

MEMORANDUM

TO : Leon Jaworski
Special Prosecutor

DATE: August 9, 1974

FROM : Carl B Feldbaum
Peter M. Kreindler

SUBJECT: Factors to be Considered in Deciding Whether to Prosecute Richard M. Nixon for Obstruction of Justice

In our view there is clear evidence that Richard M. Nixon participated in a conspiracy to obstruct justice by concealing the identity of those responsible for the Watergate break-in and other criminal offenses. There is a presumption (which in the past we have operated upon) that Richard M. Nixon, like every citizen, is subject to the rule of law. Accordingly, one begins with the premise that if there is sufficient evidence, Mr. Nixon should be indicted and prosecuted. The question then becomes whether the presumption for proceeding is outweighed by the factors mandating against indictment and prosecution.

The factors which mandate against indictment and prosecution are:

1. His resignation has been sufficient punishment.
2. He has been subject to an impeachment inquiry with resulting articles of impeachment which the House Judiciary Committee unanimously endorsed as to Article I (the Watergate cover-up).
3. Prosecution might aggravate political divisions in the country.
4. As a political matter, the times call for conciliation rather than recrimination.
5. There would be considerable difficulty in achieving a fair trial because of massive pre-trial publicity.

The factors which mandate in favor of indictment and prosecution are:

1. The principle of equal justice under law requires that every person, no matter what his past position or office, answer to the criminal justice system for his past offenses. This is a particularly weighty factor if Mr. Nixon's aides and associates, who acted upon his orders and what they conceived to be his interests, are to be prosecuted for the same offenses.
2. The country will be further divided by Mr. Nixon unless there is a final disposition of charges of criminality outstanding against him so as to forestall the belief that he was driven from his office by erosion of his political base. This final disposition may be necessary to preserve the integrity of the criminal justice system and the legislative process, which together marshalled the substantial evidence of Mr. Nixon's guilt.
3. Article I, Section 3, clause 7 of the Constitution provides that a person removed from office by impeachment and conviction "shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." The Framers contemplated that a person removed from office because of abuse of his public trust still would have to answer to the criminal justice system for criminal offenses.

4. It cannot be sufficient retribution for criminal offenses merely to surrender the public office and trust which has been demonstrably abused. A person should not be permitted to trade in the abused office in return for immunity.

5. The modern nature of the Presidency necessitates massive public exposure of the President's actions through the media. A bar to prosecution on the grounds of such publicity effectively would immunize all future Presidents for their actions, however criminal. Moreover, the courts may be the appropriate forum to resolve questions of pre-trial publicity in the context of an adversary proceeding.