

# Panel Probes Tape Mystery

By Lou Cannon

Washington Post Staff Writer

The House Judiciary Committee yesterday directed its staff attorneys to investigate a mysterious reference in a White House transcript of a supposed March 22, 1973, conversation which quotes President Nixon as apparently commenting on an event before it occurred.

Special counsel John Doar said after a committee session yesterday that he will seek to learn whether there was any way the President could have known in advance what sentence would be given to convicted Water-

gate conspirator G. Gordon Liddy.

The transcript, turned over to the committee Thursday by White House special counsel James D. St. Clair is from the recording of a conversation between Mr. Nixon and his then-chief of staff, H. R. Haldeman. The discrepancy occurs after Haldeman brings up the name of Liddy.

"Liddy is enjoying—Liddy's in jail—he didn't stay out," Haldeman said. "He just said I want to start serving my term. And he's at Danbury general prison and thoroughly enjoying it. It's a little strange."

Replied the President: "That, uh, judge gave him 35 years."

It was not until the following day, March 23, that Liddy was sentenced by Judge John J. Sirica. However, he received a sentence of six years and eight months. It was Liddy's fellow conspirator, E. Howard Hunt, Jr., who the same day was sentenced to 35 years.

This discrepancy angered Democratic members of the committee. Rep. George Danielson of California said it was "confirmation that the cover-up, which began

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two years ago, is still going on."

Rep. Hamilton Fish of New York, considered a key Republican swing vote, was more charitable.

"If it was willful, it was a very serious matter," Fish said. "In the meantime, you've got to give the benefit of the doubt to stupidity."

Fish was one of four Republican members who spent the entire day at the committee's first Saturday session. Other Republican members either failed to show up or drifted steadily away throughout the day leaving Rep. William S. Cohen of Maine, David W. Dennis of Indiana Lawrence J. Hogan of Maryland and Fish the only Republicans among the committee's 17 GOP congressmen in attendance.

The unexpected Republican absenteeism was seen by some Democrats as a sign of partisanship. Rep. Don Edwards (D-Calif.) said he regretted the poor attendance because the Saturday session was "by far the most important we ever had" since it gave the members an opportunity to ask questions.

Republicans who did attend minimized the GOP absenteeism. Fish said that "many Republicans face a tough election year" and chose to campaign instead of going to committee.

Those members who did attend not only asked many questions but also made some criticisms of Doar and minority counsel Albert Jenner.

Hogan complained that the summary volume of evidence presented to the committee on Friday contained several inaccuracies. He said that on one occasion the President is quoted as having said, "In politics, everybody bugs everybody else." Hogan said that the President was merely quoting Sen. Barry Goldwater (R-Ariz.) when he made the remark.

Cohen said Doar gave "a very strong presentation, particularly in the areas of the alleged cover-up and agency abuse." But Cohen said also about Doar's case: "Some areas are overstated and not supported by the

with unauthorized national security leaks.

"That's the whole reason they set up the 'plumbers,'" McClory said.

Jenner, talking outside the committee rooms, had some criticism of his own for White House press secretary Ronald L. Ziegler, who on Friday described the committee proceedings as "a kangaroo court."

"He's a PR man," said Jenner. "What does he know? He's never been here. He's seen nothing."

Doar declined to comment on Ziegler's remarks, telling reporters: "You can judge that for yourselves."

Staff lawyers spent most of the day leading the committee through a 306-page volume summing up the impeachment evidence against the President. The evidence is divided into four categories: Watergate, abuse of presidential powers, refusal of the President to comply with subpoenas from the House Judiciary Committee and willful tax evasion.

Several Republican members who are considered possible impeachment votes on other issues have expressed doubts about the strength of the tax evasion charge.

During the presentation yesterday, Jenner also expressed his doubts, saying that the tax issue "didn't rise to the level of an impeachable offense."

Some observers in the closed-door committee session said that members an-

White House defiance of committee subpoenas.

Nussbaum said that the committee had issued eight subpoenas for 147 conversations, 98 of them dealing with Watergate, plus documents from White House files, news summaries and extracts from the President's diary. He said the tapes the committee received were those that had already been turned over to the Watergate grand jury or the Watergate special prosecutor.

McClory called the evidence supporting this count in the impeachment articles "a very impressive section" and hinted, as he has before, that he may be prepared to vote for impeachment on this issue.

Dennis, a former Indiana prosecutor and public defender who has never been regarded as a pro-impeachment vote, also seemed impressed by Doar's presentation, which he termed "competent, professional."

"I can't escape being swayed by Doar," he added.

The committee will hear Monday from Deputy Counsel Sam Garrison, who is expected to emphasize on behalf of the GOP minority the case against impeachment.

# Watergate Panel Cure: Constitutional Band-Aids

By Arthur S. Miller

Miller, who was chief consultant to the Senate Watergate Committee, is professor of constitutional law at George Washington University's National Law Center and a consultant to the Senate Subcommittee on Separation of Powers.

THE SENATE WATERGATE Committee, the big bang of 1973, recently went out of business with a whimper. Its report, far too long, was aptly characterized by Republican Sen. Howard Baker of Tennessee in his separate views as "probably without grace or style." Of much more importance, however, is the fact that the committee failed to address the fundamental problems posed by Watergate and its aftermath.

Those problems involve the basic distribution of power within the American government. None of the committee's 34 recommendations squarely faces the critical question of a swollen presidency and a badly askew separation of constitutional powers. They tend to be more cosmetic than therapeutic. If enacted into law, they would merely cover over some (but not all) of the serious sores revealed in the past two years, rather than attacking their causes.

Much of the report is a tedious recitation of facts already known or of new evidence developed in the last months of the committee's life. Less than 5 per cent of the 2,217 pages of the draft report deals with recommendations. Some (obviously including the committee and its staff) believe that is enough. But does it fulfill the mandate of the Watergate Committee?

The answer must be that it doesn't. True, the committee performed an important function. Its televised hearings, accompanied by massive newspaper and radio coverage, were a continuing seminar for the American people in the operations of the presidency. One incident alone—the revelation on July 16, 1973, of the secret bugging of the Oval Office by President Nixon—has done more than anything else to justify the committee (and to bring the President to the verge of impeachment).

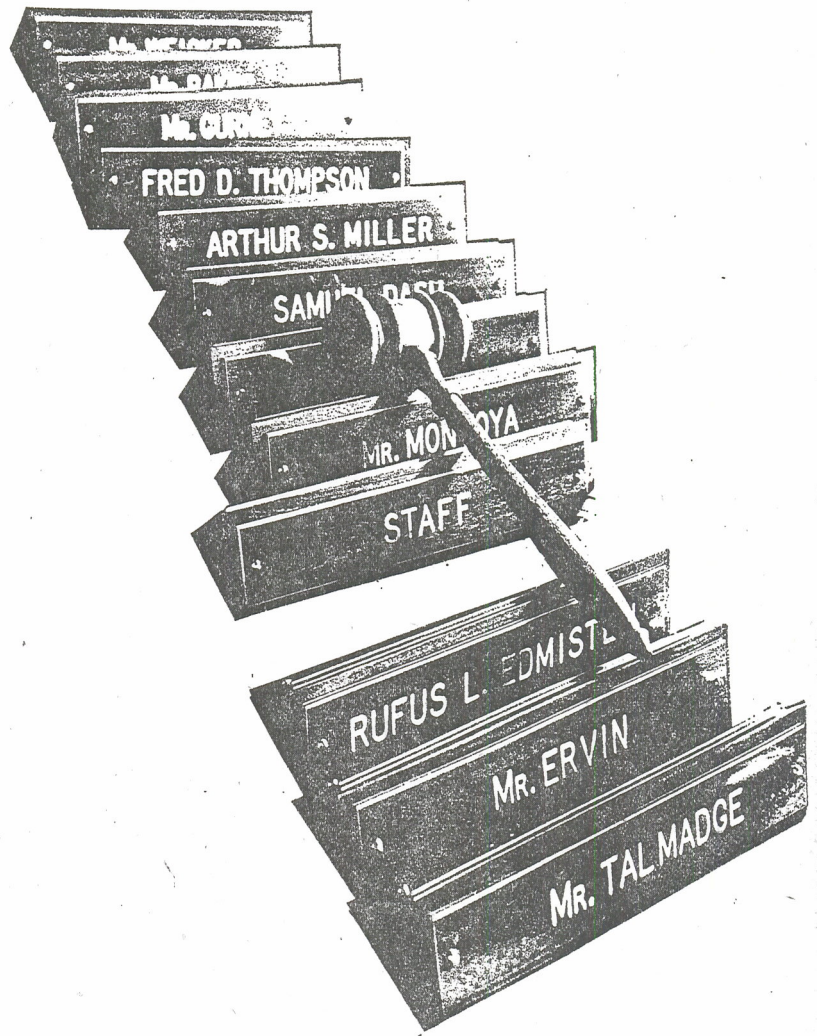
But the committee was charged with making "recommendations for new legislation it deems necessary or desir-

able for Congress to pursue inter-branch conflicts, and requiring all wiretaps to have judicial approval.

In sum, the committee enjoins Congress to do a better job and suggests a few relatively minor adjustments in the status quo. But if Watergate was, as Sen. Ervin stated in his separate views, "unprecedented in the political annals of America in respect to the scope and intensity of its unethical and illegal actions," then it is necessary to ask whether Watergate was an aberration or a culmination of trends discernible in past administrations.

ernment management of the economy. A consensus exists that government today requires presidential leadership. Congressional leaders know this, as do thoughtful citizens throughout the country. But the size of the institutional presidency poses critical constitutional problems, whoever may be in the White House. Reduced to the minimum, the question is this: How can political power that is necessary be made as tolerable and decent as possible?

Those who wrote the Constitution thought that they answered the question with the creation of separate pow-



By Ken Felt—The Washington Post

The best answer to that was given by a special panel of the National Academy

ers. To Madison, separation of powers was the "sacred maxim of free govern-



The Watergate Committee's recommendations take no note of this development. They are based on a faulty assumption—that all that is needed are a few statutory changes, a little tinkering here and there, and then all presumably will be well. But will it?

To restrain the necessary executive power within reasonable bounds requires a re-examination of the doctrine of separation of powers in the light of modern conditions, principally the emergence of the United States as the world's strongest and wealthiest nation. Congress must study itself to determine whether a bicameral body of several hundred persons can hope to retrieve any significant governing power. Can Congress place adequate checks on the executive? Not, surely, without a thorough re-examination of its internal operations. And not without enactment of statutes that far transcend those recommended by the Watergate Committee. Congress will not likely get another chance to do that job.

### Security and Privilege

**A** FEW SUCH statutes can be suggested, all of which fall within the ambit of the committee's mission.

First, something must be done to clarify the meaning of "national security" so as to establish its legitimate uses. Further, Congress should enact guidelines for its future application, both in foreign and domestic affairs.

"National security" has become the all-encompassing excuse for a variety of governmental actions, including, as the President said last week, wiretapping newsmen and government employees. True, the Supreme Court has outlawed domestic wiretaps without a judicial warrant—but that does not mean such a warrant is difficult to obtain. Foreign intelligence wiretaps, as determined by the executive, still do not need such a warrant. They should.

Congress has been derelict. As William Watts, former assistant to Henry Kissinger and now president of Potomac Associates, said in December, 1973, "Without any reasonable rules of the game, accepted by all, any President and any administration have latitude for potential mischief that is anything but healthy. Faced with such imprecision (in the definition of national security), Congress has fallen down badly, and largely acquiesced in the mystique of the 'national security' argument in fashion supine."

Second, something should be done about the exercise of "executive privilege." The Watergate Committee was "stonewalled" by the President when it tried to get tapes of some conversations relevant to its inquiry. The courts went along (both the federal district court and the U.S. Court of Appeals). It is incredible that the committee made only a partial, indirect recommendation about ways to remedy

"intelligence community." There is no effective oversight now of the CIA, FBI or other intelligence agencies. Is it enough to maintain, as former CIA head Richard Helms did before his departure to become ambassador to Iran, that the public should take it on faith that they—the intelligence personnel—are "honorable"? Haven't we learned in the past 15 years that even "the best and the brightest" can often be wrong? Here, too, Congress has been derelict, as Victor Marchetti and John D. Marks document in their recent book on the CIA.

We do not really know whether the CIA was involved in Watergate, but uncontrolled power, as Madison said, can constitute tyranny. Control over information in a society in which information and communications are central is another way of saying power. The intelligence community is at the center of the communications network.

### The Assistant Presidents

**F**OURTH, CONGRESS should improve its institutional capability to obtain, store, assimilate, retrieve, and use complex data on public-policy issues. The Watergate Committee's use of a computer marked the first time that any congressional committee entered the second half of the 20th Century to employ data storage and retrieval systems. Were it not for that, much of the vast information it collected would have been impossible to collate and manage. Further, it would not now be available to both the House Judiciary Committee and the Special Prosecutor.

One use of the computer by one committee merely points the direction. The Watergate Committee was asked by Democratic Sens. William Fulbright of Arkansas and Frank Church of Idaho to consider making recommendations on how Congress might better equip itself to match the enormous information capabilities of the executive branch. But no such recommendations were made. A chapter of its report describes what was done—and no doubt that is helpful—but no attempt was made to generalize from the committee experience.

The problem goes beyond computer technology to the question of the number and quality of Congress' professional staffs. Surely the time has come for Congress to determine whether it, like so much of the executive branch, needs a "think tank" to provide it with dispassionate, depth analyses of public policy problems.

Fifth, means must be established to control lawmaking by executive order or other proclamation. The Senate's Special Committee on Termination of the National Emergency, chaired by

tee had an opportunity to add significant momentum to reform proposals in this area, but it did not do so.

Sixth, how can the presidency be cut down to size—both in its staff numbers and its powers—the "assistant presidents," such as H. R. Haldeman, John Ehrlichman, and Henry Kissinger? Testimony before the Watergate Committee revealed how far that condition has gone. Personal advisers have been converted from presidential assistants to assistant presidents. They are accountable to no one (save the President, but even that is more theoretical than real, as the Nixon transcripts reveal), are elected by no one, the Senate does not confirm them, their actions are not judicially reviewable, they invoke executive privilege (as a new "assistant president," Kenneth Rush, has now tried to do), and otherwise refuse to deal with Congress. The presidency has become a government within a government.

When the executive offices of the presidency were created in 1939, it was emphasized that presidential assistants (men "with a passion for anonymity," as was said then) "would not be assistant presidents in any sense" and "would remain in the background, issue no orders, make no decisions, emit no public statements." President Roosevelt's Executive Order 8348 of Sept. 8, 1939, which is still in effect, states in part: "In no event shall the administrative assistants be interposed between the President and the head of any department of agency or any one of the divisions in the executive office of the President." Contrast that with the "responsiveness" program and other actions of the Nixon administration and one quickly sees how far we have strayed from that principle.

The failure of the Watergate Committee to deal with this continuing problem is one of the greatest shortcomings of its report.

### Beyond Band-Aids

**O**THER SUGGESTIONS could be made, including some on the critical question of whether an alternative to impeachment should be developed. Democratic Rep. Henry Reuss of Wisconsin and James Sundquist of the Brookings Institution, among others, have called for a vote of confidence to replace the blunderbuss of impeachment. Rexford Tugwell, the FDR brain-truster, believes that there should be recall of presidents by the electorate.

Clearly, the problem of Watergate will not be solved by putting Band-Aids on the governmental system. As Potomac Associates' Watts put it in a symposium sponsored by the Center for the Study of Democratic Institutions: "Only a tiny minority of

mentals of our democratic way that this nation has yet experienced."

It is a great pity that the Watergate Committee did not see its mission from that perspective. Given the inherent difficulties it faced, its investigations were well done and thorough. But the seminar it conducted in 1973 is over. The people now want to know what should be done. The whimper of a report that the committee produced

after 17 months of labor is not adequate to the need expressed by Rep. Richard Bolling in February, 1974: "If there is a lesson in Watergate, it is not that we had a President who was either blind or willful—but that there was nobody watching. We cannot have a system which depends on a benign executive—or a malign one. We've got to make the Congress work. There is no alternative. And if the Congress

cannot be responsible, then the whole system of representative government and free-choice government is going down the drain."

Sen. Ervin attempted to get his colleagues to "think big," but for various reasons, including a lack of time and a desire for unanimity, was unable to do so. Only Sen. Weicker, in his separate views, tackled some of the basic problems, perceiving Watergate as a challenge to the constitutional order and recommending steps ranging from Senate confirmation of senior White House aides to giving the Supreme Court original jurisdiction on issues of presidential privilege.