Appendix @ 9 I

DRAFT
LJ/flc
1/21/74

MEMORANDUM TO HENRY RUTH

I believed that the written exchange between us on the subject of dealing with the President in the light of the evidence adduced and to be adduced would be helpful because they afforded opportunities for a thorough consideration of the questions and issues that are presented. But I am beginning to wonder whether they are not wasted effort. Some of the comments in your last memorandum (January 14) almost preclude further discussion. In fact I deferred replying to it because some of the innuendoes don't do justice to calm and reasoned judgment.

I said before and I emphasize again that the mere conclusion that the President is not indictable or should not be named as an unindicted co-conspirator furnishes no basis for our pursuing still another course beset with restraints that should not be violated. I meant this: If it is not sound in law or policy to indict the President; if it is not sound in law or policy to name him as an unindicted co-conspirator -- it cannot become so simply because the efforts of the House to impeach are frustrated. Differently stated, if the House bogs down in impeachment because of lack of evidence that cannot be properly and legally released to it or because of its own failures, the unindictable President does not, perforce these shortcomings, become indictable.

It seems to me that your reasoning leads to the inevitable conclusion that whatever may be normally unsound in reaching the President becomes a laudable course to follow if he cannot be reached some other way. Although our mandate authorizes us to proceed against the President, it nowhere suggests that we are to do so regardless of fairness and just procedure. More specifically it does not authorize us to violate grand jury procedures, something I observed your memorandum avoids dealing with.

As I have indicated to you verbally, I think we have another course open to us that will not be violative of any of our obligations and responsibilities. I will be working on a possible presentation by the grand jury to Judge Sirica that will avoid the escape that concerns you.

I have carefully examined Phil's latest memo (January 16) and the attachments. His conclusion that the President is indictable is not strongly buttressed. What convinces me that this route should not be considered is the long and torturous legal battle that would follow over this question and, in the end ~~xxxxx~~ quite likely result in a negative holding. Therefore, it is my conclusion that those of us working with the grand jury should advise against any course other than referring the evidence at an appropriate time to be determined by the court to the House Committee.

Now let me address myself to the general tenor of your memorandum which reflects an attitude I discussed with you before - the subjective conviction that the President must be reached at all cost. It is also reflected in your references to St. Clair's letter. He stated nothing that you should not have expected in all fairness. Your intimations that there may have been agreements that you did not know about are especially insupportable because you have been kept informed of all discussions. Moreover you are aware of all of the references to grand jury proceedings in our letters to the White House in which we sought this information and I would have assumed that you would want to respect these assurances, expressed and implied, as much as I do.

What is of some concern to me are the discussions, plans and understandings had and reached between Staff members prior to any discussions with me. This results in convictions already formed and frankly, under such circumstances, the meeting would be of no help to me.

Perhaps I should not consider it entirely my task but inasmuch as I have undertaken responsibility, I feel I should be informed of the discussions I seem to be the object of. The stubborn fact remains that we must be alert not to give support to the White House charges that have been leveled against the staff. Perhaps it is too late to

get objective opinions from others so I will do the best I can in the making of decisions for which I -- and not the staff -- will be held responsible. It is a simple thing for you and others to discuss views and convictions you formed along the way because you do not have the ultimate responsibility.

I expect to consult a number of the members of the staff on some of the points on which decisions need to be made. I can accomplish much more by consulting these separately than having group gatherings that have not been particularly helpful. Needless to say the staff will continue to be kept informed of all matters of significance to the best of my ability.

The suggestions on page 2 of your memorandum, in the main, cannot possibly be followed because we still know nothing about the House Judiciary Committee's procedures.

If you or any member of the staff wishes to furnish any written comments, suggestions or recommendations to me on any of the matters mentioned by you, I shall be glad to receive them. I will then reach a decision on each of these as well as other matters in due course of time.