

Hearing before the Senate Judiciary Committee

“When the President Does It, that Means It’s not Illegal”: The Supreme Court’s Unprecedented Immunity Decision

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Distinguished members of the Committee, I am honored to be in the witness chair today. I apologize that my voice is a little rough.

I am a professional political historian. So, please indulge me a story. The codeword the White House staff used in its investigation of Jewish Americans was “ethnics.” As one White House staffer noted cynically, “Fred, obviously the interpretation of “ethnic” should be narrow in this case!”¹ The President of the United States had launched the investigation in a meeting with his Chief of Staff. “The Government is Full of Jews,” he said. “Second, most Jews are disloyal.” The President then used his constitutional authority over the executive branch to order the White House to “look at any sensitive areas where Jews are involved [in the US government],” adding “in those areas we have got to get the man in charge who is not Jewish to control the Jewish...” In short, he told his Chief of Staff, he wanted “the Jews checked”.² The President, the most powerful individual in the world, was gripped both by anti-Semitism and conspiracy thinking. He told his closest aides that “Jews are born spies.” He wanted this investigation to find “every

¹ Dan Kingsley to Fred Malek, July 31, 1971, Fred Malek SMOF, see Nixon Library Release January 11, 2010. <https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/jan10/077.pdf> [Retrieved September 23, 2024].

² Nixon Recordings, Oval office Recording, 536-16, July 3, 1971, 10:41-11:53, conversation with Haldeman. To listen to the recordings listed in the footnotes, see <https://www.nixonlibrary.gov/white-house-tapes> [Retrieved September 23, 2024].

Jewish cell,” observing to his chief of staff and press secretary that there was a “strange malignancy now that seems to creep among them.”³ These are not my words, these are the words of a modern American president in the nuclear age and they suggest, I would argue, the corrosive and dangerous capacity of unchecked presidential power.

The year was 1971 and the President was Richard Nixon. The infamous Watergate break-in was still a year away. As we assess the effects of the Supreme Court’s decision to remove additional guardrails from the presidency, I suggest we consider some events of the year 1971 and a few other well-documented episodes of presidential abuses of power. They suggest an historical playbook for abusing power by the Executive Branch and might also suggest ways of anticipating and restraining future abuses in the absence of the deterrent of criminal prosecution.

By July 1971, the Nixon White House, which was accustomed to over-the-top requests from the Oval Office, was equally accustomed to slow walk some of these requests.⁴ But the president was insistent in this case. So, the staff concentrated on identifying every Jewish American in the Bureau of Labor Statistics, the unit which had drawn Nixon’s ire over the way in which it had announced the monthly unemployment rate for June 1971. The summer of 1971 was also the summer of the Pentagon Papers’ leak, which motivated another noteworthy, and criminal, abuse of power. In response to the leak, the President ordered the hiring of individuals to create a special investigative unit within the White House to proceed against leakers because of the unwillingness of the FBI and the Pentagon to move as swiftly as the president wished, and to declassify national security documents with a view to discrediting his enemies.⁵ Ultimately, Nixon would acquiesce in a domestic covert action approved by his chief domestic advisor, John Ehrlichman, against Daniel Ellsberg’s psychiatrist. Finally, that summer Nixon began his campaign to use the IRS to audit and discredit his political enemies. Although the targets were not solely Jewish Americans, Nixon emphasized some of them as a special category for investigation by the IRS.

³ Nixon Recordings, Oval Office recordings, 536-16, July 3, 1971 and Oval Office Recording 537-004, July 5, 1971, conversation with Haldeman and Ziegler.

⁴ H. R. Haldeman, *The Haldeman Diaries*, (1994), p. 63.

⁵ See Watergate Exhibit Evidence, “Forming the Plumbers,” Nixon Library, <https://www.nixonlibrary.gov/watergate-exhibit-evidence> [retrieved September 23, 2024]

From 2007 until 2011, I served as the first federal director of the Richard Nixon Presidential Library and Museum. In 1974 the Congress had passed the Presidential Recordings and Materials Preservation Act. Among its provisions is a requirement given to the Archivist of the United States that the review and disclosure of presidential materials reflect “the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term “Watergate”.”⁶ The bill which had been introduced in the Senate by Gaylord Nelson of Wisconsin and had four Republican co-sponsors, including Senator Bob Dole of Kansas, passed the Senate by voice vote.⁷ Four decades later, with the creation of a federal Nixon Library by the National Archives and the transfer of Nixon presidential records from College Park, Maryland, to Yorba Linda, California, that work continued under my delegated authority.

I am here today to provide a few brief historical case studies that could possibly illustrate future unintended consequences of the Supreme Court’s decision in *Trump v the United States*. I am not a lawyer and though I have studied the political origins of our Nation, I am not here to provide you with constitutional interpretation. Instead, as a student of the competition for and use of power, I wish to share well-documented episodes in presidential history that should serve as a warning that an energetic executive isn’t always in the public’s interest; moreover that when the use of president power is untethered to the motives for which it is being used, there arises the opportunity for corruption and the appearance, at least, of criminal behavior.

My examples come from the period that led your predecessors in the 1970s to create additional guardrails not so much to rebalance the tripartite equilibrium but to make it harder for the Article 2 institution to abuse power. The current Supreme Court quotes Alexander Hamilton’s *Federalist 70* in support of an energetic executive. But the very same Hamilton understood concerns that this energetic executive might turn out to be an unelected King. To calm those fears among fellow New Yorkers, in *Federalist 69* Hamilton made clear that guardrails, including a criminal deterrent, would exist on presidential power in America: “The President of the United States

⁶ PRMPA, NARA <https://www.archives.gov/about/laws/nara.html#2111-note> [retrieved September 23, 2024]

⁷ <https://www.govtrack.us/congress/bills/93/s4016>

would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution.”⁸

I will be referring to presidents of both parties, but the greatest detail I am offering today is from the Nixon era. This doesn't reflect a belief that Nixon was unique as an abuser of presidential power, though the intensity of his real and attempted misuse of power arguably puts him in a special category. His administration is, by far, the most thoroughly documented of any presidency. Not only did the President install a secret taping system; but some of his aides taped each other and his chief of staff and his chief domestic advisor kept meticulous notes of presidential requests. What makes the Nixon presidency an important source for understanding how presidents can abuse of power is our ability to discern Nixon's motives. One can hear him explain why he is using his constitutional authorities. One can see when and why he crosses the line from administration to maladministration and, even, arguably criminal behavior. The Kennedy and Johnson years, for example, despite their presidential taping systems, aren't as rich regarding the motives of the uses of power.

I submit that the principal takeaway from these cases is that motives do matter in the application of Constitutional authority and that Presidents ought to be held accountable, if appropriate, by the Courts as well as the Congress for the motives that animate their decisions. Please keep in mind that these examples come from a time of silence from the Supreme Court on a president's civil or criminal immunities. Lyndon B. Johnson and Richard Nixon couldn't be sure of the line a Court would draw. Imagine a presidency where a president understood that this line hardly exists at all when he or she is exercising Constitutional powers.

The four cases come from two different presidencies, one Republican and one Democratic:

⁸ Federalist Number 69: https://avalon.law.yale.edu/18th_century/fed69.asp [Retrieved September 23, 2024].

The Four Cases:

A) Bureau of Labor Statistics, July 1971:

On July 2, 1971, the Department of Labor issued its monthly employment statistics. The unemployment went down from 6.2 to 5.6. An official of the Bureau of Labor Statistics, the unit that calculated the figure, told journalists that the decline was a “statistical fluke.” When President Richard Nixon learned that a member of his administration had qualified this good economic news, he was furious. He had an idea who the unnamed official was, the assistant commission for manpower and employment statistics, a longtime civil servant named Harold Goldstein. “Is it Goldstein again?” he asked his political counsellor Charles Colson around 4 p.m. in the afternoon. In February, Goldstein had drawn the attention of the White House for how he handled January’s unemployment figures.⁹ Nixon had felt that Goldstein, whom he considered left-wing, wasn’t helpful to the administration. With his patience for the man now completely gone, told Colson that if it turned out to be Goldstein, “he’s got to be fired.”¹⁰

Nixon expected an answer that very afternoon. As the minutes ticked by, with no word from Colson, Nixon became enraged. Three hours having passed, he called Colson twice within the space of two minutes, each time insisting, even without proof, that Goldstein had to be guilty and instructed Colson to make sure that Goldstein was polygraphed the next day. “Give Goldstein, the goddamn K[four letter slur against the Jewish People],” yelled the President, “a polygraph!”¹¹

By the next day, July 3, the President’s certainty about Goldstein’s guilt had hardened into a certainty that he faced a determined adversary greater than one civil servant. He told Colson that he had concluded that the entire Bureau was engaged in a complicated anti-Nixon conspiracy.

⁹ On February 11, Fred Malek had written to Haldeman, “I am convinced that there were no partisan motivations in his [Goldstein’s] mis-handling of the recent press briefing.” Malek to Haldeman, “Subject: Harold Goldstein-Bureau of Labor Statistics,” February 11, 1971, Nixon Library January 11, 2010 release, <https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/jan10/077.pdf>

¹⁰ Nixon Recordings, White House Telephone, 6-93, July 2, 1971, NARA.

¹¹ Nixon Recordings, WHT, 6-111; 6-113, July 2, 1971, NARA.

They had exaggerated the unemployment rate, perhaps by mistake, when they had reported it out at 6.2% in June and were now using the most damaging way to revise that rate. They had opted to release the improvement in statistics all at once, rather than incrementally, to cast doubt on the administration's economic success.¹²

What has happened is that the most powerful man in the world had become overcome with a conspiracy theory, founded in Nixon's deep mistreatment of Jewish Americans. Nixon sees enemies beyond the BLS. It is on the morning of that Nixon rants to his chief of staff, H. R. Bob Haldeman, about his fantasies of Jewish disloyalty. This is the moment he calls for a census of every Jewish American in a "sensitive" position in the US government. This is when he orders that each and every one in the US government be checked.

But Nixon can't do this alone. No president could mount an attack on a domestic religious group without accomplices. And Haldeman supported Nixon's effort only so far. In his Oval Office conversations with Nixon, Haldeman betrays his own anti-Semitism. The two men shared, for example, a belief that the Holocaust had been exaggerated. But Haldeman had no intention, it seems, of launching a disruptive government-wide investigation of Jews. Instead he focused on the BLS, the origins of Nixon's rage. The available documentation suggests that Nixon's Secretary of Labor, James D Hodgson wouldn't proceed with the polygraph of Goldstein. So, Haldeman turns to his own staff to get control of the BLS, which for Nixon primarily meant removing the Jews. "Malek isn't Jewish," Nixon asked when Frederick V. Malek's name is floated for the job. Malek had looked into Goldstein in February and cleared him of partisan bias.. Reassured that Malek wasn't Jewish, Nixon approves putting him in charge of taking care of the BLS problem.

In July 1971 Malek and his assistant Dan Kingsbury produced analyzes of the "demographics" of the BLS. They listed all of the members by political registration, if known, and then noted whether they were "ethnic." "Ethnic" was codeword for Jewish. On July 27, Malek and Kingsbury reported that they could only obtain "political affiliation checks" on 35 of the 50 people on the BLS organizational chart. Out of these 35, 25 were registered Democrats and "13

¹² Nixon Recordings, White House Telephone, 6-129, July 3, 1971, NARA

of the 35 fit the other demographic category that was discussed.”¹³ This information wasn’t enough for Nixon. Malek and Kingsbury were asked to redo their analysis and find out how many of the 52 on the organizational chart were Jewish. On July 30, 1971, Malek and Kingsbury wrote to Haldeman that “[I]n our original memorandum concerning the Bureau of Labor Statistics, we had identified the political registration of 35 individuals. Of the 35 names, we believe 13 were ethnics. In our figures, we did not include the 17 other people where politics were not determined; hence, their ethnic background also was not included.” This time they assessed that in total there were 19 “ethnics” [Jewish Americans] in the BLS. They had no idea how to determine a civil servant’s religion, so they guessed based on family names.¹⁴

In the end, the Commissioner of the BLS, Geoffrey H. Moore, who though not Jewish was considered by Nixon incompetent at handling the Jews who worked for him, was fired.¹⁵ Civil Service protections saved the jobs of the Jewish economists under him but Harold Goldstein lost some of his responsibilities and had a supervisor placed about him. Another economist, Peter Henle, was transferred out of the Bureau. Malek had also suggested transferring a third economist, Leon Greenberg, out of BLS but what ultimately happened to him this historian doesn’t know.¹⁶ In 2005 Goldstein and Henle told *The Forward* that they blamed Nixon but not Malek for their demotions.¹⁷ Nixon’s order regarding “checks” on Jewish Americans in other parts of the Administration appears not to have been carried out. Haldeman, perhaps, decided that doing it solely for the BLS would be enough to satisfy Nixon. Since there is no evidence that he brought up the idea of other Jewish censuses, it likely did.

¹³ Malek to Haldeman, July 27, 1971 in Nixon Library January 11, 2010 release

<https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/jan10/077.pdf>

¹⁴ Kingsley through Malek to Haldeman, July 30, 1971, in Nixon Library January 2010 release:

<https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/jan10/077.pdf> ; regarding how Malek undertook his “analysis” see his Nixon Library Video Oral History of September 17, 2007.

¹⁵ Technically he was asked to submit his resignation in November 1972. Remarkably, he stayed in his job for over a year despite the presidential pressure for change.

<https://www.bls.gov/bls/history/commissioners/moore.htm>

¹⁶ Timothy Noah, “Nixon’s Jew Count: The Whole Story!” *Slate*, September 26, 2007. The journalist Timothy Noah has been following the BLS story for decades. <https://slate.com/news-and-politics/2007/09/nixon-s-jew-count-the-whole-story.html>

¹⁷ “Steven I. Weiss, “Former Nixon Aide ‘Pardoned’ by two members of ‘Jewish Cabal,’” July 22, 2005, <https://forward.com/news/3846/former-nixon-aide-e2-80-98pardoned-e2-80-99-by-2-members-of-e2/>

Sadly, there were few checks on President Nixon's ability to act on his anti-Semitism in the case of the Department of Labor. Fortunately, there were civil service protections to limit the damage. But the leadership of the Labor Department did not put up a fight for its people and neither Congress nor the Media learned of this scandal until Nixon had left office.

The "Tax List" and the IRS, 1971-72

In the same conspiracy summer of 1971, Nixon ordered a list be made of major Democratic supporters and financial donors and that they be audited without cause by the Internal Revenue Service. On June 21, the White House had nominated a new Commissioner of the IRS, Johnnie Walters, a Republican from South Carolina, in the hope that he would be more responsive to White House requests to politicize the agency than his predecessor, Randolph W. Thrower. Two days later, Nixon instructed Haldeman, "Now we have our man at IRS...Pull Clark Clifford + top supporters of Doves—full list...Full field audit—let's see what we can make of it. Colson make a list of the ones we want."¹⁸ Haldeman opted not to slow walk this request. That very day, June 23, he conveyed the identical order to his action officer, Gordon Strachan, that "when our new IRS [Commissioner] is confirmed [initiate] full field audit of Clark Clifford." Strachan was also to instruct Colson to "get list of top fin [antial] sup[porters]'s & contribu[tors]s of doves McG[overn]. EMK [Ted Kennedy] [Edmund] Muskie"—pull audits."¹⁹

By September, a list of 20 names had been prepared for submission to the IRS. Since Walters had been confirmed as commissioner in August, Nixon wanted the IRS to move. "We have the power," he explained to John Ehrlichman, his chief domestic advisor, in early September "but are we using it to investigate contributors to Hubert Humphrey, contributors to [Edmund] Muskie, the Jews.... You see we have a new man [Walters] over there. I know the other guy didn't do

¹⁸ Michael Koncewicz, *They Said No to Nixon: Republicans Who Stood Up to the President's Abuses of Power*, California, 2018] p. 45, citing Meeting Notes Written by H. R. Haldeman, June 23, 1971, Folder H Notes, April-June 1971 [May 20, 1971 to June 30, 1971], Part II, White House Special Files H. R. Haldeman Box 43, Nixon Library.

¹⁹ Gordon Strachan, Daily Note for June 23, 1971, Nixon Library Release January 2010, <https://www.nixonlibrary.gov/january-11-2010-materials-release>

anything.”²⁰ When Nixon learned a week later that the Reverend Billy Graham had been audited, Nixon exhorted his chief of staff to start the IRS investigations: “Bob, please get me the names of the Jews, you know, the big Jewish contributors of the Democrats. Could we please investigate some of the c****s*ckers?”²¹ When Haldeman informed him the next day, September 14, that the first tax list had been delivered to the IRS of political enemies, Nixon noted his pleasure while reminding Haldeman of his favorite targets: “What about the rich Jews, Bob.? “You see,” he explained to Haldeman, “[the] IRS is full of Jews, Bob...that’s what I think. That’s the reason they’re after the Reverend Billy] Graham, is the rich Jews.”²²

Despite the President’s exhortations, the hoped for misuse of the IRS didn’t occur in 1971 because the new IRS Commission Johnnie Walters surprised the White House by being reluctant to do its bidding. “Walters appears oversensitive in his concern that IRS might be labeled ‘political,’ wrote staffer Gordon Strachan to Haldeman in December 1971, “if he moves in sensitive areas (i.e. audits, tax exceptions).” Haldeman’s team attempted to remind Walters that “discrete political actions and investigations on behalf of the Administration are a firm requirement and responsibility on his part.”²³ According to historian Michael Koncewicz by early 1972, the White House gave up on Walters temporarily.²⁴

Nixon’s attention returned to the IRS again in the summer of 1972, just after the bungled surreptitious entry in the Watergate Office Complex. An IRS investigation into the recluse billionaire Howard Hughes had turned up evidence that he had paid consulting fees to Lawrence “Larry” O’Brien, who by the summer of 1972 was the Chair of the Democratic National Committee.²⁵ The White House’s confidential ally on the IRS staff, Roger Barth, shared this politically sensitive information with Ehrlichman. Meanwhile the President received information

²⁰ Michael Koncewicz, *They Said No to Nixon*, p. 47, quoting Nixon Recordings, Executive Office Building, 274-44, September 8, 1971, Nixon Library.

²¹ Michael Koncewicz, p.47, quoting from Nixon Recordings, Oval Office, 571-10, September 13, 1971, Nixon Library.

²² Michael Koncewicz, *They Said No to Nixon*, p. 47, quoting from Nixon Recordings, Oval Office, 572-8, September 14, 1971, Nixon Library.

²³ Michael Koncewicz, *They Said No to Nixon*, p. 47, quoting from Gordon Strachan, Memorandum to H. R. Haldeman, December 1, 1971, Folder Internal Revenue Service [Folder 1 of 2], White House Special Files John W. Dean III, Box 40, Nixon Library.

²⁴ *Ibid.*, p. 49.

²⁵ *Ibid.*, p.50; p. 53

from former Democratic Governor of Texas John Connally (and former Nixon Treasury Secretary) that O'Brien had unpaid taxes.²⁶

On August 9, Nixon dictated an action memorandum to John Ehrlichman that it was “the highest priority” to “ride IRS on this matter.” Finding something on O'Brien now “will keep all of our Democratic opponents a little loose.” If the information were to be surfaced later, Nixon argued, the campaign might be charged with “a last-minute smear.” Nixon made clear to Ehrlichman that the goal in the O'Brien matter wasn't to faithfully execute the tax laws: “we are not trying to develop a legal case that is airtight. The very fact that O'Brien and associates received any money at all from Hughes, when it is firmly established, should be put out.” Nixon instructed Ehrlichman to have the IRS start an audit of O'Brien the next day. Meanwhile, Nixon wanted Walters at IRS to call O'Brien that very day to invite him in for an interview “so that the stage could be set for a subpoena in the event that O'Brien does not show up voluntarily.” “[D]on't let him delay,” Nixon added.²⁷

The IRS refused the White House request to seek a subpoena for O'Brien and ultimately none was needed. After an initial hesitation, O'Brien agreed to be interviewed. And it turned out the investigation was “a dry hole.” O'Brien had paid his taxes on the Hughes money. Disappointed that nothing useful had come of this investigation of O'Brien, Nixon pressed again for a general audit of his political enemies. In September 1972, White House Counsel John Dean presented Commissioner Walters with a list of hundreds of names to audit. Walters, who didn't want to proceed with these audits despite the presidential request, sought advice from his new boss, Secretary of Treasury George P. Shultz. Shultz instructed him to “do nothing” and added that if John Dean protested to explain that the opposition to these audits from coming from the Secretary himself. Nixon became furious with Shultz but refused to fire him, given the latter's skills as a policymaker. Walters, however, resigned. Nixon's hopes that in a second term, the IRS would become more “responsive,” however, failed because his third IRS Commissioner, Don

²⁶ Nixon Recordings, Camp David Hard Wire, Tape 200-6, August 9, 1972, Nixon Library

²⁷ Ibid.

Alexander, proved no more willing that his first or second Commissioner to politicize the agency. Before Nixon could remove his third IRS Commissioner, Watergate engulfed his presidency.²⁸

It would be hard to overestimate the damage that Richard Nixon could have done to the US taxation system if he had had a complicit Secretary of the Treasury and an unethical Commissioner of the IRS. The only protection came from the Republican officials who said no to a president of their own party. Neither the Congress nor the Media at the time knew about this internal struggle over auditing the Presidents' "enemies" until the Senate Watergate investigation began in 1973.

3) Lyndon Johnson and the Democratic Convention, August 1964

The Church committee found instances where the FBI, following the request of a President, harassed American citizens. According to the Church Committee, President Johnson, in 1964, requested "name checks" in FBI files "of his critics and of members of the staff of the Republican nominee Senator Barry Goldwater." Without providing any detail the Committee also mentioned that Johnson "also requested purely political intelligence on his critics in the Senate."²⁹

The most documented example of the use of the FBI by the Johnson White House for political purposes involved the Bureau's coverage of LBJ's own nominating convention. There the FBI used "electronic surveillance" and a "special squad." According to Taylor Branch, the special squad included "twenty-seven agents, a radio operator, two stenographers and assorted informants."³⁰ Reporting directly to White House aides Walter Jenkins and Bill Moyers, the FBI was to prevent embarrassment to the President. According to the Church Committee, the electronic surveillance was in the rented headquarters of the Mississippi Freedom Democratic

²⁸ Koncewicz, pp. 55-67. See also Nixon Library Video Oral Histories with Secretary George Shultz (May 10, 2007) and Commissioner Johnnie Walters (October 18, 2008) <https://www.nixonlibrary.gov/oral-histories>

²⁹ Church Committee Report, Volume 2, p. 10.

³⁰ Taylor Branch, *Pillar of Fire: America in the King Years, 1963-1965* (1998), p. 461

Party [MFDP] led by Fannie Lou Hamer and in Rev. Martin Luther King, Jr. 's hotel room.³¹ The MFDP was leading a credentials fight against the regular all-white Mississippi Democratic Party, arguing that given the effective lack of voting rights for Black Mississippians, the regular party was a sham. As public pressure built upon President Johnson to recognize the MFDP, especially after King. sent him a telegram urging his to do so, Johnson convinced himself it was “Bobby’s trap.” The President believed that his political nemesis, Attorney General Robert F. Kennedy, wanted to make the controversial issue a presidential matter for LBJ, forcing the Party’s Democratic nominee to choose between the aspirations of Black Mississippians and the possibility of a walk-out from the convention, as had happened in 1948, of the other delegations from the South.³² Indeed, LBJ told his chief aide Walter Jenkins that the entire MFDP challenge had been “born in the Justice Department.”³³ Out of this sense of a Kennedy conspiracy to, at the very least, embarrass him, LBJ ordered the FBI to undertake surveillance of the Attorney General.³⁴

When Democrats offered a mild compromise of seating two at-large voting delegates and forming commission to ensure that there would be no discrimination at the 1968 convention, the MFDP rejected the compromise but also gave up its challenge to the credentialing of the all-white Mississippi Democratic Party.³⁵ The FBI supervisor of the “Special Squad” reported to J. Edgar Hoover that the FBI agents, some of whom were working undercover as reporters for NBC News, had “made major changes in controlling admissions into the Convention Hall and thereby preclude infiltration of the illegal Mississippi Freedom Democratic Party [MFDP] delegates in large numbers into the space reserved for the regular Mississippi delegates.”³⁶

A decade later, the Church Committee concluded that “although it may have been implemented to prevent violence at the Convention site, the Bureau’s coverage in Atlantic City—which

³¹ Church Committee Report, Volume 2, p. 117.

³² Taylor Branch, *Pillar of Fire: America in the King Years* (1998), p. 461- 463.

³³ *Ibid.*, p. 468.

³⁴ *Ibid.*, p. 464.

³⁵ *Ibid.*, p. 469.

³⁶ *Ibid.*, p.475; the reference to the FBI getting NBC News credentials if from page 461.

included two electronic surveillances—undeniably provided useful political intelligence to the President as well.”³⁷ It also violated the civil rights of American citizens.

4) The Plumbers and the Fielding Break-In, September 3, 1971

By mid-1966, the FBI under the leadership of J. Edgar Hoover was limiting its willingness to engage in domestic covert operations. According to the Church Committee, after “hundreds of FBI “black bag job” operations had been approved over many years, Director Hoover decided to eliminate warrantless surreptitious entries for purposes other than microphone installation.”³⁸ When Richard Nixon became president, he could no longer depend on Hoover to provide him with the support that the FBI director had provided previous presidents. It was the lack of sufficient institutional support from the FBI and from the Pentagon for domestic intelligence activities that led Nixon in the wake of Daniel Ellsberg’s leak of the Pentagon Papers to the *New York Times* to authorize the creation of a Special Investigations Unit.³⁹ Run out of the White House, this operational unit, nicknamed by its members and later known to the World as “The Plumbers,” employed former intelligence and law enforcement officers to engage in domestic espionage, disinformation and, notoriously, a black bag job in Beverley Hills, that turned out not to be surreptitious at all.

The Plumbers Case is well known. For the purposes of this statement, I only wish to highlight two points:

First, there were no guardrails placed on this presidentially authorized unit because the president had given it the cloak of national security. The leadership of the Unit believed they were engaged in highly sensitive activities designed to supplement the national security work of the regular agencies.⁴⁰ Some of the operatives—especially E. Howard Hunt who participated in a plot to

³⁷ Church Committee Report, Volume 2, p. 119.

³⁸ Church Committee Report, Volume 2, p. 110.

³⁹ See Watergate Exhibit Evidence, “Forming the Plumbers,” Nixon Library, <https://www.nixonlibrary.gov/watergate-exhibit-evidence>

⁴⁰ Egil Bud Krogh, *Integrity* (2007), p.43-51.

forge official cables from the JFK era to embarrass the Kennedy family-- knew they were engaged in political matters.⁴¹

When the unit requested assistance from a regular US government agency, it did so with the imprimatur of the White House. The CIA was told by the White House that the President expected it to assist the Plumbers.⁴² John Ehrlichman called the Deputy Director of Central Intelligence General Robert Cushman in early July to tell him that E. Howard Hunt “has been asked by the President to do some special consultant work on security problems. He may be contacting you sometime in the future for some assistance. I wanted you to know that he was in fact doing some things for the President... You should consider he has pretty much *carte blanche*”⁴³ Hunt made his first request of Cushman on July 22 for assistance—“flash alias documentation and some degree of physical disguise”-- with a White House-directed domestic clandestine activity. The CIA was told that Hunt’s mission was to “visit and elicit information from an individual whose ideology we aren’t sure of.”⁴⁴ It appears the CIA was not told—or may not have asked-- that the individual was a US citizen named Clifford De Motte and that the investigation had nothing to do with national security. It involved seeking more information on the 1969 Chappaquiddick incident and the actions of Senator Edward Kennedy.

⁴¹ E, Howard Hunt, *American Spy: My Secret History in the CIA, Watergate and Beyond*, (2007), p.192-193; The Senate Watergate Report (Abridged Edition, Carroll & Graf Publishers, 1974), p.204-205.

⁴² Senate Watergate Report, *Ibid.*, p. 70. The Senate received the transcript of Ehrlichman’s July 7 call to Cushman. For additional evidence of CIA support for E. Howard Hunt’s work as a Plumber, see “Memorandum for: Executive Secretary, CIA Management Committee. Subject: Chronological Record of White House Support,” with attachments, June 1, 1973 [declassified 01/17/2017] <https://www.cia.gov/readingroom/docs/chronological%20record%20of%20w%5B15132436%5D.pdf> [retrieved September 23, 2024] and the “Minority Report on CIA Involvement, Submitted at the request of Senator Howard H. Baker, Jr., in Carroll & Graff edition of the Senate Watergate Report, pages 746-752.

⁴³ Memorandum for: Executive Secretary, CIA Management Committee. Subject: Chronological Record of White House Support,” with attachments, June 1, 1973 [declassified 01/17/2017]

⁴⁴ Memorandum for: Executive Secretary, CIA Management Committee. Subject: Chronological Record of White House Support,” with attachments, June 1, 1973 [declassified 01/17/2017]; The Attachment “Chronology on Agency Support to White House in Connection with Requests by E. Howard Hunt” notes that Cushman recorded his conversation with Hunt and that ““The transcript of the [July 22] conversation shows Cushman expressing his unfamiliarity with how the Agency could perform , then: “Mr. Hunt: Well, Ehrlichman said that you were the ---; “General Cushman: Yes, he called me...” [Declassified 01/17/2017].

The second point is that although there is no evidence that Richard Nixon authorized the break-in at the office of Daniel Ellsberg's psychiatrist, Lewis J. Fielding, in Beverly Hills ahead of time. There can be no doubt that he thought it justified and that he had the power to undertake similar operations against US citizens at home. "Given the temper of those tense and bitter times and the peril I perceived," he later wrote in his memoirs, "I cannot say that had I been informed of it beforehand, I would have automatically considered it unprecedented, unwarranted, or unthinkable."⁴⁵

Watergate investigators determined that the White House had hoped the domestic spy operation would not have involved breaking into the office; but the Plumbers were inept.⁴⁶ They ultimately had to break in and then created a crime scene to make it seem that an addict had broken in to look for drugs. The request for authorization from the Plumbers had gone to John Ehrlichman in early August, who signed it with the condition, "if done under your assurance that it is not traceable."⁴⁷ The entry proved to be untraceable not because it was a professional black bag job but because the Beverly Hills Police proved to be just as inept. Meanwhile Nixon was not kept in the dark. Ehrlichman did inform Nixon on September 8, 1971, less than a week after the break-in, that "we had one little operation that aborted out in Los Angeles, which, I think, is better that you don't know about." To which, Nixon said, "agreed." Ehrlichman then went on to add, "but we've got some dirty tricks underway that may pay off." Then Ehrlichman described a few: "we've planted a bunch of stuff with columnists, some of which will begin to surface shortly, I think, about some of this group, about Ellsberg's lawyer, about the Bay of Pigs." Nixon's sole question was "with columnists that are somewhat respectable?" When Ehrlichman gave the name of one, Nixon replied, "good, good."⁴⁸ Even without Nixon's comment in his memoir, his own

⁴⁵ Richard Nixon, *RN: The Memoirs of Richard Nixon*, (1978) p. 514. Regarding whether he ever knew about the Fielding break-in, Nixon wrote Ehrlichman says that he did not know of it in advance but that he told me about it after the fact in 1972. I do not recall this, and the tapes of the June-July 1972 period indicate that I was not conscious of it then, but I cannot rule it out." Nixon doesn't mention the September 8, 1971 conversation with Ehrlichman.

⁴⁶ See Nixon Library Video Oral History Interview with Eugenio Rolando Martinez, one of the those who broke into Fielding's office, March 25, 2008, NARA.

⁴⁷ Exhibit 61.5, "Egil Krogh and David Young Memorandum, August 11, 1971, SSC Exhibit Number 90, 6 SSC 2644-5," in House of Representatives, Hearings Before the Committee of the Judiciary, Statement of Information, Book VII, Part 2, White House Surveillance Activities and Campaign Activities

⁴⁸ <https://www.nixonlibrary.gov/media/31491>

contemporary words indicated that he felt that the President of the United States could legitimately conduct domestic clandestine operations against US citizens for political purposes.

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These four cases, from two different presidencies, illustrate the problem of energetic executives that seek to use their enormous power for illegitimate purposes. In one case the potential for major damage was dramatically reduced by the action of Republican political appointees. The tax lists—also known as enemies lists—were not acted upon but not for the lack of effort by the President but because of the opposition of the Shultz and Walters. The chair of the DNC was, however, investigated; but not with the intensity the President had wanted. In the case of the BLS, the White House encountered less push back. Geoffrey Moore lost his job for being too weak and at least two of the economists were transferred for being Jewish. The White House staff were able to partially implement the President’s abuse of power because they took charge of the matter from the Department of Labor. But civil service protections prevented them from going further. The Johnson case, involving the FBI, highlights what had become a standard practice for Presidents beginning with Franklin D. Roosevelt to use the coloration of national security to deploy intelligence and law enforcement agencies for political investigations. Finally, the Plumbers case shows what happens when there is no pushback at all on a president with negative energy.

Above all these cases illustrate the public interest –and arguably Congressional interest--in determining presidential motive, even if the Supreme Court isn’t interested. The improvement of taxpayer compliance is a justifiable presidential motive. Deterring leaks of national security secrets is another. Ensuring security at a political convention is an appropriate motive; So, too, is the accuracy of government statistics. But when these are veils to permit unethical and potentially illegal acts, then the question arises, who or what protects the Public from their President? In this new Constitutional environment, the question is only confidently answered in the negative: not by the Courts. The Congress, the Art I institution, should be concerned. The President’s ability to request investigations, whether of an individual’s tax return, of their service jacket, to request a “name check” against FBI records, to inquire into their religious faith, seems

limitless. And History has powerful examples of how that power has been abused, Congress is now the last line of defense against presidential abuses of power, which we would be naïve not to assume will happen again.