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CO-296
REV 12/71

Subpoena to Produce Document or Object

Cr. Form No. 21 (Rev. 10-51)

United States District Court

FOR THE

DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

JOHN M. MITCHELL, et al,

No. 74-110

RECEIVED
SEP 5 10 04 AM '74
U.S. MARSHAL'S SERVICE
LOS ANGELES, CALIFORNIA

To RICHARD M. NIXON
Presidential Compound
San Clemente, California

You are hereby commanded to appear in the United States District Court for the District of Columbia at John Marshall & Constitution in the city of Washington on the 30th day of September, 19 74 at 9:30 o'clock A.M.

to testify in the case of United States v. Mitchell, et al, and to remain until called for trial of that cause, when called; and bring with you all documents, books, records, tape recordings, writings, drawings, graphs, charts, photographs phono records, and other intangible matters which refer to or relate to the concealment or cover-up of the break-in into Democratic National Headquarters and the involvement as to the same by agents or employees of The White House or the Committee for the Re-election of the President.

This subpoena is issued upon application of Defendant John D. Ehrlichman.

September 4, 1974

Andrew C. Hall
Attorney for Defendant Ehrlichman
66 W. Flagler Street, 12th floor
Address Miami, Florida 33130

JAMES F. DAVEY
Clerk.
By *Robert L. Lee*
Deputy Clerk.

[1] Insert "United States," or "defendant" as the case may be.

RETURN

Received this subpoena at on
and on at
served it on the within named
by delivering a copy to h and tendering to h the fee for one day's attendance and the mileage allowed by law.[2]

Dated:

, 19 By

Service Fees
Travel $
Services
Total $

[2] [illegible] witness upon service of a subpoena issued in behalf of the United States [illegible] 28 USC 1825.

FPI—LK—8-11-62—120M—993

EXHIBIT A

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES,	)	
Plaintiff,	)	
v.	)	Criminal No. 74-110
JOHN MITCHELL, et al.,	)	
Defendant.	)	

AFFIDAVIT OF
HERBERT J. MILLER, JR.

DISTRICT OF COLUMBIA, ss:

Herbert J. Miller, Jr., being duly sworn, deposes and says as follows:

1. I am an attorney admitted to practice in the District of Columbia. I am submitting this affidavit in support of a motion to quash a subpoena served upon my client, Richard M. Nixon, by the defendant John Ehrlichman.

2. On October 2, 1974, I spoke by telephone with Dr. John C. Lungren, Mr. Nixon's attending physician in Long Beach, California, to determine the present status of Mr. Nixon's health and the outlook for the near future. Dr. Lungren informed me that he will execute an affidavit and transmit it to me by mail, for filing in this Court, stating the following information:

a. Dr. Lungren is a citizen of the United States and a resident of the State of California. He received a Doctor

Exhibit B

of Medicine Degree from the University of Pennsylvania in 1942. He is a Fellow of the American College of Physicians; a Fellow of the American College of Cardiology; a Diplomate of the American Board of Internal Medicine; a past Fellow in Cardiology of the National Heart Institute (University of Southern California); former Chief of Staff of Long Beach Memorial Medical Center; former Chief of Medicine at the Long Beach Memorial Medical Center; and an Associate Clinical Professor of Medicine at the University of California at Los Angeles Medical School. Beginning in 1952 and at intervals thereafter, he has attended Richard M. Nixon as his physician.

b. Dr. Lungren is informed that Mr. Nixon developed an active phlebitis in his left leg during the mid-1960's while on a visit to Japan, and again during a visit to the Mideast earlier this year. Phlebitis is an inflammation of the veins frequently associated with blood clotting, which is a serious condition likely to recur in those who have once experienced it. Emboli formed in a clot in the leg may travel through the heart to the lung, and there obstruct a blood vessel which could produce death or serious injury.

c. On September 11, 1974, Dr. Lungren examined Mr. Nixon in Palm Springs, California. At that time he observed increased soreness along the saphenous vein in the upper left thigh area, and obvious enlargement of both the calf and thigh areas of the left leg. It was his impression at that time that the patient had a chronic phlebitic condition in that leg which

was showing a reactivation and possible development of embolic phenomena (thrombophlebitis). On the basis of his examination, he concluded that immediate hospitalization was advisable for the purpose of treatment and tests to determine the possible causes and extent of the illness, and he so recommended to Mr. Nixon.

d. Mr. Nixon was admitted to Long Beach Memorial Medical Center on September 23 and tests began on the same date. A combination of a profusion lung scan plus an airway patency lung scan revealed the presence of a pulmonary embolus in the right mid-lung field, lateral surface. This embolus posed a potential danger to the patient's life and further tests were discontinued in order to administer rapid anticoagulation therapy by means of intravenous heparin and oral coumadin. A second profusion lung scan completed on September 30 indicates that the pulmonary embolus is resolving itself, and that there is no evidence of any new embolic phenomena in either lung.

e. On September 30, 1974, tests were resumed on the phlebitis condition. It is hoped that the results of these tests will eliminate possible causes of the thromboembolic condition more serious than the chronic phlebitis. The tests should be completed by October 4, and the results together with his analysis of them can be made available to Mr. Nixon's counsel in Washington, D. C., some time during the week of October 7.

f. Dr. Lungren expects that Mr. Nixon will be released from the hospital on October 4 or 5. Following his

release, Mr. Nixon will be continued on ambulatory anticoagulation therapy to minimize the chance of recurrence of the clot formation. This therapy will continue for a period of from three to six months. During this time Mr. Nixon will receive oral anticoagulant medication, will wear an elastic support stocking, and will be kept on a regimen of limited physical activity.

g. The limitations on Mr. Nixon's physical activity will involve, first, the avoidance of prolonged periods of sitting, standing or walking which could result in increased veinous congestion in the affected leg which might produce further clotting; and second, the avoidance of any possible trauma which, given the anticoagulant therapy he will be receiving, could lead to hemorrhaging somewhere in the body. These conditions suggest that Mr. Nixon remain, during the period of his therapy, in the controlled environment of his home, with periodic blood tests and examinations to determine the progress of the treatment and to detect any recurrence of clot formation.

h. With respect to travel, Mr. Nixon's treatment will preclude extended trips by automobile, airplane or other means which require prolonged sitting, which expose him to the risk of a trauma likely to lead to hemorrhaging, or which make it impracticable properly to monitor his condition.

i. It is impossible to predict at this time the duration of the therapy prescribed above, for it depends upon the progress made in reducing or eliminating the current phle-

bitic condition. Dr. Lungren believes that the oral anticoagulant medication will be required for three to six months. The restrictions on physical activity will continue until such time as his condition stabilizes.

j. In Dr. Lungren's professional judgment, the failure of Mr. Nixon to observe this prescribed therapy would pose a serious risk to his health.

k. Dr. Lungren is advised that Dr. Siebert Pearson Associate Clinical Professor of Surgery at the UCLA School of Medicine, Dr. Eldon Hickman, Assistant Clinical Professor of Surgery at UCLA School of Medicine, and Dr. Earl Dore, Director of Nuclear Medicine at Long Beach Memorial Medical Center, each of whom has personally examined Mr. Nixon and has consulted with Dr. Lungren in this case, concur in his recommendation on the necessity for the prophylactic ambulatory anticoagulation therapy described above, including the restrictions on Mr. Nixon's physical activity, and in his assessment of the nature and extent of the risk to Mr. Nixon's health if such therapy is not undertaken and the regimen of restricted physical activity not followed.

Herbert J. Miller, Jr.

Subscribed and sworn to
before me this 3 day
of October, 1974.

Notary Public

My Commission Expires July 24, 1977

My commission expires:

CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of October, 1974, true copies of the foregoing Motion and Exhibits were mailed, first-class, postage prepaid, to the following:

Leon Jaworski, Esquire
Special Prosecutor
1425 K Street, N. W.
Washington, D. C. 20005

John M. Bray, Esquire
Federal Bar Building
Washington, D. C. 20006

William G. Hundley, Esquire
1709 New York Avenue, N. W.
Suite 205
Washington, D. C. 20006

John J. Wilson, Esquire
815 15th Street, N.W.
Washington, D. C. 20005

Jacob A. Stein, Esquire
1200 18th Street, N. W.
Washington, D. C. 20036

William S. Frates, Esquire
66 W. Flagler
12th Floor, Concord Building
Miami, Florida 33130

_____
Herbert J. Miller, Jr.

Pmk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES,	)	
Plaintiff	)	
v.	)	Criminal No. 74-110
JOHN MITCHELL, et al.,	)	
Defendant	)	

MOTION TO QUASH SUBPOENA

Richard M. Nixon, through his undersigned counsel, hereby moves pursuant to Rule 17, Federal Rules of Criminal Procedure, to quash the subpoena served upon him on the application of the United States to testify in this proceeding. The subpoena, dated September 18, 1974, and served upon the witness on September 19, commands him to appear and testify on October 1, 1974. The date for compliance was suspended by the Court on September 20 pending the filing of these papers. A copy of the subpoena is attached hereto as Exhibit A.

The ground for this motion is that the physical conditic of the witness is such that compliance with the subpoena would be detrimental to his health and would pose a serious risk to his life. The basis for this claim is fully set forth in the motion and accompanying affidavit addressed to the subpoena served by

the defendant John Ehrlichman, which we incorporate as if fully set forth herein.

Respectfully submitted,

HERBERT J. MILLER, JR.

RAYMOND G. LARROCA

Miller, Cassidy, Larroca
& Lewin
1320 Nineteenth Street, N.W.
Washington, D. C. 20036
(202) 293-6400

Attorneys for Richard M. Nixon

Dated: October 3, 1974

Subpoena to Testify

Cr. Form No. 21 Jan. 1971

United States District Court

FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, et al

No. Cr. No. 74-110

To Richard M. Nixon
San Clemente, California

You are hereby commanded to appear in the United States District Court for the District of Columbia at Courtroom No. 20, 3rd & Constitution Ave., N.W. in the city of Washington on the 1st day of October 19 74 at 10:00 o'clock A. M. to testify in the above-entitled case.

This subpoena is issued on application of the[1] United States.

Sept. 18, 1974

James F. Neal
Attorney for United States.
1425 K Street, N. W.
Address Washington, D. C. 20005

JAMES F. DAVEY
Clerk.

By Robert L. Lee
Deputy Clerk.

RETURN

Received this subpoena at on
and on at I served it on the
within named
by delivering a copy to h and tendering[2] to h the fee for one day's attendance and the mileage allowed by law.

Service Fees

By

Travel $
Services
Total $

[1] Insert "United States," or "defendant" as the case may be.
[2] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

CD-294
REV 12/71

EXHIBIT A

CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of October, 1974, true copies of the foregoing Motion and Exhibit were mailed, first-class, postage prepaid, to the following:

Leon Jaworski, Esquire
Special Prosecutor
1425 K Street, N. W.
Washington, D. C. 20005

John M. Bray, Esquire
Federal Bar Building
Washington, D. C. 20006

William G. Hundley, Esquire
1709 New York Avenue, N. W.
Suite 205
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815 15th Street, N. W.
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Jacob A. Stein, Esquire
1200 18th Street, N. W.
Washington, D. C. 20036

William S. Frates, Esquire
66 W. Flagler
12th Floor, Concord Building
Miami, Florida 33130

_____
Herbert J. Miller, Jr.

AFFIDAVIT OF

DR. JOHN C. LUNGREN

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

John C. Lungren, being duly sworn, deposes and says as follows:

1. I am a citizen of the United States and a resident of the State of California. I received a Doctor of Medicine Degree from the University of Pennsylvania in 1942. I am a Fellow of the American College of Physicians; a Fellow of the American College of Cardiology; a Diplomate of the American Board of Internal Medicine; a past Fellow in Cardiology of the National Heart Institute (University of Southern California); former Chief of Staff of Long Beach Memorial Medical Center; former Chief of Medicine at the Long Beach Memorial Medical Center; and an Associate Clinical Professor of Medicine at the University of California at Los Angeles Medical School. Beginning in 1952 and at intervals thereafter, I have attended Richard M. Nixon as his physician.

2. I am informed that Mr. Nixon developed an active phlebitis in his left leg during the mid-1960's while on a visit to Japan, and again during a visit to the Mideast earlier this year. Phlebitis is an inflammation of the veins frequently associated with blood clotting, which is a serious condition likely to recur in those who have once experienced it. Emboli formed in a clot in the leg may travel through the heart to

the lung, and there obstruct a blood vessel which could produce death or serious injury.

3. On September 11, 1974, I examined Mr. Nixon in Palm Springs, California. At that time I observed increased soreness along the saphenous vein in the upper left thigh area, and obvious enlargement of both the calf and thigh areas of the left leg. It was my impression at that time that the patient had a chronic phlebitic condition in that leg which was showing a reactivation and possible development of thrombophlebitis. On the basis of my examination, I concluded that immediate hospitalization was advisable for the purpose of treatment and tests to determine the possible causes and extent of the illness, and I so recommended to Mr. Nixon.

4. Mr. Nixon was admitted to Long Beach Memorial Medical Center on September 23 and tests began on the same date. During testing, a combination of a profusion lung scan plus an airway patency lung scan revealed the presence of a pulmonary embolus in the right mid-lung field, lateral surface. This embolus posed a potential danger to the patient's life and further tests were discontinued in order to administer rapid anticoagulation therapy by means of intravenous heparin and oral coumadin. A second profusion lung scan completed on September 30 indicated that the pulmonary embolus was resolving itself, and that there was no evidence of any new embolic phenomena in either lung.

5. On September 30, 1974, tests were resumed on the phlebitis condition. It is hoped that the results of these

tests will eliminate possible causes of the thromboembolic condition more serious than the chronic phlebitis. The tests should be completed by October 4, and the results together with my analysis of them can be made available to Mr. Nixon's counsel in Washington, D.C., some time during the week of October 7.

6. Mr. Nixon was released from the hospital on October 4, 1974. Mr. Nixon will be continued on ambulatory anticoagulation therapy to minimize the chance of recurrence of the clot formation. This therapy will continue for a period of from three to six months. During this time Mr. Nixon will receive oral anticoagulant medication, will wear an elastic support stocking, and will be kept on a regimen of limited physical activity.

7. The limitations on Mr. Nixon's physical activity will involve, first, the avoidance of prolonged periods of sitting, standing or walking which could result in increased veinous congestion in the affected leg which might produce further clotting; and second, the avoidance of any possible trauma which, given the anticoagulant therapy he will be receiving, could lead to hemorrhaging somewhere in the body. During the period of his therapy, Mr. Nixon should remain in a controlled environment, with periodic blood tests and examinations to determine the progress of the treatment and to detect any recurrence of clot formation.

8. With respect to travel, Mr. Nixon's condition precludes extended trips by automobile, airplane or other means which require prolonged sitting, which expose him to the risk

of a trauma likely to lead to hemorrhaging, or which make it impracticable properly to monitor his condition.

9. It is impossible to predict at this time the duration of the therapy prescribed above, for it depends upon the progress made in reducing or eliminating the current phlebitic condition. I believe that the oral anticoagulant medication will be required for three to six months. The restrictions on physical activity will continue until such time as his condition stabilizes.

10. In my professional judgment, the failure of Mr. Nixon to observe this prescribed therapy would pose a serious risk to his health.

11. I am advised that Dr. Siebert Pearson, Associate Clinical Professor of Surgery at the UCLA School of Medicine, Dr. Eldon Hickman, Assistant Clinical Professor of Surgery at UCLA School of Medicine, and Dr. Earl Dore, Director of Nuclear Medicine at Long Beach Memorial Medical Center, each of whom has personally examined Mr. Nixon and has consulted with me in this case, concur in my recommendation on the necessity for the prophylactic ambulatory anticoagulation therapy described above, including the restrictions on Mr. Nixon's physical activity, and in my assessment of the nature and extent of the risk to Mr. Nixon's health if such therapy is not undertaken and the regimen of restricted physical activity not followed.

John C. Lungren M.D.

JOHN C. LUNGREN, M.D.

Subscribed and sworn
to before me this 11th
day of October, 1974.

Ellen E. Best

Notary Public

My Commission Expires: March 13, 1977

OFFICIAL SEAL
ELLEN E. BEST
Notary Public - California
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
MY COMMISSION EXPIRES MARCH 13, 1977

① w/draw our subpoena ⇒ not a material witness

everything

If he does testify, then we would have questions relating to authenticity

② motion for continuance —
possibility of deposition

no motion for deposition

materiality of testimony ▷
specificity

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Crim. No. 74-110

v

JOHN N. MITCHELL, et al,

DEFENDANT JOHN D. EHRLICHMAN'S REPLY TO MOTION TO QUASH FILED ON BEHALF OF RICHARD M. NIXON

Richard M. Nixon is an indispensable witness for the defense. Defendant Ehrlichman has previously stated in his Motion for Continuance and Severance, a copy of which is attached hereto as Exhibit "A", not less than thirty (30) factual issues on which Richard M. Nixon should testify in this case.

THE FACTS TO WHICH MR. NIXON WILL TESTIFY

The government has contended that Mr. Ehrlichman, as part of the conspiracy, participated in a scheme whereby the CIA would be used as a mechanism to thwart and subvert the FBI investigation during the aftermath of the break-in of Democratic National Headquarters. On June 22, 1972, L. Patrick Gray, Acting Director of the FBI, told John Dean that the FBI had discovered several checks that had passed through Bernard Barker's bank account, one of those arrested in connection with the break-in. Mr. Gray indicated that the FBI was investigating whether or not sums which went directly from CRP to the bank account were part of an effort by CRP to finance the Watergate bugging and break in. At that time, the FBI entertained the theory that the break-in was a CIA operation,

notwithstanding the CIA's denial of this contention. The government will contend that on June 22, 1972 Dean recommended to Haldeman that the CIA be used as a vehicle to prevent the FBI from discovering that CRP was the source of the Watergate burglars' funds. Government Exhibits 1, 2 and 3, tape recordings of conversations on June 23, 1972, reflect discussions between Mr. Nixon and Defendant Haldeman which might tend to support this theory. As a result of these meetings, evidenced by Exhibits 1 and 2, the Director of the CIA, Helms, and his Deputy Director, General Walters, were asked to attend a meeting at the White House. The government will contend that the purpose of the meeting was to use the CIA to subvert a legitimate investigation then being conducted by the FBI.

The evidence will reflect that Mr. Ehrlichman was in attendance at the CIA-White House meeting on June 23, 1972. Mr. Nixon's testimony is indispensable in that such testimony will establish that Mr. Ehrlichman was not apprised of the discussions held between Mr. Haldeman and Mr. Nixon on June 23, 1972. Mr. Ehrlichman was told by President Nixon on July 6 and 7, 1972, that the purpose of the meetings was lawful, as Mr. Ehrlichman thought. Questions were raised concerning whether or not CIA activities might be jeopardized by an FBI investigation involving Messrs. Ogarrio and Dahlberg. The President expressed great concern that a vigorous investigation would lead to grave consequences for the CIA, former government officials and other subjects of a national security character would be compromised.

It was in this context that Mr. Ehrlichman approved a CIA check as to whether or not a comprehensive FBI investigatio

would compromise CIA activities. The result of that investigation, as Ehrlichman learned, was that the CIA would not be compromised. As a result, Ehrlichman, in a conversation with Acting FBI Director Gray, told Gray to go forward with his investigation as Gray saw fit.

The sinister motives which the government seeks to attach to Mr. Ehrlichman's contact with the CIA on Watergate in late June, 1972, require that President Nixon testify and establish what knowledge Mr. Ehrlichman was privy to at the time, and to establish the lack of specific intent.

Another theory that the government will argue in this case involves the question of clemency. The government will seek to introduce evidence to the effect that in early January, 1973 Ehrlichman met with Charles Colson and John Dean in connection with clemency offers which were to be made in an indirect manner to Howard Hunt to assure Hunt's silence. In furtherance of the conspiracy, the government will offer a tape of January 8, 1973 conversation, Exhibit 5, where the President discusses the matter of executive clemency for Howard Hunt with Charles Colson. The evidence Mr. Ehrlichman intends to adduce will establish that Mr. Ehrlichman never approved of any offers of clemency to Howard Hunt from the White House. Richard M. Nixon will testify that the issue of executive clemency was raised during a conversation with Mr. Ehrlichman in July, 1972. During that conversation, Mr. Nixon advised Mr. Ehrlichman that executive clemency for any Watergate burglar was out of the question. The evidence will show that because of this clear statement, Mr. Ehrlichman stated to Mr. Colson in January, 1973 that no offers of clemency could be made to Mr. Hunt. Mr. Nixon's testimony is indispensable to establish that when the

matter was raised by Mr.Colson on January 8, Mr. Ehrlichman was not told of Colson's conversation, nor was his advice requested. Mr. Nixon will testify that Colson's request for clemency for Hunt was kept from Ehrlichman until much later.

The government has contended in connection with both the obstruction of justice charge and the conspiracy charge that Mr. Ehrlichman participated in a cover-up of grandiose proportions to conceal the involvement of high level officials at the White House and of CRP in the planning of the break-in and bugging of Democratic National Headquarters, as well as other illegal activities. Mr. Nixon's testimony is indispensable on this subject on not less than two specific issues.

First, Mr. Ehrlichman never advocated a cover-up. Instead, as the tapes reflect, Mr.Ehrlichman advocated full and complete disclosure. One of the issues in this case will be when Mr. Ehrlichman first took the position of full and complete disclosure. Mr. Nixon will testify that John Ehrlichman advocated and was told by Mr. Nixon that full and complete disclosure was the order of the day, on or about July 6, 1972, and again in August of 1972. Mr. Nixon will further state that Mr. Ehrlichman never varied from this position until his resignation on April 29, 1973. At the time Mr. Nixon received and accepted Mr. Ehrlichman's resignation as Assistant to the President for Domestic Affairs, Mr. Nixon acknowledged that Ehrlichman had played the role of the President's conscience, recommending full disclosure, and that the President and not Ehrlichman was responsible for any concealment of facts which might have occurred. No tape of that conversation was made.

On the second part of the cover-up issue, the government, in its opening statement, said that Mr. Ehrlichman's motive in the cover-up was the concealment of the break-in of Dr. Lewis J. Fielding's offices by members of the Special Investigation Unit of the White House. In this regard, Mr. Nixon will testify that in the aftermath of the theft of the Pentagon Papers in June, 1971, he, as President, became concerned about the unauthorized disclosure of national security information. Mr. Nixon instructed that a Special Investigation Unit be established to investigate the disclosure of national secrets and to take such steps as might be required to assure that such disclosures were terminated.

There were a number of specific disclosures which were under investigation during the latter part of 1971. Included was the theft of the Pentagon Papers, the SALT leaks (which involved the leak of the strategy of negotiations in connection with the Strategic Arms Limitations Talks) and a leak in connection with the Indian-Pakistani dispute (which was the cause of the compromise of a CIA agent). The President believed that in order for this unit to have maximum effect its very existence could not be disclosed except on a strict "need to know" requirement. That unit was under the general supervision of John Ehrlichman.

Perhaps the most significant information the unit was in possession of was in connection with the now infamous Moorer-Wellender-Radford leak. This particular leak had drastic consequences in connection with the national security of the United States. Disclosure of the facts of the Moorer-Wellender-Radford

affair would have, in the opinion of the President, seriously impaired the utility and efficacy of the Joint Chiefs of Staff and made more difficult the pressing relations with members of his Cabinet, as well as adversely affecting the conduct of the war in Vietnam and the President's ongoing attempts to achieve peaceful stabilization in Asia.

The government will contend that when Hunt, on March 16, 1973, conveyed to Paul O'Brien his demand for $130,000.00, lest he review his options and reveal the "seamy things he had done for the White House", Ehrlichman participated in a cover-up and that the object of the cover-up was to preclude disclosure of the Fielding break-in, as stated above. In fact, Overt Act No. 45 of Count I of the Indictment relates precisely this question.

However, Mr. Nixon's testimony will assist in establishin that that conversation was related to Mr. Ehrlichman's review of what information Mr. Hunt might have as to the other highly secret activities of the "Plumbers'" unit, each of which were and are lawful in nature, and was in direct response to Mr. Nixon's order imposing secrecy on this unit and its operations.[1] The government through its opening statement, has made this subject an issue in this case, and, as a result, Mr. Nixon's

1 In connection with the prosecution in the United States v Ehrlichman, case No. 74-116, the government has charged Mr. Ehrlichman with not only participating in the break-in of the office of Dr. Lewis Fielding, but also a conspiracy to conceal the same. In this regard, the Honorable Gerhard Gesell, the trial judge, ruled that the President's imposition of secrecy on the unit's activities was relevant, and, further, submitted interrogatories to Richard M. Nixon, who was then President of the United States, in lieu of requiring a sitting President to appear in Court as a witness.

testimony on this question is indispensable.

The government has contended that the meetings at La Costa, California in February, 1973, were part of an effort to preclude an investigation by the Senate Select Committee on Presidential campaign activities into the Watergate matter. However, Mr. Nixon will testify that that was not the purpose of the meetings. Mr. Nixon will testify that the purpose of the La Costa meetings was to develop a strategy whereby the facts would be disclosed and at the same time avoid what he thought would be a political witch hunt. That was the purpose communicated to Mr. Ehrlichman and it was on that premise that Mr. Ehrlichman participated in the meetings at La Costa.

On March 30, 1973,Mr. Nixon removed John Dean and assigned John Ehrlichman as legal adviser and investigator into the Watergage matter. These instructions were given, but are not on a tape. Mr. Nixon's testimony as to these instructions are necessary to clearly indicate to the jury the nature of Mr. Ehrlichman's activities in April of 1973 and will establish that Mr. Ehrlichman was not engaged in a cover-up but, rather, was engaged in a lawful investigatory function. Included within this subject would be discussions between Mr. Nixon and Attorney General Richard Kleindienst on March 31, 1973 on this question.

In addition, the tapes which the government seeks to offer in evidence are highly exculpatory as to Defendant Ehrlichman, on the issue of a cover-up. Mr. Nixon's testimony is indispensable on this issue to establish that there were no other conversations or communications on this subject with Mr. Nixon.

While a more comprehensive statement of Mr. Nixon's testimony could be developed, if sufficient time were available, Defendant Ehrlichman submits that in light of the foregoing Mr. Nixon's testimony is absolutely indispensable in this case.

ARGUMENT

In seeking to quash the subpoena issued on Mr. Nixon, Mr. Nixon, through his counsel, asserted a number of specific arguments. First, Mr. Nixon has contended that he is unable to travel by reason of thrombophlebitis and in this regard has attached the affidavit of his physician. It is apparent that the illness, from which Mr.Nixon now suffers, is only a bar to travel and not a bar to testimony. Rule 15, Federal Rules of Crimincal Procedure and 18 USC Sec. 3503, establish that under these circumstances Mr. Ehrlichman is entitled to have a deposition of Mr.Nixon taken to perpetuate his testimony in the event that when Defendant Ehrlichman commences his case in chief, Mr. Nixon willbe unable to appear in Court. In the attached motion on page 11, the three standards for the authorzation of a deposition are stated. These standards are:

(a) The prospective witness may be unable to testify.

(b) The testimony is material.

(c) The deposition is necessary to prevent a failure of justice.

Defendant Ehrlichman submits that each of these three standards have been established. As a result, a deposition must be taken to perpetuate the testimony in the event that, when called during Mr. Ehrlichman's case in chief, Mr. Nixon is physically unable to

respond to the subpoena now outstanding.

The second portion of the Motion to Quash is related only to the production of documents. In this regard, Mr. Ehrlichman is willing to provide Mr. Nixon with a more precise description of the documents to be produced at trial. To that extent, the Court would have the power to modify the subpoena and defendant Ehrlichman is willing to cooperate with the Court and with Mr. Nixon on this issue.

However, production of documents is an entirely different matter than the necessity for perpetuating Mr. Nixon's testimony and the necessity for his presence at trial, should his health permit. As to these questions, Mr. Ehrlichman is entitled to have an order entered in his favor allowing a deposition to be taken to perpetuate Mr. Nixon's testimony and, thereafter, requiring Mr. Nixon to appear and to testify on behalf of Defendant Ehrlichman.

FRATES FLOYD PEARSON STEWART
PROENZA & RICHMAN, P.A.
Attorneys for Defendant Ehrlichman
Twelfth floor Concord Building
Miami, Florida 33130

By_____
Wm. Snow Frates

By_____
Andrew C. Hall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Motion to Quash was furnished by hand this 16th day of October, 1974, to the following:

Leon Jaworski, Special Prosecutor
Watergage Special Prosecution Force
1425 K Street, N. W.
Washington, D. C. 20005

William G. Hundley, Esq.
Plato Cacheris, Esq.
Hundley and Cacheris
839 17th Street, N. W. - Suite 500
Washington, D. C.20006

John J. Wilson, Esq.
Whiteford, Hart, Carmody & Wilson
815 15th Street,N.W.
Washington, D. C. 20005

Jacob A. Stein, Esq.
Stein, Mitchell, Mezines
1200 18th Street, N. W.
Washington, D. C.

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By_____
Andrew C. Hall

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Criminal No. 74-110

vs.

JOHN N. MITCHELL, et al.,

/

DEFENDANT JOHN D. EHRLICHMAN'S
MOTION FOR CONTINUANCE AND SEVERANCE

Defendant, JOHN D. EHRLICHMAN, hereby moves this Court for the entry of an order severing Defendant Ehrlichman from his codefendant and continuing the trial date. As grounds for the same, Defendant Ehrlichman submits that:

1. Defendant Ehrlichman caused to be issued a subpoena requiring Richard M. Nixon to appear and to testify as a witness for the defense in this cause;

2. That subpoena is valid, outstanding and requires compliance;

3. That Richard M. Nixon is an indispensable witness in this cause whose testimony will be highly exculpatory for the defense on the issues involved;

4. That Richard M. Nixon has represented to the Court that, subsequent to the issuance of the subpoena, he has suffered the aggravation of a previous illness, thrombophlebitis, and as a result requires present hospitalization and treatment;

5. That this condition has been complicated by the lodging of a blood clot in Mr. Nixon's lung, thereby precluding travel to the District of Columbia at this time;

6. That the medical condition of Mr. Nixon is such as to require Mr. Nixon to be hospitalized and thereafter to convalesce at his home in San Clemente, California;

7. That Defendant Ehrlichman is willing to exhaust such rights as are provided to perpetuate this testimony;

EXHIBIT "D"

8. That it is manifestly unfair and a violation of due process of law to commence the trial in this cause, to require Defendant Ehrlichman to make opening statements and to cross examine government witnesses without first being allowed to perpetuate this vital and indispensable testimony

9. That to perpetuate such testimony in a proper manner Mr. Nixon must be deposed, by video tape, and that such a deposition may not be commenced until Mr. Nixon's health improves substantially, and once that deposition is commenced it will take not less than two weeks to conclude; (See Natvig v. United States, 236 F. 2d 694, 98 U.S. App. D. C. 399 [1956]; cert. den. 352 U.S. 1014; Burton v. United States, 175 F. 2d 960, rehearing den. 176 Fed. 865 [5th Cir. 1949] cert. den. 338 U.S. 909);

10. That it is manifestly unfair to sequester the jury in this cause an to require that jury to idly sit by for such a delay; and

11. That Defendant Ehrlichman is the only defendant that has subpoenaed Mr. Nixon thereby allowing the trial to go forward as to his co-defendants and during which Mr. Nixon's medical problems can either be favorably resolved or, in the alternative, his testimony can be perpetuated.

Mr. Nixon is a material and indispensable witness in this cause. Mr. Nixon has sole and personal knowledge of the following facts to which he can be expected to testify in the trial of this case:

(1) The nature, content and extent of his knowledge of the facts of the Watergate break-in and cover-up and which parts thereof were imparted by him to Defendant Ehrlichman.

(2) His reason and motive for including Defendant Ehrlichman in the Helms-Walters meeting of June 23, 1972.

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(4) Whether he discussed with Defendant Ehrlichman the John Mitchell resignation from the Chairmanship of The Committee to Reelect.

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(15) An unrecorded conversation among Richard Nixon, Defendant Ehrlichman and Mr. Haldeman, in which instructions were given which explain the fact, purpose and scope of the Dean-Moore-Haldeman-Ehrlichman meeting at LaCosta in February, 1973 referred to in Overt Act 35 of Count I of the Indictment.

(16) Unrecorded conversations on and after February 24, 1973, with Defendant Ehrlichman and/or Mr. Haldeman concerning the results of the LaCosta meetings including instructions concerning John Dean's duties, and method of reporting to the President and the duties of Defendant Ehrlichman relative to Watergate and its aftermath.

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(19) The portion of the content of an unrecorded meeting between Richard Nixon and Ricard Kleindienst March 31, 1973, which was related to Defendant Ehrlichman.

(20) Unrecorded instructions on April 5, 1973, to Defendant Ehrlichman to meet with Judge Mathew Byrne in connection with the Administration of the FBI.

(21) Confidential communications to the President in 1972 and 1973 concerning acts of administrators and other employees of the FBI in leaking or giving results of the investigation of the Watergate matter to unauthorized persons, including media reporters; instructions give to Defendant Ehrlichman to convey to Patrick Gray and John Dean concerning this situation; all relating to Overt Act 4 of Count I of the Indictment and the disposition of the contents of Howard Hunt's safe in June, 1972.

(22) Unrecorded conversations with Defendant Ehrlichman in which instructions were given for negotiation with Senators Ervin and Baker for the creation of agreed rules of procedure for the Senate

Select Committee and Defendant Ehrlichman's recommendations for full disclosure of all facts concerning the Watergate matter.

(23) Unrecorded conversations with Defendant Ehrlichman in which questions of privilege were discussed and Defendant Ehrlichman made recommendations for all White House personnel (except the President) to appear and testify fully before the Grand Jury without assertion of any privilege and without immunity from prosecution.

(24) Facts relating to the authenticity, custody and genuineness of a report rendered to him by Defendant Ehrlichman April 14, 1973 relating to the Watergate burglary and aftermath.

(25) The circumstances of two telephone calls made by Defendant Ehrlichman in his behalf and in his presence to Patrick Gray on April 15, 1973 from his office, the tape of which has not been produced, including the portion heard by Mr. Nixon and the res gestae reactive conversation (also apparent by unrecorded, or at least unproduced) concerning Mr. Gray's adminission that he destroyed evidence turned over to him by Mr. Dean.

(26) An unrecorded telephone conversation between Richard Nixon and Henry Peterson including instructions concerning the national security restrictions on activities of the Special Invesitgation Unit, which call was made in Defendant Ehrlichman's presence and reaffirmed standing instructions to him; related to Overt Act 45 of Count I of the Indictment.

(27) An unrecorded conversation April 29, 1973 at Camp David with Defendant Ehrlichman alone, in which Defendant Ehrlichman's attempts to uncover the Watergate matter were acknowledged, certain information known to Defendant Ehrlichman was disclosed which is exculpatory in nature, and permission was given for Defendant

Ehrlichman to retain the possession of certain Presidential papers for use in aiding the authorities investigations.

(28) Unrecorded (or unproduced) conversations with Henry Peterson recounting statements to Peterson and other prosecutors by John Dean, either exculpatory or materially inconsistent.

(29) Defendant Ehrlichman's recommendations to him for disclosure and their proximate relationship to Mr. Nixon's assignment to John Dean of March 22 to go to Camp David and prepare a report of his knowledge of the facts.

(30) The purpose of Richard Nixon's instructions to Defendant Ehrlichman to solicit information from the attorney general March 27, 1973.

In addition to the foregoing, Mr. Nixon will testify relating to the facts and circumstances of the government's allegations in an exculpatory manner as to Mr. Ehrlichman.

From the foregoing, it is readily apparent that Mr. Nixon has exclusive knowledge of a great number of exculpatory facts which are the subject matter of this action and which cannot be duplicated through other evidence. The interests of justice compel that Mr. Ehrlichman be given the right to demonstrate to the jury the complete factual background which is now the basis of the charges against him. The recommended procedure of a severance, continuance and deposition is the only way in which Defendant Ehrlichman's fundamental constitutional rights can be protected.

While judicial continuances are generally considered discretionary with the Court, under the circumstances of this case, the failure to grant the instant motion so as to perpetuate Mr. Nixon's testimony and thereafter commence trial would amount to an abuse of that discretionary and would constitute a fundamental deprivation of Mr. Ehrlichman's constitutional right to due process of law and to adequately confront his accusers. The authorities discussed below establish defendant's right to the relief requested and based on the same, the motion should be granted.

In dealing with the absence of a witness vital to an action, two Courts have reversed trial courts in refusing to grant continuances because a party was ill and unable to give testimony in a case.

In Gaspar v. Kassm, 493 F.2d 964 (3rd Cir.1974) the Court reversed the trial court for failing to grant a continuance. The Court stated:

> An examination of the complaint, as we have indicated, shows that Kassm was charged with negligent driving and failure to observe the laws of Pennsylvania in respect to the operation of motor vehicles. These allegations were denied in Kassm's answer and as third party plaintiff he alleged negligence on the part of the third party defendant Smetzer, the other driver in the accident.
>
> We think Kassm's case was gravely prejudiced by the fact that he was not present. Particularly, Gaspar and his witnesses testified that the accident was caused by Kassm's negligence in allowing his car to cross the road and strike Smetzer's car at or near a narrow bridge. One of Gaspar's witnesses, Chasar, the Chief of Police of the Pennsylvania township where the accident occurred, testified over objection that Kassm made damaging oral admissions at the scene of the accident, and these statements were not convincingly rebuted by the deposition taken in the Bucks County arbitration proceedings which was read to the jury in the case at bar. The defense asserted by Kassm to these admissions is not clear nor is the ground of the deposition's admission. However, in the view we take of the case it is not necessary to decide these difficult evidentiary questions. As we have said, Kassm's entire defense on the issue of liability consisted of reading to the jury the deposition taken in the Bucks County proceedings and the persuasiveness of this evidence was obviously lessened by the apparent language difficulties and the fact that Kassm was questioned solely by opposing counsel.
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> Moreover, we can see no pressing necessity for haste albeit we are aware of the annoyance caused to a trial judge when his carefully arranged trial calendar is disarranged, but we cannot let this obscure the fact that we deem the grounds upon which the distinguished district judge acted were insufficient. We do not consider the motion for continuance to be deficient on its face. It is customary to grant a continuance on the ground of illness of a party. We conclude that Kassm's testimony was necessary for the defense of his case, that the granting of a continuance would not have unduly prejudiced the other parties, and that the continuance motion was not motivated by procrastination, bad planning or bad faith on the part of Kassm or his counsel. It is the law that where none of the foregoing appear, the

> denial of a continuance for illness is abuse of discretion. Cornwell v. Cornwell, 73 App. D. C. 233, 118 F. 2d 396 (1941); Harrah v. Morgenthau, 67 App. D. C. 119, 89 F. 2d 863 (D. C. Cir., 1937), and Davis v. Operation Amigo, Inc., 378 F. 2d 101 (10 Cir. 1967). Such is the case now before the Court. Cf. Lehman v. United States, 313 F. Supp. 249 (E. D. Pa. 1970).

In Harrah v. Morgenthau, 89 F. 2d 863 (D. C. Cir. 1937) the Court of Appeals set out the standards for a continuance. In that case the Court said

> The record discloses nothing else on the subject than is outlined above. The high professional character and standing of counsel for Dunning satisfy us that the motion was made in good faith and, in the absence of a showing to the contrary or of some injury resulting to the other parties, we think the court below should have delayed the trial. In saying this we are, of course, not unmindful of the rule that a postponement or continuance is largely within the discretion of the trial court and unless it is shown to have been abused there is no sufficient ground for reversal. Fidelity & Deposit Co. v. L. Bucki & Son Lumber Co., 189 U. S. 135, 143, 23 S. Ct. 582, 47 L. Ed. 744. If there were anything in this record challenging the good faith of the motion for continuance, the professional ability or character or truthfulness of the physicians who made affidavit to the inability of Dunning to appear, or even if there were a showing that a continuance would have resulted in serious loss to the other parties, we should not now hesitate to sustain the action of the lower court; but here we are confronted with a case in which, as appears, the plaintiff was his only witness and was so seriously ill that his appearance in court would probably have resulted in his death. Insisting upon a trial in these circumstances must necessarily have resulted in prejudice to Dunning's rights. There may have been good reasons for the refusal to grant the continuance, but if there were it was the duty of counsel to have shown them by the record, for we can know only what the record contains.

Since Mr. Nixon is an unindicted co-conspirator, and since his testimony is as vital and as indispensible as that of any party, it would be reversable error to fail to grant a continuance. Fine distinctions between situations where a party is involved and where a material witness who is alleged to be a co-conspirator is involved should not interfere with steps necessary to assure that a defendant in a criminal case is able to obtain full and complete due process of law.

Other courts have reversed where a material witness is ill and a motion to continue is denied.

In Dod v. Grimes, 123 Atl. 894 (R.I. 1924) the Court dealt with the question of a witness, absent due to illness, in the context of a continuance. The Court held:

> [1, 2] Before proceeding to trial counsel for the defendants moved for a continuance of the cases on the ground that a material witness, one William H. Tripp, was ill and unable to attend court, he having recently figured in an automobile accident, and was suffering from injuries resulting therefrom. The defendants produced the certificate of a doctor to the effect that he first saw Mr. Tripp on November 4, 1922. A comparison of dates shows that the doctor saw Mr. Tripp on the day following the accident and five days prior to the date set for the trial of the cases, the latter being November 9, 1922. This certificate sets forth the then present physical condition of Mr. Tripp which, in the opinion of the doctor, would not permit him to travel, and would demand that he be kept quiet.
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> * * *
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> In cases of this character, that is, claims against the estates of deceased persons, it seems to us that every reasonable latitude should be allowed in bringing before the court and jury all the circumstances and facts which would aid the latter in coming to a just and proper conclusion. In the cases which we are now considering it would seem to be particularly unfortunate if the defendant should be deprived of the benefit of the material testimony solely within the knowledge of Tripp, and which, if presented to the jury, might lead them to a different conclusion from that to which they arrived. The certificate of the physician, in terms, refers to the then present condition of the witness Tripp and his inability at that time to attend court, or depose. It can be reasonably deduced, however, from such a certificate, that the incapacity of the witness was temporary rather than permanent or likely to continue for a long period. The affidavit fully and explicitly states the facts to which the witness would testify. While it fails to give in precise words the grounds of such expectation, it may reasonably be inferred from it, taken as a whole, that such facts must have been obtained from the witness himself, and could not have originated in the mind of the affiant.

> There is no specific statement either in the certificate of the physician or in the affidavit as to the expectation of procuring the attendance of the witness at a future time, but there, again, the incapacity appearing to be temporary, any determination as to its duration could be as easily reached or estimated by the plaintiff as by the defendant. Although neither the certificate of the physician nor the affidavit are in perfect form, we think that they substantially comply with the rules governing such matters. At the hearing before us it was not claimed either in brief or in argument that the absent witness was in a condition to attend court or to give his deposition.
>
> We think the first exception of the defendant must be sustained. Having reached this conclusion, the other exceptions need not be considered.

In Wigley v. Buzzard, 124 S.W. 2d 898 (Ct. Civ. App. 1939) the Court held that if the absence of a material witness would be prejudicial, it would be error not to continue the trial. The Court stated:

> There is yet another reason why the case should be reversed.
>
> Appellants sought a continuance because of the absence of Mrs. Maggie Wigley. She was ill, feeble and unable to attend the trial. We consider her the most important witness in this case. We think the court and jury should see her and hear her testify. If she gives the appearance of one mentally capable of knowing the extent, purpose and consequence of her acts, the appellees have nothing to fear.
>
> The overruling of the motion for a continuance on account of the absence of Mrs. Maggie Wigley, was error.

Similarly, in Bernard's Fur Shop v. De Witt, 102 A. 2d 462 (Mun. Ct. App. O.C., 1954) the Court reversed a trial court's refusal to grant a continuance on the following reasoning:

> We think there was error. The Court was advised that appellant's chief officer who was to be its chief witness was unable to be present because of illness. This statement was supported by a doctor's certificate. Nothing in the record questions the truthfulness of the statement or certificate. Although continuances on the date set for trial are to be discouraged, nevertheless when a party or an important witness is unable to be present because of illness, the party ought not to be deprived of the opportunity of presenting his

> case. A continuance should have been granted until the witness was able to come to court or until her deposition could be taken. The offer of opposing counsel to stipulate as to the witness's testimony was not sufficient justification for the denial of the continuance. One issue in the case was the date of service of the notice to quit. Appellee's evidence was that the notice was served on the absent witness on June 29. Appellant's answer, verified by that witness, stated the notice was served on July 2. A mere stipulation as to the witness's testimony would hardly have had the same weight before a jury as the testimony of the witness herself.

While the granting of a motion for a continuance is discretionary, see Franklin v. South Carolina, 218 U.S. 161, 30 S.Ct. 640, 54 L. Ed. 980 (1910), the denial of a continuance where there is an ill and absent material witness, until a deposition under Rule 15, F.R.Cr.P. is taken, is error. See Natvig v. U.S. 236 F.2d 694 (D.C. 1956).

Rule 15, F.R.Cr.P. contemplates the propriety of a continuance for the taking of a deposition as requested. To obtain a deposition, a defendant must show:

(1) The prospective witness may be unable to testify; See U.S. v. Hagedorn, 253 F.Supp. 969 (S.D.N.Y. 1966)

(2) That the testimony is material; See U.S. v. Egorov, 34 F.R.D. 130 (E.D.N.Y. 1963), and

(3) The deposition is necessary to prevent a failure of justice. See 8 Moore's Federal Practice §15.03 [3].

Similarly, under 18 U.S.C. §3503, defendant Ehrlichman is also entitled to have the deposition of Mr. Nixon taken. See U.S. v. Singleton, 460 Fed. 1148 (2d. Cir. 1972). Mr. Ehrlichman has made the required showing and is now entitled to take Mr. Nixon's deposition to perpetuate that testimony.

CONCLUSION

Defendant, JOHN D. EHRLICHMAN, has made a clear and positive showing that the testimony of Richard M. Nixon is indispensable to his defense. Mr. Ehrlichman further demonstrated to this Court that he has been diligent in attempting to procure the testimony of Mr. Nixon. Further, Mr. Ehrlichman has demonstrated that at this time Mr. Nixon is ill and unable to testify at trial. Further, Mr. Ehrlichman has demonstrated to the Court that it would be unduly prejudicial to commence the trial without first having opportunity to perpetuate Mr. Nixon's testimony. The Federal Rules of Criminal Procedure clearly contemplate that a deposition be taken under the circumstances in the instant case. To require the trial to commence on October 1, 1974, as now set, would result in substantial prejudice and a violation of Defendant Ehrlichman's right to due process of law. Mr. Ehrlichman is willing to commence a deposition of Mr. Nixon as soon as his health permits and, upon the completion of that deposition, to go to trial in this cause in an orderly manner. If the trial is commenced on October 1, 1974, this vital and indispensable testimony may never be forthcoming. Certainly, under such circumstances, each and every required showing has been made. Further, since Defendant Ehrlichman is the only defendant in this cause who has sought to obtain the testimony of Mr. Nixon by way of subpoena, the granting of a continuance coupled with a severance would in no way prejudice the rights of the United States of America, nor that of any other defendant.

Based on the foregoing, Defendant Ehrlichman respectfully submits that the trial in this cause be continued, that Mr. Nixon's

deposition be authorized, and that Defendant Ehrlichman be severed from his co-defendants.

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Wm. Snow Frates

By _____
Andrew C. Hall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Continuance and Severance was furnished by mail this 27th day of September, 1974 to the following:

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SEALED

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Persons with Dean

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Discuss with R. Kleindienst

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(21) Confidential communications to the President in 1972 and 1973 concerning acts of administrators and other employees of the FBI in leaking or giving results of the investigation of the Watergate matter to unauthorized persons, including media reporters; instructions give to Defendant Ehrlichman to convey to Patrick Gray and John Dean concerning this situation; all relating to Overt Act 4 of Count I of the Indictment and the disposition of the contents of Howard Hunt's safe in June, 1972.

(22) Unrecorded conversations with Defendant Ehrlichman in which instructions were given for negotiation with Senators Ervin and Baker for the creation of agreed rules of procedure for the Senate

Select Committee and Defendant Ehrlichman's recommendations for full disclosure of all facts concerning the Watergate matter.

(23) Unrecorded conversations with Defendant Ehrlichman in which questions of privilege were discussed and Defendant Ehrlichman made recommendations for all White House personnel (except the President) to appear and testify fully before the Grand Jury without assertion of any privilege and without immunity from prosecution.

(24) Facts relating to the authenticity, custody and genuineness of a report rendered to him by Defendant Ehrlichman April 14, 1973 relating to the Watergate burglary and aftermath.

(25) The circumstances of two telephone calls made by Defendant Ehrlichman in his behalf and in his presence to Patrick Gray on April 15, 1973 from his office, the tape of which has not been produced, including the portion heard by Mr. Nixon and the res gestae reactive conversation (also apparent by unrecorded, or at least unproduced) concerning Mr. Gray's adminission that he destroyed evidence turned over to him by Mr. Dean.

(26) An unrecorded telephone conversation between Richard Nixon and Henry Peterson including instructions concerning the national security restrictions on activities of the Special Invesitgation Unit, which call was made in Defendant Ehrlichman's presence and reaffirmed standing instructions to him; related to Overt Act 45 of Count I of the Indictment.

(27) An unrecorded conversation April 29, 1973 at Camp David with Defendant Ehrlichman alone, in which Defendant Ehrlichman's attempts to uncover the Watergate matter were acknowledged, certain information known to Defendant Ehrlichman was disclosed which is exculpatory in nature, and permission was given for Defendant

Ehrlichman to retain the possession of certain Presidential papers for use in aiding the authorities' investigations.

(28) Unrecorded (or unproduced) conversations with Henry Peterson recounting statements to Peterson and other prosecutors by John Dean, either exculpatory or materially inconsistent.

(29) Defendant Ehrlichman's recommendations to him for disclosure and their proximate relationship to Mr. Nixon's assignment to John Dean of March 22 to go to Camp David and prepare a report of his knowledge of the facts.

(30) The purpose of Richard Nixon's instructions to Defendant Ehrlichman to solicit information from the attorney general March 27, 1973.

In addition to the foregoing, Mr. Nixon will testify relating to the facts and circumstances of the government's allegations in an exculpatory manner as to Mr. Ehrlichman.

From the foregoing, it is readily apparent that Mr. Nixon has exclusive knowledge of a great number of exculpatory facts which are the subject matter of this action and which cannot be duplicated through other evidence. The interests of justice compel that Mr. Ehrlichman be given the right to demonstrate to the jury the complete factual background which is now the basis of the charges against him. The recommended procedure of a severance, continuance and deposition is the only way in which Defendant Ehrlichman's fundamental constitutional rights can be protected.

While judicial continuances are generally considered discretionary with the Court, under the circumstances of this case, the failure to grant the instant motion so as to perpetuate Mr. Nixon's testimony and thereafter commence trial would amount to an abuse of that discretionary and would constitute a fundamental deprivation of Mr. Ehrlichman's constitutional right to due process of law and to adequately confront his accusers. The authorities discussed below establish defendant's right to the relief requested and based on the same, the motion should be granted.

In dealing with the absence of a witness vital to an action, two Courts have reversed trial courts in refusing to grant continuances because a party was ill and unable to give testimony in a case.

In Gaspar v. Kassm, 493 F. 2d 964 (3rd Cir. 1974) the Court reversed the trial court for failing to grant a continuance. The Court stated:

> An examination of the complaint, as we have indicated, shows that Kassm was charged with negligent driving and failure to observe the laws of Pennsylvania in respect to the operation of motor vehicles. These allegations were denied in Kassm's answer and as third party plaintiff he alleged negligence on the part of the third party defendant Smetzer, the other driver in the accident.
>
> We think Kassm's case was gravely prejudiced by the fact that he was not present. Particularly, Gaspar and his witnesses testified that the accident was caused by Kassm's negligence in allowing his car to cross the road and strike Smetzer's car at or near a narrow bridge. One of Gaspar's witnesses, Chasar, the Chief of Police of the Pennsylvania township where the accident occurred, testified over objection that Kassm made damaging oral admissions at the scene of the accident, and these statements were not convincingly rebuted by the deposition taken in the Bucks County arbitration proceedings which was read to the jury in the case at bar. The defense asserted by Kassm to these admissions is not clear nor is the ground of the deposition's admission. However, in the view we take of the case it is not necessary to decide these difficult evidentiary questions. As we have said, Kassm's entire defense on the issue of liability consisted of reading to the jury the deposition taken in the Bucks County proceedings and the persuasiveness of this evidence was obviously lessened by the apparent language difficulties and the fact that Kassm was questioned solely by opposing counsel.
>
> * * *
>
> Moreover, we can see no pressing necessity for haste albeit we are aware of the annoyance caused to a trial judge when his carefully arranged trial calendar is disarranged, but we cannot let this obscure the fact that we deem the grounds upon which the distinguished district judge acted were insufficient. We do not consider the motion for continuance to be deficient on its face. It is customary to grant a continuance on the ground of illness of a party. We conclude that Kassm's testimony was necessary for the defense of his case, that the granting of a continuance would not have unduly prejudiced the other parties, and that the continuance motion was not motivated by procrastination, bad planning or bad faith on the part of Kassm or his counsel. It is the law that where none of the foregoing appear, the

> denial of a continuance for illness is abuse of discretion. Cornwell v. Cornwell, 73 App. D. C. 233, 118 F. 2d 396 (1941); Harrah v. Morgenthau, 67 App. D. C. 119, 89 F. 2d 863 (D. C. Cir., 1937), and Davis v. Operation Amigo, Inc., 378 F. 2d 101 (10 Cir. 1967). Such is the case now before the Court. Cf. Lehman v. United States, 313 F. Supp. 249 (E. D. Pa. 1970).

In Harrah v. Morgenthau, 89 F. 2d 863 (D. C. Cir. 1937) the Court of Appeals set out the standards for a continuance. In that case the Court said:

> The record discloses nothing else on the subject than is outlined above. The high professional character and standing of counsel for Dunning satisfy us that the motion was made in good faith and, in the absence of a showing to the contrary or of some injury resulting to the other parties, we think the court below should have delayed the trial. In saying this we are, of course, not unmindful of the rule that a postponement or continuance is largely within the discretion of the trial court and unless it is shown to have been abused there is no sufficient ground for reversal. Fidelity & Deposit Co. v. L. Bucki & Son Lumber Co., 189 U. S. 135, 143, 23 S. Ct. 582, 47 L. Ed. 744. If there were anything in this record challenging the good faith of the motion for continuance, the professional ability or character or truthfulness of the physicians who made affidavit to the inability of Dunning to appear, or even if there were a showing that a continuance would have resulted in serious loss to the other parties, we should not now hesitate to sustain the action of the lower court; but here we are confronted with a case in which, as appears, the plaintiff was his only witness and was so seriously ill that his appearance in court would probably have resulted in his death. Insisting upon a trial in these circumstances must necessarily have resulted in prejudice to Dunning's rights. There may have been good reasons for the refusal to grant the continuance, but if there were it was the duty of counsel to have shown them by the record, for we can know only what the record contains.

Since Mr. Nixon is an unindicted co-conspirator, and since his testimony is as vital and as indispensible as that of any party, it would be reversable error to fail to grant a continuance. Fine distinctions between situations where a party is involved and where a material witness who is alleged to be a co-conspirator is involved should not interfere with steps necessary to assure that a defendant in a criminal case is able to obtain full and complete due process of law.

what if (HN) were a co-Δ?

Other courts have reversed where a material witness is ill and a motion to continue is denied.

In Dod v. Grimes, 123 Atl. 894 (R.I. 1924) the Court dealt with the question of a witness, absent due to illness, in the context of a continuance. The Court held:

> [1, 2] Before proceeding to trial counsel for the defendants moved for a continuance of the cases on the ground that a material witness, one William H. Tripp, was ill and unable to attend court, he having recently figured in an automobile accident, and was suffering from injuries resulting therefrom. The defendants produced the certificate of a doctor to the effect that he first saw Mr. Tripp on November 4, 1922. A comparison of dates shows that the doctor saw Mr. Tripp on the day following the accident and five days prior to the date set for the trial of the cases, the latter being November 9, 1922. This certificate sets forth the then present physical condition of Mr. Tripp which, in the opinion of the doctor, would not permit him to travel, and would demand that he be kept quiet.
>
> * * *
>
> In cases of this character, that is, claims against the estates of deceased persons, it seems to us that every reasonable latitude should be allowed in bringing before the court and jury all the circumstances and facts which would aid the latter in coming to a just and proper conclusion. In the cases which we are now considering it would seem to be particularly unfortunate if the defendant should be deprived of the benefit of the material testimony solely within the knowledge of Tripp, and which, if presented to the jury, might lead them to a different conclusion from that to which they arrived. The certificate of the physician, in terms, refers to the then present condition of the witness Tripp and his inability at that time to attend court, or depose. It can be reasonably deduced, however, from such a certificate, that the incapacity of the witness was temporary rather than permanent or likely to continue for a long period. The affidavit fully and explicitly states the facts to which the witness would testify. While it fails to give in precise words the grounds of such expectation, it may reasonably be inferred from it, taken as a whole, that such facts must have been obtained from the witness himself, and could not have originated in the mind of the affiant.

> There is no specific statement either in the certificate of the physician or in the affidavit as to the expectation of procuring the attendance of the witness at a future time, but there, again, the incapacity appearing to be temporary, any determination as to its duration could be as easily reached or estimated by the plaintiff as by the defendant. Although neither the certificate of the physician nor the affidavit are in perfect form, we think that they substantially comply with the rules governing such matters. At the hearing before us it was not claimed either in brief or in argument that the absent witness was in a condition to attend court or to give his deposition.
>
> We think the first exception of the defendant must be sustained. Having reached this conclusion, the other exceptions need not be considered.

In Wigley v. Buzzard, 124 S.W. 2d 898 (Ct. Civ. App. 1939) the Court held that if the absence of a material witness would be prejudicial, it would be error not to continue the trial. The Court stated:

> There is yet another reason why the case should be reversed.
>
> Appellants sought a continuance because of the absence of Mrs. Maggie Wigley. She was ill, feeble and unable to attend the trial. We consider her the most important witness in this case. We think the court and jury should see her and hear her testify. If she gives the appearance of one mentally capable of knowing the extent, purpose and consequence of her acts, the appellees have nothing to fear.
>
> The overruling of the motion for a continuance on account of the absence of Mrs. Maggie Wigley, was error.

Similarly, in Bernard's Fur Shop v. De Witt, 102 A. 2d 462 (Mun. Ct. App. O.C., 1954) the Court reversed a trial court's refusal to grant a continuance on the following reasoning:

> We think there was error. The Court was advised that appellant's chief officer who was to be its chief witness was unable to be present because of illness. This statement was supported by a doctor's certificate. Nothing in the record questions the truthfulness of the statement or certificate. Although continuances on the date set for trial are to be discouraged, nevertheless when a party or an important witness is unable to be present because of illness, the party ought not to be deprived of the opportunity of presenting his

> case. A continuance should have been granted until the witness was able to come to court or until her deposition could be taken. The offer of opposing counsel to stipulate as to the witness's testimony was not sufficient justification for the denial of the continuance. One issue in the case was the date of service of the notice to quit. Appellee's evidence was that the notice was served on the absent witness on June 29. Appellant's answer, verified by that witness, stated the notice was served on July 2. A mere stipulation as to the witness's testimony would hardly have had the same weight before a jury as the testimony of the witness herself.

While the granting of a motion for a continuance is discretionary, see Franklin v. South Carolina, 218 U.S. 161, 30 S.Ct. 640, 54 L. Ed. 980 (1910), the denial of a continuance where there is an ill and absent material witness, until a deposition under Rule 15, F.R.Cr.P. is taken, is error. See Natvig v. U.S. 236 F.2d 694 (D.C. 1956).

Rule 15, F.R.Cr.P. contemplates the propriety of a continuance for the taking of a deposition as requested. To obtain a deposition, a defendant must show:

(1) The prospective witness may be unable to testify; See U.S. v. Hagedorn, 253 F.Supp. 969 (S.D.N.Y. 1966)

(2) That the testimony is material; See U.S. v. Egorov, 34 F.R.D. 130 (E.D.N.Y. 1963), and

(3) The deposition is necessary to prevent a failure of justice. See 8 Moore's Federal Practice §15.03 [3].

Similarly, under 18 U.S.C. §3503, defendant Ehrlichman is also entitled to have the deposition of Mr. Nixon taken. See U.S. v. Singleton, 460 Fed. 1148 (2d. Cir. 1972). Mr. Ehrlichman has made the required showing and is now entitled to take Mr. Nixon's deposition to perpetuate that testimony.

CONCLUSION

Defendant, JOHN D. EHRLICHMAN, has made a clear and positive showing that the testimony of Richard M. Nixon is indispensable to his defense. Mr. Ehrlichman further demonstrated to this Court that he has been diligent in attempting to procure the testimony of Mr. Nixon. Further, Mr. Ehrlichman has demonstrated that at this time Mr. Nixon is ill and unable to testify at trial. Further, Mr. Ehrlichman has demonstrated to the Court that it would be unduly prejudicial to commence the trial without first having opportunity to perpetuate Mr. Nixon's testimony. The Federal Rules of Criminal Procedure clearly contemplate that a deposition be taken under the circumstances in the instant case. To require the trial to commence on October 1, 1974, as now set, would result in substantial prejudice and a violation of Defendant Ehrlichman's right to due process of law. Mr. Ehrlichman is willing to commence a deposition of Mr. Nixon as soon as his health permits and, upon the completion of that deposition, to go to trial in this cause in an orderly manner. If the trial is commenced on October 1, 1974, this vital and indispensable testimony may never be forthcoming. Certainly, under such circumstances, each and every required showing has been made. Further, since Defendant Ehrlichman is the only defendant in this cause who has sought to obtain the testimony of Mr. Nixon by way of subpoena, the granting of a continuance coupled with a severance would in no way prejudice the rights of the United States of America, nor that of any other defendant.

Based on the foregoing, Defendant Ehrlichman respectfully submits that the trial in this cause be continued, that Mr. Nixon's

deposition be authorized, and that Defendant Ehrlichman be severed from his co-defendants.

FRATES FLOYD PEARSON STEWART
PROENZA & RICHMAN, P. A.
Attorneys for Defendant Ehrlichman
Twelfth floor Concord Building
Miami, Florida 33130

Wm. Snow Frates

By Andrew C. Hall
Andrew C. Hall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Continuance and Severance was furnished by mail this 27th day of September, 1974 to the following:

Leon Jaworski, Special Prosecutor
Watergate Special Prosecution Force
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Washington, D. C. 20005

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Washington, D. C.

By Andrew C. Hall
Andrew C. Hall

~~Sealed~~

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 74-110
JOHN N. MITCHELL, et al.,	)	
Defendants	)	

DEFENDANT H.R. HALDEMAN'S MOTION FOR SUSPENDING OF TRIAL AND FOR CONTINUANCE

Defendant, H.R. Haldeman, hereby moves this Court for the entry of an order suspending and continuing the trial. As grounds for the same, defendant Haldeman submits that:

1. Defendant Haldeman is causing to be issued a subpoena requiring Richard M. Nixon to appear and to testify as a witness for the defense in this cause;

2. That Richard M. Nixon is an indispensable witness in this cause whose testimony will be highly exculpatory for the defense on the issues involved;

3. That Richard M. Nixon has probably represented to the Court that he is suffering the aggravation of a previous illness, thrombophlebitis, has been hospitalized and requires treatment and quiet in his home for an indefinite period;

4. That this condition was complicated by the lodging of a blood clot in Mr. Nixon's lung, thereby precluding travel to the District of Columbia at this time;

5. That the medical condition of Mr. Nixon is such as to require Mr. Nixon to convalesce in his home in San Clemente, California;

6. That defendant Haldeman is willing to exhaust such rights as are provided to perpetuate this testimony;

7. That it is manifestly unfair and a violation of due process of law to continue with the trial in this cause, and to

require this defendant to cross examine government witnesses without first being allowed to perpetuate this vital and indispensable testimony;

8. That to perpetuate such testimony in a proper manner Mr. Nixon must be deposed, and that such a deposition may not be commenced until Mr. Nixon's health improves substantially, and once that deposition is commenced it will take not less than two weeks to conclude; (see Natvig v. United States, 236 F.2d 694, 98 U.S. App. D.C. 399 (1956); cert. den. 352 U.S. 1014; Burton v. United States, 175 F.2d 960, rehearing den. 176 Fed. 865 (5th Cir. 1949) cert. den. 338 U.S. 909);

9. That it is manifestly unfair to sequester the jury in this cause and to require that jury idly to sit by for such a delay;

10. That while defendant Ehrlichman so far is the only defendant who has subpoenaed Mr. Nixon, defendant Haldeman also considers the testimony of Richard Nixon to be material and indispensable to his defense. Therefore, the trial must not go forward until Mr. Nixon's medical problems can either be favorably resolved or, in the alternative, his testimony can be perpetuated; and

11. Mr. Nixon is a material and indispensable witness in this case. Mr. Nixon has sole and personal knowledge of the following facts to which he can be expected to testify in the trial of this case:

(1) The operating procedure employed by Mr. Nixon and defendant Haldeman that encompassed full and complete contemporaneous disclosure by Haldeman to Mr. Nixon of all Haldeman's actions and activities of any substantive importance - and the complete lack of any such disclosure regarding any Watergate cover-up activities or knowledge by Haldeman, i.e. -

- the $350,000 and any use for the Watergate defendants
- Kalmbach activity re funds for Watergate defendants
- Dean's substantive involvement in the cover-up regarding perjury, money payments, clemency promises, etc.

(2) Any advance (of June 17) knowledge, known to Richard Nixon, of campaign intelligence plans involving illegal entries or wiretaps or of information gained from same.

(3) The nature, content and extent of his knowledge of the facts of the Watergate break-in and cover-up and which parts thereof were imparted by him to defendant Haldeman - with his knowledge as to Haldeman's degree of involvement or first-hand knowledge.

(4) The details of discussions with defendant Haldeman on the weekend of June 17, 1972 in Key Biscayne regarding the Watergate break-in, and the lack of any discussion regarding any need to institute a cover-up plan to obstruct the investigation.

(5) Any subsequent unrecorded discussions on the above subjects.

(6) Any knowledge or information received from any source or at any time regarding any plan or desire to cover up the identities of the persons involved in Watergate or any other illegal and improper activities, imparted to Haldeman, including any such plan, desire, or activity involving defendant Haldeman.

(7) Any knowledge regarding the destruction of defendant Haldeman's files - or any other White House files or records.

(8) Instructions to defendant Haldeman regarding the Nixon Estate plan given in June 1972, which required and were the purposes of meetings between defendant Haldeman and John Dean.

(9) A description of his discussions with defendant Haldeman concerning the John Mitchell resignation from the Chairmanship of the Committee to Reelect, and whether he discussed with Haldeman the possibility or desirability of removing Jeb Magruder from his Committee post.

(10) His (untaped) instructions to defendant Haldeman in June or July 1972 concerning (a) offers of clemency to those involved in the Watergate burglary, (b) the scope of the FBI investigation of that crime.

(11) Untaped conversations in late July and in August 1972 and at several subsequent occasions prior to March 1973 with defendant Haldeman alone in which defendant Haldeman proposed and advocated a full and complete disclosure of all known facts concerning Watergate both by the President (or someone on his behalf) and by the Committee to Reelect - and a full public disclosure by defendant Haldeman of all facts known to him.

(12) Any decisions which he, Richard Nixon, made with respect to those proposals.

(13) Untaped conversations in September, October, November and December 1972 in which defendant

Haldeman was instructed to prepare certain substantive work and perform substantive duties in November and December 1972, and January and February 1973, which conversation will establish the factual accuracy of the defense contention that during those months defendant Haldeman was engaged full time in governmental reorganizations, personnel matters, White House staff revisions, and intense national security matters.

(14) Any discussion between Mr. Nixon and defendant Haldeman in November 1972 regarding a tape recording of a telephone conversation between Howard Hunt and Charles Colson.

(15) The absence of any conversation or other communication between Richard Nixon and defendant Haldeman in January 1973 or at any other time prior to March 1973, concerning clemency for Howard Hunt or anyone else involved in the Watergate burglary or payments to defendants in the Watergate case, or the commission of perjury by witnesses in the case.

(16) Any conversations he may have had with Haldeman in January, February or March 1973 regarding employment for Jeb Magruder and Bart Porter, and any inclusion in such conversations of any reference to Magruder and Porter having committed perjury in the Watergate investigation or trial.

(17) Any unrecorded conversation among Richard Nixon, defendant Ehrlichman and defendant Haldeman, in which instructions were given which explain the

fact, purpose and scope of the Dean-Moore-Haldeman-Ehrlichman meeting at LaCosta in February 1973, referred to in Overt Act 35 of Count I of the Indictment.

(18) Unrecorded conversations on and after February 24, 1973, with defendant Ehrlichman and/or defendant Haldeman concerning the results of the LaCosta meetings, including instructions concerning John Dean's duties, and method of reporting to the President and the duties of defendant Haldeman relative to Watergate and its aftermath.

(19) The nature of Richard Nixon's activities and discussions regarding Watergate and cover-up in March and April 1973 - and his knowledge of defendant Haldeman's activities in that period and the reasons for same.

(20) Any instructions he may have given to defendant Haldeman regarding contacting Mitchell with respect to the Hunt threat on March 21 - and any understanding he may have had regarding Haldeman's expected actions on that subject.

(21) His understanding of "it would be wrong".

(22) Defendant Haldeman's recommendations to him for disclosure and their proximate relationship to Mr. Nixon's assignment to John Dean of March 22 to go to Camp David and prepare a report of his knowledge of the facts.

(23) The purpose of sending Dean to Camp David to write a report in late March 1973 - and what was going to be done with the report?

(24) Actions taken as a result of Dean's failure to deliver a report.

(25) The purpose and content of intensive and lengthy discussions with defendant Haldeman at Key Biscayne over the weekend of March 23, 1973.

(26) The reasons for instructing defendant Haldeman to listen to tapes of March 21 and September 15 - and the circumstances of the subsequent reports on their contents.

(27) Explanation of the many ambiguities, inconsistencies, and erroneous impressions conveyed by the tape recordings to be produced at trial by the Prosecutor.

(28) Unrecorded conversations with defendants Haldeman and Ehrlichman in which instructions were given Ehrlichman for negotiation with Senators Ervin and Baker for the creation of agreed rules of procedure for the Senate Select Committee and defendant Haldeman's recommendations for full disclosure of all facts concerning the Watergate matter, including Haldeman's own proposed public statement.

(29) A number of late March and early April 1973 unrecorded conversations regarding getting the full story on the public record, the means of doing so, the concern regarding the effects of the Ervin Committee, frustration in these efforts because of concern for defendants' rights, etc.

(30) A lengthy unrecorded conversation at San Clemente on or about April 6, 1973 in which Haldeman recommended he participate in a one-hour

television interview on CBS with Dan Rather for the purpose of telling publicly all he knew regarding Watergate and its aftermath - as a counter-move to the delays in Haldeman's appearance before the Senate Committee and the personal attacks on him by Senator Weicker.

(31) Discussions with Haldeman and Ehrlichman on the evening of April 15 regarding possible charges against them.

(32) Unrecorded (or unproduced) conversations with Henry Peterson recounting statements to Peterson and other prosecutors by John Dean, either exculpatory or materially inconsistent.

(33) Any instructions to defendant Haldeman regarding his Senate or Grand Jury testimony - specifically any instructions as to telling the truth at Senate hearings.

(34) In addition to the foregoing, Mr. Nixon will testify relating to the facts and circumstances of the government's allegations in an exculpatory manner as to Mr. Haldeman.

From the foregoing, it is readily apparent that Mr. Nixon has exclusive knowledge of a great number of exculpatory facts which are the subject matter of this action and which cannot be duplicated through other evidence. The interests of justice compel that Mr. Haldeman be given the right to demonstrate to the jury the complete factual background which is now the basis of the charges against him. The recommended procedure of a suspending of trial, a continuance and a deposition is the only

way in which defendant Haldeman's fundamental constitutional rights can be protected.

JOHN J. WILSON

FRANK H. STRICKLER

ROSS O'DONOGHUE

GEORGE A. FISHER

Attorneys for defendant Haldeman

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October 1973, copies of the foregoing Motion and attached Memorandum were delivered by hand to the following:

Leon Jaworski, Esq.
Special Prosecutor

William Hundley, Esq.
Attorney for defendant Mithcell

David Bress, Esq.
Attorney for defendant Mardian

Jacob A. Stein, Esq.
Attorney for defendant Parkinson

William S. Frates, Esq.
Attorney for defendant Ehrlichman

JOHN J. WILSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)
v.	) Criminal No. 74-110
JOHN N. MITCHELL, et al.,	)
Defendants	)

MEMORANDUM IN SUPPORT OF ANNEXED MOTION

While judicial continuances are generally considered discretionary with the Court, under the circumstances of this case, the failure to grant the instant motion so as to perpetuate Mr. Nixon's testimony and thereafter commence trial would amount to an abuse of that discretion and would constitute a fundamental deprivation of Mr. Haldeman's constitutional right to due process of law and adequately to confront his accusers. The authorities discussed below establish this defendant's right to the relief requested and based on the same, the motion should be granted.

Defendant Haldeman, in order to avoid repetition, hereby incorporates herein the law portion of Mr. Ehrlichman's motion, being pages 7 - 11 thereof.

For the foregoing reasons, the annexed Motion should be granted.

Respectfully submitted,

JOHN J. WILSON

FRANK H. STRICKLER

ROSS O'DONOGHUE

GEORGE A. FISHER

Attorneys for defendant Haldeman

~~Sealed~~ 1019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal No. 74-110
	)	
JOHN N. MITCHELL, et al.,	)	
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Defendants	)	

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1. Defendant Haldeman is causing to be issued a subpoena requiring Richard M. Nixon to appear and to testify as a witness for the defense in this cause;

2. That Richard M. Nixon is an indispensable witness in this cause whose testimony will be highly exculpatory for the defense on the issues involved;

3. That Richard M. Nixon has probably represented to the Court that he is suffering the aggravation of a previous illness, thrombophlebitis, has been hospitalized and requires treatment and quiet in his home for an indefinite period;

4. That this condition was complicated by the lodging of a blood clot in Mr. Nixon's lung, thereby precluding travel to the District of Columbia at this time;

5. That the medical condition of Mr. Nixon is such as to require Mr. Nixon to convalesce in his home in San Clemente, California;

6. That defendant Haldeman is willing to exhaust such rights as are provided to perpetuate this testimony;

7. That it is manifestly unfair and a violation of due process of law to continue with the trial in this cause, and to

require this defendant to cross examine government witnesses without first being allowed to perpetuate this vital and indispensable testimony;

8. That to perpetuate such testimony in a proper manner Mr. Nixon must be deposed, and that such a deposition may not be commenced until Mr. Nixon's health improves substantially, and once that deposition is commenced it will take not less than two weeks to conclude; (see Natvig v. United States, 236 F.2d 694, 98 U.S. App. D.C. 399 (1956); cert. den. 352 U.S. 1014; Burton v. United States, 175 F.2d 960, rehearing den. 176 Fed. 865 (5th Cir. 1949) cert. den. 338 U.S. 909);

9. That it is manifestly unfair to sequester the jury in this cause and to require that jury idly to sit by for such a delay;

10. That while defendant Ehrlichman so far is the only defendant who has subpoenaed Mr. Nixon, defendant Haldeman also considers the testimony of Richard Nixon to be material and indispensable to his defense. Therefore, the trial must not go forward until Mr. Nixon's medical problems can either be favorably resolved or, in the alternative, his testimony can be perpetuated; and

11. Mr. Nixon is a material and indispensable witness in this case. Mr. Nixon has sole and personal knowledge of the following facts to which he can be expected to testify in the trial of this case:

(1) The operating procedure employed by Mr. Nixon and defendant Haldeman that encompassed full and complete contemporaneous disclosure by Haldeman to Mr. Nixon of all Haldeman's actions and activities of any substantive importance - and the complete lack of any such disclosure regarding any Watergate cover-up activities or knowledge by Haldeman, i.e. -

- the $350,000 and any use for the Watergate defendants
- Kalmbach activity re funds for Watergate defendants
- Dean's substantive involvement in the cover-up regarding perjury, money payments, clemency promises, etc.

(2) Any advance (of June 17) knowledge, known to Richard Nixon, of campaign intelligence plans involving illegal entries or wiretaps or of information gained from same.

(3) The nature, content and extent of his knowledge of the facts of the Watergate break-in and cover-up and which parts thereof were imparted by him to defendant Haldeman - with his knowledge as to Haldeman's degree of involvement or first-hand knowledge.

(4) The details of discussions with defendant Haldeman on the weekend of June 17, 1972 in Key Biscayne regarding the Watergate break-in, and the lack of any discussion regarding any need to institute a cover-up plan to obstruct the investigation.

(5) Any subsequent unrecorded discussions on the above subjects.

(6) Any knowledge or information received from any source or at any time regarding any plan or desire to cover up the identities of the persons involved in Watergate or any other illegal and improper activities, imparted to Haldeman, including any such plan, desire, or activity involving defendant Haldeman.

(7) Any knowledge regarding the destruction of defendant Haldeman's files - or any other White House files or records.

(8) Instructions to defendant Haldeman regarding the Nixon Estate plan given in June 1972, which required and were the purposes of meetings between defendant Haldeman and John Dean.

(9) A description of his discussions with defendant Haldeman concerning the John Mitchell resignation from the Chairmanship of the Committee to Reelect, and whether he discussed with Haldeman the possibility or desirability of removing Jeb Magruder from his Committee post.

(10) His (untaped) instructions to defendant Haldeman in June or July 1972 concerning (a) offers of clemency to those involved in the Watergate burglary, (b) the scope of the FBI investigation of that crime.

(11) Untaped conversations in late July and in August 1972 and at several subsequent occasions prior to March 1973 with defendant Haldeman alone in which defendant Haldeman proposed and advocated a full and complete disclosure of all known facts concerning Watergate both by the President (or someone on his behalf) and by the Committee to Reelect - and a full public disclosure by defendant Haldeman of all facts known to him.

(12) Any decisions which he, Richard Nixon, made with respect to those proposals.

(13) Untaped conversations in September, October, November and December 1972 in which defendant

Haldeman was instructed to prepare certain substantive work and perform substantive duties in November and December 1972, and January and February 1973, which conversation will establish the factual accuracy of the defense contention that during those months defendant Haldeman was engaged full time in governmental reorganizations, personnel matters, White House staff revisions, and intense national security matters.

(14) Any discussion between Mr. Nixon and defendant Haldeman in November 1972 regarding a tape recording of a telephone conversation between Howard Hunt and Charles Colson.

(15) The absence of any conversation or other communication between Richard Nixon and defendant Haldeman in January 1973 or at any other time prior to March 1973, concerning clemency for Howard Hunt or anyone else involved in the Watergate burglary or payments to defendants in the Watergate case, or the commission of perjury by witnesses in the case.

(16) Any conversations he may have had with Haldeman in January, February or March 1973 regarding employment for Jeb Magruder and Bart Porter, and any inclusion in such conversations of any reference to Magruder and Porter having committed perjury in the Watergate investigation or trial.

(17) Any unrecorded conversation among Richard Nixon, defendant Ehrlichman and defendant Haldeman, in which instructions were given which explain the

fact, purpose and scope of the Dean-Moore-Haldeman-Ehrlichman meeting at LaCosta in February 1973, referred to in Overt Act 35 of Count I of the Indictment.

(18) Unrecorded conversations on and after February 24, 1973, with defendant Ehrlichman and/or defendant Haldeman concerning the results of the LaCosta meetings, including instructions concerning John Dean's duties, and method of reporting to the President and the duties of defendant Haldeman relative to Watergate and its aftermath.

(19) The nature of Richard Nixon's activities and discussions regarding Watergate and cover-up in March and April 1973 - and his knowledge of defendant Haldeman's activities in that period and the reasons for same.

(20) Any instructions he may have given to defendant Haldeman regarding contacting Mitchell with respect to the Hunt threat on March 21 - and any understanding he may have had regarding Haldeman's expected actions on that subject.

(21) His understanding of "it would be wrong".

(22) Defendant Haldeman's recommendations to him for disclosure and their proximate relationship to Mr. Nixon's assignment to John Dean of March 22 to go to Camp David and prepare a report of his knowledge of the facts.

(23) The purpose of sending Dean to Camp David to write a report in late March 1973 - and what was going to be done with the report?

(24) Actions taken as a result of Dean's failure to deliver a report.

(25) The purpose and content of intensive and lengthy discussions with defendant Haldeman at Key Biscayne over the weekend of March 23, 1973.

(26) The reasons for instructing defendant Haldeman to listen to tapes of March 21 and September 15 - and the circumstances of the subsequent reports on their contents.

(27) Explanation of the many ambiguities, inconsistencies, and erroneous impressions conveyed by the tape recordings to be produced at trial by the Prosecutor.

(28) Unrecorded conversations with defendants Haldeman and Ehrlichman in which instructions were given Ehrlichman for negotiation with Senators Ervin and Baker for the creation of agreed rules of procedure for the Senate Select Committee and defendant Haldeman's recommendations for full disclosure of all facts concerning the Watergate matter, including Haldeman's own proposed public statement.

(29) A number of late March and early April 1973 unrecorded conversations regarding getting the full story on the public record, the means of doing so, the concern regarding the effects of the Ervin Committee, frustration in these efforts because of concern for defendants' rights, etc.

(30) A lengthy unrecorded conversation at San Clemente on or about April 6, 1973 in which Haldeman recommended he participate in a one-hour

television interview on CBS with Dan Rather for the purpose of telling publicly all he knew regarding Watergate and its aftermath - as a counter-move to the delays in Haldeman's appearance before the Senate Committee and the personal attacks on him by Senator Weicker.

(31) Discussions with Haldeman and Ehrlichman on the evening of April 15 regarding possible charges against them.

(32) Unrecorded (or unproduced) conversations with Henry Peterson recounting statements to Peterson and other prosecutors by John Dean, either exculpatory or materially inconsistent.

(33) Any instructions to defendant Haldeman regarding his Senate or Grand Jury testimony - specifically any instructions as to telling the truth at Senate hearings.

(34) In addition to the foregoing, Mr. Nixon will testify relating to the facts and circumstances of the government's allegations in an exculpatory manner as to Mr. Haldeman.

From the foregoing, it is readily apparent that Mr. Nixon has exclusive knowledge of a great number of exculpatory facts which are the subject matter of this action and which cannot be duplicated through other evidence. The interests of justice compel that Mr. Haldeman be given the right to demonstrate to the jury the complete factual background which is now the basis of the charges against him. The recommended procedure of a suspending of trial, a continuance and a deposition is the only

way in which defendant Haldeman's fundamental constitutional rights can be protected.

JOHN J. WILSON

FRANK H. STRICKLER

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GEORGE A. FISHER

Attorneys for defendant Haldeman

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October 1973, copies of the foregoing Motion and attached Memorandum were delivered by hand to the following:

Leon Jaworski, Esq.
Special Prosecutor

William Hundley, Esq.
Attorney for defendant Mithcell

David Bress, Esq.
Attorney for defendant Mardian

Jacob A. Stein, Esq.
Attorney for defendant Parkinson

William S. Frates, Esq.
Attorney for defendant Ehrlichman

JOHN J. WILSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal No. 74-110
	)	
JOHN N. MITCHELL, et al.,	)	
Defendants	)	

MEMORANDUM IN SUPPORT OF ANNEXED MOTION

While judicial continuances are generally considered discretionary with the Court, under the circumstances of this case, the failure to grant the instant motion so as to perpetuate Mr. Nixon's testimony and thereafter commence trial would amount to an abuse of that discretion and would constitute a fundamental deprivation of Mr. Haldeman's constitutional right to due process of law and adequately to confront his accusers. The authorities discussed below establish this defendant's right to the relief requested and based on the same, the motion should be granted.

Defendant Haldeman, in order to avoid repetition, hereby incorporates herein the law portion of Mr. Ehrlichman's motion, being pages 7 - 11 thereof.

For the foregoing reasons, the annexed Motion should be granted.

Respectfully submitted,

JOHN J. WILSON

FRANK H. STRICKLER

ROSS O'DONOGHUE

GEORGE A. FISHER

Attorneys for defendant Haldeman