

*Memorandum*

TO : Leon Jaworski  
Special Prosecutor

DATE: January 21, 1974

FROM : Philip A. Lacovara *PA*  
Counsel to the Special  
Prosecutor

SUBJECT: Presentment by Watergate Grand Jury Concerning  
the President

As part of our consideration of the most appropriate way of dealing with evidence tending to implicate the President in the Watergate cover-up, we have discussed the possibility of advising the grand jury that it may return a presentment setting forth its views of the President's complicity even though it might be determined as a matter of law or policy that the President should not be indicted. Peter Kreindler was asked to prepare a memorandum on this subject and he has reached the conclusion, reflected in the attached memorandum, that submission of such a presentment by the grand jury would be constitutional. I have been discussing this subject with him since the beginning of his research and am familiar with the authorities. I agree with his analysis and conclusions in all respects.

If you agree that presentment in lieu of either indictment or non-action is the proper mode to pursue, there remains the question of procedure. Specifically, the relative rarity with which presentments are filed in federal courts makes it desirable to advise Chief Judge Sirica in advance of this proposed course. It would be most unfortunate, for example, for the grand jury to return a presentment without forewarning and then have the judge summarily refuse to receive it because of his lack of awareness of the basis for such a submission. However, it is also questionable whether we should discuss this procedure with the chief judge before the grand jury, whose decision would be involved, has had an opportunity to consider this possible course. Yet there would be some risk in discussing such an approach with the grand jury, and perhaps planting a seed that could not be unsown, before the judge has at least tentatively indicated that he would be prepared to accept such a presentment.

In light of all of the foregoing factors, I recommend the following course:

1. That you decide formally and as quickly as possible what advice you want given to the grand jury in your capacity as its counsel on the questions of (a) the President's indictment as a matter of law, (b) the policy factors concerning indictment of an incumbent President, and (c) the propriety of the grand jury's submission of a presentment naming the President, either in open court or under seal, with a request that it be forwarded to the House Committee on the Judiciary. My own recommendation is that the grand jury be told (a) we believe that the President can constitutionally be indicted for the crime of obstruction of justice but that the question is subject to considerable doubt, and therefore (b), in light of the severe dislocations that would immediately flow from the naming of a sitting President as a criminal defendant, it would be preferable to leave formal proceedings to the House of Representatives. With regard to (c) the grand jury should be advised that it may return a presentment, which states its conclusions based on the evidence it has heard but which does not initiate a criminal proceeding, and I would propose that the presentment be submitted under seal to the chief judge, with a request that it be forwarded to the House Judiciary Committee after counsel for the President have been given an opportunity to submit any objections, either on the law or the facts, that they may have.

2. After you make the foregoing decisions, I recommend that you or I or both appear before the grand jury, at the conclusion of the presentation of the tapes, to advise them of these determinations. They should candidly be told that it is not certain how the court will respond to the submission of a presentment but should be advised that this matter will be discussed with the chief judge if the grand jury is inclined to return a presentment involving the President.

3. If the grand jury indicates its tendency toward returning a presentment, we should schedule a conference with Chief Judge Sirica to apprise him in advance of this possible development. I would be prepared to submit a memorandum of law to him at such a meeting, if he indicated an interest in receiving it.



4. At any such meeting we should recommend to Judge Sirica that the presentment be received by him under seal, with disclosure only of the fact that the grand jury has made a submission to him, and that the White House be given ten days to review the presentment and to make objections to its filing and transmission.

Attachment

cc: Mr. Ruth (w/attachment)  
Mr. Kreindler (w/o attachment)  
Mr. Ben-Veniste (w/o attachment)