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On the Evidence?

By Anthony Lewis

ABROAD AT HOME

As counsel to President Nixon in the impeachment inquiry, James St. Clair has performed with a rare insouciance. He has had what most lawyers would consider a difficult client with a difficult case, but nothing has seemed to faze him.

Faced with embarrassing facts and uncomfortable law, he has done his best to paint them both in different colors. He has changed the subject. He has distracted. He has earnestly asked his audience to swallow eight impossible things before breakfast.

The technique is the old jury lawyer's—in a cool modern version, without histrionics. Mr. St. Clair has kept his manner bland, his voice matter-of-fact. But like the old-style advocate, he has necessarily counted on a certain gullibility or helpful bias among the jurors.

Last winter Mr. St. Clair put forward the proposition that Presidents are immune to legal process and can be impeached only for serious criminal offenses committed in their official capacity. Under this remarkable theory, a President who shot a friend on the White House lawn in broad daylight would be untouchable.

The argument was as much a nonsense in history as in logic. The framers of the Constitution built on English precedents of impeachment not for crimes as such but for broad abuses of the public trust. Moreover, for years after the United States Government was formed it had almost no criminal laws, so the impeachment clause would have been a virtual nullity under the St. Clair theory.

When Mr. Nixon released edited transcripts of White House tapes last spring, even some of his strong supporters were sickened by the President's cynical talk of paying hush money and the like. Mr. St. Clair, brushing aside inconvenient words, said of the transcripts: "Not once does it appear that the President was engaged in a criminal plot to obstruct justice." His view was, and is, astonishing as a characterization of evidence even by the loose standard of a lawyer's closing argument.

Then there has been the question of providing evidence in response to subpoenas. Mr. St. Clair has played a curiously ambivalent role on this issue, at times appearing to have nothing to do with the White House tapes but at others getting into the substance of the dispute.

House Judiciary Committee lawyers negotiated with him for months over requests for additional tapes. So did the special prosecutor, Leon Jaworski. Both thought they were working toward a practical compromise, based in large part on confidence in the good faith of Mr. St. Clair. On April 11, Dean Burch, of the White House staff, said specifically: "We're going to turn over [to the House committee] all materials Mr. St. Clair deems relevant." But after all the talk and delay, the final answer — Mr. Nixon's — was a flat no. 10 JUL 74

Last week the House committee issued a transcript of a March 22, 1973, conversation not published by Mr. Nixon. In it he spoke of "the cover-up plan," his first known use of that phrase in connection with Watergate. He told aides: "I want you all to stonewall it, let them plead the Fifth Amendment, cover-up or anything else, if it'll save it, save the plan."

Asked why that passage had been omitted from the White House transcripts, Mr. St. Clair said it was "not that relevant." He added that "we furnished the tape to the House so that if they felt it was relevant they could publish it." In fact, the passage became available to the House committee when a Secret Service agent inadvertently let a tape play past the stopping point fixed by Mr. Nixon.

There are admirers of Mr. St. Clair who found that last episode troubling. If he actually had a part in excising the incriminating portion of the March 22 tape as "not relevant," his action was professionally insupportable. If he did not, then it was of dubious propriety for him to endorse the decision as if it had been based on his legal judgment.

But the ethics of Jim St. Clair's tactics are not the issue at this point. Reflecting on the way he has conducted this case is important for quite another reason. That is to understand what will be the consequences if he is right in his estimate of what may persuade this jury not to bring what amounts to an indictment.

In order to prevent impeachment, Mr. St. Clair must persuade the House to ignore evidence so compelling that, if such a test applied, our ordinary system of criminal justice would cease to function. He must establish that this defendant, unlike all others, decides himself what evidence shall be produced. He must bet the House to define the law so narrowly or set the standard of proof so high that no President could ever be impeached.

All that can happen only if enough members of the House want to be persuaded of the impossible for political reasons. Of course politics in the large sense must be part of the impeachment process. But Mr. St. Clair is necessarily gambling that grounds of partisanship and personal calculation will be decisive, and I think he will lose. It is not romantic to believe that, in the end, most members of the Judiciary Committee and the House will decide on the Constitution and the evidence.