The original documents are located in Box 34, folder "Nixon Pardon Hungate Subcommittee – Ken Lazarus Memo Re Possible Questions" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

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THE WHITE HOUSE

WASHINGTON

October 14, 1974

MEMORANDUM FOR: PHIL BUCHEN

FROM: KEN LAZARUS KL

SUBJECT: House Judiciary Subcommittee Hearing On Pardon: Anticipated Questions For The President.

Set forth below are a number of questions which I anticipate may be raised at the hearing on Thursday and some rather cryptic notes which may be of assistance to you in this regard. Hopefully, the President will have the opportunity to consider these and all other questions which may be anticipated prior to his appearance.

I. QUESTIONS OF LAW

A. Basis of the Pardon Power

1. What is the Constitutional basis of the President's pardoning power?

Article II, section 2, cl. 1: " . . . and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

2. Who has the power to pardon and is the exercise of that power exclusive?

a. Only the President may exercise the power to pardon.

(1) Ex Parte Wells, 59 U.S. (18 How.) 307 (1855): at p. 309 "Under this power, the President has granted reprieves and pardons since the commencement of the present government . . . No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases, the President has acted exclusively under the power as it is expressed in the constitution."

(2) Ex Parte Garland, 4 Wall. 333, 380 (1867): "This power of the President is not subject to legislative control. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

(3) Ex Parte Grossman, 267 U.S. 87, 120 (1924): "The Executive can reprieve or pardon all offenses . . . conditionally or absolutely, and this without modification or regulation by Congress."

(4) The Laura, 114 U.S. 411, 414 (1885): The President's " . . . constitutional power in these respects cannot be interrupted, abridged, or limited by any legislative enactment."

(5) See also, United States v. Klein, 13 Wall. 128 (1872) and Knote v. United States, 95 U.S. 149 (1877), both stating that the President has the power to grant a full pardon.

(6) Thompson v. Duehay, 217 Fed. 484, 487 (W.D. Wash. 1914) affd. 223 Fed. 305 (9th Cir. 1915); Bozel v. United States, 139 F.2d 153 (6th Cir. 1943); United States v. Kawkita, 108 F. Supp. 627 (S.D. Cal. 1952); United States v. Jenkins, 141 F. Supp. 499 (S.D. Ga. 1956).

(7) 20 Op. A.G. 668 (1893), stating that " . . . the pardoning power of the President is absolute, and is not a subject of legislative control."
41 Op. A.G. 251 (1955), stating "Nor do I believe that the parole laws and regulations can be regarded as a limitation upon the President's pardoning power vested in him by the Constitution. The books are replete with statements that Congress can neither control nor regulate the action of the President in this regard." At p. 254.

b. May the President delegate his power to pardon to other officials or agencies within the Executive Branch?

(1) In light of the above cases, it would appear that the power to pardon is nondelegable. To support this premise, 19 Op. A. G. 106 (1888) states that "This grant of power to pardon offenses against the United States to the President alone forbids the exercise of it by any one else . . . But it is to be presumed Congress passed law (permitting an officer to pardon after general court-martial) in subservience to and not in violation of the Constitution." Since the ability to remit punishment was limited solely to punishment and not to the offense itself, which is the essential object of a pardon, the President's pardoning power was not impinged. The Opinion went on to state, however, "But when the law has finally pronounced its judgment /and an offense has been established/, it /Congress/ could not and did not intend to grant the power to pardon the offense against the United States." At p. 108 "If the power of the officer to pardon existed at any time after the final judgment, and could be exercised after the offender had paid a large part of the penalty of the law, he might be again prosecuted, convicted, and twice punished for the same offense." At p. 109.

(2) But see dictum in Solesbee v. Balkcom, 339 U.S. 9 (1950) which states that the "power of executive clemency has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom has this power of executive clemency been subjected to review by the courts."

(3) I believe that 41 Op. A. G. 251 (1955) disposes of the issue that the parole statutes in any measure detract from the President's pardoning power. Viewing the dictum stated above as relating solely to the act of parole, it is clear that judicial review of the decision to parole has been denied the courts.

c. Does the Congress have any power to pardon?

(1) From a reading of the Debates of the Constitutional Convention, it appears that the Framers of the Constitution specifically omitted the Congress from participation in the exercise of the President's pardoning power. By a vote of 1 to 8 the following clause including the Senate

in the participation of the Executive's pardoning power was omitted: " , . . . power to grant reprieves . . . and pardons with consent of the Senate." (emphasis supplied) 2 M. Farrand, Records of the Federal Convention of 1787, 419 (1937).

In one of the debates, Rufus King of Massachusetts made the following observation: "It would be inconsistent with the constitutional separation . . . of powers to let the prerogative /of pardon/ to be exercised by the legislature -- a legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment." 2 M. Farrand, supra, at p. 626.

(2) The power to pardon has been committed exclusively by the Constitution to the President of the United States. See Ex Parte Wells, supra; Ex Parte Garland, supra; Ex Parte Grossman, supra.

(3) In 22 Op. A. G. 36 (1898), it is stated that:

"The power thus conferred is unlimited with the exception stated (except in cases of impeachment). It extends to every offense known to the law, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

(4) Cases of general grants of amnesty or immunity from prosecution can be distinguished from the exercise of the pardoning power reposed exclusively in the President.

In Brown v. Walker, 161 U.S. 591 (1896), the Court held that a statute granting witnesses testifying before the Interstate Commerce Commission immunity from prosecution was virtually a grant of amnesty and therefore a witness could not be excused from testifying on the ground that he might incriminate himself. The granting of immunity to witnesses before prosecution on a quid pro quo basis seems readily distinguishable from the grace concept intrinsic in amnesty. Immunity statutes

have the limited and special purpose of obviating the constitutional privilege against self-imcrimination. Brown should not be read as support for the proposition that Congress can pass a general amnesty statute which in effect is an exercise of the pardoning power. See distinction discussed in Burdick v. United States, 236 U.S. 79, 94-95 (1915).

In The Laura, 114 U.S. 411 (1885), the Supreme Court upheld the remission of a fine by the Secretary of the Treasury acting pursuant to Congressional authorization. the Court observed that the President's power to pardon offenses and remit penalties is not exclusive, the case indicates that the statutory authority accorded the Secretary of the Treasury was placed wholly within his discretion and that a remission could not have occurred without his concurrence. Under such circumstances, the degree of Congressional encroachment on the Executive's power to pardon was minimal, given the predominant role accorded Executive discretion by the statute.

d. Does the judicial branch have the power to pardon?

(1) This issue has been addressed by the Supreme Court in Ex Parte United States, 242 U.S. 27 (1916). In this case, the Court held that courts possess the right to impose punishment provided by law. But this right affords no ground for the contention that " . . . the power to enforce begets inherently a discretion to permanently refuse to do so. Authority to define and fix punishment is legislative and includes the right to bring within judicial discretion in advance elements of consideration which would be otherwise beyond the scope of judicial authority; but that the right to relieve from the punishment, fixed by law, belongs to the executive department."

3. Must the recipient of an offer of pardon accept it?

a. Yes, without acceptance, an offer of pardon lapses.

(1) United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833) which states that a pardon is a "deed" to the validity of which delivery is essential and is not complete without acceptance.

(2) Burdick v. United States, 236 U.S. 79 (1915), holding that acceptance is essential to a pardon's validity.

(3) Biddle v. Perovich, 274 U.S. 480, 486 (1927), distinguishes a commutation which needs no acceptance from a pardon which does.

(4) 11 Op. A.G. 227 (1865) at p. 230 states that "After the pardon has been accepted, it becomes a valid act, and the person receiving it is entitled to all its benefits." See also 41 Op. A.G. 251, 254-258 (1955).

(5) In re DePuy, 7 Fed. Cas. 507 (Cas. No. 3814, 1869); Ex Parte Perovich, 9 F.2d 124 (D. Kan. 1925).

4. Does acceptance of a pardon imply an admission of guilt?

a. Yes.

b. 6 Op. A.G. 20 (1853) states that a pardon before trial and conviction is proper " . . . because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime by process of law. But there must be satisfactory evidence of some kind as to the guilt of the party. And it has been held unwise and inexpedient, as a general rule, to interpose the pardoning power in anticipation of trial and condemnation, although particular circumstances may exist to justify such an exceptional act on the part of the President. Mr. Wirt's opinion, March 30, 1820; Mr. Berrien's opinion, October 12, 1829; Mr. Taney's opinion, December 28, 1831." 6 Op. A.G. at 21.

11 Op. A.G. 227, 228 (1865) states that "There can be no pardon where there is no actual or imputed guilt. The acceptance of a pardon is a confession of guilt, or of the existence of a state of facts from which a judgment of guilt would follow."

Burdick v. United States, 236 U.S. 70 (1915) states that a pardon carries an imputation of guilt; acceptance a confession of it. But legislative immunity has no such imputation or confession, being the unobtrusive act of the law given protection against a sinister use of the witnesses' compelled testimony.

5. May a pardon be void ab initio?

a. Yes.

b. 11 Op. A. G. 227 at 229 (1865) states that "A pardon procured by fraud or for a fraudulent purpose, upon the suppression of the truth or the suggestion of falsehood, is void. It is a deed of mercy given without other fee or reward than the good faith, truth and repentance of the culprit. On the other hand, as an act of grace freely given, when obtained without falsehood, fraud, and for no fraudulent use, it should be liberally construed in favor of the repentent offender."

6. May the President grant a pardon without first investigating the facts upon which the pardon operates to relieve an individual from punishment?

a. Yes.

b. 1 Op. A. G. 359 (1820) stating with respect to the suggestion that the President must either grant a new trial because of the petitioners' submission of new facts upon which to base the pardon or to accept without question the explanation of the petitioners that "I do not think that the power of pardon either requires or authorizes him to do the one or the other of these things; but that, on the contrary, to do either would be an abuse of that power." Distinguish that right to do something from the judgment whether something which one has the right to do should be done in a particular manner.

B. Form of the Pardon

1. Must a pardon have a particular form or designation?

a. Yes.

b. Ex Parte Wells, 59 U.S. (18 How.) 307, 310 (1855)

"Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special, or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course."

c. It appears that there is a difference between a full and unconditional pardon for an offense which has been specified in the preamble of the pardon statement, and a "general" pardon.

See Stetler's Case, 22 Fed. Cas. (Cas. No. 13,380, 1852) where the Court distinguished between a full and unconditional pardon, which was there involved, and a general pardon. The Court held that the pardon which was full and unconditional was valid for the offense recited in the preamble but that this was not a general pardon for other crimes.

8 Op. A. G. 281 (1857) also made specific reference to the fact that the form of the pardon was significant. As an example, the Opinion stated "a 'general' pardon restores the competency of a party as a witness but that effect may not follow a special remission merely of the residue of a sentence i.e., commutation."

d. President Ford referred to Mr. Nixon's pardon as "full, free and absolute" and covering the period of his term in office.

2. Must the form of the pardon include a statement which indicates the intent of the President with respect to the offenses encompassed by the pardon?

   a. Stetler's Case, supra, states that the "effect of the preamble /of the pardon statement/ reciting a single offense limits the general words of the grant of pardon."

   b. Where the scope of the pardon is ambiguous, 11 Op. A. G. 227 at 229 (1865) suggests that since the pardon is essentially an act of grace, "when obtained without falsehood, fraud, and for no fraudulent use, it should be liberally construed in favor of the repentent offender."

3. If there is any ambiguity regarding the President's intent in specifying the offenses which are the subject of the pardon, may he be required to specify his intent?

   a. No.

   b. So long as the offenses covered or which may be covered are in some manner treated by the terms of the pardon, i.e., "during the period from January 20, 1969 through August 9, 1974."

   c. Somewhat bearing on this consideration is the comment in 11 Op. A. G. 227, 232-233 (1865) which suggests that it would be proper for the judiciary to determine in each

particular case the adequacy of the repicients' acceptance of the terms of a pardon. Apparently, ambiguity with respect to acceptance is a subject of judicial determination, permitting a court to review the expression of intent in a pardon as the way of gauging the adequacy of the acceptance.

C. Timing of the Pardon

1. May a pardon precede indictment and conviction?

a. Yes.

b. During the debates of the Constitutional Convention, a motion was made to insert the words "after conviction" after the words "reprieves and pardons". Mr. James Wilson of Pennsylvania objected to this proposal on the grounds that "pardon before conviction might be necessary in order to obtain the testimony of accomplices." The motion was then withdrawn. 2 M. Farrand, supra, at 422, 426.

c. 6 Op. A. G. 20, 21 (1853) permits the offer of a pardon before trial and conviction " . . . because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime by process of law."

d. Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1866) states that the pardoning power may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.

e. 8 Op. A. G. 281 (1857) states "He may pardon before trial and conviction. He may pardon at any time either anterior to prosecution or pending the same or subsequent to the executions -- subject in the latter case only to the limits of legal, moral, or physical possibilities.

f. Stetler's Case, supra, states that "the President has constitutional authority to pardon an offense so long as any of its consequences remain."

2. May a pardon include offenses which have neither been discovered, nor listed in the pardon statement at the time of its issuance?

a. Yes.

b. If the pardon statement designates that the pardon will be general or if by its terms the pardon states that it includes "all" offenses which have been committed by the recipient, knowledge of the precise types of crimes involved is irrelevant. A pardon is essentially directed to the nullification of the legal consequences flowing from an offense. Such an effect is not dependent on knowledge or enumeration of the offenses involved. 22 Op. A. G. 36 (1898) Since the Congress cannot limit the President's power to pardon, "the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

D. Challenge and Review of a Pardon

1. Who has standing to challenge the pardon?

a. The President

Matter of DePuy, 7 Fed. Case. No. 3814 (1869) states that the President has the right to arrest a pardon, but only before it has been delivered and accepted by the grantee.

b. Leon Jaworski, Special Prosecutor, has standing to challenge the pardon. Ordinarily, of course, a prosecutor is subject to the President's control, so the basis of his challenge would not be that the incumbent President acted improperly. But here, the understanding between the Department of Justice, the President and the Special Prosecutor contained in Order No. 551-73 (Nov. 2, 1973), 38 Fed. Reg. 30738, provided

"that the President will not exercise his constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given." The President further agreed not to remove him from his duties except for extraordinary improprieties on his part and without the President's first consulting the majority and the minority leaders and chairmen and ranking minority members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action."

Note the decision in Nader v. Bork, ___ F. Supp. ____ (D. D. C. 1973) 42 L. W. 2262, which apparently does not address the standing question, but did hold that Acting Attorney General Bork's firing of Special Prosecutor Cox was illegal.

From newspaper reports of September 9, 1974, Mr. Jaworski had decided not to challenge the pardon. New York Times, p. 1 col. 4 states that "The special prosecutor 'accepts the decision' . . . . 'He thinks it's within the President's power to do it. His feelings is that the President is exercising his lawful power, and he accepts it.'"

The challenge would have to be based on the grounds discussed above -- notably, fraud in the inducement. There is no Federal case law which will indicate that obtaining it by inducement contrary to public policy (e. g., a "deal" for Nixon's resignation) would constitute invalidating fraud. Obviously, however, care should be taken to eliminate any such speculation. It is difficult to argue that the pardon violates the agreement with Jaworski. It does not "effect /his/ discharge" or "limit his independence" or "remove him from his duties." But obviously, questions can be expected on this point.

2. May the President revoke a pardon once it has been accepted?

   a. No.

   b. In re DePuy, 7 Fed. Cas. 507 (Cas. No. 3814, 1869). In reviewing a pardon by the President, the Court stated that "when a pardon is complete there is no power to revoke it, any more than there is power to revoke any other completed act." Once a pardon has been accepted, it becomes a completed act and cannot be revoked.

   c. This situation should be distinguished from the case where the pardon is conditional and the recipient fails to fulfill the terms of the condition. See Lupo v. Zerbst, 92 F. 2d 362 (5th Cir. 1937).

3. Can Congress challenge a pardon?

   a. No.

   b. United States v. Klein, 13 Wall. 128, 143, 148 (1872): "Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law."

4. See discussion of fraud as a basis for challenging a pardon, supra at (A)(5) of the outline discussing 11 Op. A. G. 227 (1865).

5. May courts review a grant of a pardon?

   a. Yes.

   b. Judicial review may not extend to the propriety of the President's exercise of the pardoning power. However, the courts have reviewed such issues as whether the offense pardoned falls within the category of an offense against the United States (Ex Parte Grossman, supra); whether the conditions imposed are valid (i.e., Hoffa v. United States (most recent example); Ex Parte Wells, supra; United States v. Klein, supra); whether the grantor of the pardon has the authority to issue the pardon (The Laura, supra; 22 Op. A.G. 36, supra; 19 Op. A.G. 106, supra); whether the terms of the pardon are ambiguous; and whether at the time of the issuance of the pardon the President was constitutionally able to exercise the pardoning power by reason of the Twenty-fifth Amendment.

6. Can a recipient of an invalid pardon claim estoppel if he is prosecuted for an offense covered by a pardon allegedly granted to him?

   a. Yes, However, there is no case law on this point.

   b. It is reasonable that if in reliance on the grant of a pardon (where the pardon might be phrased in ambiguous terms), the recipient "waives" his Fifth Amendment protection against self-incrimination by making incriminating statements, subsequent prosecution would be estopped. The recipient because of his reliance on the pardon in making those statements would effectively be prevented from obtaining a fair trial by an impartial jury, guaranteed him by the Sixth Amendment.

E. Extent of the Pardoning Power

1. Can the pardoning power affect either state criminal jurisdiction or civil liability to third parties?

   a. No.

   b. (Angle v. Chicago, St. P.M. &O.R. Co., 151 U.S. 1 (1893); Osborn v. United States, 91 U.S. 474 (1875). As to third parties (see also 5 Op. A.G. 532 (1852)), stating "this power of granting pardons does not confer an unlimited power . . . . The power of granting pardons does not extend to the release of the portion of fines, penalties, and forfeitures which, by United States law, are directed to be distributed by the individual. Such would deprive individuals of their interests . . . and they would suffer loss."

   c. Ex Parte Grossman, supra, at page 121 which states "neither in this country nor in England can /a pardon/ interfere with the use of coercive measures to enforce a suitor's rights."

   d. Look to the express terms of Article II, Section 2, cl. 1 which limits the power to offenses against the United States.

2. What are offenses against the United States?

   a. Ex Parte Grossman, supra

      (1) A pardon of the president is meant to operate on offenses against the United States as distinguished from offenses against the States.

      (2) Offenses against the United States include, but are not limited to, crimes and misdemeanors defined and announced by Congressional acts.

      (3) The words of the pardon clause were not meant to exclude therefrom common law offenses in "the nature of contempts against the dignity and authority of United States courts." Criminal, but not civil, contempts are subject to pardon.

      (4) The term offenses is used in the Constitution in a more comprehensive sense than are the terms "crimes" and "criminal prosecution".

b. A state felony (i.e., assault and violation of traffic regulations) is not an offense against the United States. In re Bocchiaro, 49 F. Supp. 37 (W.D.N.Y. 1943)

c. The pardon power is sufficient to remit a fine imposed on a citizen for contempt for neglecting to serve as a juror. 4 Op. A.G. 317 (1844)

d. The pardon power extends to all penalties and forfeitures, as well as other punishments. 8 Op. A.G. 281 (1857)

e. Proceedings instituted by the United States for punishment of criminal contempt committed by a violation of an injunction is an offense against the United States. United States v. Goldman, 277 U.S. 229 (1928).

F. Equal Protection Argument

1. Can others who allegedly have committed the same offenses as co-conspirators or accomplices sustain a claim that they have been denied equal protection when one of their number has been pardoned?

a. No. The act of pardoning is essentially an act of executive grace, specifically directed usually at one particular person. Moreover, there is no equal protection argument possible where there is a rational basis upon which a distinction can be made.

Even if equal protection considerations were raised, it is arguable that considerations, other than those strictly legal, may validly distinguish one co-conspirator from another, i.e., health, position, effect of a trial on the national conscience and morale, as well as the extent of the recipient's participation.

Since this power is ultimately designed to function as a stress point in our Constitutional fabric to which no citizen has a right, failure to accord the grace to all involved in a particular offense does not violate equal protection.

2. May the pardon of Mr. Nixon be considered in the sentencing by judges presiding over trials involving Watergate-related offenses?

a. Yes. The sentencing power of the judge is wholly discretionary and subject to very little review so long as the terms of the sentences are within the statutory limits.

G. Prospective Application of the Pardoning Power.

1. Can a Presidential pardon be prospective in application to offenses against the United States committed after the offer of the pardon?

a. No. 22 Op. A. G. 36, 39 (1898).

H. Effect of Pardon.

1. Can President Nixon refuse to testify in future Watergate trials by claiming his Fifth Amendment right against self-incrimination?

a. No. He has been granted immunity from federal criminal prosecution. He may refuse to testify on matters which would involve State criminal liability since he has not been given immunity with respect to State liability. Jaworski could give him such immunity.

2. If Nixon testifies at Watergate trials and is shown to have lied under oath and if he is then charged with perjury can he raise President Ford's pardon as a bar to liability for perjury? No. A pardon is limited in this case to crimes completed as of the date of Mr. Nixon's resignation, August 9, 1974.

3. Does Nixon face the possibility of criminal tax liability for tax fraud in California? Yes.

4. Would Nixon be subject to civil suits? Yes.

I. Executive Privilege: Congressional Demands.

1. How does Executive Privilege operate in response to Congressional demands?

Congressional demands for material may be grouped into four categories:

a. Some Presidents have acknowledged that a demand for material pursuant to an impeachment inquiry would require production for any and all executive material. See Washington's statement, 5 Annals of Congress 710-12 (1796).

b. Particularized Congressional demands for materials pursuant to a legislative mission may be rejected on the basis of Executive Privilege where it is deemed by the President that the production of such material would be detrimental to the functioning of the Executive Branch.

c. Particularized Congressional demands for sensitive materials have at times been met with certain restrictions on access, e.g., examination by only the Chairman and ranking Republicans on a committee.

d. Non-particularized claims for general access with no compelling indication of need are routinely rejected.

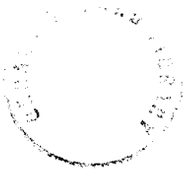
2. Does a former President have the authority to invoke Executive Privilege for materials or conversations arising during his Presidency?

Yes. The rationale behind the privilege and the interest it serves compels an affirmative response. The invocation of Executive Privilege is not so much to protect the content of the particular discussions demanded as it is to protect the expectation of confidentiality which enables future discussions to be free and frank. Principle recognized as early as 1846. Richardson, Messages and Papers of the Presidents, Vol. IV, 433-34.

Former President Truman in 1953, having returned to public life, asserted privilege in response to House committee subpoena concerning matters which transpired while he was in office. The House committee accepted the letter and did not attempt to enforce the subpoena.

3. Does the Congress itself protect a sphere of confidentiality in its internal deliberations?

Yes. At least four precedents can be given in this regard.



a. In 1962, certain staff members of the Senate Rackets Committee were allowed to testify in a criminal proceeding against Jimmy Hoffa but they were forbidden from making available

any documents in the hands of the Senate and from testifying about information that they gained while employed in the Senate. 108 Cong. Rec. 3626 (1962). In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of government which it wishes to protect." Id. at 3627.

b. In 1970, the House Committee on Armed Services refused to comply with a request from counsel for Lieutenant William Calley for the production of testimony given to the committee by Calley in closed session. The chairman of the committee, Rep. Hebert, indicated that " . . . only Congress can direct the disclosure of legislative records." See 116 Cong. Rec. 37652 (1970).

c. In 1972, the United States Senate by resolution refused a judicial subpoena for documentary evidence in the criminal case of United States v. Brewster, then pending in the D. C. District Court. 118 Cong. Rec. 766 (1972).

d. In 1974, the Senate passed a resolution allowing a Senate staff member to testify in a criminal proceeding but limited the scope of the testimony by providing that " . . . he shall respectfully decline to provide information concerning any and all other matters that may be based on knowledge acquired by him in his official capacity . . ." S. Res. 338, passed June 12, 1974.

II. QUESTIONS OF FACT

A. Introductory Notes: This hearing presents a real opportunity for the President. At the same time, however the open-ended nature of the factual inquiry must be limited to ensure a responsible search for the truth regarding the pardon. Although the President need not assume a defensive posture, potential for political mischief must be minimized.

1. Ground Rules. The ground rules which have been agreed upon with the subcommittee may be summarized as follows:

a. Opening Statement. No time limitations but statement should be responsive to each of the formal inquiries raised by H. Res. 1367 and H. Res. 1370.

b. Scope of Inquiry. The understanding has been reached that the inquiry shall be limited by the scope of the two formal resolutions of inquiry.

c. Time Limitations. Each of the nine members sitting with the subcommittee shall have the opportunity to question the President for two periods of five minutes each. Thus, there will be a total of 90 minutes of questioning.

d. Television. Consent has been given to live television coverage of the hearing.

2. Thoughts on ground rules. In my opinion, further consideration should be given to the ground rules in the following respects:

a. Time Limits. If possible, the agreement reached on the period for questioning should be reopened and substantially reduced. Perhaps, a total of 1/2 hour to be controlled by and divided between the chairman and ranking Republican. Alternatively, only 5 minutes per member might be allowed for a total of 45 minutes. Ninety minutes is simply too long.

b. Order of questioning. The order of questioning should alternate from Democrat to Republican and form senior to junior. The Democrats should not be allowed to exhaust their time prior to the allotment of time to the Republicans.

c. Nixon-GSA Agreement. It should be clearly understood that the tapes agreement is beyond the scope of this inquiry, except to the extent that it might impact upon the grant of the pardon.

d. Prior Executive's Discussions and Materials which are presumptively privileged. It should be understood that President Ford will not infringe upon any claim of Executive Privilege which former President Nixon may want to assert with regard to materials or conversations arising prior to

August 9th. This position can be substantially strengthened by a letter to Jack Miller, counsel to the former President, inquiring as to whether he intends to assert a privilege on behalf of the former President. Assuming Miller will not consent to any waiver, documentation of this position will then be available.

e. Presumptively Privileged Discussions and Materials Arising after August 9th. Two ground rules should be established in this regard:

(1) President Ford will not make available members of the White House staff for further examination on the subject of the pardon; and

(2) Formal requests or demands for documents of the Ford Presidency will not be complied with unless of a public nature -- this is not to say, however, that such materials may not be made available pursuant to informal requests by the committee The point in this latter regard is that release in this context is a Presidential prerogative.

f. Role of the Chairman. Chairman Hungate should assume the following responsibilities:

(1) Channel all appropriate informal requests for materials to the White House;

(2) Strictly enforce time limitations and ground rules on relevancy and privilege; and

(3) Rule clearly repetitious questions out of order.

3. Need For Certainty. If equitable ground rules for this hearing cannot be firmly established prior to Wednesday, the President might give thought to postponing his appearance until an agreement reflecting a good faith effort on both sides can be reached.

B. Individuals Involved In Grant of Pardon.

1. Who were the individuals representing Mr. Nixon during the course of any pardon discussions or negotiations?

   a. What was the scope of authority of Mr. Miller, counsel of record so to speak, in the pardon discussions?

   b. Was Fred Buzhardt involved in any way?

   c. Was Alexander Haig involved in any way?

   d. When did Messrs. Buzhardt and Haig leave the White House payroll?

   e. Was any representative of H. R. Haldeman privy to the discussions?

   f. Did Mr. St. Clair represent Mr. Nixon in any way relative to the pardon?

2. Who were the individuals representing your interests during the course of any pardon discussions or negotiations?

   a. Did anyone other than Messrs. Marsh, Hartmann, Buchen and Becker, represent you in any way during these discussions?

   b. How did you happen to enlist the assistance of Mr. Becker?

   c. Were you aware of the fact that Mr. Becker is currently under investigation for income tax evasion by the Department of Justice?

   d. Was Mr. Becker paid for his efforts?

   e. Does Mr. Becker currently provide you any assistance, legal or otherwise?

   f. With the nation's finest and most highly respected lawyers and the Department of Justice presumably available to assist you in this regard, why were they not utilized?

g. Do you have any personal logs or minutes of your meetings with individuals representing your interests in this regard?

h. May the subcommittee review these materials?

i. Would you object to our receiving testimony from those who assisted you on the pardon?

C. Considerations In Granting Pardon.

1. Did you have any hard evidence of the frailty of Mr. Nixon's physical or mental health?

2. With the benefit of hindsight, what is your view of the pardon today in terms of healing the nation's wounds?

3. What factors under consideration by you with respect to the pardon of Mr. Nixon would not impact equally on other Watergate defendants?

4. Since in ordinary legal proceedings the leading member of a criminal group is most actively prosecuted, what prompted you to turn this notion on its head?

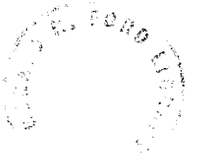
5. Prior to granting the pardon, did you consider the impact it could have on the independence of the Special Prosecutor and any pending criminal matters?

6. Did you consider discussing these matters with the Congressional group referred to in Mr. Jaworski's charter?

7. Do you consider Mr. Nixon's statement upon acceptance of the pardon to constitute an appropriate "statement of contrition"?

8. Did you make any notes or review any staff recommendations as you formulated your views on the necessity for a pardon?

9. May the subcommittee review these materials?



D. Timing and Secrecy of Pardon.

1. In terms of setting "Watergate" to rest, might it not have been preferable to take your case to the people prior to the grant of the pardon?

2. Didn't your precipitous action reduce the possibility of ever achieving a complete record of "Watergate" which presumably is in the public interest?

3. Why wasn't a complete record of the former President's involvement in the cover-up made public prior to the grant of the pardon as was done prior to the acceptance of a guilty plea on behalf of former Vice President Agnew?

4. You have indicated that your Administration would be one of "openness" -- how does the handling of the pardon square with that notion?

5. Did you feel any pressure to grant the pardon from any former Nixon aides?

6. Did you feel any pressure from any Congressional sources to grant the pardon?

7. In terms of public reaction, did you consider that your actions could be interpreted as a quid pro quo for assuming the Presidency?

E. Relationship of Pardon to Tapes Agreement.

1. Do you have any reason to believe that any conversations which you may have had with the former President during your service in the House or as Vice President were secretly tape recorded?

2. Did you meet frequently with him in the Oval Office, the EOB or the Cabinet Room where secret recording devices were installed?

3. Were many of these conversations of a confidential nature?

4. Did many of these conversations involve only yourself and the former President?

5. Were any White House aides, other than H. R. Haldeman or John Ehrlichman frequently in attendance at these meetings?

6. After the existence of the tape recording devices became known, did you ever discuss with anyone their possible content as it might reflect on you?

7. Has anyone ever expressed to you their fears regarding the content of the tapes as they might affect you or others close to you?

8. Is anyone other than the former President and Mr. Haldeman aware of the content of the tapes as they may reflect on you?

9. Did Mr. Haldeman, to your knowledge, ever attempt to exercise any leverage over the former President or yourself with respect to the tapes in order to secure a pardon?

10. Can you confirm or deny published reports to the effect that, during the course of hearings on your nomination to be Vice President, Mr. Buzhardt reviewed tapes covering certain days when you had met with the former President?

11. Did any of your representatives participate in the development of the Nixon-GSA tapes agreement with representatives of GSA or Mr. Nixon?

12. Did you give these individuals any directives?

13. Paragraph 10 of the tapes agreement provides you with access to the tapes -- how did this provision find its way into the agreement?

14. The same paragraph provides Mr. Nixon with access -- however, no one else can access these materials. Does this strike you as salutary?

15. What arrangements are being made to ensure the security of the tapes?

#

THE WHITE HOUSE

WASHINGTON

October 14, 1974

MEMORANDUM FOR: PHIL BUCHEN

FROM: KEN LAZARUS

SUBJECT: House Judiciary Subcommittee Hearing On Pardon: Anticipated Questions For The President.

Set forth below are a number of questions which I anticipate may be raised at the hearing on Thursday and some rather cryptic notes which may be of assistance to you in this regard. Hopefully, the President will have the opportunity to consider these and all other questions which may be anticipated prior to his appearance.

I. QUESTIONS OF LAW

A. Basis of the Pardon Power

1. What is the Constitutional basis of the President's pardoning power?

Article II, section 2, cl. 1: " . . . and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

2. Who has the power to pardon and is the exercise of that power exclusive?

a. Only the President may exercise the power to pardon.

(1) Ex Parte Wells, 59 U.S. (18 How.) 307 (1855): at p. 309 "Under this power, the President has granted reprieves and pardons since the commencement of the present government . . . No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases, the President has acted exclusively under the power as it is expressed in the constitution."

(2) Ex Parte Garland, 4 Wall. 333, 380 (1867): "This power of the President is not subject to legislative control. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

(3) Ex Parte Grossman, 267 U.S. 87, 120 (1924): "The Executive can reprieve or pardon all offenses . . . conditionally or absolutely, and this without modification or regulation by Congress."

(4) The Laura, 114 U.S. 411, 414 (1885): The President's ". . . constitutional power in these respects cannot be interrupted, abridged, or limited by any legislative enactment."

(5) See also, United States v. Klein, 13 Wall. 128 (1872) and Knote v. United States, 95 U.S. 149 (1877), both stating that the President has the power to grant a full pardon.

(6) Thompson v. Duehay, 217 Fed. 484, 487 (W.D. Wash. 1914) affd. 223 Fed. 305 (9th Cir. 1915); Bozel v. United States, 139 F.2d 153 (6th Cir. 1943); United States v. Kawkita, 108 F. Supp. 627 (S.D. Cal. 1952); United States v. Jenkins, 141 F. Supp. 499 (S.D. Ga. 1956).

(7) 20 Op. A.G. 668 (1893), stating that ". . . the pardoning power of the President is absolute, and is not a subject of legislative control."
41 Op. A.G. 251 (1955), stating "Nor do I believe that the parole laws and regulations can be regarded as a limitation upon the President's pardoning power vested in him by the Constitution. The books are replete with statements that Congress can neither control nor regulate the action of the President in this regard." At p. 254.

b. May the President delegate his power to pardon to other officials or agencies within the Executive Branch?

(1) In light of the above cases, it would appear that the power to pardon is nondelegable. To support this premise, 19 Op. A. G. 106 (1888) states that "This grant of power to pardon offenses against the United States to the President alone forbids the exercise of it by any one else . . . But it is to be presumed Congress passed law (permitting an officer to pardon after general court-martial) in subservience to and not in violation of the Constitution." Since the ability to remit punishment was limited solely to punishment and not to the offense itself, which is the essential object of a pardon, the President's pardoning power was not impinged. The Opinion went on to state, however, "But when the law has finally pronounced its judgment /and an offense has been established/, it /Congress/ could not and did not intend to grant the power to pardon the offense against the United States." At p. 108 "If the power of the officer to pardon existed at any time after the final judgment, and could be exercised after the offender had paid a large part of the penalty of the law, he might be again prosecuted, convicted, and twice punished for the same offense." At p. 109.

(2) But see dictum in Solesbee v. Balkcom, 339 U.S. 9 (1950) which states that the "power of executive clemency has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom has this power of executive clemency been subjected to review by the courts."

(3) I believe that 41 Op. A. G. 251 (1955) disposes of the issue that the parole statutes in any measure detract from the President's pardoning power. Viewing the dictum stated above as relating solely to the act of parole, it is clear that judicial review of the decision to parole has been denied the courts.

c. Does the Congress have any power to pardon?

(1) From a reading of the Debates of the Constitutional Convention, it appears that the Framers of the Constitution specifically omitted the Congress from participation in the exercise of the President's pardoning power. By a vote of 1 to 8 the following clause including the Senate

in the participation of the Executive's pardoning power was omitted: " , . . . power to grant reprieves . . . and pardons with consent of the Senate." (emphasis supplied) 2 M. Farrand, Records of the Federal Convention of 1787, 419 (1937).

In one of the debates, Rufus King of Massachusetts made the following observation: "It would be inconsistent with the constitutional separation . . . of powers to let the prerogative /of pardon/ to be exercised by the legislature -- a legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment." 2 M. Farrand, supra, at p. 626.

(2) The power to pardon has been committed exclusively by the Constitution to the President of the United States. See Ex Parte Wells, supra; Ex Parte Garland, supra; Ex Parte Grossman, supra.

(3) In 22 Op. A. G. 36 (1898), it is stated that:

"The power thus conferred is unlimited with the exception stated (except in cases of impeachment). It extends to every offense known to the law, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

(4) Cases of general grants of amnesty or immunity from prosecution can be distinguished from the exercise of the pardoning power reposed exclusively in the President.

In Brown v. Walker, 161 U.S. 591 (1896), the Court held that a statute granting witnesses testifying before the Interstate Commerce Commission immunity from prosecution was virtually a grant of amnesty and therefore a witness could not be excused from testifying on the ground that he might incriminate himself. The granting of immunity to witnesses before prosecution on a quid pro quo basis seems readily distinguishable from the grace concept intrinsic in amnesty. Immunity statutes

have the limited and special purpose of obviating the constitutional privilege against self-imcrimination. Brown should not be read as support for the proposition that Congress can pass a general amnesty statute which in effect is an exercise of the pardoning power. See distinction discussed in Burdick v. United States, 236 U.S. 79, 94-95 (1915).

In The Laura, 114 U.S. 411 (1885), the Supreme Court upheld the remission of a fine by the Secretary of the Treasury acting pursuant to Congressional authorization. the Court observed that the President's power to pardon offenses and remit penalties is not exclusive, the case indicates that the statutory authority accorded the Secretary of the Treasury was placed wholly within his discretion and that a remission could not have occurred without his concurrence. Under such circumstances, the degree of Congressional encroachment on the Executive's power to pardon was minimal, given the predominant role accorded Executive discretion by the statute.

d. Does the judicial branch have the power to pardon?

(1) This issue has been addressed by the Supreme Court in Ex Parte United States, 242 U.S. 27 (1916). In this case, the Court held that courts possess the right to impose punishment provided by law. But this right affords no ground for the contention that " . . . the power to enforce begets inherently a discretion to permanently refuse to do so. Authority to define and fix punishment is legislative and includes the right to bring within judicial discretion in advance elements of consideration which would be otherwise beyond the scope of judicial authority; but that the right to relieve from the punishment, fixed by law, belongs to the executive department."

3. Must the recipient of an offer of pardon accept it?

a. Yes, without acceptance, an offer of pardon lapses.

(1) United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833) which states that a pardon is a "deed" to the validity of which delivery is essential and is not complete without acceptance.

(2) Burdick v. United States, 236 U.S. 79 (1915), holding that acceptance is essential to a pardon's validity.

(3) Biddle v. Perovich, 274 U.S. 480, 486 (1927), distinguishes a commutation which needs no acceptance from a pardon which does.

(4) 11 Op. A.G. 227 (1865) at p. 230 states that "After the pardon has been accepted, it becomes a valid act, and the person receiving it is entitled to all its benefits." See also 41 Op. A.G. 251, 254-258 (1955).

(5) In re DePuy, 7 Fed. Cas. 507 (Cas. No. 3814, 1869); Ex Parte Perovich, 9 F.2d 124 (D. Kan. 1925).

4. Does acceptance of a pardon imply an admission of guilt?

a. Yes.

b. 6 Op. A.G. 20 (1853) states that a pardon before trial and conviction is proper ". . . because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime by process of law. But there must be satisfactory evidence of some kind as to the guilt of the party. And it has been held unwise and inexpedient, as a general rule, to interpose the pardoning power in anticipation of trial and condemnation, although particular circumstances may exist to justify such an exceptional act on the part of the President. Mr. Wirt's opinion, March 30, 1820; Mr. Berrien's opinion, October 12, 1829; Mr. Taney's opinion, December 28, 1831." 6 Op. A.G. at 21.

11 Op. A.G. 227, 228 (1865) states that "There can be no pardon where there is no actual or imputed guilt. The acceptance of a pardon is a confession of guilt, or of the existence of a state of facts from which a judgment of guilt would follow."

Burdick v. United States, 236 U.S. 70 (1915) states that a pardon carries an imputation of guilt; acceptance a confession of it. But legislative immunity has no such imputation or confession, being the unobtrusive act of the law given protection against a sinister use of the witnesses' compelled testimony.

5. May a pardon be void ab initio?

a. Yes.

b. 11 Op. A. G. 227 at 229 (1865) states that "A pardon procured by fraud or for a fraudulent purpose, upon the suppression of the truth or the suggestion of falsehood, is void. It is a deed of mercy given without other fee or reward than the good faith, truth and repentance of the culprit. On the other hand, as an act of grace freely given, when obtained without falsehood, fraud, and for no fraudulent use, it should be liberally construed in favor of the repentent offender."

6. May the President grant a pardon without first investigating the facts upon which the pardon operates to relieve an individual from punishment?

a. Yes.

b. 1 Op. A. G. 359 (1820) stating with respect to the suggestion that the President must either grant a new trial because of the petitioners' submission of new facts upon which to base the pardon or to accept without question the explanation of the petitioners that "I do not think that the power of pardon either requires or authorizes him to do the one or the other of these things; but that, on the contrary, to do either would be an abuse of that power." Distinguish that right to do something from the judgment whether something which one has the right to do should be done in a particular manner.

B. Form of the Pardon

1. Must a pardon have a particular form or designation?

a. Yes.

b. Ex Parte Wells, 59 U.S. (18 How.) 307, 310 (1855)

"Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special, or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course."

c. It appears that there is a difference between a full and unconditional pardon for an offense which has been specified in the preamble of the pardon statement, and a "general" pardon.

See Stetler's Case, 22 Fed. Cas. (Cas. No. 13,380, 1852) where the Court distinguished between a full and unconditional pardon, which was there involved, and a general pardon. The Court held that the pardon which was full and unconditional was valid for the offense recited in the preamble but that this was not a general pardon for other crimes.

8 Op. A. G. 281 (1857) also made specific reference to the fact that the form of the pardon was significant. As an example, the Opinion stated "a 'general' pardon restores the competency of a party as a witness but that effect may not follow a special remission merely of the residue of a sentence i.e., commutation."

d. President Ford referred to Mr. Nixon's pardon as "full, free and absolute" and covering the period of his term in office.

2. Must the form of the pardon include a statement which indicates the intent of the President with respect to the offenses encompassed by the pardon?

   a. Stetler's Case, supra, states that the "effect of the preamble /of the pardon statement/ reciting a single offense limits the general words of the grant of pardon."

   b. Where the scope of the pardon is ambiguous, 11 Op. A. G. 227 at 229 (1865) suggests that since the pardon is essentially an act of grace, "when obtained without falsehood, fraud, and for no fraudulent use, it should be liberally construed in favor of the repentent offender."

3. If there is any ambiguity regarding the President's intent in specifying the offenses which are the subject of the pardon, may he be required to specify his intent?

   a. No.

   b. So long as the offenses covered or which may be covered are in some manner treated by the terms of the pardon, i.e., "during the period from January 20, 1969 through August 9, 1974."

   c. Somewhat bearing on this consideration is the comment in 11 Op. A. G. 227, 232-233 (1865) which suggests that it would be proper for the judiciary to determine in each

particular case the adequacy of the repicients' acceptance of the terms of a pardon. Apparently, ambiguity with respect to acceptance is a subject of judicial determination, permitting a court to review the expression of intent in a pardon as the way of gauging the adequacy of the acceptance.

C. Timing of the Pardon

1. May a pardon precede indictment and conviction?

a. Yes.

b. During the debates of the Constitutional Convention, a motion was made to insert the words "after conviction" after the words "reprieves and pardons". Mr. James Wilson of Pennsylvania objected to this proposal on the grounds that "pardon before conviction might be necessary in order to obtain the testimony of accomplices." The motion was then withdrawn. 2 M. Farrand, supra, at 422, 426.

c. 6 Op. A. G. 20, 21 (1853) permits the offer of a pardon before trial and conviction " . . . because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime by process of law."

d. Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1866) states that the pardoning power may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.

e. 8 Op. A. G. 281 (1857) states "He may pardon before trial and conviction. He may pardon at any time either anterior to prosecution or pending the same or subsequent to the executions -- subject in the latter case only to the limits of legal, moral, or physical possibilities.

f. Stetler's Case, supra, states that "the President has constitutional authority to pardon an offense so long as any of its consequences remain."

2. May a pardon include offenses which have neither been discovered, nor listed in the pardon statement at the time of its issuance?

a. Yes.

b. If the pardon statement designates that the pardon will be general or if by its terms the pardon states that it includes "all" offenses which have been committed by the recipient, knowledge of the precise types of crimes involved is irrelevant. A pardon is essentially directed to the nullification of the legal consequences flowing from an offense. Such an effect is not dependent on knowledge or enumeration of the offenses involved. 22 Op. A. G. 36 (1898) Since the Congress cannot limit the President's power to pardon, "the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

D. Challenge and Review of a Pardon

1. Who has standing to challenge the pardon?

a. The President

Matter of DePuy, 7 Fed. Case. No. 3814 (1869) states that the President has the right to arrest a pardon, but only before it has been delivered and accepted by the grantee.

b. Leon Jaworski, Special Prosecutor, has standing to challenge the pardon. Ordinarily, of course, a prosecutor is subject to the President's control, so the basis of his challenge would not be that the incumbent President acted improperly. But here, the understanding between the Department of Justice, the President and the Special Prosecutor contained in Order No. 551-73 (Nov. 2, 1973), 38 Fed. Reg. 30738, provided

"that the President will not exercise his constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given." The President further agreed not to remove him from his duties except for extraordinary improprieties on his part and without the President's first consulting the majority and the minority leaders and chairmen and ranking minority members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action."

Note the decision in Nader v. Bork, ___ F. Supp. ____ (D. D. C. 1973) 42 L. W. 2262, which apparently does not address the standing question, but did hold that Acting Attorney General Bork's firing of Special Prosecutor Cox was illegal.

From newspaper reports of September 9, 1974, Mr. Jaworski had decided not to challenge the pardon. New York Times, p. 1 col. 4 states that "The special prosecutor 'accepts the decision' . . . . 'He thinks it's within the President's power to do it. His feelings is that the President is exercising his lawful power, and he accepts it.'"

The challenge would have to be based on the grounds discussed above -- notably, fraud in the inducement. There is no Federal case law which will indicate that obtaining it by inducement contrary to public policy (e. g., a "deal" for Nixon's resignation) would constitute invalidating fraud. Obviously, however, care should be taken to eliminate any such speculation. It is difficult to argue that the pardon violates the agreement with Jaworski. It does not "effect /his/ discharge" or "limit his independence" or "remove him from his duties." But obviously, questions can be expected on this point.

2. May the President revoke a pardon once it has been accepted?

   a. No.

   b. In re DePuy, 7 Fed. Cas. 507 (Cas. No. 3814, 1869). In reviewing a pardon by the President, the Court stated that "when a pardon is complete there is no power to revoke it, any more than there is power to revoke any other completed act." Once a pardon has been accepted, it becomes a completed act and cannot be revoked.

   c. This situation should be distinguished from the case where the pardon is conditional and the recipient fails to fulfill the terms of the condition. See Lupo v. Zerbst, 92 F. 2d 362 (5th Cir. 1937).

3. Can Congress challenge a pardon?

   a. No.

   b. United States v. Klein, 13 Wall. 128, 143, 148 (1872): "Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law."

4. See discussion of fraud as a basis for challenging a pardon, supra at (A)(5) of the outline discussing 11 Op. A. G. 227 (1865).

5. May courts review a grant of a pardon?

   a. Yes.

   b. Judicial review may not extend to the propriety of the President's exercise of the pardoning power. However, the courts have reviewed such issues as whether the offense pardoned falls within the category of an offense against the United States (Ex Parte Grossman, supra); whether the conditions imposed are valid (i.e., Hoffa v. United States (most recent example); Ex Parte Wells, supra; United States v. Klein, supra); whether the grantor of the pardon has the authority to issue the pardon (The Laura, supra; 22 Op. A.G. 36, supra; 19 Op. A.G. 106, supra); whether the terms of the pardon are ambiguous; and whether at the time of the issuance of the pardon the President was constitutionally able to exercise the pardoning power by reason of the Twenty-fifth Amendment.

6. Can a recipient of an invalid pardon claim estoppel if he is prosecuted for an offense covered by a pardon allegedly granted to him?

   a. Yes, However, there is no case law on this point.

   b. It is reasonable that if in reliance on the grant of a pardon (where the pardon might be phrased in ambiguous terms), the recipient "waives" his Fifth Amendment protection against self-incrimination by making incriminating statements, subsequent prosecution would be estopped. The recipient because of his reliance on the pardon in making those statements would effectively be prevented from obtaining a fair trial by an impartial jury, guaranteed him by the Sixth Amendment.

E. Extent of the Pardoning Power

1. Can the pardoning power affect either state criminal jurisdiction or civil liability to third parties?

   a. No.

   b. (Angle v. Chicago, St. P. M. &O. R. Co., 151 U. S. 1 (1893); Osborn v. United States, 91 U. S. 474 (1875). As to third parties (see also 5 Op. A. G. 532 (1852)), stating "this power of granting pardons does not confer an unlimited power . . . . The power of granting pardons does not extend to the release of the portion of fines, penalties, and forfeitures which, by United States law, are directed to be distributed by the individual. Such would deprive individuals of their interests . . . and they would suffer loss."

   c. Ex Parte Grossman, supra, at page 121 which states "neither in this country nor in England can /a pardon/ interfere with the use of coercive measures to enforce a suitor's rights."

   d. Look to the express terms of Article II, Section 2, cl. 1 which limits the power to offenses against the United States.

2. What are offenses against the United States?

   a. Ex Parte Grossman, supra

      (1) A pardon of the president is meant to operate on offenses against the United States as distinguished from offenses against the States.

      (2) Offenses against the United States include, but are not limited to, crimes and misdemeanors defined and announced by Congressional acts.

      (3) The words of the pardon clause were not meant to exclude therefrom common law offenses in "the nature of contempts against the dignity and authority of United States courts." Criminal, but not civil, contempts are subject to pardon.

      (4) The term offenses is used in the Constitution in a more comprehensive sense than are the terms "crimes" and "criminal prosecution".

b. A state felony (i.e., assault and violation of traffic regulations) is not an offense against the United States. In re Bocchiaro, 49 F. Supp. 37 (W.D.N.Y. 1943)

c. The pardon power is sufficient to remit a fine imposed on a citizen for contempt for neglecting to serve as a juror. 4 Op. A.G. 317 (1844)

d. The pardon power extends to all penalties and forfeitures, as well as other punishments. 8 Op. A.G. 281 (1857)

e. Proceedings instituted by the United States for punishment of criminal contempt committed by a violation of an injunction is an offense against the United States. United States v. Goldman, 277 U.S. 229 (1928).

F. Equal Protection Argument

1. Can others who allegedly have committed the same offenses as co-conspirators or accomplices sustain a claim that they have been denied equal protection when one of their number has been pardoned?

a. No. The act of pardoning is essentially an act of executive grace, specifically directed usually at one particular person. Moreover, there is no equal protection argument possible where there is a rational basis upon which a distinction can be made.

Even if equal protection considerations were raised, it is arguable that considerations, other than those strictly legal, may validly distinguish one co-conspirator from another, i.e., health, position, effect of a trial on the national conscience and morale, as well as the extent of the recipient's participation.

Since this power is ultimately designed to function as a stress point in our Constitutional fabric to which no citizen has a right, failure to accord the grace to all involved in a particular offense does not violate equal protection.

2. May the pardon of Mr. Nixon be considered in the sentencing by judges presiding over trials involving Watergate-related offenses?

a. Yes. The sentencing power of the judge is wholly discretionary and subject to very little review so long as the terms of the sentences are within the statutory limits.

G. Prospective Application of the Pardoning Power.

1. Can a Presidential pardon be prospective in application to offenses against the United States committed after the offer of the pardon?

a. No. 22 Op. A.G. 36, 39 (1898).

H. Effect of Pardon.

1. Can President Nixon refuse to testify in future Watergate trials by claiming his Fifth Amendment right against self-incrimination?

a. No. He has been granted immunity from federal criminal prosecution. He may refuse to testify on matters which would involve State criminal liability since he has not been given immunity with respect to State liability. Jaworski could give him such immunity.

2. If Nixon testifies at Watergate trials and is shown to have lied under oath and if he is then charged with perjury can he raise President Ford's pardon as a bar to liability for perjury? No. A pardon is limited in this case to crimes completed as of the date of Mr. Nixon's resignation, August 9, 1974.

3. Does Nixon face the possibility of criminal tax liability for tax fraud in California? Yes.

4. Would Nixon be subject to civil suits? Yes.

I. Executive Privilege: Congressional Demands.

1. How does Executive Privilege operate in response to Congressional demands?

Congressional demands for material may be grouped into four categories:

a. Some Presidents have acknowledged that a demand for material pursuant to an impeachment inquiry would require production for any and all executive material. See Washington's statement, 5 Annals of Congress 710-12 (1796).

b. Particularized Congressional demands for materials pursuant to a legislative mission may be rejected on the basis of Executive Privilege where it is deemed by the President that the production of such material would be detrimental to the functioning of the Executive Branch.

c. Particularized Congressional demands for sensitive materials have at times been met with certain restrictions on access, e.g., examination by only the Chairman and ranking Republicans on a committee.

d. Non-particularized claims for general access with no compelling indication of need are routinely rejected.

2. Does a former President have the authority to invoke Executive Privilege for materials or conversations arising during his Presidency?

Yes. The rationale behind the privilege and the interest it serves compels an affirmative response. The invocation of Executive Privilege is not so much to protect the content of the particular discussions demanded as it is to protect the expectation of confidentiality which enables future discussions to be free and frank. Principle recognized as early as 1846. Richardson, Messages and Papers of the Presidents, Vol. IV, 433-34.

Former President Truman in 1953, having returned to public life, asserted privilege in response to House committee subpoena concerning matters which transpired while he was in office. The House committee accepted the letter and did not attempt to enforce the subpoena.

3. Does the Congress itself protect a sphere of confidentiality in its internal deliberations?

Yes. At least four precedents can be given in this regard.

a. In 1962, certain staff members of the Senate Rackets Committee were allowed to testify in a criminal proceeding against Jimmy Hoffa but they were forbidden from making available

any documents in the hands of the Senate and from testifying about information that they gained while employed in the Senate. 108 Cong. Rec. 3626 (1962). In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of government which it wishes to protect." Id. at 3627.

b. In 1970, the House Committee on Armed Services refused to comply with a request from counsel for Lieutenant William Calley for the production of testimony given to the committee by Calley in closed session. The chairman of the committee, Rep. Hebert, indicated that " . . . only Congress can direct the disclosure of legislative records." See 116 Cong. Rec. 37652 (1970).

c. In 1972, the United States Senate by resolution refused a judicial subpoena for documentary evidence in the criminal case of United States v. Brewster, then pending in the D. C. District Court. 118 Cong. Rec. 766 (1972).

d. In 1974, the Senate passed a resolution allowing a Senate staff member to testify in a criminal proceeding but limited the scope of the testimony by providing that " . . . he shall respectfully decline to provide information concerning any and all other matters that may be based on knowledge acquired by him in his official capacity . . ." S. Res. 338, passed June 12, 1974.

II. QUESTIONS OF FACT

A. Introductory Notes: This hearing presents a real opportunity for the President. At the same time, however the open-ended nature of the factual inquiry must be limited to ensure a responsible search for the truth regarding the pardon. Although the President need not assume a defensive posture, potential for political mischief must be minimized.

1. Ground Rules. The ground rules which have been agreed upon with the subcommittee may be summarized as follows:

a. Opening Statement. No time limitations but statement should be responsive to each of the formal inquiries raised by H. Res. 1367 and H. Res. 1370.

b. Scope of Inquiry. The understanding has been reached that the inquiry shall be limited by the scope of the two formal resolutions of inquiry.

c. Time Limitations. Each of the nine members sitting with the subcommittee shall have the opportunity to question the President for two periods of five minutes each. Thus, there will be a total of 90 minutes of questioning.

d. Television. Consent has been given to live television coverage of the hearing.

2. Thoughts on ground rules. In my opinion, further consideration should be given to the ground rules in the following respects:

a. Time Limits. If possible, the agreement reached on the period for questioning should be reopened and substantially reduced. Perhaps, a total of 1/2 hour to be controlled by and divided between the chairman and ranking Republican. Alternatively, only 5 minutes per member might be allowed for a total of 45 minutes. Ninety minutes is simply too long.

b. Order of questioning. The order of questioning should alternate from Democrat to Republican and form senior to junior. The Democrats should not be allowed to exhaust their time prior to the allotment of time to the Republicans.

c. Nixon-GSA Agreement. It should be clearly understood that the tapes agreement is beyond the scope of this inquiry, except to the extent that it might impact upon the grant of the pardon.

d. Prior Executive's Discussions and Materials which are presumptively privileged. It should be understood that President Ford will not infringe upon any claim of Executive Privilege which former President Nixon may want to assert with regard to materials or conversations arising prior to

August 9th. This position can be substantially strengthened by a letter to Jack Miller, counsel to the former President, inquiring as to whether he intends to assert a privilege on behalf of the former President. Assuming Miller will not consent to any waiver, documentation of this position will then be available.

e. Presumptively Privileged Discussions and Materials Arising after August 9th. Two ground rules should be established in this regard:

(1) President Ford will not make available members of the White House staff for further examination on the subject of the pardon; and

(2) Formal requests or demands for documents of the Ford Presidency will not be complied with unless of a public nature -- this is not to say, however, that such materials may not be made available pursuant to informal requests by the committee. The point in this latter regard is that release in this context is a Presidential prerogative.

f. Role of the Chairman. Chairman Hungate should assume the following responsibilities:

(1) Channel all appropriate informal requests for materials to the White House;

(2) Strictly enforce time limitations and ground rules on relevancy and privilege; and

(3) Rule clearly repetitious questions out of order.

3. Need For Certainty. If equitable ground rules for this hearing cannot be firmly established prior to Wednesday, the President might give thought to postponing his appearance until an agreement reflecting a good faith effort on both sides can be reached.

B. Individuals Involved In Grant of Pardon.

1. Who were the individuals representing Mr. Nixon during the course of any pardon discussions or negotiations?

   a. What was the scope of authority of Mr. Miller, counsel of record so to speak, in the pardon discussions?

   b. Was Fred Buzhardt involved in any way?

   c. Was Alexander Haig involved in any way?

   d. When did Messrs. Buzhardt and Haig leave the White House payroll?

   e. Was any representative of H. R. Haldeman privy to the discussions?

   f. Did Mr. St. Clair represent Mr. Nixon in any way relative to the pardon?

2. Who were the individuals representing your interests during the course of any pardon discussions or negotiations?

   a. Did anyone other than Messrs. Marsh, Hartmann, Buchen and Becker, represent you in any way during these discussions?

   b. How did you happen to enlist the assistance of Mr. Becker?

   c. Were you aware of the fact that Mr. Becker is currently under investigation for income tax evasion by the Department of Justice?

   d. Was Mr. Becker paid for his efforts?

   e. Does Mr. Becker currently provide you any assistance, legal or otherwise?

   f. With the nation's finest and most highly respected lawyers and the Department of Justice presumably available to assist you in this regard, why were they not utilized?

g. Do you have any personal logs or minutes of your meetings with individuals representing your interests in this regard?

h. May the subcommittee review these materials?

i. Would you object to our receiving testimony from those who assisted you on the pardon?

C. Considerations In Granting Pardon.

1. Did you have any hard evidence of the frailty of Mr. Nixon's physical or mental health?

2. With the benefit of hindsight, what is your view of the pardon today in terms of healing the nation's wounds?

3. What factors under consideration by you with respect to the pardon of Mr. Nixon would not impact equally on other Watergate defendants?

4. Since in ordinary legal proceedings the leading member of a criminal group is most actively prosecuted, what prompted you to turn this notion on its head?

5. Prior to granting the pardon, did you consider the impact it could have on the independence of the Special Prosecutor and any pending criminal matters?

6. Did you consider discussing these matters with the Congressional group referred to in Mr. Jaworski's charter?

7. Do you consider Mr. Nixon's statement upon acceptance of the pardon to constitute an appropriate "statement of contrition"?

8. Did you make any notes or review any staff recommendations as you formulated your views on the necessity for a pardon?

9. May the subcommittee review these materials?

D. Timing and Secrecy of Pardon.

1. In terms of setting "Watergate" to rest, might it not have been preferable to take your case to the people prior to the grant of the pardon?

2. Didn't your precipitous action reduce the possibility of ever achieving a complete record of "Watergate" which presumably is in the public interest?

3. Why wasn't a complete record of the former President's involvement in the cover-up made public prior to the grant of the pardon as was done prior to the acceptance of a guilty plea on behalf of former Vice President Agnew?

4. You have indicated that your Administration would be one of "openness" -- how does the handling of the pardon square with that notion?

5. Did you feel any pressure to grant the pardon from any former Nixon aides?

6. Did you feel any pressure from any Congressional sources to grant the pardon?

7. In terms of public reaction, did you consider that your actions could be interpreted as a quid pro quo for assuming the Presidency?

E. Relationship of Pardon to Tapes Agreement.

1. Do you have any reason to believe that any conversations which you may have had with the former President during your service in the House or as Vice President were secretly tape recorded?

2. Did you meet frequently with him in the Oval Office, the EOB or the Cabinet Room where secret recording devices were installed?

3. Were many of these conversations of a confidential nature?

4. Did many of these conversations involve only yourself and the former President?

5. Were any White House aides, other than H. R. Haldeman or John Ehrlichman frequently in attendance at these meetings?

6. After the existence of the tape recording devices became known, did you ever discuss with anyone their possible content as it might reflect on you?

7. Has anyone ever expressed to you their fears regarding the content of the tapes as they might affect you or others close to you?

8. Is anyone other than the former President and Mr. Haldeman aware of the content of the tapes as they may reflect on you?

9. Did Mr. Haldeman, to your knowledge, ever attempt to exercise any leverage over the former President or yourself with respect to the tapes in order to secure a pardon?

10. Can you confirm or deny published reports to the effect that, during the course of hearings on your nomination to be Vice President, Mr. Buzhardt reviewed tapes covering certain days when you had met with the former President?

11. Did any of your representatives participate in the development of the Nixon-GSA tapes agreement with representatives of GSA or Mr. Nixon?

12. Did you give these individuals any directives?

13. Paragraph 10 of the tapes agreement provides you with access to the tapes -- how did this provision find its way into the agreement?

14. The same paragraph provides Mr. Nixon with access -- however, no one else can access these materials. Does this strike you as salutary?

15. What arrangements are being made to ensure the security of the tapes?

#

THE WHITE HOUSE
WASHINGTON 10/15

Eva --

Here is a copy for your files of the memo Ken did yesterday for Mr. Buchen. Also enclosed is a copy for Mr. Areeda. I wasn't exactly sure where he would be tomorrow.

Dawn

EVA

THE WHITE HOUSE

WASHINGTON

October 14, 1974

MEMORANDUM FOR: PHIL BUCHEN

FROM: KEN LAZARUS KL

SUBJECT: House Judiciary Subcommittee Hearing On Pardon: Anticipated Questions For The President.

Set forth below are a number of questions which I anticipate may be raised at the hearing on Thursday and some rather cryptic notes which may be of assistance to you in this regard. Hopefully, the President will have the opportunity to consider these and all other questions which may be anticipated prior to his appearance.

I. QUESTIONS OF LAW

A. Basis of the Pardon Power

1. What is the Constitutional basis of the President's pardoning power?

Article II, section 2, cl. 1: " . . . and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

2. Who has the power to pardon and is the exercise of that power exclusive?

a. Only the President may exercise the power to pardon.

(1) Ex Parte Wells, 59 U.S. (18 How.) 307 (1855): at p. 309 "Under this power, the President has granted reprieves and pardons since the commencement of the present government . . . No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases, the President has acted exclusively under the power as it is expressed in the constitution."

(2) Ex Parte Garland, 4 Wall. 333, 380 (1867): "This power of the President is not subject to legislative control. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

(3) Ex Parte Grossman, 267 U.S. 87, 120 (1924): "The Executive can reprieve or pardon all offenses . . . conditionally or absolutely, and this without modification or regulation by Congress."

(4) The Laura, 114 U.S. 411, 414 (1885): The President's ". . . constitutional power in these respects cannot be interrupted, abridged, or limited by any legislative enactment."

(5) See also, United States v. Klein, 13 Wall. 128 (1872) and Knote v. United States, 95 U.S. 149 (1877), both stating that the President has the power to grant a full pardon.

(6) Thompson v. Duehay, 217 Fed. 484, 487 (W.D. Wash. 1914) affd. 223 Fed. 305 (9th Cir. 1915); Bozel v. United States, 139 F.2d 153 (6th Cir. 1943); United States v. Kawkita, 108 F. Supp. 627 (S.D. Cal. 1952); United States v. Jenkins, 141 F. Supp. 499 (S.D. Ga. 1956).

(7) 20 Op. A.G. 668 (1893), stating that ". . . the pardoning power of the President is absolute, and is not a subject of legislative control."
41 Op. A.G. 251 (1955), stating "Nor do I believe that the parole laws and regulations can be regarded as a limitation upon the President's pardoning power vested in him by the Constitution. The books are replete with statements that Congress can neither control nor regulate the action of the President in this regard." At p. 254.

b. May the President delegate his power to pardon to other officials or agencies within the Executive Branch?

(1) In light of the above cases, it would appear that the power to pardon is nondelegable. To support this premise, 19 Op. A. G. 106 (1888) states that "This grant of power to pardon offenses against the United States to the President alone forbids the exercise of it by any one else . . . But it is to be presumed Congress passed law (permitting an officer to pardon after general court-martial) in subservience to and not in violation of the Constitution." Since the ability to remit punishment was limited solely to punishment and not to the offense itself, which is the essential object of a pardon, the President's pardoning power was not impinged. The Opinion went on to state, however, "But when the law has finally pronounced its judgment /and an offense has been established/, it /Congress/ could not and did not intend to grant the power to pardon the offense against the United States." At p. 108 "If the power of the officer to pardon existed at any time after the final judgment, and could be exercised after the offender had paid a large part of the penalty of the law, he might be again prosecuted, convicted, and twice punished for the same offense." At p. 109.

(2) But see dictum in Solesbee v. Balkcom, 339 U.S. 9 (1950) which states that the "power of executive clemency has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom has this power of executive clemency been subjected to review by the courts."

(3) I believe that 41 Op. A. G. 251 (1955) disposes of the issue that the parole statutes in any measure detract from the President's pardoning power. Viewing the dictum stated above as relating solely to the act of parole, it is clear that judicial review of the decision to parole has been denied the courts.

c. Does the Congress have any power to pardon?

(1) From a reading of the Debates of the Constitutional Convention, it appears that the Framers of the Constitution specifically omitted the Congress from participation in the exercise of the President's pardoning power. By a vote of 1 to 8 the following clause including the Senate

in the participation of the Executive's pardoning power was omitted: " , . . . power to grant reprieves . . . and pardons with consent of the Senate." (emphasis supplied) 2 M. Farrand, Records of the Federal Convention of 1787, 419 (1937).

In one of the debates, Rufus King of Massachusetts made the following observation: "It would be inconsistent with the constitutional separation . . . of powers to let the prerogative /of pardon/ to be exercised by the legislature -- a legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment." 2 M. Farrand, supra, at p. 626.

(2) The power to pardon has been committed exclusively by the Constitution to the President of the United States. See Ex Parte Wells, supra; Ex Parte Garland, supra; Ex Parte Grossman, supra.

(3) In 22 Op. A. G. 36 (1898), it is stated that:

"The power thus conferred is unlimited with the exception stated (except in cases of impeachment). It extends to every offense known to the law, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

(4) Cases of general grants of amnesty or immunity from prosecution can be distinguished from the exercise of the pardoning power reposed exclusively in the President.

In Brown v. Walker, 161 U.S. 591 (1896), the Court held that a statute granting witnesses testifying before the Interstate Commerce Commission immunity from prosecution was virtually a grant of amnesty and therefore a witness could not be excused from testifying on the ground that he might incriminate himself. The granting of immunity to witnesses before prosecution on a quid pro quo basis seems readily distinguishable from the grace concept intrinsic in amnesty. Immunity statutes

have the limited and special purpose of obviating the constitutional privilege against self-imcrimination. Brown should not be read as support for the proposition that Congress can pass a general amnesty statute which in effect is an exercise of the pardoning power. See distinction discussed in Burdick v. United States, 236 U.S. 79, 94-95 (1915).

In The Laura, 114 U.S. 411 (1885), the Supreme Court upheld the remission of a fine by the Secretary of the Treasury acting pursuant to Congressional authorization. the Court observed that the President's power to pardon offenses and remit penalties is not exclusive, the case indicates that the statutory authority accorded the Secretary of the Treasury was placed wholly within his discretion and that a remission could not have occurred without his concurrence. Under such circumstances, the degree of Congressional encroachment on the Executive's power to pardon was minimal, given the predominant role accorded Executive discretion by the statute.

d. Does the judicial branch have the power to pardon?

(1) This issue has been addressed by the Supreme Court in Ex Parte United States, 242 U.S. 27 (1916). In this case, the Court held that courts possess the right to impose punishment provided by law. But this right affords no ground for the contention that " . . . the power to enforce begets inherently a discretion to permanently refuse to do so. Authority to define and fix punishment is legislative and includes the right to bring within judicial discretion in advance elements of consideration which would be otherwise beyond the scope of judicial authority; but that the right to relieve from the punishment, fixed by law, belongs to the executive department."

3. Must the recipient of an offer of pardon accept it?

a. Yes, without acceptance, an offer of pardon lapses.

(1) United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833) which states that a pardon is a "deed" to the validity of which delivery is essential and is not complete without acceptance.

(2) Burdick v. United States, 236 U.S. 79 (1915), holding that acceptance is essential to a pardon's validity.

(3) Biddle v. Perovich, 274 U.S. 480, 486 (1927), distinguishes a commutation which needs no acceptance from a pardon which does.

(4) 11 Op. A.G. 227 (1865) at p. 230 states that "After the pardon has been accepted, it becomes a valid act, and the person receiving it is entitled to all its benefits." See also 41 Op. A.G. 251, 254-258 (1955).

(5) In re DePuy, 7 Fed. Cas. 507 (Cas. No. 3814, 1869); Ex Parte Perovich, 9 F.2d 124 (D. Kan. 1925).

4. Does acceptance of a pardon imply an admission of guilt?

a. Yes.

b. 6 Op. A.G. 20 (1853) states that a pardon before trial and conviction is proper " . . . because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime by process of law. But there must be satisfactory evidence of some kind as to the guilt of the party. And it has been held unwise and inexpedient, as a general rule, to interpose the pardoning power in anticipation of trial and condemnation, although particular circumstances may exist to justify such an exceptional act on the part of the President. Mr. Wirt's opinion, March 30, 1820; Mr. Berrien's opinion, October 12, 1829; Mr. Taney's opinion, December 28, 1831." 6 Op. A.G. at 21.

11 Op. A.G. 227, 228 (1865) states that "There can be no pardon where there is no actual or imputed guilt. The acceptance of a pardon is a confession of guilt, or of the existence of a state of facts from which a judgment of guilt would follow."

Burdick v. United States, 236 U.S. 70 (1915) states that a pardon carries an imputation of guilt; acceptance a confession of it. But legislative immunity has no such imputation or confession, being the unobtrusive act of the law given protection against a sinister use of the witnesses' compelled testimony.

5. May a pardon be void ab initio?

a. Yes.

b. 11 Op. A. G. 227 at 229 (1865) states that "A pardon procured by fraud or for a fraudulent purpose, upon the suppression of the truth or the suggestion of falsehood, is void. It is a deed of mercy given without other fee or reward than the good faith, truth and repentance of the culprit. On the other hand, as an act of grace freely given, when obtained without falsehood, fraud, and for no fraudulent use, it should be liberally construed in favor of the repentent offender."

6. May the President grant a pardon without first investigating the facts upon which the pardon operates to relieve an individual from punishment?

a. Yes.

b. 1 Op. A. G. 359 (1820) stating with respect to the suggestion that the President must either grant a new trial because of the petitioners' submission of new facts upon which to base the pardon or to accept without question the explanation of the petitioners that "I do not think that the power of pardon either requires or authorizes him to do the one or the other of these things; but that, on the contrary, to do either would be an abuse of that power." Distinguish that right to do something from the judgment whether something which one has the right to do should be done in a particular manner.

B. Form of the Pardon

1. Must a pardon have a particular form or designation?

a. Yes.

b. Ex Parte Wells, 59 U.S. (18 How.) 307, 310 (1855)

"Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special, or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course."

c. It appears that there is a difference between a full and unconditional pardon for an offense which has been specified in the preamble of the pardon statement, and a "general" pardon.

See Stetler's Case, 22 Fed. Cas. (Cas. No. 13,380, 1852) where the Court distinguished between a full and unconditional pardon, which was there involved, and a general pardon. The Court held that the pardon which was full and unconditional was valid for the offense recited in the preamble but that this was not a general pardon for other crimes.

8 Op. A. G. 281 (1857) also made specific reference to the fact that the form of the pardon was significant. As an example, the Opinion stated "a 'general' pardon restores the competency of a party as a witness but that effect may not follow a special remission merely of the residue of a sentence i. e., commutation."

d. President Ford referred to Mr. Nixon's pardon as "full, free and absolute" and covering the period of his term in office.

2. Must the form of the pardon include a statement which indicates the intent of the President with respect to the offenses encompassed by the pardon?

   a. Stetler's Case, supra, states that the "effect of the preamble /of the pardon statement/ reciting a single offense limits the general words of the grant of pardon."

   b. Where the scope of the pardon is ambiguous, 11 Op. A. G. 227 at 229 (1865) suggests that since the pardon is essentially an act of grace, "when obtained without falsehood, fraud, and for no fraudulent use, it should be liberally construed in favor of the repentent offender."

3. If there is any ambiguity regarding the President's intent in specifying the offenses which are the subject of the pardon, may he be required to specify his intent?

   a. No.

   b. So long as the offenses covered or which may be covered are in some manner treated by the terms of the pardon, i. e., "during the period from January 20, 1969 through August 9, 1974."

   c. Somewhat bearing on this consideration is the comment in 11 Op. A. G. 227, 232-233 (1865) which suggests that it would be proper for the judiciary to determine in each

particular case the adequacy of the repicients' acceptance of the terms of a pardon. Apparently, ambiguity with respect to acceptance is a subject of judicial determination, permitting a court to review the expression of intent in a pardon as the way of gauging the adequacy of the acceptance.

C. Timing of the Pardon

1. May a pardon precede indictment and conviction?

a. Yes.

b. During the debates of the Constitutional Convention, a motion was made to insert the words "after conviction" after the words "reprieves and pardons". Mr. James Wilson of Pennsylvania objected to this proposal on the grounds that "pardon before conviction might be necessary in order to obtain the testimony of accomplices." The motion was then withdrawn. 2 M. Farrand, supra, at 422, 426.

c. 6 Op. A. G. 20, 21 (1853) permits the offer of a pardon before trial and conviction " . . . because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime by process of law."

d. Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1866) states that the pardoning power may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.

e. 8 Op. A. G. 281 (1857) states "He may pardon before trial and conviction. He may pardon at any time either anterior to prosecution or pending the same or subsequent to the executions -- subject in the latter case only to the limits of legal, moral, or physical possibilities.

f. Stetler's Case, supra, states that "the President has constitutional authority to pardon an offense so long as any of its consequences remain."

2. May a pardon include offenses which have neither been discovered, nor listed in the pardon statement at the time of its issuance?

a. Yes.

b. If the pardon statement designates that the pardon will be general or if by its terms the pardon states that it includes "all" offenses which have been committed by the recipient, knowledge of the precise types of crimes involved is irrelevant. A pardon is essentially directed to the nullification of the legal consequences flowing from an offense. Such an effect is not dependent on knowledge or enumeration of the offenses involved. 22 Op. A. G. 36 (1898) Since the Congress cannot limit the President's power to pardon, "the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

D. Challenge and Review of a Pardon

1. Who has standing to challenge the pardon?

a. The President

Matter of DePuy, 7 Fed. Case. No. 3814 (1869) states that the President has the right to arrest a pardon, but only before it has been delivered and accepted by the grantee.

b. Leon Jaworski, Special Prosecutor, has standing to challenge the pardon. Ordinarily, of course, a prosecutor is subject to the President's control, so the basis of his challenge would not be that the incumbent President acted improperly. But here, the understanding between the Department of Justice, the President and the Special Prosecutor contained in Order No. 551-73 (Nov. 2, 1973), 38 Fed. Reg. 30738, provided

"that the President will not exercise his constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given." The President further agreed not to remove him from his duties except for extraordinary improprieties on his part and without the President's first consulting the majority and the minority leaders and chairmen and ranking minority members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action."

Note the decision in Nader v. Bork, ___ F. Supp. ____ (D. D. C. 1973) 42 L. W. 2262, which apparently does not address the standing question, but did hold that Acting Attorney General Bork's firing of Special Prosecutor Cox was illegal.

From newspaper reports of September 9, 1974, Mr. Jaworski had decided not to challenge the pardon. New York Times, p. 1 col. 4 states that "The special prosecutor 'accepts the decision' . . . . 'He thinks it's within the President's power to do it. His feelings is that the President is exercising his lawful power, and he accepts it.'"

The challenge would have to be based on the grounds discussed above -- notably, fraud in the inducement. There is no Federal case law which will indicate that obtaining it by inducement contrary to public policy (e. g., a "deal" for Nixon's resignation) would constitute invalidating fraud. Obviously, however, care should be taken to eliminate any such speculation. It is difficult to argue that the pardon violates the agreement with Jaworski. It does not "effect /his/ discharge" or "limit his independence" or "remove him from his duties." But obviously, questions can be expected on this point.

2. May the President revoke a pardon once it has been accepted?

   a. No.

   b. In re DePuy, 7 Fed. Cas. 507 (Cas. No. 3814, 1869). In reviewing a pardon by the President, the Court stated that "when a pardon is complete there is no power to revoke it, any more than there is power to revoke any other completed act." Once a pardon has been accepted, it becomes a completed act and cannot be revoked.

   c. This situation should be distinguished from the case where the pardon is conditional and the recipient fails to fulfill the terms of the condition. See Lupo v. Zerbst, 92 F. 2d 362 (5th Cir. 1937).

3. Can Congress challenge a pardon?

   a. No.

   b. United States v. Klein, 13 Wall. 128, 143, 148 (1872): "Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law."

4. See discussion of fraud as a basis for challenging a pardon, supra at (A)(5) of the outline discussing 11 Op. A. G. 227 (1865).

5. May courts review a grant of a pardon?

   a. Yes.

   b. Judicial review may not extend to the propriety of the President's exercise of the pardoning power. However, the courts have reviewed such issues as whether the offense pardoned falls within the category of an offense against the United States (Ex Parte Grossman, supra); whether the conditions imposed are valid (i.e., Hoffa v. United States (most recent example); Ex Parte Wells, supra; United States v. Klein, supra); whether the grantor of the pardon has the authority to issue the pardon (The Laura, supra; 22 Op. A.G. 36, supra; 19 Op. A.G. 106, supra); whether the terms of the pardon are ambiguous; and whether at the time of the issuance of the pardon the President was constitutionally able to exercise the pardoning power by reason of the Twenty-fifth Amendment.

6. Can a recipient of an invalid pardon claim estoppel if he is prosecuted for an offense covered by a pardon allegedly granted to him?

   a. Yes, However, there is no case law on this point.

   b. It is reasonable that if in reliance on the grant of a pardon (where the pardon might be phrased in ambiguous terms), the recipient "waives" his Fifth Amendment protection against self-incrimination by making incriminating statements, subsequent prosecution would be estopped. The recipient because of his reliance on the pardon in making those statements would effectively be prevented from obtaining a fair trial by an impartial jury, guaranteed him by the Sixth Amendment.

E. Extent of the Pardoning Power

1. Can the pardoning power affect either state criminal jurisdiction or civil liability to third parties?

   a. No.

   b. (Angle v. Chicago, St. P.M. &O. R. Co., 151 U.S. 1 (1893); Osborn v. United States, 91 U.S. 474 (1875). As to third parties (see also 5 Op. A.G. 532 (1852)), stating "this power of granting pardons does not confer an unlimited power . . . . The power of granting pardons does not extend to the release of the portion of fines, penalties, and forfeitures which, by United States law, are directed to be distributed by the individual. Such would deprive individuals of their interests . . . and they would suffer loss."

   c. Ex Parte Grossman, supra, at page 121 which states "neither in this country nor in England can /a pardon/ interfere with the use of coercive measures to enforce a suitor's rights."

   d. Look to the express terms of Article II, Section 2, cl. 1 which limits the power to offenses against the United States.

2. What are offenses against the United States?

   a. Ex Parte Grossman, supra

      (1) A pardon of the president is meant to operate on offenses against the United States as distinguished from offenses against the States.

      (2) Offenses against the United States include, but are not limited to, crimes and misdemeanors defined and announced by Congressional acts.

      (3) The words of the pardon clause were not meant to exclude therefrom common law offenses in "the nature of contempts against the dignity and authority of United States courts." Criminal, but not civil, contempts are subject to pardon.

      (4) The term offenses is used in the Constitution in a more comprehensive sense than are the terms "crimes" and "criminal prosecution".

b. A state felony (i.e., assault and violation of traffic regulations) is not an offense against the United States. In re Bocchiaro, 49 F. Supp. 37 (W.D.N.Y. 1943)

c. The pardon power is sufficient to remit a fine imposed on a citizen for contempt for neglecting to serve as a juror. 4 Op. A.G. 317 (1844)

d. The pardon power extends to all penalties and forfeitures, as well as other punishments. 8 Op. A.G. 281 (1857)

e. Proceedings instituted by the United States for punishment of criminal contempt committed by a violation of an injunction is an offense against the United States. United States v. Goldman, 277 U.S. 229 (1928).

F. Equal Protection Argument

1. Can others who allegedly have committed the same offenses as co-conspirators or accomplices sustain a claim that they have been denied equal protection when one of their number has been pardoned?

a. No. The act of pardoning is essentially an act of executive grace, specifically directed usually at one particular person. Moreover, there is no equal protection argument possible where there is a rational basis upon which a distinction can be made.

Even if equal protection considerations were raised, it is arguable that considerations, other than those strictly legal, may validly distinguish one co-conspirator from another, i.e., health, position, effect of a trial on the national conscience and morale, as well as the extent of the recipient's participation.

Since this power is ultimately designed to function as a stress point in our Constitutional fabric to which no citizen has a right, failure to accord the grace to all involved in a particular offense does not violate equal protection.

2. May the pardon of Mr. Nixon be considered in the sentencing by judges presiding over trials involving Watergate-related offenses?

a. Yes. The sentencing power of the judge is wholly discretionary and subject to very little review so long as the terms of the sentences are within the statutory limits.

G. Prospective Application of the Pardoning Power.

1. Can a Presidential pardon be prospective in application to offenses against the United States committed after the offer of the pardon?

a. No. 22 Op. A.G. 36, 39 (1898).

H. Effect of Pardon.

1. Can President Nixon refuse to testify in future Watergate trials by claiming his Fifth Amendment right against self-incrimination?

a. No. He has been granted immunity from federal criminal prosecution. He may refuse to testify on matters which would involve State criminal liability since he has not been given immunity with respect to State liability. Jaworski could give him such immunity.

2. If Nixon testifies at Watergate trials and is shown to have lied under oath and if he is then charged with perjury can he raise President Ford's pardon as a bar to liability for perjury? No. A pardon is limited in this case to crimes completed as of the date of Mr. Nixon's resignation, August 9, 1974.

3. Does Nixon face the possibility of criminal tax liability for tax fraud in California? Yes.

4. Would Nixon be subject to civil suits? Yes.

I. Executive Privilege: Congressional Demands.

1. How does Executive Privilege operate in response to Congressional demands?

Congressional demands for material may be grouped into four categories:

a. Some Presidents have acknowledged that a demand for material pursuant to an impeachment inquiry would require production for any and all executive material. See Washington's statement, 5 Annals of Congress 710-12 (1796).

b. Particularized Congressional demands for materials pursuant to a legislative mission may be rejected on the basis of Executive Privilege where it is deemed by the President that the production of such material would be detrimental to the functioning of the Executive Branch.

c. Particularized Congressional demands for sensitive materials have at times been met with certain restrictions on access, e.g., examination by only the Chairman and ranking Republicans on a committee.

d. Non-particularized claims for general access with no compelling indication of need are routinely rejected.

2. Does a former President have the authority to invoke Executive Privilege for materials or conversations arising during his Presidency?

Yes. The rationale behind the privilege and the interest it serves compels an affirmative response. The invocation of Executive Privilege is not so much to protect the content of the particular discussions demanded as it is to protect the expectation of confidentiality which enables future discussions to be free and frank. Principle recognized as early as 1846. Richardson, Messages and Papers of the Presidents, Vol. IV, 433-34.

Former President Truman in 1953, having returned to public life, asserted privilege in response to House committee subpoena concerning matters which transpired while he was in office. The House committee accepted the letter and did not attempt to enforce the subpoena.

3. Does the Congress itself protect a sphere of confidentiality in its internal deliberations?

Yes. At least four precedents can be given in this regard.

a. In 1962, certain staff members of the Senate Rackets Committee were allowed to testify in a criminal proceeding against Jimmy Hoffa but they were forbidden from making available

any documents in the hands of the Senate and from testifying about information that they gained while employed in the Senate. 108 Cong. Rec. 3626 (1962). In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of government which it wishes to protect." Id. at 3627.

b. In 1970, the House Committee on Armed Services refused to comply with a request from counsel for Lieutenant William Calley for the production of testimony given to the committee by Calley in closed session. The chairman of the committee, Rep. Hebert, indicated that " . . . only Congress can direct the disclosure of legislative records." See 116 Cong. Rec. 37652 (1970).

c. In 1972, the United States Senate by resolution refused a judicial subpoena for documentary evidence in the criminal case of United States v. Brewster, then pending in the D. C. District Court. 118 Cong. Rec. 766 (1972).

d. In 1974, the Senate passed a resolution allowing a Senate staff member to testify in a criminal proceeding but limited the scope of the testimony by providing that " . . . he shall respectfully decline to provide information concerning any and all other matters that may be based on knowledge acquired by him in his official capacity . . ." S. Res. 338, passed June 12, 1974.

II. QUESTIONS OF FACT

A. Introductory Notes: This hearing presents a real opportunity for the President. At the same time, however the open-ended nature of the factual inquiry must be limited to ensure a responsible search for the truth regarding the pardon. Although the President need not assume a defensive posture, potential for political mischief must be minimized.

1. Ground Rules. The ground rules which have been agreed upon with the subcommittee may be summarized as follows:

a. Opening Statement. No time limitations but statement should be responsive to each of the formal inquiries raised by H. Res. 1367 and H. Res. 1370.

b. Scope of Inquiry. The understanding has been reached that the inquiry shall be limited by the scope of the two formal resolutions of inquiry.

c. Time Limitations. Each of the nine members sitting with the subcommittee shall have the opportunity to question the President for two periods of five minutes each. Thus, there will be a total of 90 minutes of questioning.

d. Television. Consent has been given to live television coverage of the hearing.

2. Thoughts on ground rules. In my opinion, further consideration should be given to the ground rules in the following respects:

a. Time Limits. If possible, the agreement reached on the period for questioning should be reopened and substantially reduced. Perhaps, a total of 1/2 hour to be controlled by and divided between the chairman and ranking Republican. Alternatively, only 5 minutes per member might be allowed for a total of 45 minutes. Ninety minutes is simply too long.

b. Order of questioning. The order of questioning should alternate from Democrat to Republican and form senior to junior. The Democrats should not be allowed to exhaust their time prior to the allotment of time to the Republicans.

c. Nixon-GSA Agreement. It should be clearly understood that the tapes agreement is beyond the scope of this inquiry, except to the extent that it might impact upon the grant of the pardon.

d. Prior Executive's Discussions and Materials which are presumptively privileged. It should be understood that President Ford will not infringe upon any claim of Executive Privilege which former President Nixon may want to assert with regard to materials or conversations arising prior to

August 9th. This position can be substantially strengthened by a letter to Jack Miller, counsel to the former President, inquiring as to whether he intends to assert a privilege on behalf of the former President. Assuming Miller will not consent to any waiver, documentation of this position will then be available.

e. Presumptively Privileged Discussions and Materials Arising after August 9th. Two ground rules should be established in this regard:

(1) President Ford will not make available members of the White House staff for further examination on the subject of the pardon; and

(2) Formal requests or demands for documents of the Ford Presidency will not be complied with unless of a public nature -- this is not to say, however, that such materials may not be made available pursuant to informal requests by the committee. The point in this latter regard is that release in this context is a Presidential prerogative.

f. Role of the Chairman. Chairman Hungate should assume the following responsibilities:

(1) Channel all appropriate informal requests for materials to the White House;

(2) Strictly enforce time limitations and ground rules on relevancy and privilege; and

(3) Rule clearly repetitious questions out of order.

3. Need For Certainty. If equitable ground rules for this hearing cannot be firmly established prior to Wednesday, the President might give thought to postponing his appearance until an agreement reflecting a good faith effort on both sides can be reached.

B. Individuals Involved In Grant of Pardon.

1. Who were the individuals representing Mr. Nixon during the course of any pardon discussions or negotiations?

   a. What was the scope of authority of Mr. Miller, counsel of record so to speak, in the pardon discussions?

   b. Was Fred Buzhardt involved in any way?

   c. Was Alexander Haig involved in any way?

   d. When did Messrs. Buzhardt and Haig leave the White House payroll?

   e. Was any representative of H. R. Haldeman privy to the discussions?

   f. Did Mr. St. Clair represent Mr. Nixon in any way relative to the pardon?

2. Who were the individuals representing your interests during the course of any pardon discussions or negotiations?

   a. Did anyone other than Messrs. Marsh, Hartmann, Buchen and Becker, represent you in any way during these discussions?

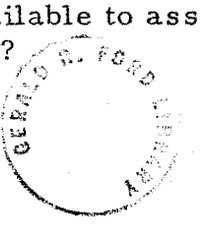
   b. How did you happen to enlist the assistance of Mr. Becker?

   c. Were you aware of the fact that Mr. Becker is currently under investigation for income tax evasion by the Department of Justice?

   d. Was Mr. Becker paid for his efforts?

   e. Does Mr. Becker currently provide you any assistance, legal or otherwise?

   f. With the nation's finest and most highly respected lawyers and the Department of Justice presumably available to assist you in this regard, why were they not utilized?



g. Do you have any personal logs or minutes of your meetings with individuals representing your interests in this regard?

h. May the subcommittee review these materials?

i. Would you object to our receiving testimony from those who assisted you on the pardon?

C. Considerations In Granting Pardon.

1. Did you have any hard evidence of the frailty of Mr. Nixon's physical or mental health?

2. With the benefit of hindsight, what is your view of the pardon today in terms of healing the nation's wounds?

3. What factors under consideration by you with respect to the pardon of Mr. Nixon would not impact equally on other Watergate defendants?

4. Since in ordinary legal proceedings the leading member of a criminal group is most actively prosecuted, what prompted you to turn this notion on its head?

5. Prior to granting the pardon, did you consider the impact it could have on the independence of the Special Prosecutor and any pending criminal matters?

6. Did you consider discussing these matters with the Congressional group referred to in Mr. Jaworski's charter?

7. Do you consider Mr. Nixon's statement upon acceptance of the pardon to constitute an appropriate "statement of contrition"?

8. Did you make any notes or review any staff recommendations as you formulated your views on the necessity for a pardon?

9. May the subcommittee review these materials?

D. Timing and Secrecy of Pardon.

1. In terms of setting "Watergate" to rest, might it not have been preferable to take your case to the people prior to the grant of the pardon?

2. Didn't your precipitous action reduce the possibility of ever achieving a complete record of "Watergate" which presumably is in the public interest?

3. Why wasn't a complete record of the former President's involvement in the cover-up made public prior to the grant of the pardon as was done prior to the acceptance of a guilty plea on behalf of former Vice President Agnew?

4. You have indicated that your Administration would be one of "openness" -- how does the handling of the pardon square with that notion?

5. Did you feel any pressure to grant the pardon from any former Nixon aides?

6. Did you feel any pressure from any Congressional sources to grant the pardon?

7. In terms of public reaction, did you consider that your actions could be interpreted as a quid pro quo for assuming the Presidency?

E. Relationship of Pardon to Tapes Agreement.

1. Do you have any reason to believe that any conversations which you may have had with the former President during your service in the House or as Vice President were secretly tape recorded?

2. Did you meet frequently with him in the Oval Office, the EOB or the Cabinet Room where secret recording devices were installed?

3. Were many of these conversations of a confidential nature?

4. Did many of these conversations involve only yourself and the former President?

5. Were any White House aides, other than H. R. Haldeman or John Ehrlichman frequently in attendance at these meetings?

6. After the existence of the tape recording devices became known, did you ever discuss with anyone their possible content as it might reflect on you?

7. Has anyone ever expressed to you their fears regarding the content of the tapes as they might affect you or others close to you?

8. Is anyone other than the former President and Mr. Haldeman aware of the content of the tapes as they may reflect on you?

9. Did Mr. Haldeman, to your knowledge, ever attempt to exercise any leverage over the former President or yourself with respect to the tapes in order to secure a pardon?

10. Can you confirm or deny published reports to the effect that, during the course of hearings on your nomination to be Vice President, Mr. Buzhardt reviewed tapes covering certain days when you had met with the former President?

11. Did any of your representatives participate in the development of the Nixon-GSA tapes agreement with representatives of GSA or Mr. Nixon?

12. Did you give these individuals any directives?

13. Paragraph 10 of the tapes agreement provides you with access to the tapes -- how did this provision find its way into the agreement?

14. The same paragraph provides Mr. Nixon with access -- however, no one else can access these materials. Does this strike you as salutary?

15. What arrangements are being made to ensure the security of the tapes?

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