

'Mislead or Conceal'

"If any part of any underpayment . . . of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 per cent of the underpayment. . . ."

—Internal Revenue Code, Sec. 6653 (b)

By Anthony Lewis

WASHINGTON, Jan. 30—Certain nuggets of information that have surfaced lately add weight to the possibility, much discussed among tax experts, that there was fraud in the preparation of President Nixon's disputed tax returns. The particular issue is Mr. Nixon's claim of \$482,000 in deductions, so far, for a "gift" of personal papers to the National Archives.

First there was the strange remark of Edward L. Morgan, who as Deputy Counsel to the President signed over Mr. Nixon's typed name a deed purporting to give those papers to the Archives. On suddenly resigning as a Treasury official, Mr. Morgan said he now doubted that he had authority to sign that deed. He made the remark after being questioned in secret by the Congressional committee that is investigating the Nixon taxes.

Then there was a report that the deed had not been signed on March 27, 1969, the date given, or notarized on April 21, 1969, as indicated. California's Deputy Secretary of State, Thomas Quinn, said witnesses had told him the deed was actually signed and notarized on April 10, 1970, but backdated to 1969.

Those dates are significant because the law allowing tax deductions on such gifts of papers was changed effective July 25, 1969. Any gift legally made after that date would not qualify for a deduction.

A typewriter led California investigators to question the deed—a nice irony for the Richard Nixon who nailed Alger Hiss with the evidence of a typewriter. The deed was typed on a machine that the President's California tax lawyer, Frank DeMarco Jr., did not acquire until July, 1969. Mr. DeMarco himself notarized the paper. Mr. Quinn said the notary's date of April 21, 1969, was "obviously false."

Mr. DeMarco has said the piece of paper now extant is a copy of an earlier deed—but that one has not turned up. Mr. DeMarco has also argued that any backdating of the deed is immaterial, because Mr. Nixon's papers were physically delivered to the Archives in March, 1969, and the gift was legally made then. But some students of the tax law question that argument.

The papers delivered in March, 1969, were put in an Archives area for temporary storage, not acquisitions. Moreover, if the mere delivery constituted the "gift," then legally all the papers that arrived then would be owned by and open to the public. But only a third of them were later designated as going to the United States, and

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they are subject to severe restrictions. So it was the deed that defined the "gift."

A crucial element in defining "fraud" under the law is, as the Supreme Court put it in 1943, "any conduct the likely effect of which would be to mislead or conceal." A number of tax lawyers who have considered the known facts of the Nixon papers deduction think there is evidence of such conduct in this case.

The President's tax return made the unequivocal statement that a gift of papers had been made on March 27, 1969. Prof. George Cooper of Columbia Law School has said that "only an incredibly suspicious revenue agent would ever discover the critically misleading character of that statement." Moreover, the backdating of the deed could well be misleading conduct evidencing fraud.

If in fact the Internal Revenue Service or the Congressional Joint Committee on Internal Revenue Taxation finds fraud here, Mr. Nixon would owe a very large sum of money. The White House estimated last December that he had saved \$235,000 in taxes by the papers deductions. If that alone were disallowed, to it would be added the 50 per cent penalty and, at a rough estimate, \$37,000 in interest—a total of nearly \$390,000.

There have been indications that Mr. Nixon may try to soften the political blow of a tax decision against him by offering, before a decision, to pay the added amount owing without the papers deduction. But that would not help his defense against any fraud charge. Admitting a mistake is viewed as mitigation only if the taxpayer acts before an investigation of his returns.

The more important question is whether Mr. Nixon may be subject to criminal prosecution. "Willful" evasion of taxes is a felony. The courts have defined it in very much the same terms as civil fraud, but the prosecution has the higher burden of proving guilt beyond a reasonable doubt.

As a practical matter a taxpayer may be civilly liable for a fraudulent return if, as one expert put it, "he's grown-up, he's responsible." In a criminal case, if the taxpayer pleads that he was busy and relied on his lawyers or accountants, the prosecution might have to show knowledge on his part. It would be a question of fact, for the jury to decide.

The case of the President's tax returns raises more profound questions, for a jury of more than twelve. The legal doubts are evidently serious enough to trouble Representative Wilbur Mills, a man who does not rattle easily. From the public point of view, the question is an even more acute version of the one implicit in all of Watergate: Will the law treat a President as it does all other citizens?