ADVANCE SHEET – August 19, 2022

President's Letter

The arguments concerning what to do about rogue rulers are as old as history, and are certainly contemporary. On the one hand are those who believe that political distempers should find political cures, through such means as impeachment, investigation and exposure, summary execution incident to victory in war, defeat at elections, or the 'truth and reconciliation' commissions used in South Africa and some Latin American countries. On the other are those favoring trials by national or international courts, including many lawyers who, as Judge Henry Friendly once observed, are instinctively attracted to due process like dogs in heat. The historian Jill Lepore has noted the criminalization of American politics in the last several administrations, even though the binary nature of trials can lead to either vindication or martyrdom and the prospect of them can make rulers reluctant to relinquish office. Sometimes the purposes merge; the value of the Nuremberg trials is sometimes said to arise not from the sentencing of a dozen second-level Nazi leaders, the 'Big Four' having committed suicide, but in Justice Jackson's eloquent opening and closing speeches and in the assembly of a published documentary record rendering Holocaust denial unfeasible and aiding the judgment of history.

We here tender three notable reflections on these matters. The first is a chapter from *Political Justice* (Princeton University Press, 1956) by Professor Otto Kirchheimer, a German refugee scholar and notable member of the pre-Nazi Frankfurt School of political science. The second are two chapters from Professor Philip Kurland's *Watergate and the Constitution* dealing with the role of congressional investigations and special counsel in that affair. The third is Senator Robert Taft's speech at Kenyon College on the Nuremberg trials, the ambivalent reaction to which is said to have cost him a Presidential nomination while earning him a chapter in John F. Kennedy's *Profiles in Courage*.

George W. Liebmann

The length and file size of the material necessitated that it be divided. The material from Professor Kirchheimer appeared in the last issue of the *Advance Sheet* and may be viewed by going to the Library's Web Page at **www.barlib.org**, clicking on the Information Tab and then on the Newsletter Button once it appears. Past issues going back to 2016 may be found there. The material from Professor Kurland and Senator Taft appears in this issue. - J.B.

The United States Marshals Service
Through the Eyes of A U.S. Marshal

On Wednesday, September 7, 2022, at 12:30 p.m., Johnny L. Hughes, the United States Marshal for the District of Maryland will speak on the United States Marshals Service and the District Of Maryland. He will recount the role the Service played in numerous cases including their involvement in the 2002 D.C., Maryland., Virginia Sniper Case. Please join us for what should be a fascinating afternoon as Marshal Hughes talks to us about the Marshals Service and recounts almost a half century in law enforcement. The program will be in-person as well as by way of Zoom.

Johnny L. Hughes is the United States Marshal for the District of Maryland. He was appointed by President George W. Bush and confirmed by the United States Senate on February 8, 2002. Prior to becoming United States Marshal, Mr. Hughes was Director of the National High Intensity Drug Trafficking Area Congressional Affairs and Public Information Office under the office of National Drug Control Policy. He was appointed to that position July 1, 1996. Hughes began his law enforcement career on July 10, 1967, as a trooper with the Maryland State Police, retiring at the rank of Major on June 30, 1996. Major Hughes worked in numerous assignments and held several command positions with the Maryland State Police. Hughes has extensive experience in congressional affairs work and has testified on law enforcement and criminal justice matters on Capitol Hill. He has served on several local, state and federal boards, committees and commissions. Hughes was the recipient of the United States Attorney General's Special Commendation Award in 1993, and recipient of the National Law Enforcement Council Achievement Award in 1992. A family man, Marshal Hughes is the father of Michael and David Hughes, both former Maryland State Troopers. Michael was shot in the line of duty and is now medically retired from the Maryland State Police while David is currently a Supervisory Special Agent with the Drug Enforcement Administration.

Time: 12:30 p.m., Wednesday, September 7, 2022, with the Library's famous wine & cheese reception immediately following.
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R.S.V.P.: If you would like to attend telephone the Library at 410-727-0280 or reply by e-mail to **jwbennett@barlib.org**. Please remember to indicate whether you will be attending in-person or by way of Zoom. If you are joining us remotely, a Zoom link will be forwarded the week of the program.

Wonderful Times

By the time the next issue of the *Advance Sheet* "hits the newsstand," schools will have reopened. When I was young, the first day of school was always the day after Labor Day, a holiday I have ambivalent feelings about to this day.

Several years ago, there was an ad campaign where a group of ecstatic looking parents made their way through a store buying school supplies while their crestfallen children trailed behind them. The music that played in the background was "It's the Most Wonderful Time of the Year," the old holiday standard by Andy Williams.

I always hated that commercial. My wife would be amused as I invariably yelled at the television "If you don't want to be around your children, you shouldn't have had them."

For most parents, the day comes when their children go off, but unlike school, do not come back at the end of the day. For my wife and I, that day has come four times in the guise of marriages and a military enrollment. When the children visit, which is frequent, I know in fact what a "wonderful time" really is all about.

Wonderful times can be achieved in a myriad of ways, including professional accomplishments. Winning that first case, that big case, or obtaining a result that looked unobtainable. Developing a case, like raising a child, requires hard work. Positive outcomes just do not happen. Although we cannot offer a lot of help with your children, we can with your case. Comprehensive services and collections offered by the Library can put you where you need to be. It's affordable, it's complete, it's the Bar Library. In the words of another ad campaign "Try It, You'll Like It." I guarantee it.

I look forward to seeing you soon.

WATERGATE AND THE CONSTITUTION

Philip B. Kurland

The University of Chicago Press

Chicago and London

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The Congressional Power of Inquiry

The role of Congress as grand inquisitor is almost as old as the nation. It has had a long and checkered career. One will look in vain in the text of the Constitution, however detailed Article I may seem to be, for the source of this power and function. Like Topsy, the inquisitorial power of Congress "never was born. It just growed like cabbage and corn." Yet even those most insistent on the impropriety of constitutionally implied powers, such as Raoul Berger,[1] have no doubts whatsoever about the constitutional legitimacy of this implied congressional function.

Senator Sam Ervin, who also subscribes to a strict interpretation of presidential powers, described the congressional power:[2]

> Congress can probe into every matter where there is legitimate federal interest. In the modern age, where government is involved in multifaceted aspects of our daily lives, there are increasingly few areas where Congress may not delve. . . .
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> The Constitution [he does not say where] and statutes give Congress a solemn duty to oversee the activities of the executive branch. . . .
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> Congress also has the duty and the right to publicize its findings on corruption and maladministration. Indeed, fulfilling its responsibility to inform the public about the state of government is one of Congress's most significant functions. . . .
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> But as great as Congress's powers are, they are subject to weighty limitations. Congress must act with valid legislative purpose. It cannot probe purely private affairs nor expose private activity solely for the sake of exposure. It cannot usurp the functions of the executive and judicial branches and prosecute, try, and convict for criminal offenses. The legislative trials of the loyalty investigations era are a black mark on the history of congressional inquiries. . . .
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> A congressional committee cannot venture beyond the responsibilities given it by its parent House through authorizing or enabling resolutions.

As will be noted again and again in this volume, the constitutional authority at issue—here the power of legislative inquiry—cannot be evoked from the words of the Constitution itself. We cannot impose paternity on the Founding Fathers. Necessity was probably its mother. But its legitimacy is long past question.

It is true—to shift the metaphor—that there are straws to be found in parliamentary, colonial, Convention, and post-Convention history to support the notion that the constitution makers might have assumed the existence of such legislative power, although they did not mention it. But, if bricks cannot be made without straw, neither can they be made of straw alone. And there is some difficulty in relying on such history to justify Senate inquiry into malversations of executive branch officials.

There can be no doubt that there was a history of parliamentary investigation before the American states separated from Great Britain and established their national constitution. As George Keeton remarks: "Committees of Inquiry into allegations of misconduct, whether of public servants or others, have been a part of the ordinary machinery of the two Houses of Parliament, and particularly of the House of Commons, at least since the Restoration of Charles II in 1660."[3]

The difficulty with this pre-Revolutionary history is that the work of parliamentary committees of inquiry was, in almost every instance, the machination of newly installed ministries to impose blame for the deficiencies of government on the ministries that had just been ousted from office. In 1667, the House of Commons, following the fall of Clarendon, appointed a committee to investigate the expenditures of taxes by the king and his ministers.[4] And, in 1679, after the dissolution of the Restoration Parliament, and the consequent exile of the Duke of York, the House of Commons established a committee of inquiry into the state of the navy, an attack directed at Samuel Pepys, who is known to us as a diarist but who was then the loyal supporter and henchman of the Duke of York.[5] Although Pepys suffered incarceration pending the outcome of the investigation, the inquiry, like many that were to follow, petered out with no conclusion. Thus, as Keeton put it: "The Committee of Inquiry, therefore, appears in its first use as a tribunal of investigation after the Restoration as a party instrument making no claim to impartiality."[6]

This remained the characteristic mode for parliamentary inquiries throughout the pre–American Revolution period. Sir Robert Walpole's life affords demonstration enough. In 1715, at the beginning of his career, Walpole was instrumental in creating a committee for the investigation of the alleged wrongdoings of Lord Bolingbroke, particularly with reference to the negotiations that led to the Peace of Utrecht. Bolingbroke was already out of office; indeed, in anticipation of Walpole's actions, Bolingbroke had left the country for France. (Since it

was in France that Bolingbroke turned to philosophy and history and friendship with Voltaire and Montesquieu, we indirectly owe to Walpole the important political and historical analyses that Bolingbroke wrote which had such important effect on the thinking of American revolutionaries.)[7] It was Walpole's committee report that resulted in the impeachment of Bolingbroke and started Walpole's star on its rise.[8]

When the South Sea Bubble burst in 1720, the ministry of which Walpole was a part became endangered by a parliamentary inquiry of both Houses into the relationships between the members of the ministry —and the Crown—and the corporate directors of the ill-fated venture.[9] The ministry barely survived this highly partisan probe, largely as a result of the timely death of one villain who could be made the scapegoat. In 1742, when Walpole was driven from the premiership, after twenty-two years of rule of highly dubious ethical standards, parliamentary inquiry was again invoked. This time Walpole was slated for the role that he had once assigned Bolingbroke. He, however, escaped impeachment by the narrowest of margins.

While it is clear that the writers of the Constitution were familiar with the facts of parliamentary inquiry, it is less than clear that this was the kind of behavior that they wished the American Congress to emulate. There is almost nothing in the reported debates at the Convention or the ratifying conventions that followed to suggest that this power was intended to be included by implication among the extensive list of powers specifically stated. As the great protagonist of congressional authority, Professor Berger, has pointed out,[10] there is one place at the Constitutional Convention where the House of Representatives was referred to as the "grand inquest of the Nation";[11] and the phrase was twice repeated at the ratifying conventions;[12] and still again by James Wilson in his constitutional lectures of 1791.[13] But when one examines the context of these remarks, they do not seem to mean what Berger would read into them.

The reference in the records of the Convention indicates that the phrase was meant to refer to the impeachment process. The exact quotation is: "The House of Representatives shall be the grand Inquest of this Nation; and all Impeachments shall be made by them." And when Wilson used the phrase in his lectures, he seemed to be talking more of the legislative function than the inquisitorial power. What he said was:[14]

> A difference in the posts assigned to the two houses, and in the number and duration of their members, will produce a difference in their sense of the duties required and expected of them. The house of representatives, for instance, form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things. Their commissions will commence or be renewed at short distances of time. Their sentiments, and views, and wishes, and even

> their passions, will have received a deep and recent tincture from the sentiments, and views, and wishes, and passions of their constituents. Into their counsels, and resolutions, and measures, this tincture will be strongly transfused. They will know the evils which exist, and the means of removing them: they will know the advantages already discovered, and the means of increasing them. As the term of their commission and trust will soon expire, they will be desirous, while it lasts, of seeing the publick business put, at least, in a train of accomplishment. From all these causes, a sufficient number of overtures and propositions will originate in the house of representatives. These overtures and propositions will come, in their proper course, before the senate.

Even if these authorities were to be read as justifying legislative inquiry, it is clear that they referred only to the House of Representatives and not to the Senate. But a real doubt about such implied adoption of English procedure derives from the fact that the parliamentary precedents were essentially revelations of the expression of political faction rather than searches for information or truth. And it was the purpose of the constitution makers to frame a government that would restrain faction rather than endorse it.[15] It must be remembered that the American party system was subsequent to, not antecedent to or contemporary with, the framing of the Constitution.[16]

When the English parliamentary system was to be followed, or adapted —as with impeachment—the framers let it be known in the words of the Constitution. When the English parliamentary system was to be rejected—as with bills of attainder and ex post facto laws—the framers let that be known in the same way. The parliamentary system of committees of inquiry falls somewhere in between. The problem is to determine the meaning of silence. And the answer, therefore, cannot be found in what was said; it has been found in what was done after the Constitution became a reality.

By 1885, the congressional power of inquiry could be extolled by no less a figure than the future President Woodrow Wilson. In his book *Congressional Government*, Wilson wrote the often-quoted proposition:[17]

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and di-

> rect. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.

While this passage is frequently quoted, it is usually not noted that Wilson was speaking here in normative rather than descriptive terms. Diligent oversight by Congress was what he believed necessary. But he recognized that the need was not reflected in actuality:[18]

> Congress stands almost helplessly outside of the departments. Even the special, irksome, ungracious investigations which it from time to time institutes in its spasmodic endeavors to dispel or confirm suspicions of malfeasance or of wanton corruption do not afford it more than a glimpse of the inside of a small province of federal administration. Hostile or designing officials can always hold it at arm's length by dexterous evasions and concealments. It can violently disturb, but it cannot often fathom, the waters of the sea in which the bigger fish of the civil service swim and feed. Its dragnet stirs without cleansing the bottom. Unless it have at the head of the departments capable, fearless men, altogether in its confidence and entirely in sympathy with its designs, it is clearly helpless to do more than affright those officials whose consciences are their accusers.

Wilson had a hundred years of history behind his judgments. We now have almost two hundred. But when Congress first entered the arena of legislative inquisition, it was writing on a blank slate.

The legislative power of inquiry came into the Constitution in 1792, when the House of Representatives, with some trepidation, undertook to investigate the smashing defeat of the American army under General St. Clair at the hands of the Indians at the headwaters of the Wabash River on 4 November 1791. Washington was informed of this catastrophe by messenger, and he in turn reported the event to Congress through his personal secretary. Things being no different then than now, the story leaked to the press, causing some furor, and the Secretary of War disingenuously reported to Congress that the cause of the defeat was "a deficient number of good troops."[19] It was too simple an answer either to satisfy the country or to satisfy the Congress.

St. Clair himself was asking for a court of inquiry to absolve him from liability. President Washington declined. In February a motion to investigate the defeat was offered in the House, without effect. On March 27, Congressman Giles of Virginia introduced a motion to ask Washington to conduct an investigation. Congressman Vining of Delaware, urging that the request to Washington would only embarrass the President without securing an investigation, suggested that the House

itself undertake the investigation. He asserted that the House had that power because it had the impeaching power and investigation was certainly a precondition to impeachment.

There was opposition from Smith of South Carolina, who urged that the Congress had no authority. The execution of the laws was entrusted to the President and it was his responsibility to determine why the failures occurred. He thought that there was no wisdom in the House acting as the "grand inquest of the nation," and that the ludicrous behavior of the French National Assembly in this regard should not be repeated here:[20]

> Most members of the House were aware of the precedent-setting aspects of the proposal, but they also believed the virtual destruction of the nation's military force and the huge expenditure of funds demanded a public accounting. The motion [to establish a committee of inquiry] passed on a vote of 44 to 10.

The House passed a resolution asking the President to have the proper officers "lay before this House such papers of a public nature" as might afford it a basis for investigating the causes of St. Clair's defeat. Washington, who had seldom called a cabinet, did so on this occasion, meeting with his four departmental chiefs, Jefferson at State, Hamilton at Treasury, Knox at War, and the Attorney General, Edmund Randolph. (There was then no department for the Attorney General; the Department of Justice did not come into existence until 1870.) The cabinet was called with knowledge that this was the first exercise of legislative inquisition authority and the precedent of the response would be important. The meeting was adjourned without conclusion on the Saturday on which it was called and resumed on the following Monday. The ultimate response, which made the requested papers available to the House, also created the beginnings of the text on what we have come to call "executive privilege":[21]

> Jefferson noted that the group reached unanimity on the essential points: the House could conduct an inquest, institute inquiries, and call for papers. The President, however, could release such papers as the "public good would permit and ought to refuse those the disclosure of which would injure the public." Jefferson wrote that neither the House nor the committee had a right to call on department heads to release records. Requests for Executive records were to be made directly to the President.

The problem of "executive privilege" was the primary constitutional issue framed by the Select Committee's investigations and will be treated in following chapters. But the President did, in the St. Clair affair, afford all the documents to the House that it requested.

The House proceeded to prepare a report, at which the Secretary of War and General Hodgdon took umbrage. It pointed out the faults that led to the disaster but declined to recommend censure for any civil officials or courts-martial for any military officials.

The precedent-setting House investigation found its authority either in the Impeachment Clause or in its duty to inform the public of the conduct of government by the executive branch. It clearly did not rest on the need to secure information for the purpose of passing legislation. But with the precedent established, problems of constitutional authority disappeared, as legislative committee after legislative committee undertook investigations without further worry about the propriety of their doing so under the terms of the Constitution. (In 1798, in implementation of this inquiry power, Congress passed a statute authorizing both houses to put witnesses under oath.)[22]

As with much of our constitutional history, Congress performed its duties as it conceived them to be until the courts were brought in to tell it what it could and could not do. The Supreme Court was, at first, less than sympathetic to the notion that the House of Representatives could act as the grand inquest of the nation. When the House undertook an investigation into the events that led to the bankruptcy of Jay Cooke & Co., one of whose creditors was the United States, it ordered the attendance by subpoena of Hallett Kilbourn. Kilbourn appeared but refused to answer certain questions and refused to produce certain documents called for by the subpoena. The committee reported this recalcitrance to the whole House and asked that Kilbourn be held in contempt of Congress. Citations for contempt of Congress, then as now, had to be voted by the entire House or Senate as the case might be.[23] Kilbourn was arrested on the Speaker's warrant, but still refused to answer, and was charged with contempt and incarcerated in the congressional jail. Kilbourn brought the issue to the courts by petition for a writ of habeas corpus. Justice Miller wrote the opinion for the unanimous Court granting Kilbourn his freedom from congressional restraint.[24] Miller's reasons were not quite so clear as his conclusion, but that has been true of most Supreme Court opinions, both great and petty, both late and soon.

Miller examined the Constitution and found no basis therein for a congressional authority to impose any sanctions, except with regard to impeachment and discipline of its own members. If he did not find the power explicit in the Constitution, neither was it implicit in either of the grounds offered by Congress: first, that it was a power exercised by Parliament and inherited by Congress; second, that it was a power necessary to the performance of its legislative functions. It was, said Miller on highly dubious historical grounds,[25] because Parliament was not only a legislature but a "court of judicature" that it could assert the

power of inquiry and punishment. Congress is only a legislative body and has no such authority. Moreover, in a not untypical judicial construction of the constitutional doctrine of separation of powers, the Court held that the function being exercised by the Congress here rightfully belonged to the judicial branch. Inquiry into private business transactions had no function except to establish wrongdoing by individuals and that was a judicial task. The inquiry could not be considered in aid of the legislative function since it "could result in no valid legislation on the subject to which the inquiry referred."[26] It must be remembered with reference to the last proposition that all government power had not yet been transferred to the national government by the Supreme Court. There were then, as there are not now, subjects that did not fall within the national ken.

Kilbourn was a strong restraint on the congressional power of investigation, but even if it had not been revised, it could not have seriously affected the Senate Select Committee in the Watergate affair. First, one of that committee's avowed purposes was the collection of data on which to base legislation. Second, the subject matter of the investigation was behavior of government employees rather than of individuals engaged in private affairs. On the other hand, *Kilbourn* would suggest the invalidity of the Ervin probe insofar as its goal was the exercise of what has come to be known as the informing function. And, insofar as it was engaged in unearthing evidence also sought in criminal proceedings, as it was, *Kilbourn* might be read as a bar. Just as the Court found the pending bankruptcy proceedings of Jay Cooke & Co. preemptive of the subject matter, so, too, might the special prosecutor's activities have been thought to be a similar barrier.

It will be recalled that in Watergate, Special Prosecutor Archibald Cox requested that the Senate hearings be stayed lest they interfere with his criminal law processes. He was turned down both by the Select Committee and by Chief Judge Sirica of the United States District Court of the District of Columbia, whom he asked to enjoin the televising of the Senate proceedings. And these judgments were surely correct, especially in light of the earlier retreat by the Supreme Court from such rigid restraints on congressional investigations as would have been imposed by *Kilbourn*.

In Supreme Court adjudication, the first judgment is not likely to be the last; nor is the second, the third, the fourth. And while *Kilbourn* has never been specifically overruled, it is of limited authority today. This is not the place to canvass all the Court's opinions on the subject, but reference to a few is called for. Two cases derived from the Teapot Dome investigation.[27] Both *McGrain* v. *Daugherty*[28] and *Sinclair* v. *United States*,[29] like *Kilbourn* v. *Thompson*, were concerned with the power of a congressional committee to compel the testimony of witnesses who were not government employees.

In *McGrain* v. *Daugherty*, the Court found a very different historical base from that stated in *Kilbourn*. And the conclusion was a very different one. After reviewing "legislative practice, congressional enactments and court decisions" the Court, in an opinion by Justice Van Devanter, stated:[30]

> We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time. The acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it "more effectually" than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

It did not matter that the resolution establishing the Teapot Dome committee did not speak of the potential of legislation. The subject matter was the administration of the Department of Justice. "The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable."[31] Such a presumption of validity negated the charge that the investigation was for the purpose of "attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part."[32]

Sinclair reiterated the essence of *McGrain* v. *Daugherty*. The power of investigation was a necessary auxiliary to the legislative function. But it also established two conditions on congressional inquiry that have remained controlling:[33]

> . . . while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and . . . a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry.

> It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs.

Thus is the Constitution slowly but effectively amended so that it may be read to fill the lacunae. Foresighted as the forefathers were, they could not have anticipated all the conditions which would require answers to questions that did not exist when they wrote. What the Court has told us here, as it has elsewhere about all branches of the government, is that the assumption and exercise of power over a long period of time will eventually be legitimated by the Supreme Court, which has constituted itself a continuing constitutional convention. The problems of such constitutional amendments tend to derive not so much from the legitimation of power as from the inadequate rationalizations for that legitimation.

The tools used in the congressional inquiry cases were familiar ones. One is called the legal fiction by which the Court indulges a presumption that something is true that it knows is not necessarily true. The presumption that congressional inquiry is addressed to gathering facts on which to base legislation is such a fiction. The investigation of the Attorney General's department and its behavior surely did not have legislation as its objective any more than did the St. Clair inquiry heretofore noted. The St. Clair inquiry, however, could have been considered an adjunct of the impeachment power, since it was conducted by the House of Representatives. The Senate inquiry in *McGrain* v. *Daugherty* could not have relied on that provision.

The other tool utilized by the Court to amend the Constitution in the congressional inquiry cases was what the late Alfred Kelly appropriately labeled "law office history." The opening paragraph of Kelly's article, in reliance on Mark Howe, makes the point:[84]

> In a recent review article, Mark DeWolfe Howe delivered himself of a few trenchant comments upon the increasing tendency which certain Justices of the United States Supreme Court have exhibited to resort to the "historical method of adjudication." Admittedly, he said, "tension between the complexities of confused reality and the simplicities of sure conviction has very probably always marked the divisions within the Court." But "only within recent years," he continued, "have the justices who have discovered and embraced the solacing simplicities [of historical adjudication] endeavored to persuade us that a careful reading of history confirms their confidence." And if the Justices "have not always succeeded in this effort," he added, "they have at least taught us that a selective interpretation of

history can provide much satisfaction to the interpreter." In short, in Professor Howe's opinion, the Court's recent historical "scholarship" is both simplistic and naïve.

Howe was certainly right about the modes of judicial historicism. But he was wrong about the proposition that these deficiencies are of only recent origin. Chief Justice Marshall, in *Martin* v. *Hunter's Lessee*[35] and elsewhere, certainly indulged in rewriting history to serve his cause.[36] Chief Justice Taney in the *Dred Scott* case was taken to task by the dissents of Justices McLean and Curtis for the same reason.[37] And the congressional inquiry cases reveal the same deficiencies.

Certainly, as Justice Miller said in *Kilbourn*, the British Parliament had judicial as well as legislative functions. But there is no evidence that they believed themselves to be undertaking judicial functions when they engaged in committees of inquiry. The previous references to the Walpole and Pepys inquiries are evidence enough that it was a parliamentary and not a judicial function in which they were engaged.

Nor were the later cases of *McGrain* v. *Daugherty* and *Sinclair* any better in this regard. Surely there were a multitude of congressional investigations on which the legitimacy of the power of Congress was rested in its lawmaking function. But these cannot accurately be said to be confined to exercises in the collection of data for the purpose of enacting legislation. The St. Clair investigation;[38] the investigation of James Wilkinson in 1810;[39] the investigation of the burning of Washington in 1814;[40] the investigation of Andrew Jackson's invasion of Florida in 1818;[41] the Calhoun investigation of 1826;[42] the investigation of the Second Bank of the United States in 1832;[43] the investigation of Sam Houston's misbehavior in 1832;[44] the investigation into the assault on Charles Sumner in 1856;[45] the Harper's Ferry inquiry of 1859;[46] the Covode inquiry into the misconduct of the Buchanan administration in 1860;[47] the investigation of the conduct of the war in 1861;[48] the investigation of the Joint Committee on Reconstruction in 1865;[49] the investigation of the Crédit Mobilier scandal in 1873;[50] the Ballinger-Pinchot inquiry of 1910;[51] the Clapp Committee investigation of 1912;[52] and the Pujo Committee of the same year;[53] in short, almost every major congressional inquiry that preceded the decisions in *McGrain* v. *Daugherty* and *Sinclair* indicates that Congress was not limited in the exercise of its inquiry power to the preparation of legislation.

The justification by the Court of congressional inquiries as an adjunct of the lawmaking function is not an unreasonable one. Surely, collection of information is a necessary prerequisite to framing legislation. But the presumption that all congressional investigations are in fact in aid of the lawmaking function is an indulgence in "law office history."

The history of congressional investigations reveals not that they are necessary to the lawmaking process, but rather that there is more to the

job of the legislature than legislating. Oversight of government behavior, within the legislative as well as the executive and judicial branches, and the need to inform the public about such behavior and misbehavior—in short, the things that Woodrow Wilson was talking about—are also legitimate legislative functions. Surely the constitutional language provides that only the Congress may legislate; it does not demonstrate that the Congress may only legislate. The Court may have misled itself by an erroneous conception that the Constitution affords a strict separation of powers, when in fact it provides rather for an intricate system of checks and balances. And, indeed, checks and balances is what the Watergate inquiry was all about. The imperial presidency is not a question solely of the accumulation of power in the executive branch of government; the greater problem is that the accumulated power is exercised without being subjected to the oversight and scrutiny necessary to assure that the fiduciary obligations of the President are being met.

Thus, as Martin Shapiro has written:[54]

> By subsuming administrative investigations under the heading of investigations for legislative purposes, the Supreme Court has obscured two factors that lie at the heart of its own demands for a lawmaking and only a lawmaking purpose. First, a category of investigation that does not have as its sole or principal purpose the making of laws has from the very beginning of our government been recognized as legitimate. Second, exposure of individual misconduct discovered in the pursuit of information, not necessarily for making laws but for its own sake, has always been an integral and essential part of this category of investigation. . . .
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> It is true that the gathering of information for the purpose of making law is often an element in the "problem" investigation, and indeed sometimes the problem is identified by the amount of proposed legislation on a given subject. But only the most opaque pair of legalistic dark glasses can blot out the obvious exposing or general informing function of many such investigations. . . .
>
> Congressional investigations are then multipurpose tools. Those purposes—lawmaking, administrative, educational, judicial, and self-preservative—closely parallel the general functions of Congress. The parallel suggests that in practice Congress has conceived of the investigation not simply as a scoop for gathering the raw materials of legislation but also as a flexible political device that can be utilized to implement any or all of its aims.

By the time of Watergate, these facts of life seem to have been implicitly, if not explicitly, accepted by the Supreme Court. The more recent restraints on Congress by the Court have not derived from the limits of the lawmaking function. Instead, they have been demands that specified constitutional inhibitions on government also be imposed

on the legislative branch. Lawmaking is still spoken of by the Court as the pin for the investigating process.[55] But it has been recognized that the legislative function is broader than lawmaking, though subject to the restraints of the Bill of Rights. In *Watkins* v. *United States*,[56] the Court, speaking through Chief Justice Warren, said:

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.
>
> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. . . . This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.

In the *Watkins* case itself, a conviction for contempt of Congress was reversed essentially on procedural due process grounds. It was found that the committee's charter from the House and the chairman's definition of the committee's scope of inquiry were too vague to permit the witness to determine whether the questions put to him were in fact pertinent to the authorized inquiry. The Court suggested that Congress would have to be more careful in stating its charges to its committees of investigation:[57]

> It is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out that group's jurisdiction and purpose with sufficient

particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter. Broadly drafted and loosely worded, however, such resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress.

When the Senate came to draw the "charter" under which the Select Committee was to operate,[58] it was fully cognizant of the constitutional restraints under which it must operate. And the chairman also drafted rules of procedure and guidelines for the conduct of the hearings.[59] The result was that few if any of the constitutional limitations placed on legislative inquiries by the Supreme Court became issues in the conduct of the Select Committee's Watergate hearings.

The general power of subpoena has consistently been treated by the courts as an inherent power of Congress.[60] Chief Justice Warren's opinion in *Watkins*, which makes clear the citizen's duty to respond to such subpoenas, is typical.[61] All standing committees of both Houses now have such authority either under law[62] or under Standing Rules.[63] Special or select committees may be given that power by the resolution that creates them, as it was given to the Senate Watergate committee by its charter.[64] Senate Resolution 60 included authorization to subpoena "any . . . officer . . . of the executive branch of the United States Government."[65] The White House argued that the language of the Resolution did not authorize a subpoena to the President. But that was settled to the contrary both by further Resolution of the Senate[66] and by judicial opinion.[67]

The means for enforcing a legislative subpoena are cumbersome. There are two, neither of which is very efficacious. The first is self-help. The second is by means of judicial contempt proceedings. Self-help is more of a threat than a reality. But it was threatened at least twice in the committee hearings. Thus, immediately after Alexander Butterfield had told the Select Committee's staff of the existence of the White House tapes, he proposed to take off for Russia on Federal Aviation Administration business. When he was told that his testimony was wanted immediately before the committee in full session, he replied that he could not come because of this previous engagement. Thereupon Senator Ervin sent him a message: "Tell Mr. Butterfield that if he is not here this afternoon I will send the sergeant at arms to fetch him."[68] Wherefore Butterfield was voluntarily present to tell the world the story of the existence of the White House tapes, a story that ultimately led to the first resignation of an American president.

Senator Ervin had earlier responded in a similar tone when President Nixon told his White House staff that they should not attend the hear-

ings at the behest of the committee. Then, too, the putative witnesses backed down when Ervin announced he would cause them to be arrested by the sergeant at arms, if necessary. Fortunately, it was not necessary. The self-help of a Senate sergeant at arms is a puny force against executive branch soldiery. As Senator Baker was said to have observed, the sergeant at arms couldn't get beyond the White House gates if he had to.

The contempt process is one that has afforded a repeated testing ground for the power of legislative subpoena. It, too, is a dubious weapon. Like self-help, it is used more as a threat than a reality. It could result in the punishment of a recalcitrant witness including incarceration for the duration of a Congress under the common-law authority of Congress.[69] Since 1857, the process has been rather a judicial one than a legislative one.[70] Upon proper vote of the offended House, a criminal case may be brought against the offender, which requires both a grand jury indictment and the approval of the United States Attorney. There are obvious difficulties with this process. There are always doubts about how effectively a United States Attorney would proceed before the grand jury against other officials of the executive branch. Indeed, that was the reason that the Watergate cases were removed from the jurisdiction of the United States Attorney in the District of Columbia and given to the special prosecutor. Moreover, while the contempt process is a threat to a recalcitrant witness, it is not necessarily a good means of evoking testimony, simply because the course of a criminal contempt case is likely to take more time than the life span of the investigation. The process was never invoked by the Watergate committee. When G. Gordon Liddy, a self-styled "007," refused to testify, the committee simply ignored him. When Nixon refused to produce documents commanded by committee subpoena, the committee eschewed the contempt process in recognition that it was not likely to succeed against a President of the United States, even if, as was doubtful, a sitting President is subject to criminal contempt processes.[71]

The Fifth Amendment's privilege against self-incrimination is a recognized barrier to compelled testimony before Congress as well as the courts.[72] The Ervin Committee, unlike its predecessor committees in the Kefauver and McCarthy investigations,[73] did not provide the unedifying and cruel process of commanding the public appearance of those who would refuse to testify on grounds of the privilege against self-incrimination. Several potential witnesses took or threatened to take the Fifth Amendment in executive session, at one time or another, including McCord, Sloan, Magruder, Dean, and Colson. In each instance, the committee excused the witness from making his claim in public hearings, except insofar as it was a prerequisite to a grant of immunity. The policy of the committee was stated by Samuel Dash in his book:[74]

> By excusing Colson we were implementing a policy Ervin and I had succeeded in getting the committee to adopt: no witness asserting his Fifth Amendment privilege would be forced to appear publicly before television cameras to repeat his refusal to answer questions on constitutional grounds. Other committees had engaged in the practice of exhibiting "Fifth Amendment" witnesses—some notoriously. But we concluded that public display of such witnesses could serve only an improper purpose of showmanship and did not perform any legislative or public-informing function.

The committee did, however, make use of its capacity to compel evidence by the use of the immunity laws. In 1857, the Congress had passed a law that permitted it to compel testimony even against a plea of the Fifth Amendment, provided that the witness was immunized from prosecution relating to the transaction about which the testimony was given.[75] This proved too great a boon to witnesses who "spilled everything" on the stand, thus buying wide protection against criminal prosecutions. In 1862, the Congress contracted the immunity, so that it extended protection only against use of the testimony, not against prosecution for the transaction with regard to which the testimony was given.[76] In 1892, the Supreme Court declared that immunity must extend not only to the use of the testimony but to the leads given to other evidence—the "fruits." The Court, in *Counselman* v. *Hitchcock*,[77] said: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." This was read to mean that transactional immunity was required by the Fifth Amendment. But in 1964, the Supreme Court took another turn, suggesting that an immunity law would be adequate if it protected only against the use of the testimony and its fruits.[78] And the Nixon administration secured the passage of the Omnibus Crime Control Act, which contained provisions for use and fruits immunity only.[79] And this time, the Supreme Court upheld the statute as adequate protection under the Fifth Amendment for those who would be compelled to testify.[80]

The Ervin Committee did make use of this statute with regard to two of its most important witnesses: Magruder and Dean. Both were granted the use immunity provided by the statute and became willing witnesses before the committee. Indeed, it was the compelled Dean testimony that broke the case against the President. It might be noted that Senators Baker and Gurney opposed the grant of immunity to Dean, whom they regarded as the principal culprit defaming the President.[81] Had they succeeded, history might have been afforded a different view of the Watergate affair, although Dean did negotiate a similar immunity from the prosecutor. Whether that would have occurred in the absence of the Senate immunity, we do not know.

To my mind, the immunity laws rest on thin grounds. The standard for their validity is the requirement that they afford the witness all the protection he would have had if the Fifth Amendment privilege had been invoked. The fact of the matter is that the immunity grant can never be as broad as the right to silence.

There were several times when the question was raised whether the Watergate committee's investigation poached on the province of the criminal prosecutorial process. Suffice it here to note that in no instance did a court find that the committee exceeded its proper function in this regard.

The Senate Watergate committee was meticulous in affording witnesses the protections that the law was intended to give and in adhering to the Constitution, statutes, and Senate rules, with one important exception. As Senator Baker is reported to have stated: "The Ervin Committee did not invent the leak, but we elevated it to its highest art form."[82] It is not quite clear what he meant by "we." Certainly, the leaks were not from Ervin or his chief counsel, for whom they were extraordinarily "counterproductive." It was the view of at least one senator that the leaks could not be blamed primarily on the staff. "It's the damnedest thing I've ever seen," said Senator Talmadge. "I've been in the Senate seventeen and a half years and never has anything leaked from my staff. The Select Committee was like a sieve. My opinion is that Senators more than staff were guilty."[83]

Certainly the leaks were in direct violation of the rules of the committee and the rules of the Senate. They might even have been criminally prosecutable.[84] But the leak is a way of life in Washington. The press condemned the officials who engaged in leaking, at the same time extorting information from the officials who sought good relations with the media which they regarded as the makers and breakers of Washington officialdom. No effort was made to affix responsibility for the practice with regard to the Watergate committee. One day the legislative branch as well as the executive and even the judicial branch is going to have to undertake an enforceable, self-imposed discipline.

4

Judicial Arbiter

The courts were involved in the Watergate affair from the beginning. Indeed, if one takes a narrow view of the appropriate time period, it may be said that the Watergate episode was opened by the trial of the burglars accused of the break-in at the Democratic headquarters in the Watergate complex and that it was effectively closed by the Supreme Court decision in *United States* v. *Nixon*,[1] which commanded the production of the tapes even as the House Judiciary Committee met under the glaring lights of the television cameras.[2] In fact, the judicial processes wound on for many months after Nixon left the White House, particularly with the trial and appeals of those to whom the new President refused to grant mercy, as he had done to his predecessor. The Supreme Court declined to review the convictions in the last days of the 1976 term.[3]

The primary constitutional question addressed by the courts was that of "executive privilege." Two sets of cases were involved here. The first by the special prosecutor's office, the second by the Select Committee. The special prosecutor got almost all he asked; the Select Committee got nothing.

Let me trace first the failure of the Senate Committee to secure aid and comfort from the judiciary. As soon as Alexander Butterfield had publicly spilled the beans about the existence of the White House tapes, the committee issued subpoenas to the President for their production. He declined to honor them and thereby put the members of the Select Committee in a procedural box. They could, of course, have sought a presidential contempt citation from the entire Senate. But they knew that this was not likely to be forthcoming. Nor was it clear that a contempt of Congress citation would be enforceable against the President of the United States. Surely they could not seize him, as they had Kilbourn, and bring him before the bar of the Senate. Nor was it likely

that they could get the United States Attorney to bring criminal contempt proceedings against the President. Still more dubious was the question whether a President of the United States is subject to criminal prosecutions while he holds office.

A conference was called with Senators Ervin and Baker, the chief counsel, chief minority counsel, and several other staff lawyers. Senator Ervin had invited two consultants from his Subcommittee on Separation of Powers to help canvass the possibilities for enforcement of the subpoenas through civil actions in the courts. These consultants informed the group that, in their opinion, jurisdiction for civil suit was highly uncertain, unless the trial court was anxious to rule in the committee's favor. They recommended the passage of legislation that would create jurisdiction.[4] Only Senator Ervin wanted to follow this course. Baker said a statute could not be secured under existing conditions. The staff and Senator Baker preferred to take their chances on various tenuous arguments for jurisdiction. The committee therefore went to court without the statute. (As it turned out, the statute would not have been of any help.)

When the committee filed its action, a subpoena sought by the special prosecutor had already been granted.[5] The committee could see no reason why it should not be equally successful. But Judge Sirica could. Emulating Marshall's judicial modesty in *Marbury* v. *Madison*,[6] Sirica found an absence of judicial power to enforce the congressional subpoena.[7]

It was refreshing, if frustrating, to read of the limited capacities of federal courts, especially in light of their theretofore—and thereafter—persistent grasp for power:[8]

> For the federal courts, jurisdiction is not automatic and cannot be presumed. Thus, the presumption in each instance is that a federal court lacks jurisdiction until it can be shown that a specific grant of jurisdiction applies. Federal courts may exercise only that judicial power provided by the Constitution in Article III and conferred by Congress. All other judicial power or jurisdiction is reserved to the states. And although plaintiffs may urge otherwise, it seems settled that federal courts may assume only that portion of the Article III judicial power which Congress, by statute, entrusts to them. Simply stated, Congress may impart as much or as little of the judicial power as it deems appropriate and the Judiciary may not thereafter on its own motion recur to the Article III storehouse for additional jurisdiction. When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.

No doubt, Judge Sirica, like the devil, enjoyed quoting scripture, especially to Sam Ervin. As Sirica held, the Senate committee could not

sue in the name of the United States: only "the Department of Justice, under direction of the Attorney General" can bring such a suit. Since it was necessary to reject all possible grounds for jurisdiction, Sirica also rested on a weaker reed, the need to satisfy the jurisdictional amount requirement for a case that "arises under the . . . laws . . . of the United States."[9] The difficulty with this basis for jurisdiction was explained by Sirica:[10]

> Unlike the statutes heretofore discussed, this provision includes a monetary sum or value as an incident of jurisdiction, the $10,000 jurisdictional amount. Although the amount has varied over the years, defendant is correct in his assertion that whatever the sum, it is a jurisdictional prerequisite. The satisfaction of a minimum amount-in-controversy is not a technicality; *it is a requirement imposed by Congress which the courts may not dispense with at their pleasure.*

The issue in controversy here, access of the Senate committee to the tapes, the court said, could not be valued at more than $10,000.

It is true that this irrational jurisdictional requirement exists. But there were cases that the court could have invoked to find that the issue was in fact worth more than $10,000.[11] He rejected these cases, in order to defeat jurisdiction.

Since jurisdiction was Congress's to bestow, as Sirica stated, Congress then bestowed it by passage of a law authorizing jurisdiction over the committee's suit. But this, too, proved of no avail. This time the question came before Judge Gesell for resolution, and he at least was not embarrassed to set up the supremacy of the judiciary as the one ultimately to determine whether Congress displayed an adequate interest to secure the tapes.[12] It seemed that it did not:[13]

> It has not been demonstrated to the Court's satisfaction that the Committee has a pressing need for the subpoenaed tapes or that further public hearings before the Committee concerning the content of those tapes will at this time serve the public interest.

Some years ago it might have been thought that the people's elected representatives were the proper authority to determine what was in the public interest. That era has long since passed. Gesell would have it that the sole function of Congress was to legislate—and that the Senate would best leave it to the judiciary to take care of the more important Watergate issues. With a becoming immodesty, Judge Gesell declared:[14]

> The Committee's role as a "Grand Inquest" into governmental misconduct is limited, for it may only proceed in aid of Congress' legislative function. The Committee has, of course, ably served that function over the last several months, but surely the time has come to question whether it is in the public interest for the criminal inves-

tigative aspects of its work to go forward in the blazing atmosphere of ex parte publicity directed to issues that are immediately and intimately related to pending criminal proceedings. The Committee itself must judge whether or not it should continue along these lines of inquiry, but the Court, when its equity jurisdiction is invoked, can and should exercise its discretion not to enforce a subpoena which would exacerbate the pretrial publicity in areas that are specifically identified with pending criminal charges.

The Court recognizes that any effort to balance conflicting claims as to what is in the public interest can provide only an uncertain result, for ours is a country that thrives and benefits from factional disagreements as to what is best for everyone. In assigning priority to the integrity of criminal justice, the Court believes that it has given proper weight to what is a dominant and pervasive theme in our culture. To be sure, the truth can only emerge from full disclosure. A country's quality is best measured by the integrity of its judicial processes. Experience and tradition teach that facts surrounding allegations of criminal conduct should be developed in an orderly fashion during adversary proceedings before neutral fact finders, so that not only the truth but the whole truth emerges and the rights of those involved are fully protected.

This kind of tunnel vision is endemic in the federal judiciary. For it, the important aspect of Watergate was that those guilty of criminal acts should be punished after receiving due process of law. There is no doubt that, for the federal courts in the District of Columbia, it was more important to punish criminals than to reveal the institutional deficiencies that were the origins of the constitutional crisis. But this is only to say in one more way that the judicial function is more important than the legislative.

On appeal, the Court of Appeals for the District of Columbia affirmed the trial court on different, if no more persuasive, grounds.[15] It argued that it need not reject the existence of a legislative oversight power, as the trial court had done. But the House Judiciary Committee had already instituted its impeachment hearings and since the House hearings rested on specific constitutional authority, said the Court, it was sufficient expression of congressional power of inquiry to leave access to the tapes to the House Judiciary Committee:[16]

> . . . the Judiciary Committee now has in its possession copies of each of the tapes subpoenaed by the Select Committee. Thus, the Select Committee's immediate oversight need for the subpoenaed tapes is, from a congressional perspective, merely cumulative. Against the claim of privilege, the only oversight interest that the Select Committee can currently assert is that of having these particular conver-

> sations scrutinized simultaneously by two committees. We have been shown no evidence indicating that Congress itself attaches any particular value to this interest. In these circumstances, we think the need for the tapes premised solely on an asserted power to investigate and inform cannot justify enforcement of the Committee's subpoena.

One can only speculate whether subpoenas from two federal courts conducting separate criminal trials should also be regarded as "merely cumulative." The Court of Appeals then went on to dispose of the need for the materials in support of the committee's "legislative function":[17]

> The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings.

Therefore, said the court in its opinion, these facts are not among those necessary to the congressional legislative function and we deny enforcement of the subpoena. It will readily be seen that the court here was relying on the existence of executive privilege as the barrier to access by the Select Committee. It was a balancing of the privilege against the need of the Select Committee that was indulged by the court. It had held previously, in *Nixon* v. *Sirica*,[18] that there was an executive privilege against which it measured the needs of the grand jury for the data, and found the grand jury's interest superior. The Court of Appeals, therefore, did here what the Supreme Court was later to refuse to do, treat executive privilege vis-à-vis judicial subpoena as equally applicable to congressional inquiries. As the Supreme Court was to do, however, the Court of Appeals here, as it had in *Nixon* v. *Sirica*, reasserted the supremacy of the judicial branch. The executive and the legislative branches were to be confined in their operations to the degree that the judicial branch determined, not what was constitutionally prescribed, but what was the better public policy. Who better equipped with the bases for judgment as to public policy than the federal judiciary, whose black robes, like those of Merlin, confer access to wisdom, truth, and justice unavailable to ordinary mortals. It was years ago that this attitude was attacked by a federal judge as the "cult of the

robe," and forty years ago that it was attacked by a President: "The judicial branch also is asked by the people to do its part in making democracy successful."[19]

It is apparent that the federal courts, despite Sirica's notions that their jurisdiction and the substantive rules governing that jurisdiction were entirely in the hands of Congress, continually and successfully frustrated the Select Committee's demand for information against an assertion of executive privilege by the President. For it was not the courts that made available the data to the House Judiciary Committee, although they approved it, but an act of the special prosecutor's office.[20]

The story of the judiciary's own right of access to the tapes by way of subpoena is a very different one. From the beginning of that quest, the courts upheld their own authority to compel the President to produce the evidence that he claimed to be privileged. When Archibald Cox went to Sirica for enforcement of his grand jury subpoena, Sirica was forthcoming. At least, he was prepared to examine the tapes himself to determine whether they contained data appropriate for the eyes of the prosecutor and the members of the grand jury.[21]

Sirica started with the legislative history of the Constitution, which afforded him evidence that there is no basis in the Constitution for executive privilege. His quotation from Charles Pinckney set the tone:[22]

> No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary and no more.

Sirica did not read this as a ban on executive privilege but rather as a license to the courts to determine "what was necessary." From there, he went on to cite the Supreme Court decision in *United States* v. *Reynolds*,[23] which found, he said, "an executive privilege, evidentiary in nature, for military secrets."[24] From this he derived the notion that, despite the original premise, there is also "an evidentiary privilege based on the need to protect Presidential privacy."[25] He did not point out that the *Reynolds* case was decided in the context of a statute which provided for privilege for military secrets. But that could make no difference to him, since surely there was nothing that Congress could do that the courts could not. Thus immediately, once again, came the assertion of judicial supremacy:[26]

> The Court, however, cannot agree with Respondent that it is the Executive that finally determines whether its privilege is properly invoked. The availability of evidence including the validity and scope of privileges, is a judicial decision.

The mode for effectuating judicial supremacy required all that was called for by the subpoena to be submitted to the court *in camera* for its review:[27]

> If after judicial examination *in camera,* any portion of the tapes is ruled not subject to privilege, that portion will be forwarded to the grand jury at the appropriate time. To call for the tapes *in camera* is thus tantamount to fully enforcing the subpoena as to any unprivileged matter. Therefore, before the Court can call for production *in camera*, it must have concluded that it has authority to order a President to obey the command of a grand jury subpoena as it relates to unprivileged evidence in his possession.

The court answered this question by a not uncommon judicial technique of stating its conclusion in its premise:[28] "Analysis of the question must begin on the well established premises that the grand jury has a right to every man's evidence and that for purposes of gathering evidence, process may issue to anyone." The burden was, therefore, on the President to show that, by reason of his office, he is not "every man." That burden, the court found, the President could not carry.

The conclusion that the office of the presidency is entitled to no special treatment is followed by an encomium to the grand jury process:[29]

> The grand jury is well known to Anglo-American criminal justice as the people's guardian of fairness. Ever since the Earl of Shaftesbury relied upon its integrity, the grand jury has been promoted as a shield for the innocent and a sword against the guilty. . . . [W]hen that group, independent in its sphere, acts according to its mandate, the court cannot justifiably withhold its assistance, nor can anyone, regardless of his station, withhold from it evidence not privileged.

The judge saw in the grand jury the representatives of the people, a role he was not prepared to concede to the elected members of the Congress. This praise for the grand jury would be amusing if the matter were not so serious. Today, the grand jury, far from serving its original purpose, has become a mere tool of the prosecutor. It is more often an engine of oppression than a protector of liberty.[30] It has been abandoned in England, where it was born, and in many American states, as an anachronism. Today, a grand jury indictment differs little from a prosecutor's information. Both are the product of the prosecutor. There is little evidence of grand jury independence.

Given the problem of balancing the need of the grand jury for the evidence and the "need to favor the privacy of Presidential deliberations, to indulge a presumption in favor of the President"[31]—a strange presumption in light of the earlier portions of the opinion—the court would examine the documents in the case and, in its wisdom, reveal

what should be revealed and conceal what, in its wisdom, should be concealed. In making such judgment, the court made it clear that "If the interest served by a privilege is abused or subverted, the claim of privilege fails."[32]

The President and the special prosecutor appealed the trial court judgment. The prosecutor sought a ruling that the materials were to be turned over to that palladium of justice, the grand jury, without prior judicial scrutiny. Again, there was doubt that the appellate court had jurisdiction to review such an interlocutory order. But the Court of Appeals for the District of Columbia Circuit, showing none of the qualms that Sirica demonstrated carefully to limit judicial authority to that which Congress specifically mandated, quickly resolved the question in favor of its own jurisdiction, at least as to the President's appeal.

The Court of Appeals found, what no one else has been able to discover, "the longstanding judicial recognition of Executive privilege,"[33] and the equally long-standing power of courts to override it.[34] In fact, the judicial opinions cited by the court as authorities do not deal with the immunities of Presidents and certainly not with the confidential communication privilege asserted in the case before it. And the reliance for the most part is on dicta rather than holdings. Be that as it may, the court had no difficulty in concluding that a grand jury has the right to every man's evidence—including the President's—unless it is privileged. Whether it is privileged is to be determined not by the President but by the judiciary, for no man is above the law and the judiciary is the law. In balancing the interests of the grand jury against those of executive privilege, the court thought the President hoist by his own petard, and those of former White House associates who had informed against him:[35]

> Our conclusion that the general confidentiality privilege must recede before the grand jury's showing of need, is established by the unique circumstances that made this showing possible. In his public statement of May 22, 1973, the President said: "Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up." We think that this statement and its consequences may properly be considered as at least one factor in striking the balance in this case. Indeed, it affects the weight we give to factors on both sides of the scale. On the one hand, the President's action presumably reflects a judgment by him that the interest in the confidentiality of White House discussions in general is outweighed by such matters as the public interest . . . in the integrity of the level of the Executive Branch closest to the President, and the public interest in the integrity of the electoral process. . . . Although this judgment in

> no way controls our decision, we think it supports our estimation of the great public interest that attaches to the effective functioning of the present grand jury. . . .
>
> At the same time, the public testimony given consequent to the President's decision substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate. The simple fact is that the conversations are no longer confidential. . . . In short, we see no justification, on confidentiality grounds, for depriving the grand jury of the best evidence of the conversations available.

Why these arguments should not have been equally applicable to the Senate inquiry, we shall never know.

The Court of Appeals for the District of Columbia Circuit is made up not only of judges but of statesmen. It did not want to be overbearing; so, as it said:[36]

> Two days after oral argument, this Court issued a Memorandum calling on the parties and counsel to hold conversations toward the objective of avoiding a needless constitutional adjudication. Counsel reported that their sincere efforts had not been fruitful. It is our hope that our action in providing what has become an unavoidable constitutional ruling, and in approving, as modified, the order of the District Court, will be followed by maximum cooperation among the parties. Perhaps the President will find it possible to reach some agreement with the Special Prosecutor as to what portions of the subpoenaed evidence are necessary to the grand jury's task.

This was a license to negotiate a settlement that would deprive the trial court order of any force and effect. What was thought to be an act of statesmanship, however, turned out to be equivalent to throwing a lighted match into a tank of kerosene. Indeed, the decision of the Court of Appeals in *Nixon* v. *Sirica* was the decisive event of Watergate: not because of its constitutional ruling, but because the chain of events that followed clearly turned public opinion against the man in the White House. The role of the federal judiciary as mediator in problems of state—witness the mediation in the Hayes-Tilden election—is of dubious validity or worth. If its legitimacy turns on its success, there is no doubt that this mediation power, at least, was conceived on the wrong side of the blanket.

Nixon grasped the offer of the Court of Appeals to negotiate a settlement. He announced that he would not appeal the judgment to the Supreme Court because it was not in the best interests of the nation "to leave this matter unresolved for the period that might be required for a review by the highest court," although he was confident that his position would be sustained there.[37]

Nixon's notions about negotiating consisted of an attempt to dictate the compromise to be effected. His approach was more than devious; it was predicated on plain prevarication. His plan was to provide summaries of the relevant tape material—summaries that he prepared—to both the Senate Select Committee and the grand jury. The veracity of those summaries was to be tested by submitting the tapes themselves to Senator Stennis for comparison with the summaries. And, as part of this "negotiated" compromise, he said:[38]

> Accordingly, though I have not wished to intrude upon the independence of the special prosecutor, I have felt it necessary to direct him, as employee of the Executive Branch, to make no further attempts by judicial process to obtain tapes, notes, or memoranda of Presidential conversations. I believe that with the statement that will be provided to the court, any legitimate need of the special prosecutor is fully satisfied and that he can proceed to obtain indictments against those who may have committed any crimes.

The plan was totally rejected by Cox. Although it was announced that Ervin and Baker had agreed to the proposal, the fact was that the proposal they had agreed to was not the proposal announced by the President.[39]

The President's next step was to order the Attorney General, Elliot Richardson, to fire Cox as special prosecutor. Richardson declined and resigned. The Deputy Attorney General also declined and sought to resign but was fired for refusing to obey orders. The third in command, the Solicitor General, Robert Bork, a nonpolitical officer, was urged by both Richardson and Ruckelshaus to remain in office after doing what was certainly going to be done sooner or later.[40] Bork fired Cox. The consequence was a windstorm of criticism of Bork, who had made a hard choice if not the right one. Subsequent to his action, a trial court held, and later the Supreme Court implied, that Cox could not legally be fired so long as the executive order specifying his tenure remained in effect.[41] If, as some have suggested, Bork recognized the illegality of his act, he was, of course, not justified in his actions on the ground of "superior orders." But he did not have the benefit of hindsight now available to us. As Elliot Richardson has recorded it:[42]

> Bill Ruckelshaus had also sent over a letter of resignation. The President refused to accept it and directed General Haig to fire him instead. Who, then, would be left to fire Archibald Cox? The Solicitor General, Robert H. Bork, was next in line. He believed that the President had the right to order Cox fired and had no personal compunctions about wielding the axe. He felt, however, that if he went through with it he should then resign himself. "I don't want to stay on and be perceived as an *apparatchik*," he said. Bill and I persuaded

him that this should not in itself be a sufficient concern to justify the drastic loss of continuity at Justice that would result if he also resigned.

The result of the dismissal of Cox was what General Haig called a "firestorm." Almost immediately, two hundred and twenty thousand telegrams were sent to the President and Congress, an extraordinary portion of which condemned the action. All sorts of persons, from the president of the American Bar Association to George Meany, many of whom would be expected to be in the President's camp, chastised him publicly. The House of Representatives began to take seriously the notion of impeachment and took steps toward that end. The public reaction was so extreme that when Charles Alan Wright appeared before Judge Sirica on October 23, four days after the Cox firing, he announced that the President had decided to "comply in all respects" with the court order.[43]

General Alexander Haig told a news conference on the same day that "the President concluded after very painful and anguished discussions that the circumstances were sufficiently grave that he should abandon his very strongly and long held right to protect the prerogatives of his office not only for himself but for future Presidents."[44] Haig denied that the decision had been a consequence of the impeachment move, claiming that it derived rather from the "whole milieu of national concern" over the recent events.[45] (Parenthetically, it may be noted that the promise to deliver all the tapes subpoenaed was not fully met; some of them turned out to be nonexistent, and one contained an eighteen and one-half minute erasure. It was never explained by whom the erasure was made, but it was established that the deletion was intentional.)

One week later, the House Judiciary Committee began its impeachment inquiry. The investigations of presidential and White House misbehavior had now turned into a three-ring circus: the Senate committee was going forward; the criminal investigations were proceeding, soon under the new prosecutor, Leon Jaworski, to whom the President promised complete independence; and the impeachment inquiry was proceeding in the House of Representatives. Meanwhile it appeared that all government in Washington dependent on presidential direction had come to a grinding halt. Watergate overshadowed everything.

The appetite or needs of the grand jury—or its alter ego, the special prosecutor—for the tapes were not sated by what was delivered to them after screening by Sirica. After a period of negotiated deliveries, the President finally called a halt. Jaworski had to go to court again; again the court issued an order for production. This time, the President declined to obey. He quickly filed his appeal in the Court of Appeals, and thus opened the door for the prosecutor to ask for review by the

Supreme Court of the United States before judgment by the Court of Appeals. This was the route that had brought an earlier President's overreaching to grief in the *Steel Seizure Case.*[46] The same occurred this time. The Supreme Court just could not abstain from playing a role in this constitutional crisis of our time. If it did not act immediately, it might find that events had passed it by, and so it granted certiorari, had a special hearing, and came down with the decision under the unfortunately appropriate title *United States* v. *Nixon.*[47] Its decision came down on the very day that the impeachment hearings went public on national television. Its contribution to their outcome is not to be denied.

The Court quickly overcame doubts about its jurisdiction to review what was essentially an interlocutory order. It had equally little difficulty in determining that the issue was a justiciable one, although the President claimed that this was a controversy within the executive branch and not subject to resolution by the courts. The regulations under which the special prosecutor was acting had the force of law and removed his actions from control by the Attorney General or the President. There was a real case or controversy not resolvable by any authority within the executive branch. Moreover, the technical requirements of Rule 17 of the Federal Rules of Criminal Procedure, governing the issuance of subpoenas, had been met. Thus, the Court addressed the issue of executive privilege.

Once again, the Court starts out with an announcement of its own preeminence:[48]

> In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* v. *Madison*, 1 Cranch 137 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177.

The Court then went on to say that, while there was no direct precedent with regard to presidential privilege for confidential communications, "other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. . . . Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers."[49] As if to convince itself rather than its audience, the Court repeated its precedents on its own authority. "We therefore reaffirm that it is the province and duty

of this Court 'to say what the law is' with respect to the claim of privilege presented in this case."[50]

Recognizing its own interest in confidentiality—and it would indeed be interesting to discover what the Court's reaction would be to a subpoena to the Justices for their conference notes for use in a criminal trial—the Court didn't take long to find a confidential communication privilege for the President in the Constitution. Indeed, it was "too plain to require further discussion."[51] But the privilege was not an absolute one:[52]

> To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

The confidential communication privilege is, nevertheless, a most important one:[53]

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.

For those who wondered where in the Constitution the privilege was to be found, the answer was: "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[54] Nevertheless, fundamental as the privilege is, it must be abated when in conflict with the need of criminal courts for evidence:[55]

> In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. . . . No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The last two sentences could as easily have read: "No case of the Court, however, has rejected this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution is there any explicit reference to a privilege for diplomatic or military secrets," etc.

And so the opinion goes on, like the description of a tennis match. First the Court is on the side of the privilege and then on the side of the subpoena, over and over again, until ultimately it is game, set, and match—to the referee:[56]

> We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

"The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." Perhaps the same thing could not be said about the clearly constitutionally defined privilege against self-incrimination. But can it not be said about the confidential communication privileges that have no constitutional base at all, such as the lawyer-client privilege, the priest-penitent privilege, the spousal privilege? If not, why not? After all, it was so held, said the Court, with reference to the privilege of secrecy of grand jury proceedings.[57]

We are told that there is a constitutional basis for the executive privilege, which is divided, not into five parts, as I suggested earlier, but only into three parts: confidential communications, military secrets, and diplomatic secrets. It would appear that the first is outweighed by the need for evidence in criminal trials, while the other two may or may not be. We are also told that the discussion of executive privilege was confined so that it did not necessarily control claims for materials either in civil litigation or by Congress, or where—whether this is a fourth category is not revealed—"the President's interest [is] in preserving state secrets."[58]

The consequences of the decision are known. After toying with the idea of disobeying the Supreme Court's judgment, which was by a unanimous 8 to 0 vote, but recognizing that the failure to abide the decision would constitute a count in an almost certain impeachment by the House, the President agreed to surrender the tapes. Indeed, he went further and published them and thereby provided the House Judiciary Committee with "the smoking gun" demanded by those congressmen who had been dragging their heels on impeachment. The President

tested the waters, found them boiling, and submitted his resignation.

United States v. *Nixon* was the penultimate judicial decision in the Watergate affair. The ultimate decision was in the criminal trial of Ehrlichman and company. The initial judicial participation was that of Judge Sirica in the case of the burglary defendants. Let me turn now to these and one or two other judicial Watergate escapades in constitutional law.

You will recall that one of the concerns of the federal courts about enforcing the Senate subpoenas was that publicizing the material thus secured could preclude the capacity of the criminal defendants to secure a fair trial, *i.e.*, it would be impossible to empanel a jury unbiased by knowledge of the events on which they were to sit in judgment. This question of the adverse effects of undue publicity arose again and again. But, outside the context of the Senate investigation, it weighed very lightly indeed on the judiciary.

The special prosecutor had determined to turn over to the House Judiciary Committee—not to the Senate Select Committee—the evidence he had secured from the tapes and other subpoenas, as well as an evaluation of the grand jury testimony. Two of the Watergate defendants, Haldeman and Strachan, took exception to that proposal on the ground that the publication of the data would prejudice their trials. The Court of Appeals denied them relief by sustaining the trial court's discretion in approving the delivery.[59]

There is no doubt that the law provides for preserving the secrecy of grand jury proceedings "except where there is a compelling necessity" to breach it.[60] But the Court found that the defendants' complaint about this breach of security was inadequate or, at least, premature:[61]

> We note, as did also the District Judge, that, if the disclosures to the public so feared by petitioners do in fact take place and have the consequences that petitioners predict, they will be free at trial to raise these claims in the light of what has actually happened, and to seek the traditional relief ranging from continuance through change of venue to dismissal of their indictments. It appears to be premature at the least to make their speculations about future prejudice the basis for present employment of our extraordinary writ power. With respect to the substance of those speculations, we cannot be unaware of the fact that the Special Prosecutor has concluded that his interests in successful prosecutions can be reconciled with this transmittal for consideration in the impeachment process—thereby suggesting that the dangers in his estimation are not great. The District Judge who received the indictment, perused the materials accompanying the report, and expressed his general interest in the fairness of the trial over which he will preside later this year, also concluded that it is unlikely that this transmittal will interfere with a fair trial.

By putting the burden on the defendants to show that their predilections should overcome the preferences of the special prosecutor and the trial judge, the court avoided determining whether there was a "compelling necessity" for the invasion of the confidentiality of the grand jury process. Not that such an issue would have proved troublesome. For, after all, the question of "compelling necessity" is only one aspect of what is the "public good," a question that the federal courts in the District of Columbia never had any difficulty in resolving.

Indeed, when the question here postponed as premature arose at the trial of the White House defendants, the courts were adequately satisfied that whatever publicity had occurred did not preclude the empanelment of a jury that would judge the defendants solely on the basis of the evidence produced in court and without bias or prejudice from the publicity.[62] The *voir dire*—the examination of potential jurors before they are chosen—indicated that of the 120 called, only 13 "indicated they had an unfavorable opinion about the defendants."[63] Of the jurors selected, "none had expressed an opinion about the defendants' guilt, although one had heard that there had been a break-in [the Fielding break-in, not the Democratic National Committee break-in] by someone and another had heard that Ehrlichman was 'involved' . . . [N]one expressed any particular interest in Watergate. . . . [The judge's] examination did not reveal a deep seated prejudice against defendants that would make the voir dire procedure suspect."[64]

One must conclude that if the jurors were as ignorant as the court made them out to be, they were far too ingenuous to comprehend or to analyze the evidence that was to be produced at the trial. On the other hand, apparently the presumption of innocence indulged for jurors far outweighs the presumption of innocence for defendants. And one cannot but wonder how a court that had been so concerned to keep the subpoenaed data from the Senate committee on the grounds that the undue publicity would adversely affect the criminal law processes must have felt about the inadequacy of its predictive capacities; for everything that the Senate committee had sought had been published before the Ehrlichman trial. Even for federal judges, however, hindsight proves more accurate than foresight.

There is still one more inconsistency—or what appears to be an inconsistency—between earlier decisions and the one in the *Ehrlichman* case. For the case again presented the question of executive privilege, this time for an ex-President. The question arose here on Ehrlichman's subpoenas for presidential records and for testimony by Nixon both at the trial and by way of interrogatories. Despite the duty of every man to appear to testify when called, despite the fact that the burdens of office no longer inhibited such appearance, the presumption of privilege was held not sufficiently overcome by a demonstration of Ehrlichman's

need for either the answers to his specific interrogatories, the papers he sought from the files, or the appearance of the witness. The courts, trial and appellate, simply decided that the ex-President's data collection and his testimony would not be relevant. This evidence was not to be submitted to the petit jury. Whether an earlier request for the same materials by the prosecutor for the use of the grand jury would have met the same fate is highly doubtful in light of the judicial precedents.

The *Ehrlichman* case, and its companion cases in the Court of Appeals for the District of Columbia,[65] raised some interesting but still unanswered questions of constitutional law. Throughout the Watergate episode the primary defense offered for the misconduct of the Plumbers and their bosses had been that their actions were taken for purposes of "national security," under the direction of their superiors. These propositions were again offered in defense in the criminal trials.

Ehrlichman was charged, inter alia, with conspiring to violate the constitutional rights of Dr. Fielding, whose office was invaded and searched by the Plumbers under the direction of Ehrlichman. Ehrlichman's defense was twofold: First, that the break-in and search were legal because of the President's authority in the field of foreign affairs to order such entries. Second, that if the entry and search were not in fact legal, Ehrlichman lacked the requisite intent to commit the crime because he believed that they were in fact legal.

The appeals court, like the trial court, rejected both defenses. It held that good faith belief in the legality of his actions was not enough to afford Ehrlichman a defense. So long as he intended the actions which in fact deprived Fielding of his civil rights, Ehrlichman could be found guilty of the crime.[66] This conclusion required a rather tortuous reading of a tortuous opinion by the Supreme Court in an infamous case called *Screws* v. *United States*,[67] which has always been more or less of an enigma. This question, however, presented no constitutional problem.

On the second element of the defense, the legality of the entry, there was indeed an underlying constitutional question. And the Department of Justice, not a party to this prosecution, filed a brief amicus curiae in this case and companion cases asserting that a President has implied power to authorize "black bag" jobs without judicial warrant, where the entries and searches are related to foreign affairs rather than domestic concerns. The court's opinion did not reach the implied power of the presidency for such warrantless searches, because it found that there was no presidential authorization in this instance:[68]

> The defendant totally misapprehends the critical role played by the President and the Attorney General, when the "national security" exception is invoked. It is argued that this exception gives government officials the power surreptitiously to intrude on the privacy of citizens without the necessity of first justifying their action before an

> independent and detached member of the judiciary. Unless carefully circumscribed, such a power is easily subject to abuse. The danger of leaving delicate decisions of propriety and probable cause to those actually assigned to ferret out "national security" information is patent, and is indeed illustrated by the intrusion undertaken in this case, without any more specific Presidential direction than that ascribed to Henry II vexed with Becket.[69]
>
> As a constitutional matter, if Presidential approval is to replace judicial approval for foreign intelligence gathering, the personal authorization of the President—or his alter ego for these matters, the Attorney General—is necessary to fix accountability and centralize responsibility for insuring the least intrusive surveillance necessary and preventing zealous officials from misusing the President's prerogative.

The last quoted sentence was repeated in the opinion, as if to make up for the absence of even a shadow on the Constitution to support such details as to how the President's foreign affairs powers are to be managed, if indeed he has such powers as the court hypothesizes. It should be pointed out that two of the three judges, *i.e.*, a majority of the court, while conceding that the question was not present on the facts of the case, insisted on answering the question whether even the President or his Attorney General could authorize home or office invasion without judicial warrant. They found no such authority explicit or implicit in Article II.

When the Court of Appeals turned from Ehrlichman's case to that of Bernard Barker and Eugenio Martinez, two of the Watergate burglars who had also carried out the invasion of Dr. Fielding's office, it turned a more sympathetic ear to what was a dubious claim of "superior orders." If allowed to become law, it will exonerate the lower echelons, and perhaps all but the highest, for invasion of individual freedoms, on claims of reasonable reliance on superior orders. Thus, the Court of Appeals' majority, in separate opinions by Judges Wilkey and Merhige and over the dissent of Judge Leventhal, created a new defense of reasonable ignorance of the law.

Judge Wilkey rested in part on the decision by the Department of Justice not to prosecute Richard Helms, Director of the CIA, for a 1971 break-in in Virginia. Wilkey said:[70]

> Helms, like the present defendants, was involved in a 1971 break-in to conduct a visual search for evidence of national security violations. The positions of both Helms and the present appellants rest upon good faith belief that their warrantless physical intrusions were legally authorized. Helms' belief, which led the Justice Department to decline prosecution, was that a statute authorized him to ignore the commandments of the Fourth Amendment. Barker's and Martinez's

> belief was that there was authorization within the White House for this intrusion relating to national security—a legal theory which, if valid, would be of constitutional rather than merely statutory dimensions. Though both were mistakes of law, appellants' view thus appears to be supported by sounder legal theory than that of Helms, who seems to assert that a statute can excuse constitutional compliance. Yet even in the case of Helms, the Attorney General concluded that any prosecution for the physical search would be inappropriate.

The court leaves it quite unclear why Ehrlichman was held to the strict letter of the law, while Barker and Martinez could rely on their reasonable belief of the law. The difference apparently related not to an understanding of the law, but whether the persons accused were executing orders or issuing them. And while this may distinguish Ehrlichman from the two Cubans, it does not distinguish Ehrlichman from Helms, on whose case that of Barker and Martinez was predicated. Surely the argument of the court as to the substantiality of the claims is the same for all four men:[71]

> As to the *reasonableness* of the legal theory on which Barker's and Martinez's actions rest, they thus have at least the position of the Attorney General behind them. This is not to hold here that the position is correct, but surely two laymen cannot be faulted for acting on a known and represented fact situation and in accordance with a legal theory espoused by this and all past Attorneys General for forty years.

When the legal question that the Court of Appeals declined to address gets to the Supreme Court, it will likely choose between two theories. It may rule against any implied presidential power of home and office invasion in foreign affairs cases, or it may assert that only a specific authorization from the President or the Attorney General will suffice as a substitute for a judicial warrant in this area. The effect of either decision on the *Barker* doctrine is far from clear.

Two other constitutional questions afforded by the Watergate affair are worthy of at least cursory notice. The first of these resulted from the fact that, even before the burglary trial, the *Los Angeles Times* published a story based on a taped interview with Alfred Baldwin in which he said he had a role in the burglary. Lawyers for one of the defendants sought a subpoena of the tape of the interview, which was in the hands of the Washington bureau chief of the *Times*. The court issued the subpoena but the newsman refused to produce the tape. He was held in jail until released pending resolution of the question whether he was entitled to keep the tape from the court because of a newsman's privilege to keep his sources confidential. The *Times* had pledged confidentiality to Baldwin for the taped interview. Before the issues

could be ultimately resolved by the judicial process, however, Baldwin released the newspaper from its pledge of secrecy and the tape was turned over to the court.

At best, the newspaper's claim to privilege rested on weak grounds. Baldwin was named in the news stories as the source for the published material. The essence if not the totality of the interview was also published. There was little substance to the claim for secrecy. And, more important, the newsman's privilege to protect even anonymous informants was rejected by the Supreme Court in an opinion in *Branzburg* v. *Hayes* in 1972.[72] That opinion is an interesting precursor to the executive privilege cases, for in both the question was, To what degree is there implied in the Constitution a privilege to keep relevant data from revelation to the grand jury? The Court's opinion in *Branzburg* is instructive, as the following excerpts reveal:[73]

> The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence. The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.
>
> . . . . . .
>
> Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.
>
> . . . . . .
>
> Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforce-

> ment but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

It is somewhat surprising, in light of this opinion and the efficacy of the investigative reporting that surrounded the Watergate affair, that reporters were not called on more often by the investigating authorities for proof that what they published was based on evidence. But when the Committee for the Reelection of the President (CREEP) subpoenaed the *New York Times*, the *Washington Post*, the *Washington Star News*, and *Time* magazine for their unpublished material on the Watergate affair, Judge Richey quashed the subpoenas. "This court," he said, "cannot blind itself to the possible chilling effect the enforcement of . . . these subpoenas would have on the press and the public."[74] On the other hand, it must not be assumed that reporters unwilling to testify formally were not more than willing suppliers of information. Leaks were not one-directional; they moved from the media as well as to it.

The last constitutional question I would address is more tenuous but not less troublesome. It is more tenuous because it has never received Supreme Court attention. Judge Sirica, it will be recalled, was anything but satisfied with the sufficiency or veracity of the testimony offered at the burglary trial. And so, when the time came for the sentencing of the Watergate burglars, he meted out conditional sentences of twenty to forty years, the maximum allowed by law. It must be admitted that these were extraordinary sentences for a burglary, even by Sirica, who had a reputation as a hanging judge. At the time of the sentencing, he made clear the reasons for their extraordinary length:[75]

> For these reasons I recommend your full cooperation with the Grand Jury and the Senate Select Committee. You must understand that I hold out no promises or hopes of any kind to you in this matter but I do say that should you decide to speak freely I would have to weigh that factor in appraising what sentence will be finally imposed in this case. Other factors will of course be considered but I mention this one because it is one over which you have control and I mean each one of the five of you.

The implications of the sentencing power had already resulted in James McCord's request for a private interview with Sirica, and McCord's sentencing had been postponed for that reason. McCord, in his request, had made it clear that he understood that if he were regarded as uncooperative he could "expect a much more severe sentence."[76]

Whether this form of judicial blackmail has constitutional authority is not yet decided by the Supreme Court. We do know that threats of

increased sentences may not properly be used to deter appeals.[77] And we do know that increased or diminished sentences may not be used to promote pleas of guilty.[78] There is a question whether increased imprisonment may be a price imposed for a failure to be more forthcoming.[79] Certainly that is not the reason for imposing a sentence on a convicted felon or misdemeanant.

It is clear that the judiciary played a vital part in bringing the Watergate crisis to its denouement. Its judgments, some of highly innovative nature, forced the White House to the revelation of records of its misdeeds. The indirect results of its judgments, however, were more important. The public perceived its judgments to put the most popular and least political branch on the side of removal of the president. The judiciary made it possible for the House of Representatives to bring in a bill of impeachment and likely that the Senate would bring in a verdict of guilt. And they made it possible for Nixon to see that such impeachment and judgment were in the offing. In terms of its own proper function, the judicial branch brought to fruition criminal trials of the White House wrongdoers and subjected them to what most of the public regarded as appropriate punishment.

The judicial branch, in helping to resolve this constitutional crisis, enhanced its public image, but also moved one step forward to the next most imminent one. For in continuing to expand its own role in the government of the United States, the third branch again proved that we have arrived at the stage described by Raoul Berger in his new book *Government by Judiciary*. Sooner or later, this country must directly face the question whether it is prepared to entrust the judiciary with the mantles of Plato's guardians. The answer to that question will also determine the future of American democracy and, perhaps, even of American liberty.

The Papers of Robert A. Taft

VOLUME 3, 1945–1948

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The Kent State University Press
KENT & LONDON

SPEECH AT KENYON COLLEGE[1]

October 5, 1946
Gambier, Ohio

JUSTICE AND LIBERTY FOR THE INDIVIDUAL

I WISH to speak of the heritage of the English-speaking peoples in the field of government, and their responsibility to carry on that heritage, and to extend its tried principles to the entire world as rapidly as that can be done. The very basis of the government of the United States, derived through the Colonies from principles of British government, was the liberty of the individual and the assurance to him of equal treatment and equal justice. We cannot claim that these principles were original with the English-speaking peoples, because, of course, they existed in Greece and in the Roman Republic and in other nations before England became a nation. But to a large extent they disappeared during the Middle Ages and their revival was most marked in Great Britain, and even more in the establishment of the American Republic.

I desire today to speak particularly of equal justice, because it is an essential of individual liberty. Unless there is law, and unless there is an impartial tribunal to administer that law, no man can be really free. Without them only force can determine controversy, as in the international field today, and those who have not sufficient force cannot remain free. Without law and an appeal to a just and independent court to interpret that law, every man must be subject to the arbitrary discretion of his ruler or of some subordinate government official.

Over the portal of the great Supreme Court building in Washington are written the words "Equal Justice Under Law." The Declaration of Independence, the Constitution of the United States and every pronouncement of the founders of the Government stated the same principle in one form or another. Thomas Jefferson in his first inaugural emphasized above everything the necessity for "equal and exact justice to all men of whatever state or persuasion, religious or political."

In England the progress towards a definite law, administered by efficient and impartial courts or tribunals, was slow and uncertain. The common law developed slowly and only became clear and definite after many centuries. For a long time the courts were anything but impartial, and the actual application of the law was often unfair and unjust. But reverence for the principle must have existed, or it would not have been transported so early to the shores of America to become the dominant theory of government in the Colonies.

However slowly it developed, there developed with it something even more important, namely, a public reverence for law and a public acceptance of the verdict, even though it might be felt to be wrong. As James Truslow Adams says in his analysis of the British people, "Connected with many of the points we have mentioned is that feeling for law and order which strikes almost every visitor to England. It is a trait with a long history behind it, but seems to have become deeply embedded in the race."[2] I cannot over-emphasize the importance of this attitude, the willingness to accept the decision of an impartial tribunal made in accordance with the law, even if that decision is thought to be wrong. Until we reach such a universal acceptance in the world at large, we cannot hope that any international organization can prevent a resort to force, and the war which must follow it.

The same quality is shown in England, and here, in our attitude toward sport and games. Mr. Adams says again, "Sport, which for centuries has played so large a part in British life, has had enormous influence in fields apparently wholly remote from it. Unless games are all to end in fights and bloody noses, there must grow up a willingness to give and take, to accept decisions in good faith, whether winners or losers."[3] Here in America, too, we have been willing to accept the decisions of the umpire, although our respect for law may not be equal today to that of our British cousins.

I think the same characteristic is shown in our willingness to accept the decision of the people in fair elections. An election may be won by only one vote, but ninety-nine out of a hundred people feel that the public has spoken and that the decision must be accepted as a matter of course as a basic feature of our life. It is this attitude which has distinguished our people from Latin American countries where an election is only one step in party policy and no discouragement of an appeal to force, and from Germany and Russia where a plebiscite is only propaganda for the party directing it. Only by this attitude do we avoid civil war such as developed in this country on the one occasion when a large section of the country refused to accept the verdict of Lincoln's election.

Unfortunately, the philosophy of equal justice under law, and acceptance of decisions made in accordance with respected institutions, has steadily lost strength during recent years. It is utterly denied in totalitarian states. There the law and the courts are instruments of state policy. It is inconceivable to the people of such a state that a court would concern itself to be fair to those individuals who appear before it when the state has an adverse interest. Nor do they feel any need of being fair between one man and another. Therefore they see no reason for presenting logical argument to justify a position. Nothing is more typical of the Communist or the Fascist than to assert and reassert an argument which has been completely answered and disproved, in order to create public opinion by propaganda to the ignorant. The totalitarian idea has spread throughout many nations where, in the nineteenth century, the ideals of liberty and justice were accepted. Even in this country the theory that the state is finally responsible for every condition, and that every problem must be cured by giving the government arbitrary power to act, has been increasingly the philosophy of the twentieth century. It infects men who still profess complete adherence to individual liberty and individual justice, so that we find them willing to sacrifice both to accomplish some economic or social purpose. There is none of the burning devotion to liberty which characterized Patrick Henry and even the conservative leaders of the American Revolution.

We see the ignoring of justice internationally when a powerful nation takes the position that its demands must be complied with, "or else," and refuses to argue or discuss the question. We see it within this country in some labor groups and in some business groups who present ultimatums backed by economic force, and refuse to submit even to impartial arbitration. It is present in the world so long as any nation refuses to submit its disputes to argument or adjudication.

Of course the new philosophy has been promoted by two world wars, for war is a denial both of liberty and of justice. *Inter arma leges silent.* We all of us recognize that justice to the individual, vital as it is, must be subordinate to the

tremendous necessity of preserving the nation itself. Abraham Lincoln said, "Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap, let it be taught in the schools, in the seminaries and in colleges." But Lincoln suspended the writ of habeas corpus in Maryland in the early days of the Civil War, in violation of the Constitution. In this war we have granted arbitrary war powers without appeal to the courts, and now the people have become so accustomed to such powers that the government proposes to continue war powers unimpaired to meet some supposed peace emergency. We hear constantly the fallacious argument, "If you would surrender these rights to win the war, is it not just as necessary to surrender them to win the peace?" Unless we desire to weaken for all time the ideals of justice and equality, it is absolutely essential that our program of reconversion and of progress abandon the philosophy of war, that it be worked out within the principles of justice.

Take as an example of war legislation the Price Control Act. I considered price control essential for the conduct of the war and supported that Act. I am convinced, however, that general price control is impossible without the granting of arbitrary powers over every citizen's life to an executive board. Congress itself cannot fix the prices. No individual can be allowed to go to court and enjoin an unjust act, because to permit this would break down the entire system, and so the law must give wide discretion to the Price Administrator without any effective appeal to the courts. Also the spirit in which it has been administered has been arbitrary without any interest in assuring substantial justice. The administrator adopted the so-called "freeze" theory which, in effect, required that prices be unchanged regardless of increased costs, of the destruction of many small businesses, and even of necessary production.

So, also, landlords have been forced to rent their property without regard to the fairness of their rents or the fact that others receive more for the same facilities. Wages have been held on an arbitrary formula and an injustice done to those groups who did not have the political power to force increases. While I do not agree with the theory even in time of war, I could only regard these individuals as casualties of the war. But we cannot continue this course in time of peace unless we are prepared to repudiate our heritage and take a long step towards the destruction of liberty. The truth is that general price and wage control, attempting to regulate from Washington a billion transactions a day, is impossible without granting arbitrary power and denying equal justice. I feel very strongly that its very existence in time of peace would be an end to economic liberty, which I believe to be essential to political liberty. There is no compromise if we are to return to a system of equal justice under law, except to abolish general price and wage control.

There are other war powers still remaining which also are impossible to administer if they are subject to court appeal and principles of justice, notably the priority powers under the Second War Powers Act. They must be brought to an end.

Even before the war we had drifted far from justice at home. Expediency has been the key to the legislation of recent years, and many of the existing bureaus administer the law without any belief in the principle that the government should be fair to every individual according to written law. For instance, the National Labor Relations Act was based on the sound principle that collective bargaining should not be interfered with by employers.[4] But wide discretion was given to the Board, and the first Board members, instead of trying to administer the act fairly, regarded themselves as crusaders to put a CIO union into every plant in the United States without consideration of any element of impartiality. I sat for weeks hearing the bitter complaints against the administration of that law, and the most violent complaints came from the heads of the American Federation of Labor. The courts held that the law did not permit them to interfere with the discretion of the Board. I do not think that any more serious miscarriages of justice have ever occurred in the United States than under that first National Labor Relations Board. President Roosevelt was finally forced to replace all the members of that Board, but only amendments to the Act can reverse some of the arbitrary practices and decisions established by the first board.[5] Questions, for instance, regarding the calling of elections, and freedom of speech, and the reinstatement of workers, are decided with little consideration of principles of justice.

The whole government policy has been so pro-labor in industrial disputes that few have any confidence in the impartiality of federal action. It is essential not only that we have law, but that we have a faith in the impartiality of our government boards and officials who administer the law.

Industrialists are criticized because they do not submit their disputes to arbitration by the President or his appointees. Obviously, they feel from experience that those appointees will be prejudiced against their position, and that the decision will be based not on principles of law but on Government policy. The fact-finding board in the General Motors case clearly stated that its decision was based on a wage-price policy without authority of law, declared by President Truman in a press release.[6] If we establish fact-finding boards for labor disputes, they must at least purport to be judicial in nature and we must declare by law the principles on which they must act.

Now we have the same kind of a plan in the Chavez bill to set up a Fair Employment Practice Commission authorized to deal with every application for employment. Certainly no end can be more desirable than to remove the dis-

crimination which exists, particularly in the employment of Negroes. But even for the best possible end, we cannot afford to proceed with the unfair labor practice technique, because it gives arbitrary power to a board necessarily prejudiced, because concerned with policy alone and with no practical appeal to the courts. Other methods can be developed.

The practice of creating administrative boards has destroyed justice in many other fields. When Government undertook to regulate the production of every farmer, telling him what he could sow and what he could reap, it had to set up an administrative machinery far beyond the capacity of any court to control. The enforcement of milk prices, production, and distribution by Federal milk boards has also been pursued without regard to any legal principle. Programs for general economic regulation are always inconsistent with justice because the detailed control of millions of individuals can only be carried through by giving arbitrary discretion to administrative boards. Such boards are always concerned with policy, but not with justice.

The law authorizing reciprocal trade treaties has a most desirable purpose of promoting foreign trade, but because no legal standards for granting tariff reductions are prescribed, the procedure again has departed from principles of justice. Hearings are held before boards which have nothing to do with making the final decisions, decisions which may destroy an American industry, without that industry even being advised what action is proposed to be taken. It is now proposed to hold a general conference in Europe with a number of foreign nations to make these reciprocal treaties in some secret meeting, with even less opportunity to be heard for those whose occupation and property are at stake. In this field, as in many others, we have delegated to the President powers to be exercised in his individual discretion, without the slightest requirement of any conformity to law or principle. Such power is not necessary to a sound program of promoting foreign trade.

I have seen something of the enforcement of the Wages and Hours Act. The director is prosecutor, judge, jury and instigator of private suits. The employer is presumed to be guilty until he proves himself innocent.

These are only examples. But even more discouraging is the attitude of the people and the press. Government action which twenty-five years ago would have excited a sense of outrage in thousands, is reported in a few lines and if disapproved at all, is disapproved with a shrug of the shoulders and a hopeless feeling that nothing can be done about it.

To a large extent this feeling has been promoted by the attack on the Supreme Court, and the effort to make the courts instruments of executive policy. The old court may have been too conservative, but the judges believed they were interpreting the laws and Constitution as they were written, and most of the

country believed that they were honestly impartial. Today the court regards itself in many respects as the maker of policy—no maker of policy can command respect for impartial dispensation of justice.

I believe more strongly than I can say that if we would maintain progress and liberty in America, it is our responsibility to see not only that laws be rewritten to substitute law for arbitrary discretion, but that the whole attitude of the people be guided from now on by a deep devotion to law, impartiality and equal justice.

It is even more important to the entire world that these principles be established as the guide for international action. In my opinion they afford the only hope of future peace. Not only must there be a more definite law to govern the relations between nations, not only must there be tribunals to decide controversies under that law, but the peoples of the world must be so imbued with a respect for law and the tribunals established that they will accept their decisions without an appeal to force.

Whether we have a league of sovereign nations like the United Nations, or a World State, there cannot be an end of war if any important people refuse to accept freely the principle of abiding by law, or if truly impartial tribunals are not established.

Unfortunately, I believe we Americans have also in recent foreign policy been affected by principles of expediency and supposed necessity, and abandoned largely the principle of justice. We have drifted into the acceptance of the idea that the world is to be ruled by the power of the great nations and a police force established by them rather than by international law.

I felt very strongly that we should join the United Nations organization, but it was not because I approved of the principles established in the Charter. Those who drafted the original Dumbarton Oakes proposals apparently had little knowledge of the heritage of the English-speaking peoples, for in those proposals there was no reference to justice and very little to liberty. At San Francisco a good many declarations were inserted emphasizing the importance of law and justice, but they were not permitted to interfere with the original setup of the Security Council. The Security Council is the very heart of the United Nations, the only body with power to Act. The Charter gives it the power to adopt any measure, economic or military, which it considers necessary to maintain or restore international peace and security. The heritage of the English-speaking peoples has always emphasized liberty over peace and justice over security. I believe that liberty and justice offer the only path to permanent peace and security.

In spite of the fact that justice is mentioned in the preamble to the Charter and as one of the guides for the Assembly, there is nothing in the Charter

to make it a guide or even a consideration for the Security Council. In perfect accord with the Charter, the Security Council could decree the destruction of a nation simply because its location or its misfortunes make it a center of international contest, without regard to any justice or liberty for the nation concerned.

I offered an amendment on the floor of the Senate, directing our delegate not to vote for action against any nation unless he was satisfied that the result would be in accord with international law and justice as well as peace and security. The fact that this was rejected by the Administration shows the extent to which it has accepted the philosophy of force as the controlling factor in international action. When we consider also the veto power, we can see that the Charter tends to create an arbitrary rule of the world by the joint action of the great powers, which can only be overcome by the use of our veto power to insist always on law and justice. I do not favor the veto power in a properly constituted international organization, but it must remain until the underlying theory of the Charter is changed. But the question arises whether our delegate, and public opinion in this country, *will* insist on justice to all nations.

Only by pressure against a reluctant Administration did Congress agree to adhere to the decision of an impartial tribunal in the International Court of Justice. Such a willingness on the part of all nations, accepted by the public opinion of the world, is the basic essential of future peace. But the court and international law have been step-children to our government. Force, and a police force, similar to the police force within a nation, have been the keynotes, forgetting that national and local police are only incidental to the enforcement of an underlying law, that force without law is tyranny. This whole policy has been no accident. For years we have been accepting at home the theory that the people are too dumb to understand and that a benevolent executive must be given power to describe policy and administer policy according to his own prejudices in each individual case. Such a policy, in the world as at home, can lead only to tyranny, or to anarchy.

The Atlantic Charter professed a belief in liberty and justice for all nations, but at Teheran, at Yalta, at Moscow, we forgot law and justice.[7] Nothing could be further from a rule of law than the making of secret agreements distributing the territory of the earth in accordance with power and expediency. We cannot excuse ourselves by declining territorial acquisition ourselves or subjecting ourselves to unreasonable and illogical restriction on our sovereignty over uninhabited Pacific Islands. We are just as much to blame if we acquiesce in unjustified acquisition of territory by others, such as the handing over of the Kuril Islands to Russia without trusteeship of any kind. Without a word of protest, we have agreed to the acquisition of Lithuania, Estonia and Latvia by the USSR against their will.[8] There is little justice to the people of Poland in the boundaries

assigned to them. The extending of justice throughout the world may be and is beyond our powers, but certainly we need not join in the principles by which force and national policy is permitted to dominate the world.

During the war and since I have felt that there has been little justice in our treatment of the neutral countries. We took the position in effect that no nation had the right to remain neutral, and bullied these countries to an extreme restrained only by consideration of policy, but not of justice.

The treatment of enemy countries has seldom been just after any war, but only now are we beginning to get some justice into our treatment of Germany. Our treatment has been harsh in the American Zone as a deliberate matter of government policy, and has offended Americans who saw it and felt that it was completely at variance with American instincts. We gave countenance to the revengeful and impracticable Morgenthau plan which would have reduced the Germans to economic poverty. We have fooled ourselves in the belief that we could teach another nation democratic principles by force. Why, we can't even teach our own people sound principles of government. We cannot teach liberty and justice in Germany by suppressing liberty and justice.

I believe that most Americans view with discomfort the war trials which have just been concluded in Germany and are proceeding in Japan. They violate that fundamental principle of American law that a man cannot be tried under an *ex post facto* statute. The hanging of the eleven men convicted at Nuremberg will be a blot on the American record which we shall long regret.[9]

The trial of the vanquished by the victors cannot be impartial no matter how it is hedged about with the forms of justice. I question whether the hanging of those, who, however despicable, were the leaders of the German people, will ever discourage the making of aggressive war, for no one makes aggressive war unless he expects to win. About this whole judgment there is the spirit of vengeance, and vengeance is seldom justice.

In these trials we have accepted the Russian idea of the purpose of trials, government policy and not justice, having little relation to our Anglo-Saxon heritage. By clothing vengeance in the forms of legal procedure, we may discredit the whole idea of justice in Europe for years to come. In the last analysis, even at the end of a frightful war, we should view the future with more hope if even our enemies believed that we have treated them justly in trials, in the provision of relief and in the final disposal of territory. I pray that we do not repeat the procedure in Japan, where the justification on grounds of vengeance is much less than in Germany.

Our whole attitude in the world, for a year after V-E Day, seemed to me a departure from the principles of fair and equal treatment which has made America respected throughout the world before this second World War. Today we

are cordially hated in many countries. I am delighted that Secretary Byrnes and Senator Vandenberg have reversed our policy in many respects. But abroad as at home we have a long way to go to restore again to the American people our full heritage of an ingrained belief in fairness, impartiality, and justice.

Peace in the world can only come if a law is agreed to relating to international relations, if there is a tribunal which can interpret that law and decide disputes between nations, and if the nations are willing to submit their disputes to impartial decision regardless of the outcome. There can be no peace until the public opinion of the world accepts as a matter of course the impartiality and the decisions of an international tribunal.

War has always set back temporarily the ideals of the world. This time because of the tremendous scope of the war, the increased barbarism of its methods and the general prevalence of the doctrine of force and expediency even before the war, the effect today is even worse and the duration of the post-war period of disillusionment may be longer. As I see it, the English-speaking peoples have one great responsibility. That is to restore to the minds of men a devotion to equal justice under law.

The Heritage of English Speaking Peoples and Their Responsibility (Gambier, Ohio: Kenyon College, 1947), 157–69.

1. Taft spoke at the Kenyon College Conference, "The Heritage and Responsibility of the English-Speaking Peoples."
2. James Truslow Adams wrote *Empire on the Seven Seas: The British Empire, 1784–1939* (New York: Charles Scribner's Sons, 1940) and *Building the British Empire: To the End of the First Empire* (New York: Charles Scribner's Sons, 1939).
3. Ibid.
4. Regarding the National Labor Relations Act, see Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (New York: Cambridge Univ. Press, 1985), 132–40.
5. For an assessment of the early Wagner Act NLRB, see Tomlins, *The State and the Unions*, 197–243.
6. On the importance of the 1946 General Motors strike, see Lichtenstein, "Labor in the Truman Era," 138–40.
7. The Atlantic Charter, signed by President Roosevelt and Prime Minister Winston Churchill in Aug. 1941. It called for self-government after the war for all nations occupied by Allied forces.
8. The Japanese had controlled the Kuril Islands since 1875, but the USSR occupied them in 1945 following Japan's defeat. In June 1940, the Soviet Union militarily occupied Estonia, Latvia, and Lithuania, after which the three territories became subjects of the Soviet government. Estonia had been occupied by the Nazi government for a period during World War II but reverted back to the Soviets.
9. Under the auspices of the International Military Tribunal, the Allied Powers held trials that convicted nineteen leading Nazis of war crimes, twelve of whom were sentenced to death for crimes against humanity (eleven were hanged and one committed suicide before his execution). The Allies were holding similar trials in Japan at that time.