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Excerpts From Nixon Lawyer's

Special to The New York Times

WASHINGTON, Sept. 10— Following are excerpts from a memorandum submitted to the Watergate special prosecutor on Sept. 4 by Herbert J. Miller arguing in behalf of former President Richard M. Nixon against any move to indict Mr. Nixon. The memorandum was released by the White House today.

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 memor3ndum 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 weikgh in his judgment the possible impact of such an indictment on the domestic spirit and on international relations, as well a 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.

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 talk or public print." **Patterson v. Colorado, 205 U. S. 454, 462 (1907).**

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 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 asure Mr. Nixon that any indictment sworn against him will produce "a charge fairly made ad 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 proceeding sneither 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 misdemaenors" for which criminal indictments could be justified.

'Devastating Culmination'

All of this standing alone would have caused even those most critical of . Nixon to doubt his chances of subsequently receiving a trial free from preconceived judgments of guilt. But the devastating culimination 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 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 concerning 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 minimsum 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 "afford 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 10 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 principle expounded by the court in **Delaney** 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 there of 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 an exposure to the issues and evidence involved, the Government must now abide by that decision which produced the very environment

Memorandum Against Any Indictment Move

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 choise 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.

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. The very nature of the Watergate events and the massive public discussion of Mr. Nixon's 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. 33 (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, describingg 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 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 Wtergate is hunadredfoald that of the Sheppard murder. But the media techniques remain the same and the destruction of an environment for a trial consistent with due process has been nation-wide.

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 evision 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 aroused 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 h 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."

PUPublic Opinions Expressed

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." **Krulewith v. United States,** 336 U.S. 440, 453 (1949) (concurring opinion).

CONCLUSION

The media accounts of Watergate, the political columnists' debates, the daily televised procedings 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 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 constitutiwonal requirements of due process of law and of trial by impartial jury.