Memorandum to the

Special Prosecutor

on behalf of

Richard M. Nixon

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This memorandum is submitted on behalf of Richard M. Nixon to bring to the attention of the Special Prosecutor facts and supporting legal authority which, we submit, warrant a decision not to seek indictment of the former President. We wish to emphasize that this memorandum focuses specifically on issues of law rather than policy. In so limiting this presentation we do not wish to imply that all other considerations are irrelevant or inappropriate. Indeed, we believe it is highly desirable and proper for the Special Prosecutor to weigh in his judgment the possible impact of such an indictment on the domestic spirit and on

international relations, as well as the more traditional policy considerations entrusted to prosecutorial discretion. */ However, the purpose of this memorandum is solely to demonstrate that one -- and probably the most crucial -- legal prerequisite to indicting and prosecuting Mr. Nixon does not exist: the ability of this government to assure him a fair trial in accordance with the demands of the Due Process Clause of the Fifth Amendment and the right to trial by an impartial jury guaranteed by the Sixth Amendment.

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*/ Such intangible but none-the-less critical factors as domestic and international relations certainly fall within the ambit of the prosecutor's discretion as expressed in the Standards Relating to The Prosecution Function and The Defense Function, ABA Project on Standards for Criminal Justice, March 1971, where it is stated that

> ". . . The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. ABA Standards § 3.9(b).

A decision to forego prosecution because of overriding concerns of the national interest is in keeping with similar prosecutorial decisions to forego prosecution rather than disclose confidential national security or law-enforcement information required as evidence. United States v. Andolchek, 142 F.2d 503 (2d Cir. 1944); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); Christoffel v. United States, 200 F.2d 734 (D.C. Cir. 1952).

## I. The Events and Publicity Surrounding Watergate have Destroyed the Possibility of a Trial Consistent with Due Process Requirements.

Recent events have completely and irrevocably eliminated, with respect to Richard M. Nixon, the necessary premise of our system of criminal justice -- that, in the words of Justice Holmes, ". . . the conclusions to be reached in a case will be induced only by evidence and argument in open court, not by any outside influence, whether of private talk or public print." Patterson v. Colorado, 205 U.S. 454, 462 (1907). As reiterated by the Court in Turner v. Louisiana, 379 U.S. 466, 472 (1965):

> "The requirement that a jury's verdict 'must be based upon the evidence developed at trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."

Never before in the history of this country have a person's activities relating to possible criminal violations been subjected to such massive public scrutiny, analysis and debate. The events of the past two years and the media coverage they received need not be detailed here, for we are sure the Special Prosecutor is fully aware of the nature of the media exposure generated. The simple fact is that the

national debate and two-year fixation of the media on Watergate has left indelible impressions on the citizenry, so pervasive that the government can no longer assure Mr. Nixon that any indictment sworn against him will produce "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion [and] excitement . . ." Chambers v. Florida, 309 U.S. 227, 236-37, (1940).

Of all the events prejudicial to Mr. Nixon's right to a fair trial, the most damaging have been the impeachment proceedings of the House Judiciary Committee. In those proceedings neither the definition of the "offense," the standard of proof, the rules of evidence, nor the nature of the fact-finding body, were compatible with our system of criminal justice. Yet the entire country witnessed the proceedings, with their all-pervasive, multi-media coverage and commentary. And all who watched were repeatedly made aware that a committee of their elected Representatives, all lawyers, had determined upon solemn reflection to render an overwhelming verdict against the President, a verdict on charges time and again emphasized as constituting "high crimes and misdemeanors" for which criminal indictments could be justified.

All of this standing alone would have caused even those most critical of Mr. Nixon to doubt his chances of subsequently receiving a trial free from preconceived judgments of guilt. But the devastating culmination of the proceedings eliminated whatever room for doubt might still have remained as the entire country viewed those among their own Representatives who had been the most avid and vociferous defenders of the President (and who had insisted on the most exacting standards of proof) publicly abandon his defense and join those who would impeach him for "high crimes and misdemeanors."

None of this is to say, or even to imply, that the impeachment inquiry was improper, in either its inception or its conduct. The point here is that the impeachment process having taken place in the manner in which it did, the conditions necessary for a fair determination of the criminal responsibility of its subject under our principles of law no longer exist, and cannot be restored.

Even though the unique televised congressional proceedings looking to the possible impeachment of a President leave us without close precedents to guide our judgments con-

cerning their impact on subsequent criminal prosecutions, one court has grappled with the issue on a much more limited scale and concluded that any subsequent trial must at minimum await the tempering of prejudice created by the media coverage of such events.

In Delaney v. United States, 199 F.2d 107 (1st Cir. 1952), a District Collector of Internal Revenue was indicted for receiving bribes. Prior to the trial a subcommittee of the House of Representatives conducted public hearings into his conduct and related matters. The hearings generated massive publicity, particularly in the Boston area, including motion picture films and sound recordings, all of which "afforc the public a preview of the prosecution's case against Delaney without, however, the safeguards that would attend a criminal trial." 199 F.2d at 110. Moreover, the publicized testimony "ranged far beyond matters relevant to the pending indictments. 199 F.2d at 110. Delaney was tried ten weeks after the close of these hearings and was convicted by a jury. The Court of Appeals reversed, holding that Delaney had been denied his Sixth Amendment right to an impartial jury by being forced to "stand trial while the damaging effect of all that hostile publicity may reasonably be thought not to have been erased from the public mind." Id. 114.

The Court of Appeals did not suggest that the hearings were themselves improper. Indeed, the court emphatically stated that ". . . [i]t was for the Committee to decide whether considerations of public interest demanded at that time a full-dress public investigation . . ." Id. 114 (emphasis added). But the court continued,

> "If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed."

The principle expounded by the court in Delaney is applicable here. Faced with allegations that the Watergate events involved actions by the President, the House of Representatives determined that not only was an impeachment inquiry required, but that the inquiry must be open to the public so that the charges and evidence in support thereof could be viewed and analyzed by the American people. We need not fault Congress in that decision. Perhaps -- in the interest of the country -- there was no other choice. But having pursued a

course purposely designed to permit the widest dissemination of and exposure to the issues and evidence involved, the government must now abide by that decision which produced the very environment which forecloses a fair trial for the subject of their inquiry.

The foregoing view is not at all incompatible with the Constitution, which permits the trial of a President following impeachment -- and therefore, some might argue, condones his trial after his leaving office. Nothing in the Constitution withholds from a former President the same individual rights afforded others. Therefore, if developments in means of communication have reached a level at which their use by Congress in the course of impeachment proceedings forever taints the public's mind, then the choice must be to forego their use or forego indictment following impeachment. Here, the choice has been made.

Further demonstration of the wholly unique nature of this matter appears in the public discussion of a pardon for the former President -- which discussion adds to the atmosphere in which a trial consistent with due process is impossible

Since the resignation of Mr. Nixon, the news media has been filled with commentary and debate on the issue of whether the former President should be pardoned if charged with offenses relating to Watergate. As with nearly every other controversial topic arising from the Watergate events, the media has sought out the opinions of both public officials and private citizens, even conducting public opinion polls on the question. A recurring theme expressed by many has been that Mr. Nixon has suffered enough and should not be subjected to further punishment, certainly not imprisonment.

Without regard to the merits of that view, the fact that there exists a public sentiment in favor of pardoning the former President in itself prejudices the possibility of Mr. Nixon's receiving a fair trial. Despite the most fervent disclaimers, any juror who is aware of the general public's disposition will undoubtedly be influenced in his judgment, thinking that it is highly probable that a vote of guilty will not result in Mr. Nixon's imprisonment. Indeed, the impact of the public debate on this issue will undoubtedly fall not only on the jury but also on the grand jury and the Special Prosecutor, lifting some of the constraints which might otherwise have militated in favor of a decision not to prosecute. Human nature could not be otherwise.

We raise this point not to suggest that the decision of whether to prosecute in this case cannot be reached fairly, but rather to emphasize that this matter -- like none other before it and probably after it -- has been so thoroughly subjected to extraneous and highly unusual forces that any prosecution of Mr. Nixon could not fairly withstand detached evaluation as complying with due process.

## II. The Nationwide Public Exposure to Watergate Precludes the Impaneling of an Impartial Jury

The Sixth Amendment guarantees a defendant trial by jury, a guarantee that has consistently been held to mean that each juror impaneled -- in the often quoted language of Lord Coke -- will be "indifferent as he stands unsworn." Co. Litt. 155b. See Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. Louisiana, 379 U.S. 472 (1965). The very nature of the Watergate events and the massive public discussion of Mr. Nixon relationship to them have made it impossible to find any array of jurymen who can meet the Sixth Amendment standard.

On numerous occasions the Supreme Court has held that the nature of the publicity surrounding a case was such that jurors exposed to it could not possibly have rendered a

verdict based on the evidence. See Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, supra; Marshall v. United States, 360 U.S. 310 (1959). The most memorable of these was Sheppard v. Maxwell, in which the Court, describing the publicity in the Cleveland metropolitan area, referred time and again to media techniques employed there -- which in the Watergate case have been utilized on a nationwide scale and for a much longer period of time. The following excerpts from the Court's opinion are exemplary:

> "Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities." p. 340.

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> "On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were photographed and televised whenever they entered or left the courtroom." pp. 343-44.

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> "The daily record of the proceedings was made available to the newspapers and the testimony of each witness was printed verbatim in the local editions, along with objections of counsel, and rulings by the judge. Pictures of Sheppard, the judge, counsel, pertinent witnesses, and the jury often accompanied the daily newspaper and television accounts. At times the newspapers published photographs of exhibits introduced at the trial, and the rooms of Sheppard's house were featured along with relevant testimony." pp. 344-45.

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> "On the second day of voir dire examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer." p. 346.*

The Sheppard murder was sensational news and the media reacted accordingly. In the course they destroyed the state's ability to afford Sheppard a fair trial.

The sensation of Watergate is a hundredfold that of the Sheppard murder. But the media techniques remain the

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*/ The prejudicial publicity in Sheppard commenced well before trial, even before charges were brought, and continued throughout the duration of the prosecution. Although Mr. Nixon has not been criminally tried, the press coverage of the impeachment proceedings and Watergate related criminal trials reflect obvious similarities to the Sheppard coverage.

same and the destruction of an environment for a trial consistent with due process has been nationwide. The Supreme Court should not -- upon an appeal by Mr. Nixon -- have to recount for history the unending litany of prejudicial publicity which served to deprive the President of the rights afforded others.

The bar against prosecution raised by the publicity in this case defies remedy by the now common techniques of delaying indictment or trial, changing venue, or scrupulously screening prospective jurors. Although the court in Delaney, supra, could not envision a case in which the prejudice from publicity would be "so permanent and irradicable" that as a matter of law there could be no trial within the foreseeable future, 199 F.2d, at 112, it also could not have envisioned the national Watergate saturation of the past two years.

Unlike others accused of involvement in the Watergate events, Mr. Nixon has been the subject of unending public efforts "to make the case" against him. The question of Mr. Nixon's responsibility for the events has been the central political issue of the era. As each piece of new evidence became public it invariably was analyzed from the viewpoint of whether it brought the Watergate events closer to "the

Oval Office" or as to "what the President knew and when he knew it." The focus on others was at most indirect.

In short, no delay in trial, no change of venue, and no screening of prospective jurors could assure that the passions arroused by Watergate, the impeachment proceedings, and the President's resignation would dissipate to the point where Mr. Nixon could receive the fair trial to which he is entitled. The reasons are clear. As the Supreme Court stated in Rideau v. Louisiana, 373 U.S. 717, 726 (1963):

> For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was . . . [the] trial . . . Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

Not only has the media coverage of Watergate been pervasive and overwhelmingly adverse to Mr. Nixon, but nearly every member of Congress and political commentator has rendered a public opinion on his guilt or innocence. Indeed for nearly two years sophisticated public opinion polls have surveyed the people as to their opinion on Mr. Nixon's involvement in Watergate and whether he should be impeached. Now the polls ask whether Mr. Nixon should be indicted. Under such conditions, few Americans can have failed to have formed an opinion

as to Mr. Nixon's guilt of the charges made against him. Few, if any, could -- even under the most careful instructions from a court -- expunge such an opinion from their minds so as to serve as fair and impartial jurors. "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Irvin v. Dowd, 366 U.S. 717, 727 (1961). And as Justice Robert Jackson once observed, "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion). See also Delaney v. United States, 199 F.2d 107, 112-113 (1st Cir. 1952).

## CONCLUSION

The media accounts of Watergate, the political columnists' debates, the daily televised proceedings of the House Judiciary Committee, the public opinion polls, the televised dramatizations of Oval Office conversations, the newspaper cartoons, the "talk-show" discussions, the letters-to-the-editor, the privately placed commercial ads, even

bumper stickers, have totally saturated the American people with Watergate. In the process the citizens of this country -- in uncalculable numbers -- from whom a jury would be drawn have formulated opinions as to the culpability of Mr. Nixon. Those opinions undoubtedly reflect both political and philosophical judgments totally divorced from the facts of Watergate. Some are assuredly reaffirmations of personal likes and dislikes. But few indeed are premised only on the facts. And absolutely none rests solely on evidence admissible at a criminal trial. Consequently, any effort to prosecute Mr. Nixon would require something no other trial has ever required -- the eradication from the conscious and subconscious of every juror the opinions formulated over a period of at least two years, during which time the juror has been subjected to a day-by-day presentation of the Watergate case as it unfolded in both the judicial and political arena.

Under the circumstances, it is inconceivable that the government could produce a jury free from actual bias. But the standard is higher than that, for the events of the past two years have created such an overwhelming likelihood

of prejudice that the absence of due process would be inherent in any trial of Mr. Nixon. */ It would be forever regrettable if history were to record that this country -- in its desire to maintain the appearance of equality under law -- saw fit to deny to the former President the right of a fair trial so jealously preserved to others through the constitutional requirements of due process of law and of trial by impartial jury.

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*/ "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a [procedure] employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." Estes v. Texas, 381 U.S. 532, (1965).