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Justice for Mr. Nixon

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"When in doubt, hesitate," is a maxim followed instinctively by most of us in private life. Now it applies with a vengeance to the vexing public question of whether former President Nixon should be subject to prosecution.

There are no good answers to the question. So the best thing is to wait and see what evidence emerges in the future and how Mr. Nixon behaves.

The starting point for analysis is a powerful presumption against prosecution. Nobody wants a former President to be in jail for the sport of it.

Nor can anybody doubt that Mr. Nixon has already paid a very high penalty—the penalty of personal humiliation. While the worst may be over for him now, there is more to come.

He is going to have to testify in cases where he will not, to put it mildly, look good. He has heavy payments for back taxes due. He may be subject to civil suits from victims of Watergate.

Moreover, the two arguments generally used to support the case for prosecution turn out on inspection to be terribly weak. First, there's the argument that it is unfair to prosecute the President's leading associates—notably H. R. Haldeman, John Ehrlichman and John Mitchell—without also giving Mr. Nixon the business.

But, in fact, we all know that our system of justice is not a 100 per cent Simon-pure platonic model of perfect

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equality. All kinds of practical distinctions are regularly observed.

White-collar crime, in particular, is punished much less severely—and much less frequently with prison sentences—than crimes associated with the working class. Several former White House aides who have pleaded guilty—notably Egli Krogh, Charles Colson, Jeb Magruder and John Dean—have had relatively light sentences in keeping with the view taken by our society of white-collar crime.

Mitchell, Haldeman and Ehrlichman are going to profit from that view in the future. Just as former White House aides are set apart from ordinary criminals, so a former President can be set apart from his underlings.

A second argument is that unless Mr. Nixon is prosecuted along with the others, many people—and especially children—will lose faith in American democracy and the system of justice. But faith in democracy and the system of justice is something acquired through many experiences over a long period of time. Anybody who turns to

subversion and crime because Mr. Nixon does not do time can be assumed to have been headed in that direction anyway.

Even if some shallow people are shaken in their faith because of special treatment for Mr. Nixon, the adverse social effects of a prosecution would probably be more injurious. For Mr. Nixon retains the sympathy and support of millions of Americans.

The overwhelming evidence that he lied to the country, the Congress, the Supreme Court and his own staff has not shaken the Nixonite hardcore. It strains credulity to believe that a public trial would finally convince them.

To the contrary, my own impression is that a prosecution of the President would look like a vindictive act of malice. It would intensify the bitterness of the Nixon loyalists, and perhaps win huge sympathy for the former President from the vast majority of people whose disposition is to have done with the whole affair.

On the other side of the question, there is no good way to give Mr. Nixon protection against prosecution. A statute of immunity would probably be un-

constitutional even if it could be passed by the Congress, which is doubtful. Certainly a prosecutor minded to try Mr. Nixon would want to test such a statute in the Supreme Court—with results apt to be unhappy for everybody.

The final story on Mr. Nixon, moreover, is not yet in. New evidence is likely to come out as more tapes are processed through the courts and made available to Leon Jaworski, the Watergate Special Prosecutor. The upcoming trial of Ehrlichman, Haldeman and Mitchell for the Watergate cover-up could well yield more material—perhaps in the form of confessions.

Then there is the question of what Mr. Nixon himself does. It will be one thing if he takes the advice of President Ford and searches for a personal peace. It will be another thing if he, in his refusal to recognize guilt, goes to the point of trying to make a comeback.

For the time being, however, we don't know enough to make clear decisions with confidence. It makes sense to hedge bets. It also makes sense to leave the decision to those entrusted with the responsibility—in this case, to Jaworski. And only the willfully obtuse will fail to understand why he would want to postpone a decision until the passions of the past few months are spent and the dust of the resignation has settled.