The original documents are located in Box 32, folder "Nixon Pardon - General (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

[ca. 9/3/74]

PERSONAL MEMORANDUM OF COUNSEL TO PRESIDENT

1. Scope of Presidential Power of Pardon

   a) Applies to offenses against the United States.

   b) May be exercised before indictment.

   c) May be conditional or unconditional.

   d) Can apply only to offenses committed up to time pardon is granted.

   e) Historically has involved some degree of specificity such as acts of rebellion against the United States or wrongful dealings with Custom officers but not references to particular criminal statutes.

   f) Depends on acceptance by the alleged offender.

2. Steps Which Could be Taken Before Pardon is Issued

   a) Obtain the particulars of acts which could arguably be grounds for charging that RN has committed offenses against the United States:

      i) From the Special Prosecutor;

      ii) From the House Judiciary Committee's report on impeachment;

      iii) From RN himself (this step need not involve admissions of guilt for offenses but it might still negate any views that he was unfairly dealt with by the House Judiciary Committee and by those who urged his resignation).

   b) Obtain opinions as to how soon, if ever, it may be possible for RN to receive a fair trial for offenses with which he could be charged and, if he were later to be tried on such charges, as to the period over which the trial or trials would likely extend:

      i) From the Special Prosecutor;

      ii) From Counsel to the President.

   c) Obtain evaluations of how prolonged law enforcement investigations and judicial dispositions of possible charges against RN could affect:

      i) The general welfare of the country;

      ii) RN's personal health and chances for physical or mental survival.

(NOTE: Steps (b) and (c) could provide the basis for distinguishing the case of RN from those of other offenders whose offenses are related to acts in which RN may also have been involved.)

d) Obtain from RN a binding agreement on documentary, recorded, or tangible materials related to his Presidency which are in the possession of the United States, so as to:

i) Allow retention by the United States in a suitable Federal facility or facilities under jurisdiction of General Services Administration or other agency of the United States Government for a maximum period of five years or until all orders and subpoenas which involve any of the materials and which arise out of then pending Court actions have been satisfied or otherwise disposed of.

ii) Require RN or his designees, to be responsible for complying with any order, subpoena, or warrant which involves the materials, subject to any defenses or objections he may effectively raise against the order, subpoena, or warrant and subject to review by United States employees of any materials proposed to be furnished or discovered pursuant to the order, subpoena, or warrant for purpose of claiming to the appropriate Court that the materials, or parts thereof, are privileged for national security reasons or otherwise; provided that in default of timely compliance by RN with an order, subpoena, or warrant the United States shall be entitled to whatever access and rights of inspection and temporary withdrawal as may be necessary for compliance on its part as custodian of the materials and to exercise of whatever rights or responsibilities employees of the United States may have as result of discovery of evidence incidental to their attempting or accomplishing compliance with such order, subpoena, or warrant.

iii) Allow RN or his designees unlimited access and rights of inspection and copying as he may desire for any purpose under appropriate safeguards to preserve the completeness and integrity of the materials while they remain in the custody of the United States.

iv) Permit an ongoing program of archival sorting, arranging, and cataloging or indexing at all times while the materials are in the custody of the United States under strict standards of confidentiality.

v) Specify that the agreement is without prejudice to whatever non-conflicting rights or interests RN may have or claim as owner of the materials, including the right to give the materials to the United States for a Presidential library, and that the agreement is subject to modification or rescission by any final Court order of a Court having jurisdiction over the subject matter.

e) Obtain from RN an agreement that, unless the United States elects to continue or undertake the legal defense of any action pending or brought against him in his capacity as President or individually based upon acts or occurrences during his incumbency or arising out of the present or future status of documentary, recorded, or tangible materials related to his Presidency, the United States is under no obligation to do so and may in any action represent the present Federal government interests only and not those which may involve personal liability or penalties on RN's part or that of any member of his family.

(NOTE: Unless steps (d) and (e) are accomplished before the granting of a pardon -- or are prescribed as a condition of the pardon -- the present administration will continue to be enmeshed in burdensome aftermaths of acts and deeds which were not of its own doing but which could otherwise have an adverse fallout on this administration.)

3. The Timing of a Pardon

a) If done on Presidential initiative before any criminal proceeding against RN is begun or proposed by the Special Prosecutor, the public may view a pardon as contrary to answers given at the August 28th Presidential Press Conference -- though the answers to the first two relevant questions can be interpreted as declining only to make a public commitment on the subject until an initiative against RN is taken or until even later after a court decision, and the answer to a third question involved only what prosecutorial duties the Special Prosecutor had no matter what individuals were involved.

b) If done before a jury is chosen and sequestered in the upcoming trial of United States vs. Mitchell, et al., a pardon of RN could affect the outcome of such trial, although even a sequestered jury is likely to learn of such a significant event, and it is possible defendants' counsel will seek not to have the jury sequestered in hopes that news will develop to help their cause. An opposite effect may result when a pardoned RN as a witness for defendant Ehrlichman would no longer have the right to refrain from answering questions on Fifth Amendment grounds.

c) If not done early, the pressures and counter-pressures on the issue of RN's treatment could drastically increase and the Special Prosecutor would be under increasing pressure to act even though he might otherwise wish to stop short of prosecuting RN. Also, the lack of solutions to problems noted in items (d) and (e) of paragraph 2 could produce adverse consequences for this administration.

d) If a pardon were to await the outcome of a trial of RN, the atmosphere may not be favorable at all to a pardon or, in the event of an acquittal, the resentment of people who have deplored his resignation and the steps leading to it would really be fired up.

4. The Terms of Pardon

a) To achieve a degree of specificity, the nature of the offenses would have to be described, and the description could be developed on the basis of particulars obtained from one or more of the three sources mentioned in paragraph 2(a). (Not only would this achieve a needed specificity, but it would avoid clemency for possible offenses on which evidence has not yet been discovered and which, if known, would be of such a serious nature as to justify no clemency.)

b) If steps (d) and (e) did not precede the granting of a pardon, fulfillment of such steps could be stated as a condition to the effectiveness of the pardon or as binding upon RN with his acceptance of the pardon.

[cca. 9/3/74]

THE WHITE HOUSE

WASHINGTON

MEMORANDUM ON PRESIDENTIAL POWER TO GRANT REPRIEVES AND PARDONS

The President's power to grant reprieves and pardons is provided in Article II, Section 2, Clause 1 of the Constitution. It extends to all offenses against the United States except in cases of impeachment.

The pardon power is exclusively that of the chief executive, Bozel v. United States, 139 F.2d 153 (1943) (cert. denied, 321 U.S. 800) and is not subject to legislative control. Yelvington v. Presidential Pardon and Parole Attorneys, 211 F.2d 642, 94 U.S. App. D.C. 2.

The pardon power may be exercised at any time after the commission of an offense, either before legal proceedings are taken, or during their pendancy, or after conviction and judgment. Ex Parte Garland, 71 U.S. 366 (1867), Brown v. Walker, 161 U.S. (1896). The power extends to cases of criminal contempt. Ex Parte Grossman, 267 U.S. 87 (1925).

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WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : Leon Jaworski DATE: Sept. 3, 1974

FROM : Henry Ruth

SUBJECT: Mr. Nixon

The following matters are still under investigation in this Office and may prove to have some direct connection to activities in which Mr. Nixon is personally involved:

1. Tax deductions relating to the gift of pre-Presidential papers.

2. The Colson obstruction of justice plea in the Ellsberg matter.

3. The transfer of the national security wire tap records from the FBI to the White House.

4. The initiating of wire tapping of John Sears.

5. Misuse of IRS information.

6. Misuse of IRS through attempted initiation of audits as to "enemies."

7. The dairy industry pledge and its relationship to the price support change.

8. Filing of a challenge to the Washington Post ownership of two Florida television stations.

9. False and evasive testimony at the Kleindienst confirmation hearings as to White House participation in Department of Justice decisions about ITT.

10. The handling of campaign contributions by Mr. Rebozo for the personal benefit of Mr. Nixon.

None of these matters at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon, but I thought you ought to know which of the pending investigations were even remotely connected to Mr. Nixon. Of course, the Watergate cover-up is the subject of a separate memorandum.

cc: Mr. Lacovara

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

September 4, 1974

Philip W. Buchen, Esq.
Counsel to the President
The White House
Washington, D. C.

Dear Mr. Buchen:

You have inquired as to my opinion regarding the length of delay that would follow, in the event of an indictment of former President Richard M. Nixon, before a trial could reasonably be had by a fair and impartial jury as guaranteed by the Constitution.

The factual situation regarding a trial of Richard M. Nixon within constitutional bounds, is unprecedented. It is especially unique in view of the recent House Judiciary Committee inquiry on impeachment, resulting in a unanimous adverse finding to Richard M. Nixon on the Article involving obstruction of justice. The massive publicity given the hearings and the findings that ensued, the reversal of judgment of a number of the members of the Republican Party following release of the June 23 tape recording, and their statements carried nationwide, and finally, the resignation of Richard M. Nixon, require a delay, before selection of a jury is begun, of a period from nine months to a year, and perhaps even longer. This judgment is predicated on a review of the decisions of United States Courts involving prejudicial pre-trial publicity. The Government's decision to pursue impeachment proceedings and the tremendous volume of television, radio and newspaper

coverage given thereto, are factors emphasized by the Courts in weighing the time a trial can be had. The complexities involved in the process of selecting a jury and the time it will take to complete the process, I find difficult to estimate at this time.

The situation involving Richard M. Nixon is readily distinguishable from the facts involved in the case of United States v. Mitchell, et al, set for trial on September 30th. The defendants in the Mitchell case were indicted by a grand jury operating in secret session. They will be called to trial, unlike Richard M. Nixon, if indicted, without any previous adverse finding by an investigatory body holding public hearings on its conclusions. It is precisely the condemnation of Richard M. Nixon already made in the impeachment process, that would make it unfair to the defendants in the case of United States v. Mitchell, et al, for Richard M. Nixon now to be joined as a co-conspirator, should it be concluded that an indictment of him was proper.

The United States v. Mitchell, et al, trial will within itself generate new publicity, some undoubtedly prejudicial to Richard M. Nixon. I bear this in mind when I estimate the earliest time of trial of Richard M. Nixon under his constitutional guarantees, in the event of indictment, to be as indicated above.

If further information is desired, please advise me.

Sincerely,

LEON JAWORSKI
Special Prosecutor

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

September 4, 1974

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LEON JAWORSKI
Special Prosecutor

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

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cc: Mr. Lacovara

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

September 10, 1974

Philip W. Buchen, Esq.
Counsel to the President
The White House
Washington, D. C.

Dear Mr. Buchen:

Although the copy of the memorandum from Henry Ruth to me, dated September 3, 1974, "Subject: Mr. Nixon", was sent you in confidence, if you are willing to assume the responsibility for its release, I shall raise no objection to your doing so.

In the event of its release, we would expect of course that it be made available in its entirety, including the first and last paragraphs of the memorandum. I emphasize this because news media references have been made to a list without pointing to other significant portions of the memorandum. The reported statement of Senator Scott this morning also falls in this category.

Sincerely yours,

LEON JAWORSKI
Special Prosecutor

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

September 9, 1974

PRESS RELEASE

For Immediate Release

A spokesman for Special Prosecutor Leon Jaworski today issued the following statement:

"In view of the approaching trial of U.S. v Mitchell et al and the order of the court regarding pre-trial publicity entered on March 1, the Special Prosecutor will not discuss the subject of the pardon granted former President Nixon. There will be no further comment on that subject from this office."

United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

September 4, 1974

Philip W. Buchen, Esq.
Counsel to the President
The White House
Washington, D. C.

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cc: Mr. Lacovara

United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

September 4, 1974

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The White House
Washington, D. C.

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Sincerely,

LEON JAWORSKI
Special Prosecutor

COMMITTEE TO DEFEND THE PRESIDENCY
Suite 202, Union Building
Charleston, W. Va. 25301

(304) 345-1555
TWX 710-930-1828

JOHN EDWARD DAVIS, JR.
CHAIRMAN

August 29, 1974

Mr. Philip W. Buchen, Esquire
Counsel to the President
White House
Washington, D. C. 20500

Dear Mr. Buchen;

Due to a common concern for the Presidency, I feel that I am within the mark and sound discretion in transmitting a copy of a letter legal-memorandum to President Nixon, appertaining to the law and logic of criminal and/or civil sanctions against an incumbent or former President for offenses allegedly committed during his tenure of office.

With highest professional and personal regards, I remain,

Respectfully,

JOHN E. DAVIS, JR.

COMMITTEE TO DEFEND THE PRESIDENCY
Suite 202, Union Building
Charleston, W. Va. 25301

(304) 345-1555
TWX 710-930-1828

JOHN EDWARD DAVIS, JR.
CHAIRMAN

August 28, 1974

The Honorable Richard M. Nixon
The Western White House
San Clemente, California 92672

Dear Chief:

An exhaustive study of the Constitution and the works of the Founding Fathers commands the inescapable conclusion that you, ever faithful to your oath of office to execute not merely the laws, but "the office of President of the United States, and...preserve, protect, and defend the Constitution...," were and are right in your defense of the constitutional confidentiality of the Presidential papers and tapes; were right in your defense of the executive branch against encroachment from both the judicial and legislative branches. Finally, you were right in defending the legislative branch against encroachment from the judiciary.

The law and logic of our Constitution is absolutely clear that the only and exclusive procedure by which a present or former President can have criminal sanctions enforced against him for alleged offenses committed during his tenure of office is only after a mandatory conviction by the Senate of a House Impeachment.

"Separation of Powers," again and as always, the basis of the present concern, is, of course, the most fundamental institutional feature of our government.

"The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny...the preservation of liberty requires that the three great departments of power would be separate..." Federalist, 47 Madison.

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And as Madison immediately acknowledges, and which is our paramount concern here:

"The oracle, who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the mint at least of displaying and recommending it most effectually to the attention of mankind." Federalist, 41 supra.

Roscoe Pound, in "The Limits of Effective Legal Action," 3A.B.A.J/55,65-70, 27 Int. T. Eth. 150 (1917), makes clear that.

"Law secures interest by punishment, by prevention, by specific redress, and by substitutional redress; and the wit of man has discovered no further possibilities of judicial action."

Article I of the Constitution is a grant and establishment of Legislature jurisdiction: Section 2 (supra) grants "the sole" and exclusive power and jurisdiction to seek sanctions against the President in the House of Representatives. Thus, under the Constitutional grant of judicial power and jurisdiction, Article III, the Judicial Branch of government is, in this instance, expressly deprived of jurisdiction over both procedural and substantive Presidential sanctions, is vested solely and exclusively in, the "House of Representatives." In the words of the "oracle of the Founding Fathers (Madison, The Federalist, Number 47, Montesquieu:

"That part of the legislative power cannot try cases, much less can it try this particular case, (Chief Executive or President) where it (House of Representatives) represents the party aggrieved, which is the people. It can only, therefore, impeach." (See Appendix A, infra; Montesquieu, The Spirit of Laws, Book XI, Section 6, infra, (Emphasis and parenthetical language supplied.)

At this juncture, of course, two rules of law obtain, the most obvious being: (1) only the House, and not Special Prosecutor, would have standing to seek judicial action before the constitutional Tribunal and its sanction: Frothingham v Mellon (1923). 262 US 447. 67L Ed 1078, 43S Ct 597; and (2) the Supreme Court will not review judgments from lower Courts, if, as in this instance case, they are not "binding" i.e. upon the executive, infra:

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Sections II and III of Article I having expressly and exclusively pre-empted from both the Executive Branch under Article II, i.e., the special persecution and the Judicial Branch, Article III, i.e., the courts, primary and original power and jurisdiction over prosecutorial and juridical action and sanctions against the President, the same is vested "solely" and exclusively in the Legislative, Article I, i.e., the House, Section II, and the Senate, Section III.

Section III, Article I, further provides for the sole and exclusive, procedural and substantive sanctions to be imposed upon a President, and the necessary priority and order hereof: First, removal from office after conviction by the Senate acting as judge and jury; second, disqualification from ever holding any office of honor, trust, or profit under the United States; third, after and only after conviction "by Senate", indictment, trial, judgment and punishment, according to law. This last provision resolves the question of double jeopardy.

Thus, all remedies or sanctions requested or available in this case, are expressly provided for under Article I, and, thus, the exclusive "judicial power" as to the President is pre-empt from the Judiciary Branch and expressly vested in the Legislative Branch (Article I instead of Article III). Again, Montesguieu, ibid, Book XI, Section 6: "The judiciary power ought not to be united with any part of the legislative... (except)...the great (the President, and)...a subject entrusted with the administration of public affairs (the President, and they may be)... guilty of crimes which the ordinary magistrates (the Courts or Judicial Branch) either could not or would not punish." (Emphasis and parenthetical language supplied).

Article II (Executive) Section 2 granting the President power to grant reprieves and pardons "except in cases of impeachment" would, indeed, be unmeaningful under any other reading of the Constitution, except as above. Since the President's power to grant reprieves and pardons is plentary, "except in cases of impeachment", there is no relief or sanction that the Courts of Law, including the Supreme

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Court, could impose on the President that he could not pre-emptively invoke his executive clemency for and on behalf of his own personal interest.

Moreover, since the power of the President to pardon an offense, in the language of the Supreme Court, "may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." (Emphasis supplied) Ex parte Garland (1867, US) 4 Wall 333, 380, 18 L ed 366, 370, 371.

Thus, it is perfectly clear that President Nixon, at any applicable time furing his term of office could have pardoned himself once he elected to resign and not proceed with the exclusive Constitutional procedure of bringing sanctions against present or former Presidents for offenses allegedly occurring while he was in office. This, or course is ridiculous, since it only irrefutably shows the inexorable logic behind the theory and Constitutional interpretation here advanced. This pardoning power of the President extends not only to felonies and misdemeanors, but also to the remission of fines, penalties, and forfeitures. United States v. Thomasson (1869 DC Ind) 4 Biss 336, f Cas No. 16, 479; and compare Osborn v. United States (1876) 91 US 474 23 L Ed 388, Humbert, The Pardoning Power of the President. (Washington, 1941) pp 36-42, Corwin, The President, Office and Powers (4th rev ed New York, 1957) 160, 412

In this regard, in passing, were President Ford, in considering the best interest of the people, to grant a pardon, necessary or not, and if both the present and former President thought it prudent, since a Presidential pardon removes the person's incapacity to testify in federal courts, Boyd v. United States (1892) 142 US 450, 35 L Ed 1077, 12 S Ct 292, this might well be construed by them to be a precedent necessary to your testimony. For although a present or former President is not above the Law, so also is he not beneath the Law.

Blackstone considered squarely this broad question of "The limits of effective legal action" and "The availability of sanctions" I Commentaries, (1765), Introd. Sec. 2, p. 56,

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CHAIRMAN

where he observed and stated that: "Though a prudent bestowing of rewards is sometimes of exquisite use...yet we find that those civil laws, which enforce or enjoin our duty...do constantly come armed with a penalty denounced against transgressors..." (See slao John Dickinson," "Legislation and the Effectiveness of Law", 37 Rep. Pa. Bar Ass'n 337, 346-55 (1931); McGeorge Bundy, "A Lay View of Due Process", Government Under Law; Herbert Brownell, Jr., Opinion of Attorney General, July 13, 1955 (validity of certain provisions of H. R. 6042, 84th Congress, first session. "section 638")

Section 4 of Article II using the manadtory and exclusive "shall" as to the sole and exclusive sanctions (always excepting the basic non-judicial political "adjusication" of the "Polls" or a Presidential resignation in the national or other interest), imposed and/or imposable against the President clearly: (1) confirms and is consistent with the theory set out hereinabove and, (2) make clear the only time any authority can effect or impose sanctions for actions or inactions by President is restricted to certain "high Crimes and Misdemeanors."

Thus, Section 2 of Article III (the Judicial Branch) clearly and affirmatively pre-empts and pre-determines the "judiciary power" from vesting initially in the Judicial Branch of Government as to an acting of former Chief Executive or President. This is evident by the inclusion in the Constitutional grant under Article III to "...all cases affecting...public Ministers...", explicitly omitting and pre-empting therefrom the Chief Executive or President. Again, Montesguieu, supra, states: (the other two branches of government) ought not to have a power of arraigning the person, nor, of course, the conduct, of him who is entrusted with the executive power. His person (and effects, i.e., the Presidential Papers or tapes) should be sacred...the moment he is accused or tried, there is an end of Liberty." (Emphasis and parenthetical language supplied.)

Again, Montesgueiu, the "father" of the doctrine of Separation of Powers and Checks and Balances, by the clearest

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and most emphatic of language, provides, and our Constitution incorporates thereinto, this basic principle of "Checks and Balances" (which is integral to an understanding and pragmatic exemplification of the doctrine of "Separation of Powers") that an incumbentor former Chief Executive or President, his person and his effects, is "sacred" and is not a person who "may be examined and punished" (supra). I repeat again, and again: "His person is sacred, because it is necessary for the good of the state to prevent the legislative body from rendering themselves arbitrary, the moment he is accused or tried there is an end of liberty."

Of course, the classic statement of "Separation of Powers" as it is here vitalized by "Checks and Balances," is the 1881 Supreme Court case of Kilbourn v Thompson. 103 US 168, 26 L Ed 377, 387; and the rational is absolutely applicable and controlling here. The Court then and there ruled that one Branch of Government (the legislative) had exceeded its authority in attempting to investigate into the reasons why a particular concern was in bankruptcy on the basis that the subject-matter of such an inquiry was: "in its nature clearly judicial and therefore, one in respect to which no valid legislation could be enacted... The House of Representatives not only exceeded the limits of its own authority, but assumed a power which could be only properly execised by another branch of the government..." Thus, as beforehand seen, in regard to the person and effects of the President, "the sole" and exclusive branch of the government that has authority is the Legislative, and specifically, (1) the House prior to Impeachment; (2) the Senate, after Impeachment and prior to Conviction; (3) the Courts after and only after a conviction by the Senate of a House Impeachment. Finally, the Supreme Court, in 1929, in Barenblatt v United States, 360 US 109, 3 L Ed 2d 1115, 1120, 1121, 79 S Ct 1085, reh den 361 US 854, 4 L Ed 2d 93, 80 S Ct 40, held that the power of one branch of government in investigation or otherwise, is costitutionally circumscribed and as to matters of "sole" or exclusive jurisdiction another branch "cannot inquire into matters that are exclusively the conern of the Judiciary. Neither can it supply the Executive in what exclusively belongs to the Executive."

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It follows that since the House, who has the "sole" power to initiate sanction against a President, did not further act on the Judiciary Committee's report, the sole and exclusive constitutional procedure for sanctions against Presidents is terminated and expired.

Perhaps the clearest insight and exemplification of the principles advanced ther is found in a sound understanding of the Kilbourn v. Thompson case (supra) and State ex rel. Moore v. Blake, (1932). 225 Ala 124, 142 So 418. where it expressly provides that a person subject to impeachment by the Congress, as the House Judiciary was concerned, is entitled to due process of law. Indeed, at the time of the Supreme impeachment the Senate voted that the privilege against self incrimination is available to a person being impeached, and the House voted the same way at the time of the Seward Impeachment. Simpson, A Treatise on federal Impeachments (Phila, 1916) 27.

Thus in this case we have evidence, i.e. the tapes, which the Supreme Court ruled must be given to Judge Sirica and, subject to his scrutiny, to the Special Prosecutor. If the Special Prosecutor could attempt to use this evidence against you, there would be clear violation of due process. Again, the only way for this evidence to, by any reach of the imagination, bu used against you, would be if the impeachment process had been continued until after Senate conviction. The Constitution specifically waines what amounts to double jeopardy and due process as to a Chief Executive only if there is the magnitude of a guilt determination by the Seante.

The Supreme Court has indicated that neither it nor the other federal "constitutional" or "Article Three" Courts are to be engaged in "legislative" activities. For instance, in 1874, the Court refused to order a tax to be levied to pay off a judgment on municipal bonds. Said the Court: "This power...is exercised...by the power of legislative authority only. It is a power that has not been extended to the Judiciary." Rees v. Watertown (1874, US 19 Wall 107, 22 L Ed, 72, 7S. Honolulu Rapid Transit & Land Co. v.

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Hawaii (1908), 211 US 282, S3 L Ed 186, 188, 189 29S Ct 22. McChord v. Louisville & N. R. Co. (1902) 183 US 483, 46 L Ed 289,295, 225 Ct 165.

Of course, the Special Prosecutor, upon having the above indicated brought clearly to his attention, could very properly cite the name for the reason and logic for his not attempting sanctions against a former President before an "Article Three" Court if there has not been a Senate Conviction in an "Article One" Court.

Chief, it's as simple as this: "they can't have their cake and eat it too!"

And so in conclusion, we can readily realize the great challenge before us in regard to these vital Constitutional questions. For as the late, great patriot, Henry Luce proclaimed in another hour of National trial:

"This is the day of wrath. It is also the day of hope... For this hour America was made. Uniquely among the nations, America was created out of the hopes of mankind and dedicated to the fulfillment of those hopes."

Judge Sirica's energetic and forthright "judicial presence" in the midst of these great constitutional issues is itself, a confession of a certain mystical rebellion and atavism in the contemporary mind. It will remain a beautiful monument to the passing moment, full of psycological truth and of a kind of restrained sentimental piety. But of its charm and competence, the Constitution has no need for its own strength and mastery. We found it existing before, and we shall leave it to exist forever after us. All we can do is to make use of it now for the sovereign people's service. We must look to the power of the Constitution itself, and not to our meager resources, as if we were a learned jurist at sea who, to make himself useful, should blow into the sail.

I must, again, and for a final time, entreat and respectfully request that you indulge the rush and blemishes of this writer for the basic truths of shich he claims no authorship, but merely transmits and is meager usher. As, perhaps one of our Nation's wisest of sages has kindly admonished: "He who does not remember the past is condemned to repeat it."

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He who writes this letter and begs to transmit these truths is not of your party, but is of your faith and commitment both as to Constitution and Country. So judge, therefore, not of one unimportant countryman from the hills of Appalachia, but judge only of the Constitution itself. If it be false or imperfect, seek to turn all men from it; but if it be, as you, my President, believes it to be, the greatest document for the dignity and duration of democratic society and the human community since the very Gospels themselves, then believe in it, follow it, lead others to follow it, and be of good cheer.

With profound respect - love and respect - I remain,

Respectfully,

President Richard M. Nixon

LAW OFFICES
OF
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NEW YORK, N.Y. 10020
212 246-8380
CABLE ADDRESS-FRANCRISTY

FRANCIS T. CHRISTY
JOHN H. FREY
ARTHUR H. CHRISTY
ROBERT S. APPEL

August 27, 1974

Honorable Nelson A. Rockefeller
Seal Harbor, Maine 04675

Dear Nelson:

Your nomination as Vice-President delighted me as an old friend and associate. However, I must say, in frankness, that my delight was dampened considerably when you told the press that you favored clemency for Nixon. To my mind, any clemency for him would be the greatest travesty on justice of all time.

Such clemency would be an affront to the millions of Americans who obey the law, pay their taxes, respect the Constitution, believe in equal justice for all, and who know that if they, as ordinary citizens, had obstructed justice, abused a trust and diddled their income taxes, they would long since have been languishing in jail.

It would be even more of an affront to the poor souls who conspired with him and who are now paying, and will pay, for his sins as well as their own.

You seem to have adopted the view of Senator Scott that Nixon has been hanged and that he should not be drawn and quartered. There are several fallacies in this view. First, he was not hanged, - he hung himself. Second, his co-conspirators have been drawn and quartered, - why should he escape? Third, he has shown no remorse and no sensitivity to moral and ethical principles. Fourth, unlike his co-conspirators he has gained financially and, despite his criminal and immoral conduct in a position of the greatest trust, he will receive from the people he deceived, through their taxes, a very generous pension and perquisites for the rest of his life.

The only reason for clemency would seem to be to gain some political advantage for the Republican party, although I fail to see any such advantage. I think politics should keep its hands off the judicial process, which is what Nixon did not do.

You will remember that many people excused the conduct of Nixon and his group as "politic's as usual". If you and other politicians suggest clemency and if clemency should be granted, these cynics will say "We told you so".

Would you and Senator Scott want to stand up before the American people and explain just why, and how you think justice would be served by granting any kind of clemency to Nixon?

I wish you could be persuaded to make your statement to the press "inoperative". Although such practice has now been discredited, I think it would be better for you and the people who are placing their faith in you than permitting your statement to stand on the record.

Sincerely,

Francis (mep)

FTC/mep

cc: Philip W. Buchen, Esq.
Senator Hugh Scott
Leon Jaworski, Esq.

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Presidential Clemency

Ford Says He Will Decide Nixon Case After Legal Process Runs Its Course

By CLIFTON DANIEL
Special to The New York Times

WASHINGTON, Aug. 28—Leon Jaworski, the Watergate special prosecutor, got the word tody from the President of the United States. The word was: Let justice take its course in case of Richard M. Nixon — up to a point. That point will apparently be when — and if —

News Analysis

ton said they assumed that Mr. Miller would have some proposals to make to the prosecutor on behalf of Mr. Nixon, but not just yet, because it was only Monday that Mr. Miller was retained.

A precedent in everybody's mind was the case of Vice President Spiro T. Agnew, who

[ca. 9/3/74]

PERSONAL MEMORANDUM OF COUNSEL TO PRESIDENT

1. Scope of Presidential Power of Pardon

   a) Applies to offenses against the United States.

   b) May be exercised before indictment.

   c) May be conditional or unconditional.

   d) Can apply only to offenses committed up to time pardon is granted.

   e) Historically has involved some degree of specificity such as acts of rebellion against the United States or wrongful dealings with Custom officers but not references to particular criminal statutes.

   f) Depends on acceptance by the alleged offender.

2. Steps Which Could be Taken Before Pardon is Issued

   a) Obtain the particulars of acts which could arguably be grounds for charging that RN has committed offenses against the United States:

      i) From the Special Prosecutor;

      ii) From the House Judiciary Committee's report on impeachment;

      iii) From RN himself (this step need not involve admissions of guilt for offenses but it might still negate any views that he was unfairly dealt with by the House Judiciary Committee and by those who urged his resignation).

   b) Obtain opinions as to how soon, if ever, it may be possible for RN to receive a fair trial for offenses with which he could be charged and, if he were later to be tried on such charges, as to the period over which the trial or trials would likely extend:

      i) From the Special Prosecutor;

      ii) From Counsel to the President.

   c) Obtain evaluations of how prolonged law enforcement investigations and judicial dispositions of possible charges against RN could affect:

      i) The general welfare of the country; (Larry O'Brien Scott, Mansfield, Rhodes + Albert) Fortas

      ii) RN's personal health and chances for physical or mental survival.

(NOTE: Steps (b) and (c) could provide the basis for distinguishing the case of RN from those of other offenders whose offenses are related to acts in which RN may also have been involved.)

d) Obtain from RN a binding agreement on documentary, recorded, or tangible materials related to his Presidency which are in the possession of the United States, so as to:

How about Nixon's dead file?

i) Allow retention by the United States in a suitable Federal facility or facilities under jurisdiction of General Services Administration or other agency of the United States Government for a maximum period of five years or until all orders and subpoenas which involve any of the materials and which arise out of then pending Court actions have been satisfied or otherwise disposed of.

ii) Require RN or his designees, to be responsible for complying with any order, subpoena, or warrant which involves the materials, subject to any defenses or objections he may effectively raise against the order, subpoena, or warrant and subject to review by United States employees of any materials proposed to be furnished or discovered pursuant to the order, subpoena, or warrant for purpose of claiming to the appropriate Court that the materials, or parts thereof, are privileged for national security reasons or otherwise; provided that in default of timely compliance by RN with an order, subpoena, or warrant the United States shall be entitled to whatever access and rights of inspection and temporary withdrawal as may be necessary for compliance on its part as custodian of the materials and to exercise of whatever rights or responsibilities employees of the United States may have as result of discovery of evidence incidental to their attempting or accomplishing compliance with such order, subpoena, or warrant.

Congressional & GAO access

iii) Allow RN or his designees unlimited access and rights of inspection and copying as he may desire for any purpose under appropriate safeguards to preserve the completeness and integrity of the materials while they remain in the custody of the United States.

iv) Permit an ongoing program of archival sorting, arranging, and cataloging or indexing at all times while the materials are in the custody of the United States under strict standards of confidentiality.

v) Specify that the agreement is without prejudice to whatever non-conflicting rights or interests RN may have or claim as owner of the materials, including the right to give the materials to the United States for a Presidential library, and that the agreement is subject to modification or rescission by any final Court order of a Court having jurisdiction over the subject matter.

e) Obtain from RN an agreement that, unless the United States elects to continue or undertake the legal defense of any action pending or brought against him in his capacity as President or individually based upon acts or occurrences during his incumbency or arising out of the present or future status of documentary, recorded, or tangible materials related to his Presidency, the United States is under no obligation to do so and may in any action represent the present Federal government interests only and not those which may involve personal liability or penalties on RN's part or that of any member of his family.

(NOTE: Unless steps (d) and (e) are accomplished before the granting of a pardon -- or are prescribed as a condition of the pardon -- the present administration will continue to be enmeshed in burdensome aftermaths of acts and deeds which were not of its own doing but which could otherwise have an adverse fallout on this administration.)

3. The Timing of a Pardon

a) If done on Presidential initiative before any criminal proceeding against RN is begun or proposed by the Special Prosecutor, the public may view a pardon as contrary to answers given at the August 28th Presidential Press Conference -- though the answers to the first two relevant questions can be interpreted as declining only to make a public commitment on the subject until an initiative against RN is taken or until even later after a court decision, and the answer to a third question involved only what prosecutorial duties the Special Prosecutor had no matter what individuals were involved.

b) If done before a jury is chosen and sequestered in the upcoming trial of United States vs. Mitchell, et al., a pardon of RN could affect the outcome of such trial, although even a sequestered jury is likely to learn of such a significant event, and it is possible defendants' counsel will seek not to have the jury sequestered in hopes that news will develop to help their cause. An opposite effect may result when a pardoned RN as a witness for defendant Ehrlichman would no longer have the right to refrain from answering questions on Fifth Amendment grounds.

Evidence ?

c) If not done early, the pressures and counter-pressures on the issue of RN's treatment could drastically increase and the Special Prosecutor would be under increasing pressure to act even though he might otherwise wish to stop short of prosecuting RN. Also, the lack of solutions to problems noted in items (d) and (e) of paragraph 2 could produce adverse consequences for this administration.

d) If a pardon were to await the outcome of a trial of RN, the atmosphere may not be favorable at all to a pardon or, in the event of an acquittal, the resentment of people who have deplored his resignation and the steps leading to it would really be fired up.

4. The Terms of Pardon

a) To achieve a degree of specificity, the nature of the offenses would have to be described, and the description could be developed on the basis of particulars obtained from one or more of the three sources mentioned in paragraph 2(a). (Not only would this achieve a needed specificity, but it would avoid clemency for possible offenses on which evidence has not yet been discovered and which, if known, would be of such a serious nature as to justify no clemency.)

b) If steps (d) and (e) did not precede the granting of a pardon, fulfillment of such steps could be stated as a condition to the effectiveness of the pardon or as binding upon RN with his acceptance of the pardon.

[ca. 9/3/74]

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WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

September 9, 1974

PRESS RELEASE

For Immediate Release

A spokesman for Special Prosecutor Leon Jaworski today issued the following statement:

"In view of the approaching trial of U.S. v Mitchell et al and the order of the court regarding pre-trial publicity entered on March 1, the Special Prosecutor will not discuss the subject of the pardon granted former President Nixon. There will be no further comment on that subject from this office."

THE ATTACHED DOCUMENT HAS BEEN TRANSFERRED TO
THE VALUABLE DOCUMENTS FILE.

Lisa Tobin
Ford Library
August 16, 1988

THE WHITE HOUSE

WASHINGTON

August 28, 1974

MEMORANDUM FOR: PHILIP BUCHEN

FROM: LEONARD GARMENT

I have a difficult but urgent matter to raise with the President, and I don't know how else to do it but quickly and directly through you.

In all of his Presidency, President Ford will probably face no more difficult decision than what to do about President Nixon. I know there is a feeling that with time the problem may resolve itself, that for the moment a restatement of the call for compassion is sufficient, that action can be delayed at least until it is seen whether some consensus arrangement can be worked out with the Special Prosecutor and the Leadership in the Congress. I disagree. I doubt very much that there can be an "arrangement." A Special Prosecutor must prosecute; and Jaworski's staff, the media and Sam Dash will not let him forget that. My belief is that unless the President himself takes action by announcing a pardon today, he will very likely lose control of the situation. Other factors will begin to operate. The national mood of conciliation will diminish; pressures for prosecution from different sources will accumulate; the political costs of intervention will become, or in any event seem, prohibitive; and the whole miserable tragedy will be played out to God knows what ugly and wounding conclusion.

It is an illusion to think the President can count on anyone--the courts, Congress or Jaworski--to share with him the burden of solving this problem. The problem is uniquely one for Presidential decision and Presidential action--taken and announced by him alone. Truman's insight about the Presidency that President Ford selected and cited is right to the point: "The buck stops here." For President Ford to act on his own now would be strong and admirable, and would be so perceived once

the first reaction from the media passed. There would be a national sigh of relief. Quite apart from the millions who were supporters of Richard Nixon and are deeply depressed by what has already happened, there are many anti-Nixon voices--Osborne, Sevareid, Geyelin--who feel enough is enough. But, again, unless the President acts, the inexorable logic of the law rather than its sensible administration will take over.

Even from a narrow political standpoint, the weight of the argument seems to me to be strongly on the side of prompt action by the President. To have the disposition of Richard Nixon a live issue during the upcoming months of efforts to extract some unity on economic issues and during the Fall elections could have the most harmful consequences for the President, his Administration and his party. Because he has both the Constitutional and the moral authority to act on behalf of the former President, any failure to exercise that authority would be--and perceived to be as--fully as much a deliberate action as the exercise of it.

The country is struggling to get on its feet. Public feeling toward Richard Nixon is extremely confused. There is a drift toward prosecution stimulated by a variety of sources, but it has not yet crystallized. At this point most of the country does not want Richard Nixon hounded, perhaps literally, to death. Once the institutional machinery starts rolling, however, and the press fastens on Nixon as a criminal defendant, Presidential action will be immensely more difficult to justify and therefore, perhaps, impossible to take.

The country trusts President Ford and will follow him on this matter at this time.

A draft of a statement that the President could use at the opening of his press conference is attached.

Attachment

I have a brief statement with regard to former President Nixon which will anticipate some of your questions.

The issue of whether to proceed against the former President is more than a strictly legal one. It turns on considerations that are essentially political, in the broadest and best sense of that term--that is, considerations of the broader public interest, not merely of the mechanical application of laws written for other purposes and other circumstances. Therefore, I believe it is a decision that should not be imposed by default on the Special Prosecutor alone. Because this is a case that uniquely involves the national interest, and because it uniquely involves the Presidency itself, and because the Constitution gives the President the authority to decide, it is one that the President must decide. As Harry Truman used to say, the buck stops here.

Oliver Wendell Holmes once wrote that the life of the law is not logic, but experience. What this means is that the letter of the law is often best tempered by common sense, and the exercise of the law by restraint.

I meant deeply, in my heart, what I said when I took the oath of office: "May our former President, who brought peace to millions, find it for himself." I believe that justice should be tempered with mercy. Richard Nixon has already paid what, for a man in his position, was the supreme penalty--and a penalty that only a President can pay. I will not be a party to his further harassment or to the degradation of this

office that would result from his being forced to defend himself in a criminal trial.

Because he has paid this high penalty, and because, realistically speaking, there is no way that he could be given a fair trial by an unbiased jury, and because of the national interest uniquely involved in the question of prosecuting a former President, I believe his case can be separated from those of the other Watergate defendants. Those cases can and should proceed.

Therefore, I have today instructed my counsel to institute the necessary procedures for granting to President Nixon a full pardon for any acts committed while he was President. This will relieve the Special Prosecutor of the necessity of making what is essentially a political, not a legal, decision. It will enable us to bind up the nation's wounds, rather than opening them wider in a proceeding that would further divide and embitter the nation. It will let us get on with the business of the future.

In the final analysis, the judgment on Richard Nixon that matters will be the judgment of history. So let us leave that judgment to history.

FOR IMMEDIATE RELEASE AUGUST 5, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

I have today instructed my attorneys to make available to the House Judiciary Committee, and I am making public, the transcripts of three conversations with H.R. Haldeman on June 23, 1972. I have also turned over the tapes of these conversations to Judge Sirica, as part of the process of my compliance with the Supreme Court ruling.

On April 29, in announcing my decision to make public the original set of White House transcripts, I stated that "as far as what the President personally knew and did with regard to Watergate and the cover-up is concerned, these materials -- together with those already made available -- will tell it all."

Shortly after that, in May, I made a preliminary review of some of the 64 taped conversations subpoenaed by the Special Prosecutor.

Among the conversations I listened to at that time were two of those of June 23. Although I recognized that these presented potential problems, I did not inform my staff or my Counsel of it, or those arguing my case, nor did I amend my submission to the Judiciary Committee in order to include and reflect it. At the time, I did not realize the extent of the implications which these conversations might now appear to have. As a result, those arguing my case, as well as those passing judgment on the case, did so with information that was incomplete and in some respects erroneous. This was a serious act of omission for which I take full responsibility and which I deeply regret.

Since the Supreme Court's decision twelve days ago, I have ordered my Counsel to analyze the 64 tapes, and I have listened to a number of them myself. This process has made it clear that portions of the tapes of these June 23 conversations are at variance with certain of my previous statements. Therefore, I have ordered the transcripts made available immediately to the Judiciary Committee so that they can be reflected in the Committee's report, and included in the record to be considered by the House and Senate.

In a formal written statement on May 22 of last year, I said that shortly after the Watergate break-in I became concerned about the possibility that the FBI investigation might lead to the exposure either of unrelated covert activities of the CIA, or of sensitive national security matters that the so-called "plumbers" unit at the White House had been working on, because of the CIA and plumbers connections of some of those involved. I said that I therefore gave instructions that the FBI should be alerted to coordinate with the CIA, and to ensure that the investigation not expose these sensitive national security matters.

That statement was based on my recollection at the time -- some eleven months later -- plus documentary materials and relevant public testimony of those involved.

MORE

The June 23 tapes clearly show, however, that at the time I gave those instructions I also discussed the political aspects of the situation, and that I was aware of the advantages this course of action would have with respect to limiting possible public exposure of involvement by persons connected with the re-election committee.

My review of the additional tapes has, so far, shown no other major inconsistencies with what I have previously submitted. While I have no way at this stage of being certain that there will not be others, I have no reason to believe that there will be. In any case, the tapes in their entirety are now in the process of being furnished to Judge Sirica. He has begun what may be a rather lengthy process of reviewing the tapes, passing on specific claims of executive privilege on portions of them, and forwarding to the Special Prosecutor those tapes or those portions that are relevant to the Watergate investigation.

It is highly unlikely that this review will be completed in time for the House debate. It appears at this stage, however, that a House vote of impeachment is, as a practical matter, virtually a foregone conclusion, and that the issue will therefore go to trial in the Senate. In order to ensure that no other significant relevant materials are withheld, I shall voluntarily furnish to the Senate everything from these tapes that Judge Sirica rules should go to the Special Prosecutor.

I recognize that this additional material I am now furnishing may further damage my case, especially because attention will be drawn separately to it rather than to the evidence in its entirety. In considering its implications, therefore, I urge that two points be borne in mind.

The first of these points is to remember what actually happened as a result of the instructions I gave on June 23. Acting Director Gray of the FBI did coordinate with Director Helms and Deputy Director Walters of the CIA. The CIA did undertake an extensive check to see whether any of its covert activities would be compromised by a full FBI investigation of Watergate. Deputy Director Walters then reported back to Mr. Gray that they would not be compromised. On July 6, when I called Mr. Gray, and when he expressed concern about improper attempts to limit his investigation, as the record shows, I told him to press ahead vigorously with his investigation -- which he did.

The second point I would urge is that the evidence be looked at in its entirety, and the events be looked at in perspective. Whatever mistakes I made in the handling of Watergate, the basic truth remains that when all the facts were brought to my attention I insisted on a full investigation and prosecution of those guilty. I am firmly convinced that the record, in its entirety, does not justify the extreme step of impeachment and removal of a President. I trust that as the Constitutional process goes forward, this perspective will prevail.

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STATEMENT BY VICE PRESIDENT GERALD R. FORD

OFFICE OF THE VICE PRESIDENT

WASHINGTON, D.C.

FOR IMMEDIATE RELEASE
Monday, August 5, 1974

CONTACT:
Paul Miltich 456-2364

I have not listened to the tapes nor have I read the transcripts of the President's conversations with Mr. Haldeman. Without knowing what was said and the context of it my comment would serve no useful purpose and I shall have none.

Indeed, I have come to the conclusion that the public interest is no longer served by repetition of my previously expressed belief that on the basis of all the evidence known to me and to the American people the President is not guilty of an impeachable offense under the Constitutional definition of "treason, bribery or other high crimes and misdemeanors." Inasmuch as additional evidence is about to be forthcoming from the President, which he says may be damaging, I intend to respectfully decline to discuss impeachment matters in public or in response to questions until the facts are more fully available.

The whole truth should be the objective of the trial before the Senate. Under the Constitution the Vice President is relieved of his role as Presiding Officer of the Senate when it sits to try a President on impeachment charges. The wisdom of this provision is obvious, for the Vice President regardless of his personal feelings is a party of interest as the Constitutional successor if a President is removed from office. Since President Andrew Johnson was himself a Vice President who succeeded to the Presidency upon the death of

Abraham Lincoln, and no provision then existed for filling a vacancy in the Vice Presidency, there are no precedents to guide me except my own common sense and my conscience. Both tell me to let my widely known views on the impeachment issue stand until I have reason to change them and to refuse further comment at this time.

There is another compelling reason for my decision. When I was nominated by the President to be Vice President ten months ago, I promised the Congress that confirmed me that I would do my very best to be a calm communicator and ready conciliator between the Executive and Legislative branches of our Federal government. I have done so. But in the impeachment process the President and the Congress are now in an adversary relationship which as deeply divides the legislators as it does the people they represent.

There are many urgent matters on America's agenda in which I hope to continue to serve this great country as a communicator and conciliator. The business of government must go on and the genuine needs of the people must be served. I believe I can make a better contribution to this end by not involving myself daily in the impeachment debate, in which I have no Constitutional role.

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