

WATERGATE SPECIAL PROSECUTION FORCE

DEPARTMENT OF JUSTICE

Memorandum

TO : Leon Jaworski

DATE: February 12, 1974

FROM : Carl B. Feldbaum, George T. Frampton,
Gerald Goldman, Peter F. Rient

SUBJECT: Attached Memorandum

The attached memorandum was prepared on the basis of extensive discussions among ourselves and after consultation with other members of the legal staff. . We submit it to you in the hope that it may assist you in deciding how best to proceed with respect to the evidence now before the Watergate Grand Jury.

Recommendation for Action By
The Watergate Grand Jury

This office will soon be called upon by the Watergate Grand Jury for recommendations as to what actions it should take in light of the evidence that has been presented to it. Since this evidence implicates the President in a conspiracy to obstruct justice, the Grand Jury will no doubt be anxious to receive our recommendation, and the reasons therefor, concerning appropriate action with respect to the President. The purpose of this memorandum is to aid the process of decision by focusing attention on two possible courses of action -- indictment and presentment -- and articulating the reasons for which we believe that one of these courses should be recommended to the Grand Jury.

I.

The facts described to you in a separate memorandum, in our view constitute clear and compelling prima facie evidence of the President's participation in a conspiracy to obstruct justice. Assuming that the Grand Jury agrees with this assessment, then we are compelled by (1) our mandate to investigate and prosecute allegations involving the President, (2) the Grand Jury's sworn duty to make

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true presentment of all offenses that come to its knowledge, and (3) the paramount importance of reaffirming the integrity of the law, to recommend that the Grand Jury express its judgment by the customary method of indictment or (if we conclude indictment is constitutionally barred or is otherwise inappropriate) by a presentment setting out the evidence and the Grand Jury's conclusion of criminal activity.

The proposition that we and the Grand Jury have a duty to reach a conclusion whether the President has acted criminally and to manifest that conclusion by appropriate action on the part of the Grand Jury follows from several considerations. In the first place, the Special Prosecutor's "duties and responsibilities" include "full authority for investigating and prosecuting . . . allegations involving the President . . ." E.O. No. 551-73, § 0.37 and App. A. The history of the Watergate matter leaves no doubt that the Office of the Special Prosecutor was established and continues to exist because of overwhelming public support for committing the decision of the President's criminal guilt or innocence to the traditional processes of law enforcement. The need for a Special Prosecutor arose from widespread public suspicion concerning the ability of the Executive to identify and pursue any criminal wrong-doing

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by the President and his closest associates -- a suspicion that created a crisis of confidence in the President, the Presidency, and the criminal justice system. The unique arrangements creating and sustaining this office were a direct result of public conviction that there should be an independent, responsible body which could be trusted not only to investigate fully and vigorously all allegations of criminal wrong-doing, and to determine, on the basis of all available evidence, whether crimes had in fact been committed, but also to do so in like fashion as in the case of allegations of criminal activity involving anyone else.

Furthermore, the Grand Jury -- which exists wholly apart from these arrangements and indeed "is a constitutional fixture in its own right," Nixon v. Sirica, 487 F.2d 700 -- is obliged under the oath of office taken by each of its members "diligently, fully and impartially [to] inquire into and true presentment make of all offenses which will come to [its] knowledge" and to "present no one from hatred or malice or leave anyone unrepresented from fear, favor, affection, reward or hope of reward . . ." To recommend to the Grand Jury any action inconsistent with a definitive conclusion about the President's criminal liability based on the extensive evidence that it has received would thus

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be to counsel abdication of its constitutionally sanctioned function to "present" crimes committed by any citizen, regardless of his circumstances or station.

This leads to another consideration -- the necessity for vindicating the integrity of the law. No principles are more firmly rooted in our traditions, or more at stake in the decision facing this office and the Grand Jury, than that there shall be equal justice for all and that "(n)o man in this country is so high that he is above the law." United States v. Lee, 106 U.S. 196, 220 (1882). For us or the grand jury to shirk from an appropriate expression of our honest assessment of the evidence of the President's guilt would not only be a departure from our responsibilities but a dangerous precedent damaging to the rule of law. The inevitable conclusion would be that one man, at least, is so far different from anybody else as to be above the ordinary processes of the criminal law. The implications of such a conclusion would be unfortunate under ordinary circumstances; but we are not faced with ordinary circumstances -- we are dealing with the very man in whom the Constitution reposes not only the most power in our society but also the highest and final obligation to ensure that the law is obeyed and enforced. Thus, failure to deal evenhandedly

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with the President would be an affront to the very principle on which our system is built. And this failure would be all the more severe because of the nature of the crime in question, a conspiracy to obstruct justice, the purpose of which was to place certain individuals beyond the reach of the law. The result would probably be greater public disrespect for the integrity of the legal process than has already been created by public knowledge of attempts by the nation's highest officials to put themselves beyond the law.*

It follows from this analysis of our responsibilities and those of the grand jury that our duty is to make a recommendation with respect to the President which is directed toward enforcement of the criminal law. The existence of the impeachment mechanism in no way alters this conclusion. Impeachment is an avowedly "political" process by which the people's representatives can remove a sitting President before the end of his term based on a "political" judgment about his fitness to govern. Although

* Another possible consequence is an increased likelihood of wrong-doing by a future President who need not fear the strictures of the criminal law as a limitation on the exercise of his immense power.

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the matter is subject to debate, Congress' judgment about impeachment, in our view, is meant to respond to considerations that may or may not include and, in any event, are not limited to whether the President has committed a crime. The Constitution, in other words, does not require that a felony have been committed for conviction upon impeachment, nor does it demand that a felon be ousted from office. In contrast, our criminal justice process exists, and is universally perceived to exist, for a different purpose, entailing a different standard: to prosecute crimes with reference to an apolitical code applied objectively to all citizens. For this very reason our office was created as an office of criminal prosecution, not (as it might have been) as an independent commission to determine all the facts and then to make recommendations about anyone's fitness to continue to serve in public office. Under the Constitution the one task is allocated to Congress and the other to the grand and petit juries.

The constitutional allocation of these separate functions means that to let "political" considerations of the kind now being debated in Congress intrude upon the decision-making of this office and of the Grand Jury would be to confuse the functions of law enforcement

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and of impeachment, and the result would be further to undermine public confidence in the integrity of the legal process. A recent precedent seems instructive. A substantial segment of the public was critical of the plea bargain reached with Vice President Agnew not only because they perceived that on account of his position Agnew was given much more favorable treatment than would have been afforded others guilty of similar crimes, but also because they perceived that a motivating force in this bargain was the desire of those in power to remove him from public office. In accomplishing this, the Executive Branch was regarded as taking upon itself the decision of fitness for public office. This not only usurped a decision constitutionally allocated to another institution -- the Congress could, after all, have decided against Agnew's impeachment -- but was seen in the public eye as a departure from the principle of equal justice for all.

Thus, we believe that it would be impermissible for this office to determine its course of action on the basis of a belief that the President should or should not be removed from public office. By the same token, we cannot responsibly leave the question of the President's criminal guilt or innocence to the "political"

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process and the "political" judgment of impeachment. To do so, we feel, would be an abdication of our duties and those of the Grand Jury, premised only on the view that for the most powerful official in the country, the essence of "justice" is limited to the decision of his fitness to govern and to ouster from office if he is found wanting. The Constitution itself decries such a premise by stating that a person convicted after impeachment "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." If the President were placed so much apart from all other citizens that he could even escape the determination of whether there is probable cause to believe that he has committed a crime, one can only imagine how much greater the public cynicism would be.

This is not to say that no room exists for interplay between the functions of law enforcement and of impeachment. We and the Grand Jury would obviously be remiss if we allowed the impeachment process to go forward without full knowledge of what the President has in fact done.* And, indeed, there is precedent for a Grand Jury

* Disclosure of the facts concerning the President's involvement should not occasion undue pretrial publicity problems for any of our defendants since the facts add little to those which will, in any event, be charged in the indictment.

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presentment to the House of Representatives of specific, criminal charges and the evidence supporting them, for the purpose of impeachment. See 3 Hinds' Precedents of the House of Representatives § 2488, at 985 (1907). But assuring that the House has at its disposal information concerning the President's involvement in Watergate does not fulfill our function or that of the Grand Jury. We and the Grand Jury do not exist merely for the purpose of assuring that debate on impeachment is fully informed.

In short, we do not believe that mere transmission of our evidence to Congress is a satisfactory means of discharging our responsibilities or those of the Grand Jury. Nor do we believe that our decision about how to proceed in the matter of the President should be influenced by the likelihood that some "political" mechanism will determine his "fitness" for office or by any other abstract notion of how "justice" can be served other than by enforcement of the criminal law. We and the Grand Jury are the only ones who can make the decision that we, in large part, were established, and the Grand Jury is sworn, to make -- the decision whether the President has acted criminally. If we and the Grand Jury refuse to make that judgment, the consequences for the criminal justice system and for public confidence in the law will, in our view, be most unfortunate.

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II.

Assuming the validity of the foregoing conclusions, the question to be addressed is whether we should recommend to the Grand Jury an indictment or a presentment of the President.

As we understand it, the conclusions regarding indictment of an incumbent President reached by the Department of Justice, the U.S. Attorney's office, and this office, are all consistent: there is nothing in the language or legislative history of the Constitution that bars indictment of a sitting President, but there are a number of "policy" factors that weigh heavily against it. Chief among these are (1) that indictment would be equivalent to substantially disabling, if not functionally removing, the President from office -- a decision that is Constitutionally allocated to Congress and not to a prosecutor's office and Grand Jury; and (2) that indictment would create a dangerous precedent for abuses in the future, even if justified by the facts in this case.

Before addressing these considerations relating to the President's indictability, we should point out that we recognize that these "policy" factors are relevant not only to the question whether the President can legally be indicted but also to the question whether, as a matter of

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prosecutorial discretion, he should be. We need not be convinced in other words, of the unconstitutionality of indictment to recommend against it. The issue of "prosecutorial discretion," however, does not arise in the traditional sense. The factors that customarily inform an exercise of prosecutorial discretion not to press all the charges warranted by the evidence uniformly militate in favor of indictment in this case. These include the nature of the offense and strength of the evidence, the background and other activities of the potential defendant, his degree of culpability, the extent of his cooperation, and the presence or absence of various mitigating circumstances.* Rather, the "policy" factors advanced against the appropriateness of indicting the President are more general public policy or quasi-Constitutional considerations concerning the proper relationship between the President, the criminal justice system, and the Congress.

For many of the same reasons set out in the first part of this Memorandum, some of us cannot easily accept

* Apparently, the only significant defense available to the President should he be indicted appears to be a legal defense based on constitutional provisions concerning his tenure in office -- provisions that do not absolve him of liability once he leaves office and that in no way mitigate his culpability.

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the proposition that such "policy considerations" -- in essence, political considerations -- should be dispositive of the President's indictability. While not suggesting that such matters are entirely outside our purview in deciding upon whether indictment is the proper course, we believe that too heavy reliance on them threatens abdication of our peculiar responsibility in favor of another process designed to produce a different kind of decision, and risks further public disillusionment with the principle of equal (and unpoliticized) justice.* In short, there is a good argument that in deciding whether the President can appropriately be indicted, it is not up to us to weigh the politics of the matter at all but to do our job and do it faithfully.

In evaluating the considerations against indictment, we believe that the second one mentioned -- that of creating a dangerous precedent -- has little merit. To begin with,

* Congress, as the people's representative, is in a far better position to weigh these factors. It may decide, for example, to remove the President from office but to immunize him from prosecution. Whatever its decision, Congress will have acted openly and the people and history can judge the validity of its decision. We would be formulating public policy in private, and there is nothing in our mandate or backgrounds that gives us expertise or responsibility for such a policy-making role.

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the argument sweeps with too broad a brush, for the possibility of abuse inheres in the exercise of any responsibility. Moreover, the quantum of proof we believe should be required to support a recommendation of indictment (or presentment) -- that the evidence of the President's guilt be direct, clear, and compelling, and that it admit of no misinterpretation -- is a substantial bulwark against future abuse and against charges of improper action on our part. Furthermore, the fact that the President normally exercises the ultimate prosecutorial authority of the Federal Government and can, in the ordinary course, prevent his subordinate officers and employees from prosecuting him conclusively puts to rest any fear that maverick or partisan prosecutors might subject the President to unjustified future harrassment in the Federal courts.* In the case before us, of course, both the Legislative and Executive branches have recognized the uniqueness of the situation by endorsing creation of a special officer explicitly authorized to "prosecute" allegations concerning

* Even if the President can be indicted in the federal courts, we believe there is no question but that considerations of federalism would bar his indictment in a state court and that adequate remedies for preventing such action exist. Thus indictment of the President for federal crimes will not provide a precedent for local prosecutors who might seek to harrass the President by indicting him for local or state crimes.

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the President himself, and insulated to a considerable extent from contrary instructions or dismissal by the President. If at some future time circumstances require appointment of a new "Special Prosecutor," then the precedent set here would not be a dangerous one. Moreover, even if the risks of future abuse were great, which we think they are not, those risks would have to be weighed against the harmful precedent of failing to act appropriately in the case before us. The best way to prevent a situation like the one we have now from occurring again is to assure that the criminal justice process fulfills its historic responsibilities, thus reaffirming the principle that the President, like everyone else, is subject to prosecution for commission of serious crimes.

The other serious argument against indictment is that it would be the "equivalent" of impeachment because if the President were convicted and incarcerated (and even if he had to prepare for and undergo trial) he would no longer be able to discharge the duties of his office; and in any event the country would be brought to a standstill prior to trial by the existence of outstanding and unresolved charges against a President who refused to resign or was not impeached.

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The answer to this argument is that the disruption caused by indictment and trial of the President would be no greater, and possibly less, than that caused by the impeachment process.* The institution of criminal charges might well reduce considerably the time during which the disruptive effect was felt, considering how quickly Mr. Nixon could be tried on a specific charge based on tapes and a few prosecution witnesses, contrasted with what promises to be a terribly drawn out, divisive, and possibly inconclusive process of impeachment and trial in Congress on a variety of less distinct charges.

Moreover, at least some of our evidence showing the President's complicity in illegal activity is probably going to become public in any event, particularly if we have an obligation to communicate the evidence to the Congress. If our primary concern is the impact of that information on the conduct of our domestic and foreign affairs should the President attempt to remain in office,

* Of course, the President clearly could not perform the duties of his office while in jail, but the Twenty-Fifth Amendment provides a mechanism by which the Vice President can govern the country should the President become "unable to discharge the powers and duties of his office."

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then it might be better for it to come out in the traditional legal form of specific, distinct allegations which can then be determined to public satisfaction in a traditional proceeding according to a customary standard applicable to all citizens. The fact that some evidence of criminal activity will probably become public in any event also means the public will eventually realize we had evidence we did not act upon. This would certainly raise serious questions about the performance of this office and the integrity of the criminal justice system.

Finally, the Framers obviously contemplated some disruption in the Executive Branch as a necessary and bearable cost to providing the people -- through the impeachment mechanism -- with a remedy for gross misconduct. Since the Framers did not specifically provide for Presidential immunity from indictment, it could be concluded that they also contemplated that if a President engaged in serious criminal activity destroying public confidence in the Executive, the same cost should be borne in connection with institution of ordinary criminal charges.

In the final analysis, if imposition of criminal charges indeed results in uncertainty and paralysis in the

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conduct of governmental affairs, the remedy is readily available in the hands of Congress -- that is, impeachment, if the President refuses to resign -- and the grounds for impeachment will then unquestionably be on the table. If the people then believe that such an impasse is intolerable, they will compel their representatives to act.

Although, we are of different minds about the final outcome in balancing these considerations relating to the President's indictability, we all agree on the fundamental premise of this memorandum: the real issue before us is not whether to recommend that the Grand Jury manifest its conclusion about the President's guilt or innocence, but how we should recommend that it do so. If we conclude that indictment of the President is constitutionally barred or is inappropriate, then we and the Grand Jury can and must fulfill our responsibilities to the public and to the law by recommending a Grand Jury presentment setting out in detail the most important evidence and the Grand Jury's conclusions that the President has violated certain criminal statutes and would have been indicted were he not President. There appears to be no question of the propriety or legality of such a course, and there is precedent for it as

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pointed out above.*

Expression of the Grand Jury's conclusion about the President's guilt through a presentment, rather than formal institution of charges by indictment, meets most of the arguments against indictment canvassed above. A presentment would raise no spectre of Presidential preparation for a trial or possible imprisonment. Moreover, although presentment might still affect the ability of the Executive to conduct governmental affairs, it would not functionally disable the President or result ipso facto in his removal from office.

Presentment offers the additional advantage of focusing the issues that must be resolved by Congress without infringing on Congress' constitutional prerogatives. While indictment would set in motion an independent process for determining Presidential guilt or innocence, perhaps adding to the present ambiguity regarding institutional

* A separate question would then be raised whether or not to name the President as a co-conspirator in our main indictment. The evidence is clear the the President joined the conspiracy that will be charged in that indictment. Failure to name him as a co-conspirator in our case would serve no purpose since we would have to name him in our Bill of Particulars in any event. In addition, the existence of a presentment would vitiate the strongest argument against naming the President, that of "fairness", as is discussed in the following text.

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responsibilities, presentment would signal to Congress our belief that no further action can or should be taken through the ordinary criminal process against a sitting President. The result would be that responsibility for further action would be placed squarely upon Congress, and that Congress would then have an unambiguous basis for swift action.

On the other hand, presentment arguably raises an additional problem not raised by indictment -- lack of "fairness" to the President. The President, it may be urged, has no way to meet or contest charges articulated in a presentment. Although logically the problem cannot be dismissed, it seems more theoretical than real. It should be remembered, first, that this is a "problem" created by a desire to avoid the even greater "problem" for the President of indicting him. To put the point another way, the alleged unfairness to the President must be weighed against the unfairness to the public and the damage to the rule of law should we and the Grand Jury, contrary to our responsibilities, altogether fail to act on the evidence that we have gathered, thereby depriving the public of our conclusion about what that evidence shows. Moreover, the truth of the matter is that the President has almost unlimited access to the media and the evidence

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in his own possession. He is, therefore, in a position to answer any charges directly to the country.

In reality, it is the people who have not had the opportunity to have a disinterested and independent representative of the public interest examine the evidence and arrive at an informed and professional conclusion about what it shows. That is the reason we are here. That is the reason we have concluded that the only responsible recommendation we can make to the Grand Jury is that if it finds clear and compelling prima facie evidence that the President participated in a conspiracy to obstruct justice, the Grand Jury should manifest that conclusion.

In sum, if the Grand Jury finds probable cause to believe the President acted criminally, then it is essential that this simple, primary truth emerge from the action we and the Grand Jury take: that but for the fact that he is President, Richard Nixon would have been indicted. This fundamental conclusion should not be allowed to be lost in a recitation of facts or sources of evidence that omits the basic judgment involved or leaves it open to public (and Congressional) speculation and debate. Such a critical omission would, in our view, (1) avoid the mandate of the Special Prosecutor to investigate and

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prosecute allegations involving the President, (2) evade the responsibility of the Grand Jury to make true presentment of all offenses which come to its knowledge, (3) confuse the distinct purposes of the criminal justice system and the political system, and, (4) ultimately, dilute the force of law in our social and governmental processes.

Carl B. Feldbaum
George T. Frampton
Gerald Goldman
Peter F. Rient

6/21/74

Nos. 73-1766, 73-1834

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE
UNITED STATES, ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE
UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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