Nixon's Non-Assessment of Evidence

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HAVING DISDAINED, in his Wednesday night white paper, "to assess the evidence or comment on the specific witnesses or their credibility" in the Watergate case, President Nixon, in his accompanying televised address, proceeded to do so. "As for the cover-up," he declared, "my statement (of May 22) has been challenged by only one of the 35 witnesses who appeared—a witness who offered no evidence other than his own impressions, and whose testimony has been contradicted by every other witness in a position to know the facts."

The President's notion seems to be widely shared. At the Senate Watergate hearings, where the rules of evidence were somewhat lax and the questioning erratic, John Dean was in fact the only witness to conclude from his conversations with the President that Mr. Nixon had guilty knowledge of the obstruction of justice in the Watergate case — to infer, for example, that when, on Sept. 15, 1972, the President praised him for the "fine job" he had done, he was praising him for having "contained" the case so the indictments "stopped with Liddy."

Much of that testimony would not have been appropriate in a court of law. Neither, for that matter, would H. R. Haldeman's repeated assertions of presidential innocence, his exculpatory interpretations of each presidential utterance.

Instead, both Dean and Haldeman — in fact the only witness to "contradict" the Dean recitations of presidential complicity in the cover-up — would have been restricted to reciting the sort of factual statements Sens. Baker and Gurney elicited from Dean during their interrogations and chief minority council Fred Thompson drew out of Haldeman during his examination of that witness.

We would then have been left not with the task of resolving seemingly irreconcilable contradictions, but with an agreed upon body of fact from which further adducements could be made and reasonable inferences drawn. As the office of special prosecutor Archibald Cox noted in supporting its request for taped presidential conversations, ". . . Haldeman has confirmed many of the details of the meetings at which both he and Dean were present. The opposite conclusions he draws are based upon a different interpretation and different recollection of some of the details."

Points of Agreement

THERE IS NO material question, for example, that on Sept. 15, 1972 — the day seven indictments were returned in the Watergate case — Dean was summoned to the Oval Office, where he found the President and Haldeman waiting for him. It is undisputed that:

- After some light banter the President congratulated Dean on the job he had done to that date in whatever role he had been playing in the Watergate matter.
- Dean demeaned his own role and made some reference either to the fact that he could not indefinitely "contain" the case or that, at some future time, it might "unravel."
- The desirability of both the criminal and civil cases being conducted after the election was discussed, along with that of blocking the Patman congressional inquiry.
- Ex parte contacts with Judge Richey regarding the civil litigation were mentioned.
- The President's displeasure with certain elements of the press was made known, as was his distaste for the allegedly Democratic orientation of the Internal Revenue Service; in

both cases the suggestion was made that retribution would follow the election.

As for the March 21 meeting — again assuming some merger in Dean's mind with his presidential conversation of March 13 — there is no material dispute about the following:

- Dean told the President that a "cancer" was afflicting the presidency and that unless it was removed by "surgery" it might kill the President himself.
- Dean recounted early meetings in former Attorney General John Mitchell's office regarding espionage activities and recalled his own warning to Haldeman that there should be no White House involvement in such matters.
- Regarding pre-June 17 events, Dean informed the President that Jeb Stuart Magruder had definitely been aware of plans for bugging Democratic National Committee headquarters, that Mitchell may have given approval to the final plans, and that Charles Colson's pressure on Magruder to put the G. Gordon Liddy plan into operation could also be a "problem." Also troublesome, according to Dean, was the fact that logs of DNC wiretaps had been supplied to Gordon Strachan, who had presumably supplied the "fruits" of the illegal activity to Haldeman.
- Dean recounted post-June 17 discussions between Colson and E. Howard Hunt regarding executive clemency. He said that $350,000 in "lawyers' fees" had been transferred from the White House to the defendants through Herbert Kalmbach, with the approval of Haldeman, himself, and perhaps Ehrlichman. He further informed the President of a $120,000 "blackmail" demand then being made by Hunt in exchange for silence about the "seamy" things Hunt had done for Ehrlichman.
- The President questioned Dean as to how much money would ultimately be required to keep Hunt silent. When Dean replied that it might take up to $1 million and that it would be difficult to raise, the President indicated that would be "no problem," though, according to Haldeman, the President added that such an effort would be "wrong."
- Dean expressed concern about the Ellsberg break-in, the Brookings Institution matter, Donald Segretti's activities, Hunt's Chappaquiddick adventures and other Kalmbach fundraising efforts.

Closing One's Eyes

THESE AREAS of agreement standing alone would support neither John Dean's conclusion that Mr. Nixon was aware of the cover-up nor Haldeman's assertion that "he was exploring and probing; that he was surprised; that he was trying to find out what in the world was going on . . ." Rather than relying upon the self-serving interpretations of either witness, a trier of fact would look closely at the circumstances surrounding those facts which have been agreed upon in testimony. These are uniformly unfavorable to the President's cause.

There is, first, a point at which one ceases to be a political cuckold and becomes instead a negligent, even incompetent administrator. At some point beyond that one's ignorance becomes so willful, so deliberate, that an inference of malice can properly be drawn. Instructions to juries that a defendant cannot be considered innocent of wrongdoing by "deliberately closing his eyes to what otherwise would have been obvious to him," or that his "knowledge of a fact may be inferred from willful blindness to the existence of that fact," have consistently been upheld on appeal.

Mr. Nixon's failure to ask acting FBI Director L. Patrick Gray which aides were trying to "mortally wound him" by involving the CIA in the Watergate cover-up, his failure to promptly check the CIA lead with the agency's director or assistant director, his lack of heed to 10 months of screaming Watergate headlines, and his inability to make the connection between $350,000 raised for the defendants' "lawyers' fees" and an additional $120,000 demanded as "blackmail" all may not be conclusive evidence of guilty knowledge. But they certainly do not leave one with the impression of a man who throughout the summer of 1972 "continued to press the question" as to whether the conspiracy reached inside the White House itself.

Second, there was Mr. Nixon's propensity for assigning key advisory and investigative roles to those very aides suspected of complicity in the cover-up. Following the Gray warning, there was no apparent change of status for the Haldeman-Ehrlichman-Dean team. Nor did the President shift investigatory responsibility away from Dean in the days immediately following March 21, despite his own criminal culpability to the President. In fact, the White House used the Gray confirmation hearings during the last week in March to express confidence in the President's counsel.

Dean was instead spirited to Camp David, where he was finally asked to prepare a written report on Watergate. When he didn't comply, responsibility for the "investigation" was supposedly shifted to John Ehrlichman, himself implicated by Dean on March 21 if not earlier. Ehrlichman and Haldeman also both survived Henry Peterson's April 15 warning to the President that they were involved in the cover-up. Dean, whom Peterson said was "cooperating" with the grand jury, was notified of his dismissal the following day. John Mitchell, implicated by Dean on March 21, was invited to Washington the following day for a strategy session on how to deal with the forthcoming Senate hearings and other Watergate-related matters.

Hand in hand with the President's reliance on men he had reason to believe might be criminally involved in Watergate activities was his failure to report knowledge of crimes he learned to have been committed to appropriate civil authorities, quite possibly in violation of federal laws regarding mispri-

son of crimes (U.S. Code, Title 18 S 4). For one who claims to have "trusted the agencies conducting the investigations," it is strange that Mr. Nixon did not immediately contact the attorney general or assistant attorney general concerning what he learned on March 21.

The Ellsberg Case

EVEN MORE PUZZLING was the President's withholding from top Justice Department officials — indeed, his instruction to them to pull back from obtaining — information regarding the break-in at Daniel Ellsberg's psychiatrist's offices in Los Angeles.

Unlike Ehrlichman, the President never seems to have regarded that action as legal. In his May 22 statement, Mr. Nixon recalled instructing chief plumber Egil Krogh to have his group "find out all it could about Mr. Ellsberg's associates and his motives." However, he added, "I did not authorize and had no knowledge of any illegal means to be used to achieve this goal."

Again in his statement last Wednesday, the President reiterated, "I at no time authorized the use of illegal means by the special investigations unit, and I was not aware of the break-in of Dr. Fielding's office until March 17, 1973."

Yet for 38 days the President sat on the knowledge that a crime had been committed in the attempt to gain knowledge about or evidence against a man then on trial. Indeed, on April 18, upon learning that the Justice Department had investigated or was about to investigate the incarcerated Hunt about the matter, Mr. Nixon says he "directed Mr. Peterson to stick to the Watergate investigation and stay out of national security matters."

It was not until April 25 that he learned of the Justice Department's full knowledge of the affair and succumbed to Attorney General Kleindienst's urging that the matter be revealed to the California trial court. Between the date he claims to have learned of the break-in and its disclosure, the FBI directorship had been discussed with presiding trial Judge Matthew Byrne, an interference in the legal process that can most charitably be described as flagrant.

Making Evidence Public

MR. NIXON'S explanations for his failure to turn over evidence of criminal activity, both with respect to the Watergate and Ellsberg affair, are confusing and internally inconsistent.

Regarding the March 21 revelations, the President in his televised speech claimed that rather than turn them immediately over to the appropriate federal investigators, "I wanted the White House to be the first to make them public."

This is inconsistent with repeated presidential statements that his silence on the Watergate affair was motivated solely by the desire to be fair, to avoid interference with ongoing investigations and grand jury proceedings. On May 22, for example, the President said that in view of the criminal investigations, "it would be prejudicial and unfair of me to render my opinions on the activities of others: those judgments must be left to the judicial process, our best hope for achieving the just result that we all seek."

Again last week, he emphasized that commenting on the specifics of the matters under investigation "is the function of the Senate committee and the courts."

Thus it was apparently Mr. Nixon's intention to be the first to make Watergate matters public only so long as the White House alone was privy to the information. When that publication date would have been no one will ever know.

With respect to his knowledge of the Ellsberg matter, the President on Wednesday quoted his May 22 address as follows: "It was not until the time of my own investigation that I learned of the break-in at the office of Mr. Ellsberg's psychiatrist, and I specifically authorized the furnishing of this information to Judge Byrne."

Not only does Mr. Nixon now concede that he learned of the break-in on March 17 — four days before his investigation allegedly began — but a close reading of the May 22 statement gives no indication that the matter had also been discussed with John Dean on March 21. Indeed, the implication is plain that the President knew nothing of the crime until April 25 and before that was concerned only with national security matters involved in the case.

What Is on the Tapes?

ALL THIS SUGGESTS that the Watergate tapes would, contrary to Mr. Nixon's assertions, be definitive of the ultimate issue in the Watergate affair: the extent of the President's knowledge of the crimes being committed and his possible involvement in the criminal activity itself.

The broad outlines of some of the

conversations are known. About others there has been little substantive testimony. Most revealing, though, may be presidential responses to statements made at his Sept. 15, March 13 and March 21 meetings with Dean, Haldeman, and, later on the 21st, with Ehrlichman. Did the President react with shock to revelations of the possible criminal involvement of his closest advisers? Did he chide his counsel for the flimsiness of his earlier "investigation"? Did he question those implicated in the Dean accounts as to the truth of the allegations? Did they respond with anguished and outraged denials, as one would expect innocent public servants to do?

Did the President and his closest advisers, in short, reveal in their private discussions the same thirst for knowledge, the same sense of moral rectitude, and the same innocence of wrongdoing that they have claimed in their television addresses to the nation and in testimony before the Senate Watergate committee?