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Luis Kutner

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A LEGAL NOTE ON THE NIXON PARDON:  
EQUAL JUSTICE *VIS-A-VIS*  
DUE PROCESS\*

LUIS KUTNER†

*I . . . do grant a full, free and absolute pardon  
unto Richard Nixon for all offenses against the  
United States which he has committed or may  
have committed or may have taken part in. . . .*

President Gerald R. Ford  
September 8, 1974

*I am still convinced, despite the public reaction  
so far, that the decision I made was the right one.*

President Ford on Nixon  
pardon at press conference,  
September 16, 1974

THE PARDONING POWER

THE FIRST TWO MAJOR ACTS of the Ford Presidency—the offer of earned amnesty (at least insofar as draft resisters in the Vietnam conflict are concerned) and the pardon granted to former President Richard M. Nixon—were charitable, wise and just. This article, of course, will discuss the presidential pardon for Mr. Nixon.

The Founding Fathers conferred upon the President, under Article II, Section 2, clause 1, of the Federal Constitution, the “Power to grant . . . Pardons for Offenses against the United States . . .” (as distinguished from offenses against the State). As Chief Justice John Marshall once noted,<sup>1</sup> the pardoning power had been “exercised from time immemorial” by English monarchs. The Founders, who had seen it in operation before the American Revolution, also felt it essential for the new republic they were creating to vest such power in the Chief Executive to ameliorate or avoid particular judgment in special cases as a check against the courts, whose administration of justice was not always necessarily wise or considerate of circumstances which may mitigate guilt. In the case of Richard Nixon, Senator Brooke of Massachusetts, a fine lawyer and former attorney-general of his State, has observed: “[R]esignation itself is a severe punishment. Relinquishing the Nation’s highest

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† Lecturer, University of Chicago Law School; former Visiting Associate Professor of Law, Yale University; President, Commission for International Due Process of Law; Member, Illinois Bar Association; Nominee, 1975 Nobel Peace Prize; J.D., LL.B., University of Chicago.

<sup>1</sup> United States v. Wilson, 32 U.S. 150, 160 (1833).

elective office and the most powerful position in the world would be a painful decision for any man. I do not think any justifiable purpose would be served by punishment more severe than this. . . ."<sup>2</sup>

The discretionary authority of the pardon was entrusted to the nation's highest executive officer in the confidence that he would not abuse it by exercising it to the extent of destroying the deterrent effect of judicial punishment. Still, if a President is to make the pardon power useful, he must have the *full* discretion to exercise it—*sans* any modification or regulation by the Congress. The timing of the Nixon pardon, that is, prior to any trial of the ex-President on charges of committing criminal offenses arising out of the Watergate affair, might be said to thwart the judicial process, given the view that in such a case a pardon "blots out the existence of guilt."<sup>3</sup> Nevertheless, a President can pardon all offenses of an individual after their commission at any time before, during, or after legal proceedings for punishment.<sup>4</sup> A number of constitutional authorities have pointed this out in their own commentaries.<sup>5</sup> Moreover, former Special Prosecutor Leon Jaworski has himself maintained that the Nixon pardon was both timely and legal.<sup>6</sup>

Thus, there seems no reason to suppose that the pardoning of Mr. Nixon by President Ford was an abuse of that power. Indeed, this article does not question the validity of that action. Furthermore, the writer takes the position that no criminal—or even civil—proceeding should be brought, conducted or continued against the former President, now that he has resigned, because this writer is "compelled to conclude," as did President Ford, "that many months and perhaps more years will have to pass before Richard Nixon could obtain a fair trial by jury in any jurisdiction of the United States. . . ."<sup>7</sup>

#### THE RIGHT TO A FAIR TRIAL

The sixth amendment of our Constitution guarantees that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." Further guarantees for a fair trial are found under the due process clauses of the fifth and fourteenth amendments.

Let a trial be free and open, to be sure—but, above all, a trial must be fair. *Absolute* fairness under due process of law is required in the judicial process. "[O]ur system of law," wrote Mr. Justice Black, "has always

<sup>2</sup> CONG. REC. at S14548 (daily ed. Aug. 8, 1974).

<sup>3</sup> E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 94 (1947).

<sup>4</sup> *Ex Parte Garland*, 71 U.S. 333, 380 (1867).

<sup>5</sup> E. CORWIN and J. PELTASON, UNDERSTANDING THE CONSTITUTION 78 (1967) [hereinafter cited as CORWIN and PELTASON]; W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1199 (1929) [hereinafter cited as WILLOUGHBY].

<sup>6</sup> *Wall Street Journal*, Oct. 16, 1974, at 1.

<sup>7</sup> U.S. NEWS & WORLD REPORT, Sept. 23, 1974, at 20.

endeavored to prevent even the probability of unfairness. . . ."<sup>8</sup> Fairness is the most crucial test that can be applied, and it would be equally applicable to a trial involving former President Nixon.

However, in the wake of the all-pervasive pretrial publicity Mr. Nixon has experienced through press and television, including televised coverage of the Senate Watergate investigations of the Ervin Committee, and the impeachment proceedings of the House Judiciary Committee, it would be extremely difficult to protect the concept of a fair trial here. Indeed, in one case<sup>9</sup> a federal court held that a threat to a fair trial was caused by the prejudicial effects of nationwide publicity emanating from a congressional investigation prior to the trial on the same subject. In that case, the chairman of the investigating committee had made statements as to the guilt of the defendant, and the proceedings and testimony were published, although the statements were not subject to cross-examination or any of the due process rights of the defendant, who himself was not even present. While reasoning that the defendant had no assurances of less prejudice, given the publicity, in any other area of the country than where the alleged offense was committed, the court said of this defendant: "He is not obliged to forego his constitutional right to an impartial trial. . . ."<sup>10</sup> Nor, historically, for that matter, do the words "public trial" in the sixth amendment mean a "nationwide arena."<sup>11</sup>

Of course in the case of the ex-President, coverage by press and television was so extensive even prior to the telecasts of the Senate and House hearings as to create intense public emotion to the prejudice of Mr. Nixon. Undoubtedly, the news media would have magnified the impact of public opinion on any subsequent trial, selecting those parts of the proceedings which they determined must be emphasized. Former Federal Judge Rifkind allowed that our judicial procedure "works fairly well in all cases but one—the celebrated case. As soon as the *cause celebre* comes in, the judges and lawyers no longer enjoy a monopoly. They have a partner in the enterprise, and that partner is the press."<sup>12</sup>

Mr. Justice Douglas has referred to those times when the press has helped to "beat the drums of prejudice and passion" and by so doing "make it doubtful whether a trial can be fair to a particular defendant," thus making any such trial "a mere mockery of justice."<sup>13</sup> These problems inherent in

<sup>8</sup> *In re Murchison*, 349 U.S. 133, 136 (1954).

<sup>9</sup> *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952).

<sup>10</sup> *Id.* at 116.

<sup>11</sup> Douglas, *Public Trial and the Free Press*, 46 A.B.A.J. 840, 842 (1960) [hereinafter cited as Douglas].

<sup>12</sup> Arnold, *Mob Justice and Television*, ATLANTIC MONTHLY, June 1951, at 70 [hereinafter cited as Arnold].

<sup>13</sup> Douglas, *supra* note 11, at 841.

unfavorable radio, television and newspaper publicity reflecting on a defendant and affecting his right to a fair trial are of vital importance. The entire matter has been of extreme concern to this writer for some years.<sup>14</sup> Mr. Justice Frankfurter on the issue here considered said in his opinion in the case of a radio broadcaster who made prejudicial statements prior to a criminal trial:

Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication. . . .<sup>15</sup>

The writer is certainly not unmindful that maximum freedom must be permitted in order to allow the press to fully exercise its function to inform; yet this constitutionally protected right of freedom of the press must be balanced against the equally fundamental right to an impartial trial. At least one newsman has himself recognized that "it never was intended that freedom of the press should give newspapers license to cripple the right of every man to a fair trial."<sup>16</sup> And a federal court judge for the Northern District of California stated in *United States v. Powell*:

The doctrine of freedom of the press is not for the benefit of the press but for the benefit of the people. Newspaper publishers, therefore, have a high degree of responsibility to preserve the doctrine of freedom of the press for the benefit of the people, and not for their own benefit.<sup>17</sup>

But, as was once appropriately pointed out by Mr. Justice Douglas, "[n]ewspapers, radio, and television are in the hands of men who have their own political philosophies and their own ideas as to what justice is and how it should be administered." Justice Douglas added what seems today to have been an almost prophetic warning: "One shudders to think what could be the result in trials having a political cast—where the accused is unpopular, where the charge is inflammatory."<sup>18</sup> To be sure, there is still much hostility toward Mr. Nixon, and the charges against him were extremely serious in nature.

The public exposure would have had an adverse impact on both defendant Nixon and any prospective jurors in the case, as well. There is a grave responsibility in determining guilt, as, indeed, there would have been in the particular circumstances of deciding the question of any criminal conduct

<sup>14</sup> See Kutner, *Unfair Comment: A Warning to News Media*, 17 U. MIAMI L. REV. 51 (1962) [hereinafter cited as *Unfair Comment*].

<sup>15</sup> *Maryland v. Baltimore Radio Show Inc.*, 338 U.S. 912, 919 (1950).

<sup>16</sup> Harrison, *The Press vs. the Courts*, SATURDAY REVIEW, Oct. 15, 1955, at 35 [hereinafter cited as Harrison].

<sup>17</sup> *United States v. Powell*, 171 F. Supp. 202, 205 (N.D. Cal. 1959).

claimed on the part of Mr. Nixon. A person who sits as a juror is to maintain strict impartiality, in judging a case, in order to allow the accused due process of law. The thing desired of a faithful juror is that he not prejudge the case he is called upon to decide. Any judgment should be absolutely withheld until the entire case is presented. In arriving at their collective judgment, jurors must confine their minds to the fact-finding process. However, the pretrial publicity would deeply affect the thinking to be done and the conclusions to be reached by a jury in any Nixon trial, thereby playing havoc with the decision-making function of the jury. Because of such publicity beclouding the impartial judgment required, it is not only possible but most highly probable that jurors, sitting in judgment of Richard Nixon, might well know—either through entertaining some conscious bias or through subconscious influences—how they would vote before they even heard all the evidence. We should realize that this is true. The jury system itself operates on the presumption that, according to the *Alker* case and others, jurors cannot “disabuse their minds of a perhaps unconscious prejudice or predisposition against the defendant.”<sup>19</sup> Nor can the exposure of inflammatory matters appearing out of court (or even in court, for that matter) “be overcome by instructions to the jury”—as if those instructions were some kind of “verbal magic wand”; that is, a “naive assumption . . . all practicing lawyers know to be an unmitigated fiction.”<sup>20</sup> So, if the former President had been brought to trial, there was a potential present for predetermined judgment involving the temptation to possible jurors of yielding to the corrupting effects of past media comment that could detract and dissuade them from their duties and deliberations, thus denying Mr. Nixon due process. As Chief Justice William Howard Taft stated in *Tumey v. Ohio*:

The requirement of due process of law in judicial proceedings is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burdens of proof required to convict the respondent, or which *might lead him not to hold the balance nice, clear, and true between the state and the accused*, denies the latter due process of law. (emphasis added)<sup>21</sup>

The Supreme Court said much the same thing in *Estes v. Texas*.<sup>22</sup>

Such temptations ought not to be allowed. In a jury trial safeguards are necessary “to insure the absence of any improper influence operating on the

<sup>19</sup> *United States v. Alker*, 180 F. Supp. 661, 664 (E.D. Pa. 1959).

<sup>20</sup> *Krulewitch v. United States*, 336 U.S. 440, 453 (1949).

<sup>21</sup> *Tumey v. Ohio*, 273 U.S. 510, 532 (1926).

<sup>22</sup> *Estes v. Texas*, 381 U.S. 532 (1965).

minds of the jurors,"<sup>23</sup> as well as to insure that the accused obtain a fair hearing. But there is nothing that can be done now to prevent the abuses here in regard to a trial of Mr. Nixon—if it had occurred. The likelihood is that due to the detrimental effects of national publicity, the former President would be prejudiced in the defense of his own case. Indeed, it could have no other effect, and the prejudicial aspects of such a trial would be inherently violative of his right to a fair hearing.

#### JUSTICE OR VENGEANCE

All this is somewhat frustrating to explain to those people who say they want "equal justice." *Equal Justice Under Law*, inscribed across the portal of the Supreme Court Building, is a heritage of the English-speaking peoples. It was, to be sure, a dominant theory of government even when the United States was still part of the English colonial system. The principle was derived by the Colonies from the British government and it was stated in some form or other in the Declaration of Independence and the Constitution. In his first inaugural address, President Thomas Jefferson, one of the Founders, pronounced "Equal and exact justice to all men, of whatever state or persuasion, religion or political," to be one of "the essential principles of our government."<sup>24</sup>

Along with the whole ideal of equal justice, just treatment is also assured. But a trial of former President Nixon, as already discussed above, would seem to have been a departure from the Anglo-Saxon concept of just treatment. Surrounding all those cries raised for such a trial—either in the belief that this would serve the ends of justice or for purely partisan reasons—there is a spirit of vengeance, and vengeance is seldom justice. Clothing vengeance in the forms of legal procedure discredits the whole idea of justice. This writer, for one, wants no part of that. It might be called mob justice, but Mr. Justice Douglas has reminded us that "[m]obs are not interested in the administration of justice. They have base appetites to satisfy."<sup>25</sup> After all, as Mr. Justice Black noted in *Murchison*, "Justice must satisfy the appearances of justice."<sup>26</sup>

The genius of the American system is that *every* person has constitutional rights when confronted. Murderers and pornographers are not the only people who possess these rights. The Watergate tapes have revealed Nixon to be a mean and vindictive man who, perhaps, should never have become President; but surely we should not deny him the protection of the Constitution and let him be tried without due process of law. If there were no need for impartial juries, no need for safeguards to afford a fair trial, and if a prompt conviction

<sup>23</sup> *United States v. B. Goedde & Co.*, 40 F. Supp. 523, 529 (E.D. Ill. 1941).

<sup>24</sup> 1 MESSAGES AND PAPERS OF THE PRESIDENTS 311 (1912).

<sup>25</sup> Douglas, *supra* note 11, at 842.

<sup>26</sup> *In re Murchison*, 349 U.S. 133, 136 (1954).

was all that was required, then the ex-President could have been prosecuted and convicted without further ado. But, of course, serious legal questions arise as to whether the resulting judgment would be just. When it comes to procedural safeguards, the "means used to reach a result" were known by such men as Chief Justice Charles Evan Hughes, for example, to be "as important as the ends themselves."<sup>27</sup> Another jurist, Thurman Arnold, has written that one of our judicial traditions is to "protect the innocent even at the cost of letting the guilty escape."<sup>28</sup>

Notwithstanding how outraged or concerned individuals may be—and properly so—by the unfortunate events pertaining to the Watergate affair, we must remain within the bounds of the Constitution; we cannot compromise the principle of affording a fair trial in all criminal proceedings. To do so would be to undermine our constitutional guarantees, thus involving the risk of further upsetting the confidence of the American public in the adequacies of our institutions, at a time when constitutional rights should be regarded most precious. "Mass opinion has acquired mounting power in this country," Walter Lippmann observed. "It has shown itself to be a dangerous master of decisions."<sup>29</sup> But it is "even more dangerous in the operation of our legal system," where "[i]t has no business . . . in determining the awful decision of guilt or innocence," according to Justice Douglas. In short, mass opinion "is anathema to the very conception of a fair trial."<sup>30</sup> Hence, public passion, bearing the pressures of emotional or partisan considerations, can never be sufficient reason to disregard those standards set under our constitutional framework.

#### SOME RELEVANT CASES ON PRETRIAL PUBLICITY

Even if former President Nixon had been indicted and convicted, it is quite possible that that conviction would have later been reversed on the basis of pretrial publicity. Most recently, a federal district court judge reviewed the murder conviction of Lt. Calley and overturned it on the grounds that there had been "massive, adverse pretrial publicity."<sup>31</sup> President Ford, noting the

<sup>27</sup> Douglas, *supra* note 11, at 844.

<sup>28</sup> Arnold, *supra* note 12, at 70.

<sup>29</sup> W. LIPPMAN, *THE PUBLIC PHILOSOPHER* 20 (1955).

<sup>30</sup> Douglas, *supra* note 11.

<sup>31</sup> Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975). [EDITOR'S NOTE: In reversing the district court's finding of "adverse pre-trial publicity" the Fifth Circuit Court of Appeals found: "Our own review of the voir dire . . . convinces us that there was no substantial likelihood that the court members selected were other than fair and impartial individuals who would determine Calley's guilt or innocence based solely on the evidence developed before the court." 519 F.2d at 209. The fifth circuit's opinion was rendered on Sept. 10, 1975, which was after the completion of this writing. The court found that the petitioner, Calley, "was not deprived of a fair trial by prejudicial pretrial publicity." In an extensive treatment of the claim of prejudice, the court established the rationale for its decision on the basis of five separate factors: (1) That there was "no single sentiment regarding the case

"governing decisions of the Supreme Court," anticipated that such action could be taken regarding the Nixon case when he declared in the statement pardoning his predecessor, "In the end, the courts might well hold that Richard Nixon had been denied due process...."<sup>32</sup> There are numerous cases in this area, to be sure.

### District Court Decisions and the *Calley* Case

In a case from Pennsylvania involving pretrial publicity, the court declared a mistrial, in the government's action to recover excess duties because a newspaper had repeatedly printed prejudicial stories (instigated, as a matter of fact, by a government official). The court found the articles would bias the minds of jurors, and prevent them from rendering a fair decision, concluding that "it is incredible that going out into the community, they did not see and read these newspaper publications."<sup>33</sup>

The decision in the *Powell* case, previously cited, was based solely on the conduct of the press. Here newspapers printed misleading headlines and their stories read as though the defendant was guilty of treason although he was indicted on another count, having been accused of violating a statute prohibiting certain activities affecting the Army during war. "It needs no argument to show that a defendant in a criminal case could not have a fair trial in the face of newspaper publications such as in this case," commented the federal district judge in granting a new trial.<sup>34</sup> (Of course, remanding a case for a new trial raises the question of double jeopardy and could totally bar any future prosecution.)

Along these same lines the Seventh Circuit Court of Appeals reversed the conviction of Tony ("Big Tuna") Accardo on three counts of violating the Internal Revenue Code, by making false and fraudulent statements, on the grounds that prejudicial newspaper publicity "made it extremely difficult for the defendant to have a fair trial. . . ."<sup>35</sup> For a number of years prior to his indictment, Accardo had been widely publicized in the Chicago press and elsewhere as the reputed leader of the "Syndicate." He was said to be the power behind a number of legitimate and illegitimate enterprises, the principals of

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held by a vast segment of the American public"; (2) The military court delayed the proceedings to permit publicity to abate; (3) The court "allowed extensive *voir dire* examination to probe for any possible influence on the court members by the publicity"; (4) The court took "great pains to insure that no publicity reach the court members during the trial"; (5) The court issued an order to all prospective witnesses, civilian and military, prohibiting disclosure of their prospective testimony." 519 F.2d at 205-13.]

<sup>32</sup> U.S. NEWS & WORLD REPORT, Sept. 23, 1974, at 20.

<sup>33</sup> *Meyer v. Cadwalader*, 49 F. 32, 36 (E.D. Pa. 1891).

<sup>34</sup> *United States v. Powell*, 171 F. Supp. 202, 205 (N.D. Cal. 1959).

<sup>35</sup> *United States v. Accardo*, 298 F.2d 133, 139 (7th Cir. 1962). A petition by the prosecution for rehearing was denied by the court sitting en banc.

which were said to be hoodlums or members of the "Mafia." The federal charges against Accardo only occasioned a widespread repetition of these reports, as Chicago papers stirred up public opinion prior to his trial with articles usually complaining of, mentioning or alluding to the defendant's reputed background of past skirmishes with the law.<sup>36</sup> Thus, in the face of such prejudicial publicity, the court held that Accardo could not be assured a fair trial.

In the more recent *Calley* case, United States District Judge J. Robert Elliott applied similar principles of law to test this particular conviction and determined that Lt. Calley was "not only denied . . . a fair trial," but was "even denied . . . a fair chance for a fair trial." The judge was especially critical of the news media's coverage of the case, citing the use of such words or phrases as "atrocious," "wanton killing," and "barbaric act."<sup>37</sup> Judge Elliott ended his 132-page order with the following remarks in regard to Calley and the media:

He was pummelled and pilloried by the press.  
 He was taunted and tainted by television.  
 He was reproached and ridiculed by radio.  
 He was criticized and condemned by commentators. . . .<sup>38</sup>

The feeling that Lt. Calley did not have a fair trial seems to point up that in this case Army justice was hardly justice at all.

#### *Sheppard and Other Supreme Court Cases*

The Supreme Court frequently has petitions before it based on substantial claims, that jury trials are distorted because of inflammatory newspaper accounts, and it seems the highest court in the land has been led to upset several cases a year, on the effects of prejudicial publicity as it reflects on the right to a fair trial guaranteed by due process.

One such case where the Supreme Court reversed the conviction of a trial court in Florida was *Shepherd v. Florida*<sup>39</sup> (like the *Scottsboro* cases<sup>40</sup> in which the Supreme Court also intervened). In this case the Court, commenting

<sup>36</sup> *Unfair Comment*, *supra* note 14, at 52, 62.

<sup>37</sup> *Calley v. Calloway*, 382 F. Supp. 650, 658 (1974), *rev'd*, 519 F.2d 184 (1975). [EDITOR'S NOTE: The Fifth Circuit in responding to this position of the district court stated:

The district court's conclusion that mere exposure to publicity necessarily prevented any person from serving as a juror has an extremely unsettling sidelight. If, in this age of instant, mass communication, we were to automatically disqualify persons who have heard about an alleged crime from serving as a juror, the inevitable result would be that truly heinous or notorious acts will go unpunished. The law does not prohibit the informed citizen from participating in the affairs of justice. In prominent cases of national concern, we cannot allow widespread publicity concerning these matters to paralyze our system of justice. 519 F.2d at 210.]

<sup>38</sup> 382 F. Supp. at 712.

<sup>39</sup> *Shepherd v. Florida*, 341 U.S. 50 (1951).

<sup>40</sup> See generally *Howe v. United States*, 398 U.S. 131 (1970) and *Howe v. United States*, 398 U.S. 131 (1970).

on how prejudicial publicity—unseen, unsworn and uncontrovertible—had inflamed the atmosphere of the community, indicated that the composition of a jury is irrelevant, when publicity is so highly inflammatory in nature. And, as actual reading of the prejudicial publicity was also a fact in this case, it was a forerunner of *Marshall v. United States*.<sup>41</sup>

The *Marshall* case was decided solely on the issue of pretrial publicity and its influence. It had been established that prejudicial material in two newspapers was read by a substantial number of jurors, though those who admitted reading the articles told the judge they were still able to give the defendant a fair trial. However, the Supreme Court felt that the “special facts” of this case, that is, the nature of the prejudicial publicity, was so great and its exposure sufficient, that the defendant could not have a fair trial. Prior to *Marshall*, in leading cases on prejudicial publicity such as *United States v. Holt*,<sup>42</sup> the general rule was that there had to be proof, not only that jurors were exposed to prejudicial matters, but that their verdict was influenced by that knowledge, as well. But, under the *Marshall* doctrine, just the mere showing of the actual reading of highly prejudicial publicity was sufficient grounds for a mistrial.

Two other cases based solely on pretrial publicity soon followed *Marshall*. In *Janko v. United States*,<sup>43</sup> where it was ascertained that four jurors were actually exposed to prejudicial publicity, the Supreme Court rendered a memorandum opinion reversing a lower court holding. One week later, the Court was again “compelled . . . to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome,” as it had in *Janko*. This case, *Irvin v. Dowd*,<sup>44</sup> originated in the state of Indiana, where a defendant went on trial for murder in a small community which had six unsolved murders in a short period of time. The type of pretrial publicity here included assertions that the defendant had confessed to the other five murders and references to his prior record. In addition, the sheriff vowed that if the jury acquitted the defendant of this murder, he would devote his life to seeing him hanged. This sort of thing continued for six to seven months prior to the trial. The defendant was finally granted a change of venue to another rural community—but it was just as highly charged with prejudice, for 95% of the local population read the same paper. During four weeks of *voir dire* examinations, 430 jurors were impanelled and questioned, and 90% of them had some opinion as to the defendant’s guilt, ranging from mere suspicion to

<sup>41</sup> *Marshall v. United States*, 360 U.S. 310 (1959).

<sup>42</sup> *United States v. Holt*, 218 U.S. 245 (1910).

<sup>43</sup> *Janko v. United States*, 366 U.S. 716 (1961).

<sup>44</sup> *Irvin v. Dowd*, 366 U.S. 717 (1961).

absolute certainty. Even after 12 jurors had been selected, two-thirds of them still had preconceptions of guilt. Basing its opinion on the quantity of "deep and bitter prejudice throughout the community," the Supreme Court found the atmosphere of prejudice just too overwhelming and, thus, determined that a defendant should be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury not possessing a belief of the defendant's guilt. In his comments on this example of community prejudice in *Irvin*, Mr. Justice Frankfurter said that when "such disregard of fundamental fairness is so flagrant . . . convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned."<sup>45</sup> Further, Justice Frankfurter had to unhappily conclude in his concurring opinion that the *Irvin* case was not an:

. . . isolated case . . . nor an atypical miscarriage of justice due to anticipatory trials by newspapers.

. . . .

This court has not yet decided that the fair administration of criminal justice must be subordinate to . . . freedom of the press. . . .<sup>46</sup>

One of the most "sensational" cases in judicial history was that of Dr. Sam Sheppard. It was certainly a "full treatment" case—in more ways than one. Almost a month before Dr. Sheppard was arrested on the charge of murdering his wife, the local newspapers began stressing his lack of cooperation with the police and other officials ("Testify Now In Death, . . . Doctor Is Ordered," ran one headline). The papers also played up Sheppard's refusal to take a lie detector test ("Doctor Balks At Lie Test," another headline read); or to allow authorities to inject him with "truth serum." A front-page editorial charged that someone was "getting away with murder," meaning that "a husband who ought to have been subjected instantly to the same third degree to which any other person under similar circumstances is subjected. . . ." In response to another front-page editorial asking, "Why No Inquest?" the county coroner called such a hearing for the following day, to be held in a high-school gymnasium. The inquest was broadcast, as well as attended by several hundred spectators—including reporters and photographers. During the three-day inquest, in which Sheppard was questioned for five and one-half hours, a headline in large type stated that the captain of police "Urges Sheppard's Arrest." Also during this time, the newspapers emphasized evidence that tended to incriminate Sheppard, pointing out discrepancies in his statements to authorities in order to cast doubt on his own account of the murder. Delving into his private life, the papers pictured

<sup>45</sup> *Id.*

him as a Lothario, who had been involved with a number of women: a motive for committing the crime. One editorial demanded that Sheppard, whom it described as "proven under oath to be a liar, still . . . left free to do whatever he pleases . . .," be taken to police headquarters and questioned. Finally, another page-one editorial asked, "Why Isn't Sam Sheppard In Jail?" The editorial, subsequently entitled "Quit Stalling—Bring Him In," claimed that Sheppard was "surrounded by an iron curtain of protection [and] concealment." Sheppard was arrested the same evening after this editorial appeared.<sup>47</sup>

After Sheppard's arrest and until his indictment about a month later, the unfavorable publicity increased in intensity. Typical of the press coverage during that period were such headlines as "Doctor Is Ready For Jury," "Blood Is Found In Garage," and "New Murder Evidence Is Found, Police Claim." All in all, from the time of the July murder until Sheppard's eventual conviction in December, press coverage was so detailed that clippings from each of the three local daily newspapers filled five volumes.<sup>48</sup> Unlike *Irvin*, this took place in a metropolitan area—Cleveland. Interestingly enough, while Judge Frank, in his dissent in the *Leviton* case, spoke with seemingly fatalistic acceptance, that trial by newspaper was an unavoidable curse of metropolitan living;<sup>49</sup> in the *Sheppard* case, one journalist had to admit that "almost everyone who watched the performance of the Cleveland press agrees that a fair hearing for the defendant . . . would be a modern miracle."<sup>50</sup> Added another Ohio newspaper in an editorial, "[T]he press must ask itself if its freedom, carried to excess, doesn't interfere with the conduct of a fair trial."<sup>51</sup> Indeed, the assertion was made that the trial judge himself had told a reporter, "It's an open and shut case . . . he [Sheppard] is guilty as hell."<sup>52</sup>

It took two weeks to select a jury in the *Sheppard* case and the trial itself lasted for seven weeks, a motion for a change of venue being denied.<sup>53</sup> Sheppard's conviction for second degree murder was affirmed by the Ohio Court of Appeals<sup>54</sup> and the Ohio Supreme Court. The right to a fair trial "is not," said the Ohio Supreme Court, "to be decided on the volume of publicity [alone] or the tendency such publicity may have had in influencing the public mind generally as to the defendant's guilt or innocence."<sup>55</sup>

<sup>47</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 338-41 (1966).

<sup>48</sup> *Id.* at 341-43.

<sup>49</sup> *United States v. Leviton*, 193 F.2d 848, 865 (2d Cir. 1951).

<sup>50</sup> Harrison, *supra* note 16.

<sup>51</sup> Toledo Blade, Dec. 22, 1954.

<sup>52</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 338 n. 11 (1966).

<sup>53</sup> *Unfair Comment*, *supra* note 14, at 73-74.

<sup>54</sup> *State v. Sheppard*, 100 Ohio App. 345, 128 N.E.2d 471 (1955).

<sup>55</sup> *State v. Sheppard*, 165 Ohio St. 293, 135 N.E.2d 340, 343 (1956).

Though the United States Supreme Court denied certiorari to Sheppard's original petition for review,<sup>56</sup> it did rule in 1966 that the "massive, pervasive, and prejudicial publicity that attended his prosecution" and "saturated the community . . . deprived the defendant of a fair trial consistent with due process," which "requires that the accused receive a trial by an impartial jury free from outside influences."<sup>57</sup> This decision reversed the United States Court of Appeals,<sup>58</sup> and, in turn, upheld a prior United States District Court holding that the murder conviction was void because a fair trial was not afforded<sup>59</sup> (from which holding the appeal had been taken). While the Supreme Court recognized that "reversals are but palliatives," said Mr. Justice Clark, in speaking for the Court in *Sheppard*, "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent," and, thus, there was "[a] reasonable likelihood that prejudicial news prior to trial will prevent a fair trial."<sup>60</sup>

Certainly, in accord with *Sheppard*, there could be no exception to our constitutional guarantee of due process for Richard Nixon, though no longer our Chief of State, when "it would be blinking reality not to recognize the extreme prejudice inherent"<sup>61</sup> here.

#### CONCLUSION

The Bill of Rights offers, together with the fourteenth amendment, certain guarantees to protect an individual against unjust conviction. In addition, executive clemency, by pardon, exists to afford a chance for relief from possible or evident mistake, from undue prejudice or harshness, or in order to avoid needless severity in the operation and enforcement of criminal law.

On that basis, this author takes the position that the presidential pardon of Richard Nixon was sound and valid. Of course, one question which arises from this pardon was directly asked of President Ford in his historic appearance before the House Judiciary Subcommittee on Criminal Justice, October 17, 1974, by Congressman Edwards of California: "Would not the same considerations . . . apply to the Watergate defendants . . . ?" The President responded that he thought it "inadvisable" for him to comment on this "in light of the fact that these trials are being carried out at the present

<sup>56</sup> 352 U.S. 910 (1956).

<sup>57</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 335, 362 (1966).

<sup>58</sup> *Id.*

<sup>59</sup> 231 F. Supp. 37 (S.D. Ohio 1964).

<sup>60</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966).

<sup>61</sup> *Turner v. Louisiana*, 379 U.S. 466, 473 (1965).

time.”<sup>62</sup> Later in the hearing, however, the following exchange took place between Congressman Mayne and Mr. Ford:

Mr. Mayne: . . . Did you, by granting this pardon, have any intention of stopping the investigations of any other defendants or potential defendants?

The President: None whatsoever.<sup>63</sup>

It is hoped here that President Ford will not grant pardons to those persons who stand accused of committing Watergate-related offenses in criminal proceedings now under way in the courts—at least, that is, until all trials and any appeals are completed, for only through pursuing such trials will the full truth of what happened in the Watergate matter be made known to the American people. And, even though pardoned from prosecution, Mr. Nixon should still be expected to testify, as a material witness, in regard to the commission of such offenses during the course of any such criminal proceedings.\*

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<sup>62</sup> U.S. NEWS & WORLD REPORT, Oct. 28, 1974, at 69.

<sup>63</sup> *Id.*

\* As of the date of this printing President Ford has granted no other pardons to persons accused of Watergate-related offenses.