiry.

As for the impeachment inquiry by the House Judiciary Committee, we cannot say that it was able to fill the gaps in the record left by the Special Prosecutor's office. In fact, the President's response to Committee subpoenas included nothing not also furnished to the Special Prosecutor. Although the Committee concluded, from the evidence available to it, that the President ought to be impeached, its inquiry was continually frustrated by lack of evidence. Article III spoke directly to this point—the President's refusal to comply with subpoenas

properly issued by a Committee of the Congress charged with the responsibility of determining whether or not the President had committed impeachable offenses.

The evidence which remains hidden is astounding. The Committee issued eight separate subpoenas between April 11 and June 24, 1974, for recordings and materials relating to 147 separate conversations, plus various other documents. The Committee felt that the subpoenaed materials were necessary in order to learn the full story of Watergate, the abuse of the IRS, domestic surveillance, the dairy case, and the ITT and the Kleindeinst confirmation hearings. In response to its subpoenas, the Committee received some notes previously turned over to the Special Prosecutor, news summaries without the President's notations, and the edited transcript of 36 conversations. The Committee received none of the lists of meetings and phone calls which had been subpoenaed, and no tape recordings. Even the transcripts turned out to be of highly dubious accuracy.

The cumulative results of both Senate and House Committees' and the Special Prosecutor's efforts will be an impressive but truncated review of Nixon administration offenses. There will be no final judgment by the Congress or the courts on that conduct, and the record will be incomplete and liberally sprinkled with gaps and unanswered questions. History and the American people may forever suffer an incomplete understanding of these traumatic events and the lessons they must teach. Corrective changes in our body of laws will be more difficult without a clearer understanding of the offenses which must be prohibited. Finally, Richard Nixon could some years hence resurrect his claims of innocence, relying heavily on the fact that he was never proved guilty of any violation of the Constitution nor formally charged with criminal conduct by any court.

These possibilities make imperative further investigation, analysis and judgment of Richard Nixon and his administration. The question which your Committee and the Congress must now answer is how should this be done. There are some who argue that the House should impeach Richard Nixon and send his case to the Senate for trial. This suggestion is not without merit, since it would at least insure a definitive, constitutional judgment of Richard Nixon's responsibility for high crimes and misdemeanors. However, resumption of the impeachment process is not only unlikely, it would also provide a completed record of Nixon's misconduct in only those areas covered by the Articles of Impeachment, when in fact the areas of wrongdoing are far more extensive.

It would be most useful, however, for the House Judiciary Committee to insist that its outstanding subpoenas be answered, and submit a supplementary report based on that evidence. As I have said since Richard Nixon resigned, this relatively simple step would produce answers to a number of open questions about corruption and other misdeeds in the Nixon administration and about Nixon's personal responsibility therefor.

A national commission of inquiry similar to the Warren Commission which investigated the assassination of President Kennedy has also been suggested as a means of completing the record of Watergate and related matter. I fear, however, that such a commission would mean long and unnecessary delays while its members and staff became familiar with all the details already revealed by prior investigations. Moreover, its findings might not achieve widespread acceptance. This, you will recall, was the fate of the Warren Commission report.

Most importantly, there are the Special Prosecutor and the Watergate grand jury with the capability of carrying through with a comprehensive review of Nixon's alleged offenses. Two weeks ago, a group of Senators led by Senator Edward Kennedy urged the Special Prosecutor to include in the final report he must submit to Congress "a full and complete record detailing any involvement of the former President in matters under investigation by you." The Special Prosecutor responded to this suggestion by citing "substantial legal and ethical questions as to the statutory authority for the issuance of a detailed report on the matters you suggest."

I urge this Committee to take immediate steps to grant the Special Prosecutor whatever authority he needs to present such a comprehensive report. However, I urge you not to take any action which might preclude the Watergate grand jury from issuing an indictment of Richard Nixon for any crimes he might have committed while holding the Office of President. I believe that the grand jury not only has the power to issue an indictment of the former President but also that it *should* issue such an indictment if the evidence justifies it, despite the pardon granted by President Ford. Although the public seems generally unaware of this point, the Presidential pardon power is nothing more than, quoting from

U.S. v. *Wilson* "an act of grace . . . which exempts the individual from the punishment the law inflicts for a crime he has committed" (*U.S.* v. *Wilson*, 32 U.S. 150 (1833)). In 1867, the Supreme Court ruled that a pardon, if granted before conviction, "prevents any of the penalties and disabilities consequent upon conviction, from attaching; if granted after conviction, it removes the penalties and disabilities." There is no legal precedent, to my knowledge, for a Presidential pardon precluding a properly constituted grand jury from issuing an indictment.

If the Watergate grand jury were to issue an indictment of Richard Nixon, as it reportedly wanted to do many months ago, he could then come into court and plead the pardon to block further court proceedings. This would allow a court test of the legality of the pardon, as was only yesterday suggested by a U.S. District Court judge.

Grand jury action and the Special Prosecutor's report together could tie up all the loose ends left hanging by earlier truncated investigations. These steps would provide the opportunity for filing formal criminal charges against the former President and a comprehensive statement of the evidence which supports those charges. Parallel action by the Congress to ensure necessary access to the Presidential tapes and documents currently in the custody of the White House would also be desirable.

Mr. HUNGATE. The committee will stand adjourned for the day.

[Whereupon, at 4:15 p.m., the subcommittee was adjourned, to reconvene Tuesday, October 1, 1974.]

PARDON OF RICHARD M. NIXON, AND RELATED MATTERS

TUESDAY, OCTOBER 1, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Kastenmeier, Edwards, Holtzman, Smith, Dennis, and Hogan.

Staff present: Robert J. Trainor, counsel; Stephen P. Lynch, research assistant; and Michael W. Blommer, associate counsel.

Mr. HUNGATE. The subcommittee will be in order. We will resume our hearings into various bills and resolutions relating to (1) the pardon of former President Richand M. Nixon; (2) the issuance of additional pardons to persons involved in Watergate related activities; (3) the ability and appropriateness of the Watergate Special Prosecution Force to make public the information it has compiled relating to the alleged criminal conduct of former President Richard M. Nixon; and (4) the public disclosure of all Watergate related documents and tapes which were in the custody of the United States between January 20, 1969, and August 9, 1974.

Primarily the hearing today will be addressed to the second, third, and fourth points.

The Chair would announce that the President has indicated his desire to appear before the subcommittee in response to the two privileged resolutions of inquiry at a time mutually convenient to the Chief Executive and to the committee. I would say that I express the appreciation of the committee for the President's desire to take this action personally. I think again, it's consistent with the frankness and openness he regularly displayed as a Member of the House.

The time of the meeting will be worked out after a meeting of the subcommittee members in conjunction with the officials at the White House. At this time, if there is no objection, I will insert into the record a statement submitted to the subcommittee by our colleague, Congresswoman Jordan.

[The prepared statement of Hon. Barbara Jordan follows:]

STATEMENT OF HON. BARBARA JORDAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

SPECIAL PROSECUTOR'S RELEASE OF INFORMATION TO THE PUBLIC

Mr. Chairman, members of the Subcommittee, as members of the House Committee on the Judiciary, we have weathered a storm which swept a President out of office. When our Constitution was tested, we did not succumb, we did not for-

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sake it, we did not abandon our oaths. The question before us today is whether or not a President can resign knowing the injustices he committed while in office, will never be publicly scrutinized. I believe the American people have an absolute right to know whether, during his tenure, a President acted legally or illegally in executing his duties. No circumstance I can imagine should compromise that axiom; not resignation, not death, not assassination, nothing.

When the House Judiciary Committee began reviewing the plethora of information assembled by its impeachment inquiry staff, it soon found it difficult to withhold information from the public. Concerned with the rights of defendants, and due process for the President, the Committee released all the information in its possession which would not degrade or defame. Through the summer months the Committee released over 13,000 pages of information. The public had trouble digesting it all.

Did the release of the information prejudice any trials? I think not. Did the release of the information prejudice the President's case? Members of the President's party fully supported the Committee's action. I would suggest the Special Prosecutor follow the example of the House Judiciary Committee and release the information at his disposal bearing upon the President's conduct in office.

The Special Prosecutor has in his possession tapes, documents and other memoranda not scrutinized by the House Judiciary Committee. Of the tapes subpeonaed by the Committee, sixty-three were not supplied. The Special Prosecutor secured possession of the tapes as the result of a Supreme Court decision to which the Committee was not a party. These tapes and documents contain information concerning the President's involvement, and the alleged culpability of his former aides, in covering up the Watergate break-in and its aftermath.

In addition, the Special Prosecutor has in his possession information gleaned from his investigations of possible destruction of evidence, income tax evasion, and appropriation of campaign funds for his own personal use. While these investigations had not been completed prior to the time President Ford pardoned former President Nixon, the investigation into the possible involvement of other individuals is continuing.

To a certain extent, release of some or all of the information in the Special Prosecutor's possession is a matter of timing. Some may emerge during the upcoming trials. Some may be released with the handing down of new indictments. During the normal workings of the judicial process, some of this information will emerge. But we must go beyond that. We must provide a means whereby the American people, within the limits of due process, can be privy to the actions their President implemented while in office.

None of the bills before the Subcommittee require the Special Prosecutor to divulge information which would jeopardize the rights of defendants or compromise the government's case. We should not consider for a moment, trading rights of due process for the public's right to know. And yet I cannot help but believe that between the two, lies a vast middle ground.

The information in the Special Prosecutor's possession can be classified into two categories: inculpatory and exculpatory. Within our normal judicial processes, government prosecutors divulge that information which is inculpatory—that information which will prove their case. Prosecutors are not generally required to defend their belief, as a result of their investigation, there is no substantiating evidence to believe, with probable cause, a crime has been committed. Prosecutors are not required to defend negative findings. Should the Special Prosecutor be required, by legislation, to divulge information which he believes does not inculpate the former President in any criminal act?

Because the question of probable cause is open to judgment, U.S. Attorneys are normally given wide latitude to decide whether to bring an indictment. Assume, for example, the Special Prosecutor thought the information available to him did not substantiate an allegation that the President willfully and knowingly submitted false tax returns. Should the Special Prosecutor be required, nevertheless, to support his judgment after having been required to divulge the information upon which he based his opinion? I know this Subcommittee will consider this issue carefully before reporting a bill to the full Committee.

Mr. HUNGATE. At this time I would also include Chapter I of *The Pardoning Power of the President* by W. H. Humbert. This work has been most helpful to the Subcommittee and its staff in their preparation for these hearings. (See p. 265 for Chapter I.) Mr. Smith?

Mr. SMITH. Thank you, Mr. Chairman. I just want to say, I'm sure I am speaking for all the Members on this side, we are delighted that the President has taken this action, and has made known his willingness to come down here and appear before this committee in regard to these two privileged resolutions of inquiry. I think it does speak well for the candor and frankness that the President has exhibited thus far in his new term.

Mr. HUNGATE. Mr. Kastenmeier?

Mr. KASTENMEIER. I just wanted to join in with what the chairman and the ranking minority member said, and express my own compliments and admiration for the work of the chairman and the gentleman from New York, Mr. Smith, in bringing this about. I think this particular solution of the President appearing before us is in accordance with the highest tradition, and I am very pleased with the work of the chairman and the ranking minority member in this connection.

Mr. HUNGATE. We appreciate your generosity. I think it's the firm for which we work that gets the respect. Are there any further statements?

We have as first witness today the Honorable George Danielson, concerning H.R. 16816, a bill to authorize the June 5, 1972, Federal grand jury of the District of Columbia to submit a report to the court concerning its investigation of the Watergate and related matters.

Mr. Danielson, we welcome you, a fellow member of the committee and a distinguished Member of the Congress. We look forward to your contribution.

TESTIMONY OF HON. GEORGE DANIELSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. DANIELSON. Thank you, Mr. Chairman, members of the committee. I appreciate the opportunity to appear here on behalf of my bill, H.R. 16816, which is now before you. I have a written statement which has been filed with the committee, I would like permission to have it made part of the record, and also the permission to ad lib as I cover it.

Mr. HUNGATE. Without objection, it's so ordered, Mr. Danielson.

Mr. DANIELSON. I'm appearing, Mr. Chairman and members of the committee, on behalf of my bill, and I want to point out that the purpose of this legislation is to seek, to find, to provide a vehicle through which this committee can preserve for all time the total record of that series of events which we all now refer to as Watergate.

The approach that I have is slightly different than the approach in some of the other bills before this committee in that most of them, or some of them call for the Special Prosecutor to file a report as to everything that has come to his attention. I take a different approach. The purpose of my bill is to authorize the Watergate grand jury which has been specially convened and has entertained this investigation now for close to 2 years, to file a comparable report, which would be a public record.

The bill which I have introduced is based in large part on the provisions of title 18, section 3333, which provides for reports to be issued by special grand juries. This is already a part of the law of the land, and the approach included in my bill does not depart from that approach.

My bill permits the grand jury, on the conclusion of its investigation, to file a report. There should be Xerox copies of section 3333 of title

18, attached to my written presentation and I will refer only to the first subparagraph, that's subparagraph A(1). This authorizes a special grand jury, on completion of its term, to submit to the court a report concerning noncriminal misconduct, malfeasance or misfeasance in office involving organized criminal activities by an appointed public officer or employee, as the basis for a recommendation for removal, disciplinary action, and so forth.

I have changed the verbs around somewhat, and my bill, H.R. 16816, would authorize the special Watergate grand jury to submit to the court a report concerning offenses against the criminal laws of the United States, and noncriminal misconduct, malfeasance or misfeasance in office by elected or appointed public officials, arising out of the unauthorized entry of the Democratic National Committee Headquarters, and so forth.

From that point forward I have set forth the language which is included in the Charter of the Special Prosecutor, the language which appears in the Federal Register, and under which Jaworski is operating.

So, the bill is, in effect, a combination of the thrust of section 3333 of title 18, giving authority to the grand jury to make a report, and of the Charter of the Special Prosecutor, describing the parameters of the subject matter of the investigation. Beyond that it does not depart from any existing law, it's within the public policy of the United States, and I respectfully submit, should probably experience less resistance than any other form of legislation because we are not entering into new ground, we are simply providing that the existing Watergate grand jury may exercise a reporting function which is already conferred upon special grand juries and within the context of the Watergate investigation.

Before I depart from this page I respectfully suggest that in the event this committee should consider to report out this bill, there should be one amendment. At the top of page 2, in line 1, due to my own inadvertence, I have set forth this language, "by elected or appointed public officials". I had intended to have that read, "by elected or appointed public officer or employees" as is set forth in section 3333 of title 18. And in the event the committee should see fit to report this bill, I would urge it make a comparable amendment.

Mr. HUNGATE. Pardon me, Mr. Danielson, would you run through that again? As I understand it, you say that the special grand jury in the normal course of events would have authority to file this sort of report to which you allude.

Mr. DANIELSON. That is correct.

Mr. HUNGATE. And the Watergate grand jury does not have such authority.

Mr. DANIELSON. That's correct.

Mr. HUNGATE. Now, can you——

Mr. DANIELSON. There are very slight technical differences. They do not go to the substance of the authority, but they go to the fact that legally this grand jury will not have that authority in the absence of new legislation. By "this grand jury" I mean the Watergate grand jury.

In chapter 216 of title 18, it's a short chapter, four sections, 3331 through 3334, the Congress, this committee, in the big criminal law revision of 1970 provided for special grand juries in districts having populations exceeding 4 million, and so forth.

Mr. HUNGATE. The Safe Streets Act, was that what that was?

Mr. DANIELSON. Yes, that's right. And all I'm doing is taking—I have plagiarized the language of that chapter deliberately so that we are not invading new ground as to policy, and have blended the Safe Street Act provisions in chapter 216 of title 18 with the Charter of the Special Prosecutor. That's what we have before us here. That would authorize this grand jury to make that type of a report.

Now, the benefit of it is, we would, permit the Watergate grand jury to make such a report, and it would satisfy at least something that's consuming to me. It would satisfy our need to have a permanent public record of the full story of Watergate.

Mr. SMITH. Would the gentleman yield?

Mr. DANIELSON. I would be pleased to yield.

Mr. SMITH. As I read section 3333 here, it concerns a report of a special grand jury in regard to organized crime. Is that right?

Mr. DANIELSON. That's right. Now, the Watergate grand jury—I've often been wrong, so I will not say I can't be wrong again—but as I read it, the Watergate grand jury does not have this power that an ordinary special grand jury would have. And the thrust of my bill is to give the Watergate grand jury the power granted to special grand juries in title 18, sections 3331 and following. That's the thrust of the whole bill.

Now, I noticed with great pleasure the news this morning, indicating that President Ford has agreed to appear before this distinguished subcommittee at a convenient time, and I am very pleased to hear that. I commend the chairman and the committee for their efforts of having his appearance. But, I would be less than frank if I didn't state, along with that, I feel a small degree of apprehension, and I wish to at least communicate that to this committee.

I feel this degree of apprehension. We all know that President Ford is one of the most charming, most frank, the most open, the most congenial personalities that ever served in the House of Representatives; and I wish to issue a caveat, I wish to caution this subcommittee that you may be standing in the position of the farmer's daughter. I would say, beware of Presidents who come with a broad smile because Mr. Ford's charm is so great, and his openness and frankness upon which the chairman commented is so well known that I'm fearful that in the explanation that this was all done in the "spirit of mercy" we may subsume the whole concept of preserving the Watergate story in a great warm feeling of camaraderie. So, I would ask that the farmer's daughter be very alert in the forthcoming hearings.

Mr. DENNIS. Will the gentleman yield?

Mr. DANIELSON. Yes.

Mr. DENNIS. I would like to ask my distinguished colleague who sat on this committee with me for many weeks and heard what I believe is practically all the evidence on the subject of Watergate, whether he personally has any reason whatsoever to believe that there is anything behind the pardon other than mercy and justice, as conceived by the President of the United States.

Mr. DANIELSON. I will be very frank, and I appreciate the question of my colleague from Indiana, I don't think there is much of anything else behind it.

Mr. DENNIS. Frankly, I say to the gentleman, I don't think there is anything else behind it.

Mr. DANIELSON. Well, maybe I can respond more explicitly. I think we are in total harmony, Mr. Dennis, I don't know of anything else behind it, and I will not assume that there is anything else behind it. My own analysis, my very honest analysis is that overwhelmed by a feeling of compassion—and I say overwhelmed to the extent that it subordinated any other consideration—but on the basis of compassion, and mercy, and humanity, and being overwhelmed thereby, I think that the gentleman goofed. I think he shot from the hip when he should have taken careful aim.

Now, I am not impugning the President's motives when I say that, I'm only intending to emphasize the fact that he was carried away; and I think that is a weakness that all of us are subject to, including myself. I just think that we must keep our powder dry in those situations.

Mr. DENNIS. Well, I'm addressing my remarks to the suggestion that there is something he could fool us about. Supposing the gentleman is right—and I disagree with him—but supposing he is right that this was premature, and a mistake, and so on. There is still nothing to hide.

And what I am wondering is why the gentleman and other Members come down here and suggest that here is, or suggest that we have to be alert, that somebody is going to pull the wool over our eyes. I'm not worried about that.

Mr. DANIELSON. I thank you for raising this point because I want to assure the gentleman from Indiana that I don't think anyone is going to pull the wool over our eyes, which in my mind implies an intent to deceive; and I don't think that there is, within the President, any trace of the intent to deceive.

I do think that we have an expansive personality, a warm personality which might be subject to the human frailty of being carried away from time to time, and that is the condition that I seek to guard against. The gentleman from Indiana could not possibly get me into an argument on this point because I agree with him fully.

Mr. HUNGATE. Does the gentleman have further comments on his statement?

Mr. DANIELSON. On the statement I do have this—I set it forth in detail—and I don't know what merit would be served by my repeating it here. I know that this subcommittee studies these statements assiduously.

I would like to assure two of my colleagues, at least, who I know are always guided by the principles of civil rights, the human rights, that this bill has three purposes which are set forth at the bottom of page 1 and the top of page 2 of my statement, and then expanded on through the rest of the statement, namely:

1. To produce a complete disclosure of the Watergate affair and everything connected with it;

2. To protect the rights of all persons who participated in that affair, including the rights of former President Nixon. Civil rights should be fully protected; and

3. And this is probably the most important reason why you should consider this bill—a full compliance with the Canons of Professional Ethics of the American Bar Association, by which I submit Special Prosecutor Jaworski is bound and guided, and all attorneys are bound and guided.

The essence of that last point being this, prosecuting attorneys may not air their feelings, their personal opinions, on the result of their investigations in the arena of public relations. They are under an inhibition against making public statements that are not backed up by an indictment or information in a prosecution. Their forum is the courts. They are under an injunction not to communicate to the public through the normal channels of communication, but only through criminal process.

Now, Mr. Jaworski is very mindful of that restriction on his conduct, and I think that's why he respectfully declined to comply with the request of certain Members of the other House. But, this bill of mine would relieve him of that responsibility and transfer the reporting function where it belongs, to the grand jury. We have precedents in our existing law for this type of procedure. There are ample safeguards, I invite the committee to study them. The safeguard that the judge receiving the report of the grand jury may examine it, he must first determine that no pending prosecutions are going to be prejudiced; he must determine that the due process has been offered. It's a system that has built-in safeguards, and I think it would be a valuable route for this committee to follow in this effort that we all have of preserving the record of the Watergate.

I have no other affirmative statement. If any of the members would like to ask a question, I'll do the best I can to answer it.

Mr. HUNGATE. I thank the gentleman for his usual thorough and helpful job, and we will proceed under the 5-minute rule. Mr. Smith?

Mr. SMITH. Thank you.

I want to thank my colleague from California for coming today, this is an interesting proposal in your bill. I have a question on the section which says in effect, "If such report makes critical reference to an identified person, such person shall be afforded the same rights and privileges as are afforded to a public officer employed under section 3333 of title 18." Then it says, "Provided that the subject matter of such critical reference will not be resolved", and so forth.

Is it your intention by that proviso to say in effect that if a report makes critical reference to an identified person and the subject matter of such critical reference will not be resolved in a judicial proceeding, that the report shall be made in any event, without the rights of due process which section 3333 of title 18 grants in the present cases?

Mr. DANIELSON. As I understand the gentleman's question, here would be my answer to it. Section 3333 provides for a report on misconduct, or malfeasance, in a situation in which a person identified in the report would not be subject to prosecution, or is not going to be prosecuted, in a criminal proceeding.

The separation here is as follows: If the person whose activities are within the report is going to be prosecuted, then the court is the arena to which this evidence or information should come forward. But, if the person is not going to be prosecuted, then there is nothing in our procedure which enables a report to be made. Now, we have that in the existing situation, in the Watergate situation. We have a number of parties to the Watergate who have been granted immunity, they are not going to be prosecuted on the items on which they got immunity.

We have a former President who has been pardoned. He will not be prosecuted, he can't be prosecuted, I submit. So, his activities could be included in the report of the special grand jury.

Now, I'm not going to try to tick off a list of those who have been granted immunity, I can't remember them. There are a number of people who may not have been granted immunity or a pardon, but who, nevertheless, for whatever the reason, the judgment of the prosecutor, are not named as defendants in a criminal proceeding. The main difference is this, if their participation in the Watergate is to be resolved through an appropriate judicial proceeding, then that's the channel through which the information should be made public. But, if they are not to be in a judicial proceeding, then the special grand jury's report would be the vehicle for making these records public.

Mr. SMITH. Well, I understand the gentleman, but it looks to me as though the present section 3333 allows that due process of appearing before the grand jury, and so forth, whether there is to be a resolution by judicial proceedings, or not because the report in that case, under present law, is in regard to organized crime conditions in the District, for instance.

Now, it's very likely that the report might name certain identified people, but they will not be prosecuted, but they are then given a chance and opportunity under the present law of appearing, and explaining, and doing all these other things.

Mr. DANIELSON. Well, I would like to say, if I may, that it was my intent in drawing the bill—and I did have the assistance of legislative counsel in doing so—it was my intent, it was my desire, and I want the record to reflect this, that a person who may be named in a report of the grand jury will have an opportunity to appear on his own behalf if he chooses to do so. That is provided for in section 3333. He may call witnesses if he chooses to do so, so that his side of the story can be told. And as a matter of fact, he would also have the right to file a report, a written report, which is in effect his own answer to the proceedings, if he wishes. The section 3333 provides some excellent civil rights safeguards. And it is my intention in H.R. 16816 to incorporate all of those safeguards which are in 3333, into 16816.

Mr. SMITH. Well, I appreciate the gentleman's saying that. It seems to me however that your clause as provided in section 2 negated some of that due process that you had provided in section 2.

Mr. DANIELSON. Well, if the gentleman please, it was not my intent to negate, in fact, it was my intent affirmatively to guarantee those protections to the person named. I am glad that the record of the committee will reflect that fact.

I might also point out that on page 5 of my written statement when you get down—well, substantially all of page 5, I'll quote a little bit of it.

As you know, Title I of the Organized Crime Control Act passed in 1970, provides that the grand jury may submit a report to the court on non-criminal activities of a public official provided that certain protective procedures are observed. Those procedures which are set forth in 18 U.S.C. Sec. 3333, are incorporated fully into my bill by reference. My bill provides that any person who is named in the report, but who has not been indicted, will have the opportunity to call a reasonable number of witnesses on his own behalf before the grand jury. He is further entitled to prepare an answer to the report containing a statement of the law and facts which consfitute his defense to the charges made in the report. The report must be supported by a preponderance of the evidence. The court would further have the authority to seal the report if due process has not been complied with, or if publication of the report would prejudice the fair consideration of any pending criminal matter.

So, my point here is simply to provide a vehicle through which the record of the affair on which we have been so long working, the Watergate affair, can be preserved for all time; but at the same time to provide every conceivable safeguard to the persons who may be named therein.

If my language in H.R. 16816 is a bit inarticulate, if it can be improved upon—and I'm sure it can—by this subcomittee, I welcome that improvement, and would urge the subcommittee to take whatever steps are necessary to insure this protection of the rights of innocent people.

Mr. SMITH. I appreciate the gentleman's statement.

Mr. HUNGATE. The gentleman from Wisconsin, Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I would like to complement my friend from California for a very persuasive argument why the grand jury, rather than the Special Prosecutor, and for taking the initiative he has.

I have only one or two questions. First, in order to achieve what you intend to, to make the full story of Watergate a public record, what is necessary? I ask this because I think there are some people who say, "Well, isn't the full story already known"; "Hasn't the Senate Select Committee on Campaign Expenditures for 2 years, and the House Judiciary Committee, and public disclosure through reporters, and other transcripts of cases which now may be in part, or fully public, isn't this enough to constitute a full story." And, "Why is it that only this particular report is asked for to complete it, what about the tapes that remain in the custody of the government, ought they not be revealed to tell the full story, those that have not yet been disclosed."

In other words, what is your answer as to why you selected this precise instrument to complete the full story, the disclosure of Watergate to the public?

Mr. DANIELSON. If the gentleman please, I am not so confident as to assume that this would tell the absolute, 100 percent, hermetically sealed, full story. But, it would tell a great deal more than the public record today will tell. Hopefully it would tell a great deal about the tapes. Perhaps it would not bring in all of the 150, more or less, tapes, which this committee subpenaed and which were not produced, but there are many tapes at least, and the transcripts of many tapes in possession of the Special Watergate grand jury which are not a part of the record of this Judiciary Committee; they were not a part of the record of the impeachment hearing, and I don't know where else they are a record. But at least my goal would be to reach those, if not for the sake of the media, publicity, at least that they be preserved for posterity so that at an appropriate time they could be examined, for the guidance of our Government in the future.

Now, I would say this, even though this remedy may not—though I will no concede that it does not—but it may not reach the entire story. That is not an argument to persuade us that we should not go this far. Should we not take one step simply because we can't complete the entire jonrney? I don't agree with that. I think we should go as far as we can, and I respectfully submit that preserving, and making a record of the entire information before this Watergate grand jury will be a huge step in the direction of preserving as much as possible for history.

Now, I'm a natural-born optimist. I'm hopeful that as this story continues to unfold, and as the grand jury continues in its work it will obtain more and more of the entire story, and at least to that extent, let's preserve those pieces of the story for the benefit of the American people. I would like to go further, and I don't have so much pride in my authorship that I would resist any amendments. If you know some way that you could expand the thrust of the bill, or draw a separate bill which would reach the entire picture, you would have a very ardent supporter in me. I would favor that.

But, this is as far as I know how to go at the present time. And also, I have to be mindful of the fact that it's one thing to draw up a bill, it's quite another one to get it through the Congress.

Mr. KASTENMEIER. Yes. And I'm sure my friend apprehends that I ask the question not because I disagree with him, but because the question is there, and it does constitute the full story of Watergate. Why is this a reasonable initiative to achieve a rather illusive goal, perhaps, in that connection.

Mr. DANIELSON. Well, I think, that which is implicit in the gentleman's question is something—I think we are in full agreement. I would like to go farther and obtain the entire story. This bill is not intended to be "the" answer to that question. It is intended to be "an" answer to a part of that question. But, it would bring into the public record, into the public archives, a vastly greater sum of information than we now have in the public archives, and I think that's a worthy goal, and that's why I urge the adoption of this type of legislation.

Mr. KASTENMEIER. I thank my friend for his answers, Mr. Chairman.

Mr. HUNGATE. The gentleman from Indiana, Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. Danielson, as you point out on page 5 of your written statement, section 3333 does apply to noncriminal activities of public officials, the thrust of the section being that in these organized crime matters particularly such a report can be made where for one reason or another you can't return an indictment.

Your bill, on the other hand, applies also to offenses against the criminal laws of the United States, as well as to noncriminal misconduct. So, it's really quite a different thing from section 3333, which is directed at noncriminal activities, is it not?

Mr. DANIELSON. Well, I respectfully submit it's directed at both criminal and noncriminal. For example, subsection 2 of subsection (*a*) authorizes a report to include information regarding organized crime conditions, for example.

Mr. DENNIS. Yes, but that is not directed as against any identified person. If you will look under B–2, that report is supposed to be not critical of an identified person, that's directed at general conditions. And, as far as individuals are concerned, I submit to you 3333 deals only with noncriminal activity.

Mr. DANIELSON. The gentleman is correct. I wish to disabuse the gentleman, or any Member who may have the impression that I'm saying that this bill I have before you is identical with section 3333, they are addressed to different purposes. Section 3333 is addressed to the situation of organized crime more than anything else. H.R. 16816 is addressed to only one thing, the whole milieu of Watergate. I only wish to point out that I have plagiarized a substantial part of the

language of Section 3333, and have melded it with the charter of the Special Prosecutor in order to avoid creating new, foreign, unfamiliar language for this committee, and the full committee, and the Congress to adopt.

The bill that I have before us is not directed at what we normally think of as organized crime, or any crime. I'm just using a set of verbs as a frame of reference with which we are already familiar. This is directed at a very specific thing, the bill before us is, and it isn't organized crime. And, bear in mind one other litle thing, at the bottom of page 2 of the bill, "It ought to be eminently clear here," and up there also, lines 6 and 7 of page 2. We have the unique situation, a former President has been pardoned—and I'm not going into the merits whether he should or should not have been pardoned, that's another subject—but he has been pardoned, he has been granted an immunity that is apparently impenetrable. So, could you even say that there is any criminal activity?

Let's just assume, only for the sake of debate, that the facts would show that former President Nixon was responsible for some ordinary criminal activity. Under existing law there is no way that you could make that activity criminal because, apparently, the pardon is full, complete and unconditional. But nevertheless, the conduct is conduct which under ordinary circumstances, and under my hypothesis, would be criminal.

Mr. DENNIS. Well, I certainly agree with you that the section 3333 is directed at an entirely different situation from your bill, and that's why I query, I guess, why section 3333 procedures are appropriate for this essentially different situation.

I point out to you, for instance, to take advantage of the civil rights safeguards provided in section 3333, you would now have to practically have a minitrial before the Watergate grand jury, held in secret, in order to do that because the person who would be named, and the witnesses he would want to call, and so on, have not presumably appeared before a Watergate grand jury at this time.

So, you would have to start back and go all over, conduct a trial before a grand jury in order to even invoke the safeguards of section 3333 which you rely upon. Isn't that true?

Mr. DANIELSON. Well, there is a great element of truth in the gentleman's question. I'm thinking of the concept of due process, of the concept of civil rights. Due process is, as I understand it, if you want to reduce it to a very simple level, is that a person should have notice of anything that is charged against him, or sought to be charged against him; he should have an opportunity, the right and the opportunity to appear and tell his side of the story. In other words, nothing should be done behind his back, it ought to be out in the open. Now, if a person has a right to appear and doesn't appear, after he's gotten notice, that's his judgment. But he should have the right to appear; he should have notice; he should have the right to call witnesses on his own behalf. When we have achieved those ends, I submit, we have achieved due process.

Now, I admit that is a pretty simple exposition of due process, but I'll also submit that it is about right. That's the essence of due process, notice; opportunity to appear; opportunity to call witnesses on your own behalf; opportunity to respond with facts and law, in other words, a chance properly to defend yourself.

Mr. DENNIS. Well, the chairman tells me my time is elapsed, so I won't——

Mr. DANIELSON. If I had time to yield to the gentleman, I would.

Mr. DENNIS. I'm sure the gentleman would, and I appreciate his courtesy. I think he and I did a fairly good job to bring the facts of this matter out already, that's another one of the reasons which makes me doubt the necessity of the gentleman's measure. But, I thank the Chair.

Mr. HUNGATE. The gentleman from California, Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

I thank the gentleman from California for his very important contribution this morning. The information that you would like to see made public has to do with criminal activity that is somehow or other protected from disclosure, or from the criminal justice system either by the President's pardon, or by immunity; is that correct?

Mr. DANIELSON. Well, if the gentleman pleases, it goes a little further than that. You will find that on page 1, lines 9, 10 and following, I not only talk about offenses against the criminal law, criminal activity, but I also speak of noncriminal misconduct, malfeasance, or misfeasance in office. As the gentleman knows, this includes a much broader spectrum than criminal.

I've been a prosecuting attorney, I have handled the grand jury, the Federal Grand Jury for the Southern District of California during one term of court, and I know full well that our procedures then are followed in many courts today. There are many cases which come to the attention of the prosecuting attorney and the grand jury which for one reason or another do not become the subject of an indictment.

Just the good judgment of the U.S. Attorney oftentimes results in a decision that the ends of justice would not be furthered by prosecution, even though, technically, there may be a violation; many situations come up. Likewise, that which starts off as an apparent violation of the criminal laws, turns out to be, when you get into it further only some very unsavory conduct, something that would not become a public official at all, as a matter of fact something that would be detrimental to good government, but it falls short, for one reason or another, of being an actual violation of the criminal laws; so, there is no prosecution. But, it would be noncriminal misconduct, or malfeasance, or misfeasance in office by an elected or appointed officer or employee.

So, it reaches further. I would think the entire milieu of Watergate, as this committee has read it, seen it, heard it for months. There are many situations in which the conduct of somebody in our government was abhorrent to the principals to our government, was detrimental to it, but they might not reach the level of criminal misconduct. And I think that there should be, as a great civics lesson for all time, for the people of the United States, there should eventually be a public record of this, as a guide if nothing else, to what we expect from our public officials in the future.

Mr. EDWARDS. You are talking more about what a congressional committee is supposed to do in its oversight responsibilities, rather than the traditional role of the grand jury; isn't that correct?

Mr. DANIELSON. I definitely am speaking of something in addition to the traditional role of the grand jury. The traditional role of a grand jury under the Federal Rules of Criminal Procedure does not permit a report. The portions of our Federal Rules of Criminal Pro-

cedure relating to the regular grand jury, the standard grand jury, are not even in our codified criminal code, they are in the Federal Rules of Criminal Procedure under rule 6, and there is no provision at all for a report.

I can remember many, many, many times when I was a prosecuting attorney, we had a very distinguished judge in the southern district of California, Judge Leon Yankwich who, every time he impaneled a grand jury, gave them about an hour long lecture on the fact that they were not comparable to a California State grand jury, entitled to explore into every ramification in government, and report on anything they want. They could not become a runaway grand jury, but they must confine their reports to violations of the criminal laws of the United States.

Now, that is our traditional role of a grand jury under Federal Criminal Procedure. But, the Organized Crime Control Act of 1970, in which I find section 3333 of title 18, puts in this other element of a report on noncriminal conduct.

Mr. DENNIS. Would the gentleman yield to me briefly for a comment?

Mr. EDWARDS. Yes. Of course I will.

Mr. DENNIS. I don't want to take your time. I just want to observe that there is a good reason for not having the Federal grand juries have a right to issue reports, normally. And the reason is that their business is not to accuse people unless they've got a criminal offense. We all know that the grand jury usually reflects the prosecutor. And if you get grand juries going around making general borrowed condemnations of the American people, what you are really doing is just letting some U.S. attorney somewhere say what he thinks is moral and right, and condemning everybody that disagrees with him. And that's why we don't let them do that.

Mr. EDWARDS. Let me follow that up with an observation that bothered me. We have the prosecutor, Federal prosecutor arranging for immunity with a particular witness who is probably subject to the criminal justice system for a crime.

Mr. DANIELSON. Who would otherwise be.

Mr. EDWARDS. He makes a deal, we'll call it a deal with the prosecutor that he gets immunity, but usually he gives something in return, and that is his testimony. So, immunity is granted. But now we come along and pass a law that allows the grand jury to make an end run around the grant of immunity and it all comes out anyway, and the person who has been granted immunity has, as our colleague from Indiana described, a minicriminal trial; but it's without the safeguards that the criminal justice system would offer.

Mr. DANIELSON. I'm most pleased that my colleague from California is on this committee because I can assure you, Mr. Chairman, so long as he is on this committee, there will be absolutely no erosion of civil rights; and I favor that. However, I'm pleased to respond to the gentleman. The grant of immunity is not some kind of a baptism, he is not washed clean, it is not a fiat that this man is above and beyond all criticism, that he has done no wrong. It doesn't make him, to use the old cliche, as pure as the driven snow on the chapel roof.

It merely means that he has bartered away some testimony that he might otherwise have withheld or given, and he has been given a pass,

a weekend pass, he doesn't get prosecuted this time. But, it is not a finding that he is above reproach. He may have been guilty of the most horrible conduct, the most terrible conduct. And the fact that he doesn't have to go to jail, he doesn't have to stand trial, is quite a benefit, and he has found it worthwhile. He is willing to give up his testimony in exchange for staying out of the prison, or the jail, or whatever it may be.

I'm not going to go into the merits of immunity. As a matter of fact, I'm not satisfied that our immunity statutes serve a real good purpose in the long run. There is something about the immunity statutes that reminds me very much of coercion, it's almost like a gun at somebody's head: you testify, or else. I don't like that, and I don't think that the gentleman likes that either.

But, we shouldn't be so naive, or so super-hyper conscientious as to deceive ourselves into thinking that because somebody got immunity he is thereby innocent above reproach. He isn't even pardoned. He may be a scoundrel, but he's gotten immunity and therefore he can't be prosecuted.

All I seek, and all that we have a right to seek is that the truth be known. The Watergate situation struck so close to the heart of our system of free government that I submit that the least we can do is do our very best, to take every necessary, reasonable step to preserve all of the evidence and all of the stories of these events for future generations.

Believe me, sir, the wounds of Watergate are still festering, and they will never heal unless we lance them open and drain them out, and let them heal from the bottom up, otherwise they are going to scar over and we will never have recovered, and our country will never be as good as it used to be. We must bring this story out, and we must do it as effectively and completely as possible.

Mr. EDWARDS. Thank you very much.

Mr. HUNGATE. The gentleman from Maryland, Mr. Hogan.

Mr. HOGAN. I have no questions, Mr. Chairman.

Mr. HUNGATE. The young lady from New York, Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Thank you, Mr. Danielson. I share your views that the full story has not been told, the whole story of Richard Nixon's misconduct in office, criminal or otherwise, and that there is additional information that has not yet been brought to light in a number of areas.

I think that what you are groping for here is the most appropriate vehicle for documenting the story in its entirety, or as much of the entirety as we can figure out getting at this time. I gather it is your impression that to empower the Special Prosecutor to make that kind of report would violate the canons of ethics and would create a problem. In other words, it's an undesirable route, and possibly an improper route to require the Special Prosecutor to make the kind of report you are asking the grand jury to make.

Mr. DANIELSON. Yes, I do. The answer precisely is "Yes." I would like to elaborate briefly.

This ties in very much to the comments of the gentleman from Indiana, Mr. Dennis, relative to the role of the grand jury; and incidentally, I want to associate myself with those remarks. Unless we have some safeguards, he pointed out a very critical thing. An over-

zealous U.S. attorney, one who might seek publicity, or whatever, or a vindictive sort of person, could very easily bring prosecutions against someone against whom there should be no prosecution. I think that it's important that we have these restrictions.

Now, on the whole story——

Ms. HOLTZMAN. That's a separate question, whether or not the grand jury is the proper vehicle for it. What I'm asking is: in your judgment, is the Special Prosecutor not the proper person to be charged with the duty of making a report? Is that your basic conclusion?

Mr. DANIELSON. That is my belief. If the gentlewoman would please, I would like to point out on pages 6 and 7 of my written statement, on page 6, canon 7, the canons of professional ethics of the American Bar Association provides that:

"A lawyer should represent his client zealously within the bounds of the law." Now, that's a first position. Within the bounds of the law means to me not only that he may not violate the law himself, but that his client may not, with his cooperation.

And then we go on to the American Bar Association's disciplinary rule No. 7, on page 7 of my statement, and you find that the areas in which an attorney is associated with the investigation of a criminal matter—and I expect that includes Mr. Jaworski in this case—may not make public statements except as provided here in canon 7:

> A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
>
> (1) Information contained in a public record.
>
> (2) That the investigation is in progress.
>
> (3) The general scope of the investigation including a description of the offense, and, if permitted by law, the identity of the victim.
>
> (4) A request for assistance in apprehending a suspect or assistance in other matters.
>
> (5) A warning to the public of any dangers.

I feel that Mr. Jaworski is governed by that. If I were in his shoes I would be governed by that, and I think my bill seeks to achieve the purpose which needs to be achieved without violating these rules.

Ms. HOLTZMAN. And you think a report of this nature that would be submitted by the Special Prosecutor to the court, for example, would be an extrajudicial statement that would be prohibited by that canon that you quoted?

Mr. DANIELSON. I feel that it would, ma'am. I feel that it would to this extent, using the words "extrajudicial statement." I'm of the belief that this was drawn up and intended to encompass only a matter directly related to an information, or an indictment, in other words, a criminal prosecution, rather than some collateral matters.

Ms. HOLTZMAN. Well, let me ask you another question, then. Why do you think that the grand jury is a better vehicle than, let's say, a commission for the purpose of documenting the record?

Mr. DANIELSON. Well, I respond as follows: The grand jury is already in existence; the grand jury is the body which has heard this testimony for—I don't know how long, 18 months, or more. They have the records, they have the information. It would seem to me it would facilitate the communication if they made a report, rather than delegate it, again, to someone else.

Ms. HOLTZMAN. I'm not necessarily disagreeing with you, but I thought it important to get some of your views on the record. I have one additional question which is——

Mr. DANIELSON. May I, ma'am, interrupt, I would like to state another good reason to leave it with the grand jury. We have all had experience with commissions. If the new commission were now to be appointed, would we not have the same situation as when a President appointed a commission to study the John F. Kennedy assassination; or when one was set up to study the causes of civil unrest, and the like.

You are immediately subject to criticism. Well, they picked a few old cronies here, and a few old cronies there. This grand jury is just "Mr. and Mrs. District of Columbia," they are citizens taken from every walk of life; they have already demonstrated they do a fairly good job. In fact, I'm proud of the way they have done their job, I think it's excellent. I think they are the logical people to make a report, and it would shorten time so much, they already have it, they don't have to seek it out.

I appreciate the gentlewoman yielding to me there.

Ms. HOLTZMAN. I just have one final question—I have a few others, but this is something else that concerns me perhaps a little bit more than others. Why is the grand jury's report not limited simply to Richard Nixon?

The reason I ask you this is that if the grand jury were to come forward with a report respecting offenses against the criminal law of the United States in this whole area of jurisdiction, it may be that the grand jury would come out with a report that some person had committed, in the grand jury's opinion, a criminal offense, even though that person may well have been acquitted in a trial.

Is it the focus of what you are saying that we want a report documenting Richard Nixon's activities, rather than everybody else's, or am I misinterpreting your statement?

Mr. DANIELSON. I hope I can remember all of those questions because they are good ones. But, you mentioned one, suppose this grand jury should report that Mr. X was engaged in criminal activity, but he's already been tried and acquitted.

If he has already been tried and acquitted, he must have been charged, an indictment has already been brought, or an information. He's been tried, he's been acquitted. The very fact that the grand jury brought an indictment in the first place is a report by the grand jury that they believed him to be quilty of criminal misconduct, otherwise they couldn't bring in the indictment.

So, I think that that question sort of answers itself.

I don't know that I can remember all the subdivisions of the questions. Would you give me another one?

Ms. HOLTZMAN. It was really part of a question asking whether you really wanted the report limited to Richard Nixon's misconduct.

Mr. DANIELSON. No, I do not want it limited to Mr. Nixon, I definitely do not. I don't want this even to appear that it's limited to Mr. Nixon, though he is included.

For example, when the entire story is told, I'm just certain that there will be evidence that other persons participated in some of the activity involved. Let's use something with which we are all familiar, not

necessarily to point a finger, but to illustrate because we already know these things.

We know that Mr. Strachan, for example, participated in some of the activities, though he was not a policymaker, he was an implementer for Mr. Haldeman. We already know about Mr. Strachan, so I don't hesitate to use his name. Now, there may be others in similar capacity who carried out the instructions of people at a higher level. Now, at a certain level you cut off the investigation because they are just supernumeraries. But, there is a level of employee, implementer, which is below the policymaker and above the taxicab driver who probably should be brought out. We have to delegate that to someone, and I think the grand jury is the right person.

We all know a name, we know a Larry Higby. Now, in our long deliberations Mr. Higby's name came up frequently. He was apparently one or two steps down the ladder from Mr. Strachan, but in that same chain of command. I don't know, I'm not taking on Mr. Higby, I'm trying to give you an example.

Maybe a full story would name such a person. Maybe it wouldn't. Now, if it didn't and I were Mr. Higby, I would be highly pleased because once that story is out and it shows I'm not involved, it doesn't name me, I could for all time point to that report and say, "Look, they told the whole story, and I'm not named."

I remember now the first part of the lady's question, that she does not believe the whole story has been told, and I don't either. But, I don't know that it hasn't been told, and I think that's one of the values of this report. I have no fear of any consequences if the whole story is told and establishes only that which we already know about it. In other words, if it goes no further than it has, I'd be happy. I do not believe that to be the case.

But, if someone could reassure me and the American people for all times that the whole story has been told, think of the speculation we would avoid. People are still, today, debating who killed John F. Kennedy. Let's tell the whole story.

Mr. HUNGATE. The time of the gentlelady has expired. I yield 2 minutes of my time to the gentleman from Wisconsin, Mr. Kastenmeier.

Mr. KASTENMEIER. I thank the chairman, and I will be very brief because I know we have other witnesses.

But, as I read the bill, lest someone believes that this mandates a public report in a time certain, it merely says that the grand jury may, with the concurrence of the majority, submit to the court a report; not necessarily even a public report. There is no time certain, but presumably during a time during which its term may be extended by the court.

And therefore, even though you pass this legislation, is it not a fact that the grand jury could decide not to issue the report; that the court could decide not to extend its term for that purpose; or indeed, the court could even suppress the report, as far as making it public?

Mr. DANIELSON. Let me answer those questions sequentially, if I can.

There is in effect—there is a practical time certain. It is not a time certain, but as you know from civil law, it's considered certain if it can be calculated. Now, in line 6 of page 1 it says that the report shall be submitted "upon completion of its term." That term is going to

expire one of these days, it's bound to. If not, this will be the first grand jury in human history that didn't complete its term. It's going to expire.

Now, it is true, the discretion is in there. Maybe the committee would like to eliminate that discretion. I submit that the committee should not. I submit that if this grand jury collectively—and don't forget, this is up to the concurrence of a majority of the members—if the majority of the members of the grand jury feel that they do not have a story that needs to be told, then I think they should not be compelled to state one.

But, if a majority does concur to issue a report, then I think they should have the right to do so.

Mr. HUNGATE. I have one brief question, and we have our colleague, Mr. Stark, waiting patiently.

What would you think about the publication of the grand jury report filed with the Judiciary Committee, the so-called "Suitcase Papers."

Mr. DANIELSON. I'd like to see them. I have not been through that whole suitcase.

Mr. HUNGATE. Would you consider it authorized?

Mr. DANIELSON. I beg your pardon?

Mr. HUNGATE. Would you consider publication authorized?

Mr. DANIELSON. Yes. I think they should be made available. I don't know if I understand your question exactly, but my attitude is, I think this information should be made available.

Mr. DENNIS. Mr. Chairman, would you yield for a comment?

Mr. HUNGATE. Yes, Mr. Dennis.

Mr. DENNIS. I would just like to point out for the record, I think I'm correct, under section 2 of Mr. Danielson's bill, in the event that the grand jury does submit the report, then the court shall proceed as if it were a report submitted under section 3333——

Mr. DANIELSON. Right.

Mr. DENNIS [continuing]. Which definitely contemplates publication.

Mr. DANIELSON. It contemplates publication, but it does permit the court—in fact, it requires the court to find that there was due process; to find that there was a preponderance of evidence. I think it builds in, it incorporates a good number of safeguards. Enough, I believe, even to satisfy my colleague from California, Mr. Edwards, who I know is assiduous in his desire to protect civil rights, and I commend him for it.

Mr. HUNGATE. The Chair would like to express the committee's appreciation to the gentleman from California for his thorough job. I don't know where you went to law school, but I think I wish I went there, Mr. Danielson.

I appreciated your warning concerning our proceedings and the farmer's daughter. In my case that warning comes 30 years too late. I'm the traveling saleman's son who married the farmer's daughter.

Mr. DANIELSON. Well, I'd say, don't do it again, Mr. Chairman.

Mr. HUNGATE. All right. I shall employ all the caution I have learned in dealing with it.

Thank you very much.

Mr. DANIELSON. Thank you.

[The prepared statement of Hon. George Danielson follows:]

STATEMENT OF HON GEORGE DANIELSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I am appearing here today in support of legislation I have introduced, H.R. 16816, to give the Watergate grand jury the authority to file with the U.S. District Court for the District of Columbia, a full report on its investigation, which would become a public record. The report would cover all matters which are under the jurisdiction of the Watergate Special Prosecution Force.

The purpose of my bill is to assure that the full story of Watergate is told, and that the public has full access to all the relevant facts. My approach is different from some of the other proposals before the subcommittee, in that it calls for a report to be filed by the so-called "Watergate" grand jury, rather than by the Special Prosecutor.

My bill is designed to accomplish three prime objectives:

1. complete public disclosure of all the relevant facts of the Watergate affair, and the actions of all the parties to that affair;

2. the protection of the rights of all the persons who participated in the Watergate affair, including the rights of former President Nixon; and

3. full compliance with the Canons of Professional Ethics of the American Bar Association, by which Special Prosecutor Jaworski, and all attorneys, are bound.

1. COMPLETE WATERGATE DISCLOSURE

We find ourselves today in a situation where almost all of the avenues leading to complete Watergate disclosure have been closed by various legal happenings.

Of utmost public importance is a full disclosure of the role in Watergate played by former President Nixon. The President is the most public of all public officials; his conduct, or misconduct, his stewardship of the office of the Presidency is a matter of prime concern to all of the American people, of this generation and of future generations. The American people have a fundamental and inalienable right to a full accounting for his public trust by each and every President.

The completion of the impeachment process would have resulted in such an accounting, but that was aborted by Mr. Nixon's resignation from the Presidency. The criminal proceedings likewise would have brought about full disclosure, but they were cut short by President Ford's pardon of former President Nixon. Even the disciplinary proceedings before the State Bar of California were terminated following Mr. Nixon's resignation from the bar, and I submit that Mr. Nixon tendered his 11th hour resignation from the bar for no reason other than to prevent the truth concerning his activities in recent years from coming to light.

For more than two years, the coverup consisted of withholding evidence from the appropriate authorities. It is no longer thusly limited—it is now an attempt to conceal that evidence from history.

My bill would unwrap that evidence, by giving the Watergate grand jury the authority to write a final public report on its entire investigation. The scope of the report proposed in my bill closely parallels the scope of the duties of the Watergate Special Prosecutor. It would include offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate; all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deemed it necessary and appropriate to assume responsibility; allegations involving former President Nixon, members of his White House Staff, or his appointees; and any other matters which the Special Prosecutor consented to have assigned to him by the Attorney General. In addition, the grand jury would have authority similar to that of a special grand jury summoned pursuant to Chapter 216 of Title 18, U.S. Code [18 U.S.C. Secs. 3331-3334], to include in its report matters relating to noncriminal misconduct, and malfeasance or misfeasance in office by elected or appointed public officials. Title 18, Section 3333, authorizes such a report with respect to "appointed" public officers or employees; H.R. 16816 specifies "elected or appointed public officials." The latter authority is necessary because Mr. Nixon, by reason of the full, free, and absolute pardon which was granted to him on September 8, of this year, is probably immune, even from being charged with having committed any offense against the criminal laws of the United States.[1]

[1] *Ex parte Garland*, 1867, 71 U.S. (4 Wall.) 333, 18 L. Ed. 366.

My bill is necessary, because in the absence of statutory authority, no report submitted by the Watergate grand jury could shed light on the role of Mr. Nixon in the Watergate affair. The well settled rule is that, in the absence of statutory authority, a grand jury has no right to file a report reflecting on the character or conduct of public officers or citizens, unless it is accompanied or followed by an indictment.[2] That is because an indictment provides the accused with a vehicle for resolving the charges in an appropriate judicial proceedings—a criminal trial. Without an indictment, the accused cannot have the charges resolved.

2. OBSERVANCE OF CIVIL RIGHTS

In the past, our committee has grappled with the problem of permitting a grand jury to write a report which is critical of an individual, but which is not accompanied or followed by an indictment. As you know, Title I of the Organized Crime Control Act [Title 18, U.S.C., Secs. 3331–3334] passed in 1970, provides that a grand jury may submit a report to the court on noncriminal activities of a public official *provided* that certain protective procedures are observed. Those procedures, which are set forth in 18 U.S.C. Sec. 3333, are incorporated fully into my bill by reference. My bill, H.R. 16816, provides that any person who is named in the report but who has not been indicted will have the opportunity to call a reasonable number of witnesses on his own behalf before the grand jury. He further is entitled to prepare an answer to the report containing a statement of the law and facts which constitute his defense to the charges made in the report. The report must be supported by a preponderance of evidence. The court would further have the authority to seal the report if due process has not been complied with, or if publication of the report would prejudice the fair consideration of any pending criminal matter.

In short, the persons named in the report but who are not indicted would have more rights with respect to the grand jury, under my proposed bill, than those persons who are indicted.

3. THE SPECIAL PROSECUTOR

In an effort to clarify the record of the Watergate case, eight members of the Senate Judiciary Committee wrote a letter to Special Prosecutor Leon Jaworski, asking that he disclose those charges which would have been made against Richard Nixon had he not been pardoned. Mr. Jaworski, however, respectfully declined to list those charges. The Special Prosecutor's office has announced his opinion that it would be improper for any prosecuting attorney to exceed the scope of his responsibilities, which is to prosecute criminal offenses in court, and not to make accusations in the arena of public opinion. Mr. Jaworski's role is to prosecute—not to persecute. He is guided and governed by that principle, and I respect him for it.

Moreover, Canon 7 of the Canons of Professional Ethics of the American Bar Association provides: "A lawyer should represent his client zealously within the bounds of the law." That canon does not only mean that a prosecutor must personally obey the law; it means that he is to represent his client—the people—only within the framework of the procedures which our society has developed, and which has been handed down from generation to generation—the framework of our system for the prosecution of criminal cases, the system of our courts.

In addition, ABA Disciplinary Rule 7–107(A) which was promulgated under Canon 7 provides:

"A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

"(1) Information contained in a public record.

"(2) That the investigation is in progress.

"(3) The general scope of the investigation including a description of the offense, and, if permitted by law, the identity of the victim.

"(4) A request for assistance in apprehending a suspect or assistance in other matters.

"(5) A warning to the public of any dangers."

I submit that legislation authorizing or directing the Special Prosecutor to make charges and public accusations against former President Nixon—charges

[2] 38 Am. Jur. 2d, Grand Jury, Sec. 30 (p. 976).

which *cannot* be brought to a judicial resolution—could very well place Mr. Jaworski in a position which conflicts with the rules I have just outlined, and which govern Mr. Jaworski and all members of the legal profession.

Instead, my legislation permits the grand jury to report crimes and misconduct within a framework already authorized by Federal law, and with ample procedural safeguards for the rights of all concerned. It would accomplish all three of the objectives I have outlined, and make the full story of Watergate a public record.

Mr. HUNGATE. We are pleased to have with us Congressman Stark of California. You have a prepared statement, I believe.

Mr. STARK. Yes, Mr. Chairman, I do; and I'll try and paraphrase it.

Mr. HUNGATE. Without objection, we will make it part of the record at this point, and you may proceed as you see fit.

TESTIMONY OF HON. FORTNEY H. STARK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. STARK. Mr. Chairman, I appreciate the opportunity to testify. As a nonlawyer, I'm here to urge you, as Mr. Danielson did before me, to see that the American public gets the truth.

Like most of you I have received an avalanche of letters, telegrams, phone calls, and pleadings from my constituents since the pardon. They want to know why former President Nixon received special treatment. They want to know—does the pardon, coming as it did before any indictment, imply that some men are above the law. These are questions that I have heard time and time again, and I think that the thread that runs through these questions is, will we ever learn the whole truth about Watergate. I would like to center my remarks on that particular point because it's the crucial question, I think, before you today.

The outrage that followed the Nixon pardon wasn't based, in my opinion, on any desire for revenge; the protests weren't made out of malice. I think many Americans hoped that the President would never be in danger of going to jail, but our colleagues our constituents, the press, they all cried out for the truth, the whole truth and the complete truth about break-ins, buggings, bribery, all of those sorts of activities that have come to be called Watergate.

The pardon seems to present a road block to the judicial process which I had felt would provide us with all the facts. Although it's possible that Mr. Nixon may still testify in various court proceedings, it's unlikely that this limited presentation will yield the complete story. And with that avenue more or less closed, it's up to Congress to insure that the public will have the full facts. The exact manner, in which these facts are presented is of secondary importance. If the Special Prosecutor can provide us with a definitive report: if the subpenaed tapes are released to the public; if the House Judiciary Committee, or a special select committee holds extensive hearings, any of these alternatives or a combination will bring out the truth.

Now, I'm particularly pleased that President Ford has agreed to appear before your committee and answer your questions. His appearance could very well prove to be the catalyst that will bring out the truth which we all so urgently need.

I urge you to question Mr. Ford closely. With all due respect for the President and the Presidency, your first allegiance in questioning Mr.

Ford is not to the Presidency, nor to political politeness, but to the American people who are going to be looking to you to find the answers. I am concerned that Americans know what crimes Mr. Ford thinks Mr. Nixon was pardoned from. Let's hear from President Ford of his own understanding of I.T. & T., and the milk deal, and the use of CIA and FBI agents involved in domestic-political processes. What did Mr. Ford think was wrong with what Mr. Nixon did because that could very well establish the kind of legislative history by which future Presidents can be guided.

I'm afraid if nothing else works, if it appears unlikely that any alternative course will answer all these legitimate questions, that some Member—and if no Member, then I, will of necessity take to the floor, prior to election, and call up your impeachment resolution as outlined in Committee Report 93–1305, for a vote before the full House.

This action, again, would not be taken out of malice, however an impeachment vote and a trial in the Senate may prove to be the only way that history properly records these events, but I certainly hope not. I think that's the position that you people are facing. This committee has labored with tough decisions and after considering all available data you voted to remove the President. I doubt that there are many Americans who don't believe that Mr. Nixon is guilty of impeachable offenses, and perhaps convictable crimes.

The truth of time is such, however, that if we fail to provide a definitive account of the events of Watergate they will become blurred and their meaning uncertain. I don't want a Clifford Irving to write the story of Watergate for my children. I want the Congress, and I want the courts to provide the facts. You have heard that time and time again that we have a duty to provide the truth, and I firmly believe the American people deserve definitive action from their elected Representatives in Congress.

I can't urge you in strong enough terms to proceed with your investigation, and to explore every alternative available, and to begin the congressional process which will bring the facts before the American public in clear, concise terms. It's your obligation and your responsibility to do thus, just as it's my obligation and my responsibility to urge and support whatever actions you decide to take.

Thank you for letting me add my words to your testimony.

Mr. HUNGATE. Thank you very much for your appearance, and for your testimony today, Mr. Stark.

Mr. Smith?

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Stark, I do add my thanks for your testimony today, and for the thrust of your bill, your proposal; and those who are associated with you in this proposed legislation, to arrive at, it's possible, arrive at the truth of Watergate.

Mr. STARK. Thank you.

Mr. HUNGATE. Mr. Kastenmeier?

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I want to welcome our friend from California. I have no questions, other than to observe that the witnesses, both gentlemen from California, Mr. Danielson and Mr. Stark, I note, have cautioned the committee in terms of the appearance of the President, not to be taken in by him. And apparently this is a commonly perceived apprehension

that Members, and perhaps the public have, that we will not deal as candidly and forthrightly and tough with the President as we must under our mandate. And I assure the gentleman that we will.

Mr. STARK. Thank you.

Mr. HUNGATE. The gentleman from Indiana, Mr. Dennis.

Mr. DENNIS. I have no questions, Mr. Chairman.

Mr. HUNGATE. The gentleman from California, Mr. Edwards.

Mr. EDWARDS. No questions, Mr. Chairman, but I want to thank my colleague from northern California—the other Californian being from southern California—for his contribution. And I assure him, I certainly trust that we will listen to your admonitions and very good advice, and will do a thorough job in this important hearing that we are going to have, I presume next week, at which the President will be the witness.

Thank you.

Mr. HUNGATE. The gentleman from Maryland, Mr. Hogan.

Mr. HOGAN. Thank you, Mr. Chairman.

I don't think there is any doubt that the story of Watergate is going to be told, has been told, and every shred of information related to the case is going to receive public scrutiny.

I'm sure that our friend from California realizes that the Special Prosecutor is already mandated to issue a report, whenever that might be. I'm sure he also shares my concern that the rights of other defendants in those trials not in any way be impaired by our effort to bring the story of Watergate to public scrutiny.

But, I do want to say, and I say it kindly because I do have a great deal of respect for the gentleman from California and the previous witness from California, that it troubles me very much that we have reached a point in time where we in the subcommittee are about to have the President of the United States appear as a witness on a legislative matter—and I might say that's the first time that's happened in over a hundred years—rather than applaud the action of the President in coming in recognition of the equal power of Congress in our Federal Government, rather than applaud that, we are warned to make sure that we are not hoodwinked by the President of the United States. And, don't allow him to come here and mesmerize us, and lure us away from our responsibility.

That really troubles me very much because everybody on this committee, and everyone in this Congress, knows the President as a personal friend; and they know the depth of his integrity and his honesty, and his candor. And I just don't think it's fair to issue those kinds of warnings with what is really a historic event.

Mr. STARK. I share the gentleman's concern. I suppose it's unfortunate, particularly for those of us who may not have had the privilege of serving with the President for very long in the House, that all we can base our worry about lack of candor on is previous holders of the position, and that creates our concern. We have seen it from many members of the executive branch in all areas—a lack of concern, and a lack of candor. The Secretary of State telling us what the CIA did in Chile; and the Secretary of Defense telling us why he called military alerts.

There are some who would contend that we have been consistently lied to, and I would not like to see that perpetuated. We have a new

administration, and I hope that we could do away with the lack of candor, and the lack of honesty that existed in the previous one.

Mr. HOGAN. Well, I certainly share the gentleman from California's hope. And I certainly agree that the deception, and the dishonesty, and the lack of candor in the immediately previous administration does give one cause to be suspicious. But I think that's unfortunate. I think that we ought to give the new President the benefit of the doubt, particularly because we do know his own particular character, so that we are not going forward and trying to solve the problems of the country with mutual distrust, rather than mutual confidence and trust.

Mr. STARK. I agree with the gentleman and share his remarks.

Mr. HUNGATE. The gentlewoman from New York, Ms. Holtzman?

Ms. HOLTZMAN. Thank you, Mr. Chairman.

I think what my colleague from California—and I want to thank him for his testimony—is trying to say is that we don't have the system that exists in England, where the legislative branch freely questions the Head of State; and perhaps in prior administrations the Congress felt in too much awe of the Office of the President.

I think that Mr. Ford's coming here will hopefully be a long step in correcting the balance between the two branches and permitting a free flow of information with full candor between both branches. I think that was the thrust of his concern, and I certainly look forward to seeing that happen.

I have no other questions, or comments, Mr. Chairman.

Mr. HUNGATE. I thank the gentlelady.

Mr. STARK. I'd like to tell the chairman, your committee really has been riding the crest of a great wave of history; and I hope you keep right on top.

I want to thank you very much for a chance to be with you today.

Mr. HUNGATE. Well, it has 435 legs for support, that's the secret of it, Mr. Stark. I thank you and appreciate your testimony. As we quest for the truth, we also want to read Oedipus Rex once a year. Thank you, sir.

Mr. STARK. Thank you.

[The prepared statement of Hon. Fortney H. Stark follows:]

STATEMENT OF HON. FORTNEY H. (PETE) STARK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman and members of the committee, I appreciate this opportunity to testify before your committee. The number of bills and resolutions which have been introduced since President Ford's decision to grant a full and complete pardon to Richard Nixon is only one of many indications we have that the "Watergate episode" is not yet resolved.

Like many of my colleagues, I have received an avalanche of letters, telegrams, and phone calls from constituents who all ask basic, eloquent questions—why did Richard Nixon receive special treatment? Does the Nixon pardon, coming as it does before any indictment, let alone conviction, for crime had been rendered, imply that some men are indeed above the law? Will we ever know the whole truth about Watergate?

I'd like to center my remarks around that last point because I believe it is the crucial question before this committee today, before the Congress, and before the Nation.

The outrage which followed the Nixon pardon was not based on individuals' desire for revenge. The protests were made not out of malice toward the former President—in fact, I doubt if there are many Americans who actually wished to see Mr. Nixon behind bars—however, our colleagues, our constituents and the

press have rightfully cried out for the truth, the whole, full and complete truth about Watergate.

The pardon prevents the judicial process from providing us with the facts. Although it is possible that Mr. Nixon might still testify before either the Watergate conspiracy trial which begins today or in some other court in the future, it is unlikely that this limited presentation will yield the complete story.

With that avenue now closed, it is up to the Congress to insure the public that it will receive all the facts. The exact manner of presenting these facts is of secondary importance. If the Special Prosecutor can provide us with a definitive report; if the suponeaed tapes are released to the public; if the House Judiciary Committee or a special select committee holds extensive public hearings; any of these alternatives, or a combination thereof, will bring out the truth.

I am pleased to learn that Mr. Ford has decided to appear before your committee and answer your questions. His appearance before you may well prove to be the best public forum available for bringing out the truth. I urge you to question Mr. Ford closely, for with all due respect to the President, I believe your first allegience in that hearing is not to the Presidency, nor to political politeness, but to the American people who will be looking to you to find the answers.

I am primarily concerned that Americans know what crimes Mr. Nixon was pardoned from. We owe that to our constituents, to the strength of this republic and to history.

The Judiciary Committee has labored with its tough decisions and finally voted to remove the President.

Although I doubt that there are many Americans today who do not believe that Mr. Nixon was guilty of impeachable offenses—and perhaps convictable crimes—the truth of time is such that if we fail to provide a definitive account of the events of Watergate, they will become blurred and their meaning uncertain. I do not think we should rely on second-hand accounts, autobiographical materials, or participants' interpretation of historical events for which there exists abundant, more reliable data.

History can be confused, make no mistake about it. If this Congress provides Mr. Nixon with hundreds of thousands of dollars for transitional expenses, as requested by the Ford administration, and then fails to decide convincingly the question of Mr. Nixon's guilt in the Watergate case, history may show that a President resigned his office because of lack of support from a Congress which then turned around and gave him practically unlimited funds from the public treasury—hardly the way one would expect a man associated with "impeachable" or "convictable" offenses to be treated.

We have a duty to provide the truth. I firmly believe that the American people deserve definitive action from their elected Representatives in Congress. I cannot urge this subcommittee in strong enough terms to pursue its investigation, to explore the alternatives available, and to begin the congressional process which will bring the facts before the American public. It is your obligation and your responsibility to do thus, just as it is my obligation and my responsibility to urge and support your actions.

Mr. HUNGATE. Our colleague, Congresswoman Margaret Heckler was to be the next witness. She is detained in another committee. I suppose the reform bill that we passed this week will stop such conflicts in the future. They are marking up a bill which she introduced, so we can understand that her first responsibility would be there.

She does have a prepared statement which has been presented to the committee; and without objection, it will be made part of the record at this point.

[The prepared statement of Hon. Margaret M. Heckler follows:]

STATEMENT OF HON. MARGARET M. HECKLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman. The Watergate excesses of the past two years must never be forgotten. To forget would invite a repeat of the tragedy. This bill assures the American public of a complete and factual record.

This sad era has stimulated millions of words of analysis, thousands of hours of investigation, and hundreds of charges and innuendoes. The American people have been bombarded with the Watergate break-in, misuse of government agencies, and a total disregard for the spirit and letter of the law by those in high places. But, years hence, when the emotions and passions of the moment are history, what will the record show of these agonizing days.

There are scattered admissions of guilt and reams of testimony. But much of the record has been supplied by second-hand sources and those, espousing a certain interpretation of the facts. The American people deserve better.

I think the most touching illustration of the need for this type of legislation was a conversation I had just last week with a history teacher from my District. The dilemma she faces in the classroom is no doubt repeated in thousands of schools and colleges across the country. Today's young people are losing confidence in their system of government. After months on end of the Watergate trauma these students still have questions for which their Civics books do not have an answer. To some, inaction by the Congress would be complicity in the last act of the cover-up. What do I tell my students, she asks.

Enactment of this legislation would console our young people with the fact that Congress cares enough to provide itself with a complete record from which conclusions can be drawn. The facts in all their candor would be there. I would favor a follow-up move by the Congress to make the material public thus exhibiting to the next generation our desire to let the record be known. My teacher friend would have an explanation for her students.

Mr. Chairman. This bill would transmit to the Congress all materials, documents, and reports obtained, prepared, and compiled by the Office of the Watergate Special Prosecution Force following a determination by the Attorney General that the rights of parties named in the material or parties related to the litigation will not be compromised. The natural next step by the Congress would be release to the general public.

We, as Americans, have been hounded by the incessant Watergate controversy for over two years. Watergate must not be allowed to whimper into the history books without a complete accounting of the facts. The record must be available so that a future Watergate is prevented.

Mr. HUNGATE. There are no further witnesses to come before the committee this morning. We will recess subject to the call of the Chair.

[Whereupon, at 11:35 a.m., the subcommittee recessed, subject to the call of the Chair.]

PARDON OF RICHARD M. NIXON AND RELATED MATTERS

THURSDAY, OCTOBER 17, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:12 a.m., in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee] presiding.

Present: Representatives Hungate, Kastenmeier, Edwards, Mann, Holtzman, Smith, Dennis, Mayne, Hogan, Rodino [chairman of the full committee], and Hutchinson [ranking minority member of the full committee]

Also present: Representatives Donohue, Conyers, Eilberg, Flowers, Sarbanes, Rangel, Thornton, Mezvinsky, McClory, Sandman, Fish, and Cohen.

Staff present: Jerome M. Zeifman, general counsel; Garner J. Cline, associate general counsel; Robert J. Trainor, counsel; Franklin G. Polk, and Michael W. Blommer, associate counsels; and Stephen P. Lynch, research assistant.

Mr. HUNGATE. The subcommittee will be in order.

The Subcommittee on Criminal Justice of the House Committee on the Judiciary today welcomes the President of the United States, Gerald R. Ford. We appreciate your willingness, voluntarily, to appear to respond to the questions posed in two privileged resolutions of inquiry, and to accept inquiries from the subcommittee as it carries out the responsibilities assigned it by the House of Representatives.

This is perhaps the first documented appearance of a President of the United States before a committee or subcommittee of the U.S. Congress.

The Chair understands, Mr. President, that you have a commitment at noon, and the House convenes at 11:30 a.m. today. With these constraints of time in mind, we shall proceed as quickly as possible to accomplish as much as we can in the available time. The questioning will be done by subcommittee members only, and under the 5-minute rule.

President Ford's appearance demonstrates his commitment to be open and candid with the American people. It is absolutely vital for the restoration of the public's trust in their governing institutions and elected officials that frankness be the hallmark of this and future administrations.

The newspaper "Le Monde," of Paris, recently wrote:

No European republic invests its President with the right of pardon as sweeping and irrevocable as that which Gerald Ford exercised in favour of Richard Nixon.

In a sense, the royal pardon takes over from the executive privilege behind which the former President took refuge so long, as a way of preventing Congress and the law courts from investigating his conduct.

Since September 8, when as President you issued a full, free, and absolute pardon to former President Nixon for all crimes he committed or may have committed while serving as President of the United States, several questions have been raised relating to the circumstances surrounding the pardon, and whether, as a result of the pardon and subsequent agreements entered into by the former President and officials of the executive branch, the full and complete story of Watergate and related activities will ever be known. In an attempt to resolve these questions, more than 70 Members of the House of Representatives, Republicans and Democrats alike, have sponsored bills and resolutions seeking to uncover the full story of the pardon and Watergate. These several bills and resolutions are currently pending before the subcommittee.

Included among the 23 bills and resolutions pending before the subcommittee are the two privileged resolutions of inquiry considered today; one, House Resolution 1367, introduced by Representative Abzug, of New York, and the second, House Resolution 1370, introduced by Representative Conyers, of Michigan. The Rules of the House of Representatives require prompt committee action on privileged resolutions of inquiry.

Copies of the two privileged resolutions were immediately forwarded to President Ford requesting a response, and following an exchange of correspondence, the President offered to appear here as he voluntarily does today.

The task we undertake is made easier by the personal friendship and common background we share in the Congress. But to faithfully perform our respective tasks, we must, insofar as possible, lay aside personal relationships and considerations.

We are not here because of friendship, but because of the responsibility our governmental system of checks and balances and separation of powers places upon us; to seek and reveal the truth to the American people about the working of their Government by cooperation if possible, by confrontation when necessary.

I hope the American people, as well as the Congress, appreciate the importance of President Ford's appearance, as well as the need to do all that we can to resolve once and for all the questions relating to the pardon of former President Nixon. I am convinced that the issue of the pardon will not be behind us until the record of the pardon is complete.

The Chair recognizes Chairman Rodino from New Jersey.

Chairman Rodino. Mr. President, as chairman of the Committee on the Judiciary, I want to welcome you here, not only as the Chief Executive of this great country, but as a friend, and one who served with all of us for so many years. This historic occasion and your voluntary appearance here only demonstrates once more the great institutions that we are both proud to be part of, and I know that your effort in coming before this committee voluntarily will assist this subcommittee

and this Committee on the Judiciary in meeting its important responsibilities.

And with that, Mr. President, I am going to relinquish the responsibility to the chairman of the subcommittee and to the members of the subcommittee who will direct inquiries to you.

Thank you for coming here.

Mr. HUNGATE. The Chair recognizes the gentleman from Michigan, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. President, the chairman of the Judiciary Committee, Mr. Rodino, and I, as ranking minority member, are ex officio members of this subcommittee. But we appear here this morning only in that capacity, sitting at the foot of the subcommittee on our respective sides, rather than in our familiar places at its head. In this arrangement, Mr. Rodino does not displace the chairman of the subcommittee, Mr. Hungate, nor do I displace Mr. Smith, of New York, as ranking minority member of this subcommittee.

Chairman Rodino and I earlier agreed that we will not participate in questioning our distinguished visitor this morning, leaving that function to the members of the subcommittee regularly appointed. Our participation will be limited to our opening statements.

Other members of the Judiciary Committee, the full Judiciary Committee, who are not members of this subcommittee, some of whom are present here today, will not participate at all, but are interested in the event that the matter under discussion reaches the full committee. The subcommittee has before it a couple of resolutions of inquiry which were introduced in the House of Representatives, referred by the Speaker to the Judiciary Committee and Chairman Rodino designated this subcommittee to consider them.

By a resolution of inquiry, the House of Representatives requests the President or directs the head of one of the Departments of Government to furnish certain factual information, presumably to assist the House in its legislative function. Since the pardon power is not subject to legislative control, I suppose that a question can be raised as to whether a resolution of inquiry is legitimate on this question, since the question itself cannot be resolved by the legislative branch. In any event, the mere introduction of a resolution does not impose a duty upon the Executive to respond, and neither does committee consideration and, indeed, a resolution would be expected only if the House of Representatives then itself adopted such a resolution, and then written communication transmitting the factual information called for would ordinarily be sufficient.

The personal appearance of the President of the United States before this subcommittee does not humble his high office, nor does it violate the separation of powers between the executive and the legislative branches of Government. It is essential, if our Government is to operate, that the executive and the legislative work together. Your meeting with this subcommittee, Mr. President, here on Capitol Hill, is symbolic of that working together in the national interest. But, you do not come, Mr. President, in response to any command of the subcommittee, nor even in response to its request, for it made no demand upon you or even a request for your presence. Your appearance is

entirely voluntary on your part. Your personal appearance here today must not be construed to mean that you will personally appear before this or any other committee of Congress in the future, and Presidents of the United States in the future will be expected to respond to resolutions of inquiry in the future as they have in the past, by written communication.

But, Mr. President, I cannot adequately express to you my personal feelings of warm friendship and welcome, and my sense of high honor that you do this subcommittee, the full Judiciary Committee, and the House of Representatives in meeting with us here today.

Thank you, Mr. Chairman.

Mr. HUNGATE. The Chair recognizes the gentleman from New York, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. President, I, too, join in welcoming you here in your voluntary appearance before this subcommittee of the House Committee on the Judiciary. You have come to answer questions in regard to your pardon of Richard M. Nixon on September 8, 1974. These questions have been propounded by certain Members of Congress, and, generally speaking, the Members of Congress and the people of the United States of America have a right to know the answers as far as this may be possible. Your appearance here has been voluntary and on your own motion, and I commend you for taking this initiative. I do not think it establishes any precedent, but, on the other hand, it is an example of a splendid cooperation between the executive and the legislative branches of our Government, which I trust may be followed many times in the future by those who may come after you as President of the United States of America—the world's toughest job.

Mr. President, I have known you for almost 10 years, and in that time I have always found you to be a man of frankness and candor, a man in whose word one could have implicit trust, a man of the utmost integrity. It is in this spirit that I know you will answer the questions that have been raised about your pardon of Mr. Nixon. And it is in this spirit that I know this committee will receive your answers and will interrogate you.

Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. President, you have an opening statement. Without objection, it will be made part of the record and you may proceed as you see fit. We welcome you here today.

TESTIMONY OF HON. GERALD R. FORD, PRESIDENT OF THE UNITED STATES

President FORD. Thank you very much, Mr. Chairman, and members of the subcommittee.

We meet here today to review the facts and circumstances that were the basis for my pardon of former President Nixon on September 8, 1974.

I want very much to have those facts and those circumstances known. The American people want to know them. And Members of the Congress also want to know them. The two congressional resolutions of inquiry now before this subcommittee serve those purposes. That is why I have volunteered to appear before you this morning, and I

welcome and thank you for this opportunity to speak to the questions raised by the resolutions.

My appearance at this hearing of your distinguished subcommittee of the House Committee on the Judiciary has been looked upon as an unusual historic event—one that has no firm precedent in the whole history of Presidential relations with the Congress. Yet, I am here not to make history, but to report on history.

The history you are interested in covers so recent a period that it is not well understood. If, with your assistance, I can make for better understanding of the pardon of former President Nixon, then we can help to achieve the purpose I had for granting the pardon when I did.

That purpose was to change our national focus. I wanted to do all I could to shift our attentions from the pursuit of a fallen President to the pursuit of the urgent needs of a rising nation. Our Nation is under the severest of challenges now to employ its full energy and efforts in the pursuit of a sound and growing economy at home and a stable and peaceful world around us.

We would needlessly be diverted from meeting those challenges if we as a people were to remain sharply divided over whether to indict, bring to trial, and punish a former President, who is already condemned to suffer long and deeply in the shame and disgrace brought upon the office that he held. Surely, we are not a revengeful people. We have often demonstrated a readiness to feel compassion and to act out of mercy. As a people we have a long record of forgiving even those who have been our country's most destructive foes.

Yet, to forgive is not to forget the lessons of evil in whatever ways evil has operated against us. And certainly the pardon granted the former President will not cause us to forget the evils of the Watergate-type offenses or to forget the lessons we have learned that a government which deceives its supporters and treats its opponents as enemies must never, never be tolerated.

The pardon power entrusted to the President under the Constitution of the United States has a long history and rests on precedents going back centuries before our Constitution was drafted and adopted. The power has been used sometimes as Alexander Hamilton saw its purposes:

> In seasons of insurrection * * * when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.[1]

Other times it has been applied to one person as:

> An act of grace * * * which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.[2]

When a pardon is granted, it also represents "the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." [3]

However, the Constitution does not limit the pardon power to cases of convicted offenders or even indicted offenders.[4]

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[1] The Federalist No. 74, at 79 (Central Law Journal ed. 1914) (A. Hamilton).
[2] Marshall, C. J., in *United States* v. *Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833).
[3] *Biddle* v. *Perovich*, 247 U.S. 480, 486 (1927).
[4] *Ex parte Garland*, 4 Wall. 333, 380 (1867); *Burdick* v. *United States*, 236 U.S. 79 (1915).

Thus, I am firm in my conviction that as President I did have the authority to proclaim a pardon for the former President when I did.

Yet, I can also understand why people are moved to question my action. Some may still question my authority but I find much of the disagreement turns on whether I should have acted when I did. Even then many people have concluded as I did, that the pardon was in the best interests of the country because it came at a time when it would best serve the purpose I have stated.

I came to this hearing in a spirit of cooperation to respond to your inquiries. I do so with the understanding that the subjects to be covered are defined and limited by the questions as they appear in the resolutions before you. But even then we may not mutually agree on what information falls within the proper scope of inquiry by the Congress.

I feel a responsibility as you do, that each separate branch of our Government must preserve a degree of confidentiality for its internal communications. Congress, for its part, has seen the wisdom of assuring that Members be permitted to work under conditions of confidentiality. Indeed, earlier this year the U.S. Senate passed a resolution which reads in part as follows:

"—no evidence under the control and in the possession of the Senate of the United States can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession, but by its permission." (S. Res. 338, passed June 12, 1974).

In *United States* v. *Nixon*, 42 U.S.L.W. 5237, 5244 (U.S. July 24, 1974), the Supreme Court unanimously recognized a rightful sphere of confidentiality within the executive branch of the Government which the Court determined could only be invaded for overriding reasons of the fifth and sixth amendments to the Constitution.

As I have stated before, Mr. Chairman, my own view is that the right of executive privilege is to be exercised with caution and with restraint. When I was a Member of Congress, I did not hesitate to question the right of the executive branch to claim a privilege against supplying information to the Congress even if I thought the claim of privilege was being abused. Yet, I did then, and I do now, respect the right of executive privilege when it protects advice given to a President in the expectation that it will not be disclosed. Otherwise, Mr. Chairman, no President could any longer count on receiving free and frank views from the people designated to help him reach his official decisions.

Also, it is certainly not my intention or even within my authority to detract on this occasion or in any other instance from the generally recognized rights of the President to preserve the confidentiality of internal discussions or communications whenever it is properly within his constitutional responsibility to do so. These rights are within the authority of any President while he is in office, and I believe may be exercised as well by a past President if the information sought pertains to his official functions when he was serving in office.

I bring up, Mr. Chairman, important points before going into the balance of my statement, so there can be no doubt that I remain mindful of the rights of confidentiality which a President may and ought to exercise in appropriate situations. However, I do not regard my answers as I have prepared them in the present circumstances or to

constitute a precedent for responding to congressional inquiries different in nature or scope or under different circumstances.

Accordingly, Mr. Chairman, I shall proceed to explain as fully as I can in my present answers the facts and the circumstances covered by the present resolutions of inquiry. I shall start with an explanation of these events which were the first to occur in the period covered by the inquiry, before I became President. Then I will respond to the separate questions as they are numbered in House Resolution 1367 and as they specifically relate to the period after I became President.

House Resolution 1367 [see app. 2 at p. 196] before this subcommittee asks for information about certain conversations that may have occurred over a period that includes when I was a Member of Congress or the Vice President. In that entire period no references or discussions on a possible pardon for then President Nixon occurred until August 1 and 2, 1974.

You will recall, Mr. Chairman, that since the beginning of the Watergate investigations, I had consistently made statements and speeches about President Nixon's innocence of either planning the break-in or of participating in the coverup. I sincerely believed he was innocent.

Even in the closing months before the President resigned, I made public statements that in my opinion, the adverse revelations so far did not constitute an impeachable offense. I was coming under increasing criticism for such public statements, but I still believed—I believed them to be true based on the facts as I knew them.

In the early morning of Thursday, August 1, 1974, I had a meeting in my vice presidential office, with Alexander M. Haig, Jr., Chief of Staff for President Nixon. At this meeting, I was told in a general way about fears arising because of additional tape evidence scheduled for delivery to Judge Sirica on Monday, August 5, 1974. I was told that there could be evidence which, when disclosed to the House of Representatives, would likely tip the vote in favor of impeachment. However, I was given no indication that this development would lead to any change in President Nixon's plans to oppose the impeachment vote.

Then shortly after noon, General Haig requested another appointment as promptly as possible. He came to my office about 3:30 p.m. for a meeting that was to last for approximately three-quarters of an hour. Only then did I learn of the damaging nature of a conversation on June 23, 1972, in one of the tapes which was due to go to Judge Sirica the following Monday.

I describe this meeting, Mr. Chairman, because at one point it did include references to a possible pardon for Mr. Nixon, to which the third and fourth questions in H. Res. 1367 are directed. However, nearly the entire meeting covered other subjects, all dealing with the totally new situation resulting from the critical evidence on the tape of June 23, 1972. General Haig told me he had been told of the new and damaging evidence by lawyers on the White House staff who had firsthand knowledge of what was on the tape. The substance of his conversation was that the new disclosure would be devastating, even catastrophic, insofar as President Nixon was concerned. Based on what he had learned of the conversation on the tape, he wanted to know whether I was prepared to assume the Presidency within a very short

period of time, and whether I would be willing to make recommendations to the President as to what course he should now follow.

I cannot really express adequately in words how shocked and how stunned I was by this unbelievable revelation. First, under these most troubled circumstances; and second, the realization these new revelations and disclosures ran completely counter to the position I had taken for months, in that I believed the President was not guilty of any impeachable offense.

General Haig in his conversation at my office went on to tell me of discussions in the White House among those who knew of this new evidence.

General Haig asked for my assessment of the whole situation. He wanted my thoughts about the timing of a resignation, if that decision were to be made, and about how to do it and accomplish an orderly change of the administration. We discussed what scheduling problems there might be and what the early organizational problems would be.

General Haig outlined for me President Nixon's situation as he saw it and different views in the White House as to the courses of action that might be available, and which were being advanced by various people around him on the White House staff. As I recall there were different courses being considered:

(1) Some suggested "riding it out" by letting the impeachment take its course through the House and the Senate trial, fighting all the way against conviction.

(2) Others were urging resignation sooner or later. I was told some people backed the first course and other people a resignation but not with the same views as to how and when it should take place.

On the resignation issue, there were put forth a number of options which General Haig reviewed with me. As I recall his conversation, various possible options being considered included:

(1) The President temporarily step aside under the 25th Amendment.

(2) Delaying resignation until further along the impeachment process.

(3) Trying first to settle for a censure vote as a means of avoiding either impeachment or a need to resign.

(4) The question of whether the President could pardon himself.

(5) Pardoning various Watergate defendants, then himself, followed by resignation.

(6) A pardon to the President himself, should he resign.

The rush of events placed an urgency on what was to be done. It became even more critical in view of a prolonged impeachment trial which was expected to last possibly 4 months or longer.

The impact of the Senate trial on the country, the handling of possible international crises, the economic situation here at home, and the marked slowdown in the decisionmaking process within the Federal Government were all factors to be considered, and were discussed.

General Haig wanted my views on the various courses of action as well as my attitude on the options of resignation. However, he indicated he was not advocating any of the options. I inquired as to what was the President's pardon power, and he answered that it was his understanding from a White House lawyer that a President did have the authority to grant a pardon even before any criminal action

had been taken against an individual, but obviously, he was in no position to have any opinion on a matter of law.

As I saw it, at this point the question clearly before me was, under the circumstances, what course of action should I recommend that would be in the best interest of the country.

I told General Haig I had to have some time to think. Further, that I wanted to talk to James St. Clair. I also said I wanted to talk to my wife before giving any response. I had consistently and firmly held the view previously that in no way whatsoever could I recommend either publicly or privately any step by the President that might cause a change in my status as Vice President. As the person who would become President if a vacancy occurred for any reason in that office, a Vice President, I believed, should endeavor not to do or say anything which might affect his President's tenure in office. Therefore, I certainly was not ready even under these new circumstances to make any recommendations about resignation without having adequate time to consider further what I should properly do.

Shortly after 8 o'clock the next morning, James St. Clair came to my office. Although he did not spell out in detail the new evidence, there was no question in my mind that he considered these revelations to be so damaging that impeachment in the House was a certainty and conviction in the Senate a high probability. When I asked Mr. St. Clair if he knew of any other new and damaging evidence besides that on the June 23, 1972, tape, he said "No." When I pointed out to him the various options mentioned to me by General Haig, he told me he had not been the source of any opinion about Presidential pardon power.

After thought on the matter, I was determined not to make any recommendations to President Nixon on his resignation. I had not given any advice or recommendations in my conversations with his aides, but I also did not want anyone who might talk to the President to suggest that I had some intention to do so.

For that reason, Mr. Chairman, I decided I should call General Haig the afternoon of August 2. I did make the call late that afternoon and told him I wanted him to understand that I had no intention of recommending what President Nixon should do about resigning or not resigning, and that nothing we had talked about the previous afternoon should be given any consideration in whatever decision the President might make. General Haig told me he was in full agreement with this position.

My travel schedule called for me to make appearances in Mississippi, and Louisiana over Saturday, Sunday, and part of Monday, August 3, 4, and 5. In the previous 8 months, I had repeatedly stated my opinion that the President would not be found guilty of any impeachable offense. Any change from my stated views, or even refusal to comment further, I feared, would lead in the press to conclusions that I now wanted to see the President resign to avoid an impeachment vote in the House and probable conviction in the Senate. For that reason, I remained firm in my answers to press questions during my trip and repeated my belief in the President's innocence of an impeachable offense. Not until I returned to Washington did I learn that President Nixon was to release the new evidence late on Monday, August 5, 1974.

At about the same time I was notified that the President had

called a Cabinet meeting for Tuesday morning, August 6, 1974. At that meeting in the Cabinet room, I announced that I was making no recommendations to the President as to what he should do in the light of the new evidence. And I made no recommendations to him either at the meeting or at any time after that.

In summary, Mr. Chairman, I assure you that there never was at any time any agreement whatsoever concerning a pardon to Mr. Nixon if he were to resign and I were to become President.

Mr. Chairman, turning now to House Resolution 1367, the first question of House Resolution 1367 asks whether I or my representative had "specific knowledge of any formal criminal charges pending against Richard M. Nixon." The answer is: No.

I had known, of course, Mr. Chairman, that the grand jury investigating the Watergate break-in and coverup had wanted to name President Nixon as an unindicted coconspirator in the coverup. Also, I knew that an extensive report had been prepared by the Watergate Special Prosecution Force for the grand jury and had been sent to the House Committee on the Judiciary, where, I believe, it served the staff and members of the committee in the development of its report on the proposed articles of impeachment. Beyond what was disclosed in the publications of the Judiciary Committee on the subject and additional evidence released by President Nixon on August 5, 1974, I saw on or shortly after September 4, a copy of a memorandum prepared for Special Prosecutor Jaworski by the Deputy Special Prosecutor, Henry Ruth. A copy of this memorandum had been furnished by Mr. Jaworski to my counsel and was later made public during a press briefing at the White House on September 10, 1974.

I have supplied the subcommittee with a copy of this memorandum. The memorandum lists matters still under investigation which "may prove to have some direct connection to activities in which Mr. Nixon is personally involved." The Watergate coverup is not included in this list; and the alleged coverup is mentioned only as being the subject of a separate memorandum not furnished to me. Of those matters which are listed in the memorandum, it is stated that none of them "at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon."

This is all the information I had which related even to the possibility of formal criminal charges involving the former President while he had been in office.

The second question in the resolution asks whether Alexander Haig referred to or discussed a pardon with Richard M. Nixon or his representatives at any time during the week of August 4, 1974, or any subsequent time. My answer to that question is: not to my knowledge. If any such discussions did occur, they could not have been a factor in my decision to grant the pardon when I did, because I was not aware of them.

Questions 3 and 4 of House Resolution 1367 deal with the first and all subsequent references to, or discussions of, a pardon for Richard M. Nixon, with him or any of his representatives or aides. I have already described at length what discussions took place on August 1 and 2, 1974, and now these discussions brought no recommendations or commitments whatsoever on my part. These were the only discussions related to questions 3 and 4 before I became President, but question 4 relates also to subsequent discussions.

At no time after I became President on August 9, 1974, was the subject of a pardon for Richard M. Nixon raised by the former President or by anyone representing him. Also, no one on my staff brought up the subject until the day before my first press conference on August 28, 1974. At that time, I was advised that questions on the subject might be raised by media reporters at the press conference.

As the press conference proceeded, the first question asked involved the subject, as did other later questions. In my answers to those questions, I took a position that, while I was the final authority on this matter, I expected to make no commitment one way or the other depending on what the Special Prosecutor and courts would do. However, I also stated that I believed the general view of the American people was to spare the former President from a criminal trial.

Shortly afterwards I became greatly concerned that if Mr. Nixon's prosecution and trial were prolonged, the passions generated over a long period of time would seriously disrupt the healing of our country from the wounds of the past. I could see that the new administration could not be effective if it had to operate in the atmosphere of having a former President under prosecution and criminal trial. Each step along the way, I was deeply concerned, would become a public spectacle and the topic of wide public debate and controversy.

As I have before stated publicly, these concerns led me to ask from my own legal counsel what my full right of pardon was under the Constitution in this situation and from the Special Prosecutor what criminal actions, if any, were likely to be brought against the former President, and how long his prosecution and trial would take.

As soon as I had been given this information, Mr. Chairman, I authorized my counsel, Philip Buchen, to tell Herbert J. Miller, as attorney for Richard M. Nixon, of my pending decision to grant a pardon for the former President. I was advised that the disclosure was made on September 4, 1974, when Mr. Buchen, accompanied by Benton Becker, met with Mr. Miller. Mr. Becker had been asked, with my concurrence, to take on a temporary special assignment to assist Mr. Buchen, at a time when no one else of my selection had yet been appointed to the legal staff of the White House.

The fourth question, Mr. Chairman, in the resolution also asks about "negotiations" with Mr. Nixon or his representatives on the subject of a pardon for the former President. The pardon under consideration was not, so far as I was concerned, a matter of negotiation. I realized that unless Mr. Nixon actually accepted the pardon I was preparing to grant, it probably would not be effective. So I certainly had no intention to proceed without knowing if it would be accepted. Otherwise, I put no conditions on my granting of a pardon which required any negotiations.

Although negotiations had been started earlier and were conducted through September 6 concerning White House records of the prior administration, I did not make any agreement on that subject a condition of the pardon. The circumstances leading to an initial agreement on Presidential records are not covered by the resolutions before this subcommittee. Therefore, I have mentioned discussions on that subject with Mr. Nixon's attorney only to show they were related in time to the pardon discussions but were not a basis for my decision to grant a pardon to the former President.

The fifth, sixth, and seventh questions of House Resolution 1367 ask whether I consulted with certain persons before making my pardon decision.

I did not consult at all with Attorney General Saxbe on the subject of a pardon for Mr. Nixon. My only conversation on the subject with Vice Presidential nominee Nelson Rockefeller was to report to him on September 6, 1974, that I was planning to grant the pardon.

Special Prosecutor Jaworski was contacted on my instructions by my counsel, Philip Buchen. One purpose of their discussions was to seek the information I wanted on what possible criminal charges might be brought against Mr. Nixon. The result of that inquiry was a copy of the memorandum I have already referred to and have furnished to this subcommittee. The only other purpose was to find out the opinion of the Special Prosecutor as to how long a delay would follow, in the event of Mr. Nixon's indictment, before a trial could be started and concluded.

At a White House press briefing on September 8, 1974, the principal portions of Mr. Jaworski's opinion were made public. In this opinion, Mr. Jaworski wrote that selection of a jury for the trial of the former President, if he were indicted, would require a delay and I quote: "of a period from 9 months to 1 year, and perhaps even longer." On the question of how long it would take to conduct such a trial, he noted that the complexities of the jury selection made it difficult to estimate the time. Copy of the full text of his opinion dated September 4, 1974, I have now furnished to this subcommittee. [See app. 1 at p. 189.]

I did consult with my counsel, Philip Buchen, with Benton Becker, and with my counsellor, John Marsh, who is also an attorney. Outside of these men, serving at the time on my immediate staff, I consulted with no other attorneys or professors of law for facts or legal authorities bearing on my decision to grant a pardon to the former President.

Questions 8 and 9 of House Resolution 1367 deal with the circumstances of any statement requested or received from Mr. Nixon. I asked for no confessions or statement of guilt; only a statement in acceptance of the pardon when it was granted. No language was suggested or requested by anyone acting for me, to my knowledge. My counsel advised me that he had told the attorney for Mr. Nixon that he believed the statement should be one expressing contrition, and in this respect, I was told Mr. Miller concurred. Before I announced the pardon, I saw a preliminary draft of a proposed statement from Mr. Nixon, but I did not regard the language of the statement, as subsequently issued, to be subject to approval by me or my representatives.

The 10th question, Mr. Chairman, covers any report to me on Mr. Nixon's health by a physician or psychiatrist, which led to my pardon decision. I received no such report. Whatever information was generally known to me at the time of my pardon decision was based on my own observations of his condition at the time he resigned as President and observations reported to me after that from others who had later seen or talked with him. No such reports were by people qualified to evaluate medically the condition of Mr. Nixon's health, and so they were not a controlling factor in my decision. However, I believed and still believe, that prosecution and trial of the former President would have proved a serious threat to his health, as I stated in my message on September 8, 1974.

House Resolution 1370 [see app. 2 at p. 201.] is the other resolution of inquiry before this subcommittee. It presents no questions but asks for the full and complete facts upon which was based my decision to grant a pardon to Richard M. Nixon.

I know of no such facts that are not covered by my answers to the questions in House Resolution 1367.

Subparagraphs (1) and (4): There were no representations made by me or for me and none by Mr. Nixon or for him on which my pardon decision was based.

Subparagraph (2): The health issue is dealt with by me in answer to question 10 of the previous resolution.

Subparagraph (3): Information available to me about possible offenses in which Mr. Nixon might have been involved is covered in my answer to the first question of the earlier resolution.

In addition, in an unnumbered paragraph at the end, House Resolution 1370 seeks information on possible pardons for Watergate-related offenses which others may have committed. I have decided that all persons requesting consideration of pardon requests should submit them through the Department of Justice.

Only when I receive information on any request duly filed and considered first by the pardon attorney at the Department of Justice would I consider the matter. As yet no such information has been received, and if it does I will act or decline to act according to the particular circumstances presented, and not on the basis of the unique circumstances, as I saw them, of former President Nixon.

Mr. Chairman, by these responses to the resolutions of inquiry, I believe I have fully and fairly presented the facts and the circumstances preceding my pardon of former President Nixon. In this way, I hope I have contributed to a much better understanding by the American people of the action I took to grant the pardon when I did. For having afforded me this opportunity, I do express my appreciation to you, Mr. Chairman, and to Mr. Smith, the ranking minority member, and to all the other distinguished members of this subcommittee; also to Chairman Rodino of the Committee on the Judiciary, to Mr. Hutchinson, the ranking minority member of the full committee, and to other distinguished members of the full committee who are present.

In closing, Mr. Chairman, I would like to reemphasize that I acted solely for the reasons I stated in my proclamation of September 8, 1974, and my accompanying message and that I acted out of my concern to serve the best interests of my country. As I stated then, Mr. Chairman, and I quote,

> My concern is the immediate future of this great country. . . . My conscience tells me it is my duty, not merely to proclaim domestic tranquility, but to use every means that I have to insure it.

Mr. Chairman, I thank you and the committee members for the opportunity to make these views known.

Mr. HUNGATE. Mr. President, on behalf of the subcommittee, we express our appreciation for your appearance here and bringing facts that will be helpful to the American people and the Congress.

There will be some who will find the answers fully satisfactory and forthright. There will be others who will not. But I would hope that

all would appreciate your openness and willingness to come before the American public and the Congress to discuss this important matter.

The gentleman from Wisconsin, Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I, too, would like to join my colleagues in welcoming the President. I do not believe any of us could have anticipated a year ago when the President then appeared as a nominee under the 25th amendment for Vice President that he would once again appear before this committee as President of the United States. And I would only comment no matter how well motivated the desire to put Watergate behind us, I can only acknowledge today several key issues in the news this morning. The President's appearance before this committee, the trial downtown, the Watergate trial itself, and even the nomination of Mr. Rockefeller to be the Vice President, occasioned by a vacancy due to Watergate, all of these still command the attention of the American people and I guess we will just have to be patient.

Mr. President, you indicated that you wanted to spare Mr. Nixon a criminal trial. Did you specifically have any other ends in view in terms of protecting Mr. Nixon, in terms of a pardon? That is to say, whatever a pardon would spare the President, other than a criminal trial, were there any other adversities which a pardon would help Mr. Nixon with as you saw it?

President FORD. As I indicated in the proclamation that I issued and as I indicated in the statement I made at the time, on September 8, my prime reason was for the benefit of the country, not for any benefits that might be for Mr. Nixon.

I exercised my pardon authority under the Constitution which relates only to those criminal matters during the period from January 20, 1969, until August 9, 1974.

Mr. KASTENMEIER. I appreciate that, Mr. President, but it must have been something you foresaw which could happen to Mr. Nixon which justified a pardon. If in fact you were advised, and perhaps you were not, that there is no proceeding going to be commenced against Mr. Nixon, that nothing would happen to him, really a pardon may have been an empty gesture in that event.

President FORD. Well, as I indicated, Mr. Kastenmeier, after the press conference on August 28, where three questions were raised about the pardon or the possibility of a pardon, I asked my counsel to find out from the Special Prosecutor what, if any, charges were being considered by the Special Prosecutor's Office, and as I indicated in my prepared statement, I received from Mr. Jaworski certain information indicating that there were possible or potential criminal proceedings against Mr. Nixon.

Mr. KASTENMEIER. But you did not determine as a matter of fact that there was any intention to proceed to indictment with any of those matters. Is that not correct?

President FORD. In the memorandum I believe of September 4, from Mr. Jaworski, prepared by Mr. Ruth, there were 10 possibilities listed.

On the other hand, there was I think well known information that there was a distinct possibility of Mr. Nixon being indicted on the grounds of obstructing justice.

Mr. KASTENMEIER. The effect of the pardon in terms of 10 possible areas of investigation as you saw it at the time was to terminate those investigations as well as end any possibilities of indictment on those grounds.

President FORD. Well, the power of pardon does cover any criminal actions during the stipulated period and as the pardon itself indicated, it went from the day that Mr. Nixon first took the oath of office until he actually resigned on August 8.

Mr. KASTENMEIER. My question is, did you have a reason to believe that other than the 10 areas of investigation in the coverup, that the former President might need to be protected in any other area where a possibility of criminal prosecution existed?

President FORD. I knew of no other potential or possible criminal charges; no.

Mr. KASTENMEIER. My time has expired, Mr. Chairman.

Mr. HUNGATE. The gentleman from New York, Mr. Smith.

Mr. SMITH. Mr. President, in regard to your answer, on page 8 of your statement, of whether you consulted with certain persons, and in that connection, and in connection with question No. 6 of H.Res. 1367, you stated in regard to the Vice Presidential nominee, Nelson Rockefeller, that your only conversation on the subject with him was to report to him on September 6, 1974, that "I was planning to grant the pardon." The question asks whether he gave you any facts or legal authorities, and my question is, did he do so?

President FORD. Nelson Rockefeller did not give me any facts or legal authorities. He was in my office to discuss with me the proceedings concerning his nomination, and at the conclusion of the discussion on that matter, I felt that I should inform him of the possible or prospective action that I would be taking. But, he gave me no facts, he gave me no legal advice concerning the pardon.

Mr. SMITH. Mr. President, as you were minority leader of the Congress before you became Vice President of the United States, did you at any time discuss the wisdom or advisability of a possible Presidential pardon for President Nixon with President Nixon or any of his representatives, or any member of the White House staff? This was in the period before you became Vice President.

President FORD. The answer is categorically no. Before I became Vice President, Mr. Smith, I, on several occasions, and I cannot recall how many, indicated to President Nixon himself that I thought he should not resign. If my memory is accurate, Mr. Smith, before I became Vice President, there were individuals, both in the Congress and otherwise, who were advocating that Mr. Nixon resign. I do recall on one or more occasions telling Mr. Nixon, in my judgment he should not, because I thought that would be an admission of guilt, and on the information I had at that time, I did not believe Mr. Nixon was guilty of any impeachable offense.

Mr. SMITH. Thank your, Mr. President.

Now, you touched upon your observations of President Nixon's health, and I wonder whether at any time before you became Vice President of the United States did you learn any facts about his physical or mental health which later became relevant to your decision to pardon Mr. Nixon?

President FORD. Well, before I was Vice President I saw Mr. Nixon periodically coming to the White House for leadership meetings, or for other reasons, and during that period I had the distinct impression that his health was good. And I did not see any discernible change in my own opinion until the last day or two of his Presidency. And I did notice the last time I saw him in the Oval Office on August 9, I thought he was drawn and possibly a little thinner, but that is the only observation I made.

Mr. SMITH. Thank you, Mr. President.

Mr. HUNGATE. The gentleman from California, Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

Mr. President, on pages 10 and 11 of your statement, you indicate that there were some general discussions with General Haig and Mr. St. Clair before the resignation about the pardon power in general.

Did they have any reason to carry a message to then President Nixon that this pardon power could possibly be used on his behalf if he resigned?

President FORD. None whatsoever. Categorically no.

Mr. EDWARDS. Then why, Mr. President, were there those general discussions about pardon?

President FORD. Well, as I indicated in my prepared statement, General Haig came to me first to apprise me of the dramatic change in the situation. And as I indicated in the prepared statement, he told me that I should be prepared to assume the Presidency very quickly, and wanted to know whether I was ready to do that.

Second, he indicated that in the White House, among the President's advisors, there were many options being discussed as to what course of action the President should take, and in the course of my discussions on August 1 with General Haig, he outlined, as I did in the prepared text, the many options that were being discussed. He asked for my recommendations I would make, and as I indicated in the prepared text, I made none.

Mr. EDWARDS. Thank you, Mr. President.

Mr. Buchen has said several times, and I believe you have mentioned that the pardon did involve a certain aspect of mercy. Would not the same consideration of mercy apply to the Watergate defendants downtown who now are putting forth as their chief defense allegations that they were merely acting under orders of Mr. Nixon, then President, and their boss?

President FORD. Mr. Edwards, in light of the fact that these trials are being carried out at the present time, I think it is inadvisable for me to comment on any of the proceedings in those trials.

Mr. EDWARDS. Mr. President, put yourself in the position of a high school teacher, shall we say, in Watts or the barrios of San Jose, or Harlem. If you were such a teacher, how would you explain to the young people of America the American concept of equal justice under law?

President FORD. Mr. Edwards, Mr. Nixon was the 37th President of the United States. He had been preceded by 36 others. He is the only President in the history of this country who has resigned under shame and disgrace. I think that that in and of itself can be understood, can be explained to students or to others. That was a major, major step and

a matter of, I am sure, grave, grave deliberations by the former President, and it certainly, as I have said several times, constituted shame and disgrace.

Mr. EDWARDS. Thank you, Mr. President.

Mr. President, do you think that it is wise to pardon a man before indictment or trial for offenses that are completely unknown to you and which might possibly be terribly serious?

President FORD. Well, as I indicated, Mr. Edwards, I did, to the best of my ability, check with probably the best authority in the country on what, if any, charges would be made against Mr. Nixon. Those were, or potentially were serious charges. I think that in taking the action I did concerning those charges, I was exercising in a proper way the pardon authority given the President under the Constitution.

Mr. EDWARDS. Thank you, Mr. President.

Mr. HUNGATE. The gentleman from Indiana, Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. President, I would like to state that I too share with my colleagues a deep appreciation for your appearance here before our subcommittee this morning.

Mr. President, on page 7 of your statement where you were talking about your first or your second interview with General Haig on the afternoon of August 1, you stated that "I describe this meeting because at one point it did include references to a possible pardon for Mr. Nixon." I take it that you have spelled out what those references were over on pages 9, where the options are spelled out, and 10, where you state that you inquired as to what was the President's pardoning power, is that correct?

President FORD. Yes. It is spelled out in the itemed instances, 1 through 6, eight various options involving a pardon.

Mr. DENNIS And does that include everything that was said at that time on the subject of pardon, substantially?

President FORD. Yes, sir.

Mr. DENNIS. Mr. President, I note that on page 10 you state that you asked the General as to what the President's pardon power was, and he very properly replied that he had certain information but could not give a legal opinion.

When, where, and from whom did you ultimately obtain the opinion that you were entitled under the doctrine of *Ex parte Garland* and so on to issue a pardon when there had been no charge or no conviction?

President FORD. When I came back to the Oval Office, Mr. Dennis, following the press conference on August 28, where three questions were raised by the news media involving a pardon, I instructed my counsel, Mr. Buchen, to check in an authoritative way what pardon power a President had, and he, several days later, I do not recall precisely, came back and briefed me on my pardon power as President of the United States.

Mr. DENNIS. Mr. President, the exercise of executive clemency is, of course, a well recognized part of the legal system in this country, exercised by you and all of your predecessors, is that not the fact?

President FORD. That is correct, sir.

Mr. DENNIS. And you have given this committee, as I understand your testimony this morning, your complete statement as to your reasons for exercising that power in this particular case?

President FORD. I have, sir.

Mr. DENNIS. And in answer to my friend, Mr. Edwards, you have stated the fact that you felt that for an ex-President of the United States to resign under these circumstances was sufficient, strong punishment, and that that should answer the problem of those who have raised the question of equal justice under law?

President FORD. That is correct, sir.

Mr. DENNIS. And you would consider other possible pardons on the facts of those particular cases when and if they were presented to you?

President FORD. That is correct.

Mr. DENNIS. And that there was no condition attached to this pardon, and no sort of agreement made in respect thereto before it was granted?

President FORD. None whatsoever, sir.

Mr. DENNIS. Thank you, Mr. President. I have no further questions, Mr. Chairman.

Mr. HUNGATE. The gentleman from South Carolina, Mr. Mann.

Mr. MANN. Thank you, Mr. Chairman.

Mr. President, Mr. Kastenmeier asked you about the termination of the investigation by the Special Prosecutor's Office.

Was it your intention by the pardon to terminate the investigation by the Special Prosecutor's Office in the 10 areas on which you received a report from that office?

President FORD. I think the net result of the pardon was, in effect, just that. Yes, sir.

Mr. MANN. And is that part of the reason why you did not consult with Mr. Jaworski with reference to the tape agreements as to how that might affect his further investigations?

President FORD. Well, as I pointed out, the tape agreement was initiated between my legal counsel and Mr. Nixon sometime before the question of a pardon ever arose. The reason for that, Mr. Mann, is that I came into office and almost immediately there were demands and requests, not only from the Special Prosecutor, as I recall, but from other sources as to those tapes and other documents. And one of the first things I did when these problems came to my desk was to ask the Attorney General for his opinion as to the ownership of those tapes or any other documents. And once we got that information, then we felt that there ought to be some discussion as to where the tapes and other documents would be held, and under what circumstances.

Mr. MANN. Now, of course, the mandate of the Special Prosecutor's Office was not directed solely at President Nixon, but is it not so that the pardon, in effect, terminated that investigation insofar as other parties, and other possible defendants are concerned and getting to the true facts of the matters that have disturbed our national political life during these past 2 years?

President FORD. I do not believe that the action I took in pardoning President Nixon had any impact on any other mandate that the Special Prosecutor's Office had.

Mr. MANN. What response would you have if the Special Prosecutor's Office now requested access to certain of the tapes now in the custody of the Government?

President FORD. The material that is still held by the Government in my understanding of the Supreme Court decision permits the Spe-

cial Prosecutor to obtain any of that material for its responsibility, and I, of course, not in a personal way, would make certain that that information was made available to the Special Prosecutor's Office.

Mr. MANN. According to press reports, Mr. Clement Stone visited President Nixon on September 22 and thereafter met with you in Washington. Are you at liberty to tell us the gist of the communication involving President Nixon from Mr. Stone to you?

President FORD. Mr. Stone came to see me about a program that he has used very successfully in his business, a program which he is very proud of and he was urging me to institute it in the various bureaus and departments of the Federal Government. There was no other message conveyed by him from Mr. Nixon to me.

Mr. MANN. Did you ever discuss the pardon with former President Nixon after his resignation and prior to the granting of the pardon?

President FORD. Would you repeat the question again, please?

Mr. MANN. Did you have any personal conversation with former President Nixon concerning the pardon between his resignation and September 8?

President FORD. Absolutely not.

Mr. MANN. Now, in response to Mr. Edwards' question about equal justice under the law, I know that you make a distinction that here we are talking about the Office of President of the United States, but let us assume that we are talking about the president of a bank or Governor of a State or Chief Justice of the U.S. Supreme Court, which in the minds of most people are very high offices. Do you think any of those persons who are allegedly criminally culpable through resignation should be entitled to any treatment different from any other citizens?

President FORD. Mr. Mann, I do not think I should answer a hypothetical question of that kind. I was dealing with reality, and I have given in my best judgment the reasons for the action that I took, and to pass judgment on any other person or individual holding any office in public or private, I think it would be inappropriate for me.

Mr. MANN. You have heard the maxim that the law is no respecter of persons. Do you agree with that?

President FORD. Certainly it should be.

Mr. MANN. Thank you, Mr. President.

Mr. HUNGATE. The gentleman from Iowa, Mr. Mayne.

Mr. MAYNE. Thank you, Mr. Chairman.

Mr. President, I believe that the Chairman and others in their questioning have established very clearly that your appearance here today is an entirely voluntary one on your part, that it was your idea, that you had not been requested by the committee to come in person, that we had indicated that it would be entirely satisfactory as far as we were concerned, if some assistant appeared instead.

President FORD. That is correct, sir.

Mr. MAYNE. I do not think, however, that it has yet been made clear in the record, and I think this should be, that it is also true that you were willing to come and to tell this full story as you have done before the committee and on television before the American people much earlier than today. Is that not true?

President FORD. Yes. I think the original schedule was set for about a week ago. I have forgotten the exact date.

Mr. MAYNE. Well, my recollection, and you can correct me if I am wrong, is that as early as September 30 you offered and volunteered to appear before the subcommittee at our next regular meeting which would have been on September—on October 1, but it was indicated to you that that would be too early for the committee to be able to accommodate such an appearance.

President FORD. I do not recall that detail, but when I indicated that I would voluntarily appear, a member of my staff met with, I think, Chairman Hungate and between them they tried to work out what was an acceptable, agreeable time as to when I should appear.

Mr. MAYNE. There was, of course, the concern which developed in the subcommittee as to whether there would be any possible jeopardy to the impaneling of the jury in the Watergate cases. But I think this timetable should be established and I would ask the chairman if that is not his recollection, that originally the President did say that he would be glad to appear on October 1.

Mr. HUNGATE. Not being under oath, the Chair is glad to reply. The gentleman's recollection is the same as mine.

Mr. MAYNE. Thank you, Mr. Chairman.

I just think the point should be made that there has been no stalling at all or delay on the part of the President in making this appearance, but that he was not only willing to make the statement but to do it much earlier.

Mr. HUNGATE. If the gentleman will yield briefly——

Mr. MAYNE. I am happy to yield.

Mr. HUNGATE [continuing]. That is precisely the fact and it was consideration on behalf of many of us concerning the proper effect on any trials that held us to this day.

Mr. MAYNE. Now, Mr. President, I think there was perhaps one part of Mr. Kastenmeier's questioning of you that was left unanswered and I am going to try to go into that again.

Did you by granting this pardon have any intention of stopping the investigations of any other defendants or potential defendants?

President FORD. None whatsoever.

Mr. MAYNE. Mr. President, ever since I first heard of the Watergate break-in I have felt that this was a matter which should be fully investigated and prosecuted and that anyone found to be criminally involved should be punished as provided by the law, and I repeatedly stated I thought our American system of justice as administered in the courts was fully capable of handling the situation if permitted to proceed without interference.

I have been apprehensive that the activities of some of the legislative committees and the large amount of publicity attending upon those activities might make it impossible for our court system to function as it should, and I have also been fearful that the executive branch would intervene to limit or handicap the normal functioning of the courts.

Now, Mr. President, I must say to you that I am deeply concerned that both the legislative and executive branches have indeed interferred with our courts, making it extremely difficult for the traditional American system of justice to proceed in the regular manner in this case. And I was very disturbed by the granting of this pardon, par-

ticularly at such an early stage, even though certainly there is no question that under the law you had the right to act as you did.

Now, I realize that hindsight is always better than foresight, but I am wondering if after all that has happened and with further opportunity for reflection, if you do not now feel that you perhaps acted too hastily in this case.

President FORD. Mr. Mayne, I have thought about that a great deal because there has been criticism of the timing, but as I reviewed my thoughts prior to the granting of the pardon, I had to look at this factual situation. If I granted the pardon when I did, it would as quickly as possible achieve the results that I wanted, which was to permit our Government, both the Congress and the President, to proceed to the solution of the problems.

Now, some people say in their criticism, and I understand it and I am not critical of the point they raise, I should have waited until Mr. Nixon was indicted, inferring that I should have then pardoned him if I was going to do so.

Well, other people say that I should have waited until he was convicted, if he was convicted, and at that time I should have pardoned.

Others have indicated that I should have waited for a conviction and a jail sentence, if that were the result.

Now, all of that process, whether it is the indictment, the possible conviction, a conviction plus a jail sentence, would have taken, as I have tried to explain, at least 1 year and probably much longer, and during that whole period of time, Mr. Mayne, all of the things that I wanted to avoid—namely, the opportunity for our Government, the President and the Congress and others, to get to the problems we have—would have been I think deeply upset and roadblocked.

So I am convinced after reflection, as I was previously, that the timing of the pardon was done at the right time.

Mr. MAYNE. Thank you, Mr. President.

President FORD. Thank you, sir.

Mr. HUNGATE. The Representative from New York, Ms. Holtzman.

Ms. HOLTZMAN. Thank you, Mr. Chairman, and Mr. Ford, I too wish to applaud your historical appearance here today.

At the same time, however, I wish to express my dismay that the format of this hearing will not be able to provide to the American public the full truth and all the facts respecting your issuance of a pardon to Richard Nixon. Unfortunately, each member of this committee will have only 5 minutes in which to ask questions about this most serious matter. And unfortunately, despite my urging, the committee declined to provide sufficient time for each committee member to ask the questions that were appropriate. The committee declined to prepare fully for your coming by calling other witnesses, such as Alexander Haig, Mr. Buchen, Mr. Becker, and failed to insist also on full production of documents by you respecting the issuance of this pardon. I must confess my own lack of easiness at participating in a proceeding that has raised such high expectations and unfortunately will not be able to respond to them.

I would like to point out, Mr. President, that the resolutions of inquiry which have prompted your appearance here today have resulted from very dark suspicions that have been created in the public's mind. Perhaps these suspicions are totally unfounded and I sin-

cerely hope that they are. But, nonetheless, we must all confront the reality of these suspicions—the suspicions that were created by the circumstances of the pardon, the secrecy with which it was issued, and the reasons for which it was issued, which have made people question whether or not in fact there was a deal.

President FORD. May I comment there? I want to assure you, the members of this subcommittee, the Members of the Congress, and the American people there was no deal, period, under no circumstances.

Ms. HOLTZMAN. Well, Mr. President, I appreciate that statement and I am sure many of the American people do as well. But they also are asking questions about the pardon and I would like to specify a few of them for you so that perhaps we can have some of them answered.

I think, from the mail I have received from all over the country as well as my own district, that the people want to understand how you can explain having pardoned Richard Nixon without specifying any of the crimes for which he was pardoned, and how you can explain having pardoned Richard Nixon without obtaining any acknowledgement of guilt from him.

How do you explain your failure to consult the Attorney General of the United States with respect to the issuance of the pardon even though in your confirmation hearings you had indicated that the Attorney General's opinion would be critical in any decision to pardon the former President?

How can the extraordinary haste in which the pardon was decided on and the secrecy with which it was carried out be explained? How can you explain the fact that the pardon of Richard Nixon was accompanied by an agreement with respect to the tapes which in essence, in the public mind, hampered the Special Prosecutor's access to these materials and was done, also in the public's mind, in disregard of the public's right to know the full story about Richard Nixon's misconduct in office?

In addition, the public, I think, wants an explanation of why Benton Becker was used to represent the interests of the United States in negotiating a tapes agreement when, at that very time, he was under investigation by the United States for possible criminal charges.

How also can you explain not having consulted Leon Jaworski, the Special Prosecutor, before approving the tapes agreement? I think, Mr. President, that these are only a few of the questions that have existed in the public's mind and unfortunately still remain unresolved.

Since I have very brief time, I would like to ask you in addition to these questions one further one: Suspicions have been raised that the reason for the pardon and the simultaneous tapes agreement was to insure that the tape recordings between yourself and Richard Nixon never came out in public. To alleviate this suspicion once and for all, would you be willing to turn over to this subcommittee all tape recordings of conversations between yourself and Richard Nixon?

President FORD. Those tapes under an opinion of the Attorney General which I sought, according to the Attorney General, and I might add according to past precedent, belong to President Nixon. Those tapes are in our control. They are under an agreement which protects them totally, fully, for the Special Prosecutor's Office or for any other criminal proceedings. Those tapes will not be delivered to anybody un-

til a satisfactory agreement is reached with the Special Prosecutor's Office. We have held them because his office did request that, and as long as we have them, held in our possession for the Special Prosecutor's benefit, I see no way whatsoever that they can be destroyed, that they can be kept from proper utilization in criminal proceedings.

Now, those tapes belong to Mr. Nixon according to the Attorney General, but they are being held for the benefit of the Special Prosecutor, and I think that is the proper place for them to be kept.

Mr. HUNGATE. The gentleman from Maryland, Mr. Hogan.

Mr. HOGAN. Thank you, Mr. Chairman.

I am frankly amazed at my good friend, the gentlelady from New York, and her accusatory opening statement, because certainly the gentlelady knows that it is the usual, ordinary, and routine procedure of this subcommittee, and this committee, to operate under the 5-minute rule. There is nothing extraordinary about us today allocating 5 minutes of time to each member of the committee. We always operate that way.

Her other observation about not doing any preparatory work by calling other witnesses was rejected, as far as I recall, by all of the members of the subcommittee on the basis that this resolution of inquiry is directed to the President of the United States, and properly so. So, it would be totally inappropriate for the resolution of inquiry to address itself to individuals other than the subject of this resolution of inquiry.

Mr. President, I would like to join too in commending you for your statement and your openness and candor in coming to Congress in this very historic event. And frankly, I am concerned over some of the questioning by my colleagues, such as asking if all men are not equal under the law. Certainly, being the outstanding lawyers that they are, they know that the pardoning power itself is inherently inequitable.

But, for a larger purpose, it grants to the Chief Executive of the Federal Government or of the State, in the case of State crimes, the power to pardon individuals who may or may not have been indicted or convicted of crimes. So, we should not expect this concept of equality under the law to apply here as if it were a trial of criminal offenses. And furthermore, we also know that in our system of criminal justice, even the prosecutors themselves exercise prosecutive discretion to bring someone to justice or not. There is no question whatsoever that the Constitution gives to the President of the United States broad and absolute power to pardon individuals for criminal offenses.

We also know from the debates of the framers of the Constitution that they specifically rejected including in the Constitution the words "after conviction." They also, in the debate at that time, indicated situations where it might be necessary or desirable to grant a pardon even before indictment, as was the case in this instance.

Now, Mr. President, I know that you followed very carefully the deliberations of this committee during the impeachment inquiry, and I know you are also aware that this committee unanimously concluded that the President was guilty of an impeachable offense growing out of obstruction of justice. So in a sense, could we not say that this was at least the basis for a possible criminal charge, which was already spread on the record, with ample evidence to justify it?

So those who say you should have waited until there were formalized charges really are overlooking the fact that there was, in fact, a very formalized charge, an "indictment," if you will, by this committee.

President FORD. Well, the unanimous vote of the House Committee on the Judiciary, all 38 members, certainly is very, very substantial evidence the former President was guilty of an impeachable offense. There is no doubt in my mind that that recommendation of this full committee would have carried in the House which would have been even more formidable as an indication of criminal activity, or certainly, to be more specific, an impeachable offense. Of course, the prospects in the Senate with such a formidable vote in the committee and in the House would have been even more persuasive.

Mr. HOGAN. Mr. President, referring to the memorandum from Mr. Ruth to Mr. Jaworski enumerating the 10 possible criminal offenses, it is true that this committee addressed itself, if I am not mistaken, to every single one of these charges, and assessed the evidence as to each one of them, and we found them wanting. There was not sufficient justification for an impeachable offense and presumably a criminal offense.

Furthermore, the last paragraph of that memorandum says with regard to these 10 matters and I quote: "None of these matters of the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon."

This memorandum does not include the obstruction of justice charge which I addressed myself to earlier, so I think we can logically assume that there would not have been any indictments resulting from any of Mr. Jaworski's activities, other than in the area of obstruction of justice. And with further corroboration of that point, I allude to a story in the Wall Street Journal yesterday where Mr. Jaworski (who, incidentally, not only agrees with your pardon and its legality, but also the timeliness of it) says very specifically that there were going to be no additional disclosures resulting from his activities that the public was not already aware of relating to Mr. Nixon. Therefore, those who are saying that you should have waited until there was a formal charge I think are missing the point that there already has been a formal charge approved by this committee and there probably would have been no others.

Mr. President, do you not feel that the very acceptance of the pardon by the former President is tantamount to an admission of guilt on his part?

President FORD. I do, sir.

Mr. HOGAN. So again those who say that they would have preferred that the former President admit his culpability before a pardon was issued are overlooking that fact?

President FORD. The acceptance of a pardon, according to the legal authorities, and we have checked them out very carefully, does indicate that by the acceptance, the person who has accepted it does, in effect, admit guilt.

Mr. HOGAN. Thank you, Mr. President, and again I would like to express my personal appreciation for your candor and your openness and your cooperation with this coequal branch.

President FORD. Thank you very much, Mr. Hogan.

Mr. HUNGATE. Mr. President, as you can see, the peculiar strength of this subcommittee lies in the fact that the subcommittee members bring so much knowledge to it and the subcommittee chairman takes so little away. I noticed in page 10 of your statement that when you were first hit with the possibility of this responsibility you indicated that you wanted to talk to your wife before making a decision.

Mr. President, did you do that?

President FORD. I certainly did, Mr. Chairman, because the probability of or the possibility of my becoming President obviously would have had a significant impact on her life as well as our lives.

Mr. HUNGATE. That destroys my theory that if you had talked to her you would have waited until indictment or Christmas Eve.

Let me ask you if any attempt was made by you or your representative to contact the Federal pardon attorney as to his opinion as to customary procedures following the issuing of a pardon?

President FORD. I did not, sir.

Mr. HUNGATE. Now, Mr. President, I go to page 20, and I am addressing myself to the health question. In the first responses provided by the press releases, one of these at page 3, it refers to September 16. Now, was the date of this press conference after the pardon decision in which you are quoted: "I have asked Dr. Lukash, who is the head physician in the White House, to keep me posted through proper channels as to the former President's health. I have been informed on a routine, day-to-day basis, but I don't think I am at liberty to give information."

My question is, Mr. President, had he reported prior to the pardon date or only after?

PRESIDENT FORD. Dr. Lukash gave me no information concerning President Nixon's health prior to the time that I issued the pardon. He did at my request, when I heard rumors about the former President's health, keep me posted in proper channels, but that all occurred after the pardon took place.

Mr. HUNGATE. Is the gentleman from Indiana seeking recognition?

Mr. DENNIS. Thank you, Mr. Chairman. I would just like to request that we make a part of the record the text of the opinion of the U.S. Supreme Court in *Ex parte Garland*, 4 Wallace 333; and also the opinion of the U.S. Supreme Court in *Burdick* against the United States, 236 U.S. 79, which deals with the point that a pardon must be accepted.

Mr. HUNGATE. Without objection, it will be made a part of the record.

[The documents referred to follow:]

EX PARTE GARLAND

1. The act of Congress of January 24th, 1865, providing that after its passage no person shall be admitted as an attorney and counsellor to the bar of the Supreme Court, and, after March 4th, 1865, to the bar of any Circuit or District Court of the United States, or Court of Claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed in the act of July 2d, 1862—which latter act requires the affiant to swear or affirm that he has never voluntarily borne arms against the United States since he has been a citizen thereof; that he has voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that he has neither

sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; and that he has not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto—operates as a legislative decree excluding from the practice of the law in the courts of the United States all parties who have offended in any of the particulars enumerated.

2. Exclusion from the practice of the law in the Federal courts, or from any of the ordinary avocations of life for *past conduct* is punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate.

3. The act being of this character partakes of the nature of a bill of pains and penalties, and is subject to the constitutional inhibition against the passage of bills of attainder, under which general designation bills of pains and penalties are included.

4. In the exclusion which the act adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed, and for other of the acts it adds a new punishment to that before prescribed, and it is thus within the inhibition of the Constitution against the passage of an *ex post facto* law.

5. Attorneys and counsellors are not officers of the United States; they are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character.

6. The order of admission is the judgment of the court that the parties possess the requisite qualifications and are entitled to appear as attorneys and counsellors and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court *after opportunity to be heard has been afforded.* Their admission and their exclusion are the exercise of judicial power.

7. The right of an attorney and counsellor, acquired by his admission, to appear for suitors, and to argue causes, is not a mere indulgence—a matter of grace and favor—revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

8. The admitted power of Congress to prescribe qualifications for the office of attorney and counsellor in the Federal courts cannot be exercised as a means for the infliction of punishment for the past conduct of such officers, against the inhibition of the Constitution.

9. The power of pardon conferred by the Constitution upon the President is unlimited except in cases of impeachment. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment. The power is not subject to legislative control.

10. A pardon reaches the punishment prescribed for an offense and the guilt of the offender. If granted before conviction it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it remove the penalties and disabilities and restores him to all his civil rights. It gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.

11. The petitioner in this case having received a full pardon for all offences committed by his participation, direct or implied, in the Rebellion, is relieved from all penalties and disabilities attached to the offense of treason, committed by such participation. For that offense he is beyond the reach of punishment of any kind. He cannot, therefore, be excluded by reason of that offence from continuing in the enjoyment of a previously acquired right to appear as an attorney and counsellor in the Federal courts.

STATEMENT OF THE CASE

On the 2d of July, 1862, Congress, by "An act to prescribe an oath of office, and for other purposes,"[1] enacted:

"That hereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military,

[1] 18 Stat. at Large, 424.

or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, take and subscribe the following oath or affirmation:

"'I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; *that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto;* that I have neither sought nor accepted, nor attempted to exercise the functions of *any office whatever, under any authority or pretended authority in hostility to the United States;* that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God;' &c.

"Any person who shall falsely take the said oath shall be guilty of perjury; and, on conviction, in addition to the penalties now prescribed for that offence, shall be deprived of his office, and rendered incapable forever after of holding any office or place under the United States."

On the 24th of January, 1865,[1] Congress passed a supplementary act extending these provisions so as to embrace attorneys and counsellors of the courts of the United States. It is as follows:

"No person, after the date of this act, shall be admitted to the bar of the *Supreme Court of the United States*, or at any time after the fourth of March next, shall be admitted to the bar *of any Circuit or District Court of the United States, or of the Court of Claims*, as an attorney or counselor of such court, or shall be allowed to appear and be heard in any such court, by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed in 'An act to prescribe an oath of office and for other purposes,' approved July 2d, 1862. And any person who shall falsely take the said oath shall be guilty of perjury, and, on conviction," &c.

By the Judiciary Act of 1789, the Supreme Court has power to make rules and decide upon the qualifications of attorneys.

At the December Term of 1860, A. H. Garland, Esquire, was admitted as an attorney and counsellor of the court, and took and subscribed the oath then required. The second rule, as it then existed, was as follows:

"It shall be requisite to the admission of attorneys and counsellors to practice in this court, that they shall have been such for three years past in the Supreme Court of the States to which they respectively belong, *and that their private and professional character shall appear to be fair.*

"They shall respectively take the following oath or affirmation, viz.:

"'I, A. B., do solemnly swear (or affirm, as the case may be) that I will demean myself as an attorney and counsellor of this court, uprightly, and according to law, and that I will support the Constitution of the United States.'"

There was then no other qualification for attorneys in this court than such as are named in this rule.

In March, 1865, this rule was changed by the addition of a clause requiring an oath, in conformity with the act of Congress.

At the same term at which he was admitted, Mr. Garland appeared, and presented printed arguments in several cases in which he was counsel. His name continued on the roll of attorneys from then to the present time; but the late Rebellion intervened, and all business in which he was concerned at the time of his admission remained undisposed of. In some of the cases alluded to fees were paid, and in others they were partially paid. Having taken part in the Rebellion against the United States, by being in the Congress of the so-called Confederate States, from May, 1861, until the final surrender of the forces of such Confederate States—first in the lower house, and afterwards in the Senate of that body, as the representative of the State of Arkansas, of which he was a citizen—Mr. Garland could not take the oath prescribed by the acts of Congress before mentioned and the rule of the court of March, 1865.

The State, in May, 1861, passed an ordinance of secession, purporting to withdraw herself from the Union; and afterwards, in the same year, by another ordinance, attached herself to the so-called Confederate States.

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[1] 18 Stat. at Large, 424.

In July, 1865, Mr. Garland received from the President a pardon, by which the chief magistrate, reciting that Mr. Garland, "by taking part in the late Rebellion against the government, had made himself liable to heavy pains and penalties," &c., did thereby

"Grant to the said A. H. Garland a full pardon and amnesty for all offenses by him committed, arising from participation, direct or implied, in the said Rebellion, conditioned as follows: This pardon to begin and take effect from the day on which the said A. H. Garland shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865; and to be void and of no effect if the said A. H. Garland shall hereafter at any time acquire any property whatever in slaves, or make use of slave labor; and that he first pay all costs which may have accrued in any proceedings hitherto instituted against his person or property. And upon the further condition that the said A. H. Garland shall notify the Secretary of State in writing that he has received and accepted the foregoing pardon.

The oath required was taken by Mr. Garland and annexed to the pardon. It was to the purport that he would thenceforth "faithfully support, protect, and defend the Constitution of the United States and the union of the States thereunder; and that he would in like manner abide by and faithfully support all laws and proclamations which had been made during the existing Rebellion with reference to the emancipation of slaves."

Mr. Garland now produced this pardon, and by petition filed in court asked permission to continue to practice as an attorney and counsellor of the court, without taking the oath required by the act of January 24th, 1865, and the rule of the court. He rested his application principally upon two grounds:

1st. That the act of January 24th, 1865, so far as it affected his status in the court, was unconstitutional and void; and,

2d. That, if the act were constitutional, he was released from compliance with its provisions by the pardon of the President.

Messrs. Reverdy Johnson and M. H. Carpenter, for the petitioner, Mr. Garland, who had filed a brief of his own presenting fully his case.

I. In discussing the constitutionality of any law of Congress, the real question is, would the act accomplish a result which the Constitution forbids? If so, no matter what may be the form of the act, it is unconstitutional.

This court, in *Green* v. *Biddle*,[2] *Bronson* v. *Kinzie*,[3] and in *McCraken* v. *Hayward*,[4] has held, that although the States may legislate at pleasure upon remedies merely, yet if the practical effect of such legislation, in a given case, be to burden the right of a creditor unreasonably, or withdraw the debtor's property from the reach of the creditor, then such law is unconstitutional, as impairing the obligations of the contract. In *Bronson* v. *Kinzie*, C. J. Taney says:

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. *But if that effect is produced*, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. *In either case it is prohibited by the Constitution.*"

Again he says:

"And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or incumbered it with conditions *that render it useless or impracticable to pursue it.*"

In the Passenger Cases,[5] this court held that State laws, nominally mere health or police laws, were unconstitutional, *because, in their effect*, they amounted to a regulation of commerce; and, therefore, were an exercise of power vested exclusively in the Federal government.

The judges of this court hold office during good behavior. An act of Congress passed today, requiring them to take an oath that they were not above forty years of age, and providing, as the act in question does in—relation to attorneys, that, "after the 4th March next, no justice of this court should be admitted to his seat, unless he should take such oath, even if he were previously a justice of said court," would be a palpable violation of the Constitution, because it would amount to a disqualification to any man above forty years of age, and

[2] 8 Wheaton, 1.
[3] 1 Howard, 311.
[4] 2 Id. 608.
[5] 7 Howard, 283.

be equivalent to providing that no justice of this court should remain in office beyond that age; while the Constitution provides that the judges shall hold during good behavior.

The Constitution provides,[6] that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." Now, an act of Congress, or of a State, declaring that before any heir should enter into his ancestral estates he should take an oath that his ancestor had not been attainted of treason, would violate this provision; and could be intended for no other purpose.

Assault and battery is a crime punishable by fine of $50, but not with disqualification to hold office. Suppose A. today commits that offense, is tried and fined. Tomorrow, Congress passes a law that no person shall be admitted to hold any office of honor, profit, or trust until he shall subscribe an oath that he has never committed the crime of assault and battery. Is it not apparent that such act, in its practical operation, would be *ex post facto*, as adding to the punishment of assault and battery an important penalty not attaching when the crime was committed?

These are instances, and many might be cited, illustrating the proposition that an act is unconstitutional, which accomplishes a result forbidden by, or in conflict with, the Constitution.

II. What, then, is the result accomplished by the act complained of, and how does that result accord with the spirit and provisions of the Constitution?

This may be considered—

(1.) With reference to the petition; and

(2.) Upon principle generally.

1. Conceding, for the purpose of this argument, that the petitioner has been guilty of treason, for which, on conviction in the manner provided in the Constitution (on the testimony of two witnesses to the same overt act, or on confession in open court), he might have been punished with death.

The President has fully pardoned him for this offence; and the constitutional effect of that pardon is to restore him to all his rights, civil and political, including the capacity or qualification to hold office, as fully in every respect as though he had never committeed the offence. Previous to the Rebellion, the petitioner was not only qualified to be, but actually was a member of this bar. In consequence of his supposed treason, and only in consequence of that, he subjected himself to the liability of forfeiture of that office; but the pardon wipes out both the crime and the liability to punishment, and restores the petitioner to the rights he before possessed, including the right to practice at this bar. This act of Congress, however, fixes upon this petitioner, as a consequence of the offence, a perpetual disqualification to hold this or any other office of honor, profit, or trust. In other words, the act accomplishes a result in direct opposition to the constitutional effect of the pardon. Dropping names and forms and considering the substance of things the President says, by his pardon: "You shall not be precluded from practising in the Supreme Court in consequence of your crime; I pardon you." The act says: "You shall never practise in the Supreme Court without taking an oath which will be perjury, and then, on conviction of that, that shall disquality you." The President is trying to pardon, and Congress to punish the petitioner for the same offence; and the only question is, which power prevails over the other?

To examine this subject we must consider first the nature and effect of the pardon granted to the petitioner; and secondly, the character and effect of the oath prescribed by the act. If it can be shown that the pardon, in its constitutional effect, extinguishes the crime and precludes the possibility of punishment; and that the oath in effect fixes a disqualification, which is in the nature of a penalty or punishment for the same offence, then, of course, the conflict between the two is established, and we presume it will be conceded, in that case, that the pardon must prevail.

First, the pardon. The Constitution provides[7] that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." This language is plain. "Offences," means "all offences;" and then the express exception of cases of impeachment is a repetition of the same idea.

In *United States* v. *Wilson*,[8] Chief Justice Marshall, speaking of the pardoning power, says:

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[6] Article iii, § 3.
[7] Article ii, § 2.
[8] 7 Peters, 150.

"As this power had been exercised from time immemorial by the Executive of that nation, whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

This court, delivering its opinion by Mr. Justice Wayne, in *Ex parte Wells*[9] quotes this language of Chief Justice Marshall with approval, and says further that the power granted to the President was the same that had before been exercised by the Crown of England. Now let us turn to the English and American authorities.

In Sharswood's Blackstone[10] it is said.

"The effect of a pardon is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains a pardon; it gives him a new credit and capacity; and the pardon of treason or felony, even after conviction or attainder, will enable a man to have an action of slander for calling him a traitor or felon."

Bacon's Abridgement says: "The stroke being pardoned, the effects of it are consequently pardoned." And refers to Cole's Case, in the old and accurate reported Plowden,[11] Bacon says, also:[12] "The pardon removes all punishment and legal disability."[13] In Bishop's Criminal Law it is said:[14]

"The effect of a full pardon is to absolve the party from all the consequences of his crime, and of his conviction therefor, direct and collateral; it frees him from the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided."

In the Pennsylvania case of *Cope* v. *Commonwealth*,[15] the court says: "We are satisfied, however, that although the remission of the fine imposed would not discharge the offender from all the consequences of his guilt, a full pardon of the offence would."

In the Massachusetts case of *Perkins* v. *Stevens*,[16] it is said: "It is only a full pardon of the offence which can wipe away the infamy of the conviction, and restore the convict to his civil rights."

And quoting from the attorney-general of that State, the court approves the following language:

"When fully exercised, pardon is an effectual mode of restoring the competency of a witness. It must be fully exercised to produce this effect; for if the punishment only be pardoned or remitted it will not restore the competency, and does not remove the blemish of character. There must be a full and free pardon of the offence before these can be released and removed."

In other cases[17] a pardon was held to render the convict a competent witness, upon the ground that the pardon removed not only the punishment but the stigma of guilt.

These authorities show that the people intended to, and in fact did, clothe the President with the power to pardon all offences, and thereby to wash away the legal stain and extinguish all the legal consequences of treason—all penalties, all punishments, and everything in the nature of punishment.

The President, for reasons of the sufficiency of which he is the sole and exclusive judge, has exercised this power in favor of the petitioner. The effect of the pardon, therefore, is to make it impossible for any power on earth to inflict, constitutionally, any punishment whatever upon the petitioner for the crime of treason specified in the pardon.

III. The act applied to the petitioner, in substance and effect, visits upon him a punishment for his pardoned crime. It will be conceded that the effect of this act is to exclude the petitioner from this and from all civil office. That a permanent disqualification for office is a grievous punishment need not be argued in America.

In the matter of Dorsey,[18] a motion was made for the admission of Dorsey as an attorney, and to dispense with administering to him an oath in relation to dueling,

[9] 18 Howard, 315.
[10] Vol. 2, p. 402.
[11] Page 401.
[12] Pages 415–16, notes *a* and *b*.
[13] See, too, Gilbert on Evidence, 128; Brown *v.* Crashaw, 2 Bulstrode, 154; Wicks *v.* Smallbrooke, 1 Siderfin, 52.
[14] § 713.
[15] 28 Pennsylvania State, 297.
[16] 24 Pickering, 280.
[17] Jones *v.* Harris, 1 Strobhart, 162, and People *v.* Pease, 8 Johnson's Cases, 383.
[18] Porter, Alabama, 293.

required by an act of 1826. This act provided that "all members of the general assembly, all officers and public functionaries, elected or appointed under the constitution or laws of the State, and all counsellors and attorneys at law," before entering upon their office, should take an oath that they had never been engaged in any duel, and that they never would be.

The report of the case occupies about two hundred pages, and is an able and elaborate discussion of this subject, and a full authority for the position we take in this case. It was there held:

1. That in that case the law prescribed a qualification for holding office, which an individual never could comply with, and that such act, as to him, was a disqualification.

2. That such disqualification was punishment.

3. That the retrospective part of the oath was unconstitutional.

4. That as a part of the oath was unconstitutional, and the court could not separate it, the whole oath was unconstitutional, and the petitioner was entitled to be admitted without taking it.

Goldthwaite, J., says: [19]

"I have omitted any argument to show that disqualification from office, or from the pursuits of a lawful avocation, is a punishment; that it is so, is too evident to require any illustration; indeed, it may be questioned whether any ingenuity could devise any penalty which would operate more forcibly on society."

In *Barker* v. *The People*,[20] a New York case, the chancellor says:

"Whether the legislature can exclude from public trusts any person not excluded by the express rules of the Constitution, is the question which I have already examined, and according to my views of that question there may be an exclusion by law, in punishment for crimes, but in no other manner, and for no other cause."

In same case, in Supreme Court, where the opinion was delivered by Spencer, C. J., it is said:

"The disfranchisement of a citizen is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences."

Indeed, the very act we are considering provides this punishment for those who shall be convicted of perjury for taking the test oath falsely.

And more than all, the Constitution of the United States [21] itself is to the same effect. It says:

"Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States."

For the highest crimes, then, and on trial in the most solemn form known to the Constitution, the only punishment is disqualification.

These authorities, as we assert, establish:

1. That the pardon absolves the petitioner from all punishment for his offence; and,

2. That the act in question does, in its operation upon the petitioner, disfranchise him from holding office; and

3. That such disfranchisement is in effect a punishment for the same offence for which he has been pardoned; and, therefore,

4. That the act and the pardon are in conflict, and the pardon must prevail.

IV. The foregoing objections are conclusive as regards Mr. Garland; but it might be omitting a duty that every lawyer owes his country, not to call attention to the other general objections to this act.

1. What right has Congress to prescribe other qualifications that are found in the Constitution; and what is the limit of the power? Of course the power is conceded to make perpetual or limited disqualification one of the penalties of crime, applying the act prospectively. Such was the act sustained in *Barker* v. *The People*, before cited; but where does Congress get the power to disfranchise and disqualify any citizen, except as punishment for crimes, whereof the party shall have been duly convicted?

Congress can exercise none but actually delegated powers, or such as are incidental and necessary to carry out those expressly granted. If this act is constitutional, then there is no limit to the oaths that may be hereafter prescribed. The whole matter rests in the discretion of Congress. A law requiring every public officer to swear that he voted for a particular candidate at the last elec-

[19] Pages 366, 368.
[20] 8 Cowen, 686.
[21] Article I, § 3.

tion, or leave his office, would be more wanton, but not less constitutional, than the one we are considering; for if it is in the constitutional power of Congress to require these disfranchising oaths to be taken, then Congress alone can determine their nature. There is no appeal from its determination of any matter within its constitutional province.

2. The Constitution provides:[22]

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury; except," &c. . . . "Nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law," &c.

Now, suppose murder or treason to have been in fact committed by a public officer, but that there is no witness to establish the fact. Can Congress pass a law requiring him, as a condition to his further continuance in office, or ever after holding any office, to take an oath that he has not committed murder or treason? If so, all the consequences which can follow from conviction on impeachment, viz., incapacity to hold office, may be visited upon the guilty party without indictment, trial, or witnesses produced against him, and without any process of law whatever; and Congress may by *ex post facto* laws brand the most trifling offence, or even a difference of political opinion, with total disqualication to hold office. Such rapid administration of justice might often reach a correct result, and disfranchise a guilty man whose absence from office might not endanger the Republic; but the question is, is it a constitutional method of establishing and punishing guilt?

3. The petitioner's right to practice in this court is property. In *Wommack* v. *Halloway*,[23] it was held by the court unanimously, that "the right to exercise an office is as much a species of property as any other thing capable of possession; and to wrongfully deprive one of it, or unjustly withhold it, is an injury which the law can redress in as ample a manner as any other wrong; and conflicting claims to exercise it must be decided in the same manner as other claims involving any other right, if either of the claimants insist on a jury."

In *Ex parte Heyfron*,[24] it was held to be "error to strike an attorney from the roll on motion without giving him notice of the proceeding," the court saying: "It is a cardinal principle in the administration of justice, that no man can be condemned, or divested of *his rights*, until he has had an opportunity of being heard."

In the matter of Cooper,[25] it was held that the court, in passing upon the admission of an applicant to practise as an attorney, acted judicially, and its decision was reviewable in the appellate court.

In *Ex parte Secombe*,[26] this court say (by C. J. Taney):

"It rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. *The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility;* but it is the duty of the court to exercise and regulate it by sound and just judicial discretion, whereby the rights and independence of the bar may be be condemned, or divested of *his rights*, until he has had an opportunity of being of the court itself."

These cases show that the petitioner has a vested right in his office as an attorney of this court, of which he can only be deprived by some regular judicial proceeding. He may be removed for cause; but the adjudication of the court in the premises is a judicial judgment, which may be reviewed on appeal.

Depriving the petitioner, therefore, of his office by an enforcement of this act of Congress, is depriving him of his property without due process of law.

Mr. R. H. Marr, also for the petitioner:[27]

1. The President has granted to the petitioner a "full pardon and amnesty." Here are two words, and the meaning of them is different.

The meaning of the word pardon has been discussed and is well known. The word "amnesty" is not of frequent use in the English law; for the clemency

[22] Article V. Amendments.
[23] 2 Alabama, 31.
[24] 7 Howard's Mississippi, 127.
[25] 22 New York, 67. See also, Strother v. State, 1 Missouri, 554 or *772.
[26] 19 Howard, 9.
[27] Mr. Marr had himself filed a petition similar to that of Mr. Garland, for permission to continue to practise as an attorney and counsellor of the court without taking the oath required by the act of Congress and the rule of the court. He had been engaged in the Rebellion but had received a full pardon from the President. It was understood that the decision upon Mr. Garland's petition would also embrace, in principle, his. The argument here given is from the brief filed in his own case.

which is expressed by that word is usually exercised in England by what they call an act of indemnity. Let us inquire into its meaning.

Neither the English law nor our law throws great light upon the matter. It may be well to trace its history, and to see how it was understood originally, how it has been uniformly understood since, and is now understood, by some of the most polished nations of the world. If we turn our attention to France, particularly, so long and so often the sport of political storms and revolutions, we shall find in her jurisprudence abundant light to guide us in our inquiry as to the meaning and effect of the amnesty.

The word comes from the Greek, Αμνηστια, and means oblivion, the state or condition of being forgotten, no longer remembered. When Thrasybulus had overcome and dethroned the Thirty Tyrants, he induced his followers, by his persuasive eloquence, and by the influence which his noble virtues gave him, to pass an act of perpetual oblivion in favor of an oligarchical party, from whom they had suffered atrocious wrongs; to forget, to remember no longer, the past offences, grievous as they were; and this act of clemency, running back to about the year 403 B.C., he called Αμνηστια.

The Romans, too, had their amnesty, which they called *Abolitio*, and which is thus defined in their law: "*Abolitio est deletio, oblivio, vel extinctio accusationis.*"

This high prerogative was exercised by the kings of Spain from a very remote period; and its effect [28] is, to condone the penalty, and to obliterate, efface the mark of infamy.

From an early period, this prerogative has been exercised by the kings of France, and its effect has been the subject of the most minute judicial investigation.

Merlin [29] defines the word: "*Grace du souverain, par laquelle il veut qu'on oublie ce qui a été fait contre lui ou contre ses ordres.*"

Fleming & Tibbins, in their Dictionary,[30] define it: "*Pardon qu'on accorde à des rebelles ou à des déserteurs.*"

In the matter of a person named Clemency,[31] the Court of Cassation say:

"If the effect of letters of pardon is limited to the remission of the whole or a part of the penalties pronounced against one or more individuals; if they leave the offence still subsisting, as well as the culpability of the pardoned, and even declare the justice of the condemnation, it is otherwise with respect to a *full and complete amnesty*, which carries with it the extinction of the offences of which it is the object; of the prosecutions commenced or to be commenced; of the condemnations which may have been or which may be pronounced; so that these offences, covered with the veil of the law, by the royal power and clemency, are, with respect to courts and tribunals, *as if they had never been committed*, saving to third persons their right to reparation, by civil action, for injury to them."

Clemency had been guilty of theft, in a time of great scarcity; and was amnestied. She afterwards committed the same offence, and the prosecution insisted on inflicting upon her the accumulated penalties due to a repetition of the offence. But the court held that the first offence had been so completely annihiliated by the amnesty, that it could not be considered in law as having ever existed or been committed, insomuch that the offence for which she was then prosecuted, though in reality a repetition of the first, could be considered in law only as a first offence, and punished as such.

Girardin was married in 1822. In 1834, by judgment of the court of assizes of the department to which he belonged, he was condemned by default, and sentenced to death for some political offence; and civil death was a consequence of that judgment. In 1840, an amnesty was declared by royal ordinance, in favor of all under condemnation for political crimes or offences.

Supposing, as the effect of the civil death pronounced against him operated a dissolution of his marriage, that it was necessary to have it celebrated anew, Girardin instituted some proceeding, in the nature of a *mandamus*, against the mayor of his town, to compel the performance of the marriage ceremony; and the court of first instance ordered the new celebration to take place.

The mayor appealed; and the royal court reversed the decision, upon the ground that:

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[28] Tapia, Febrero Novíssimo, tomo 8, p. 56, § 14.
[29] Répertoire de Jurisprudence, Tit. "Amnistie."
[30] Tit. "Amnistie."
[31] De Villeneuve & Carrette, vol. 1825, 1827, part 1, p. 185.

"The amnesty had annihilated the sentence pronounced against Girardin, had abolished the past, and had reintegrated the amnestied in the plenitude of his civil life; that, consequently, he is to be regarded as having never been deprived of civil life; and that the new celebration would be in some sort an act of derision, and contrary in every respect to the sanctity of marriage." [32]

By writ of error, Girardin sought, in the Court of Cassation, the highest judicial tribunal in France, a reversal of the judgment of the royal court. But the Court of Cassation rejected the writ of error, and affirmed the judgment of the royal court. The court say:

"Since the object of the amnesty is to efface, completely, the past—that is to say, to replace the amnested in the position in which they were before the condemnation had been incurred, it follows that it produces the complete re-establishment of the amnestied in the enjoyment of the rights which they had before the condemnation, saving the rights of third persons." [33]

It may be said generally, we think, that pardon is usually granted to an individual; amnesty to a class of persons, or to a whole community. Pardon usually follows conviction, and then its effect is to remit the penalty. Amnesty usually precedes, but it may follow trial and conviction, and its effect is to obliterate the past, to leave no trace of the offence, and to place the offender exactly in the position which he occupied before the offense was committed, or in which he would have been if he had not committed the offence.

II. The President had the right to grant an amnesty. The Constitution gives him unlimited power in respect to pardon, save only in cases of impeachment. The Constitution does not say what sort of pardon; but the term being generic necessarily includes every species of pardon, individual as well as general, conditional as well as absolute. It is, therefore, within the power of the President to limit his pardon, as in those cases in which it is individual and after conviction, to the mere release of the penalty—it is equally within his prerogative to extend it so as to include a whole class of offenders—to interpose this act of clemency before trial or conviction; and not merely to take away the penalty, but to forgive and obliterate the offence.

It is worthy of remark, that Congress stands committed as to the extent of the pardoning power, and the mode of exercising that power by proclamation. By the act approved 17th July, 1862, entitled "*An act to suppress insurrection*," &c., section 13, it is declared, that "The President is hereby authorized, at any time hereafter, by proclamation, to extend to persons who may have participated in the existing Rebellion in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare."

Mr. Speed, contra, for the United States:

Gentlemen present themselves here who were once practitioners before this court, but who confess in form that they have been traitors, and virtually confess that they have forfeited the privileges which they had under the rules of this court. Confessing all this, they maintain their right to take the original oath again, and to come back to practise before this court because they have been pardoned by the President.

Who is a counsellor or attorney? Opposing counsel seem to think that a man has a natural right to practise law; the same sort of right that he has to locomotion, and even to life. But this, we submit, is not so. The last-mentioned rights were given to us by the Creator; and government is made to preserve them. The government does not give the right to life, nor the right to locomotion, though it protects us all in the exercise of both. We sometimes call the privilege to practise law a right, but this is a mere manner of speaking; for it is, in truth, but a privilege; a privilege created by the law; held under the law, and according to the terms and conditions prescribed in the law. Not being a natural right, and one so protected, but a right received, and upon conditions and terms, the question in this case is, can the legislature or this court prescribe such conditions as are stated in this oath?

Whence came the power of this court to exact of an attorney an oath of any kind? No oath is prescribed in the Constitution, nor in the Judiciary Act of 1789. Whence comes the power? Under the act of 1789 this court is doubtless vested with the power to prescribe one. Under that power this court prescribed the old [34] oath. But why that oath any more than any other oath? What part of the

[32] De Villeneuve & Carrette, 1840, part 2, p. 872, &c.
[33] Id. 1850, part 1, p. 672–3.
[34] See it, *supra*, p. 836.

Constitution restrains the court to the point of prescribing this oath, and this oath only? None. Then if the court could prescribe this old oath, can it not prescribe another and different oath? No, say opposing counsel, it cannot; and especially it cannot prescribe a retroactive oath.

But really there is no retroaction about this law. Every qualification is retroactive in one sense. A man presents himself to qualify under the old rule as a counsellor and attorney of this court. What is the question? It is as to his past life, as to his past conduct, and as to his then sufficiency because of his past life and past conduct. His "private and professional character shall appear to be fair," said the rule. Moreover, we submit that every man stands here with a continuing condition of that sort upon him. The condition attaches every hour in which any man stands before the courts. It is not simply that he *is*, at the time he takes it, a man whose private and professional character appears fair. Could any gentleman, having committed yesterday an offence for which, if the court knew when he was admitted that he had been guilty of, he would not have been admitted—could he stand here to-day and contend that an exclusion on account of that offence would be retroactive? The qualification does not infer as a necessity that the counsellor admitted will both *then* and *for all future time* be qualified. He may disqualify himself. Being once qualified, he must live up to that rule which qualified him at the first. Suppose a member of the bar of this court, having been once qualified for admission, were guilty of perjury before this court, does he ever afterwards continue qualified? There is, then, nothing retroactive in this qualification.

Is it a penalty? No; only a qualification. Take it as an original matter, say the opposing counsel, it is one thing; take it as a question retroactive, it is another thing. But it is always an original question whether this court cannot change its rules and repeat the qualification, either as to moral qualities, as to professional skill and ability, and even as to political crimes. Who doubts that it is competent for the court to-morrow morning to read a rule here that shall require every gentleman who practises at this bar to submit his pretensions for sufficiency over again? But the power to make the rule contains the power to repeal the rule; the power to make the rule and repeal the rule contains the power to modify and to change the rule as the court may see proper to do.

Under the act of 1789, then, it was competent for this court, by the authority given under that act, to pass such a rule as that objected to, and to make such a rule applicable not only to those who present themselves in the future, but applicable to all who appear here with a previous license to practice law.

But if under the act of 1789 the court cannot make the rule, we have the act of Congress of 24th January, 1865. Cannot the legislature prescribe the qualifications which the counsellor shall have; the length of time he shall have been at the bar; the number of books, or the very books, that he shall have read and understood; that he shall not practise in this court at all, unless he shall have practised in the Federal courts in the several States; that he may practise in this court though he had never appeared before the Supreme Court of a State? Where is the limit? Congress has the power. How can you limit that power? Can you limit it because Congress may abuse that power? Opposing counsel argue about this government becoming a government of faction, a government of party, &c., if these powers exist in Congress. This court has said too often, and it is too familiar to the judges for me to do more than mention it, that the fact that a power may be abused is no argument against its existence.

It is said Congress cannot exact *such* an oath of office from attorneys, or from any one else; but on the face of the Constitution there is such a power given. The word "oath" occurs but three times in the Constitution; once its prescribes an oath to be taken by the President; next, it is declared that the senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; "*but no religious test*, it is ordained, *shall ever be required as a qualification to any office or public trust under the United States.*" Why this exception? Simply because the framers of the instrument knew that if the exception was not put in the instrument, there would be the ability to require a religious test. That one sort of oath alone is forbidden by the Constitution. From that provision it is to be inferred that other oaths may be exacted. The inference extends to senators and members of the House of Representatives; it even reach to that point—a point not now before the court. Some persons have argued that this oath in the Constitution cannot be changed by the Senator or House of Repre-

sentatives; that all the Senate or House have to do, is to inquire as to the age and residence of the party. Have not the Senate a right to go beyond that? Have they not the right to expel a man from the body? Take the case of Breckenridge, who was expelled; the Senate recording upon its journals that he was a traitor. Could that man present credentials, and demand that he should be formally admitted, even though he might be again expelled? It was in our view of the Constitution that Chief Justice Marshall, in *McCulloch* v. *The State of Maryland*,[35] says, that the man would be insane who should say that Congress had not the power to require any other oath of office than the one mentioned in the Constitution.

As to the expediency and the propriety of passing such an act as that of 24th January, 1865, that involves a question of duty in Congress, with which this court has nothing to do. It would seem that, in times such as we have had, some oath ought to be required that would keep from this bench and from this bar men who had been guilty, and were then guilty, of treason. There was a late associate justice upon this bench, a gentleman for whom personally all had high regard. He left this bench and went off to the Confederacy. Suppose he had not resigned; suppose that this judge had come back here and demanded to take his seat on the bench; could you have received him in your conference-room either pardoned or unpardoned? Would the court regard itself as discharging its duty, if it took him into conference, guilty, as he confessed himself to be, of treason? I know that the court would not.

Will the judges admit men to minister at the bar of justice, whom they would not admit like men among themselves? Will they say that it is *un*constitutional to keep such men from the bar by an oath like this, but that it is quite constitutional to keep them from the bench? If a man has a right, without taking this oath, to come here among us, and stand at this bar, and exercise all the functions of an attorney and counsellor in his court because he has a pardon, would not a judge, though guilty confessedly of treason, have a like right to return to the bench;—if he had been pardoned? Why could he not do it? Only because this thing of office, this thing of privilege, is a creature of law, and not a natural right. Being a creature of law, no none can, like a parricide, stab that law, and claim at the same time all its privileges and all its honors. He would destroy the very government for which he asserts a right to act. This he cannot do. The case of *Cohen* v. *Wright*[36] bore strongly in our favor. There the constitution of California prescribed an oath, to be taken by "members of the legislature and all officers, executive and judicial." It then declared that "no other oath, declaration, or test, shall be required as a qualification for any office or public trust." On the 25th April, 1863, the legislature passed an act, declaring that a defendant in any suit pending in a court of record might object to the loyalty of the plaintiff; and thereupon the plaintiff should take an oath, in addition to other things, that he had not, since the passage of the act, aided or encouraged the Confederate States in their rebellion, and that he would not do so in the future. In default of his taking the oath, his suit should be absolutely dismissed, and no other suit should be maintained by himself, his grantee, or assigns, for the same cause of action. All attorneys-at-law were required to take the same oath, and file it in the county clerk's office of their respective counties; and to practise without taking it, was declared a misdemeanor. A few days after the passage of the act, an action of assumpsit was brought in one of the courts on a contract, which, as would seem from the opinion in the case, existed at and before the passage of the act. The plaintiff was required to take the oath; and having refused to do so, his case was dismissed, and judgment rendered that it should not again be brought. The attorney appearing in the cause refused to take the oath, and he was debarred. Both questions were passed on by the Supreme Court, and the oath sustained as equally applicable to both litigants and attorneys. The court say, in reference to attorneys, that the legislature "has the power to regulate as well as to suppress particular branches of business deemed by it immoral and prejudicial to the general good. The duty of government comprehends the moral as well as the physical welfare of the state." In reference to the objection that litigants are deprived of rights by a process not known as "due process of law," which is guaranteed by the California constitution, the court say: "As one State of the Union, California has the right to deny the use of her courts to those who have committed or intended to commit treason against the nation."

[35] 4 Whaton, 416.

[36] California, 225. The report, as given, is extracted from a printed statement of Mr. Henderson's argument in Summings *v.* Missouri.

The California case, indeed, was, we admit, decided on a prospective statute; and the court, in that case, say there would be a doubt if it was retroactive. Upon that subject, as we have said before, we have no doubt; because the license and privilege of every gentleman here, at the bar, is upon a continuing condition, and is subject to the power of this court, subject to the power of Congress to change the rule, there being no natural, inalienable right to occupy the position.

Mr. Stanbery, special counsel of the United States, on the same side, and against the petitioner:

I. A pardon is not, as argued, all-absorbing. It does not protect the party from all the consequences of his act. What is the old Latin maxim that governs pardon? *Rex non potest dare gratian cum injuriâ et damno aliorum.* A pardon, while it absolves the offender, does not touch the rights of others. Suppose that there is a penal statute against an offence, and the policy of the law being to detect the offender, there is a promise of reward to the informer, upon his conviction, to be had. If a pardon is given to that offender, what is the consequence upon the informer, who draws his right simply out of the offence and the conviction of the offence? Does it take away his right to the fine, or the liability to pay him the fine? If the fine is half to the informer and half to the public, what is the effect? The half to the public is gone, but the half to the informer is not gone. There is one consequence arising out of the offence that the pardon does not reach.

Put another case. Suppose a man is indicted and sent to the penitentiary for life, and that the consequence of the confinement is declared by law to be that he is *civiliter mortuus*—dead in the estimation of the law. During his confinement his wife is released from the bonds of matrimony. She is a widow in the estimation of the law; her husband is dead, so far as the law can see. She marries again. After all that comes executive clemency, makes the offender a new man, pardons the offence, and, if you please, all the consequences. The man is no longer *civiliter mortuus;* again he is *probus legalis*, or *legalis homo;* but shall he have his wife, however willing she may be? Does this pardon divorce the newly-married parties, and annul their marriage? Does it make the first husband just the man he was, and with all the rights he had when he committed the offence? No.

Suppose it is some ecclesiastical penalty that has been incurred; that some incumbent has lost his office as a part of the punishment of the offence, and afterwards the king chooses to pardon him. What does Baron Comyns say, in that case, as to restoration to rights?[37]

"A pardon to the parson of a church of all contempts for acceptance of a plurality does not restore him to the former church."

"So a pardon does not discharge a thing consequent, in which a subject has an interest vested in him; as if costs are taxed in a spiritual court, a pardon of the offence does not discharge the costs."

Pardon is forgiveness, but not necessarily restoration; it restores many things—not all things. For centuries, it has been a question in England, whether a pardon makes a man fit to sit in the jury-box, where the offence involves a forfeiture of his right to sit in the jury-box; and so whether a pardon restores a man to competency as a witness, when the crime of which he stands convicted excludes him from being a witness? On that question, I should suppose that much depends on the terms of the pardon.

What are the rights of this court and the rights of Congress, also, with regard to those who are to practise here? There are certain things in which neither the executive department nor yet the legislative department can interfere with this bench; and I am glad it is so. No law can deprive your honors of your places here during life or good behavior. No President can remove a judge from this bench; and thank God it is so. No law of Congress can remove a judge from this bench. I know there have been laws of Congress that have removed United States judges from lower benches than this, but their validity has been always questioned. But no Congress has ever dared to pass a law to remove a judge from this bench, or to abolish this bench, or change the structure of the Supreme Court of the United States.

What next? Congress, it is certain, cannot interfere with your proper judicial functions. Wherever anything is commanded of you by Congress that interferes with the upright and impartial and unfettered judicial authority that you have, such a law is void, and invades your department, just as distinct and unassailable as the power of Congress itself or the executive power itself; so that if this law, which prescribes an oath to be taken by counsellors of this court, invades the proper and exclusive power of this court—if Congress has no right to say what

[37] Vol. 5, p. 244.

lawyers shall practise here or what shall be their qualifications—if that is a matter exclusively for this court, then, undoubtedly and beyond all question, this is a void law.

But let us consider what Congress may really do with regard to this court and with regard to its officers; let us see the great field over which legislation walks undisturbed in reference to it. Who made this number of ten judges here? Congress. And they can put twelve here, or twenty, if they see fit. One they cannot take from here by act of Congress, but only by impeachment after due trial. What further can they not do? They fix your salaries; but the moment the law is passed and approved, the salary so fixed is beyond their power to reduce, not to increase. They may force the judges to take more, but they cannot require them to take a dollar less.

What next can they do? This court sits here in this Capitol. Is that not by authority of law? Why is there a chief justice to preside here? Was he made by this bench? Not at all; but made by law. Why are the judges sitting here now to hold a term? Of their own motion? Not at all; but under the authority of law. Why are the judges required to visit all the circuits, at great personal inconvenience perhaps? On their own motion? No; by authority of law.

Passing from the bench. What is the clerk? An officer of this court, appointed by this court; but under what authority? By law. Who pays him? He is paid by law. What is he? An officer merely of this court, or an officer of the United States under the laws of the United States? He is the latter in every respect. Then, your marshal; who sends him here, and compels him to be here? Congress. It is by authority of law. All the machinery of the court, so far as its officers are concerned, comes to you by statute. The statute says you shall have one marshal, not two; one clerk, not three.

A class remains; the attorneys and counsellors that practice here. Under what authority is it that we have attorneys and counsellors here, and that they have rights to be heard here? Did your honors give us these rights? Is it by grant from this court that there are counsellors and attorneys here? No. It comes by act of Congress. The Constitution is silent upon it. The word "attorney" is not mentioned, and the word "counsel" is only mentioned in it as the right of a person accused of crime. It is an act of Congress that creates us and gives us the right to appear here as attorneys and counsellors at law under certain limitations. Congress has imposed very few upon us. Congress very wisely have given to the court the power to receive or to exclude, and to lay down the terms upon which a counsellor shall be admitted.

But when you are exercising that power with regard to attorneys and counsellers you are exercising a power granted by Congress, and we stand here as attorneys under that law and say to your honors, "Admit us; here are all the things that you have required and all that the law has required; admit us." Is it not so, that in everything in which Congress has given you the power over us, to admit us or to exclude us, you get that power by law? Who prescribes the oath of the attorney? Is that left to the court merely, or has that been exercised by Congress? The original oath required of attorneys is not found in the Constitution. The Constitution, upon the subject of oaths to be administered, relates only to oaths of office of persons appointed or elected to office under the Federal authority. Attorneys, as it is admitted on the other side, are not such officers, and the oath pointed out by the Constitution has nothing to do with lawyers. But Congress undertook, in the original Judiciary Act, to say that in all courts of the United States the parties may plead and manage their own causes personally, "or by the assistance of such counsel or attorneys-at-law *as by the rules of the said courts* respectively shall be permitted to manage and conduct causes therein." Congress gives power to the court to prescribe the oath; and to exercise over its counsel all wholesome control.

What further may Congress do? If under the authority thus given to you over attorneys you have a right to prescribe an additional oath, may not Congress do the same thing? Is there any constitutional objection there? Has Congress exhausted all its power with reference to such a body of men as attorneys and counsellors in the courts of the United States, so that it can do nothing further and lay down no further rule for admission or exclusion, for oath, for bond, for security? Not at all. The very first exercise of the power under which we take our first right to be attorneys and counsellors here remains; it is not exhausted; and no one can assign any reason at this moment why Congress, in its power over the attorneys and counsellors of this court, may not prescribe rules of admission, residence, and a thousand other things, that might be fixed under a

constitution like ours. In the States we do not leave so much to our courts in regard to attorneys and counsellors as Congress has, very wisely, I think, left to this court. We prescribe almost everything there by statute; fix all the qualifications through the legislative department, to be observed as to those who practise before the judicial department.

Then I take it as clear, so far as these persons are concerned, these attorneys and counsellors at law, that there is a power in this court to prescribe oaths and additional oaths, and just as clear a power in Congress to prescribe oaths and additional oaths.

Having shown that the subject-matter of an oath to be taken by attorneys and counsellors of this court is within the competency of legislative authority and regulation, quite as fully as it is within the competency of this court by virtue of the Judiciary Act; having shown that there is no constitutional objection to the exercise of this power by Congress, and that the only possible objection that can be taken to it, is that Congress has once exercised the power by law; when I have shown that that exercise of power did not exhaust the power of the legislature, then I have shown that so far this is a valid law and a valid oath. All that it is necessary for me to say is this: if the rule is valid, the law, which has somewhat more of solemnity and force than a rule, is equally valid. I do not ask for it any greater validity, but equality, so far as mere validity is concerned in the passage of the law or the passage of the rule. If I am right here, what will the bench say to a pardon of the President, who, when a lawyer is ejected from this court as unfit to practise here, grants a pardon for the very offence for which the court has ejected him? For instance, the lawyer may have committed forgery or perjury, things which make a man, when convicted of them, very unfit to practise as an attorney and counsellor at law. In consequence of that, the court may disbar him. Then the President pardons him, absolves him from the conviction of perjury and forgery, and, according to the position of the opposite side, restores him at once to his right to be here, and defies the rule which you have made, and your authority to exclude him. If that cannot be done in opposition to a rule, can the same thing be done in opposition to a law passed by the legislative body that had authority over the subject-matter? Clearly not.

II. Now, passing over the question of the power of Congress to do it, was it not eminently fit that such a law should be passed at the time; that Congress, then charged with the duty of saving the country, should exclude from its courts members of the bar in actual rebellion against it? It was eminently proper then. What! only exclude those who have not yet committed treason, and make them swear that they will not commit treason; and have no power to exclude those who have committed treason, and who come to demand as a right to practise here, with the admission on their lips that they are traitors, and, if you please, mean to continue traitors; for I am speaking of the thing as it was in 1862, when that law was passed. What! after treason is committed, and the traitor comes here *flagrante delicto*, without pardon, if you please, asking no clemency, comes here to practise law, and this oath is opposed to him, he says, "It does not bind me; I have committed treason, it is true; I have never recanted; I have not been pardoned; but that oath is unconstitutional, so far as I am concerned, and takes away my high privilege of practising in this court at this time." He says that it is *ex post facto* and void, because it makes a thing a crime which was not a crime at the time! Does it impose a criminal penalty with regard to penal matters? That is the meaning of penalty in that sense. We have now here before us a law that simply says, that a party who has committed a certain act shall not practise law in the courts of the United States. Is that making a new crime? Is that adding a new penalty in the sense of criminal penalties? Not at all. The act prescribing the oath does not say, that when a man comes here and admits that he has committed the offence, the court shall try and punish him for that offence. It says, that in order to practice he shall take an oath that he has never committed treason, that he has never joined the Rebellion. That is all. He may take the oath or not as he pleases. No one compels him to take it. Is it a penalty, when he must invoke the penalty on his own head if there is penalty? That oath does not punish him, nor authorize anybody to punish him nor say that he has done anything heretofore that is punishable in the sense of crime or delict. He may stay away; no one can touch him. He may choose to practise in the State courts; and that is well. All that the law says is, "If you come *here* we require you, before we give you the privilege to appear in *this* court, to state under oath that you have not been in rebellion against this government." That is the whole of it.

Mr. Reverdy Johnson, in reply, for the petitioner:

I. The ninth clause of the first article of the Constitution declares that no "*ex post* facto law shall be passed." So solicitous were the framers of the Constitution to prohibit the enactment of such laws, that they imposed upon every State government the same restriction. They considered laws of that character to be "contrary to the first principles of the social compact, and to every principle of sound legislation." So says Mr. Madison in the 44th number of the Federalist. In the same number he tells us that, however obvious this is, "Our own experience has taught us nevertheless that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights." Mr. Hamilton, in the 78th number of the same work, advocates the necessity of an independent judiciary, upon the ground of its being "essential in a limited constitution," and adds: "By a limited constitution I understand one which contains certain specified exceptions to the legislative authority, such, for instance, as that it shall pass *no bills of attainder, no ex post facto laws, and the like.* Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts, contrary to the manifest tenor of the Constitution, void. Without this, all the reservations of particular rights or privileges would amount to nothing." Is not the act in question, in its appplication to Mr. Garland, an *ex post facto* law? These terms are technical, and were known to the common law of England when the Constitution was adopted. Their meaning, too, was then well understood. An English writer says that such a law is one "made to meet a particular offence committed." Another defines it to be "a law enacted *purposely* to take cognizance of an offence already committed." The same meaning was given to it as early as 1798, in *Calder* v. *Bull.*[38] And in the subsequent case of *Fletcher* v. *Peck*,[39] it was again defined and adjudged to be a law which renders "an act punishable in a manner in which it was not punishable when it was committed." This definition, as is truly said by Chancellor Kent, is "distinguished for its comprehensive brevity and precision;" and Kent correctly tells us that "laws passed after the act, and affecting a person by way of punishment, either in his person or estate, are within the definition." [40]

The design, therefore, of this restriction was to prohibit legislation punishing a man, *either in his person or estate*, for an act for which there was no punishment provided when the act was done, or from imposing an additional punishment to that which was then imposed, or to supply a deficiency of legal proof by admitting testimony less than that before required, or testimony which the courts were before prohibited from admitting. With this understanding of the term, is not the act of 1865 an *ex post facto* law? Does it not punish Mr. Garland for an act in a manner in which he was not punishable when it was committed? Does it not punish him in fact? Educated for the profession, his hopes centered in his success in it, his highest ambition being to share its honors, his support and that of his family depending upon success; can any man doubt that a law which deprives him of the right to pursue that profession, which defeats such hopes, which deprives him of the opportunity to gratify so noble an ambition, and which deprives him of the means of supporting himself and those dependent upon him, inflicts a severe, cruel, and heretofore in this country an unexampled punishment?

Our statutes, indeed, are full of provisions showing that, in the judgment of Congress, similar consequences are punishments to be inflicted for crime. Disfranchisement of the privilege of holding offices of honor, trust, or profit, is imposed as a punishment upon those who are convicted of bribery, forgery, and many other offences. And how crushing is such punishment! To be excluded from the public service makes the man virtually an exile in his native land; an alien in his own country; and whilst subjecting him to all the obligations of the Constitution, holds him to strict allegiance and denies him some of its most important advantages. Can the imagination of man conceive a punishment greater than this? And this is not only the effect of the act, but such was its obvious and declared purpose. When it was passed the country was engaged in a civil war of unexampled magnitude, begun and waged for the purpose of destroying the very life of the nation, of dissevering the government which our fathers provided for its preservation. In 1865 nearly all the members of the legal profession in the Southern States had adopted the heresy of secession as a constitutional right,

[38] 3 Dallas, 386.
[39] 6 Cranch, 138.
[40] 1 Kent's Commentaries, 409.

and were, or had been, either in the military or civil service of the Confederate government, or had given voluntary "aid, countenance, counsel, or encouragement to persons engaged in armed hostility" to the United States, or had yielded a voluntary support to some "pretended government, authority, power, or constitution within the United States hostile or inimical to the same;" and this was known to Congress. However criminal such conduct may have been; however liable the parties were to prosecution and punishment by the laws then in force, the particular punishment inflicted by the act of 1865 could not have been awarded. That act does not repeal the laws by which such conduct was then punishable, but imposes (and such was its sole and avowed purpose) the additional punishment of disfranchisement. The law assumes that the acts which the oath it prescribes is to deny, have been done by lawyers, and that such acts are crimes to be punished by a denial or forfeiture of their right to appear as counsel in the courts of the Union. Its very design, therefore, and its effect is to inflict a punishment for the imputed crime additional to that which the laws in force when the crime was committed provided. It falls, then, within the conceded definition of an *ex post facto* law, and is therefore void. It is also obnoxious to the same objection, because it changes "the legal rules of evidence and receives different testimony than was requisite for the conviction of the offender at the time the offense was perpetrated." [41] This is evident. The offense imputed is treason, of which the party at the time of its commission could not have been convicted by refusing to take such an oath as this act requires, or any other, but only upon "the testimony of two witnesses to the same overt act, or on confession in open court." [42]

II. The act is also in conflict with that part of the fifth article of the amendments of the Constitution which provides that no person "shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Within the meaning of the first part of this clause, every charge of crime against a party constitutes a "criminal case." No matter how made, if it becomes a subject of legal inquiry, the party cannot be compelled to testify. The purpose is to prevent his being called upon to prove his guilt; to prevent his being examined in relation to it against his will. Any law, therefore, which, in terms or in effect, makes him "a witness against himself" is within the clause. That a law directly compelling him to testify would be within it, will be admitted; and it is a rule of construction especially applicable to a constitutional provision intended for the protection of the citizen, that what cannot be done directly, cannot be done indirectly. Where the protection is intended to be complete, it cannot be defeated by any evasion. What in this particular, does this law provide? It does not say that Mr. Garland shall be compelled "to be a witness against himself;" but it does the same thing by providing that his guilt is to be considered conclusively established unless he will swear to his innocence. His refusal to swear that he is not guilty is made the evidence of his guilt, and has the same operation as his admission of his guilt. If this is not a clear evasion of the clause, and fatal to the protection it is designed to afford, there can be no evasion of it. The law in question says, that unless the lawyer, who is already a counsellor, will swear to his innocence of the imputed acts, he shall not continue to be such counsellor, or, if he was not before one, he shall not be admitted to that right. It constitutes, therefore, his oath the evidence of his innocence, and his refusal to take it conclusive evidence of his guilt. That this is its effect, if authority be needed, is decided in the Pennsylvania case of *Respublica and Gibbs*,[43] and the Rhode Island case of *Green and Briggs*.[44] The reasoning upon the point in those cases, and especially that of Pittman, J., in the latter case, is conclusive.

And here allow me to read an extract from a speech of the late Lord Erskine.[45] It was made during the troubles we had with England and France, growing out of the Berlin and Milan decrees, and the orders in council. It was said there that parties were not obliged to do what those laws required, and as they were not obliged the laws did them no harm. Lord Erskine replied:

"Is it not adding insult to injury to say to America that her shipping is not compelled to come into our ports, since they may return back again! Let us suppose that his majesty had been advised, while I was a practiser at the bar, to issue a proclamation that no barrister should go into Westminster Hall without

[41] 1 Kent's Commentaries, 409.
[42] Constitution, Article ii, § 3.
[43] 3 Yeates, 429.
[44] 1 Curtis, 311.
[45] Hansard's Parliamentary Debates, First Series, folio 10, p. 966.

passing through a particular gate at which a tax was to be levied on him. Should I have been told gravely that I was by no means compelled by such a proclamation to pass through it? Should I have been told that I might go back again to my chambers with briefs, and sleep there in my empty bag, if I liked? Would it be an answer to a market gardener in the neighborhood of London, if compelled to pass a similar gate erected in every passage to Covent Garden, that he was by no means compelled to bring his greens to market, as he might stay at home with his family and starve?"

And that is what we are practically told is the ground on which this law is to be upheld. The right to be a counsellor in this court, it is said, is not a natural right; that it grows out of legislation; that it may be given, or it may not be given; and as it may not be given, the legislature (in whom the power is supposed to reside), if it thinks proper to give it at all, may give it on such terms as it may prescribe; and opposing counsel apply that doctrine even to a case in which the right exists, for that it is the condition of the gentleman whom I am here representing. He has got your judgment, and the legislature undertakes to say to him, "You shall not longer enjoy that right, unless you will swear that you have not done the things stated in the oath which we require you to take;" and he is gravely told, "You are not obliged to take it." Certainly, he is not obliged to take it. No man is obliged to follow his occupation; but unless he takes it he must starve, except he have other means of living.

III. The act is void, because it interferes with the rights and powers conferred on the judicial department of the government by the third article of the Constitution. By that article the entire judicial power of the United States is vested in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish, and the judges are to hold their 'office during good behavior,'" receiving a compensation for their services which cannot be diminished.

When the Constitution was adopted, it was well known that courts could not properly discharge their functions without the aid of counsel; and it was equally well known that such a class of men, in a free government, was absolutely necessary to the protection of the citizen and the defence of constitutional liberty, whenever these might be involved, as history had proved they often were, in prosecutions instituted by government. The existence and necessity of this class, for the protection of the citizen, is recognized in the amendment last referred to, securing to the accused, in a criminal prosecution, "the assistance of counsel for his defence." And, further, by the thirty-fifth section of the Judiciary Act, passed by a Congress in which were many of the distinguished men who framed the Constitution, parties are secured "the assistance of such counsel or attorneys-at-law as, by the rules of the said courts (courts of the United States), respectively, shall be permitted to manage and conduct causes therein." As before stated, Mr. Garland, having complied with the terms of your second rule, was admitted as a counsellor of this court. Has Congress the authority to reverse that judgment without this court's assent? This the act does, if it be compulsory upon the court. The decision in *Ex Parte Secombe*[46] is, that the relations between a court of the United States and the attorneys and counsellors who practise in it, and their respective rights and duties, are regulated by the common law; and that it has been well settled by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers as an attorney and counsellor, and for what cause he ought to be removed. Let us consider this question for a few moments.

1st. The admission of counsel, and dismissal when admitted, is evidently, by the act of 1789, esteemed a power inherent in the courts, and to be exercised by them alone; and in the decision just quoted, it is held to be one resting "exclusively" with the courts. This being so, the propriety of its exercise cannot be questioned by any other department of the government. Belonging exclusively to the courts, their judgment is conclusive.

2d. If this was not the rule, and Congress has authority to interfere with or revise such judgments, if they can annul them by legislation, as is done by the act in question, then they possess a power which may be so used as to take from the courts the benefit of counsel, and thereby necessarily defeat the right secured to the accused in criminal prosecutions, of having "the assistance of counsel for his defence." A power of this description is, I submit, wholly inconsistent with the jurisdiction conferred upon the judicial department of the government, and fatal to the objects for which that department was created, and is directly in conflict with the provision of the amendment just referred to.

[46] 19 Howard.

IV. If I understand the Attorney-General, the only ground upon which he maintains the validity of the act of 1865, is that the right to be attorneys and counsellors of this court, or of any court of the United States, is not a natural one, but one given by law only; a right to be regulated at any time by law, or not be given at all, or, when given, to be at any time taken away. Without stopping to inquire whether these propositions are correct, I deny, with perfect confidence, that Congress can prohibit the appearance of counsel in the courts of the Union. The sixth amendment of the Constitution, before quoted, secures to the accused, in a criminal case, "the assistance of counsel for his defence." This security is, therefore, not dependent upon, or subject to, the power of Congress: They have no more authority to deny an accused the assistance of counsel, than they have to deny him a jury trial; or the right "to be informed of the nature and cause of the accusation;" or "to be confronted with the witnesses against him;" or "to have compulsory process for obtaining witnesses in his favor." The right to have counsel is as effectually secured as is either of the other right given by the amendment. If that, therefore, can be taken away or impaired by legislation, either or all of the other rights can be so taken away or impaired. It is true that courts, by the common law, possess authority to adopt rules for the admission of counsel; but this is to enable them, for their own advantage and the benefit and protection of suitors, to obtain, not to exclude, lawyers of competent legal learning and of fair character. They have no right to use the power so as to exclude them. On the contrary, it is one which it is their duty to execute to obtain competent counsel. It would be not only in conflict with the Constitution, but inconsistent with the principles of a free government, that there should exist a power to deny counsel. In a free country, courts without counsel could not for a moment be tolerated. The history of every such government demonstrates that the safety of the citizen greatly depends upon the existence of such a class of men. The courts also require, for the safe and correct exercise of their own powers, their aid. The preservation of liberty itself demands counsel. In all the revolutionary struggles of the past to attain or retain liberty, success, where it has been achieved, has been ever owing greatly, if not principally, to their patriotic efforts. Congress would, therefore, but convert themselves into a mere assemblage of tyrants, regardless of the safety of the citizen, recreant to the cause of freedom, and forgetful of the guarantees of the Constitution, if they attempted to deny to the courts and to the citizen the assistance of counsel.

V. Conceding, for argument sake, the constitutionality of the act, Mr. Garland is saved from its operation by the President's pardon, with the terms of which he has complied. By the second section of the second article of the Constitution, power is given to the President "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." With that exception the power is unlimited. It extends to every offence, and is intended to relieve the party who may have committed it or who may be charged with its commission, from all the punishments of every description that the law, at the time of the pardon, imposes.

That the law in question is a penal one I have already proved. That the penalty which it imposes is for the offense imputed to Mr. Garland, and of which he was technically guilty, is also, I hope, made clear; for the offense is the one assumed by the law, and in denying to him the right to continue a counsellor of this court, that denial was designed as penalty. This being the design and effect of the law, there can be no possible doubt that Mr. Garland is saved from that penalty by his pardon.

May it please the court, every right-minded man—I should think every man who has within his bosom a heart capable of sympathy—who is not the slave to a narrow political feeling—a feeling that does not embrace, as it ought to do, a *nation's* happiness—must make it the subject of his daily thoughts and of his prayers to God, that the hour may come, and come soon, when all the States shall be again within the protecting shelter of the Union; enjoying, all of them, its benefits, contented and happy and prosperous; sharing all of them, in its duties; devoted, all, to its principles, and participating alike in its renown: that hour when former differences shall be forgotten, and nothing remembered but our ancient concord and the equal title we have to share in the glories of the past, and to labor together for the even greater glories of the future. And may I not, with truth, assure your honors that this result will be hastened by the bringing within these courts of the United States, a class of men, now excluded, who, by education, character, and profession are especially qualified by their example to influence the public sentiment of their respective States, and to bring these

States to the complete conviction which, it is believed, they most largely entertain—that to support and defend the Constitution of the United States, and the government constituted by it, in all its rightful authority, is not only essential to their people's happiness and freedom, but it is a duty to their country and their God.

Mr. Justice FIELD delivered the opinion of the court.

On the second of July, 1862, Congress passed an act prescribing an oath to be taken by every person elected or appointed to an office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, except the President, before entering upon the duties of his office, and before being entitled to its salary, or other emoluments. On the 24th of January, 1865, Congress, by a supplementary act, extended its provisions so as to embrace attorneys and counsellors of the courts of the United States. This latter act provides that after its passage no person shall be admitted as an attorney and counsellor to the bar of the Supreme Court, and, after the fourth of March, 1865, to the bar of any Circuit or District Court of the United States, or of the Court of Claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed by the act of July 2d, 1862. It also provides that the oath shall be preserved among the files of the court; and if any person take it falsely he shall be guilty of perjury, and, upon conviction, shall be subject to the pains and penalties of that offense.

At the December Term, 1860, the petitioner was admitted as an attorney and counsellor of this court, and took and subscribed the oath then required. By the second rule, as it then existed, it was only requisite to the admission of attorneys and counsellors of this court, that they should have been such officers for the three previous years in the highest courts of the States to which they respectively belonged, and that their private and professional character should appear to be fair.

In March, 1865, this rule was changed by the addition of a clause requiring the administration of the oath, in conformity with the act of Congress.

In May, 1861, the State of Arkansas, of which the petitioner was a citizen, passed an ordinance of secession, which purported to withdraw the State from the Union, and afterwards, in the same year, by another ordinance, attached herself to the so-called Confederate States, and by act of the congress of that confederacy was received as one of its members.

The petitioner followed the State, as was one of her representatives—first in the lower house, and afterwards in the senate, of the congress of that confederacy, and was a member of the senate at the time of the surrender of the Confederate forces to the armies of the United States.

In July, 1865, he received from the President of the United States a full pardon for all offenses committed by his participation, direct or implied, in the Rebellion. He now produces his pardon, and asks permission to continue to practise as an attorney and counsellor of the court without taking the oath required by the act of January 24th, 1865, and the rule of the court, which he is unable to take, by reason of the offices he held under the Confederate government. He rests his application principally upon two grounds:

1st. That the act of January 24th, 1865, so far as it affects his status in the court, is unconstitutional and void; and,

2d. That, if the act be constitutional, he is released from compliance with its provisions by the pardon of the President.

The oath prescribed by the act is as follows:

1st. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;

2d. That he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto;

3d. That he has never sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority, or pretended authority, in hostility to the United States;

4th. That he has not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto; and,

5th. That he will support and defend the Constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same.

This last clause is promissory only, and requires no consideration. The questions presented for our determination arise from the other clauses. These all relate to past acts. Some of these acts constituted, when they were committed, offences against the criminal laws of the country; others may, or may not, have been offences according to the circumstances under which they were committed, and the motives of the parties. The first clause covers one form of the crime of treason, and the deponent must declare that he has not been guilty of this crime, not only during the war of the Rebellion, but during any period of his life since he has been a citizen. The second clause goes beyond the limits of treason, and embraces not only the giving of aid and encouragement of a treasonable nature to a public enemy, but also the giving of assistance of any kind to persons engaged in armed hostility to the United States. The third clause applies to the seeking, acceptance, or exercise not only of offices created for the purpose of more effectually carrying on hostilities, but also of any of those offices which are required in every community, whether in peace or war, for the administration of justice and the preservation of order. The fourth clause not only includes those who gave a cordial and active support to the hostile government, but also those who yielded a reluctant obedience to the existing order, established without their co-operation.

The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.

In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law. In the case of Cummings against The State of Missouri, just decided, we have had occasion to consider at length the meaning of a bill of attainder and of an *ex post facto* law in the clause of the Constitution forbidding their passage by the States, and it is unnecessary to repeat here what we said. A like prohibition is contained in the Constitution against enactments of this kind by Congress; and the argument presented in that case against certain clauses of the constitution of Missouri is equally applicable to the act of Congress under consideration in this case.

The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.[47] Their admission or

[47] Ex parte Heyfron, 7 Howard, Mississippi, 127; Fletcher *v.* Daingerfield, 20 California, 430.

their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. It was so held by the Court of Appeals of New York in the matter of the application of Cooper for admission.[48] "Attorneys and counsellors," said that court, "are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may, with propriety, be intrusted to the courts and the latter in performing his duty may very justly be considered as engaged in the exercise of their appropriate judicial functions."

In *Ex parte Secombe*,[49] a *mandamus* to the Supreme Court of the Territory of Minnesota to vacate an order removing an attorney and counsellor was denied by this court, on the ground that the removal was a judicial act. "We are not aware of any case," said the court, "where a *mandamus* was issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act and within the scope of its jurisdiction and discretion." And in the same case the court observed, that "it has been well settled by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a State under the form of creating qualifications we have held in the case of *Cummings* v. *The State of Missouri*, and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress.

This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."[50]

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.[51]

The pardon produced by the petitioner is a full pardon "for all offences by him committed, arising from participation, direct or implied, in the Rebellion,"

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[48] 22 New York, 81.
[49] 19 Howard 9.
[50] Article II. § 2.
[51] Blackstone's Commentaries, 402; 6 Bacon's Abridgment, tit. Pardon: Hawkins, book 2, c. 37, §§ 34 and 54.

and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offence of treason, committed by his participation in the Rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offence, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offence notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offence, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated.

It follows, from the views expressed, that the prayer of the petitioner must be granted.

The case of R. H. Marr is similar, in its main features, to that of the petitioner, and his petition must also be granted.

And the amendment of the second rule of the court, which requires the oath prescribed by the act of January 24th, 1865, to be taken by attorneys and counsellors, having been unadvisedly adopted, must be rescinded.

AND IT IS SO ORDERED.

OPINION OF MILLER, J., THE C.J., AND SWAYNE AND DAVIS, J.J., DISSENTING

Mr. Justice MILLER, on behalf of himself and the CHIEF JUSTICE, and Justices SWAYNE and DAVIS, delivered the following dissenting opinion, which applies also to the opinion delivered in *Cummings* v. *Missouri*.

I dissent from the opinions of the court just announced.

It may be hoped that the exceptional circumstances which give present importance to these cases will soon pass away, and that those who make the laws, both state and national, will find in the conduct of the persons affected by the legislation just declared to be void, sufficient reason to repeal, or essentially modify it.

For the speedy return of that better spirit, which shall leave us no cause for such laws, all good men look with anxiety, and with a hope, I trust, not altogether unfounded.

But the question involved, relating, as it does, to the right of the legislatures of the nation, and of the state, to exclude from offices and places of high public trust, the administration of whose functions are essential to the very existence of the government, those among its own citizens who have been engaged in a recent effort to destroy that government by force, can never cease to be one of profound interest.

It is at all times the exercise of an extremely delicate power for this court to declare that the Congress of the nation, or the legislative body of a State, has assumed an authority not belonging to it, and by violating the Constitution, has rendered void its attempt at legislation. In the case of an act of Congress, which expresses the sense of the members of a coördinate department of the government, as much bound by their oath of office as we are to respect that Constitution, and whose duty it is, as much as it is ours, to be careful that no statute is passed in violation of it, the incompatibility of the act with the Constitution should be so clear as to leave little reason for doubt, before we pronounce it to be invalid.

Unable to see this incompatibility, either in the act of Congress or in the provision of the constitution of Missouri, upon which this court has just passed, but entertaining a strong conviction that both were within the competency of the bodies which enacted them, it seems to me an occasion which demands that my dissent from the judgment of the court, and the reasons for that dissent, should be placed on its records.

In the comments which I have to make upon these cases, I shall speak of principles equally applicable to both, although I shall refer more directly to that which involves the oath required of attorneys by the act of Congress, reserving for the close some remarks more especially applicable to the oath prescribed by the constitution of the State of Missouri.

The Constitution of the United States makes ample provision for the establishment of courts of justice to administer her laws, and to protect and enforce the rights of her citizens. Article iii, section 1, of that instrument, says that

"the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." Section 8 of article i, closes its enumeration of the powers conferred on Congress by the broad declaration that it shall have authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department thereof."

Under these provisions, Congress has ordained and established circuit courts, district courts, and territorial courts; and has, by various statutes, fixed the number of the judges of the Supreme Court. It has limited and defined the jurisdiction of all these, and determined the salaries of the judges who hold them. It has provided for their necessary officers, as marshals, clerks, prosecuting attorneys, bailiffs, commissioners, and jurors. And by the act of 1789, commonly called the Judiciary Act, passed by the first Congress assembled under the Constitution, it is among other thing enacted, that "in all the courts of the United States the parties may plead and manage their causes personally; or by the assistance of such counsel or attorneys-at-law as, by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein."

It is believed that no civilized nation of modern times has been without a class of men intimately connected with the courts, and with the administration of justice, called variously attorneys, counsellors, solicitors, proctors, and other terms of similar import. The enactment which we have just cited recognizes this body of men, and their utility in the judicial system of the United States, and imposes upon the courts the duty of providing rules, by which persons entitled to become members of this class, may be permitted to exericse the privilege of managing and conducting causes in these courts. They are as essential to the successful working of the courts, as the clerks, sheriffs, and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar.

The right to practise law in the courts as a profession, is a privilege granted by the law, under such limitations or conditions in each state or government as the law-making power may prescribe. It is a privilege, and not an absolute right. The distinction may be illustrated by the difference between the right of a party to a suit in court to defend his own cause, and the right of another to appear and defend for him. The one, like the right to life, liberty, and the pursuit of happiness, is inalienable. The other is the privilege conferred by law on a person who complies with the prescribed conditions.

Every State in the Union, and every civilized government, has laws by which the right to practise in its courts may be granted, and makes that right to depend on the good moral character and professional skill of the party on whom the privilege is conferred. This is not only true in reference to the first grant of license to practise law, but the continuance of the right is made, by these laws, to depend upon the continued possession of those qualities.

Attorneys are often deprived of this right, upon evidence of bad moral character, or specific acts of immorality or dishonesty, which show that they no longer possess the requisite qualifications.

All this is done by law, either statutory or common; and whether the one or the other, equally the expression of legislative will, for the common law exists in this country only as it is adopted or permitted by the legislatures, or by constitutions.

No reason is perceived why this body of men, in their important relations to the courts of the nation, are not subject to the action of Congress, to the same extent that they are under legislative control in the States, or any other government; and to the same extent the judges, clerks, marshals, and other officers of the court are subject to congressional legislation. Having the power to establish the courts, to provide for and regulate the practice in those courts, to create their officers, and prescribe their functions, can it be doubted that Congress has the full right to prescribe terms for the admission, rejection, and expulsion of attorneys, and for requiring of them an oath, to show whether they have the proper qualifications for the discharge of their duties?

The act which has just been declared to be unconstitutional is nothing more than a statute which requires of all lawyers who propose to practice in the national courts, that they shall take the same oath which is exacted of every officer of the government, civil or military. This oath has two aspects; one which looks to the past conduct of the party, and one to his future conduct; but both have reference to his disposition to support or to overturn the government, in whose functions he proposes to take part. In substance, he is required to swear that he

has not been guilty of treason to that government in the past, and that he will bear faithful allegiance to it in the future.

That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument. The history of the Anglo-Saxon race shows that, for ages past, the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws. From among their numbers are necessarily selected the judges who expound the laws and the Constitution. To suffer treasonable sentiments to spread here unchecked, is to permit the stream on which the life of the nation depends to be poisoned at its source.

In illustration of this truth, I venture to affirm, that if all the members of the legal profession in the States lately in insurrection had possessed the qualification of a loyal and faithful allegiance to the government, we should have been spared the horrors of that Rebellion. If, then, this qualification be so essential in a lawyer, it cannot be denied that the statute under consideration was eminently calculated to secure that result.

The majority of this court, however, do not base their decisions on the mere absence of authority in Congress, and in the States, to enact the laws which are the subject of consideration, but insist that the Constitution of the United States forbids, in prohibitory terms, the passage of such laws, both to the Congress and to the States. The provisions of that instrument, relied on to sustain this doctrine, are those which forbid Congress and the States, respectively, from passing bills of attainder and *ex post facto* laws. It is said that the act of Congress, and the provision of the constitution of the State of Missouri under review, are in conflict with both these prohibitions, and are therefore void.

I will examine this proposition, in reference to these two clauses of the Constitution, in the order in which they occur in that instrument.

1. In regard to bills of attainder, I am not aware of any judicial decision by a court of Federal jurisdiction which undertakes to give a definition of that term. We are therefore compelled to recur to the bills of attainder passed by the English Parliament, that we may learn so much of their peculiar characteristics, as will enable us to arrive at a sound conclusion, as to what was intended to be prohibited by the Constitution.

The word attainder is derived, by Sir Thomas Tomlins, in his law dictionary, from the words *attincta* and *attinctura*, and is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law, on the pronouncing the sentence of death." The effect of this corruption of the blood was, that the party attained lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance.

This attainder or corruption of blood, as a consequence of judicial sentence of death, continued to be the law of England, in all cases of treason, to the time that our Constitution was framed, and, for aught that is known to me, is the law of that country, on condemnation for treason, at this day.

Bills of attainder, therefore, or acts of attainder, as they were called after they were passed into statutes, were laws which declared certain persons *attained*, and their blood corrupted so that it had lost all heritable quality. Whether it declared other punishment or not, it was an act of attainder if it declared this. This also seems to have been the main feature at which the authors of the Constitution were directing their prohibition; for after having, in article i, prohibited the passage of bills of attainder—in section nine, to Congress, and in section ten, to the States—there still remained to the judiciary the power of declaring attainders. Therefore, to still further guard against this odious form of punishment, it is provided, in section three of article iii, concerning the judiciary, that, while Congress shall have power to declare the punishment of treason, no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

This, however, while it was the chief, was not the only peculiarity of bills of attainder which was intended to be included within the constitutional restriction. Upon an attentive examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned, which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government:

1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial.

2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry.[82]

It is no cause for wonder that men who had just passed successfully through a desperate struggle in behalf of civil liberty should feel a detestation for legislation of which these were the prominent features. The framers of our political system had a full appreciation of the necessity of keeping separate and distinct the primary departments of the government. Mr. Hamilton, in the seventy-eighth number of the Federalist, says that he agrees with the maxim of Montesquieu, that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And others of the ablest numbers of that publication are devoted to the purpose of showing that in our Constitution these powers are so justly balanced and restrained that neither will probably be able to make much encroachment upon the others. Nor was it less repugnant to their views of the security of personal rights, that any person should be condemned without a hearing, and punished without a law previously prescribing the nature and extent of that punishment. They therefore struck boldly at all this machinery of legislative despotism, by forbidding the passage of bills of attainder and *ex post facto* laws, both to Congress and to the States.

It remains to inquire whether, in the act of Congress under consideration (and the remarks apply with equal force to the Missouri constitution), there is found any one of these features of bills of attainder; and if so, whether there is sufficient in the act to bring it fairly within the description of that class of bills.

It is not claimed that the law works a corruption of blood. It will, therefore, be conceded at once, that the act does not contain this leading feature of bills of attainder.

Nor am I capable of seeing that it contains a conviction or sentence of any designated person or persons. It is said that it is not necessary to a bill of attainder that the party to be affected should be named in the act, and the attainder of the Earl of Kildare and his associates is referred to as showing that the act was aimed at a class. It is very true that bills of attainder have been passed against persons by some description, when their names were unknown. But in such cases the law leaves nothing to be done to render its operation effectual, but to identify those persons. Their guilt, its nature, and its punishment are fixed by the statute, and only their personal identity remains to be made out. Such was the case alluded to. The act declared the guilt and punishment of the Earl of Kildare, and all who were associated with him in his enterprise, and all that was required to insure their punishment was to prove that association.

If this were not so, then the act was mere *brutum fulmen*, and the parties other than the earl could only be punished, notwithstanding the act, by proof of their guilt before some competent tribunal.

No person is pointed out in the act of Congress, either by name or by description, against whom it is to operate. The oath is only required of those who propose to accept an office or to practice law; and as a prerequisite to the exercise of the functions of the lawyer, or the officer, it is demanded of all persons alike. It is said to be directed, as a class, to those alone who were engaged in the Rebellion; but this is manifestly incorrect, as the oath is exacted alike from the loyal and disloyal, under the same circumstances, and *none* are compelled to take it. Neither does the act declare any conviction, either of persons or classes. If so, who are they, and of what crime are they declared to be guilty? Nor does it pronounce any sentence, or inflict any punishment. If by any possibility it can be said to *provide* for conviction and sentence, though not found in the act itself, it leaves the party himself to determine his own guilt or innocence, and pronounce his own sentence. It is not, then, the act of Congress, but the party interested, that tries and condemns. We shall see, when we come to the discussion of this act in its relation to *ex post facto* laws, that it inflicts no punishment.

A statute, then, which designates no criminal, either by name or description—which declares no guilt, pronounces no sentence, and inflicts no punishment—can in no sense be called a bill of attainder.

[82] See Story on the Constitution, § 1844.

2. Passing now to consider whether the statute is an *ex post facto* law, we find that the meaning of that term, as used in the Constitution, is a matter which has been frequently before this court, and it has been so well defined as to leave no room for controversy. The only doubt which can arise is as to the character of the particular case claimed to come within the definition, and not as to the definition of the phrase itself.

All the cases agree that the term is to be applied to criminal causes alone, and not to civil proceedings. In the language of Justice Story, in the case of *Watson* v. *Mercer*,[53] "*Ex post facto* laws relate to penal and criminal proceedings, which impose punishment and forfeiture, and not to civil procedings, which affect private rights retrospectively."[54]

The first case on the subject is that of *Calder* v. *Bull*, and it is the one in which the doctrine concerning *ex post facto* laws is most fully expounded. The court divides all laws which come within the meaning of that clause of the Constitution into four classes:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2d. Every law that aggravates a crime, or makes it greater than it was when committed.

3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

4th. Every law that alters the rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offense to convict the offender.

Again, the court says, in the same opinion, that "the true distinction is between *ex post facto* laws, and retrospective laws;" and proceeds to show that, however unjust the latter may be, they are not prohibited by the Constitution, while the former are.

This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth, as coming within that clause of the organic law. In looking carefully at these four classes of laws, two things strike the mind as common to them all:

1st. That they contemplate the trial of some person charged with an offence.

2d. That they contemplate a punishment of the person found guilty of such offence.

Now, it seems to me impossible to show that the law in question contemplates either the trial of a person for an offence committed before its passage, or the punishment of any person for such an offence. It is true that the act requiring an oath provides a penalty for falsely taking. But this provision is prospective as no one is supposed to take the oath until after the passage of the law. This prospective penalty is the only thing in the law which partakes of a criminal character. It is in all other respects a civil proceeding. It is simply an oath of office, and it is required of all officeholders alike. As far as I am informed, this is the first time in the history of jurisprudence that taking an oath of office has been called a criminal proceeding. If it is not a criminal proceeding, then, by all the authorities, it is not an *ex post facto* law.

No *trial* of any person is contemplated by the act for any past offence. Nor is any party supposed to be charged with any offence in the only proceeding which the law provides.

A person proposing to appear in the court as an attorney is asked to take a certain oath. There is no charge made against him that he has been guilty of any of the crimes mentioned in that oath. There is no prosecution. There is not even an implication of guilt by reason of tendering him the oath, for it is required of the man who has lost everything in defence of the government, and whose loyalty is written in the honorable scars which cover his body, the same as of the guiltiest traitor in the land. His refusal to take the oath subjects him to no prosecution. His taking it clears him of no guilt, and acquits him of no charge.

Where, then, is this *ex post facto* law which tries and punishes a man for a crime committed before it was passed? It can only be found in those elastic rules of construction which cramp the powers of the Federal government when they are to be exercised in certain directions, and enlarges them when they are to be exercised in others. No more striking example of this could be given than the

[53] 8 Peters, 88.

[54] Calder *v.* Bull, 3 Dallas, 386; Fletcher *v.* Peck, 6 Cranch, 87; Ogden *v.* Saunders, 12 Wheaton, 266; Satterlee *v.* Matthewson, 2 Peters, 880.

cases before us, in one of which the Constitution of the United States is held to confer no power on Congress to prevent traitors practising in her courts, while in the other it is held to confer power on this court to nullify a provision of the constitution of the State of Missouri, relating to a qualification required of ministers of religion.

But the fatal vice in the reasoning of the majority is in the meaning which they attach to the word punishment, in its application to this law, and in its relation to the definitions which have been given of the phrase, *ex post facto* laws.

Webster's second definition of the word "punish" is this: "In a loose sense, to afflict with punishment, &c., with a view to amendment, to chasten." And it is in this loose sense that the word is used by this court, as synonymous with chastisement, correction, loss, or suffering to the party supposed to be punished, and not in the legal sense, which signifies a penalty inflicted for the commission of crime.

And so, in this sense, it is said that whereas persons who had been guilty of the offenses mentioned in the oath were, by the laws then in force, only liable to be punished with death and confiscation of all their property, they are by a law passed since these offences were committed, made liable to the enormous additional punishment of being deprived of the right to practise law!

The law in question does not in reality deprive a person guilty of the acts therein described of any right which he possessed before; for it is equally sound law, as it is the dictate of good sense, that a person who, in the language of the act, has voluntarily borne arms against the government of the United States while a citizen thereof, or who has voluntarily given aid, comfort, counsel, or encouragement to persons engaged in armed hostility to the government, has, by doing those things, forfeited his right to appear in her courts and take part in the administration of her laws. Such a person has exhibited a trait of character which, without the aid of the law in question, authorizes the court to declare him unfit to practise before it, and to strike his name from the roll of its attorneys if it be found there.

I have already shown that this act provides for no indictment or other charge, that it contemplates and admits of no trial, and I now proceed to show that even if the right of the court to prevent an attorney, guilty of the acts mentioned, from appearing in its forum, depended upon the statute, that still it inflicts no punishment in the legal sense of that term.

"Punishment," says Mr. Wharton in his Law Lexicon, "is the penalty for transgressing the laws;" and this is, perhaps, as comprehensive and at the same time as accurate a definition as can be given. Now, what law is it whose transgression is punished in the case before us? None is referred to in the act, and there is nothing on its face to show that it was intended as an additional punishment for any offence described in any other act. A part of the matters of which the applicant is required to purge himself on oath may amount to treason, but surely there could be no intention or desire to inflict this small additional punishment for a crime whose penalty already was death and confiscation of property.

In fact the word punishment is used by the court in a sense which would make a great number of laws, partaking in no sense of a criminal character, laws for punishment, and therefore *ex post facto*.

A law, for instance, which increased the facility for detecting frauds by compelling a party to a civil proceeding to disclose his transactions under oath would result in his punishment in this sense, if it compelled him to pay an honest debt which could not be coerced from him before. But this law comes clearly within the class described by this court in *Watson* v. *Mercer*, as civil proceedings which affect private rights retrospectively.

Again, let us suppose that several persons afflicted with a form of insanity heretofore deemed harmless, shall be found all at once to be dangerous to the lives of persons with whom they associate. The State, therefore, passes a law that all persons so affected shall be kept in close confinement until their recovery is assured. Here is a case of punishment in the sense used by the court for a matter existing before the passage of the law. Is is an *ex post facto* law? And, if not, in what does it differ from one? Just in the same manner that the act of Congress does, namely, that the proceeding is civil and not criminal, and that the imprisonment in the one case and the prohibition to practise law in the other, are not punishments in the legal meaning of that term.

The civil law maxim, "*Nemo debet bis vexari, pro und et eadam causa*," has been long since adopted into the common law as applicable both to civil and criminal proceedings, and one of the amendments of the Constitution incorporates

this principle into that instrument so far as punishment affects life or limb. It results from this rule, that no man can be twice lawfully punished for the same offense. We have already seen that the acts of which the party is required to purge himself on oath constitute the crime of treason. Now, if the judgment of the court in the cases before us, instead of permitting the parties to appear without taking the oath, had been the other way, here would have been the case of a person who, on the reasoning of the majority, is punished by the judgment of this court for the same acts which constitute the crime of treason.

Yet, if the applicant here should afterwards be indicted for treason on account of these same acts, no one will pretend that the proceedings here could be successfully pleaded in bar of that indictment. But why not? Simply because there is here neither trial nor punishment within the legal meaning of these terms.

I maintain that the purpose of the act of Congress was to require loyalty as a qualification of all who practise law in the national courts. The majority say that the purpose was to impose a punishment for past acts of disloyalty.

In pressing this argument it is contended by the majority that no requirement can be justly said to be a qualification which is not attainable by all, and that to demand a qualification not attainable by all is punishment.

The Constitution of the United States provides as a qualification for the offices of President and Vice-President that the person elected must be a native-born citizen. Is this a punishment to all those naturalized citizens who can never attain that qualification? The constitutions of nearly all the States require as a qualification for voting that the voter shall be a *white male* citizen. Is this a punishment for all the blacks who can never become white?

Again, it was a qualification required by some of the State constitutions, for the office of judge, that the person should not be over sixty years of age. To a very large number of the ablest lawyers in any State this is a qualification to which they can never attain, for every year removes them farther away from the designated age. Is it a punishment?

The distinguished commentator on American law, and chancellor of the State of New York, was deprived of that office by this provision of the constitution of that State, and he was thus, in the midst of his usefulness, not only turned out of office, but he was forever disqualified from holding it again, by a law passed after he had accepted the office.

This is a much stronger case than that of a disloyal attorney forbid by law to practise in the courts, yet no one ever thought the law was *ex post facto* in the sense of the Constitution of the United States.

Illustrations of this kind could be multiplied indefinitely, but they are unnecessary.

The history of the time when this statute was passed—the darkest hour of our great struggle—the necessity for its existence, the humane character of the President who signed the bill, and the face of the law itself, all show that it was purely a qualification, exacted in self-defense, of all who took part in administering the government in any of its departments, and that it was not passed for the purpose of inflicting punishment, however merited, for past offenses.

I think I have now shown that the statute in question is within the legislative power of Congress in its control over the courts and their officers, and that it was not void as being either a bill of attainder or an *ex post facto* law.

If I am right on the questions of qualification and punishment, that discussion disposes also of the proposition, that the pardon of the President relieves the party accepting it of the necessity of taking the oath, even if the law be valid.

I am willing to concede that the presidential pardon relieves the party from all the penalties, or in other words, from all the punishment, which the law inflicted for his offense. But it relieves him from nothing more. If the oath required as a condition to practising law is not a punishment, as I think I have shown it is not, then the pardon of the President has no effect in releasing him from the requirement to take it. If it is a qualification which Congress had a right to prescribe as necessary to an attorney, then the President cannot, by pardon or otherwise, dispense with the law requiring such qualification.

This is not only the plain rule as between the legislative and executive departments of the government, but it is the declaration of common sense. The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor-at-law, may be saved by the executive pardon from the penitentiary or the gallows, but is not thereby restored to the qualifications which are essential to admission to the bar. No doubt it will be found that very many persons among those who cannot take this oath, deserve

to be relieved from the prohibition of the law; but this in no wise depends upon the act of the President in giving or refusing a pardon. It remains to the legislative power alone to prescribe under what circumstances this relief shall be extended.

In regard to the case of *Cummings* v. *The State of Missouri*, allusions have been made in the course of argument to the sanctity of the ministerial office, and to the inviolability of religious freedom in this country.

But no attempt has been made to show that the Constitution of the United States interposes any such protection between the State governments and their own citizens. Nor can anything of this kind be shown. The Federal Constitution contains but two provisions on this subject. One of these forbids Congress to make any law respecting the establishment of religion, or prohibiting the free exercise thereof. The other is, that no religious test shall ever be required as a qualification to any office or public trust under the United States.

No restraint is placed by that instrument on the action of the States; but on the contrary, in the language of Story,[55] "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions."

If there ever was a case calling upon this court to exercise all the power on this subject which properly belongs to it, it was the case of the Rev. B. Permoli.[56]

An ordinance of the first municipality of the city of New Orleans imposed a penalty on any priest who should officiate at any funeral, in any other church than the obituary chapel. Mr. Permoli, a Catholic priest, performed the funeral services of his church over the body of one of his parishioners, inclosed in a coffin, in the Roman Catholic Church of St. Augustine. For this he was fined, and relying upon the vague idea advanced here, that the Federal Constitution protected him in the exercise of his holy functions, he brought the case to this court.

But hard as that case was, the court replied to him in the following language: "The Constitution (of the United States) makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States." Mr. Permoli's writ of error was, therefore, dismissed for want of jurisdiction.

In that case an ordinance of a mere local corporation forbid a priest, loyal to his government, from performing what he believed to be the necessary rites of his church over the body of his departed friend. This court said it could give him no relief.

In this case the constitution of the State of Missouri, the fundamental law of the people of that State, adopted by their popular vote, declares that no priest of any church shall exercise his ministerial functions, unless he will show, by his own oath, that he has borne a true allegiance to his government. This court now holds this constitutional provision void, on the ground that the Federal Constitution forbids it. I leave the two cases to speak for themselves.

In the discussion of these cases I have said nothing, on the one hand, of the great evils inflicted on the country by the voluntary action of many of those persons affected by the laws under consideration; nor, on the other hand, of the hardships which they are now suffering, much more as a consequence of that action than of any laws which Congress can possibly frame. But I have endeavored to bring to the examination of the grace questions of constitutional law involved in this inquiry those principles alone which are calculated to assist in determining what the law is, rather than what, in my private judgment, it ought to be.

BURDICK *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 471. Argued December 16, 1914.—Decided January 25, 1915

Acceptance, as well as delivery, of a pardon is essential to its validity; if rejected by the person to whom it is tendered the court has no power to force it on him. *United States* v. *Wilson*, 7 Pet. 150.

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[55] Commentaries on the Constitution, § 1878.
[56] 3 Howard, 589.

Quære whether the President of the United States may exercise the pardoning power before conviction.

A witness may refuse to testify on the ground that his testimony may have an incriminating effect, notwithstanding the President offers, and he refuses, a pardon for any offense connected with the matters in regard to which he is asked to testify

There are substantial differences between legislative immunity and a pardon; the latter carries an imputation of guilt and acceptance of a confession of it, while the former is non-committal and tantamount to silence of the witness.

There is a distinction between amnesty and pardon; the former overlooks the offense and is usually addressed to crimes against the sovereignty of the State and political offenses, the latter remits punishment and condones infractions of the peace of the State.

211 Fed. Rep. 492, reversed.

The facts, which involve the effect of a pardon of the President of the United States tendered to one who has not been convicted of a crime nor admitted the commission thereof, and also the necessity of acceptance of a pardon in order to make it effective, are stated in the opinion.

Mr. Henry A. Wise, with whom *Mr. Henry W. Sackett* was on the brief, for plaintiff in error:

The proceeding before the grand jury was a "criminal case" within the meaning of the Fifth Amendment. *Counselman* v. *Hitchcock*, 142 U.S. 547.

Plaintiff in error was privileged under the Fifth Amendment to decline to answer the questions upon the ground that his answers thereto might tend to criminate him. 1 Burr's Trial, 244, Coombs; *Counselman* v. *Hitchcock*, 142 U.S. 564; *Sanderson's Case*, 3 Cranch, 638.

The refusal of a witness to answer questions upon the ground that his answers may tend to criminate him does not constitute either an admission or proof of his guilt of any offense. 30 Am. & Eng. Ency., p. 1170; *Rose* v. *Blakemore*, 21 E. C. L. Ryan & Moody, 382, 774; *Phelin* v. *Kinderline*, 20 Pa. St. 354; *State* v. *Bailey*, 54 Iowa, 414; *Dorendinger* v. *Tschechtelin*, 12 Daly (N.Y.), 34; Greenleaf on Evidence, 16th ed., § 469d; Wigmore on Evidence, § 2272; Act of March 16, 1878, 20 Stat. 30; *Wilson* v. *United States*, 149 U.S. 60; *Fitzpatrick* v. *United States*, 178 U.S. 304, 315; *Boyle* v. *Smithman*, 146 Pa. St. 255; *Beach* v. *United States*, 46 Fed. Rep. 754.

The President was without power to issue any pardon to plaintiff in error; and consequently the warrant tendered is null, void and of no effect. Art II, § 2, Const. U.S.; *Martin* v. *Hunter*, 1 Wheat. 304; Cooley's Const. Lim., p. 11; *Ex parte Wells*, 18 How. 307; *Ex parte Garland*, 4 Wall. 333; 20 Ops. Atty. Gen'l 330; 24 Am. & Eng. Ency., pp. 575–6; 2 Hawkins, P. C., Ch. 37, § 9, p. 543; *In re Nevitt*, 117 Fed. Rep. 448; 11 Ops Atty Gen'l 227; *Howard's Case*, Sir T. Raymond. 13; 83 Eng. Rep. (Full Reprint), 7; *United States* v. *Klein*, 13 Wall. 128; *Armstrong's Foundry*, 6 Wall. 766; *Carlisle* v. *United States*, 16 Wall. 147; *Lapeyre* v. *United States*, 17 Wall. 191; *Osborn* v. *United States*, 91 U.S. 474; *Wallach* v. *Van Riswick*, 92 U.S. 202; *United States* v. *Padelford*, 9 Wall. 531; *Armstrong* v. *United States*, 13 Wall. 155; *Pargoud* v. *United States*, 13 Wall. 157.

Plaintiff in error having refused to accept the tendered pardon, the same is of no effect. *Wilson* v. *United States*, 7 Pet. 150; *Commonwealth* v. *Lockwood*, 109 Massachusetts, 323; Cooley, Const. Law, 3d ed., p. 115.

The tendered pardon is not an equivalent of the constitutional privilege of error of an offense against the United States without trial by jury, and consequently in violation of his rights under the Constitution of he United States. See Fifth and Sixth Amendments, Const. U.S.; 24 Am. & Eng. Ency. 579; 11 Ops. Atty. Gen'l 227; *Dominick* v. *Bowdoin*, 44 Georgia, 357; *Manlove* v. *State*, 153 Indiana, 80; *Commonwealth* v. *Lockwood*, 109 Massachusetts, 323; *People* v. *Marsh*, 125 Michigan, 410; *United States* v. *Armour*, 142 Fed. Rep. 808.

The tendered pardon is not an equivalent of the constitutional privilege of plaintiffs in error. *Counselman* v. *Hitchcock*, 142 U.S. 564; *Brown* v. *Walker*, 161 U.S. 591; Cooley's Const. Lim., pp. 5, 365

The interpretation of the language of the Constitution conferring the pardoning power upon the President, "and he shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment," (Art. II, § 2, subd. 1) contended for by the United States stretches the actual language of the Constitution in that it makes the word "offenses" connote conjectural or purely hypothetical offenses in addition to ascertained events. Assuming for the sake of argument that this construction is permissible, upon a

mere examination of the language, then there is presented a case in which there is a choice between two permissible constructions and in such a case the court must choose the one which is most in harmony with the Constitution taken as a whole and with the spirit of our institutions. *Gibbons* v. *Ogden*, 9 Wheat. 1, 188; *Legal Tender Cases*, 12 Wall. 457, 531–532; *In re Griffin*, 17 Am. L. R. 358.

The construction of the words conferring the pardoning power that is contended for by the United States would tend to destroy some of the most essential safeguards of free government. It would pervert the grand jury, which in its origin was an institution which stood as a barrier against persecution by the crown into an instrument of inquisition that might be used by the executive department for the purpose of throttling the free and wholesome criticism of the acts of public officials. It would tend to destroy to a dangerous degree the separation of powers between the executive and the judicial branches of the government and in practical effect would arm the executive with summary powers which ought to be possessed only by the judicial branch. It would inevitably create the possibility of putting into effect a systems of censorship of news concerning the acts of public officials and tend to the creation of a secret and powerful bureaucracy. *Ex parte Bain*, 121 U.S. 1, 10–11; *Kilbourn* v. *Thompson*, 103 U.S. 168, 190; United States Constitution, Art. III, § 1; Art. II, § 1; Art. I, § 1; Fifth Amendment.

The Solicitor General for the United States:

The President has the power to pardon a person for an offense of which he has not been convicted. It was so in England. 3 Coke's Inst. 223, c. 105, Of Pardons; 14 Blackstone, c. 26, subd. IV, 4, and see c. 28; 6 Halsbury's Laws of England, p. 404.

In this country from the very first, Presidents have exercised not only the power to pardon in specific cases before conviction, but even to grant general amnesties. 20 Opt. Atty. Gen'l 339. And see *Ex parte Garland*, 4 Wall. 333; *Brown* v. *Walker*, 161 U.S. 591.

In the constitutions of some of the States the power of the governor to grant pardons is expressly limited by the words "after conviction," but in the States in which this limitation is not contained in the constitutions the governor may pardon before conviction. *Dominick* v. *Bowdoin*, 44 Georgia, 357; *Grubb* v. *Bullock*, 44 Georgia, 379; *Commonwealth* v. *Bush*, 2 Duv. (Ky.) 264; *State* v. *Woolery*, 29 Missouri, 300.

A pardon may be granted for an offense which has neither been admitted nor proved. It is true that a pardon cannot be granted as a license for future misdoing, but the pardons involved in the cases at bar do not relate to future offenses which the plaintiffs in error have committed or may have committed, or taken part in.

A person may be pardoned for an offense which has not been proved. An acknowledgment by the person pardoned that his answer will tend to incriminate him in basis enough for granting a pardon, without any other proof of the offense or of his connection with it. This is the basis of the immunity statutes.

A pardon may be granted for the purpose of affording to a witness immunity from prosecution. The exercise of the pardoning power of the President for this purpose does not amount to a usurpation of legislative functions even if it be true that it is within the powers of Congress to enact laws securing to witnesses immunity from prosecution in lieu of the constitutional prohibition against compelling incriminating testimony. See *Brown* v. *Walker*, 161 U.S. 591.

The exercise of this power by Congress, however, can have no effect in limiting the constitutional power of the President to grant pardons. The President's power of pardon "is not subject to legislation," and "Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders." *United States* v. *Klein*, 13 Wall. 128, 141. It cannot be interrupted, abridged, or limited by any legislative enactment. *The Laura*, 114 U.S. 411, 414; *Ex parte Garland*, 4 Wall. 333, 380.

The immunity afforded by the pardons is as broad as the protection afforded by the constitutional provision against compelling a person to be a witness against himself. *Counselman* v. *Hitchcock*, 142 U.S. 547, distinguished. And see *Brown* v. *Walker*, 161 U.S. 591; *Int. Com. Comm.* v. *Baird*, 194 U.S. 25; *Hale* v. *Henkel*, 201 U.S. 43; *Nelson* v. *United States*, 201 U.S. 92.

No formal acceptance is necessary to give effect to the pardons. *United States* v. *Wilson*, 7 Pet. 150, has no application here, and see *In re Callicot*, 8 Blatchf. 89, 96.

Although a court takes no notice of a pardon unless it is pleaded or in some way claimed *coram judice* by the person pardoned, *United States* v. *Wilson*, 7 Pet. 150, and the plaintiffs in error might refuse the benefit of their pardons

should they be prosecuted for the offenses which are covered by the pardons, that does not affect their validity.

The pardons have been executed, formally tendered to plaintiffs in error, have been filed with the clerk of the court for the jurisdiction in which the testimony is required, and remain at the disposal of plaintiffs in error. They have passed out of the control of the President and of the executive department of the Government with the intention that they shall pass to the plaintiffs in error, so that there has been as complete a delivery as it is possible to make, and if they are not irrevocable now they would become so at the very instant that the required testimony is given.

It is the object of the constitutional privilege to protect the witness from the danger of prosecution for a past offense which his evidence may disclose or to which his evidence may give a clue. But, since that danger has been completely removed by the pardons of which the plaintiffs may avail themselves at any time after the moment of testifying, the constitutional privilege cannot be invoked by them, for there is nothing to which it can apply—no danger against which its protecting shield is necessary.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment for contempt against Burdick upon presentment of the Federal grand jury for refusing to answer certain questions put to him in an investigation then pending before the grand jury into alleged custom frauds in violation of §§ 37 and 39 of the Criminal Code of the United States.

Burdick first appeared before the grand jury and refused to answer questions as to the directions he gave and the sources of his information concerning certain articles in the New York Tribune regarding the frauds under investigation. He is the City Editor of that paper. He declined to answer, claiming upon his oath, that his answers might tend to criminate him. Thereupon he was remanded to appear at a later day and upon so appearing he was handed a pardon which he was told had been obtained for him upon the strength of his testimony before the other grand jury. The following is a copy of it:

"Woodrow Wilson, President of the United States of America, to all to whom these presents shall come, Greeting:

"Whereas George Burdick, an editor of the New York Tribune, has declined to testify before a Federal Grand Jury now in session in the Southern District of New York, in a proceeding entitled 'United States *v.* John Doe and Richard Roe,' as to the sources of the information which he had in the New York Tribune office, or in his possession, or under his control at the time he sent Henry D. Kinsbury, a reporter on the said New York Tribune, to write an article which appeared in the said New York Tribune in its issue of December thirty first 1913, headed 'Glove Makers' Gems may be Customs Size,' on the ground that it would tend to incriminate him to answer the questions; and,

"Whereas, the United States Attorney for the Southern District of New York desires to use the said George Burdick as a witness before the said Grand Jury in the said proceeding for the purpose of determining whether any employe of the Treasury Department at the Custom House, New York City, has been betraying information that came to such person in an official capacity; and,

"Whereas, it is believed that the said George Burdick will again refuse to testify in the said proceeding on the ground that his testimony might tend to incriminate himself;

"Now, Therefore, be it Known, that I, Woodrow Wilson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said George Burdick a full and unconditional pardon for all offenses against the United States which he, the said George Burdick, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter or thing, concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act.

"In testimony whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed. Done at the City of Washington this fourteenth day of February, in the year of our Lord One Thousand Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred and Thirty-eighth."

He declined to accept the pardon or answer questions as to the sources of his information, or whether he furnished certain reporters information, giving the

reason, as before, that the answers might tend to criminate him. He was presented by the grand jury to the District Court for contempt and adjudged guilty thereof and to pay a fine of $500, with leave, however, to purge himself by testifying fully as to the sources of the information sought of him, "and in the event of his refusal or failure to so answer, a commitment may issue in addition until he shall so comply," the court deciding that the President has power to pardon for a crime of which the individual has not been convicted and which he does not admit and that acceptance is not necessary to toll the privilege against incrimination.

Burdick again appeared before the grand jury, again was questioned as before, again refused to accept the pardon and again refused to answer upon the same grounds as before. A final order of commitment was then made and entered and he was committed to the custody of the United States Marshal until he should purge himself of contempt or until the further order of the court. This writ of error was then allowed.

The question in the case is the effect of the unaccepted pardon. The Solicitor General in his discussion of the question, following the division of the District Court, contends (1) that the President has power to pardon an offense before admission or conviction of it, and (2) the acceptance of the pardon is not necessary to its complete exculpating effect. The conclusion is hence deduced that the pardon removed from Burdick all danger of accusation or conviction of crime and that, therefore, the answers to the questions put to him could not tend to or accomplish his incrimination.

Plaintiff in error counters the contention and conclusion with directly opposing ones and makes other contentions which attack the sufficiency of the pardon as immunity and the power of the President to grant a pardon for an offense not precedently established nor confessed nor defined.

The discussion of counsel is as broad as their contentions. Our consideration may be more limited. In our view of the case it is not material to decide whether the pardoning power may be exercised before conviction. We may, however, refer to some aspects of the contentions of plaintiff in error, although the case may be brought to the narrow question, Is the acceptance of a pardon necessary? We are relieved from much discussion of it by *United States* v. *Wilson*, 7 Peters, 150. Indeed, all of the principles upon which its solution depends were there considered and the facts of the case gave them a peculiar and interesting application.

There were a number of indictments against Wilson and one Porter, some of which were for obstructing the mail and others for robbing the mail and putting the life of the carrier in jeopardy. They were convicted on one of the latter indictments, sentenced to death, and Porter was executed in pursuance of the sentence. President Jackson pardoned Wilson, the pardon reciting that it was for the crime for which he had been sentenced to suffer death, remitting such penalty with the express stipulation that the pardon should not extend to any judgment which might be had or obtained against him in any other case or cases then pending before the court for other offenses wherewith he might stand charged.

To another of the indictments Wilson withdrew his plea of not guilty and pleaded guilty. Upon being arraigned for sentence the court suggested the propriety of inquiring as to the effect of the pardon, "although alleged to relate to a conviction on another indictment." Wilson was asked if he wished to avail himself of the pardon, to which he answered in person that (7 Pet., p. 154) "he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid sentence in this particular case, of the pardon referred to."

The judges were opposed in opinion and certified to this court for decision two propositions which were argued by the district attorney of the United States, with one only of which we are concerned. It was as follows (p. 154) : "2. That the prisoner can, under this conviction, derive no advantage from the pardon, without bringing the same judicially before the court by plea, motion or otherwise." There was no appearance for Wilson. Attorney General Taney (afterwards Chief Justice of this court) argued the case on behalf of the United States. The burden of his argument was that a pardon, to be effective, must be accepted. The proposition was necessary to be established as his contention was that a plea of the pardon was necessary to arrest the sentence upon Wilson. And he said, speaking of the pardon (p. 156), "It is a grant to him [Wilson] : it is his property ; and he may accept it or not as he pleases," and, further, "It is insisted that unless he pleads it, or in some way claims its benefit, thereby denoting his acceptance of the proffered grace, the court cannot notice it, nor allow it to prevent them from passing sentence. The whole current of authority establishes this principle."

The authorities were cited and it was declared that "the necessity of pleading it, or claiming it in some other manner, grows out of the nature of the grant. He must accept it."

There can be no doubt, therefore, of the contention of the Attorney General and we have quoted it in order to estimate accurately the response of the court to it. The response was complete and considered the contention in two aspects, (1) a pardon as the act of the President, the official act under the Constitution; and (2) the attitude and right of the person to whom it is tendered. Of the former it was said (p. 160) that the power had been "exercised from time immemorial by the executive of that nation (England) whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." From that source of authority and principle the court deduced and declared this conclusion: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the *private*, [italics ours] though official act of the executive magistrate, delivered to the individual for whose benefit it is intended." In emphasis of the official act and its functional deficiency if not accepted by him to whom it is tendered, it was said, "A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on."

Turning then to the other side, that is, the effect of a pardon on him to whom it is offered and completing its description and expressing the condition of its consummation, this was said: "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him."

That a pardon by its mere issue has automatic effect resistless by him to whom it is tendered, forcing upon him by mere executive power whatever consequences it may have or however he may regard it, which seems to be the contention of the Government in the case at bar, was rejected by the court with particularity and emphasis. The decision is unmistakable. A pardon was denominated as the "private" act, the "private deed," of the executive magistrate, and the denomination was advisedly selected to mark the incompleteness of the act or deed without its acceptance.

Indeed, the grace of a pardon, though good its intention, may be only in pretense or seeming; in pretense, as having purpose not moving from the individual to whom it is offered; in seeming, as involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected,—preferring to be the victim of the law rather than its acknowledged transgressor—preferring death even to such certain infamy. This, at least theoretically, is a right and a right is often best tested in its extreme. "It may be supposed," the court said in *United States* v. *Wilson* (p. 161), "that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment."

The case would seem to need no further comment and we have quoted from it not only for its authority but for its argument. It demonstrates by both the necessity of the acceptance of a pardon to its legal efficacy, and the court did not hesitate in decision, as we have seen, whatever the alternative of acceptance—whether it be death or lesser penalty. The contrast shows the right of the individual against the exercise of excessive power not solicited by him nor accepted by him.

The principles declared in *Wilson* v. *United States* have endured for years: no case has reversed or modified them. In *Ex parte William Wells*, 18 How. 307, 310, this court said, "It was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the Constitution, when this court instructed Chief Justice Marshall" to declare the doctrine of that case. And in *Commonwealth* v. *Lockwood* it was said by Mr. Justice Gray, speaking for the Supreme Judicial Court of Massachusetts, he then being a member of that court, "it is within the election of defendant whether he will avail himself of a pardon from the executive (be the pardon absolute or conditional)." 109 Massachusetts, 323, 339. The whole discussion of the learned justice will repay

a reference. He cites and reviews the cases with the same accurate and masterful consideration that distinguished all of his judicial work, and the proposition declared was one of the conclusions deduced.

United States v. *Wilson*, however, is attempted to be removed as authority by the contention that it dealt with conditional pardons and that, besides, a witness cannot apprehend from his testimony a conviction of guilt, which conviction he himself has the power to avert, or be heard to say that the testimony can be used adversely to him, when he himself has the power to prevent it by accepting the immunity offered him. In support of the contentions there is an intimation of analogy between pardon and amnesty, cases are cited, and certain statutes of the United States are adduced whereby immunity was imposed in certain instances and under its unsolicited protection testimony has been exacted against the claim of privilege asserted by witnesses. There is plausibility in the contentions; it disappears upon reflection. Let us consider the contentions in their order:

(1) To hold that the principle of *United States* v. *Wilson* was expressed only as to conditional pardons would be to assert that the language and illustrations which were used to emphasize the principle announced were meant only to destroy it. Besides, the pardon passed on was not conditional. It was limited in that—and only in that—it was confined to the crime for which the defendant had been convicted and for which he had been sentenced to suffer death. This was its emphasis and distinction. Other charges were pending against him, and it was expressed that the pardon should not extend to them. But such would have been its effect without expression. And we may say that it had more precision than the pardon in the pending case. Wilson had been indicted for a specific statutory crime, convicted and sentenced to suffer death. It was to the crime so defined and established that the pardon was directed. In the case at bar nothing is defined. There is no identity of the offenses pardoned, and no other clue to ascertain them but the information incorporated in an article in a newspaper. And not that entirely, for absolution is declared for whatever crimes may have been committed or taken part in "in connection with any other article, matter or thing concerning which he [Burdick] may be interrogated."

It is hence contended by Burdick that the pardon is illegal for the absence of specification, not reciting the offenses upon which it is intended to operate; worthless, therefore, as immunity. To support the contention cases are cited. It is asserted, besides, that the pardon is void as being outside of the power of the President under the Constitution of the United States, because it was issued before accusation, or conviction or admission of an offense. This, it is insisted, is precluded by the constitutional provision which gives power only "to grant reprieves and pardons for offenses against the United States," and it is argued, in effect, that not in the imagination or purpose of executive magistracy can an "offense against the United States" be established, but only by the confession of the offending individual or the judgment of the judicial tribunals. We do not dwell further on the attack. We prefer to place the case on the ground we have stated.

(2) May plaintiff in error, having the means of immunity at hand, that is, the pardon of the President, refuse to testify on the ground that his testimony may have an incriminating effect? A superficial consideration might dictate a negative answer but the answer would confound rights which are distinct and independent.

It is to be borne in mind that the power of the President under the Constitution to grant pardons and the right of a witness must be kept in accommodation. Both have sanction in the Constitution, and it should, therefore, be the anxiety of the law to preserve both,—to leave to each its proper place. In this as in other conflicts between personal rights and the powers of government, technical—even nice—distinctions are proper to be regarded. Granting then that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it, as we have seen, and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted; and the reasons for his action were personal. It is true we have said (*Brown* v. *Walker*, 161 U.S. 591, 605) that the law regards only mere penal consequences and not "the personal disgrace or opprobrium attaching to the exposure" of crime, but certainly such consequence may influence the assertion or relinquishment of a right. This consideration is not out of place in the case at bar. If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in theory of law. It supposed only a possibility of a charge of crime and interposed protection against the charge, and, reaching beyond it, against furnishing what might be urged or used as evidence to support it.

This brings us to the differences between legislative immunity and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is non-committal. It is the unobtrusive act of the law giving protection against a sinister use of his testimony, not like a pardon requiring him to confess his guilt in order to avoid a conviction of it.

It is of little service to assert or deny an analogy between amnesty and pardon. Mr. Justice Field, in *Knote* v. *United States*, 95 U.S. 149, 153, said that "the distinction between them is one rather of philological interest than of legal importance." This is so as to their ultimate effect, but there are incidental differences of importance. They are of different character and have different purposes. The one overlooks offense; the other remits punishment. The first is usually addressed to crimes against the sovereignty of the State, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment. The second condones infractions of the peace of the State. Amnesty is usually general, addressed to classes or even communities, a legislative act, or under legislation, constitutional or statutory, the act of the supreme magistrate. There may or may not be distinct acts of acceptance. If other rights are dependent upon it and are asserted there is affirmative evidence of acceptance. Examples are afforded in *United States* v. *Klein*, 13 Wall. 128; *Armstrong's Foundry*, 6 Wall. 766; *Carlisle* v. *United States*, 16 Wall. 147. See also *Knote* v. *United States*, *supra*. If there be no other rights, its only purpose is to stay the movement of the law. Its function is exercised when it overlooks the offense and the offender, leaving both in oblivion.

Judgment reversed with directions to dismiss the proceedings in contempt and discharge Burdick from custody.

Mr. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

Mr. DENNIS. And Mr. Chairman, I would also like to make a part of the record, if I may, the article referred to by my colleague, Mr. Hogan, which appeared in the Wall Street Journal of October 16, 1974, and is headed "The Pardon of Nixon Was Timely, Legal, Jaworski Believes."

Mr. HUNGATE. Without objection, it is so ordered.

[The article referred to follows:]

[From the Wall Street Journal, Oct. 16, 1974]

THE PARDON OF NIXON WAS TIMELY, LEGAL, JAWORSKI BELIEVES

HE SAYS NIXON'S ACCEPTANCE CLEARLY SHOWS HIS GUILT AND MORE EVIDENCE IS DUE

(By Karen J. Elliott, Staff Reporter of The Wall Street Journal)

WASHINGTON.—Special Watergate Prosecutor Leon Jaworski sees nothing wrong with President Ford's decision last month to pardon Richard Nixon.

Mr. Jaworski, talking publicly about the controversy for the first time, concedes that the pardon prevented an indictment and trial of Mr. Nixon. But he believes that sufficient evidence has, or soon will, become public to show conclusively that the former President was guilty of obstruction of justice.

"The evidence will show he's guilty, just as much as a guilty plea," the special prosecutor declared during an interview yesterday in his sparsely furnished office here. Next week, Mr. Jaworski is leaving the job he has held for 11 months and is returning to Houston to resume the practice of law.

The special prosecutor believes, furthermore that both the offering of a pardon and Mr. Nixon's acceptance of it clearly signify his guilt:

"A pardon isn't just a beautiful document to frame and hang on the wall. You are offered a pardon only because it is believed you can be charged and convicted. You accept it only if you want to be cleared."

AN ALL-OUT DEFENSE

Mr. Jaworski's attitude about the pardon has been a subject of intense speculation here for weeks. Many have assumed that the special prosecutor, who has gained a reputation in Washington for toughness and integrity, objected to the decision. It even has been suggested in recent days that his supposed anger over the pardon is what prompted him to resign his post.

In fact, his statements yesterday amount to an all-out defense of the most controversial aspect of the pardon: its timing prior to a Nixon indictment and trial. Thus, the Jaworski position could have significant political benefit for President Ford, whose popularity with the public has dropped dramatically since he granted the pardon.

The special prosecutor said he has kept silent on the pardon and on Mr. Nixon's role in the Watergate cover-up for two reasons: He wanted to wait until a jury was chosen and sequestered for the trial of five of Mr. Nixon's former top aides, and he wanted to wait until he had announced his resignation. All that has happened, and now Mr. Jaworski is talking: There will be more newspaper interviews, and on Sunday he is scheduled to appear on NBC's "Meet the Press" program.

Mr. Jaworski denies that the pardon prompted his resignation. He said in the interview yesterday that he decided three weeks ago to resign because he had completed what he has always considered to be his primary task—outlining Mr. Nixon's role in the cover-up.

His own departure, he said, won't slow the investigations that the prosecutor's office is conducting into the milk-fund scandal and into illegal political contributions by corporations. Action is expected soon against other companies, he said.

"THE BEST PREPARED CASE"

The special prosecutor said that evidence to be presented during the current Watergate trial will further enmesh the former President in the cover-up. Mr. Jaworski, who won't be participating in the prosecution, called it "the best-prepared case I've been associated with."

Mr. Jaworski's attitude about the controversial pardon rests on the assumption drawn from an early Ford news conference that President Ford always intended to pardon Mr. Nixon eventually. *Thus, to Mr. Jaworski, all that is at issue is the timing of the pardon.*

Mr. Jaworski insists that if Mr. Nixon's case had been allowed to proceed to indictment and trial, *the public would have learned nothing more about the former President's role than will come out in the trial of his former aides. "It's a mistake to believe there would have been more evidence for the public if he had been tried," the special prosecutor said.*

"If he had been pardoned after indictment, the public would have no new information. If he had gone to trial, he could have invoked his Fifth Amendment guarantees against self-incrimination, pleaded nolo contendere, or even pleaded guilty, and we wouldn't have learned any new details," Mr. Jaworski said.

The special prosecutor wouldn't say whether he would have prosecuted the former President if Mr. Ford hadn't pardoned him. "Nothing is served by talking about hypothetical situations now," he declared.

But Mr. Jaworski said that if the former President had been charged, his trial wouldn't have come for many months. "We gave no consideration to doing anything with the former President until after the cover-up jury was sequestered," he said.

A major task still facing the special prosecution force is a report to Congress on the Nixon investigation and on other aspects of the Watergate case. That report will exclude much evidence against the former President unless Congress specifically authorizes its inclusion. Without such authority, Mr. Jaworski believes, a prosecutor can't ethically disclose evidence against a man who hasn't been charged; Mr. Jaworski has asked Congress for authority to include such material in the report.

"We can paint a very full picture of Mr. Nixon's role in obstructing justice, but the difficulty arises in other areas where we didn't bring charges," he said. The Watergate grand jury named Mr. Nixon as an unindicted coconspirator in the obstruction of justice for which his former aides are being tried.

Mr. Jaworski is turning philosophical as he prepares to leave for a rest at his Texas ranch, where he will "watch the deer and birds and think about something besides Watergate for the first time in a year." Watergate, he believes, has shown that the American governmental system works. "Here are top men in government who haven't been spared from investigation, exposure and conviction," he said.

But, he isn't sorry to be leaving. "The whole thing is a tragedy," he said. "And I don't get any satisfaction from being involved in a national tragedy."

President FORD. Mr. Chairman, may I add to something I said just to make it correct?

Mr. HUNGATE. Yes, sir.

President FORD. Somebody asked about when I last saw the President. I said that I had seen him on the ninth. I did as he departed. But I had also seen the President the morning of the eighth, at the time that I was asked to come and see him, and at that time we spent an hour and 20 minutes together, or thereabouts, when he told me that he was going to resign. So I saw him both the eighth and the ninth, just to make the record accurate.

Mr. HUNGATE. All of us are aware of our time constraint. I will yield to the gentleman from Wisconsin for a question.

Mr. KASTENMEIER. Thank you, Mr. Chairman. I would like to, for the record, indicate that the statement of the gentleman from Maryland, Mr. Hogan, to the effect that the proposal that this Subcommittee will try to contact certain staff members, such as General Haig and others, was supported by me. I think it would have been excellent. We have in the past done very well in terms of staff work preliminary to hearings. That might have helped put some of the questions Ms. Holtzman had to rest.

Mr. President, you indicated that as far as Mr. Haig was concerned that he had suggested certain options to you, but did not, in fact, make a recommendation to you with respect to the pardon?

President FORD. That is correct. I answered that I think as fully as I can in my prepared statement. He discussed the options. He made no recommendations.

Mr. KASTENMEIER. Which other persons, to you personally made recommendations that the former President be pardoned from that time in early August to the day of September 6 when you made your decision?

President FORD. No other person, to my knowledge, made any recommendation to me from that time until the time that I made the decision about September 6. Nobody made any recommendation to me for the pardon of the former President.

Mr. KASTENMEIER. With respect to discussions between General Haig and Mr. Nixon, or other matters in question, you indicated you had no personal knowledge, both in writing and in your statement today.

I take it you would have no objection if the subcommittee sought to question Mr. Haig or others on the subject before us this morning to supplement this hearing and this inquiry?

President FORD. I do not think that is within my prerogative. I have come here to testify as to the specific facts as I know them. But, what the subcommittee does is a judgment for the subcommittee and not me.

Mr. KASTENMEIER. Thank you, Mr. President.

Mr. HUNGATE. The Chair is advised that the House is in recess waiting for the conclusion of this hearing for reconvening.

So, if I might, I would yield to Mr. Hogan for a question at this point, and then to Ms. Holtzman for a question, and we will then conclude.

Mr. Hogan.

Mr. HOGAN. Thank you, Mr. Chairman.

Mr. President, on page 20 of your statement you talk about the health issue, and state that you had not gotten any official reports

from physicians that were controlling in your decision. But you state that observations were reported to you from others. Now, there have been press reports that Dr. Kissinger is alleged to have said to you that he feared that former President Nixon would commit suicide. That appeared in several news accounts. Is there any truth to that?

President FORD. No truth to it whatsoever, so far as I know.

Mr. HOGAN. Well, it appeared in the New York Times and the Washington Post as is reported in a research paper prepared for this subcommittee.

President FORD. There was no discussion between Dr. Kissinger and myself that included any such comment.

Mr. HOGAN. I think, if I might add a gratuitous comment, Mr. Chairman, that much of the controversy has been generated by the press by just such erroneous statements that have been given wide circulation.

Thank you, Mr. President.

Mr. HUNGATE. I will ask for one concise question because——

Mr. EDWARDS. Thank you, Mr. Chairman.

Mr. President, what were the precise instructions given to Benton Becker by you when he went to San Clemente to negotiate Mr. Nixon's acceptance of the pardon?

President FORD. The precise instructions given to Mr. Becker were actually given by my counsel, Mr. Buchen. In general, I knew what they were. They were instructions to negotiate the protection of those documents, including the tapes, for the benefit of the Special Prosecutor in whatever use he felt was essential. And at the same time to keep them inviolate during a period of time which we felt was a proper one.

Mr. EDWARDS. But not to offer the pardon unless that agreement had been negotiated?

President FORD. Mr. Edwards, those negotiations as to the custody or ownership of the documents, including tapes, were undertaken prior to August 27 because we were more or less besieged—when I say "we", the White House—as to what to do with those documents, including tapes, and that negotiation had no relevance whatsoever to the decision on my part to pardon the President.

Mr. EDWARDS. Thank you, Mr. President.

Mr. HUNGATE. The Chair would remind all of the constraints of time and call on Ms. Holtzman for one final question.

Ms. HOLTZMAN. Thank you, Mr. Chairman.

Mr. Ford, you stated that the theory on which you pardoned Richard Nixon was that he had suffered enough. I am interested in that theory because the logical consequence of it is that somebody who resigns in the face of virtually certain impeachment or somebody who is impeached should not be punished because the impeachment or the resignation in the face of impeachment is punishment enough. I wondered whether anybody had brought to your attention the fact that the Constitution specifically states that even though somebody is impeached, that person shall nonetheless be liable to punishment according to law.

President FORD. Ms. Holtzman, I was fully cognizant of the fact that the President on resignation was accountable for any criminal charges, but I would like to say that the reason I gave the pardon was not as to

Mr. Nixon himself. I repeat, and I repeat with emphasis, the purpose of the pardon was to try and get the United States, the Congress, the President, and the American people, focusing on the serious problems we have both at home and abroad, and I was absolutely convinced then as I am now that if we had had this serious, an indictment, a trial, the conviction, and anything else that transpired after that, that the attention of the President, the Congress and the American people would have been diverted from the problems that we have to solve, and that was the principal reason for my granting of the pardon.

Mr. SMITH. Mr. Chairman——

Mr. HUNGATE. Mr. Smith.

Mr. SMITH [continuing]. Mr. Chairman, just before we adjourn this hearing, I again would like to commend the President and thank him for coming. I think, Mr. President, that you have probably opened a new era between the executive and the legislative departments and I am very happy for it.

President FORD. Mr. Chairman, I want to express to you and to the other members of the committee or subcommittee, my appreciation for the fine manner and I think the fair way in which this meeting was held this morning. I felt that it was absolutely essential because I am the only one who could explain the background and the decision-making process, and I hope, as I said in my opening statement, Mr. Chairman, that I have at least cleared the air so that most Americans will understand what was done and why it was done, and again I trust that all of us can get back to the job of trying to solve our problems, both at home and abroad.

I thank you very, very much.

Mr. HUNGATE. Mr. Chairman—Mr. President, on behalf of the subcommittee, we express our appreciation for your appearance here today. And in recognition of the responsibility we all have to complete this morning and get on with the business.

The transcripts will be furnished as quickly as possible to members of the subcommittee.

The subcommittee will adjourn, subject to the call of the Chair.

[Whereupon, at 11:57 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

[The prepared statement of President Gerald R. Ford follows:]

STATEMENT OF PRESIDENT GERALD R. FORD

We meet here today to review the facts and circumstances that were the basis for my pardon of former President Nixon on September 8, 1974.

I want very much to have those facts and circumstances known. The American people want to know them. And members of the Congress want to know them. The two Congressional resolutions of inquiry now before this Committee serve those purposes. That is why I have volunteered to appear before you this morning, and I welcome and thank you for this opportunity to speak to the questions raised by the resolutions.

My appearance at this hearing of your distinguished Subcommittee of the House Committee on the Judiciary has been looked upon as an unusual historic event—one that has no firm precedent in the whole history of Presidential relations with the Congress. Yet, I am here not to make history, but to report on history.

The history you are interested in covers so recent a period that it is still not well understood. If, with your assistance, I can make for better understanding of the pardon of our former President, then we can help to achieve the purpose I had for granting the pardon when I did.

That purpose was to change our national focus. I wanted to do all I could to shift our attentions from the pursuit of a fallen President to the pursuit of the urgent needs of a rising nation. Our nation is under the severest of challenges now to employ its full energies and efforts in the pursuit of a sound and growing economy at home and a stable and peaceful world around us.

We would needlessly be diverted from meeting those challenges if we as a people were to remain sharply divided over whether to indict, bring to trial, and punish a former President, who already is condemned to suffer long and deeply in the shame and disgrace brought upon the office he held. Surely, we are not a revengeful people. We have often demonstrated a readiness to feel compassion and to act out of mercy. As a people we have a long record of forgiving even those who have been our country's most destructive foes.

Yet, to forgive is not to forget the lessons of evil in whatever ways evil has operated against us. And certainly the pardon granted the former President will not cause us to forget the evils of Watergate-type offenses or to forget the lessons we have learned that a government which deceives its supporters and treats its opponents as enemies must never, never be tolerated.

The pardon power entrusted to the President under the Constitution of the United States has a long history and rests on precedents going back centuries before our Constitution was drafted and adopted. The power has been used sometimes as Alexander Hamilton saw its purpose: "In seasons of insurrection . . . when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall." [1] Other times it has been applied to one person as "an act of grace . . . which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." [2] When a pardon is granted, it also represents "the determination of the ultimate authority that the public welfare will be better served by inflicting less that what the judgment fixed." [3] However, the Constitution does not limit the pardon power to cases of convicted offenders or even indicted offenders.[4] Thus, I am firm in my conviction that as President I did have the authority to proclaim a pardon for the former President when I did.

Yet, I can also understand why people are moved to question my action. Some may still question my authority, but I find much of the disagreement turns on whether I should have acted when I did. Even then many people have concluded as I did that the pardon was in the best interests of the country because it came at a time when it would best serve the purpose I have stated.

I come to this hearing in a spirit of cooperation to respond to your inquiries. I do so with the understanding that the subjects to be covered are defined and limited by the questions as they appear in the resolutions before you. But even then we may not mutually agree on what information falls within the proper scope of inquiry by the Congress.

I feel a responsibility as you do that each separate branch of our government must preserve a degree of confidentiality for its internal communications. Congress, for its part, has seen the wisdom of assuring that members be permitted to work under conditions of confidentiality. Indeed, earlier this year the United States Senate passed a resolution which reads in part as follows:

* * * * * * *

". . . no evidence under the control and in the possession of the Senate of the United States can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession, but by its permission." (S. Res. 338, passed June 12, 1974)

In *United States* v. *Nixon*, 42 U.S.L.W. 5237, 5244 (U.S. July 24, 1974), the Supreme Court unanimously recognized a rightful sphere of confidentiality within the Executive Branch, which the Court determined could only be invaded for overriding reasons of the Fifth and Sixth Amendments to the Constitution.

As I have stated before, my own view is that the right of Executive Privilege is to be exercised with caution and restraint. When I was a Member of Congress, I did not hesitate to question the right of the Executive Branch to claim a privilege against supplying information to the Congress if I thought the claim of privilege was being abused. Yet, I did then, and I do now, respect the right of Executive

[1] *The Federalist* No. 74, at 79 (Central Law Journal ed. 1914) (A. Hamilton).
[2] Marshall, C. J., in *United States* v. *Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833).
[3] *Biddle* v. *Perovich*, 247 U.S. 480, 486 (1927).
[4] *Ex parte Garland*, 4 Wall. 333, 380 (1867); *Burdick* v. *United States*, 236 U.S. 79 (1915).

Privilege when it protects advice given to a President in the expectation that it will not be disclosed. Otherwise, no President could any longer count on receiving free and frank views from people designated to help him reach his official decisions.

Also, it is certainly not my intention or even within my authority to detract on this occasion or in any other instance from the generally recognized rights of the President to preserve the confidentiality of internal discussions or communications whenever it is properly within his Constitutional responsibility to do so. These rights are within the authority of any President while he is in office, and I believe may be exercised as well by a past President if the information sought pertains to his official functions when he was serving in office.

I bring up these important points before going into the balance of my statement, so there can be no doubt that I remain mindful of the rights of confidentiality which a President may and ought to exercise in appropriate situations. However, I do not regard my answers as I have prepared them for purposes of this inquiry to be prejudicial to those rights in the present circumstances or to constitute a precedent for responding to Congressional inquiries different in nature or scope or under different circumstances.

Accordingly, I shall proceed to explain as fully as I can in my present answers the facts and circumstances covered by the present resolutions of inquiry. I shall start with an explanation of these events which were the first to occur in the period covered by the inquiry, before I became President. Then I will respond to the separate questions as they are numbered in H. Res. 1367 and as they specifically relate to the period after I became President.

H. Res. 1367[5] before this Subcommittee asks for information about certain conversations that may have occurred over a period that includes when I was a Member of Congress or the Vice President. In that entire period no references or discussions on a possible pardon for then President Nixon occurred until August 1 and 2, 1974.

You will recall that since the beginning of the Watergate investigations, I had consistently made statements and speeches about President Nixon's innocence of either planning the break-in or of participating in the cover-up. I sincerely believed he was innocent.

Even in the closing months before the President resigned, I made public statements that in my opinion the adverse revelations so far did not constitute an impeachable offense. I was coming under increasing criticism for such public statements, but I still believed them to be true based on the facts as I knew them.

In the early morning of Thursday, August 1, 1974, I had a meeting in my Vice Presidential office, with Alexander M. Haig, Jr., Chief of Staff for President Nixon. At this meeting, I was told in a general way about fears arising because of additional tape evidence scheduled for delivery to Judge Sirica on Monday, August 5, 1974. I was told that there could be evidence which, when disclosed to the House of Representatives, would likely tip the vote in favor of impeachment. However, I was given no indication that this development would lead to any change in President Nixon's plans to oppose the impeachment vote.

Then shortly after noon, General Haig requested another appointment as promptly as possible. He came to my office about 3:30 P.M. for a meeting that was to last for approximately three-quarters of an hour. Only then did I learn of the damaging nature of a conversation on June 23, 1972, in one of the tapes which was due to go to Judge Sirica the following Monday.

I describe this meeting because at one point it did include references to a possible pardon for Mr. Nixon, to which the third and fourth questions in H. Res. 1367 are directed. However, nearly the entire meeting covered other subjects, all dealing with the totally new situation resulting from the critical evidence on the tape of June 23, 1972. General Haig told me he had been told of the new and damaging evidence by lawyers on the White House staff who had first-hand knowledge of what was on the tape. The substance of his conversation was that the new disclosure would be devastating, even catastrophic, insofar as President Nixon was concerned. Based on what he had learned of the conversation on the tape, he wanted to know whether I was prepared to assume the Presidency within a very short time, and whether I would be willing to make recommendations to the President as to what course he should now follow.

I cannot really express adequately in words how shocked and stunned I was by this unbelievable revelation. First, was the sudden awareness I was likely to become President under these most troubled circumstances; and secondly, the

[5] Tab A attached (see app. 2, p. 196).

realization these new disclosures ran completely counter to the position I had taken for months, in that I believed the President was not guilty of any impeachable offense.

General Haig in his conversation at my office went on to tell me of discussions in the White House among those who knew of this new evidence.

General Haig asked for my assessment of the whole situation. He wanted my thoughts about the timing of a resignation, if that decision were to be made, and about how to do it and accomplish an orderly change of Administration. We discussed what scheduling problems there might be and what the early organizational problems would be.

General Haig outlined for me President Nixon's situation as he saw it and the different views in the White House as to the courses of action that might be available, and which were being advanced by various people around him on the White House staff. As I recall there were different major courses being considered:

(1) Some suggested "riding it out" by letting the impeachment take its course through the House and the Senate trial, fighting all the way against conviction.

(2) Others were urging resignation sooner or later. I was told some people backed the first course and other people a resignation but not with the same views as to how and when it should take place.

On the resignation issue, there were put forth a number of options which General Haig reviewed with me. As I recall his conversation, various possible options being considered included:

(1) The President temporarily step aside under the 25th Amendment.

(2) Delaying resignation until further along the impeachment process.

(3) Trying first to settle for a censure vote as a means of avoiding either impeachment or a need to resign.

(4) The question of whether the President could pardon himself.

(5) Pardoning various Watergate defendants, then himself, followed by resignation.

(6) A pardon to the President, should he resign.

The rush of events placed an urgency on what was to be done. It became even more critical in view of a prolonged impeachment trial which was expected to last possiby four months or longer.

The impact of the Senate trial on the country, the handling of possible international crises, the economic situation here at home, and the marked slowdown in the decision-making process within the federal government were all factors to be considered, and were discussed.

General Haig wanted my views on the various courses of action as well as my attitude on the options of resignation. However, he indicated he was not advocating any of the options. I inquired as to what was the President's pardon power, and he answered that it was his understanding from a White House lawyer that a President did have the authority to grant a pardon even before any criminal action had been taken against an individual, but obviously, he was in no position to have any opinion on a matter of law.

As I saw it, at this point the question clearly before me was, under the circumstances, what course of action should I recommend that would be in the best interest of the country.

I told General Haig I had to have time to think. Further, that I wanted to talk to James St. Clair. I also said I wanted to talk to my wife before giving any response. I had consistently and firmly held the view previously that in no way whatsoever could I recommend either publicly or privately any step by the President that might cause a change in my status as Vice President. As the person who would become President if a vacancy occurred for any reason in that office, a Vice President, I believed, should endeavor not to do or say anything which might affect his President's tenure in office. Therefore, I certainly was not ready even under these new circumstances to make any recommendations about resignation without having adequate time to consider further what I should properly do.

Shortly after 8:00 o'clock the next morning James St. Clair came to my office. Although he did not spell out in detail the new evidence, there was no question in my mind that he considered these revelations to be so damaging that impeachment in the House was a certainty and conviction in the Senate a high probability. When I asked Mr. St. Clair if he knew of any other new and damaging evidence besides that on the June 23, 1972, tape, he said "no." When I pointed out to him the various options mentioned to me by General Haig, he told me he had not been the source of any opinion about Presidential pardon power.

After further thought on the matter, I was determined not to make any recommendations to President Nixon on his resignation. I had not given any advice or recommendations in my conversations with his aides, but I also did not want anyone who might talk to the President to suggest that I had some intention to do so.

For that reason I decided I should call General Haig the afternoon of August 2nd. I did make the call late that afternoon and told him I wanted him to understand that I had no intention of recommending what President Nixon should do about resigning or not resigning, and that nothing we had talked about the previous afternoon should be given any consideration in whatever decision the President might make. General Haig told me he was in full agreement with this position.

My travel schedule called for me to make appearances in Mississippi and Louisiana over Saturday, Sunday, and part of Monday, August 3, 4, and 5. In the previous eight months, I had repeatedly stated my opinion that the President would not be found guilty of an impeachable offense. Any change from my stated views, or even refusal to comment further, I feared, would lead in the press to conclusions that I now wanted to see the President resign to avoid an impeachment vote in the House and probably conviction vote in the Senate. For that reason I remained firm in my answers to press questions during my trip and repeated my belief in the President's innocence of an impeachable offense. Not until I returned to Washington did I learn that President Nixon was to release the new evidence late on Monday, August 5, 1974.

At about the same time I was notified that the President had called a Cabinet meeting for Tuesday morning, August 6, 1974. At that meeting in the Cabinet Room, I announced that I was making no recommendations to the President as to what he should do in the light of the new evidence. And I made no recommendations to him either at the meeting or at any time after that.

In summary, I assure you that there never was at any time any agreement whatsoever concerning a pardon to Mr. Nixon if he were to resign and I were to become President.

The first question of H. Res. 1367 asks whether I or my representative had "specific knowledge of any formal criminal charges pending against Richard M. Nixon." The answer is: "no."

I had known, of course, that the Grand Jury investigating the Watergate break-in and cover-up had wanted to name President Nixon as an unindicted co-conspirator in the cover-up. Also, I knew that an extensive report had been prepared by the Watergate Special Prosecution Force for the Grand Jury and had been sent to the House Committee on the Judiciary, where, I believe, it served the staff and members of the Committee in the development of its report on the proposed articles of impeachment. Beyond what was disclosed in the publications of the Judiciary Committee on the subject and additional evidence released by President Nixon on August 5, 1974, I saw on or shortly after September 4th a copy of a memorandum prepared for Special Prosecutor Jaworski by the Deputy Special Prosecutor, Henry Ruth.[6] Copy of this memorandum had been furnished by Mr. Jaworski to my Counsel and was later made public during a press briefing at the White House on September 10, 1974.

I have supplied the Subcommittee with a copy of this memorandum. The memorandum lists matters still under investigation which "may prove to have some direct connection to activities in which Mr. Nixon is personally involved." The Watergate cover-up is not included in this list; and the alleged cover-up is mentioned only as being the subject of a separate memorandum not furnished to me. Of those matters which are listed in the memorandum, it is stated that none of them "at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon."

This is all the information I had which related even to the possibility of "formal criminal charges" involving the former President while he had been in office.

The second question in the resolution asks whether Alexander Haig referred to or discussed a pardon with Richard M. Nixon or his representatives at any time during the week of August 4, 1974, or any subsequent time. My answer to that question is: not to my knowledge. If any such discussions did occur, they could not have been a factor in my decision to grant the pardon when I did because I was not aware of them.

Questions three and four of H. Res. 1367 deal with the first and all subsequent references to, or discussions of, a pardon for Richard M. Nixon, with him or any of

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[6] Tab B attached (see app. 1, p. 190).

his representatives or aides. I have already described at length what discussions took place on August 1 and 2, 1974, and how these discussions brought no recommendations or commitments whatsoever on my part. These were the only discussions related to questions three and four before I became President, but question four relates also to subsequent discussions.

At no time after I became President on August 9, 1974, was the subject of a pardon for Richard M. Nixon raised by the former President or by anyone representing him. Also, no one on my staff brought up the subject until the day before my first press conference on August 28, 1974. At that time, I was advised that questions on the subject might be raised by media reporters at the press conference.

As the press conference proceeded, the first question asked involved the subject, as did other later questions. In my answers to these questions, I took a position that, while I was the final authority on this matter, I expected to make no commitment one way or the other depending on what the Special Prosecutor and courts would do. However, I also stated that I believe the general view of the American people was to spare the former President from a criminal trial.

Shortly afterwards I became greatly concerned that if Mr. Nixon's prosecution and trial were prolonged, the passions generated over a long period of time would seriously disrupt the healing of our country from the wounds of the past. I could see that the new Administration could not be effective if it had to operate in the atmosphere of having a former President under prosecution and criminal trial. Each step along the way, I was deeply concerned, would become a public spectacle and the topic of wide public debate and controversy.

As I have before stated publicly, these concerns led me to ask from my own legal counsel what my full right of pardon was under the Constitution in this situation and from the Special Prosecutor what criminal actions, if any, were likely to be brought against the former President, and how long his prosecution and trial would take.

As soon as I had been given this information, I authorized my Counsel, Philip Buchen, to tell Herbert J. Miller, as attorney for Richard N. Nixon, of my pending decision to grant a pardon for the former President. I was advised that the disclosure was made on September 4, 1974, when Mr. Buchen, accompanied by Benton Becker, met with Mr. Miller. Mr. Becker had been asked, with my concurrence, to take on a temporary special assignment to assist Mr. Buchen, at a time when no one else of my selection had yet been appointed to the legal staff of the White House.

The fourth question in the resolution also asks about "negotiations" with Mr. Nixon or his representatives on the subject of a pardon for the former President. The pardon under consideration was not, so far as I was concerned, a matter of negotiation. I realized that unless Mr. Nixon actually accepted the pardon I was preparing to grant, it probably would not be effective. So I certainly had no intention to proceed without knowing if it would be accepted. Otherwise, I put no conditions on my granting of a pardon which required any negotiations.

Although negotiations had been started earlier and were conducted through September 6th concerning White House records of the prior administration, I did not make any agreement on that subject a condition of the pardon. The circumstances leading to an initial agreement on Presidential records are not covered by the Resolutions before this Subcommittee. Therefore, I have mentioned discussions on that subject with Mr. Nixon's attorney only to show they were related in time to the pardon discussions but were not a basis for my decision to grant a pardon to the former President.

The fifth, sixth, and seventh questions of H. Res. 1367 ask whether I consulted with certain persons before making my pardon decision.

I did not consult at all with Attorney General Saxbe on the subject of a pardon for Mr. Nixon. My only conversation on the subject with Vice Presidential nominee Nelson Rockefeller was to report to him on September 6, 1974, that I was planning to grant the pardon.

Special Prosecutor Jaworski was contacted on my instructions by my Counsel, Philip Buchen. One purpose of their discussions was to seek the information I wanted on what possible criminal charges might be brought against Mr. Nixon. The result of that inquiry was a copy of the memorandum I have already referred to and have furnished to this Subcommittee. The only other purpose was to find out the opinion of the Special Prosecutor as to how long a delay would follow, in the event of Mr. Nixon's indictment, before a trial could be started and concluded.

At a White House press briefing on September 8, 1974, the principal portions of Mr. Jaworski's opinion were made public. In this opinion, Mr. Jaworski wrote that selection of a jury for the trial of the former President, if he were indicted would require a delay "of a period from nine months to a year, and perhaps even longer." On the question of how long it would take to conduct such a trial, he noted that the complexities of the jury selection made it difficult to estimate the time. Copy of the full text of his opinion dated September 4, 1974, I have now furnished to this Subcommittee.[7]

I did consult with my Counsel, Philip Buchen, with Benton Becker, and with my Counsellor, John Marsh, who is also an attorney. Outside of these men, serving at the time on my immediate staff, I consulted with no other attorneys or professors of law for facts or legal authorities bearing on my decision to grant a pardon to the former President.

Questions eight and nine of H. Res. 1367 deal with the circumstances of any statement requested or received from Mr. Nixon. I asked for no confession or statement of guilt; only a statement in acceptance of the pardon when it was granted. No language was suggested or requested by anyone acting for me to my knowledge. My Counsel advised me that he had told the attorney for Mr. Nixon that he believed the statement should be one expressing contrition, and in this respect, I was told Mr. Miller concurred. Before I announced the pardon, I saw a preliminary draft of a proposed statement from Mr. Nixon, but I did not regard the language of the statement, as subsequently issued, to the subject to approval by me or my representatives.

The tenth question covers any report to me on Mr. Nixon's health by a physician or psychiatrist, which led to my pardon decision. I received no such report. Whatever information was generally known to me at the time of my pardon decision was based on my own observations of his condition at the time he resigned as President and observations reported to me after that from others who had later seen or talked with him. No such reports were by people qualified to evaluate medically the condition of Mr. Nixon's health, and so they were not a controlling factor in my decision. However, I believed and still do, that prosecution and trial of the former President would have proved a serious threat to his health, as I stated in my message on September 8, 1974.

H. Res. 1370[8] is the other resolution of inquiry before this Subcommittee. It presents no questions but asks for the full and complete facts upon which was based my decision to grant a pardon to Richard M. Nixon.

I know of no such facts that are not covered by my answers to the questions in H. Res. 1367. Also:

Subparagraphs (1) and (4): There were no representations made by me or for me and none by Mr. Nixon or for him on which my pardon decision was based.

Subparagraph (2): The health issue is dealt with by me in answer to question ten of the previous resolution.

Subparagraph (3): Information available to me about possible offenses in which Mr. Nixon might have been involved is covered in my answer to the first question of the earlier resolution.

In addition, in an unnumbered paragraph at the end, H. Res. 1370 seeks information on possible pardons for Watergate-related offenses which others may have committed. I have decided that all persons requesting consideration of pardon requests should submit them through the Department of Justice.

Only when I receive information on any request duly filed and considered first by the Pardon Attorney at the Department of Justice would I consider the matter. As yet no such information has been received, and if it does I will act or decline to act according to the particular circumstances presented, and not on the basis of the unique circumstances, as I saw them, of former President Nixon.

By these responses to the resolutions of inquiry, I believe I have fully and fairly presented the facts and circumstances preceding my pardon of former President Nixon. In this way, I hope I have contributed to a much better understanding by the American people of the action I took to grant the pardon when I did. For having afforded me this opportunity, I do express my appreciation to you, Mr. Chairman, and to Mr. Smith, the Ranking Minority Member, and to all the other distinguished Members of this Subcommittee; also to Chairman Rodino of the Committee on the Judiciary, to Mr. Hutchinson, the Ranking Minority

[7] Tab C attached (see app. 1, p. 189).
[8] Tab D attached (see app. 2, p. 201).

Member of the full Committee, and to other distinguished Members of the full Committee who are present.

In closing, I would like to re-emphasize that I acted solely for the reasons I stated in my proclamation of September 8, 1974 and my accompanying message and that I acted out of my concern to serve the best interests of my country. As I stated then: "My concern is the immediate future of this great country. . . . My conscience tells me it is my duty, not merely to proclaim domestic tranquility, but to use every means that I have to insure it."

APPENDIXES

APPENDIX 1

There follows pertinent correspondence concerning the subcommittee's investigation of the pardon of Richard M. Nixon, former President of the United States, the issuance of additional pardons to persons involved in Watergate-related activities, the ability of the Special Prosecutor to make public the information he has compiled relating to the alleged criminal conduct of the former President, and the public disclosure of all Watergate-related documents and tapes which were in the custody of the United States.

SEPTEMBER 17, 1974.

President GERALD R. FORD,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: On September 16, 1974, Representative Abzug of New York introduced a resolution of inquiry, H. Res. 1367, which has been referred to the Subcommittee on Criminal Justice of the Committee on the Judiciary. Under the Rules of the House, the Committee on the Judiciary is called upon to consider this resolution within seven legislative days of its introduction.

To assist us in the expeditious consideration of this measure, I respectfully request that you provide the Subcommittee with the following information as requested by this privileged resolution:

1. Did you or your representatives have specific knowledge of any formal criminal charges pending against Richard M. Nixon prior to issuance of the pardon? If so, what were these charges?

2. Did Alexander Haig refer to or discuss a pardon for Richard M. Nixon with Richard M. Nixon or representatives of Mr. Nixon at any time during the week of August 4, 1974 or at any subsequent time? If so, what promises were made or conditions set for a pardon, if any? If so, were tapes or transcriptions of any kind made of these conversations or were any notes taken? If so, please provide such tapes, transcriptions or notes.

3. When was a pardon for Richard M. Nixon first referred to or discussed with Richard M. Nixon, or representatives of Mr. Nixon, by you or your representatives or aides, including the period when you were a member of Congress or Vice President?

4. Who participated in these and subsequent discussions or negotiations with Richard M. Nixon or his representatives regarding a pardon, and at what specific times and locations?

5. Did you consult with Attorney General William Saxbe or Special Prosecutor Leon Jaworski before making the decision to pardon Richard M. Nixon and, if so, what facts and legal authorities did they give to you?

Respectfully,

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice.

SEPTEMBER 17, 1974.

President GERALD R. FORD,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: As I mentioned in my letter of September 17, 1974, the Subcommittee on Criminal Justice, of which I am Chairman, has pending before it H. Res. 1367 relating to the pardon of former President Richard M. Nixon.

In addition, the Subcommittee has pending before it a variety of proposals relating to the disposition of tapes and documents compiled by former President Nixon and currently within the custody of the Federal Government.

Under the circumstances, I respectfully urge that no further action be taken affecting the disposition of such materials until Congress has had sufficient time to thoroughly consider the issue.

Respectfully,

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice.

SEPTEMBER 18, 1974.

President GERALD R. FORD,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: Subsequent to my letter to you of September 17, 1974, concerning Representative Abzug's resolution of inquiry, H. Res. 1367, Representative John Conyers of Michigan introduced a second resolution of inquiry, H. Res. 1370, which also has been referred to the Subcommittee on Criminal Justice of the Committee on the Judiciary.

Under the Rules of the House, the Committee on the Judiciary is called upon to consider these resolutions within seven legislative days of their introduction. I am enclosing printed copies of both resolutions and respectfully request that you provide the Subcommittee with responses to the inquiries contained in these privileged legislative measures.

Respectfully,

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice.

Enclosures [see app. 2 at pp. 196 and 201].

SEPTEMBER 17, 1974.

LEON JAWORSKI, Esquire,
Special Prosecutor, Watergate Special Prosecution Force, 1425 K Street NW., Washington, D.C.

DEAR MR. JAWORSKI: The Subcommittee on Criminal Justice, of which I am Chairman, has currently before it several proposals relating to the disposition of tapes and documents compiled by former President Richard M. Nixon and currently within the custody of the Federal Government.

Under the circumstances, I urge that your office take all necessary steps to ensure that the tapes and documents relating to the Wategate matter remain in their present location until Congress has had ample opportunity to give this matter thorough consideration.

Respectfully,

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice.

THE WHITE HOUSE,
Washington, September 20, 1974.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your September seventeenth letter requesting information to assist the Subcommittee on Criminal Justice of the Committee on the Judiciary in its consideration of H. Res. 1367.

The pardon power conferred upon the Executive by Article II, Section 2, of the Constitution needs no elaboration here. Nor do the legal decisions relating to pardons. The reasons for my exercise of that constitutional responsibility have already been explained. The controlling considerations which led to my decision were the subjects of the pardon proclamation and my televised message to the American people on September 8 and were the main subjects of my September 16 news conference; additional background information was provided at White House briefings on September 8 and 10. Copies of these materials are enclosed.

Regardless of any background information or advice I may have received, I am responsible for the pardon decision. I am satisfied that it was the right course

to follow in accord with my own conscience and conviction. I hope the Subcommittee will agree that we should now all try, without undue recrimination about the past, to heal the wounds that divided Americans. We have much to get done for the country's goals, and I know we can do it together.

Sincerely,

GERALD R. FORD.

PRESS CONFERENCE NO. 2 OF THE PRESIDENT OF THE UNITED STATES, 8 P.M. E.D.T., SEPTEMBER 16, 1974, MONDAY, IN THE EAST ROOM, AT THE WHITE HOUSE, WASHINGTON, D.C.

The PRESIDENT. Please sit down.

Ladies and gentlemen, this press conference is being held at a time when many Americans are observing the Jewish religious new year. It begins a period of self-examination and reconciliation. In opening this press conference, I am mindful that the spirit of this holy day has a meaning for all Americans.

In examining one's deeds of the last year and in assuming responsibility for past actions and personal decisions, one can reach a point of growth and change. The purpose of looking back is to go forward with a new and enlightened dedication to our highest values.

The record of the past year does not have to be endlessly relived, but can be transformed by commitment to new insights and new actions in the year to come.

Ladies and gentlemen, I am ready for your questions.

Mr. Cormier.

Question. Mr. President, some Congressional Republicans who have talked to you have hinted that you may have had a secret reason for granting President Nixon a pardon sooner than you indicated you would at the last news conference, and I wonder if you could tell us what that reason was.

The PRESIDENT. At the outset, let me say I had no secret reason, and I don't recall telling any Republican that I had such a reason. Let me review quickly, if I might, the things that transpired following the last news conference.

As many of you know, I answered two, maybe three questions concerning a pardon at that time. On return to the office, I felt that I had to have my counsel undertake a thorough examination as to what my right of pardon was under the Constitution. I also felt that it was very important that I find out what legal actions, if any, were contemplated by the Special Prosecutor.

That information was found out, and it was indicated to me that the possibility exists, the very real possibility that the President would be charged with obstructing justice and ten other possible criminal actions.

In addition, I asked my general counsel to find out, if he could, how long such criminal proceedings would take, from the indictment, the carrying on of the trial, et cetera, and I was informed that this would take a year, maybe somewhat longer, for the whole process to go through.

I also asked my counsel to find out whether or not under decisions of the judicial system a fair trial would be given to the former President.

After I got that information, which took two or three days, I then began to evaluate, in my own mind, whether or not I should take the action, which I subsequently did.

Miss Thomas.

Question. Throughout your Vice Presidency, you said that you didn't believe that former President Nixon had ever committed an impeachable offense. Is that still your belief or do you believe that his acceptance of a pardon implies his guilt, or is an admission of guilt?

The PRESIDENT. The fact that 38 members of the House Committee on the Judiciary, Democrat and Republican, have unanimously agreed in the report that was filed that the former President was guilty of an impeachable offense, I think is very persuasive evidence.

And the second question, I don't recall——

Question. An admission of guilt?

The PRESIDENT. Was the acceptance of the pardon by the President an admission of guilt? The acceptance of a pardon, I think, can be construed by many, if not all, as an admission of guilt.

Yes, Mr. Nessen.

Question. What reports have you received on Mr. Nixon's health, and what effect, if any, did this have on your decision to pardon him now?

The PRESIDENT. I have asked Dr. Lukash, who is the head physician in the White House, to keep me posted in proper channels as to the former President's

health. I have been informed on a routine day-to-day basis, but I don't think I am at liberty to give any information as to those reports that I have received.

You also asked what impact did the President's health have on my decision. I think it is well known that just before I gave my statement at the time that I gave the pardon I personally wrote in a phrase "the threat to the President's health."

The main concern that I had at the time I made the decision was to heal the wounds throughout the United States. For a period of 18 months or longer, we had had turmoil and divisiveness in the American society. At the same time, the United States had major problems both at home and abroad that needed the maximum personal attention of the President and many others in the Government.

It seemed to me that as long as this divisiveness continued, this turmoil existed, caused by the charges and counter charges, the responsible people in the Government could not give their total attention to the problems that we had to solve at home and abroad.

And the net result was that I was more anxious to heal the Nation. That was the top priority. I felt then, and I feel now, that the action I took will do that. I couldn't be oblivious, however, to news accounts that I had concerning the President's health, but the major reason for the action I took related to the effort to reconcile divisions in our country and to heal the wounds that had festered far too long.

Question. Mr. President, after you had told us that you were going to allow the legal process to go on before you decided whether to pardon him, why did you decide on Sunday morning, abruptly, to pardon President Nixon?

The PRESIDENT. I didn't decide abruptly. I explained a moment ago the process that I went through subsequent to the last press conference. When I had assembled all of that information that came to me through my counsel, I then most carefully analyzed the situation in the country and I decided that we could not afford in America an extended period of continued turmoil and the fact that the trial, and all of the parts thereof, would have lasted a year—perhaps more—with the continuation of the divisions in America, I felt that I should take the action that I did, promptly and effectively.

Question. Mr. President, I would like to ask you a question about the decision relating to custody of the Nixon tapes and documents. Considering the enormous interest that the Special Prosecutor's office had in those documents for further investigation, I am wondering why the negotiations with Mr. Nixon's representatives were conducted strictly between the counsel in your office without bringing in discussions with either Mr. Jaworski's representatives or those from the Justice Department.

The PRESIDENT. In the first place, I did receive a memorandum, or legal opinion, from the Department of Justice which indicated that in the opinion of the Department of Justice, the documents, tapes, the ownership of them were in the hands of the former President. Historically, that has been the case for all Presidents.

Now, the negotiations for the handling of the tapes and documents were undertaken and consummated by my staff and the staff of the former President. I believe that they have been properly preserved and they will be available under subpoena for any criminal proceeding. Now, the Special Prosecutor's staff has indicated some concern. I am saying tonight that my staff is working with the Special Prosecutor's staff to try and alleviate any concerns that they have. I hope a satisfactory arrangement can be worked out.

Question. Mr. President, during your confirmation hearings as Vice President, you said that you did not think that the country would stand for a President to pardon his predecessor. Has your mind been changed about such public opinion?

The PRESIDENT. In those hearings before the Senate Committee on Rules and Administration, I was asked a hypothetical question, and in answer to that hypothetical question I responded by saying that I did not think the American people would stand for such an action.

Now that I am in the White House and don't have to answer hypothetical questions but have to deal with reality, it was my judgment, after analyzing all of the facts, that it was in the best interest of the United States for me to take the action that I did.

I think if you will reread what I said in answer to that hypothetical question, I did not say I wouldn't. I simply said that under the way the question was phrased, the American people would object.

But I am absolutely convinced when dealing with reality in this very, very difficult situation, that I made the right decision in an effort, an honest, conscientious effort, to end the divisions and the turmoil in the United States.

Mr. Lisagor.

Question. Mr. President, is there any safeguard in the tapes agreement that was made with Mr. Nixon, first, with their destruction in the event anything happens to him, because under the agreement they will be destroyed, and secondly, should not the tapes be kept in the White House until the Special Prosecutor has finished dealing with them?

The PRESIDENT. The tapes and the documents are still in our possession and we are, as I said a moment ago, working with the Special Prosecutor's office, to alleviate any concerns they have as to their disposition and their availability.

The agreement as to destruction is quite clearcut. As long as Mr. Nixon is alive and during the period of time that is set forth, they are available for subpoena by a court involving any criminal proceedings. I think this is a necessary requirement for the protection of evidence for any such action.

Question. Mr. President, recent Congressional testimony has indicated that the CIA, under the direction of a committee headed by Dr. Kissinger, attempted to destabilize the Government of Chile under former President Allende.

Is it the policy of your Administration to attempt to destabilize the governments of other democracies?

The PRESIDENT. Let me answer in general. I think this is a very important question.

Our Government, like other governments, does take certain actions in the intelligence field to help implement foreign policy and protect national security. I am informed reliably that Communist nations spend vastly more money than we do for the same kind of purposes.

Now, in this particular case, as I understand it, and there is no doubt in my mind, our Government had no involvement whatsoever in the Allende coup. To my knowledge, nobody has charged that. The facts are we had no involvement in any way whatsoever in the coup itself.

In a period of time, three or four years ago, there was an effort being made by the Allende government to destroy opposition news media, both the writing press as well as the electronic press, and to destroy opposition political parties.

The effort that was made in this case was to help and assist the preservation of opposition newspapers and electronic media and to preserve opposition political parties.

I think this is in the best interest of the people in Chile, and certainly in our best interest.

Now, may I add one further comment.

The 40 committee was established in 1948. It has been in existence under Presidents since that time. That committee reviews every covert operation undertaken by our Government, and that information is relayed to the responsible Congressional committees where it is reviewed by House and Senate committees.

It seems to me that the 40 committee should continue in existence, and I am going to meet with the responsible Congressional committees to see whether or not they want any changes in the review process so that the Congress, as well as the President, are fully informed and are fully included in the operations for any such action.

Question. In view of public reaction, do you think the Nixon pardon really served to bind up the Nation's wounds? I wonder if you would assess public reaction to that move.

The PRESIDENT. I must say that the decision has created more antagonism than I anticipated. But as I look over the long haul with a trial or several trials of a former President, criminal trials, the possibility of a former President being in the dock so to speak, and the divisions that would have existed not just for a limited period of time, but for a long period of time, it seems to me that when I had the choice between that possibility and the possibility of taking direct action hoping to conclude it, I am still convinced, despite the public reaction so far, that the decision I made was the right one.

Question. Mr. President, in regard to the pardon, you talk about the realities of the situation. Now those realities rightly or wrongly included a good many people who speculate about whether or not there is some sort of arrangement—even some of them call a deal—between you and the former President or between your staff and his staff, resignation in exchange for a full pardon.

The question is: Is there or was there, to your knowledge, any kind of understanding about this?

The PRESIDENT. There was no understanding, no deal between me and the former President, nor between my staff and the staff of the former President, none whatsoever.

Question. Mr. President, there is a bill that the Treasury Department has put forward, I think it is about 38 pages. Under this bill, which deals with getting hold of the returns, Internal Revenue returns of the citizens of the country, you could take action to get those returns whenever you wanted to.

I wonder if you are aware of this, and if you feel that you need to get those returns of citizens.

The PRESIDENT. It is my understanding that a President has, by tradition and practice, and by law, the right to have access to income tax returns. I personally think that is something that should be kept very closely held. A person's income tax return is a very precious thing to that individual and, therefore, I am about to issue an Executive Order that makes it even more restrictive as to how those returns can be handled and I do think that a proposed piece of legislation that is coming to me and subsequently will be submitted, as I recollect, to the Congress would also greatly tighten up the availability or accessibility of income tax returns. I think they should be closely held and I can assure you that they will be most judiciously handled as far as I am concerned.

Yes.

Question. Mr. President, looking beyond the Nixon papers and in view of some criticism in Congress, do you believe we may have now reached the point where Presidential White House papers should remain in the Government's hands as the property of the Government?

The PRESIDENT. As far as I am personally concerned, I can see a legitimate reason for Presidential papers remaining the property of the Government. In my own case, I made a decision some years ago to turn over all of my Congressional papers, all of my Vice Presidential papers to the University of Michigan archives.

As far as I am concerned, whether they go to the archives for use or whether they stay the possession of the Government, I don't think it makes too much difference.

I have no desire, personally, to retain whatever papers come out of my Administration.

Mr. Mollenhoff.

Question. Mr. President, at the last press conference you said, "The code of ethics that will be followed will be the example that I set." Do you find any conflicts of interest in the decision to grant a sweeping pardon to your life-long friend and your financial benefactor with no consultation for advice and judgment for the legal fallout?

The PRESIDENT. The decision to grant a pardon to Mr. Nixon was made primarily, as I have expressed, for the purpose of trying to heal the wounds throughout the country between Americans on one side of the issue or the other. Mr. Nixon nominated me for the office of Vice President. I was confirmed overwhelmingly in the House as well as in the Senate. Every action I have taken, Mr. Mollenhoff is predicated on my conscience without any concern or consideration as to favor as far as I am concerned.

Yes.

Question. If your intention was to heal the wounds of the Nation, sir, why did you grant only a conditional amnesty to the Vietnam war veterans while granting a full pardon to President Nixon?

The PRESIDENT. The only connection between those two cases is the effort that I made in the one to heal the wounds involving the charges against Mr. Nixon and my honest and conscientious effort to heal the wounds for those who had deserted military service or dodged the draft. That is the only connection between the two.

In one case, you have a President who was forced to resign because of circumstances involving his Administration and he has been shamed and disgraced by that resignation. In the case of the draft dodgers and Army and military deserters, we are trying to heal the wounds by the action that I took with the signing of the proclamation this morning.

Question. Mr. President another concern that has been voiced around the country since the pardon is that the judicial process as it finally unwinds may not write the definitive chapter on Watergate and perhaps with particular regard to Mr. Nixon's particular involvement, however total, however it may have been

in truth. My question is, would you consider appointing a special commission with extraordinary powers to look into all of the evidentiary material and to write that chapter and not leave it to later history?

The PRESIDENT. Well, it seems to me as I look at what has been done, I think you find a mass of evidence that has been accumulated. In the first instance, you have the very intensive investigation conducted by the House Committee on the Judiciary. It was a very well-conducted investigation. It came up with volumes of information.

In addition, the Special Prosecutor's office under Mr. Jaworski has conducted an intensive investigation and the Special Prosecutor's office will issue a report at the conclusion of their responsibilities that I think will probably make additional information available to the American people.

And thirdly, as the various criminal trials proceed in the months ahead, there obviously will be additional information made available to the American people. So, when you see what has been done and what undoubtedly will be done, I think the full story will be made available to the American people.

Question. Mr. President, could you give us an idea who would succeed General Haig, and how are you coming on your search for a Press Secretary?

The PRESIDENT. Do I have a lot of candidates here? (Laughter) No shows. (Laughter)

I have several people in mind to replace General Haig, but I have made no decision on that. It was just announced today that the NATO countries have accepted him as the officer handling those responsibilities.

I think he is to take office succeeding General Goodpaster on December 15. He assumes his responsibilities as the head of U.S. military forces November 1. In the next few days undoubtedly I will make the decision as to the individual to succeed him.

So far as the Press Secretary is concerned, we are actively working on that and we hope to have an announcement in a relatively short period of time.

Question. Mr. President, prior to your deciding to pardon Mr. Nixon, did you have, apart from those reports, any information either from associations of the President or from his family or from any other source about his health, about his medical condition?

The PRESIDENT. Prior to the decision that I made granting a pardon to Mr. Nixon, I had no other specific information concerning his health other than what I had read in the news media or heard in the news media. I had not gotten any information from any of the Nixon family. The sole source was what I had read in the news media plus one other fact.

On Saturday before the Sunday a member of my staff was working with me on the several decisions I had to make. He was, from my staff, the one who had been in negotiations on Friday with the President and his staff.

At the conclusion of decisions that were made, I asked him, how did the President look, and he reported to me his observations.

But other than what I had read or heard and this particular incident, I had no precise information concerning the President's health.

Question. Mr. President, your own economic advisers are suggesting that to save the economy which is very bad and very pessimistic, we are hearing the word "depression" used now. I wonder how you feel about whether we are heading for a depression?

The PRESIDENT. Let me say very strongly that the United States is not going to have a depression. The overall economy of the United States is strong. Employment is still high. We do have the problem of inflation. We do have related problems, and we are going to come up with some answers that I hope will solve those problems.

We are not going to have a depression. We are going to work to make sure that our economy improves in the months ahead.

Question. Mr. President, in the face of massive food shortages and the prospects of significant starvation, will the United States be able to significantly increase its food aid to foreign countries, and what is our position going to be at the Rome conference on participation in the world grain reserves?

The PRESIDENT. Within the next few days a very major decision in this area will be made. I am not at liberty to tell you what the answer will be because it has not been decided.

But it is my hope that the United States for humanitarian purposes will be able to increase its contribution to those nations that have suffered because of drought or any of the other problems related to human needs.

Question. Back to the CIA, under what international law do we have a right to attempt to destablize the constitutionally-elected government of another country, and does the Soviet Union have a similar right to try to destabilize the Government of Canada, for example, or the United States?

The PRESIDENT. I am not going to pass judgment on whether it is permitted or authorized under international law. It is a recognized fact that historically, as well as presently, such actions are taken in the best interest of the countries involved.

Question. Mr. President, last month when you assumed the Presidency, you pledged openness and candor. Last week you decided on the ex-President's pardon in virtually total secrecy. Despite all you have said tonight, there would still seem to be some confusion, some contradiction.

My question is this: Are the watchwords of your Administration still openness and candor?

The PRESIDENT. Without any question, without any reservation. And I think in the one instance that you cite, it was a sole decision, and believe me, it wasn't easy, and since I was the only one who could make that decision, I thought I had to search my own soul after consulting with a limited number of people, and I did it, and I think in the longrun it was the right decision.

The PRESS. Thank you, Mr. President.

PRESS CONFERENCE OF PHILIP BUCHEN, COUNSELOR TO THE PRESIDENT, SEPTEMBER 8, 1974; THE BRIEFING ROOM, AT 12:12 P.M.

Mr. TER HORST. Gentleman, if you are ready for the briefing, we have Philip Buchen, the legal counsel of the White House to address your questions on the President's statement and on the documents you have in your hand.

As you know, he is the President's legal adviser. He was very much a participant in the preparation of this proclamation and so here is Mr. Buchen to take your questions.

I think he may have an opening statement which he may like to read first.

Mr. BUCHEN. Thank you, Jerry.

I appreciate your all being here on this Sunday morning, or midday.

I wanted just to say a few things first, because it may answer questions in advance, and at the conclusion of these remarks, I will try to field the questions you throw this way.

In addition to the major developments of this morning when President Ford granted a pardon to former President Nixon, I have two other legal developments to announce which occurred prior to the issuance of the proclamation of pardon.

The first involves the opinion of Attorney General William B. Saxbe and President Ford dealing with papers and other records, including tapes, retained during the Administration of former President Nixon in the White House offices.

In this opinion, the Attorney General concludes that such materials are the present property of Mr. Nixon; however, it also concluded that during the time the materials remain in the custody of the United States, they are subject to subpoenas and court orders directed to any official who controls that custody. And in this conclusion, I have concurred.

This opinion was sought by the President from the Attorney General on August 22.

Question. When you say the President, you mean President Ford?

Mr. BUCHEN. That is right.

The reason for seeking the opinion was the conflict created between Mr. Nixon's request on the one hand for delivery to his control of the materials, and on the other hand, the pending court orders and subpoenas directed at the United States and certain of its officials.

The court orders have required that the custody of the materials be maintained at their present locations. And both the orders and subpoenas have called for the identification and production of certain materials allegedly relevant to court proceedings in which the orders and subpoenas originated.

In addition, we were advised of interests of other parties in having certain records disclosed to them under warning that if they were to be removed and delivered to the control of Mr. Nixon, court action would be taken to prevent that move and to protect the claimed rights to inspection or disclosure.

Therefore, it became fully apparent that unless this conflict was resolved, the present Administration would be enmeshed for a long time in answering the disputed claims over who could obtain information from the Nixon records,

how requested information could, as a practical matter, be extracted from the vast volume of records in which it might appear, and how, and by whom its relevancy in any particular court proceeding could be determined, and at the same time to try satisfying the claims of Mr. Nixon that he owned the records.

Within a week of the request by the Attorney General for an opinion made by President Ford, I was advised informally of what its general nature would be. From that time on, I realized that the opinion itself would not provide a practical solution to the handling and management of the papers so as to reconcile rights and interest of private ownership with the limited but very important rights and interest of litigants to disclosure of selected relevant parts of the materials.

Thus I initiated conversations with the Attorney General's Office, Special Prosecutor Jaworski, with attorneys for certain litigants seeking disclosure, and with Herbert J. Miller, as soon as he became attorney for Mr. Nixon.

The purpose of these conversations was to explore ways for reconciling these different interests in records of the previous Administration so that Administration would not be caught in the middle of trying on a case-by-case basis to resolve each dispute over the right of access or disclosure.

The outcome of these conversations was the conclusion on my part that Mr. Nixon, as the principal party in interest, should be requested to come forth with the proposal for dealing satisfactorily with Presidential material of his Administration in ways that offered reasonable protection and safeguards to each party who has a legitimate court-supported right to production of particular materials relevant to his case.

Mr. Nixon and his attorney then agreed to pursue this approach and in company with White House Counsel, they were able to accomplish the second of the developments which I am announcing today.

And that is the letter agreement, of which you have copies, between former President Nixon and Arthur F. Sampson, Administrator of the General Services Administration.

These two developments are, of course, much less significant than the one you have learned about earlier. President Ford has chosen to carry out a responsibility expressed in the Preamble to the Constitution of ensuring domestic tranquility, and has chosen to do so by exercise of a power that he alone has under the Constitution to grant a pardon for offenses against the United States.

About a week ago, President Ford asked me to study traditional precedents bearing on the exercise of his right to grant a pardon, particularly with reference to whether or not a pardon could only follow indictment or conviction. The answer I found, based on considerable authority, was that a pardon could be granted at any time and need not await an indictment or conviction.

President Ford also asked me to investigate how long it would be before prosecution of former President Nixon could occur, if it were brought, and how long it would take to bring it to a conclusion.

On this point, I consulted with Special Prosecutor Jaworski and he advised me as follows, and has authorized me to quote his language, and I quote:

"The factual situation regarding a trial of Richard M. Nixon within Constitutional bounds is unprecedented. It is especially unique in view of the recent House Judiciary Committee inquiry on impeachment, resulting in a unanimous adverse finding to Richard M. Nixon on the article involving obstruction of justice.

"The massive publicity given the hearings and the findings that ensued, the reversal of judgment of a number of Members of the Republican Party following the release of the June 23rd tape recording, and their statements carried nationwide. And, finally, the resignation of Richard M. Nixon require a delay before selection of a jury is begun of a period from nine months to a year, and perhaps even longer.

"This judgment is predicated on a review of the decisions of the United States courts involving prejudicial pre-trial publicity."

Question. Is that the end of the quotes?

Mr. BUCHEN. No, I am going on to indicate something else that will be of interest to you. That is the end of that quote.

Another quote from his communication to me is as follows: "The situation involving Richard M. Nixon is readily distinguishable from the facts involved in the case of United States versus Mitchell, et al, set for trial on September 30th.

"The defendants in the Mitchell case were indicted by a grand jury operating in secret session. They will be called to trial, unlike Richard M. Nixon, if indicted,

without any previous adverse finding by an investigatory body holding public hearings on its conclusions."

That is the end of the quotation.

Question. Would you end that last sentence again?

Mr. BUCHEN. Yes. It is an important one. "They," meaning the defendants, "will be called to trial, unlike Richard M. Nixon, if indicated, without any previous adverse finding by an investigatory body holding public hearings on its conclusions."

Except for my seeking and obtaining this advice from Mr. Jaworski, none of my discussions with him involved any understandings or commitments regarding his role in the possible prosecution of former President Nixon, or in the prosecution of others.

President Ford has not talked with Mr. Jaworski, but I did report to President Ford the opinion of the Special Prosecutor about the delay necessary before any possible trial of the former President could begin.

I would also like to add on another subject, no action or statement by former President Nixon, which has been disclosed today, however welcome and helpful, was made a pre-condition of the pardon.

That is a negative because of the word "no" at the beginning. I might add that whether or not it was disclosed today, it was not a pre-condition.

Question. There were no secret agreements made?

Mr. BUCHEN. That is right.

President Ford in determining to issue a pardon acted solely according to the dictates of his own conscience. Moreover, he did so as an act of mercy not related in any way to obtaining concessions in return.

Question. Would you go over the last phrase? After "mercy".

Mr. BUCHEN. Mercy not related in any way to obtaining concessions in return. However, my personal view——

Question. Is that yours or Ford's?

Mr. BUCHEN. Mine. —is that former President Nixon's words, which I have had a chance to read, as you have, that followed the granting of a pardon, constitute a statement of contrition which I believe will hasten the time when he and his family may achieve peace of mind and spirit and will much sooner bring peace of mind and spirit to all of our citizens.

Question. Would you review that sentence?

Mr. BUCHEN. Yes.

However my personal view—these are my own words—is that former President Nixon's words expressed upon his learning of the pardon, constitute a statement of contrition which I believe will hasten the time when he and his family may achieve peace of mind and spirit and will much sooner bring peace of mind and spirit to all of our citizens.

Now I have only one other paragraph that I would like to bring out in conclusion. I want to express for the record my heartfelt personal thanks and appreciation to a dear friend of the President's and of mine. He is Benton Becker, a Washington attorney, who has served voluntarily as my special and trusted consultant and emissary in helping to bring about the events recorded today.

Question. Emissary to Mr. Jaworski or Mr. Nixon?

Mr. BUCHEN. To Mr. Miller and Mr. Nixon, not to Mr. Jaworski.

I also acknowledge with deep gratitude the services of William Casselman, II, who is the highly valued counsel—who was the highly valued counsel to Vice President Ford for his whole tenure in that office, and is now my close associate in the service of the President of the United States.

Question. Who informed President Nixon that he was getting a pardon, and also is President Ford basing this pardon only on the fact that it would have taken a long time to try the Presidency in his own conscience?

Mr. BUCHEN. Let me take the first question first.

When Mr. Becker went to San Clemente on Thursday evening, he was authorized to advise the former President that President Ford was intending to grant a pardon, subject, however, to his further consideration of the matter because he wanted to reserve the chance to deliberate and ponder somewhat longer, but he was authorized to say that in all probability a pardon would be issued in the near future.

The second question?

Question. The second question is: There is no admission of guilt here at all and despite your assumptions that it is contrition, there is no actual admission of guilt. Do you agree?

Mr. BUCHEN. Well, my interpretation is that it comes very close to saying that he did wrong, that he did not act forthrightly.

Question. Mr. Buchen, what is the linkage between the agreement between Mr. Sampson and Mr. Becker's negotiations at San Clemente?

Mr. BUCHEN. The initiative for getting an agreement that would help solve our problems came from me and I advised Mr. Miller as attorney for Mr. Nixon that that was my desire. I so advised him before I knew anything about a contemplated pardon.

Question. Mr. Buchen——

Mr. BUCHEN. May I finish, please?

However, as we pursued talks on what to do with the papers, I made it very clear to Mr. Miller that I wanted the initiative to come from him and his client as to the specifics of what he and his client would be willing to do regarding the management and ultimate disposition of the papers and tapes.

Question. Mr. Buchen, what will this mean as far as former President Nixon's role as a witness in the upcoming trials are concerned?

Mr. BUCHEN. It would have no effect on that. If the documents do get transferred in a timely fashion, it may permit him to review the pertinent material more adequately so far as his testimony is concerned.

Question. Mr. Buchen, doesn't this pardon eliminate any possibility that the former President might invoke the Fifth Amendment to testify?

Mr. BUCHEN. I think you better ask his own lawyer that. As you know, this applies only to offenses against the United States. It does not apply to possible offenses against State law.

Question. But regarding offenses against the United States, he would have no Fifth Amendment rights now that he has been pardoned; is that correct?

Mr. BUCHEN. I don't know that you can separate them when you plead.

Question. Mr. Buchen, why did the President decide to do this now at a time before the jury has been sequestered in the September 30th trial?

Mr. BUCHEN. That will have to be information that will have to come from his statement. I have nothing to add.

Question. Can you tell us if the President has assured himself that former President Nixon is not guilty or liable to accusation of any very serious charges that have not been made public so far, that there is no other time bomb ticking away?

Mr. BUCHEN. I don't think he said that.

Question. No, no, I am saying, has President Ford done anything to assure himself that there is no evidence of any more serious criminality committed by former President Nixon than what is generally out in the House Judiciary Committee report and this sort of thing?

Mr. BUCHEN. So far as I know, he has made no independent inquiries. If he had wanted to satisfy himself as to the content of the evidence still in the White House, of course, that would have been an insurmountable task, as you have no idea of the huge volumes.

Question. Did you assure yourself——

Mr. BUCHEN. Just a minute. There are huge volumes. However, I did personally consult with Mr. Jaworski as to the nature of the investigation being conducted and I was able to tell the President that so far as I was able to learn through that inquiry, there were no time bombs, as you call them.

Question. Mr. Buchen, what was the President's reaction when Mr. Becker conveyed this message to him?

Mr. BUCHEN. I don't know that it was done in person. I don't think he was necessarily in the room, so I don't believe he can——

Question. Did you get any reaction from the President, even if it was by mail or through counsel, did the President say he was grateful for this?

Mr. BUCHEN. The only reaction we have gotten is the statement that came over the wire.

Question. Are you saying that Ziegler got the word from Becker and that President Nixon was not informed personally at any time by Ford or by any emissary?

Mr. BUCHEN. I think you will have to ask Mr. Becker that. My understanding is that initially the talks went through Mr. Ziegler, but there were also face-to-face meetings between Mr. Becker and the President and what occurred by one method, and one by the other I don't know.

Question. There was no personal contact between Ford and Nixon?

Mr. BUCHEN. None at all.

Question. You refer to Becker as an emissary and you talk about one meeting out there Thursday to notify him. What were the reasons for his previous trips back and forth? What was discussed?

Mr. BUCHEN. Becker only went once.

Question. Only on Thursday?

Mr. BUCHEN. Yes. And not only to discuss that, they had to work out the details of that letter agreement because Miller and Becker were in negotiation and Miller had to consult his client and they had to make modifications. And they had to call back to see whether that fit in correctly with what General Services Administration could feasibly do. So, that involved a lot of the time he was out there.

Question. Mr. Buchen, did Mr. Jaworksi inform you that an indictment, or indictments, against former President Nixon were expected?

Mr. BUCHEN. No, he did not.

Question. May I follow that, then? Isn't the granting of a pardon at this stage an admission that an indictment was expected and that conviction was probable?

Mr. BUCHEN. I think you have to recall that word came out that the Grand Jury at one time wanted to name the former President, or then President, as a co-conspirator and that is one evidence that something more would have happened.

And I think it is very likely, from all we have read, that there would be people who would want him prosecuted and would intend to do so, although I don't say that that was Mr. Jaworski's view.

Question. Was Mr. Jaworski ever consulted about this pardon, ever asked about this?

Mr. BUCHEN. No.

Question. Did Jaworski agree to what was done today?

Mr. BUCHEN. He has no voice in it.

Question. Do you know what his mood or sentiment was?

Mr. BUCHEN. You will have to ask him. I want to get to Peter, here.

Question. I wanted to follow up that line. You know we are not able to get a response from Mr. Jaworski's office and it would really help us for you to tell us all you can about the status of the investigation against the President, former President Nixon?

Mr. BUCHEN. I don't have that information, Peter. That is kept in his shop.

Question. But in that regard, why was he not consulted about what kind of action he contemplated against the President before the pardon was issued?

Mr. BUCHEN. We didn't think that was relevant.

Question. You assumed he would be prosecuted; is that right?

Mr. BUCHEN. We assumed that he may be prosecuted.

Question. When was Jaworski told?

Mr. BUCHEN. About the pardon?

Question. About the pardon.

Mr. BUCHEN. I called him about three-quarters of an hour before I knew the President was going to announce it so that he would know it.

Question. Today?

Mr. BUCHEN. Yes.

Question. What was his reaction? When was that?

Mr. BUCHEN. He thanked me for advising him in advance of his hearing it over the radio or TV.

Question. And he did not object?

Mr. BUCHEN. He didn't. He didn't say anything one way or the other.

Question. As we read this statement, which does not admit guilt whatsoever, what is to prevent the former President from going out, say six months hence, and saying that nothing was really ever proven against him and he was hounded out of office?

Mr. BUCHEN. I guess he has the right to say that because, until an indictment and conviction, I think that would be true in his case as well as anybody else's case who is under a cloud of suspicion.

Question. But President Ford spoke of the historical aspects of this and what is going to keep history from getting more muddled than ever?

Mr. BUCHEN. I think the historians will take care of that.

Question. Mr. Buchen, does President Ford plan to grant a similar pardon to the former President's subordinates who are scheduled to go on trial later this month?

Mr. BUCHEN. To my knowledge, he has not given that matter any thought.

Question. Can you clarify, was the agreement reached with the GSA about the disposal of the tapes and documents? Was the pardon contingent on that?

Mr. BUCHEN. Neither.

Question. They are not together?

Mr. BUCHEN. Right.

Question. Number two, why did he choose 10:30, Sunday morning, to make the announcement?

Mr. BUCHEN. I think you will have to ask him that. He figured that this was a very solemn moment that exemplified, I think, an act that was one of high mercy and it seemed appropriate, I think, to him that it should occur on a day when we do have thoughts like that, or should.

Question. Mr. Buchen, I don't understand why you contrast the treatment of Nixon with the treatment of Mitchell coming up. If I understand your statement right, you said that Mitchell has not had the publicity and the action by a hearing as Nixon had before the House Judiciary Committee.

Mr. BUCHEN. That was Mr. Jaworski's statement. That was not mine.

Question. I don't understand this and maybe you can explain what you think he means there. Mitchell certainly had the hearing with conclusions and explanations of conclusions of a hearing by the Watergate Committee.

Mr. BUCHEN. There was a hearing, but I don't know how conclusive the findings were.

Question. There was a hearing and Mitchell testified. There was a public hearing and there were conclusions and recommendations on that, and a press conference on that, and great publicity.

Mr. BUCHEN. I would judge that Mr. Jaworski does not find those conclusions prejudicial to Mr. Mitchell's upcoming case.

Question. Mr. Buchen, the President, in his statement this morning, referred to this matter threatening the former President's health. Do you have any further details on that? Do you know anything about the former President's health that we don't?

Mr. BUCHEN. No, I didn't go out there, so I didn't see the man.

Question. Do you know what he meant by that?

Mr. BUCHEN. I think it is generally known that this man has suffered a good deal. I think you people who saw him more recently than I have can form your own conclusions.

Question. Has Mr. Ford and Mr. Nixon talked this morning?

Mr. BUCHEN. No, not to my knowledge, but I do not believe they did.

Question. Do you know, was the President in a depression and has the President threatened to commit suicide or anything like that?

Mr. BUCHEN. I have no knowledge.

Question. You say that you looked into this matter from a constitutional standpoint for the President, and I am sure you looked into the history of it. Has any President ever granted a pardon before in history to anyone prior to that person being charged with a crime formally?

Mr. BUCHEN. Oh, yes, there are lots of precedents for that.

Question. Like what?

Mr. BUCHEN. Well, one of your colleagues, named Mr. Burdick, was pardoned before he was asked to testify regarding some alleged criminality involving the Customs Service during the Wilson Administration and he was given a pardon.

Question. He was a newsman?

Mr. BUCHEN. He was a newsman.

And, of course, the pardons granted by President Lincoln, for example—the pardons granted after the Whiskey Rebellion and other insurrections, were applied to people who were not indicted.

Question. Mr. Buchen, I am a little confused at your words, more or less dismissing the question of whether or not the President would grant pardons to Mr. Haldeman, Mr. Ehrlichman, Mr. Mitchell and the others who will go on trial September 30th. Is it not fairly clear to you, or at least do you not, here in the White House, admit the possibility that their defense now, in light of the action of President Ford today, will be that the President has pardoned the man under whose orders they were operating and what is your reaction to this possible line of defense or line of appeal by the defendants in that trial?

Surely, this must have been given some consideration and I again would ask you what you think is going to happen, what you think the President would do when confronted with this question?

Mr. BUCHEN. Well, I question you broad characterization that the acts for which they are being charged were necessarily——

Question. I am just suggesting this may be their defense.

Mr. BUCHEN. This may be their defense. Now, that will become Mr. Jaworski's problem and, of course, the judge's problem. You have already seen that Mr. Jaworski apparently assumes that the situation in their case is far different from the situation in the former President's case.

Question. Phil, can I ask you this: Did this process that led up to the pardon today start a week ago when the President came to you?

Mr. BUCHEN. Yes.

Question. Was there something that happened just prior to his coming to you that got his interest working in doing this thing just now?

Mr. BUCHEN. If there was, I don't know what it was, Ron.

Question. Have they talked on the phone at any time this week, or immediately prior to this week?

Mr. BUCHEN. They have not talked on the phone since Jack Miller became his attorney.

Question. Did this process start after last Sunday's publication of the Gallup poll that said that the majority of the public wanted to see Mr. Nixon prosecuted?

Mr. BUCHEN. Let me figure my dates. That was Labor Day week-end, was it? I worked all Labor Day week-end so it came before that.

Question. To what extent did the transition team look ahead to the problem of a pardon, and have you done any work at all——

Mr. BUCHEN. They didn't consider that. They had far too much else to consider.

Question. As a matter of equal justice under law, we have now had the two top officials of the United States, both allegedly involved in crimes, namely, Vice President Agnew and Mr. Nixon, who have been freed of criminal charges. Both of them are entitled to go around the country and represent themselves as being innocent. What is a citizen to make of that situation when ordinary criminals, including the aides involved in this, have to be tried?

Mr. BUCHEN. Of course I cannot speak at all for the treatment of former Vice President Agnew because this Administration was not in any way involved. But I think you have to understand—and maybe it is a good time on Sunday to think about it—that there is a difference between mercy and justice.

I don't think that you can assume that mercy is equally dispensed or how it could be equally dispensed.

Question. Mr. Buchen, is there any pardon being considered for the aides who performed their acts allegedly in the name of and in behalf of Richard Nixon?

Mr. BUCHEN. I have already spoken to that question.

Question. I don't think you have, Mr. Buchen. I am actually talking about those now in prison, not Mr. Nixon. John Dean and others?

Mr. BUCHEN. So far as I know, no thought has been given to that.

Question. Mr. Buchen, is it now possible under the agreement on the custody of Presidential tapes and papers for any tape made during the Nixon Administration to be subpoenaed even though it is not now the subject of a subpoena?

Mr. BUCHEN. It is possible. In order to get a subpoena, or court order, of course, certain showings would have to be made. It is also possible, of course, for the owner of the tapes to interject objections.

Question. A follow up to that. If the owner of those tapes doesn't want to give them up—he has now been pardoned of everything—what is the leverage?

Mr. BUCHEN. It doesn't affect the court orders or subpoenas, and he is subject to the consequences of not obeying a valid court order or subpoena.

Question. In other words, that would come under the expiration date of August 9 in the pardon; is that right?

Mr. BUCHEN. That is right.

Question. Do you feel the agreement with Mr. Sampson has insured that the Ford Administration cannot be implicated in any Watergate cover-up? Was that one of your considerations?

Mr. BUCHEN. That was not involved because I don't think that is a relevant issue.

Question. Is there any change in the rules of access to documents by former White House aides?

Mr. BUCHEN. The problem is that there would, of course, be an interim before the Nixon-Sampson letter agreements can be fully implemented. How we will handle the interim arrangements, I am sure can be worked out with Jack Miller as attorney for Mr. Nixon.

Question. As you recall, in the Agnew case, a paper prepared by the Justice Department listing the law violations by the former Vice President was presented in court on the theory that the American people were entitled to have the full story in addition to the specific charge to which the former Vice President pleaded?

In President Ford's preparation for today, what thought did he give to the presentation of an analysis by Special Prosecutor Jaworski of the full extent of President Nixon's role in the Watergate case, and is there any understanding at this point of eliminating Special Prosecutor Jaworski's ability to pursue that type of investigation?

Mr. BUCHEN. There is no limitation on what Mr. Jaworski can do except, of course, the punative defendant has the defense now of pardon.

On the first part of your question, there is a distinct difference between asking a man to plead guilty to a limited offense and the treatment of Mr. Agnew, of course, was done under very different circumstances by the system of justice. In this case, it was reliance entirely on the pardon powers which involve acts of mercy.

Question. You said earlier that you had assumed that Mr. Nixon may have been prosecuted, is that as far as you are willing to go on that issue? Did you all think it was likely that he would be prosecuted?

Mr. BUCHEN. If you mean tried or indicted?

Question. Indicted?

Mr. BUCHEN. I think it would be very likely that he would be indicted. How and when he could be tried was still an open question.

Question. This likelihood, is that on the strength of your conversation with Mr. Jaworski that you think it was very likely?

Mr. BUCHEN. No, it was largely on the basis of what the Grand Jury apparently intended to do on the basis of less evidence than is now available.

Question. Mr. Buchen, if the ex-President retains the sole right of access to the documents and as I understand this GSA agreement, can even limit access by the Archivist of the United States and his staff, why should the United States remain as custodian of the documents at all?

Mr. BUCHEN. There is a double-key arrangement. In other words, access can't be obtained by either the former President or the General Services Administration except by their concurrent acts.

Question. But he could conceivably, to prevent himself from embarrassment, limit access—no one could see these documents during the three years the United States agrees to act as custodian.

Mr. BUCHEN. Unless there is a court order or subpoena.

Question. What about the court orders or subpoenas that are outstanding?

Mr. BUCHEN. We will have to take this agreement to the courts involved in those proceedings and seek relief from the present processes and subpoenas on the basis of the current agreement.

Question. Mr. Buchen, did you and the President give much consideration to the fact that a criminal trial could have cleared Mr. Nixon of the charges of possible guilt, could have cleared him, cleared his name?

Mr. BUCHEN. We certainly recognized that as a possibility. Whether it was given any consideration, I don't know.

Question. I mean by you or the President?

Well, you were there. What was your own view?

Mr. BUCHEN. My own view is that that was a possibility. If that was what the former President wanted to do, he certainly would have told us. He didn't have to accept the pardon.

Question. Did you recommend the pardon?

Mr. BUCHEN. I had nothing to do with recommending it or disrecommending it.

Question. Did you ever discuss the political implications of this pardon with the President?

Mr. BUCHEN. I did not.

Question. Mr. Buchen, to follow up on some of these other questions, it seems that President Ford has an interest in building into the public record a record of Mr. Nixon's alleged criminality for the same reasons that Mr. Agnew's alleged criminality was made a part of the record, to prevent him from saying that he was driven out by political opponents, et cetera. Is President Ford satisfied that former President Nixon's record of wrongdoing is sufficiently in the public record now?

Mr. BUCHEN. All I can tell you is that he knows nothing that you don't know.

Question. Mr. Buchen, does the pardon in any way affect Mr. Nixon's payment of back income taxes?

Mr. BUCHEN. Not at all. This does not apply to civil liabilities.

Question. Let's get back to this double-key arrangement. This is just so much lawyer's language.

Mr. BUCHEN. I know that is complicated.

Question. Does that double-key arrangement prevent the President from going in there and destroying some of those tapes if he wanted to?

Mr. BUCHEN. Yes, it does.

Question. So, there is adequate safeguards?

Mr. BUCHEN. Yes.

Question. Does it mean that if any of those tapes are subpoenaed and he just refuses to honor those subpoenas, then what would happen?

Mr. BUCHEN. He would be subject to contempt of the court that issued the subpoenas. It doesn't apply to any future acts.

Question. When will the tapes be physically moved to this repository in California or are they going to remain here?

Mr. BUCHEN. No, they will be moved to the California repository as soon as we can get rid of, or modification of the existing orders that require they be retained here.

Question. Is that that Laguna Niguel pyramid they will be put in?

Mr. BUCHEN. Yes.

Question. But nobody can get in there by themselves. There will always be somebody to watch; is that correct?

Mr. BUCHEN. Yes.

Question. When you say "current", are you referring to the two court orders that are pending?

Mr. BUCHEN. There are at least three court orders that I know of. One is in the Wounded Knee case in Minnesota. Another is in the nature of an order because the court declined to issue the order on the assurance that documents or tapes could not be moved, and that is the case involving the networks. So, you can get Ron to answer your questions on that.

The third one is the civil suit in North Carolina involving a suit by people kept out of a meeting to celebrate Billy Graham Day.

Question. Mr. Buchen, Mr. Jaworski has, of course, in his possession a considerable number of tapes which are not the originals. They are copies. This agreement with Mr. Sampson does not affect that, does it? They don't have to be returned to the mass to be moved out to Laguna?

Mr. BUCHEN. The copies wil be disposed of as the court orders, I assume.

Question. But this does not require them to be returned to the big group?

Mr. BUCHEN. No.

Question. Can I clarify the chronology of all this? When is the first time the President indicated to you he might want to pardon Mr. Nixon?

Mr. BUCHEN. Just at the start of the Labor Day weekend.

Question. On which day?

Mr. BUCHEN. I know I started to work Friday night, so it must have been Friday.

Question. Did you have any contact with Mr. Miller on the issue of a pardon?

Mr. BUCHEN. Not at that time. The first contact, I think, was on Thursday of this week.

Question. And you can't suggest what precipitated the President's interest?

Mr. BUCHEN. I do not know.

Question. Can you tell us whether the President ever tried to—I hesitate to use "extract"—but get any admission of guilt from the President, or was it strictly——

Mr. BUCHEN. He did not.

Question. Mr. Buchen, you said that President Ford has not talked to former President Nixon since Mr. Nixon retained Miller. Could you tell us the last time President Ford had contact with President Nixon, direct contact?

Mr. BUCHEN. I don't know. I think it may have been the time of the Rockefeller appointment.

Question. Mr. Buchen, I am not clear on one thing, and following up Helen's question, your emissary went out on that Thursday, Mr. Becker went out on Thursday, that was the only time he went out. I am trying to get clear in my mind precisely what it was he told the former President, or told Mr. Ziegler, and

both of them at different times, that President Ford, in all probability would grant a pardon. What did he ask either of Mr. Nixon or Mr. Ziegler? What did he ask that Mr. Nixon do? Did he ask that this statement we have been given today be issued? Did he suggest wording and what it should say or did he ask for nothing? Did he ask for more than what we got in this statement?

You say at one point the former President could have turned down the pardon.

Mr. BUCHEN. Yes.

Question. Did he offer that option and did he say if the pardon was to be granted, what the former President then should do?

Mr. BUCHEN. The former President was represented by counsel, you know.

Question. Well, did he make the offer to Mr. Miller?

Mr. BUCHEN. Mr. Miller is shrewd enough attorney to know that he could have advised his client to accept or reject the pardon.

To answer your other question, as you can see, that letter agreement is a very complicated one and it involved a lot of practical problems. Before Miller and Becker went out, a rough draft of Miller's proposal was in our hands. But it was obvious that we could not work out the details of what would suit Miller's client and what would suit GSA and what would suit what we thought was the best interests of the Government and of the potential other parties in interest without going out and making the final draft out there. And that was done.

As far as the statement from the former President is concerned, that was a matter that was left entirely up to the discretion of his own counsel and his own advisers.

Question. Let me see if I can put it another way, Mr. Buchen. Was the pardon in any of the conversations involving yourself, Mr. Becker, or anyone else, with anyone representing the former President, was this pardon contingent on anything?

Mr. BUCHEN. I have said no and I repeat no.

Question. Are you saying if he had not given this letter at all, if he had said, "Well, I will make no letter agreement," are you saying categorically that a pardon would have been issued anyway?

Mr. BUCHEN. I am not sure because President Ford could have changed his mind or not made up his mind finally.

Question. When was the package completed that was announced today?

Mr. BUCHEN. We got the agreement back on early Saturday morning and spent that day reviewing it with Mr. Sampson so that was wound up.

Question. You mean yesterday morning?

Mr. BUCHEN. Yes, yesterday morning. The statement, of course, we didn't see until we got it over the wires right after the speech.

Question. Did the President know there was going to be a statement before he finally decided on the pardon?

Mr. BUCHEN. Yes.

Question. Did he have any idea what the contents would be, what the tone would be?

Mr. BUCHEN. In a general way, yes.

Question. You are saying that the pardon had nothing to do with this letter agreement?

Mr. BUCHEN. That was not a condition.

Question. That was a completely independent action?

Mr. BUCHEN. Right. The negotiations for that agreement were started independently before even consideration of a pardon.

Question. The decision to pardon was not made until after this agreement was obtained?

Mr. BUCHEN. That is right.

Question. What you are saying, you cannot say there would have been a pardon if the agreement had not been made?

Mr. BUCHEN. All I can say is that the President had the right not to grant a pardon because he had not finally made up his mind to do so.

Question. When did he make up his mind to do so?

Mr. BUCHEN. I suppose until that pen got on paper or until he started making the statement.

Question. He made his decision after the agreement was made?

Mr. BUCHEN. That is correct, but what went on in his mind, I don't know.

Question. When did he write the speech?

Mr. BUCHEN. Last night.

Question. In sending this word through the emissary to Mr. Nixon that he was thinking of or expected to pardon him but was reserving time judgment, was that

in any way intended as encouragement to Mr. Nixon to get on with the final agreements and possibly offer the kind of a statement that he did offer today?

Mr. BUCHEN. That was not the intent. If it created that impression, it was a wrong impression.

Question. Mr. Buchen, you said that the President had an indication in a general way of content of the former President's statement. If I may ask a two-part question: How did he obtain this indication, and did he believe, or was he informed, that the statement would be one of contrition?

Mr. BUCHEN. The report was through the mouth of Benton Becker, and the characterization of it as an act of contrition is mine.

Question. Excuse me, then. What general feeling did the President have that the statement would be, what indication did he have of what the statement would be? How was it characterized by Mr. Becker?

Mr. BUCHEN. He in general told the President what it amounts to and in particular called attention to the fact that there would be an acknowledgement of failure to act decisively and forthrightly on the matter of the Watergate break-in after it became a judicial proceeding.

Question. Was that negotiated at all?

Mr. BUCHEN. It was not negotiated.

Question. Was Mr. Becker informed of that on Thursday at the time he went out there?

Mr. BUCHEN. I think he was informed on Friday because he got out there very late on Thursday night.

Question. Do you know if that information had any effect on Mr. Ford's decision?

Mr. BUCHEN. I don't know. I am sure it pleased him and made him feel that it was easier for him to act as he contemplated doing.

We will take three more questions.

Question. Would you please clear up some things about this letter of agreement. I am sorry, but it will take me some time to understand it. Let me see here if this is what it means. Unless there is a subpoena or a court order which Mr. Nixon would reply to, any ordinary citizen of the United States, or any officials, outside of Sampson, could not just go in there and look at these tapes or listen to them, or see them at any time. They will be shut off completely to the public?

Mr. BUCHEN. That is right.

Question. Mr. Buchen, why is the date of July 1969 mentioned in the pardon?

Mr. BUCHEN. It is January, the date of inauguration, January 20. President Ford misspoke when he used the word "July".

Question. How complete was your explanation of case against the former President by Mr. Jaworski? Did he go into what areas that he might be pursuing, what he heard on the tapes that have not been made public? Anything like that?

Mr. BUCHEN. The question asked him what matters could arguably involve further steps, and it read like a list from one of your newspapers.

Question. Did Mr. Becker talk strictly with you or did he ever speak to Mr. Ford? Did he deal strictly with you?

Mr. BUCHEN. Oh, no; he was also in the room on occasions when I was speaking to the President.

Question. Why did he pick Becker to do this?

Mr. BUCHEN. Part of the problem, as you may know, is we have a rather understaffed legal staff here and Mr. Becker is a man of rare talent that helped during the confirmation hearings of the Vice President, and he is such a good and trusted friend of both of ours that we felt he was the one we should call on.

The PRESS. Thank you.

Mr. BUCHEN. All I am going to say is, for the tapes there will be two five-year windows. The first of the five-year windows involves controlled access by the former President for his listening to copies of tapes, copies to be made by an operator who himself does not listen to the originals.

Also, during the first five-year window, anyone with a legitimafe court subpoena or order that is upheld can have access or can require the former President to furnish the information contained on relevant portions of the tapes.

At the end of that first five-year period, the former President retains his window, but also can order selective destruction of tapes. At the end of the ten-year period, they all get destroyed, all that remain.

Question. In the second five-year window, is that just by persons who have legitimate subpoenas and court orders closed off?

Mr. BUCHEN. That is right, because there is a five-year statute of limitations on most, in fact on all, Federal offenses and most civil matters, so it is assumed the initial five-year window is long enough.

Question. What is the limit on destruction after five years plus one day, or can he destroy them all?

Mr. BUCHEN. He can.

Question. He can?

Mr. BUCHEN. He can order them destroyed.

Question. If they were making any copies, would the originals then be destroyed in the second five-year window?

Mr. BUCHEN. The originals will be destroyed. The copies will be destroyed immediately after they are used.

Question. And he could do it after five years and one day for everything?

Mr. BUCHEN. Right.

Question. Now can you go then from there to the documents?

Mr. BUCHEN. The documents are a different category. There is no present gift of documents as distinguished from the tapes. However, there is a three-year period when there will be controlled access by the owner of those documents requiring the double-key arrangement with the General Services Administrator. And the former President is under obligation to respond to any subpoena involving documents, just as he is to those involving tapes.

During the three-year period involving documents, the former President will be under obligation to respond to subpoenas involving those documents. At any time, the former President can designate certain documents by description to become the absolute property of the United States.

However, after the three-year period, he may either elect to complete his gifts or to withdraw materials as he desires. These are documentary materials.

Question. Why the three-year limit?

Mr. BUCHEN. We felt that as a practical matter on the documentation that would be long enough. It gives everybody a warning. Obviously if there is a subpoena out that was obtained in the three years and the matter of its resolution has not been concluded, the subpoena would prevail.

Question. Can you destroy the documents after three years?

Mr. BUCHEN. Yes, if he wants to withdraw them.

Question. By the way, Mr. Buchen, I may be wrong in what I am about to say, but I am going to predicate a question on it, nevertheless.

I am under the impression that the tapes, as opposed to documents, the tapes were—that things such as tape recordings were not covered when Congress covered that loophole and for that reason, the former President could donate those tapes to the Government and claim a tax exemption.

Your second window, the ten-year time of destruction appears to rule that out; is that right?

Mr. BUCHEN. He has already given them to the U.S. Government to be a gift effective at the end of the 5-year period.

Question. After he destroys them all?

Mr. BUCHEN. He can't destroy them during the first five-year period.

Question. He has given them as a gift to the United States—we are talking about tapes now—he has given them as a gift to the United States for five years; is that right?

Mr. BUCHEN. No, it is the other way around. He has retained title for five years and the gift takes effect at the end of the fifth year.

Question. But he can destroy his gift?

Mr. BUCHEN. He doesn't have access to them.

Question. But he can the next day. Didn't you say five years and one day he could destroy them all?

Mr. BUCHEN. He can order their destruction.

Question. What can he do with the copies? Can he dispose of them for his own purpose?

Mr. BUCHEN. No, the copies will go back into the hands of the General Services Administrator and they will be destroyed after he has listened to them.

Question. Mr. Buchen, after the ten-year period, is it mandated that the tapes, all tapes and all copies be destroyed?

Mr. BUCHEN. That is a condition.

Question. So, his gift in the second five years is a limited gift, in time it is a limited gift, say limited to five years; is that right?

Mr. BUCHEN. No.

Question. You say he has given them to the United States?

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Mr. BUCHEN. Effective five years from now.

Question. Why are they going to be destroyed after five years?

Mr. BUCHEN. Well, maybe they never should have been made in the first place. This was his desire and I think it is consistent with the fact that these matters do involve conversations with people who had no realization that their voices were being recorded.

As an old spokesman for the right of privacy, I think there is considerable merit for putting these in a separate category from documents.

Question. Mr. Buchen, was any consideration given to the right of history?

Mr. BUCHEN. I am sure the historians will protest, but I think historians cannot complain if evidence for history is not perpetuated which shouldn't have been created in the first place.

Question. Is there anything he can keep, or intends to keep?

Mr. BUCHEN. I am sure there are items in the documents that he would intend to keep. Of course, it would involve family letters, things of a highly personal nature.

Question. Mr. Buchen, if it is Mr. Nixon's desire to destroy the tapes after ten years, would it not be logical to assume he will destroy them after five years?

Mr. BUCHEN. That is his option, order them destroyed.

Question. What about the gift option? The tax deduction option?

Mr. BUCHEN. I am not his tax lawyer and it seems to me if you give a gift with instructions that the items have to be destroyed, that the gift immediately loses its value, so I would think it would be very questionable.

[For immediate release]

September 10, 1974.

OFFICE OF THE WHITE HOUSE PRESS SECRETARY

PRESS CONFERENCE OF PHILIP BUCHEN, COUNCIL TO THE PRESIDENT

THE BRIEFING ROOM

At 12:49 P.M.

Mr. HUSHEN. As I announced earlier, Mr. Philip Buchen, the Counsel to the President has agreed to come back out here today to answer some of the questions you have.

Let me say we are going to give them 60 seconds to get some photographs and then they will go away. [Laughter]

Let me say at the outset that the document that is about to be handed out is embargoed until the completion of the briefing.

This is a follow-up, of course, of the meeting we had on Sunday. And at that time someone asked the question about the disclosures made to me by Special Prosecutor Jaworski to the areas of investigation in which his special force was engaged.

And my answer was that the question asked him was: "What matters could arguably invoke further steps?"

And I reported that it read like a list from one of your newspapers.

You have now before you the document that was furnished to me and, although the copy of the Special Prosecutor's memorandum from Henry Ruth to the Special Prosecutor dated September 3, 1974, on the subject of Mr. Nixon was sent to me in confidence, Mr. Jaworski has since advised me that, if I were willing to assume the responsibility for its release, he would raise no objection to my doing so.

However, he cautioned that in the event of its release, he would expect that it be made available in its entirety, including the first and last paragraphs of the memorandum, and I quote that the first paragraph reads:

"The following matters are still under investigation in this Office and may prove to have some direct connection to activities in which Mr. Nixon is personally involved:"

At the conclusion of the memorandum Mr. Ruth, in reporting to Mr. Jaworski, wrote:

"None of these matters at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon, but I thought you ought to know which of the pending investigations were even remotely connected to Mr. Nixon. Of course, the Watergate cover-up is the subject of a separate memorandum."

Now I will try to field any questions.

Question. Tell us about considering pardons for everybody involved in Watergate?

Mr. BUCHEN. I am not involved in that matter.

Question. Well, who is?

Mr. BUCHEN. I said at the time of the last press conference to my knowledge no thought was being given to that and I have not been called in to do any part of the study so far. I assume I will be.

Question. Who is at this point? Who is considering this, the President?

Mr. BUCHEN. The President made the statement.

Question. Mr. Buchen, can you tell us if anyone tried to persuade Mr. Nixon to confess guilt prior to the granting of the pardon by President Ford?

Mr. BUCHEN. No. Mr. Miller, at the time that I informed him that the President was considering a possible pardon for Mr. Nixon, was told by me that I thought it would be very beneficial in the interests of the country, in the interests of the present Administration and in the interest of the former President, that as full a statement as possible should be issued by Mr. Nixon but that I had been told that that was not a condition to the consideration of the pardon.

Mr. Miller at that time assured me that he agreed with me that such a statement should be forthcoming from his client.

Question. Mr. Buchen, I was wondering, if, as the President's legal counsel, would you advise that the President in this study about the possibility of giving amnesty to all the Watergate people, that excluded from the people doing the study should be all Nixon holdovers? Would you advise, or do you think it is reasonable for Nixon holdovers to participate in a study of possible amnesty to all Nixon defendants?

Mr. BUCHEN. I think that is a decision the President will have to instruct me on.

Question. How would you advise him? Did you finish your answer to the earlier question?

Mr. BUCHEN. I was finished.

Question. Could I follow-up then, sir? Did the former President balk at this, was there negotiation on what finally came out in his statement afterwards?

Did you see that statement, sir, or did anyone else in the White House see it prior to its issuance?

Mr. BUCHEN. When Mr. Becker came back from San Clemente, he was able to report the substance of the statement that he thought would be forthcoming after the announcement was made.

But we did not have the statement in the form in which it was ultimately delivered.

Question. Are you satisfied that this was as full a statement as possible coming from the former President?

Mr. BUCHEN. That is something that I think would require going into the former President's mind. Obviously, if you do not condition an act of mercy on the recipient of the mercy doing anything, you are not in a position to do much bargaining.

Question. Mr. Buchen, did Mr. Becker go to San Clemente with a much stronger statement, or a statement—

Mr. BUCHEN. He had no statement in hand.

Question. You say he came back with a statement—he reported the substance of the statement he thought would be forthcoming. Was that substance substantially different from the statement that was then issued?

Mr. BUCHEN. No, the essential feature was the statement that the President believed he had not acted decisively and forthrightly in respect to the Watergate once it became a judicial proceeding and the regret for having done wrong was in the report that Becker gave us.

Question. Was it your hope or intention early in those negotiations to get Mr. Nixon to agree to a statement in which he admitted his own personal wrongdoing and involvement in the Watergate cover-up?

Mr. BUCHEN. Again I had to rely on what Mr. Miller believed would be in the best interests of his client and the country, because I had no authority to extract a statement of my own making.

Question. Not what was in the former President's mind, but what was in your mind? Do you think that the final statement met the standards that you and Mr. Miller discussed at the meeting?

Mr. BUCHEN. Well, I think they did, because, as some of your papers have already suggested, the very fact that a man accepts a pardon does imply that

he believes it is necessary for him to have that pardon, or that it is useful for him to have that pardon.

And there aren't many instances in which it is useful to have a pardon unless there is a strong probability of guilt.

Question. Mr. Buchen, do you think that you and President Ford misread the public's acceptance of the terms of this pardon and the acceptance in Congress?

Mr. BUCHEN. Well, I was not doing much reading on the outside as to what might happen. That was really outside my bailiwick, so I cannot tell you.

Question. Mr. Buchen, do you and the President hope that the former President will at some time, perhaps in the near future, release some kind of formal statement detailing further his connection with Watergate?

Mr. BUCHEN. I have not given that any thought and I assume that would be entirely up to the former President.

Question. Mr. Buchen, you were involved in the pre-accession negotiations and pre-transition operations of the Ford Administration. Was there at any time any discussion between any high-ranking member of the Ford group and any member of the Nixon group as to the possibility of a pardon for Nixon in advance of his leaving office?

Mr. BUCHEN. I answered that question Sunday and, to my knowledge, there was absolutely none and it never came up as a matter to be discussed by the transition team. And I think I participated in virtually all meetings of the transition team.

Question. How about between Ford and Nixon alone?

Mr. BUCHEN. I don't believe so.

Question. Can you find out definitely whether there was no deal before Nixon left office?

Mr. BUCHEN. Well, I know the man in the President's office quite well and I can assure you he did not make a deal. I know him that well.

Question. Mr. Buchen, he assured us in a press conference it would be untimely to do such a thing, and he assured us when he was nominated for Vice-President that the American people would not stand for it. Can you give us an explanation of this?

Mr. BUCHEN. Let's take the first; the matter of untimeliness seems to me to involve a debate that really makes little sense, because a man who had to consider whether or not to grant a pardon, it seems to me, has to consider the fact that if a pardon is desirable, the earlier it comes, the better.

It is like making a man walk a plank. You wait until he takes the first step. You wait until he gets to the middle of the plank. You wait until he jumps off the end, and then dive in to rescue him. I think it represents—let me put it this way. I don't think an act of mercy can ever be untimely, and it certainly becomes less merciful if you postpone the agony.

Question. Mr. Buchen, in that statement, you are suggesting that the former President was going to go off the end of the plank?

Mr. BUCHEN. I think there was a strong possibility.

Question. When Mr. Becker was out at San Clemente, did he discuss in the President's presence what the President might say in a statement, and did the President get angry at the suggestions that he admit guilt?

Mr. BUCHEN. I think those negotiations were entirely with Mr. Ziegler, so I don't think we have any knowledge of what the President—

Question. The New York Times states this morning as I quoted it. You better clear up what you mean by "walking the plank;" do you mean suicide or going to jail?

Mr. BUCHEN. No, as I understand "walking the plank," it is because the man has been convicted of some crime that offended the master of the ship, or not convicted, say indicted.

Question. What about the question of health; Mr. Buchen, how did that figure into this decision?

Mr. BUCHEN. I don't know because I wasn't party to any of the investigations or discussions, if there were any, about the former President's health.

Question. Did you say Mr. Becker at no time spoke to Mr. Nixon in San Clemente?

Mr. BUCHEN. I didn't say that.

Question. I thought you said the negotiations were entirely with Mr. Ziegler?

Mr. BUCHEN. I don't know whether there were negotiations but the matter of the content of the President's statement, which he contemplated giving when the pardon was issued, was dealt with entirely through Ron Ziegler. The only

face-to-face matters taken up with the former President dealt with the manner of managing and disposing of his papers and tapes.

Question. Mr. Buchen, did Mr. terHorst ask you on Friday whether Mr. Becker was involved in discussing a pardon with the former President during his trip to California, and if he did, what did you tell him?

Mr. BUCHEN. Well, we better clear that one up.

Jerry terHorst reported to me that someone had observed Benton Becker and Jack Miller in the area of San Clemente. Jerry terHorst asked me what the purpose of my having sent Benton Becker out to San Clemente was, and I said that the purpose was to take a document that had been prepared in rough draft before he left Washington, had been prepared by Mr. Miller, which related to the management and diposing of the tapes and records.

However, we objected and wanted changes in those documents, partly because we were concerned as to the practicality of some of the proposals made insofar as they involve the Administrator of the General Services Administration.

The matter is very complex, as you see, so I sugegsted, when Mr. Miller said he would have to go and discuss the terms of that document with his client, that Mr. Becker go along, so that there would be a way that Mr. Becker could be on hand as changes, additions or whatnot were proposed and so that he would be available to report back to me on the progress of the negotiations. That was the purpose of the assignment.

Question. We specifically asked you if Mr. Becker was out there engaging in pardon negotiations?

Mr. BUCHEN. There were no pardon negotiations, that is the point.

Question. Anything at all? You sent him out with instructions to say that the President had this under consideration? Would you answer my question, please?

Mr. BUCHEN. Mr. Miller knew that the pardon was under consideration, and he could report to his client. It was not necessary for Mr. Becker to do anything in connection with the pardon.

Question. Didn't Mr. Becker take out a copy of the proposed pardon?

Mr. BUCHEN. Yes, he did. It was a draft that he and I had worked on very hurriedly Thursday afternoon before he had to leave on the plane. I said, "Benton, you are going to be five hours on that plane, take a copy along, keep working on it, I don't think it is in the form we want to submit to the President for his consideration. Take it along and work on it."

Question. You didn't tell Mr. terHorst that?

Mr. BUCHEN. No, I will explain; as you may appreciate, being counsel to anyone, or lawyer to anyone, imposes certain restrictions, and I believe, on this matter, I was under complete restriction as a lawyer to the President not to disclose what I was doing for the President on a matter that he regarded as highly confidential.

Question. Did the subject of pardon ever—Would you say that you misled Mr. terHorst on Friday?

Mr. BUCHEN. Let me put it this way; I can see how he could have been mislead.

Question. Can you see how he could have been misled?

Mr. BUCHEN. No, I can see how he could have been misled. I don't say he could not have been. After all, if you get a question, why is a man whom you have sent to San Clemente there, and I give him an answer, I can see when he in turn and to respond to the man, or the reporter making the inquiries, that he would inject a negative, was he there doing anything else. And I assume that Jerry said, "Well, as far as I know he wasn't," because I had not told him he was doing anything else.

Question. Did you tell him he wasn't out there discussing the pardon?

Mr. BUCHEN. Oh, no.

Question. Why was it something you couldn't talk about?

Mr. BUCHEN. I could talk about the negotiations on the tapes.

Question. When he asked you about the pardon?

Mr. BUCHEN. He didn't ask me about the pardon.

Question. What was the precision of language used in President Nixon's statement?

Mr. BUCHEN. Let me get the question.

Question. What was the need for the secrecy in the negotiations, whatever they were?

Mr. BUCHEN. In the course of any client and attorney relationship, usually until something happens, you are under obligation not to disclose the conversations.

Question. I mean, what was the need for secrecy about the fact that a pardon was being considered, generally, not just your conversations with the President?

Mr. BUCHEN. Well, generally, that was the President's decision and not mine. I was just bound by my client-attorney relationship.

Question. Mr. Buchen, if Mr. Becker knew all about the pardon, the President seemed to trust him with that information, yet he didn't trust Mr. terHorst with that information? Or you didn't trust Mr. terHorst with it?

Mr. BUCHEN. I had no power to subdelegate in passing information. The first question is why didn't the President trust Mr. terHorst to have the information at the same time I got it?

Question. No, I mean Mr. Becker. You are talking about the attorney-client relationship, which involves you and the President; Mr. Becker is someone outside that relationship, yet he knew about the pardon because he was working on the pardon agreements.

Mr. BUCHEN. No, he had the same relationship that I had in terms of his being a lawyer and working under my supervision as a lawyer for a client. As in a law office, if a client comes into an office and the lawyer assigns a law partner to work on it, the obligation extends to the other lawyer as well as the original one.

Question. Can you be forthright with us on what is your advice to the President on pardoning other individuals associated with the—

Mr. BUCHEN. I have not given him any advice.

Question. What would be your advice; how do you see the issue?

Mr. BUCHEN. I haven't even had time to study it.

Question. When did the President's other advisers find out that the pardon was under consideration or was to be granted, and did they agree with it when they found out about it? And did you?

Mr. BUCHEN. I was in the room at the time when certain advisers were told about it on Friday before Labor Day, but I don't feel free to report their reactions.

Question. Can you tell us what role General Haig played in this granting of the pardon? He was in on all of this all the time, wasn't he? Was he recommending a pardon during this period? What was the question?

Mr. BUCHEN. I was asked that question last night and I can tell you that every occasion when I was present when the subject was raised and General Haig was there, he took an absolutely neutral stand.

Question. Did you say you are not part of the study for the other Watergate defendants? Can you tell me when you became aware that that study was in the works?

Mr. BUCHEN. I learned from Mr. Hartmann and Mr. Hushen that this matter was brought up at the early morning conference.

Question. Who brought it up? Today for the first time? Did you say there was a connection between the pardon for the others and the reaction against the pardon for Nixon? And secondly, if you are the President's lawyer and you are not working on it, who is?

Mr. BUCHEN. Well, I don't know, Ron. I really don't.

Question. What about the first part of that question; is he trying to dampen down the reaction by giving out pardons to the others?

Mr. BUCHEN. Well, I don't interpret studying a pardon as predicting what the results would be.

Question. Mr. Buchen, as a lawyer, can you see a distinction between a President granting a pardon to a former President and granting pardons or not granting pardons to former subordinates for involvement in the same illegal acts?

Mr. BUCHEN. Well, there certainly is a distinction. I will later have available for distribution—because I don't think there will be many questions on it—a memorandum, a copy of a memorandum that Mr. Jack Miller prepared for the Special Prosecutor in which he rather carefully documents the reason why the situation of his client is distinguishable from the situation of anybody else's remotely involved in the acts, or Watergate-related events.

You will remember I quoted a letter from Mr. Jaworski who did say he thought there was a distinction.

Question. Phil, could I ask you this question: Does not the mere fact that the White House has made a statement saying that pardons for all Watergate defendants are under study, does that not intrude upon the judicial process to the point that the trial for the Watergate defendants, the trial for September 30, is somehow intruded upon and interfered with by this statement?

Mr. BUCHEN. Well, I don't think so. You see, after all, the fact that there can be a pardon hangs over the trial of anybody. That is not a unique situation. The power to pardon exists in the Federal Constitution and I believe in every State Constitution.

Question. This is a matter of great and intense national interest. It is not like the case of any defendants. This is a case of specific defendants that have been involved in a great national drama or what have you, so it is a different case, is it not?

Mr. BUCHEN. Yes, but the Presidential pardon power, as well as that of a Governor of a State, hangs over the judicial process all the time.

Question. What purpose was served by announcing this morning, or authorizing Jack Hushen to announce it this morning?

Mr. BUCHEN. Well, I was not party to that determination so I can't tell you.

Question. What purpose was served by announcing the Jaworski letter on the ten points?

Mr. BUCHEN. Well, as I indicated, it was given to me on a confidential basis. The comments that have been made around town is that there was not a consideration given of what was, what someone else called "are there any possible time bombs", and we felt that it would be in the interest—provided Mr. Jaworski consented—that we do provide you with the information on which the President in part acted before he decided to grant the pardon.

Question. In this study that is being undertaken, sir, what is your understanding of the philosophy behind it—that families of all Watergate defendants have suffered enough, or what other considerations?

Mr. BUCHEN. I can't go beyond the statements Jack gave you. That is all I know.

Question. Where did it first come up? Where did this subject of possible clemency for all other Watergate defendants first come up? You didn't make that clear. You said "an early morning conference".

Question. What morning?

Mr. BUCHEN. This morning.

Question. What were the circumstances?

Mr. BUCHEN. I don't know except it was reported to me by Mr. Hartmann and Mr. Hushen that it was raised this morning.

Question. Where?

Mr. BUCHEN. I assume with the President. I don't know the circumstances.

Question. Is this a reaction, Mr. Buchen? Is this consideration of the study, consideration of pardons, and the announcement of this study, is this a reaction to the popular outcry against the pardon of the former President?

Mr. BUCHEN. I don't think so because the fact that two people are brought into his confidence this morning and that confidence has been shared with you today, doesn't mean that that is when the thought came.

I explained on Sunday when the question was asked me as to whether any thought was given to the way in which the pardon power might be exercised, if at all, respecting other people involved, I said that to my knowledge—meaning that as far as I knew—no thought had been given. But that didn't mean that the thought processes weren't going on unbeknownst to me or unbeknownst to the people who got the reports this morning.

Question. Mr. Buchen, in going back to my other question, you said mercy is never untimely. Was the President not merciful ten days ago when he said it would be untimely, and was the President lacking in mercy when he told the committee that the American people wouldn't stand for it?

What caused him to be suddenly merciful? Could you tell us what happened?

Mr. BUCHEN. I wish you would come up here and explain the theory of mercy. You can probably do a much better job than I can.

But let me tell you, it is not whether to be merciful, but how he could be merciful, and I do not think he was aware that he could act before there was any formal indictment when he made his statement before the press.

Question. Wasn't the President briefed on that very point before the news conference? Wasn't he briefed that there would be a question on pardon and this was a policy adopted?

Mr. BUCHEN. That is right.

Question. Why was that policy changed, that there would be no pardon until there was due process?

Mr. BUCHEN. You have lost me, I am sorry.

Question. He announced a policy at that news conference and you say he was briefed on that policy.

Mr. BUCHEN. He said that he would make no commitments. His intention then was to make no commitments on the pardon until something had been brought to him.

Question. Why was that changed?

Mr. BUCHEN. Well, because after the conference, I assume he reflected on the matter, and then asked me to find out whether or not he could move quicker than he had indicated at the press conference.

Question. Did you brief him prior to the news conference that the best policy was for him to wait until there was some——

Mr. BUCHEN. No, I did not.

Question. With whom was he in touch with at that point? Can you tell us who he consulted between Wednesday and Friday when he asked you to begin your research into precedents?

Mr. BUCHEN. I have no notion; I really don't, Pete.

Question. What is your understanding of the investigation status referred to in the memo? Is Jaworski going on in his investigation of these points? Is he going to furnish material to the public?

Mr. BUCHEN. I know nothing more than what is in the memorandum.

Question. The Watergate cover-up, it says, is the subject of a separate memorandum. Has that memorandum reached you?

Mr. BUCHEN. It has not.

Question. Do you know what it concerns?

Mr. BUCHEN. I can imagine what it concerns.

Question. Does it indicate to you, as a lawyer reading this, that that number one is ongoing and unlike this listing of ten points which according to the memo may prove to have some connection, but then says there is no point we can prove regarding Mr. Nixon—does that indicate to you that it is a different story entirely when it comes to the cover-up?

Mr. BUCHEN. As you know, this memorandum was issued before the pardon, so I don't know what the effect of the pardon has on the investigation referred to in the last paragraph.

Question. You must have had some indication from the Special Prosecutor where he stands with regard to the cover-up investigation.

Mr. BUCHEN. I do not.

Question. In preparing your advice for the President, did you address at all the time element of granting this pardon, with specific reference to the possibility that the Watergate cover-up trial might be affected since the jury had not been sequestered?

Mr. BUCHEN. I did not discuss that with the President, but I understand, of course, that, one, it is not certain the jury would be sequestered. I assume it is available to the attorneys for the defendant to waive any such request; and, second, I am not sure that a story like this could possibly have been kept from the jury however tightly sequestered.

Question. Mr. Buchen, did you get from Mr. Ziegler or from Mr. Nixon, either after Mr. Becker returned here or while he was there, some sort of commitment that the President would not in the future make statements protesting his innocence?

Mr. BUCHEN. We did not.

Question. Mr. Buchen, are you saying that the President did not know or understand at the time of the August 28 press conference that the pardoning power could be exercised before indictment or conviction?

Mr. BUCHEN. I certainly had not so advised him, and he had not asked my advice.

Question. You didn't say that? Do you have reason to believe that, that he didn't believe he could move before the indictment was voted?

Mr. BUCHEN. That I don't know. I didn't ask him.

Question. You so far have not given us any explanation for why Mr. Ford changed his mind after that press conference with the possible exception of his receiving this documentation of the investigation.

Does that mean that the investigation turned out to be so serious that he thought the former President wouldn't withstand it?

Mr. BUCHEN. No; I think more significant than that was the advice that I reported Sunday, namely, that before there could be a trial, there would have to be a delay of a year or more, and I think that was the matter that concerned him most.

Question. Don't many trials take a year or more to come to the court or to settle? And why is Mr. Nixon to be treated any differently in this respect than anyone else?

Mr. BUCHEN. Every defendant under the law is entitled to a prompt trial provided he can have a fair trial by an impartial jury.

Question. When did you advise the President of the long delay of nine months or a year? Was that after the press conference?

Mr. BUCHEN. He asked me after the press conference, or that Friday, to find the answer. So apparently someone had told him that that probably would be the case.

But he wanted his own lawyer to ask the Special Prosecutor who would be the best judge, of how long it might take, and that is the reason I went to Mr. Jaworski, so we would have an expert opinion.

I don't claim to be an expert. On the other hand, I have read the cases that are cited by Mr. Nixon's own attorney who makes the same arguments very effectively in a memorandum that you can all take back to your legal counsels, because I don't think you want to read it all.

Question. However you did know that indictments could be very quick, the question of laying out the charges on the public record would not have taken very long—maybe a month; is that correct?

Mr. BUCHEN. As you know, the word came out that the former President—then the President—was about to be named as an unindicted co-conspirator, so the indictment involves—that involves the defendants, involves probably everything that involves Mr. Nixon alone.

Question. But it is not the same, really.

Mr. BUCHEN. I think it is pretty good evidence of what that jury intended to do and would have done if there had not been a pardon.

Question. Was consideration given to the timing of when this jury would have done this, vis-a-vis the November elections?

Mr. BUCHEN. It had nothing to do with the elections. However, it was evident it was the President's decision to grant a pardon before the indictment. He would have to act fairly soon because it was not possible, of course, to grade the Grand Jury in the time it would act.

Question. May I clear up a question here?

Mr. BUCHEN. Let me get Phil first.

Question. In view of the last sentence in this memoradum, didn't you have any qualms about whether you could give the President full legal advice on what he could do? When it says here there are other matters and other memoranda which you have not seen, how could you give the President full advice on what he could do on the pardon in view of that?

Mr. BUCHEN. Well, we believed, of course, that the evidence before the House Judiciary Committee on this very point that resulted in the article that brought a unanimous vote ultimately, and based on particularly the June 23 tapes, gave every indication of what was involved in the alleged Watergate cover-up and we didn't think we needed to know any more than that.

Question. I think my notes are correct, that is, you told us earlier, "I do not think (the President) was aware that he could grant a pardon before the indictment when he made his press conference statement." Is that right?

Mr. BUCHEN. As far as I know. I don't believe that he was or that he understood what, if any, problems—I am talking legal problems, now—would arise if he acted before indictment.

Question. The President seemed to say in his news conference that he wouldn't act on the pardon until after an indictment and your explanation, that there would be nine months or a year, perhaps longer, before a trial, doesn't really go to the question of why he changed his mind about waiting until after an indictment to act on a pardon.

Mr. BUCHEN. Well, I guess all I can go back to is my own analogy. If you are going to—if you do come to the conclusion you ought to consider mercy, it doesn't seem to be very relevant to consider what other steps you ought to require the man to whom you are granting mercy must take.

Question. And at the news conference he had not made up his mind yet?

Mr. BUCHEN. He had not made up his mind.

Question. You are saying the main reason he changed his mind was because somebody told him there would be this long delay and he asked you to check it out and you did. And then he decided to grant the pardon? Did someone decide that the long delay would wreck Mr. Nixon's health?

Mr. BUCHEN. Not that I know of.

Question. Has there been any discussion about the former President not wishing to testify or be a witness?

Mr. BUCHEN. Well, he is under subpoena so he has no choice.

Question. I know, but if you are considering pardons, if there is consideration for others, that would spare the former President from testifying, is that part of this study?

Mr. BUCHEN. I have not seen the study, so I don't know.

Question. In your discussion of the cover-up memorandum a moment ago, you said the June 23 tapes told you everything you needed to know about that.

Mr. BUCHEN. I didn't say everything. I also said the findings of the House Judiciary Committee.

Question. Right, and earlier he spoke of the necessity, the acceptance of the pardon, the necessity for the pardon. Did this mean that you and the President in offering this pardon to the President, would make a presumption of guilt?

Mr. BUCHEN. First, take the "you" pronoun out of that and perhaps I can answer it. I did advise the President that a pardon could be characterized as implying guilt on the part of the person who was pardoned because there is no other reason for granting a pardon. But that did not deter or affect his determination to act when he finally made up his mind to do so.

Question. From the perspective of the person who accepts the pardon, does the acceptance of the pardon amount to a tacit admission of guilt?

Mr. BUCHEN. You can so accept it. The question never came up. I couldn't find in any cases where that question was litigated, so I can't give you any authority. But it just takes common sense and logic to reach that conclusion.

Let's have one of the women.

Question. Thank you.

Throughout this, we have heard solely about the consideration of an indictment and the lengthy period of time between indictment and trial. Did you try to determine from Mr. Jaworski the possibility of a plea from the former President? Now faced with the prospect of a multicount indictment, as he was and as I am sure Mr. Miller advised him, it seems extremely likely there might have been a plea far sooner than there would ever have been an indictment and trial. Did you ask for any timing on this, and if not, why not?

Mr. BUCHEN. I did consult, of course, with Mr. Nixon's Attorney, and I was pretty sure from what he told me that in his mind there would never be a plea.

Question. There would have been a trial then; you are saying he would have gone the whole route had he not been pardoned?

Mr. BUCHEN. I believe so.

Mr. HUSHEN. Let's take two more questions. We been out here for forty-five minutes. Two more questions.

Question. Maybe you have answered this; why did President Ford want mercy for Richard Nixon?

Mr. BUCHEN. Because I think he truly believed it would be in the best interests of the country.

Question. Mr. Buchen, if you are done with that answer, I would like to ask you, as a lawyer, do you think it not fair and proper that, if the President considers amnesty or granting a pardon for persons convicted for or indictments for burglary, perjury, conspiracy in Watergate related crimes, that he should give equal consideration to pardoning other persons indicted or convicted of burglary, perjury or conspiracy in non-Watergate related crimes?

Mr. BUCHEN. I wish I were a better student of the ethics or morality of mercy, but I believe a representative of the clergy would substantiate my remarks that, throughout our religious history—and I don't mean just the Christian Religion—there has always been a separate category of mercy that we know has never been equally dispensed and we know that it is an act of grace that is many times inexplicable.

I am sure all of us in the room have sought mercy on matters that we wanted to blame ourselves for, or some adverse consequences, and we didn't always get mercy.

Mercy seems to work in very unequal fashion. That is a point on which Jerry terHorst and I have disagreed. He has a notion, as he said, that mercy should be dispensed with in the same even-handed fashion as we would like to see justice dispensed.

But, I believe history tells us mercy doesn't work the same way.

Question. Mr. Buchen——

Mr. HUSHEN. Thank you, Ladies and gentlemen.

Question. Mr. Buchen, is there any limitation on the power of pardons?

Mr. BUCHEN. I refer you to——
Question. Is there any limitation on this at all?
Mr. BUCHEN. I refer you to the Constitution.
Question. Is there anything he could do that was more than this?
Mr. BUCHEN. No, not that I could find in the Constitution; no.
The PRESS. Thank you.
End (1:37 P.M. EDT)

THE WHITE HOUSE,
Washington, September 23, 1974.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: It has been called to my attention that a subsequent letter of yours to me dated September 18, 1974, refers not only to H. Res. 1367, but to an additional resolution introduced by Representative Conyers, H. Res. 1370. Please be advised that the response of September 20, 1974, concerning H. Res. 1367 is also applicable to H. Res. 1370.

Sincerely,

GERALD R. FORD.

THE WHITE HOUSE,
Washington, September 24, 1974.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The President has asked me to reply to your second letter to him of September 17, 1974, which concerns the disposition of tapes and documents compiled by former President Nixon and currently within the custody of the Federal Government.

These materials, as you know, are the subjects of various subpoenas and court orders and of requests for disclosure by the Office of the Special Prosecutor. As a result, no further action is being taken to affect the disposition of such materials until after the issues raised by the pendency of the subpoenas, court orders, and Special Prosecutor's requests are resolved. The period of time involved in resolving such issues will of itself operate to assure adherence to the request in the second paragraph of your letter.

I shall, of course, keep you informed, if you desire, of any later developments which could lead to a change in the present situation.

Sincerely yours,

PHILIP W. BUCHEN,
Counsel to the President.

WATERGATE SPECIAL PROSECUTION FORCE,
U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., September 24, 1974.

Hon. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is to reply to your letter of September 17. In your letter you request that this office take all necessary steps to ensure that the tapes and documents compiled by former-President Nixon relating to the Watergate matter remain in their present location until Congress has had an opportunity to consider various legislative proposals submitted to deal with these issues.

We have formally requested that the Administration take no steps to disturb the present location or custody of the tapes and documents produced during Mr. Nixon's Presidency and specifically have asked that no steps be taken to implement the letter agreement between the former President and the Administrator of General Services which would transfer the custody and location of these materials. We have been given assurances by the Counsel to the President that this request will be respected and that no further change in the status of these items will be made pending further discussions about our need to protect our interests.

We remain ready to cooperate with the Committee in any way appropriate.

Sincerely,

LEON JAWORSKI,
Special Prosecutor.

SEPTEMBER 25, 1974.

President GERALD R. FORD,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: I am in receipt of your letters dated September 20, 1974, and September 23, 1974, responding to my letters concerning the priviliged resolutions, H. Res. 1367, and H. Res. 1370, introduced by Representative Abzug and Conyers, respectively. A review has been made of the documents accompanying your letters of September 20, 1974, for the purpose of determining whether you and members of your staff's prior statements concerning the pardon of former President Nixon are responsive to the questions posed in the privileged measures.

Due to the difficulty in determining which portions of these statements you mean to apply to each specific question, I respectfully request that you respond individually to each inquiry and that your responses be forwarded to the Subcommittee on Criminal Justice by the close of business on Thursday, September 26, 1974.

In addition, I further respectfully request, after having consulted with the bipartisan membership of the Subcommittee on Criminal Justice, that Philip Buchen, Counsel to the President, or someone with equivalent knowledge of the circumstances surrounding the pardon of the former President, appear and testify before the Subcommittee on Tuesday, October 1, 1974.

Respectfully,

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice.

THE WHITE HOUSE,
Washington, September 30, 1974.

Congressman WILLIAM HUNGATE,
U.S. House of Representatives, Washington, D.C.

DEAR BILL: This is to advise you that I expect to appear personally to respond to the questions raised in House Resolutions 1367 and 1370.

It would be my desire to arrange this hearing before your Subcommittee at a mutually convenient time within the next ten days.

Thank you for your help and assistance in this matter.

Sincerely,

GERALD R. FORD.

WASHINGTON, D.C.,
OCTOBER 7, 1974.

President GERALD R. FORD,
The White House
Washington, D.C.

DEAR MR. PRESIDENT: You are aware that certain questions posed in the resolutions of inqury, House Resolutions 1367 (Abzug) and 1370 (Conyers), now pending before the Subcommittee on Criminal Justice provide for the production of tapes, transcripts, notes, reports, statements or other documentary information. For example, in the instance of questions two, eight, and ten of House Resolution 1367, specific requests are made for the production of certain documents and tapes, where available. To the extent relied on in arriving at the responses to the questions propounded in these two privileged resolutions, the Subcommittee requests that such documents and tapes, if available, be forwarded to the Subcommittee for review prior to your appearance.

Furthermore, there may be additional documentation that, while not specifically requested by the resolutions of inquiry, would be helpful to the Members of the Subcommittee in preparing for your forthcoming appearance before the Subcommittee. For example, in the instance of question five of House Resolution 1367, a request is made for any facts and legal authorities provided you by Attorney General Saxbe or Special Prosecutor Jaworski. If any of the information was forwarded to you in written form, it would be appropriated if you make it available to the Subcommittee prior to your appearance.

Respectfully,

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice.

THE WHITE HOUSE,
Washington, October 15, 1974.

HON. WILLIAM L. HUNGATE,
Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The President has asked me to reply to your letter to him of October 7, 1974.

In your letter you have requested, in advance of the President's appearance on October 17, 1974, copies of documentation to the extent relied on in arriving at responses to the questions in the two proposed resolutions of inquiry, H. Res. 1367 and H. Res. 1370.

In your first paragraph you refer to questions by number which specifically call for producing certain documentation if it exists, namely two, eight, and ten of H. Res. 1367. However, question two deals with matters not within President Ford's knowledge or awareness and, in any event, if any discussions covered by the question took place, they could not have been and were not a factor in his decision to pardon the former President because he was not aware of them. In the cases of the other mentioned questions, no documentation is involved in the answers of the President.

In the second paragraph you refer to possible documentation not specifically requested by the resolutions of inquiry, but, as I understand your letter, which is directly related to such questions as number five. In that connection, documentation was supplied to you with the President's letter of September 20, 1974. In addition, there are now enclosed:

copy of a letter from Special Prosecutor Jaworski to me dated September 4, 1974 (a portion of this letter was quoted by me to the press on September 8, 1974, but the enclosure provides the full text.)

copy of a memorandum furnished by Special Prosecutor Jaworski, which had been prepared for him by Deputy Special Prosecutor Henry Ruth under date of September 3, 1974, which was released from the White House on September 10, 1974.

This is the only information supplied in written form to the President which relates to questions such as five, six, or seven.

Sincerely yours,

PHILIP W. BUCHEN,
Counsel to the President.

Enclosures.

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., September 4, 1974.

PHILIP W. BUCHEN, Esq.,
Counsel to the President,
The White House,
Washington, D.C.

DEAR MR. BUCHEN: You have inquired as to my opinion regarding the length of delay that would follow, in the event of an indictment of former President Richard M. Nixon, before a trial could reasonably be had by a fair and impartial jury as guaranteed by the Constitution.

The factual situation regarding a trial of Richard M. Nixon within constitutional bounds, is unprecedented. It is especially unique in view of the recent House Judiciary Committee inquiry on impeachment, resulting in a unanimous adverse finding to Richard M. Nixon on the Article involving obstruction of justice. The massive publicity given the hearings and the findings that ensued, the reversal of judgment of a number of the members of the Republican Party following release of the June 23 tape recording, and their statements carried nationwide, and finally, the resignation of Richard M. Nixon, require a delay, before selection of a jury is begun, of a period from nine months to a year, and perhaps even longer. This judgment is predicated on a review of the decisions of United States Courts involving prejudicial pre-trial publicity. The Government's decision to pursue impeachment proceedings and the tremendous volume of television, radio and newspaper coverage given thereto, are factors emphasized by the Courts in weighing the time a trial can be had. The complexities involved in the process of selecting a jury and the time it will take to complete the process, I find difficult to estimate at this time.

The situation involving Richard M. Nixon is readily distinguishable from the facts involved in the case of *United States* v. *Mitchell, et al*, set for trial on September 30th. The defendants in the Mitchell case were indicted by a grand jury operating in secret session. They will be called to trial, unlike Richard M. Nixon, if indicted, without any previous adverse finding by an investigatory body holding public hearings on its conclusions. It is precisely the condemnation of Richard M. Nixon already made in the impeachment process, that would make it unfair to the defendants in the case of *United States* v. *Mitchell, et al*, for Richard M. Nixon now to be joined as a co-conspirator, should it be concluded that an indictment of him was proper.

The *United States* v. *Mitchell, et al*, trial will within itself generate new publicity, some undoubtedly prejudicial to Richard M. Nixon. I bear this in mind when I estimate the earliest time of trial of Richard M. Nixon under his constitutional guarantees, in the event of indictment, to be as indicated above.

If further information is desired, please advise me.

Sincerely,

LEON JAWORSKI,
Special Prosecutor.

MEMORANDUM

SEPTEMBER 3, 1974.

To: Leon Jaworski.
From: Henry Ruth.
Subject: Mr. Nixon.

The following matters are still under investigation in this Office and may prove to have some direct connection to activities in which Mr. Nixon is personally involved:

1. Tax deductions relating to the gift of pre-Presidential papers.
2. The Colson obstruction of justice plea in the Ellsberg matter.
3. The transfer of the national security wire tap records from the FBI to the White House.
4. The initiating of wire tapping of John Sears.
5. Misuse of IRS information.
6. Misuse of IRS through attempted initiation of audits as to "enemies."
7. The dairy industry pledge and its relationship to the price support change.
8. Filing of a challenge to the Washington Post ownership of two Florida television stations.
9. False and evasive testimony at the Kleindienst confirmation hearings as to White House participation in Department of Justice decisions about ITT.
10. The handling of campaign contributions by Mr. Rebozo for the personal benefit of Mr. Nixon.

None of these matters at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon, but I thought you ought to know which of the pending investigations were even remotely connected to Mr. Nixon. Of course, the Watergate cover-up is the subject of a separate memorandum.

APPENDIX 2

There follows copies of all pertinent legislation introduced concerning the pardon of Richard M. Nixon, former President of the United States, the issuance of additional pardons to persons involved in Watergate-related activities, the ability of the Special Prosecutor to make public the information he has compiled relating to the alleged criminal conduct of the former President, and the public disclosure of all Watergate-related documents and tapes which were in the custody of the United States.

93D CONGRESS
2D SESSION

H. RES. 1361

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 11, 1974

Mr. OWENS submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Resolved, That it is the sense of the House of Representatives that Special Prosecutor Leon Jaworski—

(1) should proceed with whatever criminal investigation and legal action he considers to be appropriate with respect to the conduct of Richard Nixon from January 20, 1969, through August 9, 1974, including proceeding to any indictment or indictments which may be justified by evidence presented to the grand jury; and

(2) should, at such time and in such manner as he deems to be proper and appropriate, release and make part of the public record whatever evidence he may have in his possession with respect to the conduct of Richard

M. Nixon from January 20, 1969, through August 9, 1974.

SEC. 2. It is further the sense of the House of Representatives that the fundamental principle of equal justice under law will be damaged, not served, by the granting of Presidential pardons at this time to other individuals charged with or convicted of offenses against the United States with respect to the Watergate matter.

93D CONGRESS
2D SESSION

H. RES. 1363

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 12, 1974

MS. ABZUG (for herself, Mr. BADILLO, Mr. EILBERG, Mr. HELSTOSKI, Mr. HECHLER of West Virginia, Mr. DELLUMS, Mr. ROSENTHAL, Ms. HOLTZMAN, Mr. KOCH, Mr. STOKES, and Mr. SYMINGTON) submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Resolved, That the President of the United States is hereby requested to furnish the House, within ten days, with the following information:

1. What are the specific offenses against the United States for which a pardon was granted to Richard M. Nixon on September 8, 1974?

2. What are the certain acts or omissions occurring before his resignation from the office of President for which Richard Nixon had become liable to possible indictment and trial for offenses against the United States, as stated in your Proclamation of Pardon?

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3. Did you or your representatives have specific knowledge of any formal criminal charges pending against Richard M. Nixon prior to the issuance of the pardon? If so, what were these charges?

4. Did Alexander Haig refer to or discuss a pardon for Richard M. Nixon with Richard M. Nixon or representatives of Mr. Nixon at any time during the week of August 4, 1974, or at any subsequent time? If so, what promises were made or conditions set for a pardon, if any? If so, were tapes or transcriptions of any kind made of these conversations or were any notes taken? If so, please provide such tapes, transcriptions, or notes.

5. When was a pardon for Richard M. Nixon first referred to or discussed with Mr. Nixon, or representatives of Mr. Nixon, by you or your representatives or aides, including the period when you were a Member of Congress and Vice President?

6. Who participated in these and subsequent discussions or negotiations with Richard M. Nixon or his representatives regarding a pardon, and at what specific times and locations?

7. Did you consult with Attorney General William Saxbe or Special Prosecutor Leon Jaworski before making the decision to pardon Richard M. Nixon and, if so, what facts and legal authorities did they give you?

8. Did you consult with the Vice Presidential nominee,

Nelson Rockefeller, before making the decision to pardon Richard M. Nixon and, if so, what facts and legal authorities did he give you?

9. Did you consult with any other attorneys or professors of law before making the decision to pardon Richard M. Nixon, and, if so what facts or legal authorities did they give you?

10. Did you or your representatives ask Richard M. Nixon to make a confession or statement of criminal guilt, and if so, what language was suggested or requested by you, your representatives, Mr. Nixon, or his representatives? Was any statement of any kind requested from Mr. Nixon in exchange for the pardon, and, if so, please provide the suggested or requested language?

11. Was the statement issued by Richard M. Nixon immediately subsequent to announcement of the pardon made known to you or your representatives prior to its announcement, and was it approved by you or your representatives?

12. Did you receive any report from a psychiatrist or other physician stating that Richard M. Nixon was in other than good health? If so, please provide such reports.

93D CONGRESS
2D SESSION

H. RES. 1367

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 16, 1974

Ms. ABZUG (for herself, Mr. BADILLO, Mr. JOHN L. BURTON, Mr. DELLUMS, Mr. EILBERG, Mr. HECHLER of West Virginia, Mr. HELSTOSKI, Ms. HOLTZMAN, Mr. KOCH, Mr. ROSENTHAL, Mr. STARK, Mr. STOKES, Mr. SYMINGTON, and Mr. CHARLES H. WILSON of California) submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Resolved, That the President of the United States is hereby requested to furnish the House, within ten days, with the following information:

1. Did you or your representatives have specific knowledge of any formal criminal charges pending against Richard M. Nixon prior to issuance of the pardon? If so, what were these charges?

2. Did Alexander Haig refer to or discuss a pardon for Richard M. Nixon with Richard M. Nixon or representatives of Mr. Nixon at any time during the week of August 4, 1974, or at any subsequent time? If so, what promises were

made or conditions set for a pardon, if any? If so, were tapes or transcriptions of any kind made of these conversations or were any notes taken? If so, please provide such tapes, transcriptions or notes.

3. When was a pardon for Richard M. Nixon first referred to or discussed with Richard M. Nixon, or representatives or Mr. Nixon, by you or your representatives or aides, including the period when you were a Member of Congress or Vice President?

4. Who participated in these and subsequent discussions or negotiations with Richard M. Nixon or his representatives regarding a pardon, and at what specific times and locations?

5. Did you consult with Attorney General William Saxbe or Special Prosecutor Leon Jaworski before making the decision to pardon Richard M. Nixon and, if so, what facts and legal authorities did they give to you?

6. Did you consult with the Vice Presidential nominee, Nelson Rockefeller, before making the decision to pardon Richard M. Nixon and, if so, what facts and legal authorities did he give to you?

7. Did you consult with any other attorneys or professors of law before making the decision to pardon Richard M. Nixon, and, if so, what facts or legal authorities did they give to you?

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8. Did you or your representatives ask Richard M. Nixon to make a confession or statement of criminal guilt, and, if so, what language was suggested or requested by you, your representatives, Mr. Nixon, or his representatives? Was any statement of any kind requested from Mr. Nixon in exchange for the pardon, and, if so, please provide the suggested or requested language.

9. Was the statement issued by Richard M. Nixon immediately subsequent to announcement of the pardon made known to you or your representatives prior to its announcement, and was it approved by you or your representatives?

10. Did you receive any report from a psychiatrist or other physician stating that Richard M. Nixon was in other than good health? If so, please provide such reports.

93D CONGRESS
2D SESSION

H. RES. 1368

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 16, 1974

Ms. HOLTZMAN submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Whereas President Gerald R. Ford granted a full, free, and absolute pardon to Richard Nixon prior to any indictment and it was reported that President Ford was considering similar pardons for the "Watergate" defendants, which would have precluded any trial of some of them, and

Whereas these events have aroused serious public concern and widespread public suspicion, and

Whereas it is essential to restore public confidence in the integrity of governmental processes: Now, therefore, be it

Resolved, That it is the sense of the House of Representatives that President Gerald R. Ford should make a full and voluntary disclosure to the Committee on the Judiciary of all the circumstances surrounding and the reasons prompting his grant of a pardon to Richard Nixon on September 8,

1974, and should make available for this purpose all notes, documents, tape recordings, memorandums, and other things in his possession or control, and the testimony of witnesses which the Committee on the Judiciary deems necessary for a full understanding of the facts. Such disclosure should include any communications that took place, commitments that were made, and understandings that were reached at any time (including the time before which Gerald R. Ford was nominated for Vice President) between Gerald R. Ford or anyone acting on his behalf and Richard Nixon or anyone acting on his behalf, regarding any aspect of clemency or relief from punishment in any form, whether by pardon or otherwise, for any wrongful acts or crimes that may have been committed by Richard Nixon or any of his aides or associates.

SEC. 2. In the event such disclosure has not been made within fifteen days after the adoption of this resolution, the Committee on the Judiciary should investigate fully all the circumstances surrounding and the reasons prompting President Gerald R. Ford's grant of a pardon to Richard Nixon.

SEC. 3. The Committee on the Judiciary should report to the House of Representatives its findings of fact, whether such facts are obtained under the first section or section 2 of this resolution, together with an analysis of the constitutionality and legal validity of the pardon granted to Richard Nixon, to the House of Representatives.

93D CONGRESS
2D SESSION

H. RES. 1370

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 17, 1974

Mr. CONYERS submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Resolved, That the President is directed to furnish to the House of Representatives the full and complete information and facts upon which was based the decision to grant a pardon to Richard M. Nixon, including—

(1) any representations made by or on behalf of Richard M. Nixon to the President;

(2) any information or facts presented to the President with respect to the mental or physical health of Richard M. Nixon;

(3) any information in possession or control of the President with respect to the offenses which were al-

legedly committed by Richard M. Nixon and for which a pardon was granted;

(4) any representations made by or on behalf of the President to Richard M. Nixon in connection with a pardon for alleged offenses against the United States.

The President is further directed to furnish to the House of Representatives the full and complete information and facts in his possession or control and relating to any pardon which may be granted to any person who is or may be charged or convicted of any offense against the United States within the prosecutorial jurisdiction of the Office of Watergate Special Prosecution Force.

93D CONGRESS
2D SESSION

H. RES. 1375

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 18, 1974

Mr. OWENS (for himself, Mr. JOHN L. BURTON, Mr. BROWN of California, Mr. CONYERS, Mr. DELLUMS, Mr. HARRINGTON, Mr. HECHLER of West Virginia, Mr. KOCH, Mr. MITCHELL of Maryland, Mr. REES, Mr. ROSENTHAL, Ms. SCHROEDER, and Mr. STARK) submitted the following resolution: which was referred to the Committee on the Judiciary

RESOLUTION

Resolved, That it is the sense of the House of Representatives that the Special Prosecutor of the Watergate Special Prosecution Force—

(1) should proceed with whatever criminal investigation and legal action he considers to be appropriate with respect to the conduct of Richard Nixon from January 20, 1969, through August 9, 1974, including proceeding to any indictment or indictments which may be justified by evidence presented to the grand jury; and

(2) should, at such time and in such manner as he deems to be proper and appropriate, release and make

part of the public record whatever evidence he may have in his possession with respect to the conduct of Richard M. Nixon from January 20, 1969, through August 9, 1974.

SEC. 2. It is further the sense of the House of Representatives that the fundamental principle of equal justice under law will be damaged, not served, by the granting of Presidential pardons at this time to other individuals charged with or convicted of offenses against the United States with respect to the Watergate matter.

93D CONGRESS
2D SESSION

H. RES. 1382

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 1974

Mr. HOWARD submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Resolved, That it is the sense of the House of Representatives that Special Prosecutor Leon Jaworski—

(1) should proceed with whatever criminal investigation and legal action he considers to be appropriate with respect to the conduct of Richard Nixon from January 20, 1969, through August 9, 1974, including proceeding to any indictment or indictments which may be justified by evidence presented to the grand jury; and

(2) should, at such time and in such manner as he deems to be proper and appropriate, release and make part of the public record whatever evidence he may have in his possession with respect to the conduct of Richard

M. Nixon from January 20, 1969, through August 9, 1974.

SEC. 2. It is further the sense of the House of Representatives that the fundamental principle of equal justice under law will be damaged, not served, by the granting of Presidential pardons at this time to other individuals charged with or convicted of offenses against the United States with respect to the Watergate matter.

93D CONGRESS
2D SESSION

H. RES. 1385

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 1974

Mrs. MINK submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Resolved, That it is the sense of the House of Representatives that Special Prosecutor Leon Jaworski—

(1) should proceed with whatever criminal investigation and legal action he considers to be appropriate with respect to the conduct of Richard Nixon from January 20, 1969, through August 9, 1974, including proceeding to any indictment or indictments which may be justified by evidence presented to the grant jury regardless of the pardon; and

(2) should, at such time and in such manner as he deems to be proper and appropriate, release and make part of the public record whatever evidence he may have

in his possession with respect to the conduct of Richard M. Nixon from January 20, 1969, through August 9, 1974, and file such a report to the Congress of the United States.

SEC. 2. It is further the sense of the House of Representatives that the fundamental principle of equal justice under law will be grievously damaged by the granting of Presidential pardons to other individuals charged with or convicted of offenses against the United States with respect to the Watergate matter.

93D CONGRESS
2D SESSION

H. RES. 1450

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 16, 1974

Ms. ABZUG submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Resolved, That it is the sense of the House of Representatives that the Special Prosecutor of the Watergate Special Prosecution Force—

(1) should, notwithstanding the Presidential pardon issued to Richard M. Nixon on September 8, 1974, proceed to institute all appropriate legal actions with respect to the conduct of Richard M. Nixon from January 20, 1969, through August 9, 1974, including but not limited to, the issuance of any indictment or indictments which may be justified by the evidence presented to or that may be presented to a Federal grand jury; and

(2) should, at such time as deemed appropriate by

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the Special Prosecutor, but not later than sixty days after the conclusion of all criminal proceedings within the jurisdiction of the Watergate Special Prosecutor's Office, issue to the public a full and complete report concerning all the matters that the Watergate Special Prosecution Force has investigated since its establishment, including the conduct of Richard M. Nixon from January 20, 1969, through August 9, 1974. Such report shall include, but not be limited to, transcriptions of all tapes, and all documents, and other evidentiary material available to the Special Prosecution Force since its establishment.

SEC. 2. It is further the sense of the House of Representatives that the fundamental principle of equal justice under law will be damaged, not served, by the granting of Presidential pardons at this time to other individuals charged with or convicted of offenses against the United States with respect to the Watergate matter.

93D CONGRESS
2D SESSION

H. J. RES. 1118

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 11, 1974

Mr. GUDE introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate Special Prosecution Force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. J. RES. 1121

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 12, 1974

Mr. FRENZEL introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate special prosecution force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. J. RES. 1126

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 16, 1974

Mr. GUDE (for himself, Mr. BADILLO, Mr. SARASIN, Ms. ABZUG, Mr. FAUNTROY, Mr. REUSS, Mr. ROYBAL, Mr. COUGHLIN, Mr. SYMINGTON, Mr. CHARLES H. WILSON of California, Mr. CONABLE, Mr. HECHLER of West Virginia, Mr. GRAY, Mr. GIBBONS, Mr. SISK, Mr. WON PAT, and Mr. CULVER) introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate Special Prosecution Force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning

any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. J. RES. 1130

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 18, 1974

Mr. GUDE (for himself, Mr. HARRINGTON, Mr. FORSYTHE, Mr. MITCHELL of Maryland, Mr. DINGELL, Mr. MOAKLEY, and Mrs. HECKLER of Massachusetts) introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate Special Prosecution Force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. J. RES. 1139

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 1974

Mr. GUDE (for himself, Mr. SEIBERLING, Mr. FISH, and Mr. KOCH) introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate Special Prosecution Force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. J. RES. 1142

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 1974

Mr. ROBISON of New York introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate Special Prosecution Force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. J. RES. 1149

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 30, 1974

Mr. MACDONALD introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Expressing the sense of the Congress in favor of continued legal action against Richard M. Nixon and in favor of a test of the legality of the pardon granted him.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Special Prosecutor Leon Jaworski—

(1) should proceed with whatever criminal investigation and legal action he considers to be appropriate with respect to the conduct of Richard M. Nixon from January 20, 1969, through August 9, 1974, including proceeding to any indictment or indictments which may be justified by evidence presented to the grand jury; and

(2) should, at such time and in such manner as he deems to be proper and appropriate, release and make part of the public record whatever evidence he may have in his possession with respect to the conduct of Richard M. Nixon from January 20, 1969, through August 9, 1974; and

(3) should seek a test of the legality of the pardon granted to Richard M. Nixon on September 8, 1974, in view of the agreement under which the President waived his constitutional powers to limit the independence of the Special Prosecutor.

93D CONGRESS
2D SESSION

H. J. RES. 1151

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 30, 1974

Mr. TALCOTT introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Special Prosecution Force to make available to the public a report on all admissable evidence it has involving Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Special Prosecution Force shall, in addition to existing responsibilities, prepare and publish a full and complete report stating in detail all evidence in its possession which sets forth or contains any information concerning any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the Congress no later than ninety days after the date of the adoption of this resolution.

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93D CONGRESS
2D SESSION

H. J. RES. 1152

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 30, 1974

Mr. THOMPSON of New Jersey introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate Special Prosecution Force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning

any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. J. RES. 1155

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 3, 1974

Mr. GUDE (for himself and Mr. STOKES) introduced the following resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate Special Prosecution Force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. J. RES. 1157

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 7, 1974

Mr. RUPPE introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate Special Prosecution Force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. J. RES. 1159

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 8, 1974

Mr. GILMAN introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate Special Prosecution Force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. J. RES. 1168

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 17, 1974

Mr. QUIE introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

To require the Watergate Special Prosecution Force to make available to the public a report on all information it has concerning Richard M. Nixon in offenses against the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The Office of the Watergate Special Prosecution Force shall, in addition to its existing responsibilities, compile, prepare, and publish a full and complete report stating in detail all evidence in its possession which sets forth, reflects, refers to, or contains any information concerning any involvement of Richard M. Nixon in any offense against the United States.

SEC. 2. Such report shall be printed and made available to the public no later than ninety days after the date of adoption of this resolution.

93D CONGRESS
2D SESSION

H. CON. RES. 629

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 11, 1974

Mr. BINGHAM submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

CONCURRENT RESOLUTION

Whereas the unexpected Presidential pardon of Richard M. Nixon for any crime he may have committed while holding the Office of President has again thrust the Watergate scandal to the forefront of national attention; and

Whereas the action of President Ford in granting a full and complete pardon to Richard Nixon has been a divisive force reopening the wounds of Watergate President Ford has pledged to heal; and

Whereas the pardon of Richard Nixon will tend to restrict and hinder the full revelation of Richard Nixon's involvement in the Watergate affair; and

Whereas, the White House has indicated that wholesale pardons for all aides and assistants of former President Nixon, whether convicted, indicted, or implicated in the Watergate affair, are under consideration; and

Whereas, the American people are entitled to have the full story of Watergate laid before them; and

Whereas, it is becoming increasingly clear that the President's action with respect to Richard Nixon and contemplated action with respect to other Watergate figures has caused the American people great consternation and concern about the integrity of this country's criminal justice system, and

Whereas, the courts have shown leniency and mercy when it is in the interest of justice; and

Whereas, the American concept of justice is predicated upon equality under the law: Therefore be it

Resolved, by the House of Representatives (the Senate concurring), That recognizing the President's constitutional power to grant pardons, it is the sense of Congress that the President should defer consideration of any additional pardons until after the facts about Watergate have been revealed through the unfettered operation of the criminal justice system.

93D CONGRESS
2D SESSION

H. CON. RES. 630

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 11, 1974

Mr. DU PONT submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

CONCURRENT RESOLUTION

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that the President should not grant blanket pardons with respect to Watergate related offenses or offenses being investigated by the Special Prosecutor.

93D CONGRESS
2D SESSION

H. CON. RES. 632

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 11, 1974

Mr. KOCH submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

CONCURRENT RESOLUTION

Resolved by the House of Representatives (the Senate concurring), That it is the sense of Congress that the pardon of Richard M. Nixon was wrongful and premature, and that no further Watergate related pardons should be granted prior to indictment, prosecution, and conviction, and then only on an individual basis where warranted by special circumstances.

93D CONGRESS
2D SESSION

H. CON. RES. 633

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 11, 1974

Mr. PEYSER submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

CONCURRENT RESOLUTION

Whereas the President of the United States, exercising his constitutional authority, has granted a full and complete pardon to Richard M. Nixon, former President of the United States, for all crimes which he committed or may have committed while in office; and

Whereas this action has caused great concern among the citizens of the United States; and

Whereas there remain others who were associated with what has come to be known as the Watergate affair who have been convicted of crimes or who face criminal prosecution as a result of involvement in the Watergate affair or for other possible criminal actions with which Richard Nixon was associated; and

Whereas the President of the United States has the authority to pardon, and may be considering pardoning others who were involved in the Watergate affair: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that the President not grant any additional pardons to any individuals convicted of, or facing prosecution in connection with the Watergate affair, or other criminal activities currently under investigation by the Special Prosecutor.

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93D CONGRESS
2D SESSION

H. CON. RES. 636

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 16, 1974

Mr. ADDABBO submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

CONCURRENT RESOLUTION

Resolved by the House of Representatives (the Senate concurring), That it is the sense of Congress that the pardon of Richard M. Nixon was premature, and that no further Watergate-related pardons should be granted prior to indictment, prosecution, and conviction, and then only on an individual basis where warranted by special circumstances.

93D CONGRESS
2D SESSION

H. CON. RES. 643

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 19, 1974

Mr. KOCH (for himself, Mr. ANDERSON of California, Mr. BADILLO, Mr. BROWN of California, Mr. JOHN L. BURTON, Mr. CLAY, Mr. CONYERS, Mr. DELLUMS, Mr. FAUNTROY, Mr. FULTON, Mr. HECHLER of West Virginia, Mr. LONG of Maryland, Mr. LUKEN, Mr. MITCHELL of Maryland, Mr. MURPHY of Illinois, Mr. NEDZI, Mr. PIKE, Mr. ROSENTHAL, Mr. CHARLES H. WILSON of California, Mr. WINN, and Mr. YATES) submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

CONCURRENT RESOLUTION

Resolved by the House of Representatives (the Senate concurring), That it is the sense of Congress that the pardon of Richard M. Nixon was wrongful and premature, and that no further Watergate related pardons should be granted prior to indictment, prosecution, and conviction, and then only on an individual basis where warranted by special circumstances.

93D CONGRESS
2D SESSION

H. CON. RES. 644

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 19, 1974

Mr. STEELE submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

CONCURRENT RESOLUTION

Whereas the President of the United States, exercising his constitutional authority, has granted a full and complete pardon to Richard M. Nixon, former President of the United States, for all crimes which he committed or may have committed while in office; and

Whereas this action has caused great concern among the citizens of the United States; and

Whereas there remain others who were associated with what has come to be known as the Watergate affair who have been convicted of crimes or who face criminal prosecution as a result of involvement in the Watergate affair or for other possible criminal actions with which Richard Nixon was associated; and

Whereas the President of the United States has the authority to pardon, and may be considering pardoning others who were involved in the Watergate affair: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that the President not grant any additional pardons to any individuals convicted of, or facing prosecution in connection with the Watergate affair, or other criminal activities currently under investigation by the Special Prosecutor.

93D CONGRESS
2D SESSION

H. CON. RES. 646

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 1974

Mr. RINALDO submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

CONCURRENT RESOLUTION

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that no pardon should be granted for an offense against the United States until after the person pardoned has been convicted of the offense.

93D CONGRESS
2D SESSION

H. R. 16619

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 11, 1974

Mr. MCKINNEY introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To make available to Congress the information obtained by the Special Prosecutor.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Office of the Watergate Special Prosecution Force transmit to the Speaker of the House of Representatives and to the President pro tempore of the Senate, to be available for inspection by all Members of Congress, all materials, documents, and reports obtained, prepared, and compiled by that office pursuant to part 0 of chapter I of title 28, Code of Federal Regulations, section 0.1 (a), subpart G–1, sections 0.37, 0.38, following a determination by the Attorney General that the rights of parties named therein or parties to related litigation will not be compromised.

93D CONGRESS
2D SESSION

H. R. 16751

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 19, 1974

Mr. KOCH (for himself and Mr. HARRINGTON) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for public access to all Watergate-related facts produced by any investigation conducted by any Federal executive office and to all Watergate-related documents which were produced from January 20, 1969, through August 9, 1974, and which were in the custody of the United States on August 9, 1974.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the President of the United States shall, except with regard to matters clearly vital to the national security interests of the United States, provide as soon as practicable full public access, in an adequate and effective manner, to—

(1) all facts, and related papers, documents, mem-

orandums, tape recordings, and transcripts, which are related to Watergate matters and which have been or shall be produced by any investigation conducted by any Federal executive office, department, or agency; and

(2) all Watergate-related papers, documents, memorandums, tape recordings, and transcripts which were produced during the period from January 20, 1969, through August 9, 1974, which are not included in paragraph (1), and which were in the custody of the United States on August 9, 1974.

93D CONGRESS
2D SESSION

H. R. 16756

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 19, 1974

Mr. MCKINNEY (for himself, Mr. BADILLO, Mr. STARK, Ms. ABZUG, Mr. SARASIN, Mr. DELLUMS, Mr. MITCHELL of Maryland, Mr. DINGELL, Mr. FRENZEL, Mrs. HECKLER of Massachusetts, Mr. LENT, and Mr. STEELMAN) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To make available to Congress the information obtained by the Special Prosecutor.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Office of the Watergate Special Prosecution Force transmit to the Speaker of the House of Representatives and to the President pro tempore of the Senate, to be available for inspection by all Members of Congress, all materials, documents, and reports obtained, prepared, and compiled by that office pursuant to part O of chapter I of title 28,

Code of Federal Regulations, section 0.1 (a), subpart G–1, sections 0.37, 0.38, following a determination by the Attorney General that the rights of parties named therein or parties to related litigation will not be compromised.

93D CONGRESS
2D SESSION

H. R. 16794

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 1974

Mr. KOCH (for himself, Mr. BRECKINRIDGE, Mr. HELSTOSKI, Mr. MEEDS, Mr. NIX, Mr. REES, Mr. RIEGLE, Mr. SYMINGTON, and Mr. CHARLES WILSON of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for public access to all Watergate-related facts produced by any investigation conducted by any Federal executive office and to all Watergate-related documents which were produced from January 20, 1969, through August 9, 1974, and which were in the custody of the United States on August 9, 1974.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the President of the United States shall, except with regard to matters clearly vital to the national security interests of the United States, provide as soon as practicable full public access, in an adequate and effective manner, to—

(1) all facts, and related papers, documents, mem-

orandums, tape recordings, and transcripts, which are related to Watergate matters and which have been or shall be produced by any investigation conducted by any Federal executive office, department, or agency; and

(2) all Watergate-related papers, documents, memorandums, tape recordings, and transcripts which were produced during the period from January 20, 1969, through August 9, 1974, which are not included in paragraph (1), and which were in the custody of the United States on August 9, 1974.

93D CONGRESS
2D SESSION

H. R. 16798

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 1974

Mr. MCKINNEY (for himself and Mr. ANDERSON of Illinois) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To make available to Congress the information obtained by the Special Prosecutor.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Office of the Watergate Special Prosecution Force transmit to the Speaker of the House of Representatives and to the President pro tempore of the Senate, to be available for inspection by all Members of Congress, all materials, documents, and reports obtained, prepared, and compiled by that Office pursuant to part 0 of chapter I of title 28, Code of Federal Regulations, section 0.1 (a), subpart G–1,

sections 0.37, 0.38, following a determination by the Attorney General that the rights of parties named therein or parties to related litigation will not be compromised.

93D CONGRESS
2D SESSION

H. R. 16816

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 24, 1974

Mr. DANIELSON introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To authorize the June 5, 1972, grand jury of the United States District Court for the District of Columbia to submit a report concerning its inquiry, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the grand jury which was impaneled by the United States District Court for the District of Columbia on June 5, 1972, may, with the concurrence of a majority of its members, upon completion of its term, which was extended under the authority of Public Law 93–172, or any subsequent extension thereof, submit to the court a report concerning offenses against the criminal laws of the United States, and noncriminal misconduct, malfeasance, or misfeasance in office

by elected or appointed public officials, arising out of the unauthorized entry into Democratic National Committee headquarters at the Watergate, all offenses arising out of the 1972 Presidential election for which the Special Prosecutor deemed it necessary and appropriate to assume responsibility, allegations involving former President Richard M. Nixon, members of his White House staff, or his appointees, and any other matters which the Special Prosecutor consented to have assigned to him by the Attorney General.

SEC. 2. In the event that the grand jury shall submit the report authorized by section 1 of this Act, the court shall proceed upon such report as if it were a report submitted by a special grand jury under section 3333 of title 18, United States Code, and if such report makes critical reference to an identified person, such person shall be afforded the same rights and privileges as are afforded to a public officer or employee under section 3333 of title 18, United States Code: *Provided,* That the subject matter of such critical reference has not or will not be resolved in an appropriate judicial proceeding, either because such subject matter does not amount to an offense against the criminal laws of the United States, or the person named therein has been granted immunity or has been pardoned, or for such other valid reason as the court may find.

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SEC. 3. The term of said grand jury may be extended by the court in order that the report be submitted, additional testimony be taken, or the provisions of section 3333 of title 18, United States Code, may be met.

SEC. 4. As used in this Act, the term "Special Prosecutor" means the Director of the Office of Watergate Special Prosecution Force established under subpart G–1, part 0, of chapter 1 of title 28, Code of Federal Regulations.

93D CONGRESS
2D SESSION

H. R. 16878

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 25, 1974

Mr. KOCH (for himself, Mr. FRASER, Mr. LUKEN, Mr. MCCLOSKEY, and Mr. WOLFF) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for public access to all Watergate-related facts produced by any investigation conducted by any Federal executive office and to all Watergate-related documents which were produced from January 20, 1969, through August 9, 1974, and which were in the custody of the United States on August 9, 1974.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States shall, except with regard to matters clearly vital to the national security interests of the United States, provide as soon as practicable full public access, in an adequate and effective manner, to—

(1) all facts, and related papers, documents, mem-

orandums, tape recordings, and transcripts which are related to Watergate matters and which have been or shall be produced by any investigation conducted by any Federal executive office, department, or agency; and

(2) all Watergate-related papers, documents, memorandums, tape recordings, and transcripts which were produced during the period from January 20, 1969, through August 9, 1974, which are not included in paragraph (1), and which were in the custody of the United States on August 9, 1974.

APPENDIX 3

The following materials were used by the subcommittee and staff in preparation for the hearings:

(1) Federalist paper number 74.

(2) The section on pardons and reprieves from the Annotated Constitution.

(3) Chapter I of "The Pardoning Power of the President," by W. H. Humbert.

THE FEDERALIST NO. 74

[73]

ALEXANDER HAMILTON [1]

MARCH 25, 1788.

To the People of the State of New York.

The President of the United States is to be "Commander in Chief of the army and navy of the United States, and of the militia of the several States *when called into the actual service* of the United States." The propriety of this provision is so evident in itself; and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them, which have in other respects coupled the Chief Magistrate with a Council, have for the most part concentred the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.

"The President may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." This I consider as a mere redundancy in the plan; as the right for which it provides would result of itself from the office.

He is also to be authorised "to grant reprieves and pardons for offenses against the United States *except in cases of impeachment.*" Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrased. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection, that the fate of a fellow creature depended on his *sole fiat*, would naturally inspire scrpulousness and caution: The dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of the government than a body of men.

The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason. This, it has been urged, ought to have depended upon the assent of one or both of the branches of the legislative body. I shall not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of that body or of a part of it. As treason is a crime levelled at the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy towards him to the judgment of the Legislature. And this ought the rather to be the case, as the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded. But there are also strong objections to such a plan. It is not to be doubted that a single man of prudence and good sense, is better fitted, in delicate conjunctures, to bal-

[1] From *The New-York Packet*, March 25, 1788. This essay appeared on March 26 in *The Independent Journal*. It was numbered 74 in the McLean edition and 73 in the newspapers.

ance the motives, which may plead for and against the remission of the punishment, than any numerous body whatever. It deserves particular attention that treason will often be connected with seditions, which embrace a large proportion of the community; as lately happened in Massachusetts.[2] In every such case, we might expect to see the representation of the people tainted with the same spirit, which had given birth to the offense. And when parties were pretty equally matched, the secret sympathy of the friends and favorers of the condemned person, availing itself of the good nature and weakness of others, might frequently bestow impunity where the terror of an example was necessary. On the other hand, when the sedition had proceeded from causes which had inflamed the resentments of the major party, they might often be found obstinate and inexorable, when policy demanded a conduct of forbearance and clemency. But the principal arguments for reposing the power of pardoning in this case in the Chief Magistrate is this—In seasons of insurrection or rebellion, there are often critical moments, when a well timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the Legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. If it should be observed that a discretionary power with a view to such contingencies might be occasionally conferred upon the President; it may be answered in the first place, that it is questionable whether, to a limited constitution, that power could be delegated by law; and in the second place, that it would generally be impolitic beforehand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt.

PLUBIUS.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 1972

PARDONS AND REPRIEVES

The Legal Nature of a Pardon

In the first case to be decided concerning the pardoning power, Chief Justice Marshall, speaking for the Court, said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court. . . . A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him." Marshall continued to hold that to be noticed judicially this deed must be pleaded, like any private instrument.[1]

In the case of *Burdick* v. *United States*,[2] Marshall's doctrine was put to a test that seems to have overtaxed it, perhaps fatally. Burdick, having declined to testify before a federal grand jury on the ground that his testimony would tend to incriminate him, was proffered by President Wilson "a full and unconditional pardon for all offenses against the United States" which he might have committed or participated in connection with the matter he had been questioned

[2] Hamilton referred to Shays' Rebellion.
[1] *United States* v. *Wilson*, 7 Pet. (32 U.S.) 150, 160–161 (1833).
[2] 236 U.S. 79, 86 (1915).

about. Burdick, nevertheless, refused to accept the pardon and persisted in his contumacy with the unanimous support of the Supreme Court. "The grace of a pardon," remarked Justice McKenna sententiously, "may be only a pretense . . . involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected, . . ." [2] Nor did the Court give any attention to the fact that the President had accompanied his proffer to Burdick with a proclamation, although a similar procedure had been held to bring President Johnson's amnesties to the Court's notice.[4] In 1927, however, in sustaining the right of the President to commute a sentence of death to one of life imprisonment, against the will of the prisoner, the Court abandoned this view." A pardon in our days," it said, "is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." [5] Whether these words sound the death knell of the acceptance doctrine is perhaps doubtful.[6] They seem clearly to indicate that by substituting a commutation order for a deed of pardon, a President can always have his way in such matters, provided the substituted penalty is authorized by law and does not in common understand exceed the original penalty.[7]

Scope of the Power

The power embraces all "offenses against the United States," except cases of impeachment, and includes the power to remit fines, penalties, and forfeitures, except as to money covered by the Treasury or paid an informer,[1] the power to pardon absolutely or conditionally, and the power to commute sentences, which, as seen above, is effective without the convict's consent.[2] It has been held, moreover, in face of earlier English practice, that indefinite suspension of sentence by a court of the United States is an invasion of the presidential prerogative, amounting as it does to a condonation of the offense.[3] It was early assumed that the power included the power to pardon specified classes or communities wholesale, in short, the power to amnesty, which is usually exercised by proclamation. General amnesties were issued by Washington in 1795, by Adams in 1800, by Madison in 1815, by Lincoln in 1863, by Johnson in 1865, 1867, and 1868, and by the first Roosevelt—to Aguinaldo's followers—in 1902.[4] Not, however, till after the Civil War was the point adjudicated, when it was decided in favor of presidential prerogatives.[5]

Offenses Against the United States; Contempt of Court.—In the first place, such offenses are not offenses against the United States. In the second place, they are completed offenses.[6] The President cannot pardon by anticipation, otherwise he would be invested with the power to dispense with the laws, his claim to which was the principal cause of James II's forced abdication.[7] Lastly, the term has been held to include criminal contempts of court. Such was the holding in *Ex parte Grossman* [8] where Chief Justice Taft, speaking for the

[2] Id., 90–91.

[4] *Armstrong* v. *United States*, 13 Wall. (80 U.S.), 154, 156 (1872). In *Brown* v. *Walker*, 161 U.S. 591 (1896), the Court had said: "It is almost a necessary corollary of the above propositions that, if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed." Id., 599, citing British cases.

[5] *Biddle* v. *Perovich*, 247 U.S. 480, 486 (1927).

[6] *Cf.* W. Humbert, *The Pardoning Power of the President* (Washington: 1941), 73.

[7] *Biddle* v. *Perovich*, 274 U.S. 480, 486 (1927).

[1] 23 *Ops. Atty. Gen.* 360, 363 (1901); *Illinois Central Railroad* v. *Bosworth*, 133 U.S. 92 (1890).

[2] *Ex parte William Wells*, 18 How. (59 U.S.) 307 (1856). For the contrary view, *see* some early opinions of the Attorney General. 1 *Ops. Atty. Gen.* 341 (1820); 2 *Ops. Atty. Gen.* 275 (1829); 5 *Ops. Atty. Gen.* 687 (1795); *cf.* 4 *Ops. Atty. Gen.* 458 (1845); *United States* v. *Wilson*, 7 Pet. (32 U.S.) 150, 161 (1833).

[3] *Ex parte United States*, 242 U.S. 27 (1916). Amendment of sentence, however, within the same term of court, by shortening the term of imprisonment, although defendant had already been committed, is a judicial act and no infringement of the pardoning power. *United States* v. *Benz*, 282 U.S. 304 (1931).

[4] *See* 1 J. Richardson, *Messages and Papers of the Presidents*, (Washington: 1897), 173, 293; 2 id., 543; 7 id., 3414, 3508; 8 id., 3853; 14 id., 6690.

[5] *United States* v. *Klein*, 13 Wall. (80 U.S.) 128, 147 (1872). *See also United States* v. *Padelford*, 9 Wall. (76 U.S.) 531 (1870).

[6] *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 380 (1867).

[7] F. Maitland, *Constitutional History of England* (London: 1920), 302–306; 1 *Ops. Atty. Gen.* 342 (1820).

[8] 267 U.S. 87 (1925).

Court, resorted once more to English conceptions as being authoritative in construing this clause of the Constitution. Said he: "The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century the word pardon included within its scope the ending by the King's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. [Citing cases.] These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt insofar as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. Blackstone IV, 285, 397, 398; Hawkins Pleas of the Crown, 6th Ed. (1787), Vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law." [9] Nor was any new or special danger to be apprehended from this view of the pardoning power. "If," said the Chief Justice, "we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?" Indeed, he queried further, in view of the peculiarities of procedure in contempt cases, "may it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial?" [10]

Effects of a Pardon: Ex parte Garland.—The great leading case is *Ex parte Garland*,[11] which was decided shortly after the Civil War. By an act passed in 1865 Congress had prescribed that before any person should be permitted to practice in a federal court he must take oath asserting that he had never voluntarily borne arms against the United States, had never given aid or comfort to enemies of the United States, and so on. Garland, who had been a Confederate sympathizer and so was unable to take the oath, had however received from President Johnson the same year "a full pardon 'for all offenses by him committed, arising from participation, direct or implied, in the Rebellion,' . . ." The question before the Court was whether, armed with this pardon, Garland was entitled to practice in the federal courts despite the act of Congress just mentioned. Said Justice Field for a divided Court: "The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching [thereto]; it granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." [12]

Justice Miller speaking for the minority protected that the act of Congress involved was not penal in character, but merely laid down an appropriate test of fitness to practice law. "The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor at law, may be saved by the execution pardon from the penitentiary or the gallows, but he is not thereby restored to the qualifications which are essential to admission to the bar." [13] Justice Field's language must today be regarded as much too sweeping in light of a decision rendered in 1914 in the case of *Carlesi* v. *New York*.[14] Carlesi had been convicted several years before of committing a federal offense. In the instant case the prisoner was being tried for a subsequent offense committed in New York. He was convicted as a second offender, although the President had pardoned him for the earlier federal offense. In other words, the fact of prior conviction by a federal court was considered in determining the punishment for a subsequent state offense. This conviction and sentence were upheld by the Supreme Court. While this case involved offenses

[9] Id., 110–111.
[10] Id., 121, 122.
[11] 4 Wall. (71 U.S.) 333, 381 (1867).
[12] Id., 380.
[13] Id., 396–397.
[14] 233 U.S. 51 (1914).

against different sovereignties, the Court declared by way of dictum that its decision "must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted." [15]

Limits to the Efficacy of a Pardon.—But Justice Field's latitudinarian view of the effect a pardon undoubtedly still applies ordinarily where the pardon is issued *before conviction.* He is also correct in saying that a full pardon restores a *convict* to his "civil rights," and this is so even though simple completion of the convict's sentence would not have had that effect. One such right is the right to testify in court, and in *Boyd* v. *United States* the Court held that the disability to testify being a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect.[16] But a pardon cannot "make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to which the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law." [17]

Congress and Amnesty

Congress cannot limit the effects of a presidential amnesty. Thus the act of July 12, 1870, making proof of loyalty necessary to recover property abandoned and sold by the Government during the Civil War, notwithstanding any executive proclamation, pardon, amnesty, or other act of condonation or oblivion, was pronounced void. Said Chief Justice Chase for the majority: "[T]he legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The Court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the Court to be instrumental to that end." [18] On the other hand. Congress itself, under the necessary and proper clause, may enact amnesty laws remitting penalties incurred under the national statutes.[19]

THE PARDONING POWER OF THE PRESIDENT

(By W. H. Humbert)

AMERICAN COUNCIL ON PUBLIC AFFAIRS

CHAPTER 1—CLEMENCY IN ENGLAND AND THE AMERICAN COLONIES

Although, the laws of the first Christian Saxon King, Aethelbirth (560–616),[1] contained a reference to clemency,[2] the King's prerogative of mercy as such appeared first in the laws of Ine of Wessex (688–725).[3] The prerogative in

[15] Id., 59.
[16] 142 U.S. 450 (1892).
[17] *Knote* v. *United States*, 95 U.S. 149, 153–154 (1877).
[18] *United States* v. *Klein*, 13 Wall. (80 U.S.) 128, 143, 148 (1872).
[19] *The Laura*, 114 U.S. 411 (1885).

[1] John M. Stearns. *The Germs and Developments of the Laws of England*, p. 23.

[2] For a more detailed survey of the history of clemency in England, *see* William W. Smithers and George D. Thorn. *Executive Clemency in Pennsylvania*, pp. 1–18; and for a more detailed survey of the history of clemency in the American Colonies, *see* Christen Jensen, *The Pardoning Power in the American States*, pp. 1–8.

[3] Henry St. Clair Feilden. *A Short Constitutional History of England* (1882), p. 157; B. Thorpe, *Ancient Laws and Institutes of England*, I, 125, sec. 36; and 107, sec. 6.

somewhat similar form later reappeared successively in the laws of Alfred the Great,[4] of Athelstan,[5] of Edmund,[6] of Edgar,[7] of Ethelred,[8] of Cnut,[9] and of Edward the Confessor [10] on the eve of the Conquest in 1066. After the Conquest, the prerogative of mercy found a place in the new code of laws compiled at the direction of William the Conqueror. Such repeated recognition of the executive as the dispenser of mercy might lead to the belief that the prerogative of mercy rested exclusively in the King.

Yet during the period from 560 to 1535, there were several contenders for a share of the King's prerogative of mercy. The great Earls strove for and secured the right to exercise a power of clemency within their jurisdictions.[11] The Church by obtaining a wide extension of the "benefit of clergy," [12] influenced the King in the exercise of his pardoning power.[13] But perhaps the strongest opposition to unrestrained exercise of the pardoning power by the King came from Parliament. Having observed that the King often exercised the pardoning power at his caprice,[14] Parliament rebuked him for his free use of the power and passed acts for the regulation of its exercise.[15] One of the later acts,[16] for example provided that no pardon for treason, murder or rape should be allowed unless the offense were specifically mentioned in the charter of pardon.

Despite the parliamentary dissatisfaction with royal clemency, the King retained his power of pardon. His position with respect to this power indeed became more secure in 1535, when Parliament enacted that from the first day of July, 1536,

"No person or persons, of what estate or degree soever they be . . . shall have any power or authority to pardon or remit . . . but that the king's highness, his heirs and successors, kings of this realm, shall have the whole and sole power and authority thereof united and knit to the Imperial Crown of this realm, as of good right and equity it appertaineth . . ." [17]

By this enactment Parliament placed upon the King the sole responsibility for the exercise of the pardoning power and, at the same time, terminated the contentions of the great Earls and of the Church for a share in this power. Parliament, however, showed no disposition to stop legislating with respect to the King's power. During the two hundred and fifty years following 1535, Parliament passed three important restrictive acts which affected either directly or indirectly the pardoning power. The Habeas Corpus Act of 1679,[18] establishing the principle that no man shall be arbitrarily imprisoned, made it a *praemunire* [19] "to send any subject of this realm a prisoner into parts beyond the seas" and prevented

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[4] Thorpe, I, 67, sec. 7.
[5] *Ibid.*, I. 129, sec. 4; and 231, sec. 5.
[6] *Ibid.*, I. 251, sec. 6.
[7] *Ibid.*, I. 269, sec. 7.
[8] *Ibid.*, I. 299, sec. 16.
[9] *Ibid.*, I. 409, sec. 60.
[10] Stearns, p. 241.
[11] John Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England*, p. 109; Edward Coke, *Institutes of the Laws of England*, pt. IV, ch. 36.
[12] Benefit of clergy "Originally . . . meant that an ordained clerk charged with felony could be tried only in the Ecclesiastical Court. But, before the end of Henry III's resign, the king's court, though it delivered him to the Ecclesiastical Court for trial, took a preliminary inquest as to his guilt or innocence . . . In time it [benefit of clergy] changed and became a complicated set of rules exempting certain persons from punishment for certain criminal offenses. It was extended to secular clerks, then to all who could read." John Bouvier, *A Law Dictionary* . . . (1914), I, 338.
[13] Sir William Blackstone, *Commentaries on the Laws of England* (Wendell's ed., 1847), IV, 416ff; Thomas Pitt Taswell-Langmead, *English Constitutional History* (4th ed., 1890), p. 430.
[14] With respect to the King's free use of the pardoning power, *see* Sir William R. Anson, *The Law and Custom of the Constitution* (2nd ed., 1892), pt. I, pp. 297–298; Sir Henry C. Maxwell-Lyte, *The Great Seal of England*, p. 393.
[15] Owen Ruffhead, *The Statutes at Large from Magna Charta to the End of the Last Parliament, 1761* (1763), 2 Edward III, c. 2 and 4 Edward III, c. 13; for other restrictive acts, *see* 10 Edward III, stat. I, c. 3; 14 Edward III, stat. I, c. 15; 27 Edward III, stat. I, c. 2.
[16] 13 Richard II, stat. II, c. 1.
[17] 27 Henry VIII, stat. I, c. 24.
[18] 31 Charles II, stat. II, c. 2.
[19] *Praemunire* in English law is "the name of an offense against the King and his government, though not subject to capital punishment." *Cyclopedia of Law and Procedure*, Title, *Praemunire*. In its original meaning *praemunire* was "introducing a foreign power into this land (England), and creating *imperium in imperio*, by paying that obedience to papal process which constitutionally belonged to the King alone, long before the reformation in the reign of Henry the Eighth." Penalties for *praemunire* were used first for depressing the power of the Pope only, but later these penalties were used for punishing numerous other offenses such, for example, as that made a *praemunire* by the Habeas Corpus Act. Blackstone, IV, 113–114.

the King from remitting the punishments imposed for a *praemunire* of this sort. The royal power was further restricted by the Bill of Rights.[19a] Although the King had claimed the right both to suspend the execution of a law and to dispense with its execution in particular cases, Parliament declared in 1689 that the royal exercise of both of these alleged powers was illegal.[20] Twelve years later, after the King had abused his pardoning power by using it to shield his favorites from punishment, Parliament provided in the Act of Settlement[21] "that no pardon under the Great Seal of England shall be pleadable to an impeachment by the Commons in Parliament." Though these acts of Parliament somewhat restricted the discretion of the King, he retained his prerogative of mercy.

II

When England turned her attention to expansion in the western world she had not envisaged, from a governmental point of view, a colonial empire.[22] In the beginning, especially in the southern colonies, she sought to engage in what was primarily an economic movement.[23] Her preoccupation with commerce and her consequent lack of emphasis on principles of government in the charters did not mean that those who departed from shores of the "mother country" would cease either to be Englishmen or to be governed by laws framed in harmony with English principles. On the contrary, each charter embodied a clause to the effect that adventurers and settlers were to be considered English subjects with "all liberties, franchises and immunities within any of our other dominions, to all intents and purposes, as if they had been abiding and born, within this our realm of England, or any other of our said dominions."[24] In order to retain such rights and privileges, the charters provided repeatedly that no law in conflict with established English law should be made in the colonies.[25]

The charters varied greatly in form and in substance. They were alike, however, in that they transferred from a superior to an inferior the competence to exercise certain prerogatives of sovereignty upon certain conditions and in particular places. The chief officer in each colony was the representative of the King.[26] This representative succeeded, with certain necessary limitations imposed by reason of his subordinate position, to the royal prerogatives as they were then understood in England.[27] Among these prerogatives was that of pardoning offenses and remitting penalties. Although some of the charters failed to include this prerogative, each colony at some time during its history enjoyed, through delegation, the benefits of the royal prerogative of pardon.[28] Except in the royal colonies, the executive, with assistance at times from other colonial authorities,[29] exercised the prerogative of pardon with only slight provision for intervention by the English sovereign.[30]

In the royal colonies the governor possessed the power to grant pardons in all cases except in those of treason[31] and wilful murder. In these excepted cases he exercised the power of reprieve until the royal pleasure was known. He could remit fines and forfeitures not exceeding ten pounds.[32] The royal governor was to exercise the pardoning power independently, without the need for securing the

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[19a] 1 William and Mary, sess. II, c. 2.

[20] Sir William R. Anson, *The Law and Custom of the Constitution* (4th ed., 1909; reissue rev., 1911), I, 331–333.

[21] 12 and 13 William III, c. 2.

[22] Marcus Wilson Jernegan, *The American Colonies, 1492–1750*, p. 44; George A. Washburne, *Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684–1776*, p. 17.

[23] Jernegan, p. 24; Herbert L. Osgood, *The American Colonies in the Seventeenth Century*, p. 6; Percy Lewis Kaye, *Colonial Executive Prior to the Revolution*, p. 7.

[24] William MacDonald, *Select Charters Illustrative of American History, 1606–1775*, p. 8.

[25] *Charters to Virginia*, 1606, 1600, 1612; *First Charter to Massachusetts*, 1629—MacDonald, pp. 8, 16, 19, 41.

[26] Joseph Story, *Commentaries on the Constitution of the United States* (1833), I, 169–172.

[27] Thomas Pownwall, *Administration of the Colonies*, pp. 54, 56; Evarts Boutell Greene, *The Provincial Governor in the English Colonies of North America*, p. 92.

[28] Jensen, pp. 3ff.

[29] Greene, p. 125.

[30] Jensen, p. 8.

[31] Thomas Culpeper, Governor of Virginia, 1682–83, was unable to lighten the sentence of the ringleaders of the Plantcutters insurrection. Such insurrection had been declared to be rebellion under an old statute. *Colonial Entry Book, 1681–1685*, p. 152.

[32] Green, p. 125. With respect to fines and forfeitures, *see*, for examples, *Royal Instructions to Joseph Dudley*, Governor of Massachusetts, Massachusetts Historical Society, *Collections*, (3rd series), IX, 106 and *Instructions to Dunmore of Virginia*, 1771, sec. 43, Aspinwall Papers, Massachusetts Historical Society, *Collections*, (4th series), X, 630.

concurrence of the council.[33] Out of the provisions of the commissions and instructions, out of the provisions of the charters, and out of the experiences of the colonists arose ideas of the pardoning power later embodied in the constitutions of the several states.

III

At the outbreak of the American Revolution, state governments based upon new constitutions replaced most of the colonial governments. This sudden transition represented chiefly the culmination of the long conflict between the colonists and the English King.[34] Viewed in another way, however, the contest was one between the colonists in their assemblies and the colonial governors. The governors were the champions of the King's ideas of government in opposition to the desires of the colonists and were the ever present reminders of all those offenses which had accumulated during the years. When the colonists determined to rid themselves forever of control by the King, they, in drafting their own constitution, naturally withheld powers from the governors and displayed more confidence in the legislators by concentrating in them broad authority.[35]

Under the new constitutions the legislature of each state elected the governor. His term of office was restricted to one year, except in South Carolina and Delaware, and restrictions were placed upon his eligibility for reelection. An executive council chosen by the legislature (except in New Jersey), served to restrict the governor's powers, including that of pardon; the governor had to consult the council on all important matters.[36] In short, the aim was to divest the chief magistrate "of all the royal features which made the previous governors obnoxious to the people."[37]

As would be expected, considerably altered provisions for the pardoning power emerged from the constitution-making consequent upon the abandonment of the colonial charters. In Georgia, the governor was denied the prerogative of issuing pardons, although he might grant reprieves or suspend the payment of fines until the meeting of the assembly.[38] In Connecticut and in Rhode Island, his power was restricted through the continuance of their colonial charters by which the pardoning power was vested in the assembly.[39] In five other states the chief magistrate could extend clemency only under certain circumstances, or with the advice of his council, or in accordance with predetermined limitations. By the constitutions of the remaining five of the thirteen states, the governor was invested with the power to grant pardons. Cases of impeachment were placed beyond the reach of the pardoning power in five states. In New York,[40] the governor could grant pardons in impeachment cases, but not in instances of treason or of murder. In New Jersey, the right to grant pardons for all offenses was conferred, but the governor was forced to share the prerogative with the council.[41]

IV

The representatives of the states, assembled in Philadelphia in 1787, possessed the opportunities of searching colonial charters, state constitutions,[42] records

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[33] Greene, p. 125. The governor had to respect the terms of his formal instructions. Sir William Berkley, first appointed governor of Virginia in 1641 and again after the restoration of Charles II, was authorized to issue a proclamation of pardon from which only Nathaniell Bacon was to be excepted. Berkley went beyond his instructions and excepted others, for which he afterwards was condemned by the King. *Hening's Statutes*, II, 428.

[34] William C. Morey, "The First State Constitutions," *Annals of the American Academy of Political and Social Science*, IV, No. 2, September, 1893, p. 18.

[35] *Ibid.*, pp. 18, 25.

[36] Arthur N. Holcombe, *State Government in the United States* (3rd ed., 1931), p. 57.

[37] Morey, "The First State Constitutions," *Annals of the American Academy of Political and Social Science*, IV, No. 2, September 1893, p. 29.

[38] Benjamin Perley Poore, *United States, Federal, and State Constitutions and Charters*, I, 380.

[39] *Connecticut Charter*, 1662, and *Rhode Island Charter*, 1663; Francis Newton Thorpe, *Charters and Constitutions of the United States*, I, 529 and VI, 3211, respectively; Morey, "The First State Constitution," *Annals of the American Academy of Political and Social Science*, IV, No. 2, September, 1893, p. 19.

[40] *New York Constitution*, 1776, Poore, II, 1335.

[41] *New Jersey Constitution*, 1776, Poore, II, 1312.

[42] Concerning the value of state constitutions to the members of the Philadelphia Convention, Mr. James Bryce has said: "It has been truly said that nearly every provision of the Federal Constitution that has worked well is one borrowed from or suggested by some State constitution; nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself." James Bryce, *The American Commonwealth* (3rd ed., 1893), I, 35 and *Ibid.*, Appendix, note to ch. IV, p. 671.

of English practice, and especially their own experiences,[43] for solutions to the various problems which confronted them. From any or all of these sources there were available some ideas concerning the prerogative of pardon. Despite this fact, neither the Virginia plan nor the New Jersey plan, the principal plans presented, embodied provisions for the pardoning power in their projected arrangements. But Charles Pinckney's *Draft of a Federal Government* provided that the executive "shall have power to grant pardons and reprieves, except in impeachments," and Hamilton's *Plan of Government* provided for "the supreme executive authority of the United States to be vested in a governor," one of whose authorities and functions was "the power of pardoning all offenses, except treason, which he shall not pardon, without the approbation of the Senate." [44] The resolutions adopted by the Convention and submitted to the Committee on Detail, like the Virginia and New Jersey plans, failed to include a reference to the matter of clemency.[45] But on the margin of the Randolph or Virginia plan, John Rutledge added the following to the clause defining the powers of the executive: "The power of pardoning vested in the Executive: his pardon shall not however be pleadable to the impeachment." [46] To convey his suggestion. Rutledge employed phraseology which resembled that of the Act of Settlement of 1701.[47]

The Committee on Detail adopted the Rutledge suggestion and incorporated it in the tenth article of a draft constitution reported to the Convention on the sixth of August in the form: "He shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment." [48] Discussion of this article ensued on the twenty-fifth of August, when Roger Sherman moved to amend the "power to grant reprieves and pardons" to read "to grant reprieves until the ensuing session of the senate, and pardons with the consent of the senate." [49] His motion failed, for only one state, his own, voted in favor of it.[50] Subsequent to the failure of this proposal, the Convention inserted after "pardons" the words "except in cases of impeachment" and removed the words "but his pardon shall not be pleadable in bar of an impeachment." [51] Two days later, Luther Martin desired to introduce the words "after conviction" to follow the words "reprieves and pardons." To this alteration James Wilson objected on the ground that a pardon before conviction might be necessary in order to obtain the testimony of accomplices. Forgeries were cited as cases in which such a contingency might arise. In deference to this argument, Martin withdrew his motion.[52]

The Convention did not further consider the matter of clemency until the tenth of September, when Edmund Randolph presented a motion relating to pardons in cases of treason and asked that it be referred to the Committee on Style. Although the Convention granted Randolph's request, the Secretary of the Convention failed to record in the *Journal* the content of the motion.[53] Two days before the Committee on Style submitted its report, in which appeared the provision: "and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." [54] It would appear that the committee had not approved the proposal of Randolph. In the course of comparison by the Convention of the report with the articles agreed on Randolph moved to amend the article so as to "except cases of treason" from the pardoning power.[55] He viewed the prerogative in these instances as too great a

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[43] The importance of experience was succinctly expressed by John Dickinson during the course of the debates, when he said: "Experience must be our only guide. Reason may mislead us." Max Farrand, *The Records of the Federal Convention of 1787*, II. 278. Mr. Farrand is responsible for the following statement: "In fact, making allowance for the compromises and remembering that the state constitutions were only a further development of colonial governments, it is possible to say that every provision of the federal constitution can be accounted for in American experience between 1776 and 1787." Max Farrand, *Framing of the Constitution*, p. 204.

[44] *Journal, Acts and Proceedings of the Convention, assembled at Philadelphia, Monday, May 14, and dissolved September 17, 1787, which framed the Constitution of the United States* (1819), pp. 78. 131.

[45] *Ibid.*, pp. 207ff; Farrand, *Framing of the Constitution*, p. 160; William M. Meigs, *The Growth of the Constitution in the Federal Convention of 1787*, Appendix, pp. 333–336.

[46] Meigs, p. 216.

[47] 12 and 13 William III. c. 2.

[48] Farrand, *Records*, II. 185; *Journal, Convention, 1787*, p. 225.

[49] 3 *Madison's Papers*, 1433.

[50] Farrand, *Records*, II. 419; *Journal, Convention, 1787*, p. 295.

[51] *Journal, Convention, 1787*, p. 295; Farrand, *Records*, II. 419.

[52] *Journal, Convention, 1787*, p. 295; Farrand, *Records*, II. 426.

[53] Farrand, *Records*, II. 564.

[54] *Ibid.*, II. 599; *Journal, Convention, 1787*, p. 362.

[55] For this debate, *see* Farrand, *Records*, II, 626–627; for the motion, *see Journal, Convention, 1787*, p. 382.

trust, conceiving that the President himself might be guilty and that the traitors might be his own tools. George Mason agreed, but Gouverneur Morris, also envisaging possibilities of misuse of the pardoning power, submitted that he "had rather there should be no pardon for treason, than let the power devolve on the legislature." James Wilson thought pardon for treason was necessary and that it should be placed in the hands of the executive. Should the President be a party to the guilt, he could be impeached and prosecuted. Rufus King saw a violation of the constitutional separation of powers in the event that the legislature be given a share in the pardoning power. Moreover, he considered a legislature unsuited to the purpose since it would be governed too much by the passions of the moment. He suggested the expedient of requiring the concurrence of the Senate in the acts of pardon. James Madison admitted the force of the objections to allowing the legislature to exercise the pardoning power, but he felt that the "pardon of treason was so peculiarly improper for the President" that rather than give him this right, he would acquiesce in its transfer to the legislature. His preference in the matter would be to associate the Senate, as an advisory council, with the President. Randolph, on the other hand, was unwilling to agree to the allocation to the Senate of a share in the pardoning power, for in a collusion of that body and the President he saw great danger to liberty. Mason in reply to Madison said that the Senate already had been accorded too much power. But he appeared willing for Congress to exercise the pardoning power in certain instances, for he said: "There can be no danger of too much lenity in legislative pardons, as the Senate must con [sic] concur, and the President moreover can require two-thirds of both Houses."

This closed the debate. On Randolph's motion to "except cases of treason" from the operation of the pardoning power there were two ayes and eight noes. One delegation, that of Connecticut, was divided on the question. After the failure of this motion, the Convention accepted the pardon clause as it had been written by the Committee on Style. The pardon clause in the Constitution of the United States differs in regard to impeachments from the Act of Settlement of 1701.[56] Yet this expression of Parliament served as the basis for the pardon clause in our Constitution.

V

During the period from the close of the Philadelphia Convention until the Constitution went into effect, there was, as in the Convention itself, comparatively little discussion of the pardoning power. Some arguments against placing the power of granting pardons in the executive, except in cases of impeachment, were presented. These arguments in turn evoked replies, most of which can be found in the number of *The Federalist* contributed by Hamilton.[57]

One critic of the pardon clause of the Constitution contended that the President should not have the power to grant pardons;[58] another submitted that pardons in the cases of treason should not be allowed, at least not before conviction or without the consent of Congress.[59] These and other critics conceived that this was a very dangerous power which the President might use to shield his own confederates in case of an abortive attempt to subvert the Constitution, or to stop investigations and, as a consequence, to avoid detection, since he could grant pardons before indictment.[60] The greatest misgivings about confiding this power to the President arose out of a contemplation of the crime of treason.[61] The critics held that in treasonable conspiracies the President himself would likely be involved and, entrusted with the pardoning power, would have in his hands an instrument with which he could prevent proper punishment of his confederates. If clemency were considered for the offense of treason. Congress, not the President, should be given the power of decision.

Some of the members of the ratifying Conventions who favored the constitutional grant of the pardoning power contended, first, that such a power should be lodged somewhere in a government. They argued that the testimony of an

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[56] For the content of the Act of Settlement, *see* 12 and 13 William III, c. 2; for the point of difference, *see* below, p. 62.

[57] *The Federalist, A Commentary on the Constitution of the United States,* Henry Cabot Lodge, editor, No. 74.

[58] Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution . . .* (ed. of 1907), III, 497.

[59] *Elliot's Debates,* II, 408, and *Elliot's Debates,* I, 491.

[60] *See* Luther Martin: "Genuine Information," and "An Earlier Stage of Martin's Genuine Information:" Farrand, *Records,* III, 218, 158; *Elliot's Debates,* III, 497.

[61] *The Federalist,* Lodge, editor, p. 464; *Elliot's Debates,* IV, 110–113.

accomplice, which was necessary to secure a conviction, could best be obtained by clemency from the executive and that a spy serving the executive in time of war could only be saved by clemency from the executive who alone knew of his services. The latter need for clemency would arise if the President, seeking information concerning the enemy, would secretly send a man of some importance as a spy to obtain such information. By feigning resentment against his own country, the spy would possibly be received by the enemy into favor and confidence, making it possible for him to get valuable information for the President. After completing his mission and secretly transmitting the information to the President, the spy would return to his own country where he would be regarded with disfavor by the people for his supposed treason, since the people would be unaware of his service to the country. The spy's life might even be endangered. Should not the President be able to exercise the pardoning power without interference from the legislature under such circumstances?[62] In the second place, the proponents of executive clemency deemed a legislature unsuited to the exercise of the power; hence the power could not be better placed than in the executive. During the debate in the Virginia Convention, Madison said it would be extremely improper to vest the power in the House of Representatives and not much less so to vest it in the Senate, since numerous bodies were actuated more or less by passion.[63] These bodies, moreover, would not always be in session, which would possibly occasion fatal delay in such a case as a rebellion, when an otherwise well-timed offer of a pardon to the insurgents might restore tranquillity. Then, too, in numbers there would be greater danger of connivance, more encouragement to an act of obduracy, and less fear of suspicion or censure for an injudicious exercise of the power of pardon. But by placing the power to grant pardons in a single executive these difficulties would be avoided. As Hamilton explained:

"Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed . . . As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind."[64]

Hamilton further argued that a single executive could act with as much dispatch as would be required in cases of insurrection or of rebellion. To the contention that Congress rather than the President should have power to grant pardons in cases of high treason, Roger Sherman replied in *The New Haven Gazette:* "It does not appear that any great mischief can arise from the exercise of this power by the president (though perhaps it might as well have been lodged in congress)."[65] Sherman pointed out also with respect to the general power of pardon that the President could not grant pardons in cases of impeachment, so that impeached officials could always be excluded from office.

Thus the members of the ratifying Conventions continued the arguments concerning the advisability of entrusting the executive with the power of clemency, but the pardon clause remained as it had been approved by the Philadelphia Convention. The discussion in these ratifying Conventions had sèrved only to stress the relative advantages and disadvantages of lodging the pardoning power in the executive.

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[62] *Elliot's Debates*, IV, 110–113.
[63] *Elliot's Debates*, III, 498.
[64] *The Federalist*, Lodge, editor, pp. 463–464.
[65] *The Federalist and Other Constitutional Papers*, E. H. Scott, editor, II, 608.

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