

April 27, 1992

MEMORANDUM FOR: VICE CHAIRMAN, SENATE SELECT COMMITTEE ON PRISONERS OF WAR AND MISSING IN ACTION

FROM: John F. McCreary

SUBJECT: Legal Misconduct and Possible Malpractice in the Select Committee

1. As a member of the Virginia State Bar, I am obliged by Disciplinary Rule DR-103(a) to report knowledge of misconduct by an attorney "to a tribunal or other authority empowered to investigate or act upon such violations." Under Rule IV, Paragraph 13, of the Rules for the Integration of the Virginia State Bar, this obligation follows me as a member of the Bar, regardless of the location of my employment, for as long as I remain a member of the Virginia State Bar. Therefore, I am obliged, as a matter of law and under pain of discipline by the Virginia State Bar, to report to you my knowledge of misconduct and possible prima facie malpractice by attorneys on the Select Committee in ordering the destruction of Staff documents containing Staff intelligence findings on 9 April 1992 and in statements in meetings on 15 and 16 April to justify the destruction.

2. The attached Memoranda For the Record, one by myself and another by Mr. Jon D. Holstine, describe the relevant facts, which I summarize herein:

a. On 9 April 1992, the Chairman of the Senate Select Committee, Senator John Kerry of Massachusetts, in response to a protest by other members of the Select Committee, told the Select Committee members that "all copies" would be destroyed. This statement was made in the presence of the undersigned and of the Staff Chief Counsel who offered no protest.

b. Later on 9 April 1992, the Staff Director, Frances Zwenig, an attorney, repeated and insured the execution of Senator Kerry's order for the destruction of the Staff intelligence briefing text. I personally delivered to Mr. Barry Valentine, the Security Manager for SRE-78, the original printed version of the intelligence briefing text. I also verified that the original was destroyed by shredding in the Office of Senate Security on 10 April 1992, along with 14 copies.

c. On 15 April 1992, the Staff Chief Counsel, J. William Codinha of Massachusetts, when advised by members of the Staff about their concerns over the possible criminal consequences of destroying documents, minimized the significance of the act of destruction; ridiculed the Staff members for expressing their concerns;

prior to beginning the briefing. Objections to the text by the Designees prompted the Staff Director to order all persons present to leave their copies of the briefing text in Room SRB-78. Subsequent events indicated that two copies had been removed without authorization.

b. On 9 April 1992, at the beginning of the meeting of the Select Committee and prior to the scheduled investigators' briefing, Senator McCain produced a copy of the intelligence briefing text, with whose contents he strongly disagreed. He charged that the briefing text had already been leaked to a POW/MIA activist, but was reassured by the Chairman that such was not the case. He replied that he was certain it would be leaked. Whereupon, the Chairman assured Senator McCain that there would be no leaks because all copies would be gathered and destroyed, and he gave orders to that effect. No senior staff member or attorney present cautioned against a possible violation of Title 18, U.S.C., Section 2071, or of Senate or Select Committee rules.

c. Following the briefing on 9 April, the Staff Director, Ms. Frances Zwenig, restated to the intelligence investigators the order to destroy the intelligence briefing text and took measures to ensure execution of the destruction order. (See paragraph 3 of the attachment.) During one telephone conversation with the undersigned, she stated that she was "acting under orders."

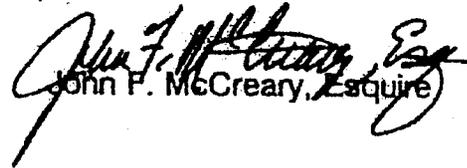
d. The undersigned also was instructed to delete all computer files, which Mr. Barry Valentine witnessed on 9 April.

e. In a meeting on 15 April 1992, the Staff's Chief Counsel, J. William Codinha, was advised by intelligence investigators of their concerns about the possibility that they had committed a crime by participating in the destruction of the briefing text. Mr. Codinha minimized the significance of the documents and of their destruction. He admonished the investigators for "making a mountain out of a molehill."

f. When investigators repeated their concern that the order to destroy the documents might lead to criminal charges, Mr. Codinha replied "Who's the injured party." He was told, "The 2,494 families of the unaccounted for US Servicemen, among others." Mr. Codinha then said, "Who's gonna tell them. It's classified." At that point the meeting erupted. The undersigned stated that the measure of merit was the law and what's right, not avoidance of getting caught. To which Mr. Codinha made no reply. At no time during the meeting did Mr. Codinha give any indication that any copies of the intelligence briefing text existed.

g. Investigators, thereupon, repeatedly requested actions by the Committee to clear them of any wrongdoing, such as provision of legal counsel. Mr. Codinha admitted that he was not familiar with the law and promised to look into it.

4. I believe that the foregoing facts establish a pattern of grave legal misconduct – possibly including orders to commit a crime, followed by acts to justify and then to cover-up that crime. Even absent criminal liability, the behavioral pattern of the attorneys involved plays fast and loose with the Canons of Legal Ethics and establishes that one or more of the attorneys on the Select Committee are unfit to practice law. I am obliged to recommend that this report be filed with the appropriate disciplinary authorities of the State Bars in which these attorneys are members.


John F. McCreary, Esquire