This is to certify that the

dissertation entitled

JOHN SIRICA AND THE CRISIS OF WATERGATE 1972-1975

presented by

David W. Guard

has been accepted towards fulfillment
of the requirements for

Ph.D. degree in History

Douglas T. Miller
Major professor

Date January 23, 1995

JOHN SIRICA AND THE CRISIS OF WATERGATE

1972-1975

By

DAVID WILLIAM GUARD

A THESIS

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

DOCTOR OF PHILOSOPHY

Department of History

1995

JUDGE SI

This st
involvement fr
considered. F
in the break-
House tapes, a
Second, what
during those
what degree
insightful an
dimensions of
from office i

In this
utilized that
extensive in
evaluation of
based strictl
variety of so
White House
author sugg

ABSTRACT

JUDGE SIRICA AND THE CRISIS OF WATERGATE 1972-1975

By

David William Guard

This study examines Judge John Sirica's Watergate involvement from 1972 to 1975. Three issues are specifically considered. First, to what extent was Sirica's participation in the break-in trial, the litigation surrounding the White House tapes, and the cover-up trial historically significant? Second, what factors contributed to the judge's decisions during those three phases of the proceedings? Finally, to what degree can Sirica's actions contribute to a more insightful and complete understanding of the constitutional dimensions of the scandal that drove President Richard Nixon from office in 1974?

In this study, a narrative methodological approach is utilized that provides a chronological account of Sirica's extensive involvement in the Watergate proceedings. The evaluation of the judge's actions between 1972 and 1975 is based strictly on historical evidence which originate from a variety of sources that include court opinions, transcripts of White House tapes, newspapers, and autobiographies. The author suggests that Sirica's role was historically

significant b
the impact th
surrounding t
these decisic
involvement u
the judge's c
federal statu
demeanor on oc
and decisions
jurist who app
particularly
suggests that
knowledge of
that rigid o
concluded tha
insights conc
political inst
other disrupt

significant because of the centrality of his participation and the impact that his decisions and rulings had on the events surrounding the entire Watergate scandal. Explanations for these decisions differ between the various phases of Sirica's involvement under consideration here; in the main, however, the judge's conscientious application of legal precedents and federal statutes, combined with an activist and confrontations demeanor on occasion, shaped and molded his behavior, rulings, and decisions. Although Sirica was by no means a perfect jurist who appeared noticeably impulsive inside his courtroom--particularly with respect to the break-in trial--the evidence suggests that his professionalism, conscientiousness, and knowledge of the law offset any significant harmful effect that rigid opinions could have caused. Finally, it is concluded that Sirica's Watergate role reveals important insights concerning the capability of American legal and political institutions to cope with and respond to scandal and other disruptions within the federal government.

INTRODUCTION

CHAPTER 1

CHAPTER 2

CHAPTER 3

CHAPTER 4

CHAPTER 5

CHAPTER 6

CHAPTER 7

BIBLIOGRAPHY

TABLE OF CONTENTS

INTRODUCTION		1
CHAPTER 1	STRUGGLE AND ADVERSITY: THE RISE OF A PRAGMATIC JUDGE, 1904-1972	15
CHAPTER 2	THE MAKING OF A SCANDAL AND COVER-UP, 1969-1972	40
CHAPTER 3	THE BREAK-IN TRIAL AND ITS SIGNIFICANCE	65
CHAPTER 4	THE BATTLE FOR THE TAPES--PHASE 1	104
CHAPTER 5	THE BATTLE FOR THE TAPES--PHASE 2	146
CHAPTER 6	CATHARSIS OR ESCAPE FROM JUSTICE? THE COVER-UP TRIAL, A PRESIDENTIAL PARDON, AND THE END OF A CRISIS	203
CHAPTER 7	CONCLUSION	259
BIBLIOGRAPHY		278

In the S

Justice Depar

evaluated the

on the bench

Washington D.

"outstanding"

professional r

and twelve we

dismissed imm

John J. Siri

district cou

celebrity st

author was un

year-old jur

serving on t

Katz wrote,

Judge in Wash

philosophica

court....but

short temper

misguided vie

compassion fo

INTRODUCTION

In the September 1973 issue of the Washingtonian, former Justice Department attorney and freelance writer Harvey Katz evaluated the performance of 71 judges who were then serving on the bench in a variety of courts in the metropolitan Washington D.C. area. His conclusion: 28 of the total were "outstanding" and performed their duties in a highly professional manner; 25 were "good"; six were "questionable"; and twelve were considered "unfit to serve" and should be dismissed immediately. Included among the latter category was John J. Sirica, chief judge of the United States federal district court. Though acknowledging Sirica's recent celebrity status as the nation's "Watergate judge," the author was unrelenting in his critique, and he accused the 69 year-old jurist of unethical and incompetent conduct while serving on the federal bench. "During the past few years," Katz wrote, "Sirica has become the most frequently reversed judge in Washington. The reversals are not attributable to a philosophical dispute between Judge Sirica and his appellate court....but rather to Sirica's careless legal errors, his short temper, his inattentiveness to court proceedings, his misguided view of the purpose of judicial review, his lack of compassion for his fellow human beings, and, strange as it now

seems, his la

To empha

a local prose

had "absolute

cases or the

"If he rules

to tiptoe up

wrong or the

States Court

time." A de

unethical co

because he's

like that de

slobs who co

have to face

this conduct

judge in w

demonstrated

before the Wa

In his

handling of t

only months

the judge had

argued that

this result a

were violate

accused, and

seems, his lack of interest in the truth."

To emphasize the judge's incompetence, the author quoted a local prosecuting attorney who claimed that Sirica's rulings had "absolutely nothing" to do with the facts of particular cases or the laws as they existed in the District of Columbia. "If he rules in your favor," the lawyer confided, "you've got to tiptoe up to his clerk and point out that he got the case wrong or the names wrong. Or else, Bazelon (of the United States Court of Appeals) is going to let him have it one more time." A defense attorney, by contrast, emphasized Sirica's unethical conduct when interviewed by the author. "Maybe it's because he's such a vicious sentencer," he remarked. "Judges like that develop defenses. They like to look at the poor slobs who come up before them as objects. Then they don't have to face what they're really doing to people." Because of this conduct in the midst of his record as the most reversed judge in Washington, Katz concluded that Sirica had demonstrated his unsuitability for service on the bench well before the Watergate break-in on June 17, 1972.

In his assessment, the author also condemned Sirica's handling of the well-publicized break-in trial which had ended only months before the article was written. Conceding that the judge had uncovered parts of the Watergate cover-up, Katz argued that Sirica's tactics were not necessary to achieve this result and that the constitutional rights of all parties were violated during the proceeding. "Sirica badgered, accused, and castigated witnesses, prosecutors, and defense

lawyers.

conferences

sentences t

constitutiona

inquisition,

This s

interpretati

to 1975. M

that histor

what extent

proceedings

of the brea

White Hous

decision

the presi

what fact

during t

judge's

primari

politic

Can it

profess

applie

decisi

an in

opinio

What

lawyers. He read transcripts of confidential bench conferences to the jury. He used the threat of lengthy sentences to force defendants into abandoning their constitutional rights. He turned the trial into an inquisition, and justice into a charade."[1]

This study of John Sirica presents a contrasting interpretation of the judge's entire Watergate role from 1972 to 1975. My specific goal is to resolve three broad issues that historians have not previously considered. First, to what extent was Judge Sirica's involvement in the Watergate proceedings historically significant in terms of his handling of the break-in trial of 1973, the litigation surrounding the White House tapes which culminated in the Supreme Court's decision in U.S. v. Nixon (1974), and the cover-up trial of the president's former associates in 1974 and 1975? Second, what factors contributed to Sirica's decisions and rulings during these three phases of the proceedings? Were the judge's confrontational demeanor and judicial activism primarily responsible? What role, if any, did Sirica's politics and ideology have in the outcomes of these cases? Can it be concluded that the judge's conscientiousness and professionalism were significant inasmuch as he carefully applied existing legal precedents and statutes to reach his decisions? Or was it true, as Katz suggested, that Sirica was an insecure and zealous jurist who allowed his personal opinions to influence his behavior on the bench? Finally, to what degree can Sirica's actions illuminate our contemporary

understandin

specifically

contribute t

the constit

President Ni

It is

study examin

Watergate th

discussion,

related to

for example

a means of

influenced

also intr

Watergate

sensation

charged

National

Chapters

litigati

discuss

coopera

second

this de

and jud

August

close N

understanding of Watergate and its significance? More specifically, can the judge's involvement in the proceedings contribute to a more insightful and complete understanding of the constitutional dimensions of the scandal that drove President Nixon from office in 1974? If so, how?

It is important to emphasize at the outset that this study examines John Sirica within the historical context of Watergate that captivated and divided the American people. My discussion, therefore, is not limited to material directly related to the three issues identified above. Chapter one, for example, considers Sirica's background and early career as a means of understanding his personality and demeanor which influenced his conduct between 1972 and 1975. Chapter two is also introductory and discusses the factors leading to the Watergate break-in and cover-up. Chapter three addresses the sensational break-in criminal trial of seven men who were charged with burglarizing the offices of the Democratic National Committee in the Watergate complex in June 1972. Chapters four and five consider two phases of the tapes litigation in Sirica's courtroom. As is demonstrated in that discussion, the Nixon administration became somewhat more cooperative with the special prosecutor's office during the second phase as Sirica became increasingly confrontational; this development heightened the tension between the executive and judicial branches until Nixon's eventual resignation in August 1974. Chapter six deals with the criminal trial of close Nixon associates who instigated and participated in the

Watergate co
which ended
such notable
Haldeman, Jo
Chapter seve
the three pr
I argue that
was historic
role and the
events surro
Richard M.
Explanations
phases of S
study. In
application
with an acti
shaped and
Although Har
means a per
inside his c
in trial--
professional
offset any
could have c
between 1972
the capabili
cope with an

Watergate cover-up between 1972 and 1973. This proceeding, which ended in January 1975, resulted in prison sentences for such notable individuals as John Mitchell, H. R. (Bob) Haldeman, John Ehrlichman, Charles Colson, and Robert Mardian. Chapter seven concludes this study and specifically resolves the three primary issues raised for consideration. Briefly, I argue that Sirica's involvement in the Watergate proceedings was historically significant because of the centrality of his role and the impact that his decisions and rulings had on the events surrounding the entire scandal as well as the fate of Richard M. Nixon as the nation's thirty-seventh president. Explanations for these decisions differ between the various phases of Sirica's involvement under consideration in this study. In the main, however, the judge's conscientious application of legal precedents and federal statutes, combined with an activist and confrontational demeanor on occasion, shaped and molded his behavior, rulings, and decisions. Although Harvey Katz correctly observed that Sirica was by no means a perfect jurist who appeared noticeably impulsive inside his courtroom--particularly with respect to the break-in trial--the evidence suggests that the judge's professionalism, conscientiousness, and knowledge of the law offset any significant harmful effect that rigid opinions could have caused. Finally, I conclude that Sirica's role between 1972 and 1975 reveals important insights concerning the capability of American legal and political institutions to cope with and respond to scandal and other disruptions within

the federal

contributio

because of t

While i

the signifi

have been p

scandal ove

predominate

example, au

series of ar

1972 and 197

and contain

respect to

approval of

had approve

Democratic

up after Ju

Woodwa

published i

Nixon admi

decision to

All The Pre

fails to p

of its cla

frequent

portraits

Henry Kiss

the federal government. Additional research into the life and contributions of Judge Sirica, therefore, appear warranted because of these insights.

While it is clear that historians have not yet considered the significance of Sirica's Watergate role, numerous books have been published which address various components of the scandal overall. Journalistic and autobiographical works predominate the list. Bob Woodward and Carl Bernstein, for example, authored All The President's Men (1974) based on a series of articles they had written for the Washington Post in 1972 and 1973. Although this account is somewhat incomplete and contains several misrepresentations--particularly with respect to the administration's prior knowledge and alleged approval of the break-in--it demonstrates that the White House had approved of a "dirty tricks" campaign designed to harass Democratic politicians and had initiated the Watergate cover-up after June 17, 1972.[2]

Woodward and Bernstein's sequel, The Final Days, was published in 1976. It describes the dramatic collapse of the Nixon administration following the president's unpopular decision to fire the special prosecutor in October 1973. Like All The President's Men, this later account is incomplete and fails to provide sufficient evidence to substantiate several of its claims. Nixon's worsening decision-making abilities, frequent alcoholic binges, discussions with presidential portraits in the White House, and a dramatic crying spell with Henry Kissinger just before the resignation were all factual,

according t

verify them

that Woodwar

have agreed

receiving in

more cynica

conjecture a

book's sales

Days remain

highlights

administrat

A thir

Anthony Luka

The Final D

and related

distinctior

overwhelmir

concern w

unscrupulo

characteri

with consi

to the pre

Donald Seg

practice

contributi

in, and th

activities

according to the authors, despite a lack of documentation to verify them. One possible explanation for this absence is that Woodward and Bernstein, as professional journalists, may have agreed not to reveal their sources as a condition for receiving inside information about the Nixon White House. A more cynical alternative is that the authors resorted to conjecture and sensationalism in an effort to improve their book's sales and income potential. In either case, The Final Days remains significant in spite of its flaws because it highlights the general turmoil that permeated the Nixon administration prior to its collapse in August 1974.[3]

A third journalistic work, also published in 1976, is J. Anthony Lukas' Nightmare. Unlike All The President's Men and The Final Days, Lukas discussed the entire Watergate affair and related events through Nixon's resignation. An additional distinction is that the author provided clear and sometimes overwhelming evidence to support his arguments. His primary concern was the Nixon administration's illegal and unscrupulous conduct between 1969 and 1974. In a style characteristic of many journalistic accounts, Lukas described with considerable detail the wide range of activities leading to the presidential resignation. Such activities included Donald Segretti's dirty tricks campaign, the administration's practice of blackmailing wealthy individuals to make contributions for the re-election effort, the Watergate break-in, and the cover-up that followed. Based on these and other activities, the author concluded that Nixon was personally

responsible
transpired.
aides and
instances, I
responsible
office insi

Perhap
the author
between the
government
addressed th
relationship
political
considered.
excellent b
information
administrat

In add
have been
John Dean's
insightful,
special cou
had played
charged tha
White House
based not o
also on tr

responsible for the systematic pattern of abuse that transpired. Although he acknowledged that several White House aides and campaign officials acted on their own in many instances, Lukas insisted that the president was nevertheless responsible because of the many directives from the oval office insisting that political opponents be harassed.[4]

Perhaps the most serious weakness in Nightmare is that the author failed to seriously discuss the interactions between the executive, legislative, and judicial branches of government during the Watergate episode. Although he addressed the activities that occurred within each branch, the relationships between them--which contributed to Nixon's political failure and resignation--were not sufficiently considered. Aside from this absence, Nightmare is an excellent book inasmuch as it contains a wealth of reliable information about the illegal activities of the Nixon administration.[5]

In addition to these journalistic works, numerous memoirs have been written by participants in the Watergate affair. John Dean's Blind Ambition (1976) is perhaps the most candid, insightful, and reliable of such accounts. Dean, who was special counsel to the president until 1973, admitted that he had played a central role in the Watergate cover-up. He also charged that the president and other key officials in the White House were involved as well. These revelations were based not only on Dean's personal recollections and memory but also on transcripts from the White House tapes and other

pieces of e

seller and

better unde

A seco

serving, thi

the conver

information

president a

Revenue Ser

possible vi

were made a

Watergate i

Nixon also

ensure tha

administrat

concluded,

impeachment

presidents h

bugging, va

fraud--for p

president fo

branch which

This ge

following t

accused of

conversation

pieces of evidence. Because of these candid admissions and interesting revelations, Blind Ambition became an instant best seller and continues to be widely read by those who seek a better understanding of Watergate.[6]

A second noteworthy memoir is RN (1978). Though self-serving, this account is quite candid because Nixon discussed the conversations with his aides which became public information when the White House tapes were released. The president admitted, for example, that he used the Internal Revenue Service to investigate political opponents for possible violations of tax laws. He conceded that efforts were made at his own request to interfere with the FBI's Watergate investigation immediately following the break-in. Nixon also acknowledged that hush money was considered to ensure that the burglars would not openly discuss the administration's involvement in criminal activity. He concluded, however, that his conduct did not justify impeachment proceedings because 1) previous Democratic presidents had sanctioned unscrupulous activities--such as bugging, various forms of harassment, and even electoral fraud--for political purposes, and 2) the forced removal of a president for political reasons served to weaken the executive branch which jeopardized America's national security.[7]

This general assessment was attacked by Nixon's critics following the book's publication. Specifically, he was accused of continuing his cover-up by misrepresenting the conversations in the oval office and failing to reveal

information
criticisms
light of re
president's
suspected.
more candid
over or ign
One ye
Record Stra
as a thoro
discussed s
burglars, t
House had a
about the a
tapes, Nixo
and 1975.
Nixon for d
was primar
attacked G
predecesso
served had
Watergate.
stressed t
clear sepa
Other
American
(1978) and

information that had not yet been made public. These criticisms now appear to have been reasonable--especially in light of recently released information which suggests that the president's personal involvement was deeper than previously suspected. Yet despite these criticisms, RN is relatively more candid than other presidential memoirs which simply gloss over or ignore weaker aspects of particular administrations.[8]

One year after RN was published, John Sirica's To Set The Record Straight appeared. Although the memoir was not written as a thorough account of the author's role,[9] the judge discussed such important events as the trial of the Watergate burglars, the revelation from James McCord that the White House had applied pressure on all defendants to remain silent about the administration's involvement, the battle for the tapes, Nixon's resignation, and the final judgments in 1974 and 1975. Throughout this blunt account, Sirica chastised Nixon for disgracing his office and argued that the president was primarily responsible for the scandal. Moreover, he attacked Gerald Ford for the presidential pardon of his predecessor and suggested that justice would have been better served had Nixon been criminally tried for his role in Watergate. Sirica concluded by praising the judiciary and stressed that America survived the scandal because of the clear separation of powers as specified in the Constitution.[10]

Other autobiographical works include Jeb Magruder's An American Life (1974), H. R. Haldeman's The Ends of Power (1978) and recently released diaries from his tenure as White

House chief

Will (1980)

These recol

Watergate b

instance, b

frank and u

sabotage an

provide si

experience.

attacked by

their involv

insight and

autobiograp

In sh

autobiograp

taken much

published

role of Ju

(1990), f

emphasis

House. K

justified

violated

Though w

particip

Publica

the num

House chief of staff, published in 1994, G. Gordon Liddy's Will (1980), and John Ehrlichman's Witness to Power (1982). These recollections have added little to what was known about Watergate before their publication. Liddy's account, for instance, became a best seller in part because of the author's frank and unapologetic admission that he had participated in sabotage and other criminal activities; it did not, however, provide significant new insights about the Watergate experience. Haldeman and Ehrlichman's memoirs were especially attacked by reviewers because both authors refused to discuss their involvement in a candid and thorough manner. A lack of insight and candor, therefore, has characterized much of the autobiographical material on Watergate.[11]

In sharp contrast to the numerous journalistic and autobiographical accounts of the scandal, few historians have taken much interest. To date, just two studies have been published on Watergate, and none of them seriously address the role of Judge Sirica. Stanley Kutler's The Wars of Watergate (1990), for example, discusses the entire scandal with an emphasis on the congressional confrontation with the White House. Kutler's thesis is that impeachment proceedings were justified because the president and his aides persistently violated the Constitution by committing numerous crimes. Though well written, historians were well aware of Nixon's participation in illegal activities long before the book's publication. Kutler's superficial consideration of Sirica and the numerous legal issues involved is especially disappointing

because o

historian.

for reader

the scanda

In co

Ruin and

biographic

excellent s

somewhat l

Nixon pre

administrat

Ambrose su

leadership

policy. In

a high price

the lack of

Similar

narrative me

that provide

involvement

the judge's

historical e

that include

newspapers,

approach pre

Sirica despi

during the W

because of the author's credentials as a constitutional historian. The Wars of Watergate, therefore, is best suited for readers wishing to attain a broad historical overview of the scandal.[12]

In contrast to Kutler's study, Stephen Ambrose's Nixon: Ruin and Recovery, 1973-1990 (1991) is essentially biographical and represents the author's third volume in his excellent series on the controversial president. Ambrose was somewhat less critical than Kutler in his assessment of the Nixon presidency. Although he recognized that the administration was indeed responsible for criminal acts, Ambrose suggested that Nixon also demonstrated strong leadership abilities--particularly in the realm of foreign policy. In hindsight, the author lamented that America paid a high price for driving Nixon from office in part because of the lack of responsible executive leadership after 1974.[13]

Similar to the approaches used by Kutler and Ambrose, a narrative methodological approach is utilized in this study that provides a chronological account of Sirica's extensive involvement in the Watergate proceedings. My evaluation of the judge's actions between 1972 and 1975 is based strictly on historical evidence which originate from a variety of sources that include court opinions, transcripts of White House tapes, newspapers, and autobiographies. It is hoped that this approach presents a clear and reliable understanding of Judge Sirica despite the controversies that his actions aroused during the Watergate period and the final two years of the

Nixon ad

1.
Harvey
September

2.
Carl Be
(New York

3.
Bob Woo
Simon and

4.
J. Antho

5.
Ibid.

6.
John Dea
1976).

7.
Richard

8.
See Lyndo
incident,
Ronald Reag

9.
Illustrat
incomplete a
regarding t
confrontatio
during the
participants

10.
John J. Si
Norton, 197

11.
G. Gordon
H. R. Halder
Times Books
Inside the W
1994); and J
and Schuster
significant
anti-semitis
insiders.

Nixon administration.

1.
Harvey Katz, "Some Call It Justice II." Washingtonian, September, 1973, pp. 127-30.

2.
Carl Bernstein and Bob Woodward, All The President's Men (New York: Simon and Schuster, 1974).

3.
Bob Woodward and Carl Bernstein, The Final Days (New York: Simon and Schuster, 1976).

4.
J. Anthony Lukas, Nightmare (New York: Viking Press, 1976).

5.
Ibid.

6.
John Dean, Blind Ambition (New York: Simon and Schuster, 1976).

7.
Richard Nixon, RN (New York: Grosset and Dunlap, 1978).

8.
See Lyndon Johnson's The Vantage Point on the Gulf of Tonkin incident, Jimmy Carter's Keeping Faith on inflation, and Ronald Reagan's An American Life on Iran-Contra.

9.
Illustrative of this lack of thoroughness is the author's incomplete analysis of judicial opinions, his legal philosophy regarding the authority of judges, the Supreme Court's confrontation with the Nixon White House, and important events during the criminal trials of key Watergate cover-up participants.

10.
John J. Sirica, To Set The Record Straight (New York: W. W. Norton, 1979).

11.
G. Gordon Liddy, Will (New York: St. Martin's Press, 1980); H. R. Haldeman and Joseph DiMona, The Ends of Power (New York: Times Books, 1978); H. R. Haldeman, The Haldeman Diaries: Inside the Nixon White House (New York: G. P. Putnam's Sons, 1994); and John Ehrlichman, Witness to Power (New York: Simon and Schuster, 1982). Recently, Haldeman's diaries received significant attention because they revealed Nixon's racism and anti-semitism which had not been documented by White House insiders. The author's discussion of Watergate, however,

merely con
the release

12.
Stanley K
A. Knopf, I

13.
Stephen E
(New York:

merely confirmed information that was already known prior to the release of these diaries.

12.
Stanley I. Kutler, The Wars of Watergate (New York: Alfred A. Knopf, 1990).

13.
Stephen E. Ambrose, Nixon: Ruin and Recovery, 1973-1990 (New York: Simon and Schuster, 1991).

In 19

American p

Sirica ack

reputation

appointmen

recollected

background

came up rou

said. "It

John

Waterbury,

of San Vale

at the age

child of I

Shortly afte

financial

tubercular

living. T

establish a

warned that

CHAPTER ONE

STRUGGLE AND ADVERSITY:

THE RISE OF A PRAGMATIC JUDGE, 1904-1972

I

In 1973, as the Watergate cover-up unravelled and the American public became preoccupied with the scandal, Judge Sirica acknowledged in an interview that he had earned a reputation for firmness and aggressive sentencing since his appointment to the federal bench in 1957. This reputation, he recollected, was made possible in large part because of his background and earlier career as a prosecuting attorney. "I came up rough and tumble, never backing away from a fight," he said. "It does something good for you."[1]

John Joseph Sirica was born on March 19, 1904 in Waterbury, Connecticut. His father, Ferdinand, was a native of San Valentino, Italy and journeyed to America with his dad at the age of seven. John's mother, Rose Zinno, was also the child of Italian immigrants and was raised in New Haven. Shortly after his birth, the Siricas experienced considerable financial difficulties because Ferdinand suffered from a tubercular cough which interfered with his ability to earn a living. Though trained as a barber, he was unable to establish a secure business in Connecticut as his physician warned that a warmer climate was necessary to improve his

health.
Dayton, O
soon foll
Thes
economic
began a
Jacksonvil
Washington
jobs such
family fina
become an
education d
in 1918, at
enrolled i
determinati
years later
decisions, h
apply direct
such a move
require unde
was equivoca
attorney.
when his cou
former class
accepted at
began his st
Just on

health. At this point, the Siricas left New England for Dayton, Ohio and hoped that a brighter economic future would soon follow.[2]

These expectations were not realized. Faced with bleak economic prospects in the Midwest, Ferdinand and his family began a traumatic odyssey searching for employment to Jacksonville, Florida, Richmond, Virginia, and finally to Washington D.C. in 1918. Along the way, John accepted various jobs such as selling newspapers and greasing cars to help his family financially. As a young teenager, his ambition was to become an automobile mechanic and to forego a college education despite his father's opinions to the contrary. But in 1918, at the age of fourteen, John changed direction and enrolled in a preparatory school in Washington with a determination to succeed academically. He graduated three years later. Although John had not yet made any firm career decisions, his family and several classmates encouraged him to apply directly to law school. Prior to the Second World War, such a move was not uncommon because many law schools did not require undergraduate degrees for admission. John, however, was equivocal in that he had no strong interest in becoming an attorney. After some hesitation, he finally agreed to apply when his cousin Alphonso and Henry Jawish, a close friend and former classmate, decided to become lawyers. Sirica was soon accepted at the George Washington University Law School and began his studies there at the age of seventeen.[3]

Just one month after enrollment, however, he became

frustrated
that he ha
universal e
and uncert
decision t
competed i
working as
additional
completed h
decided to
reputation.
law school
academic in
out once ag

Meanwh
multiply.
financial s
purchasing
later, howe
Volstead Act
Although no
embarrassed
uproot the f
for Californ
too, felt h
school.[5]

After t

frustrated and dropped out. Although Sirica later recollected that he had difficulty understanding the material--a nearly universal experience for beginning law students--his young age and uncertain career goals also likely contributed to this decision to quit. Sirica then took up boxing and soon competed in exhibition bouts with professional fighters while working as a lifeguard near the Jefferson Memorial to earn additional income. Several months later, Henry Jawish completed his first year at George Washington University and decided to transfer to Georgetown which had a higher reputation. Sirica, now eighteen years old, chose to re-enter law school and followed his friend to Georgetown. His academic insecurities nevertheless remained, and he dropped out once again because of recurring feelings of frustration.[4]

Meanwhile, Ferdinand Sirica's problems continued to multiply. In yet another attempt to improve his family's financial situation, he started his own business in 1921 by purchasing a pool room with two bowling alleys. One year later, however, the police accused Ferdinand of violating the Volstead Act when alcohol was discovered on the premisses. Although no charges were formally made, the incident embarrassed the elder Sirica which led to his decision to uproot the family once again. This time, the Siricas departed for California, and John accompanied them in part because he, too, felt humiliated after his failed experiences in law school.[5]

After three months in Los Angeles, the family journeyed

back to t
problems a
insisted t
education.
a stable ca
1923. This
remained d
employment
problems r
persevered
examinatio
Miami to a

Doubt
genuine in
flunked th
boxing. B
this endea
dismay of
in the law
Jack Brit
featherwei
in a ten
Thompson.
which mear
career alt
learned tha
decided to

back to the east coast because financial and employment problems again resurfaced. While on the road, Ferdinand insisted that John go back to law school and complete his education. Realizing that life could be fairly bleak without a stable career, Sirica relented and returned to Georgetown in 1923. This time he succeeded. The curriculum, to be sure, remained difficult. Moreover, he was forced to seek employment in addition to his studies because financial problems remained. Yet despite these challenges, Sirica persevered and graduated in 1926. He then sat for the bar examination in Washington and later rejoined his family in Miami to await the results.[6]

Doubts, however, lingered in Sirica's mind concerning his genuine interest in becoming a lawyer. Convinced that he had flunked the bar exam, Sirica decided to pursue professional boxing. Because of his enthusiasm and earlier experience in this endeavor, he became a boxing success in Miami to the dismay of his parents who wanted their son to pursue a career in the law. Initially, Sirica became a sparring partner for Jack Britton who was training to regain the world featherweight championship. Then, in July 1926, he competed in a ten-round semifinal match in Miami against Tommy Thompson. His victory in this bout made him a local celebrity which meant that professional boxing now became a viable career alternative to the law. But that summer, Sirica learned that he had passed the bar exam. Elated, he finally decided to become a lawyer because he believed that boxing was

a risky v
Sirica th
Washington
22.[7]

Short
competitio
with the
difficult
positions
discovered
Teapot Dom
criminal
conducted.
proceedings

To mo
Harding nor
the corrupt
evidence i
activity as
executive a
General Har
Justice Depa
antitrust pr
to pay a pr
Forbes, head
selling medi
veterans hos

a risky venture despite his recent successes in the ring. Sirica therefore left his family and journeyed back to Washington where he became a practicing attorney at the age of 22.[7]

Shortly after his arrival, Sirica discovered that competition for employment was rather fierce. Partnerships with the city's prestigious law firms were especially difficult to obtain because of the high salaries these positions offered. While searching for a job, Sirica discovered that the nation's capital was absorbed with the Teapot Dome scandals of the Harding administration because criminal trials against those responsible were being conducted. Intrigued, Sirica attended several of these proceedings to learn more about the crimes that had occurred.[8]

To most Americans, including Sirica, neither Warren Harding nor the Republican Party were directly responsible for the corruption between 1921 and 1923 because little to no evidence indicated that they had sanctioned the illegal activity associated with Teapot Dome; instead, the president's executive appointments were largely to blame. Attorney General Harry Daugherty, for example, had permitted the Justice Department to grant pardons, paroles, immunities from antitrust prosecution, and other favors to individuals willing to pay a price. A second presidential appointment, Charles Forbes, headed the Veterans Bureau. He was later accused of selling medical supplies, blankets, and sheets belonging to veterans hospitals to outside parties for a fee. Probably the

worst offe
Shortly af
the navy
Interior De
reserve in
Petroleum
similarly
transferre
$200,000 c
President
affairs of
subordinate
in 1923 and

The A
scandals a
presidency.
programs or
affairs, Coo
of governm
Department t
Attorney Ge
appointed tw
full authori
nominated Ha
School, to h
that Daugher

Americ

worst offender was Albert B. Fall, secretary of the interior. Shortly after taking office, Fall convinced the secretary of the navy to transfer federal naval oil reserves to the Interior Department. He subsequently leased the Elk Hills oil reserve in California to Edward Doheny of the Pan-American Petroleum Company; the Teapot Dome reserves in Wyoming were similarly leased to Harry Sinclair. In exchange, Doheny transferred $100,000 to Fall in cash, and Sinclair handed $200,000 over to Fall's son-in-law in government bonds. President Harding, who was relatively uninvolved with the affairs of his executive departments, never learned that his subordinates had committed these crimes; he suffered a stroke in 1923 and died shortly thereafter.[9]

The American public, however, became aware of the scandals after the inauguration of Calvin Coolidge to the presidency. Although he was reluctant to create new federal programs or to involve the public sector in most domestic affairs, Coolidge nevertheless sought to promote the integrity of government by directing prosecutors in the Justice Department to thoroughly investigate Teapot Dome. To prevent Attorney General Daugherty from obstructing this order, he appointed two prosecutors to handle the cases and gave them full authority to file criminal charges. The president then nominated Harlan Fiske Stone, former dean of the Columbia Law School, to head the Justice Department once it became clear that Daugherty was responsible for corrupt practices.[10]

Americans were shocked by these revelations. Sirica, who

was conti

exception

proceedin

being tri

overwhelmi

appearance

Doheny wer

acquitted.

failure to

attorneys w

to flamboy

consequentl

though bla

district

government'

lesson would

the Waterga

Follow

finally fou

firm in Was

court-appoi

a trial law

failure to

prestigious

practice cri

this endeavo

lost thirtee

was continuing his job search in the nation's capital, was no exception. In 1926, he attended portions of the criminal proceedings against Albert Fall and Edward Deheny who were being tried jointly on charges of conspiracy. Despite overwhelming evidence against both defendants, including the appearance of numerous witnesses who testified that Fall and Doheny were indeed involved in Teapot Dome, both men were acquitted. Sirica later recalled that the prosecution's failure to obtain convictions occurred in part because defense attorneys were adept at communicating with juries and resorted to flamboyant tactics in the courtroom on occasion. He consequently became convinced that political corruption, though blatant at times, often went unpunished because district attorneys sometimes failed to present the government's case in a zealous and thorough manner. This lesson would influence his treatment of federal prosecutors in the Watergate break-in trial more than four decades later.[11]

Following the Teapot Dome acquittals in 1926, Sirica finally found a job. He accepted a position with a small law firm in Washington that represented criminal defendants on a court-appointed basis. Sirica's desire to gain experience as a trial lawyer, his fascination with Teapot Dome, and his failure to obtain a partnership with any of the city's prestigious law firms all contributed to a decision to practice criminal law. He was not particularly successful in this endeavor. Sirica's greatest disappointment was that he lost thirteen of the fourteen cases he tried. While it is

true that
especially
overwhelmi
little to
period.[12]

In 19
Washington
prosecutor
Herbert Ho
Republicans
the twenty
Republican
politics, h
In addition
during his
significant
lifelong af

To Set The P

Republican
concerns re
minor role:

Th
ne
wh
co
th
be
as
st
ha

true that attorneys typically lose court-appointed cases--especially when prosecutors refuse to plea bargain in cases of overwhelming evidence against defendants--Sirica's record did little to boost his confidence as a trial lawyer during this period.[12]

In 1930, Sirica's friend and United States attorney in Washington Leo Rover offered him a position as assistant prosecutor. Rover, who had been appointed by President Herbert Hoover, told Sirica to get two recommendations from Republicans to ensure the approval of his selection. Although the twenty-six year old lawyer did not consider himself a Republican or Democrat and was generally disinterested in politics, he found the necessary endorsements and was hired. In addition to the valuable courtroom experience he acquired during his tenure as assistant prosecutor, these years were significant because they marked the beginning of Sirica's lifelong affiliation with the Republican Party. In his memoir To Set The Record Straight (1979), he later recalled that this Republican identity developed primarily because of pragmatic concerns relating to employment; ideology played a relatively minor role:

> The Republicans had done me a favor. I never forgot it. It's hard to say whether my political views were conservative before I got that job through the Republicans or whether they became conservative because of the association, but in any event it was the start of a long relationship. I never had much use for people who switched back

and
ever
mond

This pragmati
1932, Democrat
Franklin Dela
Sirica soon c
Democrat in t
he submitted
own practice

This at
fifteen yea
was so blea
"starvation
failure to
as well as
sheer numb
lack of fi
of name
success.
the White
legal assi
and gover
unwilling
capable a
aggressiv
climate

> and forth between parties. Nor did I ever believe that one party had a monopoly on honesty or integrity.[13]

This pragmatic approach to politics continued. In November 1932, Democrats swept the Republicans from the White House and Franklin Delano Roosevelt was inaugurated four months later. Sirica soon concluded that Leo Rover would be replaced by a Democrat in the United States attorney's office; as a result, he submitted his resignation in January 1934 to establish his own practice.[14]

This attempt was financially unsuccessful. For the next fifteen years, the struggling attorney's financial situation was so bleak that he later referred to these years as his "starvation period." Sirica's primary obstacle was his failure to obtain clients. Although he accepted civil cases as well as criminal ones to build a lucrative practice, the sheer number of practicing lawyers in Washington, Sirica's lack of financial resources to promote himself, and the lack of name recognition seriously undermined his chances of success. The Great Depression and Roosevelt's occupancy of the White House did not help either; individuals who needed legal assistance frequently could not afford to hire lawyers, and government agencies headed by Democrats were usually unwilling to hire Republicans. While Sirica was certainly capable as a legal practitioner and handled his cases in an aggressive and professional manner, the economic and political climate in the nation's capital reduced his chances of

establishing

Sirica w

well. To ea

professional

champion, bu

tried to en

primarily be

position on

Select Commi

Commission.

Sirica quick

Democrats

investigatio

implicated i

Sirica submi

disgust of

responding

government:

Following

Congressio

establishing the respectable practice he desired to create.[15]

Sirica was confronted by other problems and challenges as well. To earn additional income, he attempted to promote professional boxing with Jack Dempsey, a former heavyweight champion, but failed. During the Second World War, Sirica tried to enlist in the Army and Navy but was rejected primarily because of his age.[16] And in 1944, he accepted a position on capital hill as general counsel to the House Select Committee to investigate the Federal Communications Commission. Though initially pleased with this new job, Sirica quickly resigned when it became clear that several Democrats on the committee attempted to impede the investigation to prevent prominent New Dealers from being implicated in illegal activity relating to the FCC. Outraged, Sirica submitted a letter of resignation which illustrates his disgust of this cover-up and reveals his decisiveness in responding to corrupt political practices within the federal government:

> There is only one way I can try a case.... whether before a congressional committee or in a courtroom, and that is to present all the facts and let the chips fall where they may.... There is great public interest in this case. The press is going to print this. I know what is going to happen, and I don't want it on my conscience that anyone can say John Sirica, a resident of the District for many years, is a party to a whitewash....[17]

Following his resignation, Sirica learned that the congressional hearings were to be closed to the public and

that no illeg
was subsequen
well as the
convinced the
was especiall
government
prosecutions.

In 1949
Sirica's pros
Hogan and Ha
nation's cap
with Sirica'
trial divisi
capacity, bu
especially a
Though respe
an intellect
was not an e
at Hogan and
have becaus
successfully
well as th
professiona
life for so

Meanwh
politics de
Hartson, he

that no illegal conduct by officials connected with the FCC was subsequently uncovered by the committee; this outcome, as well as the acquittals in the 1926 Teapot Dome trials, convinced the frustrated attorney that political corruption was especially serious because of the many obstacles within government that hindered successful investigations and prosecutions.[18]

In 1949, after fifteen years of financial hardship, Sirica's prospects brightened rather considerably. He joined Hogan and Hartson, a prominent conservative law firm in the nation's capital, and became its best trial lawyer. Impressed with Sirica's performance, the firm selected him to head the trial division. He handled various types of cases in this capacity, but his specialty was insurance law which made him especially adept at defending companies in civil litigation. Though respected by his colleagues, Sirica was not considered an intellectual or a profound legal thinker by any means. "He was not an especially learned attorney," recalled one partner at Hogan and Hartson, "but he won a lot of cases he shouldn't have because of his sincere manner."[19] This ability to successfully represent clients in a prestigious law firm, as well as the improved income he now received, ended the professional and financial insecurities that had marked his life for so many years.[20]

Meanwhile, Sirica's involvement with Republican Party politics deepened. Even before his association with Hogan and Hartson, he assisted the party on occasion to promote its

candidates
instance,
challengir
the presid
in Washinc
American
campaigned
1940 presi
Jersey and
Although t
appearances
his growing

Eight
urged voter
candidacy f
well as op
candidates i
a federal ju
the White
President Ha
election wh
from becomi

In 19
Sirica su
campaign.[23]
Convention
his candid

candidates for local and federal office. In 1940, for instance, Sirica campaigned for Wendell Willkie who was challenging Franklin Roosevelt's candidacy for a third term to the presidency. As a member of the Republican state committee in Washington, he frequently made speeches before Italian-American groups to win ethnic votes for the GOP. He campaigned outside the District as well and stumped for the 1940 presidential ticket in such cities as Trenton in New Jersey and Newburgh, Buffalo, and Syracuse in New York. Although the Democrats won decisively in November, Sirica's appearances were significant inasmuch as they contributed to his growing visibility within the Republican Party.[21]

Eight years later, he returned to the campaign trail and urged voters in New York State to support Thomas Dewey's candidacy for president. Always the political pragmatist--as well as opportunist--Sirica publicly supported Republican candidates in large part because he was interested in becoming a federal judge and understood that his party needed to occupy the White House to make such an appointment a reality. President Harry Truman, however, defeated Dewey in an upset election which once again delayed Sirica's political ambition from becoming fulfilled.[22]

In 1952, still interested in a judicial appointment, Sirica supported Senator Robert Taft's presidential campaign.[23] To that end, he attended the Republican National Convention in Chicago to win the support from delegates for his candidate. General Dwight D. Eisenhower, however,

defeated Taf
M. Nixon o
campaigned
primarily
traditionall
the GOP capt
four years
election.[24]
contributior
receive an a

His fir
but from Se
elected in
encountered
tradition a
realistic ch
his continua
embraced ant
political a
1950, durin
organizatio
have here i
Secretary o
who, nevert
State Depar
made possib
Truman lack

defeated Taft on the first ballot and selected Senator Richard M. Nixon of California for the vice-presidency. Sirica campaigned quite extensively for this ticket and focused primarily on Italian-American organizations which traditionally endorsed Democratic candidates. In November, the GOP captured the White House for the first time in twenty-four years by defeating Adlai Stevenson in a decisive election.[24] Because of Sirica's modest yet visible contribution to this outcome, he was now in a good position to receive an appointment from the incoming administration.[25]

His first major offer, however, came not from Eisenhower but from Senator Joseph McCarthy of Wisconsin. Initially elected in the Republican sweep of 1946, McCarthy soon encountered political problems because his state's progressive tradition and liberal voters threatened to undermine any realistic chances for re-election in 1952. Seeking to justify his continuation in office before the electorate, the senator embraced anticommunism which had already emerged as a powerful political and cultural phenomenon in the United States. In 1950, during a speech delivered before a local Republican organization in Wheeling, West Virginia, McCarthy declared, "I have here in my hand a list of 205 that were known to the Secretary of State as being members of the Communist Party and who, nevertheless, are still working and shaping policy in the State Department." He further claimed that this treachery was made possible in large part because Democratic president Harry Truman lacked the will and courage to resist communism and

Soviet expar

These

unable to p

communist o

arguing that

In point

implementati

containment,

Korean confl

indications

administrati

promoted by

Truman order

employees

documentatic

required fo

McCarran In

antisubversi

employees fo

careers for

security. Y

and insiste

persons to s

provoked and

was engagi

President's

a frighteni

Soviet expansionist policies.[26]

These allegations were entirely false. McCarthy was unable to prove that specific government officials had any communist or Soviet ties, and he was simply incorrect in arguing that the president was not aggressively anticommunist. In point of fact, Truman's anti-Soviet policies, the implementation of the Marshall Plan, the strategy of containment, and the decision to militarily intervene in the Korean conflict under the auspices of the United Nations are indications that anticommunism was a salient component of the administration's foreign policy. Domestic anticommunism was promoted by the White House as well. In 1947, for example, Truman ordered the FBI to remove from government service those employees who were "bad security risks"; specific documentation of treasonous or subversive activity was not required for dismissal. Although the president vetoed the McCarran Internal Security Act in 1950 ostensibly to limit antisubversive witchhunts, his policy of investigating federal employees for alleged ties to communism continued which ended careers for many individuals who posed no threat to American security. Yet despite these policies, McCarthy was undeterred and insisted that the White House had permitted disloyal persons to serve in the public sector. The senator's attacks provoked angry responses from Truman who charged that McCarthy was engaging in character assassination. It was the president's own policies that helped make McCarthy's crusade a frightening reality.[27]

Followi

in 1952, man

his rhetoric

years; and

accusing a P

to flourish

only increa

charge that

offered Sir

subcommitte

activities.

time, Siric

Hartson wh

reduction i

pragmatic R

his party'

McCarthy's

senator had

which had

Following s

shared the

threat to n

Meanwh

Party while

to the fede

1956, Henry

District Co

Following Eisenhower's victory and McCarthy's re-election in 1952, many expected that the Wisconsin senator would soften his rhetoric because 1) his job was now secure for six more years; and 2) members of the GOP had little to gain from accusing a Republican administration of permitting subversion to flourish within government. But McCarthy's accusations only increased. It was in 1953, just one year prior to his charge that Communists had infiltrated the army, that McCarthy offered Sirica a position as chief counsel to his Senate subcommittee that was investigating alleged subversive activities. After some consideration, he declined. By this time, Sirica had been promoted to partnership at Hogan and Hartson which meant that he would have taken a serious reduction in salary to work for McCarthy. Additionally, as a pragmatic Republican who resisted the ideological rigidity of his party's right wing, Sirica was rather skeptical of McCarthy's charges. Specifically, he knew that the Wisconsin senator had failed to substantiate any of the allegations which had increased domestic anticommunism to new levels. Following Sirica's refusal, McCarthy selected Roy Cohn who shared the senator's view that subversion was indeed a genuine threat to national security.[28]

Meanwhile, Sirica continued his work in the Republican Party while remaining interested in a presidential appointment to the federal judiciary. His hopes were soon realized. In 1956, Henry Schweinhaut retired as judge on the United States District Court. Sirica, who was still serving on the

Republican st
local party
interested
lawyers with
was favored
including de
his loyalty
lawyer. Be
Eisenhower f
in as a fed
had finally

Sirica
though not
nevertheles
approach an
subsequent
Overall, Si
issued maxi
particularl
to admit
overwhelmin
occasionall
characteris
trial, Scot
bus driver

Republican state committee in Washington, immediately informed local party officials and White House aides that he was interested in this position. Although other Republican lawyers with prominence also asked to be considered, Sirica was favored by several members of the administration--including deputy attorney general William Rogers--because of his loyalty to the GOP and strong credentials as a trial lawyer. Because of this support, Sirica was nominated by Eisenhower for the position several months later and was sworn in as a federal district judge on April 2, 1957. His dream had finally been achieved.[29]

II

Sirica's record on the bench between 1957 and 1972, though not directly related to the Watergate break-in, is nevertheless significant because it reveals his judicial approach and personal demeanor which help explain the judge's subsequent confrontation with the Nixon administration. Overall, Sirica was an honest and tough judge who frequently issued maximum sentences to criminal defendants; this was particularly true in heinous crimes or when offenders refused to admit any wrongdoing despite clear and sometimes overwhelming evidence to the contrary. Sirica was occasionally impulsive as well. Illustrative of these characteristics was the case of Vincent Scott. In this 1967 trial, Scott was convicted by a jury of attempting to rob a bus driver with a toy pistol. Throughout the proceeding,

Sirica beli
several occ
angrily con
court didn'
"The court
you had ple
lenient wit
truthfulnes
practice c
Scott was s
By contras
two to ni
robbery wi
former cas
an appeal
however,
instances
injury o
sentence
murder,
when its
"Maximu

In
reputat
particu
for ins
ten mo

Sirica believed that the defendant had perjured himself on several occasions. Because of this suspicion, the judge angrily confronted him at the sentencing hearing. "Now, the court didn't believe your story on the stand," he declared. "The court believes you deliberately lied in this case. If you had pleaded guilty in this case, I might have been more lenient with you."[30] Sirica then took this apparent lack of truthfulness into consideration when pronouncing sentence--a practice considered unethical by many judges. Accordingly, Scott was sentenced to a five to fifteen-year prison sentence. By contrast, Sirica sentenced a defendant in another case to two to nine years behind bars for committing a successful robbery with a real gun. The court of appeals remanded the former case for resentencing on grounds that Scott's rights to an appeal had been jeopardized by Sirica's action; he died, however, before resentencing could be arranged. In other instances, particularly when defendants inflicted physical injury on victims, Sirica's propensity for issuing maximum sentences was especially present. In cases of first-degree murder, for example, he preferred the death penalty at a time when its use was on the decline nationally. Sirica's nickname "Maximum John" was no exaggeration.[31]

In addition to harsh sentencing, Sirica acquired a reputation for an inability to grasp complex legal issues--particularly when procedural matters were involved. In 1960, for instance, he presided over a civil proceeding lasting over ten months in which a Kansas City trucker filed an antitrust

claim agai

Although a

decision wa

permitted i

This r

Scott case,

on the benc

civil and c

that the ju

was not hi

courts tra

amount of

colleagues

however, re

the Katz a

integrity,

Final

judge, thi

during his

identify h

serious co

duties as

revealed i

claim against twenty-three domestic railroad companies. Although a $225,000 award was granted to the plaintiff, the decision was nullified by the Supreme Court because Sirica had permitted inadmissible evidence to be introduced at trial.[32]

This reversal, as well as the order to resentence in the Scott case, were not aberrations. During his first ten years on the bench alone, Sirica was reversed 35 times out of 112 civil and criminal cases that were appealed. While it is true that the judge was affirmed more often than not, this record was not highly respected at the time because 1) appellate courts traditionally grant district judges a considerable amount of discretion when making decisions; and 2) Sirica's colleagues were reversed much less frequently. The judge, however, received very little criticism--with the exception of the Katz article in 1973--because few doubted his honesty, integrity, and devotion to the law.[33]

Finally, Sirica was a pragmatist. According to the judge, this characteristic manifested itself in two ways during his career on the federal bench. First, Sirica did not identify himself as an intellectual, and he believed that any serious consideration of legal theory would interfere with his duties as district judge. This sentiment was candidly revealed in a 1973 interview:

> .... [A] great intellectual doesn't make a great trial judge.... I'm a realist as opposed to a theorist, you know me. You have to be able to evaluate people--like you're evaluating me now--make up your mind about their credibility.... Appeals

Secon
advocate
individual
Republican
feelings j
I get on t
Then it's
this dis
relationsh
to the co
and its
Richard
active pc
particula
candidate
significa
or indire
because s
did not r
reasons;
federal c

> court judges don't have to shoot from the hip. They have the leisure to think, to decide. We have to make decisions in a split second, whether to sustain or overrule an objection.... So Sirica's not an intellectual. Who cares! The important question is whether a judge is honest, and does he have the courage of his convictions to do what is right at the moment.[34] [sic]

Second, Sirica's pragmatism was evident in his refusal to advocate ideological agendas as judge, and he tried each individual case solely on its merits. "Hell yes, I'm a Republican," he remarked. "You can't change a fellow's feelings just because you give him a judicial robe. But when I get on the bench, then I'm nothing. Politics is out then. Then it's my duty to search for the truth."[35] Illustrative of this disavowal of judicial partisanship was Sirica's relationship with the Republican Party after his appointment to the court in 1957. Though continuing to support the GOP and its nominees for election--including Barry Goldwater, Richard Nixon, and others--Sirica distanced himself from active political involvement during these years. He was particularly reluctant to make public appearances for specific candidates and refused to permit Republican officials to significantly influence his actions as judge either directly or indirectly. To be sure, much of this distancing occurred because Sirica had the position he desired and consequently did not need to build political connections for professional reasons; but it is also the case that his familiarity with federal corruption genuinely convinced him that the integrity

of the j

independenc

An add

agendas wa

issues per

reluctant

who committ

the judge

criminal ju

it. On the

Warren Cou

held that

constitutio

proper.

constitutio

similarly

enforcers

While it is

Bazelon wh

such acti

technicali

short, Siri

decisis and

Court deci

posture wa

judge's int

judiciary.

of the judiciary required that judges maintain their independence while serving on the bench.[36]

An additional indication that Sirica eschewed ideological agendas was his response to the Warren Court's reforms on issues pertaining to criminal law and procedures. Though reluctant to be lenient with defendants--particularly those who committed perjury and demonstrated little to no remorse--the judge was quite adaptable to the liberalization of the criminal justice system and never spoke out publicly against it. On the contrary, Sirica stated on one occasion that the Warren Court's decision in Miranda v. Arizona (1966), which held that an arrested individual must be informed of his/her constitutional rights before questioning, was altogether proper. Other Supreme Court rulings that expanded constitutional protections to those accused of crimes were similarly accepted by Sirica; and he fully expected law enforcers and prosecutors to comply with their provisions.[37] While it is true that Sirica was sometimes reversed by David Bazelon who was a liberal appellate judge in the District, such actions were taken primarily because evidentiary technicalities were not scrupulously adhered to at trial. In short, Sirica was strongly committed to the principle of stare decisis and consistently complied with all applicable Supreme Court decisions in his courtroom. This pragmatic judicial posture was recognized even by his critics who doubted the judge's intellectual qualifications for service on the federal judiciary.[38]

By t
acquired
years and
the bench
assume ad
Sirica fa
The judge
most lik
backgroun
lawyer wh
theory a
courtroom
because h
without r
cases.

A t
pragmatic
early af
primarily
the Unit
Passionat
attorney
ahead. E
McCarthy
distanced
a more p

III

By the eve of Watergate, therefore, John Sirica had acquired a reputation which was firmly rooted in his early years and experience as a trial lawyer. His independence on the bench, for example, arose in part because he was forced to assume adult responsibilities as a young man when Ferdinand Sirica failed to provide economic security for his family. The judge's reluctance to approach the law as an intellectual most likely occurred because he had a weak liberal arts background and was primarily interested in becoming a trial lawyer which did not require a thorough understanding of legal theory and philosophy. Sirica's vast experience in the courtroom also contributed to his occasional impulsiveness because he learned the importance of making quick decisions without much reflection in the process of trying individual cases.

A third characteristic associated with Sirica, his pragmatic and non-ideological demeanor, is traceable to his early affiliation with the Republican Party which occurred primarily because the GOP had helped secure a job for him in the United States attorney's office. He did not have a passionate committment to political conservatism as a young attorney and never acquired any such sentiments in the years ahead. Even when domestic anticommunism and the popularity of McCarthy reached their height during the early 1950's, Sirica distanced himself from the Republican right wing and preferred a more pragmatic approach to politics hoping all the while

that his i

not surpr

ideologica

1957. Whi

he was re

ceased ca

Sirica was

as a poli

liberal r

publicly.

significar

of pragmat

Final

also roote

Teapot Do

House Sel

defendants

presence,

his courtr

This chara

pragmatism

Nixon Whit

1. "The M
12.

2. John J
W. Norton
p. 12; "W
Times, Mar

that his involvement would benefit him professionally. It is not surprising, then, that Sirica was generally non-ideological after his appointment to the federal bench in 1957. While continuing to identify himself as a Republican, he was relatively uninvolved with the GOP's activities and ceased campaigning for specific candidates. And although Sirica was associated with a party that promoted law and order as a political issue, he accommodated the Supreme Court's liberal reforms and endorsed several of these changes publicly. It is clear that Sirica's political involvement is significant inasmuch as it contributed to a consistent pattern of pragmatism throughout his judicial career.

Finally, the judge's propensity for tough sentencing was also rooted in his past. Disillusioned after witnessing the Teapot Dome trials, frustrated with the corruption on the House Select Committee in 1944, and angered when criminal defendants attempted to manipulate the judiciary in his presence, Sirica was determined to preserve the integrity of his courtroom by taking an engaging role in each proceeding. This characteristic, along with the judge's independence and pragmatism, would sharpen during his confrontation with the Nixon White House over Watergate.

1. "The Making of a Tough Judge." Time, January 7, 1974, p. 12.

2. John J. Sirica, To Set The Record Straight (New York: W. W. Norton & Company, 1979), pp. 18-19; Time, January 7, 1974, p. 12; "Watergate Judge: John Joseph Sirica." New York Times, March 24, 1973, p. 12:5.

3. "John J
Dies at 88
Sirica, pp.

4. Sirica,

5. Ibid.,

6. "A man
1973, VI, p

7. New York
29; Time, Ja
1992, p. A1

8. New York
1974, p. 13

9. Burl Noo
(Louisiana
Perrett, A-
1982), pp.
York: Char

10. Noggle

11. Fall wa
Doheny and
however, wa
184-85, 210

12. Sirica

13. Sirica

14. Ibid.,

15. New Yo
Washington

16. It is
men in the
Although th
defect," no

17. New Yo

18. Ibid.

19. Time,

3. "John J. Sirica, Persistent Judge in Watergate Trials, Dies at 88." Washington Post, August 15, 1992, p. A12; Sirica, pp. 19-21; Time, January 7, 1974, p. 12.

4. Sirica, pp. 21-23.

5. Ibid., pp. 23-24.

6. "A man for this season." New York Times, November 4, 1973, VI, p. 108; Sirica, pp. 24-26.

7. New York Times, November 4, 1973, p. 108; Sirica, pp. 27-29; Time, January 7, 1974, p. 12; Washington Post, August 15, 1992, p. A12.

8. New York Times, November 4, 1973, p. 108; Time, January 7, 1974, p. 13.

9. Burl Noggle, Teapot Dome: Oil and Politics in the 1920's (Louisiana State University Press, 1962), pp. 15-31; Geoffrey Perrett, America in the Twenties (New York: Simon & Schuster, 1982), pp. 137-38; Irving Werstein, Shattered Decade (New York: Charles Scribner's Sons, 1970), pp. 86-87.

10. Noggle, pp. 43-68, 118-128; Perrett, pp. 184-86.

11. Fall was subsequently convicted for accepted a bribe from Doheny and was sentenced to one year in prison. Doheny, however, was acquitted on the bribery charge. See Noggle, pp. 184-85, 210-11; New York Times, November 4, 1973, p. 108.

12. Sirica, p. 32; Washington Post, August 15, 1992, p. A12.

13. Sirica, pp. 33-34.

14. Ibid., p. 34; Washington Post, August 15, 1992, p. A12.

15. New York Times, November 4, 1973, p. 108; Sirica, p. 34; Washington Post, August 15, 1992, p. A12.

16. It is not clear why Sirica's age was a problem when many men in their late 30's were accepted for military service. Although the Navy claimed that he had a "slight physical defect," no details were provided.

17. New York Times, November 4, 1973, p. 108; Sirica, p. 59.

18. Ibid.

19. Time, January 7, 1974, p. 13.

20. Three
Lucy M. Ca
children--
New York T

21. "Judg
p. 8; Siri

22. Siric
A12.

23. Altho
the Repub
moderates
senator h
the party
Taft camp

24. Ei
Stevenson
even more
Democrats
the form
Eisenhowe
Company,

25. Sir

26. Ro
Universi
also Pau
Specter

27. Ibi

28. New
38.

29. "C
U.S. Ne
Sirica:
Washing

30. Ne

31.
Washing

32. N

33.
1973,

20. Three years after starting his new job, Sirica married Lucy M. Camalier at the age of 47; together, they had three children--John J. Jr., Patricia Ann, and Eileen Marie. See New York Times, March 24, 1973, 12:5; Sirica, p. 393.

21. "Judge Sirica: the First Test." Time, August 13, 1973, p. 8; Sirica, p. 37; Washington Post, August 15, 1992, p. A12.

22. Sirica, pp. 36-37; Washington Post, August 15, 1992, p. A12.

23. Although Taft was the choice of most conservatives within the Republican Party and was not generally favored by moderates and pragmatists, Sirica's endorsement of the Ohio senator had little to do with any ideological commitment to the party's right wing; instead, his close association with Taft campaign officials was the primary factor.

24. Eisenhower received 33,936,234 popular votes to Stevenson's 27,314,992. The vote in the electoral college was even more decisive; the Republican ticket won 442 votes to the Democrats' 89. For an excellent book on the 1952 election and the former general's presidency, see Herbert Parmet's Eisenhower and the American Crusades (New York: The Macmillan Company, 1972).

25. Sirica, pp. 37-38.

26. Robert Griffith, The Politics of Fear (Lexington: University Press of Kentucky, 1970), pp. 48-51, 70-72. See also Paul Rogin's The Intellectuals and McCarthy: The Radical Specter (Cambridge: The M.I.T. Press, 1967).

27. Ibid.

28. New York Times, November 4, 1973, p. 110; Sirica, pp. 37-38.

29. "Crucial Figure in the Case of the Watergate Tapes." U.S. News & World Report, September 3, 1973, p. 20; "Judge Sirica: In the late Afternoon of his Life, a Celebrity." Washington Post, January 2, 1975, p. A10; Sirica, pp. 38-39.

30. New York Times, November 4, 1973, p. 112.

31. Ibid.; "Unanswered Questions Plague a Tough Judge." Washington Post, March 24, 1973, p. A10.

32. New York Times, November 4, 1973, pp. 111-12.

33. New York Times, March 24, 1973, p. 12:5, November 4, 1973, p. 112.

34. Ibid.,

35. Time,

36. "Water
York Times,

37. Such
which rule
evidence if
permission
(1968) whic
death if pr
because of

38. New Yo

34. Ibid., p. 34.

35. Time, January 7, 1974, p. 13.

36. "Watergate Judge is called firm and non-partisan." New York Times, January 16, 1973, p. 18.

37. Such decisions included Escobedo v. Illinois (1964), which ruled that a confession may not be introduced as evidence if it is obtained after a defendant has been denied permission to see his/her lawyers, and Witherspoon v. Illinois (1968) which held that judges may not sentence individuals to death if prospective jurors were excluded from service solely because of firm opposition to capital punishment.

38. New York Times, March 24, 1973, p. 12.

THE

On Su
the Washin
inside the
Watergate
attempt.
individual
and electr
suspected
identified
The remain
political
Virgilio G
"anti-comm
explanatio
that the
acted ill
victory i
closer Am

This
Watergate
ties were

CHAPTER TWO

THE MAKING OF A SCANDAL AND COVER-UP, 1969-1972

I

On Sunday June 18, 1972, John Sirica noticed a story in the Washington Post reporting that five men had been arrested inside the Democratic National Committee's headquarters in the Watergate office building following an apparent burglary attempt. The article further noted that the arrested individuals were carrying large sums of hundred dollar bills and electronic equipment used for bugging purposes. The suspected leader of this group of men was James McCord who identified himself as a former CIA agent at his arraignment. The remaining individuals, all with connections to anti-Castro political groups in Miami, were Bernard Barker, Frank Sturgis, Virgilio Gonzalez, and Eugenio Martinez; they professed to be "anti-communists" by occupation. Although there were no clear explanations for the incident, the FBI initially suspected that the burglars constituted a group of "superpatriots" who acted illegally on their own to help prevent a Democratic victory in the November elections and the possibility of closer American ties with the Cuban regime of Fidel Castro.[1]

This theory was soon shattered. Shortly after the Watergate arrests, the FBI discovered that McCord's government ties were far more extensive than he had admitted to the

Washingto
he was a
Committee
obtained
contained
former emp
Colson.
Liddy, co
monitored
nearby hot
anti-Castr
domestic p

Few,
had approv
was not ge
an illegal
and someti
factors, w
January 19
Judge Siri
illegal co
the Waterg
factors as
context an
throughout

First,
institutio

Washington police; in addition to his former CIA involvement, he was also the salaried security coordinator for the Committee to Re-Elect the President (CREEP). Detectives also obtained address books belonging to the arrested men which contained the name and phone numbers of E. Howard Hunt, a former employee and consultant to White House attorney Charles Colson. Investigators soon learned that Hunt and G. Gordon Liddy, counsel to the fund-raising branch of CREEP, had monitored and supervised the burglary as it occurred from a nearby hotel. As a result, the FBI discarded its theory that anti-Castro activity led to the break-in and now believed that domestic politics was primarily responsible.[2]

Few, however, were aware that key officials within CREEP had approved of the incident months in advance. Moreover, it was not generally known that the break-in was just one part of an illegal pattern of White House conduct which was encouraged and sometimes ordered by the president. Several historical factors, which had developed before Nixon's inauguration in January 1969, contributed to this type of abuse as well as Judge Sirica's strong reactions to the administration's illegal conduct during the early stages of his involvement in the Watergate case. It is therefore helpful to consider these factors as a means of placing Watergate within its historical context and to understand the significance of the judge's role throughout the period.

First, the presidency became increasingly imperial as an institution throughout the twentieth-century. This process

especially
administrat
increased a
of internat
Second Worl
Truman, Jo
policies c
policies, a
and Great S
the Korean
declaratio
developmen
powerful a
separation
Constituti

In a
branch, t
contribut
became mo
at home
convinced
necessary
frequent
devices,
activiti
particul
surveill

especially accelerated during Franklin Roosevelt's administration because Congress agreed to give the White House increased authority to deal with the depression and a series of international crises that ultimately eventuated in the Second World War. Successive presidents--particularly Harry Truman, John Kennedy, and Lyndon Johnson--also enacted policies contributing to greater executive powers. Such policies, among others, included the Fair Deal, New Frontier and Great Society programs, and the decisions to intervene in the Korean and Vietnamese conflicts without obtaining clear declarations of war from Congress. Because of these developments, the presidency emerged by the 1960's as a more powerful and prestigious institution than Congress despite the separation of powers doctrine as enunciated in the Constitution.[3]

In addition to the emergence of an imperial executive branch, the postwar obsession with national security also contributed to Watergate. Specifically, the FBI and CIA became more involved in surveillance and espionage operations at home and abroad because Cold War anticommunist fears convinced government officials that such activities were necessary to enhance security. Civil liberties were frequently violated as wiretaps, infiltrations, bugging devices, and other methods were employed to investigate the activities of radicals in general and suspected communists in particular. During the late 1950's and 1960's, the FBI's surveillance operations focused on civil rights and antiwar

organizati

these orga

Although t

became mo

propensity

continued.

A th

overwhelmi

particular

increasing

the relian

addition,

increased

run length

expenditur

inflationa

a total of

campaigns;

million.

to the De

fewer co

contributo

disadvanta

Election

Specifica

particula

spend on

organizations because Director J. Edgar Hoover believed that these organizations were particularly disloyal to America. Although the Cold War became less virulent while civil rights became more accepted in society by the early 1970's, the propensity of government agencies to spy on citizens continued. Domestic politics was the primary motive.[4]

A third factor contributing to Watergate was the overwhelming importance of money in national elections. In particular, conducting campaigns for the presidency became increasingly expensive after the Second World War because of the reliance on television as a medium for advertising. In addition, the use of public relations and advertising firms increased as candidates needed experienced consultants to help run lengthy campaigns in a technological age. The total expenditures of presidential candidates illustrate this inflationary trend. In 1964, Republicans and Democrats spent a total of $200 million to finance the Goldwater and Johnson campaigns; four years later, they paid approximately $300 million. These skyrocketing costs were especially burdensome to the Democratic Party because its members had relatively fewer connections to big business and other wealthy contributors than their Republican opponents. Because of this disadvantage, the Democratic Congress passed the Federal Election Campaign Act in 1972 to control campaign costs. Specifically, the measure set limits on contributions to particular campaigns and the amount of money candidates could spend on media advertising. In addition, the act required

that contrib
must be repo
inflation in
obtain cont
popularity
circumvent
regulating
and the i
component
charges aga
Elect. It
elections
within pre

Final
administra
several N
them, Nix
career an
on the
paranoid
as illus
a serie
success
a cons
traits,
mental
the pr

that contributions of over $100 to a federal election campaign must be reported. Because of these restrictions and continued inflation in the economy, candidates were sometimes tempted to obtain contributions through illegal means. Despite its popularity in 1972, the Nixon administration decided to circumvent the Federal Election Campaign Act and other laws regulating the use of political expenditures. This decision, and the illegal practices that followed, formed a key component of the Watergate scandal which led to criminal charges against leading officials within the Committee to Re-Elect. It is clear that the role of money in federal elections increased the likelihood that scandal would emerge within presidential campaigns.[5]

Finally, Nixon's personality contributed to his administration's involvement in Watergate. According to several Nixon biographers, Fawn Brodie and Gary Wills among them, Nixon was extremely distrustful throughout his political career and perceived that others who disagreed with his stance on the issues were out to destroy him personally. This paranoid world view was coupled with Nixon's strong belief, as illustrated in his Six Crises (1962), that life represented a series of challenges which needed to be conquered for success to follow. Although historians have failed to reach a consensus regarding the causes for these personality traits,[6] it is clear that Nixon's distrust and crisis mentality persisted throughout the campaign of 1968 and into the presidency itself. A "siege" mentality soon emerged

within

official

perceive

contribu

Upo

1969, thr

led to th

Along wit

paranoia,

national

rise of

overseas.

began in

Times on

been cond

security

leaks fro

Though un

president

and Defens

these taps

which wa

Court in 1

fall outs

FBI was

Joseph Kr

because

within the White House which encouraged administration officials to initiate measures designed to harass genuine and perceived political opponents. Such encouragement undoubtedly contributed to the scandals that followed.[7]

Upon Nixon's inauguration to the presidency in January 1969, three of the four factors above coalesced which directly led to the administration's participation in illegal conduct. Along with the vast powers of the executive branch and Nixon's paranoia, the White House was overwhelmingly preoccupied with national security because of the ongoing Vietnam War and the rise of dissent which demanded an end to the conflict overseas. The administration's specific illegal activities began in response to an article which appeared in the New York Times on May 9, 1969 disclosing that secret bombing raids had been conducted against Cambodia. Enraged, Nixon and national security advisor Henry Kissinger immediately suspected that leaks from within the executive branch led to this disclosure. Though untrue,[8] wiretaps were consequently ordered by the president against four newsmen and thirteen White House, State and Defense Department employees. While Nixon assumed that these taps were permitted under the Crime Control Act of 1968--which was later declared unconstitutional by the Supreme Court in 1972--he ordered an additional tap that was known to fall outside the protection of this law. Specifically, the FBI was directed to tap the phone of syndicated columnist Joseph Kraft, who had written a critical piece on Nixon. But because no one seriously suspected Kraft of leaking

informatic

House Chi

Caulfield-

He obeyed

therefore,

violated

Significan

specific r

Despi

with natic

what becam

after Tom

ideologue,

entry--bre

categories

national s

increased

mail by go

college c

governmen

national s

because J

would all

FBI turf.

proposal

achieve t

Mean

information, Director J. Edgar Hoover refused. Instead, White House Chief of Staff H. R. (Bob) Haldeman instructed Jack Caulfield--a retired police officer--to carry out the order. He obeyed. Less than one year into his administration, therefore, Nixon had participated in illegal wiretapping which violated both the letter and spirit of the law. Significantly, the entire scheme failed to link anyone to a specific national security leak.[9]

Despite these disappointing results, Nixon's obsession with national security continued. Accordingly, he approved of what became known as the "Huston Plan" in July 1970. Named after Tom Huston, a White House aide and committed right wing ideologue, the plan specifically authorized "surreptitious entry--breaking and entering, in effect--on specified categories of targets in specified situations related to national security."[10] In addition, the proposal sanctioned increased electronic surveillance, the opening of anyone's mail by government officials, and the placing of informants on college campuses. In short, Nixon authorized the federal government to spy on any American believed to threaten national security. However, he decided to rescind the plan because J. Edgar Hoover complained that its implementation would allow the CIA and other federal agencies to infringe on FBI turf. At the same time, Hoover believed that Huston's proposal was excessive and that alternative policies could achieve the same result with fewer costs.[11]

Meanwhile, the White House prepared an "enemies list"

designed t
list eventu
and eight
Namath, t
Education
The Arena
list by ar
that would
House tap
prepare a
critics.
President
a lot of
because t
forget th
enthusias
on all t
didn't ha
they were
-they we
for it a

Wit
opponent
instance
Bennett
O'Brien,
Congress

designed to attack potential administration critics. This list eventually targeted approximately two hundred individuals and eighteen organizations, including Edward Kennedy, Joe Namath, the president of Yale University, the National Education Association, and the World Bank. In his memoir, In The Arena (1990), Nixon attempted to distance himself from the list by arguing he never saw it. Although evidence is lacking that would either support or refute this assertion, the White House tapes clearly indicate that he directed his aides to prepare a list as a means of harassing or embarrassing critics. Weeks before the 1972 election, Counsel to the President John Dean told Nixon that he was keeping "notes on a lot of people who are emerging as less than our friends because this [election] will be over some day and we shouldn't forget the way some of them have treated us." The president enthusiastically agreed. "I want the most comprehensive notes on all those who tried to do us in," he declared. "They didn't have to do it. If we had had a very close election and they were playing the other wide I would understand this. No--they were doing this quite deliberately and they are asking for it and they are going to get it."[12]

With this information, the administration attacked its opponents through several methods. Excessive tax audits, for instance, were conducted against Washington Post lawyer Edward Bennett Williams and Democratic National Chairman Larry O'Brien. Moreover, the White House sought to embarrass Congressman John Conyers by spreading rumors that he had a

"known wea
obsessed w
Nixon orde
surroundin
of Mary Jo
was consis
was riddle
Johnson ye
were not
potential

An ad
the Nixon
Daniel Ell
Johnson a
American
shifted in
commissio
evaluated
through l
convinced
were resp
and that
despite w
want to l
in office

Foll
inaugurat

"known weakness for white females." And because he was obsessed with the possible candidacy of Ted Kennedy in 1972, Nixon ordered his aides to uncover damaging information surrounding the Chappaquiddick incident which caused the death of Mary Jo Kopechne in 1969. This use of presidential power was consistent with Nixon's belief that the federal government was riddled with liberals held over from the Kennedy and Johnson years who would damage his administration if steps were not taken to discredit Democratic politicians and potential presidential candidates.[13]

An additional indication that criminal conduct permeated the Nixon presidency was its reaction to the activities of Daniel Ellsberg, a former Defense Department official of the Johnson administration. Though initially supportive of American intervention in Southeast Asia, Ellsberg's views shifted in part because he helped research a Pentagon study, commissioned by Secretary of Defense Robert McNamara, which evaluated Washington's policy in Indochina from World War II through 1967. Ellsberg's participation in this research convinced him that the Kennedy and Johnson administrations were responsible for the no-win military situation in Vietnam and that both presidents had approved gradual escalation--despite warnings from their advisors--because they did not want to lose the war for political reasons during their terms in office.[14]

Following his return to private life and Richard Nixon's inauguration, Ellsberg became further disillusioned because

the new
America's
manage it
of McNama
13, the
documents
Traces 3
convinced
decided
others fr

To
Investig
"plumber
advisor J
Ellsberg
September
discredit
were not

the new administration's "Vietnamization" policy permitted America's combat role to continue until South Vietnam could manage its own defense. Frustrated, Ellsberg leaked volumes of McNamara's study to the New York Times in 1971. On June 13, the newspaper began to publish the contents of these documents under the headline "Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. involvement." Nixon, convinced that these actions jeopardized national security, decided that Ellsberg needed to be humiliated to prevent others from similarly leaking documents to the press:

> I did not care about any reasons or excuses. I wanted someone to light a fire under the FBI in its investigation of Ellsberg, and to keep the departments and agencies active in the pursuit of leakers.... Ellsberg was having great success in the media with his efforts to justify unlawful dissent, and while I cared nothing for him personally, I felt that his views had to be discredited. I urged that we find out everything we could about his background, his motives, and his co-conspirators, if they existed.[15]

To comply with Nixon's directive, the Special Investigations Unit, otherwise known as the White House "plumbers," was created. Under the supervision of domestic advisor John Ehrlichman, the plumbers broke into the office of Ellsberg's psychiatrist, Dr. Louis Fielding, in Los Angeles on September 3, 1971. Nothing was found that could be used to discredit Ellsberg. Although the dimensions of this affair were not revealed to the public until 1973, the incident

marked a tu
that break
against di
Special In
weeks afte
repudiate
incident.
administr
Ellsberg
the Wate

As
Committe
Encourag
Committ
for exa
contrib
Segrett
presid
and ha
up as
he and
spread
sendi
envel
about
the
Indep

marked a turning point for Nixon administration officials in that breaking and entering now became an acceptable weapon against dissenters and political opponents. To be sure, the Special Investigations Unit was technically disbanded several weeks after the Fielding break-in; but its tactics were not repudiated by White House aides who were involved in the incident. Moreover, Hunt and Liddy were retained by the administration for campaign projects and consultations. The Ellsberg affair, therefore, created the conditions that made the Watergate break-in a greater possibility.[16]

As the election of 1972 approached, Nixon formed the Committee to Re-Elect the President to manage the campaign. Encouraged by the White House, officials working for the Committee also participated in illegal conduct. Blackmail, for example, was used to coerce wealthy individuals into contributing to the Nixon campaign.[17] In addition, Donald Segretti was hired by Dwight Chapin, deputy assistant to the president and appointments secretary, to "disrupt, ridicule and harass the Democratic [presidential] candidates and stir up as much intramural bickering as possible."[18] To that end, he and other campaign officials resorted to such tactics as spreading rumors about the sexual preferences of candidates, sending critical literature about Ted Kennedy in fake Muskie envelopes, and arranging Muskie's chauffeur to inform CREEP about key developments in the senator's campaign. Moreover, the administration sought to discredit the American Independent Party as a means of preventing another formidable

thir

goal

$10,

Cal

cla

use

the

ill

Li

a

Mi

th

de

ca

Co

tl

M

b

3

N

s

c

d

v

N

P

third-party candidacy by George Wallace. To accomplish this goal, the American Nazi Party was paid between $5,000 and $10,000 to persuade American Independent Party voters in California to switch their party preferences. Although Nixon claimed after his resignation that pranks had been commonly used in previous campaigns, the particular tactics employed by the Committee to Re-Elect were unprecedented in their illegality and misuse of presidential authority.[19]

Consistent with this pattern of "dirty tricks," G. Gordon Liddy, former plumber and finance counsel for CREEP, proposed a campaign of political espionage to Attorney General John Mitchell on January 27, 1972. Termed "Operation Gemstone," this scheme called for the kidnapping and drugging of hostile demonstrators at the Republican convention, the use of callgirls to embarrass Democratic Party officials during their convention, and sabotaging the air-conditioning equipment at the Democratic convention itself. Rejecting this proposal, Mitchell--who had resigned the office of attorney general to become director of CREEP--approved a scaled down plan on March 30. This version authorized the bugging of the Democratic National Committee offices at the Watergate complex for the specific purpose of installing electronic bugs to gather campaign information from party chairman Larry O'Brien. Funds drawn from illegal contributions were then provided to Liddy who worked with Hunt to find recruits for the operation. On May 28, McCord and the four Miamians broke into the Democratic headquarters undetected, but they failed to install the

li

Ju

Fi

is

ha

pr

ad

ex

bl

st

co

th

th

El

wi

ex

el

br

il

a d

Mit

CRE

dis

listening devices properly. The second attempt occurred on June 17 which resulted in the five arrests that night.[20]

II

These background events are significant for two reasons. First, it is clear that the Watergate bugging was not an isolated incident; rather, it was part of an illegal scheme to harass all potential political opponents and undermine a free presidential election. Indeed, the crimes committed by administration officials by June 17, 1972 were already extensive; they included wiretapping, sabotage, espionage, blackmail, and burglary. Moreover, the extensive and long-standing nature of this conduct made the subsequent Watergate cover-up an unsurprising consequence in hindsight. Because the burglars who were arrested had been involved in several of the illegal activities before June 1972--most notably the Ellsberg affair and the Fielding break-in--the administration wished to make certain that the men did not reveal the full extent of their participation in these acts prior to the election. By hiding CREEP's involvement in the Watergate break-in, the White House expected that the full range of illegal conduct would remain secret and that Nixon would win a decisive victory at the polls.[21]

Accordingly, the cover-up began immediately. On June 18, Mitchell issued a hurried statement from California denying CREEP's involvement in the burglary. "I am surprised and dismayed at these reports," he declared. "There is no place

in

ac

pr

ra

Ni

Ha

to

in

re

mo

$4

co

De

de

ex

ad

of

Jud

inv

Wat

a

imp

com

to

arr

in our campaign or in the electoral process for this type of activity, and we will not permit or condone it." In addition, press secretary Ronald Ziegler pronounced Watergate a "third-rate burglary attempt."[22]

On June 23, just six days after the break-in, President Nixon became personally involved in the cover-up. That day, Haldeman presented a plan in the Oval Office directing the CIA to order the FBI to drop its Watergate investigation. This initiative, however, failed because CIA director Richard Helms refused to comply. Consequently the administration paid "hush money" to the arrested burglars. Specifically, between $423,000 and $548,000 was paid in exchange for silence concerning the involvement of administration officials. Despite Nixon's continued denials, it is clear that he became deeply involved in the Watergate cover-up as a result of the extensive illegal conduct that had occurred throughout his administration.[23]

The events through June 17 are also significant because of their contribution to a constitutional crisis in which Judge Sirica would play a substantial role. His initial involvement was triggered by the five arrests at the Watergate. Shortly after the men were arraigned, he impaneled a grand jury to investigate. Its efforts, however, were impaneled by the cover-up. Jeb Magruder, for example, committed perjury on several occasions before the grand jury to prevent CREEP employees, other than the seven men already arrested, from being implicated. He had undoubtedly known

ab
we
ca
fr
in
au
Al
pa
be
the
lin
his
off
the
tha
aff

and
use
Re-p
gath
spec

that
Acco
sess
four

about and had participated in the planning of the break-in weeks before it occurred because of his role as deputy campaign director and the next man up the chain of command from Liddy. Following the arrests in June, he became deeply involved in the cover-up by destroying evidence and authorizing the payment of hush money to the defendants. Although federal prosecutors were largely unaware of this participation, Magruder was summoned for an initial appearance before the grand jury on July 5 to explain his knowledge of the burglary. On this occasion, his testimony was brief and limited to organizational matters. Specifically, he described his role at CREEP, how the campaign was organized, and how its officials interacted with the Finance Committee. Magruder was then excused from the proceeding and left with the impression that he was not seriously suspected of any wrongdoing in the affair.[24]

Later that week, three FBI agents went to see Magruder and began to ask questions regarding the money which had been used to fund the break-in. Conceding that the Committee to Re-Elect had authorized payments to Liddy for intelligence-gathering operations, he denied any knowledge of Liddy's specific budget or illegal plans.[25]

In early August, prosecutors informed CREEP's lawyers that Magruder was an official target of their investigations. Accordingly, a second grand jury appearance and a preliminary session with two U.S. attorneys were scheduled. On the fourteenth, just before these appearances, Magruder consulted

with

cove

morn

myri

afte

give

Magi

by

Mia

the

exp

mor

had

of

arg

be

qu

co

Th

on

no

th

A

i

s

F

with John Mitchell who summarized the broad outline of the cover-up story to be used during the testimony. The next morning, John Dean rehearsed him meticulously by asking a myriad of questions pertaining to CREEP's activities. That afternoon, prosecutors demanded to know why Liddy had been given $250,000 for intelligence-gathering and security. Magruder replied that Liddy was instructed to prevent violence by radicals from erupting at the Republican convention in Miami Beach; such fears, he insisted, were legitimate due to the events four years earlier in Chicago. When asked to explain why CREEP failed to document how Liddy had spent the money, Magruder vaguely replied that a loosening of controls had occurred because of Mitchell's preoccupation with charges of unethical activity in the campaign. Finally, Magruder argued that he was not involved with any of Liddy's activities because of his personal dislike for the man. After hours of questioning, he left the U.S. attorney's office again confident that his perjured testimony had been successful. The prosecutors' anticlimactic questions before the grand jury one day later further indicated that the investigation would not implicate leading officials in the Committee to Re-Elect the President.[26]

This optimism was short-lived. During the last week of August, the grand jury subpoenaed Magruder's diary and indicated that further testimony would be necessary. Panic swept the campaign because Magruder's entry for January 27 and February 4, 1972 read: "AG's office--w/ Dean & Liddy." By

linking Liddy to former attorney general John Mitchell, the diary revealed that Nixon's closest associates were involved in Watergate.[27]

To solve this dilemma, it was decided that Magruder would once again perjure himself before the grand jury. On September 6, he testified that the January 27 meeting had been rescheduled for February 4 and that only the newly enacted campaign laws were discussed. Convinced that Magruder was being truthful, the grand jury limited its indictments on September 15 in Sirica's courtroom to seven defendants: Liddy, Hunt, McCord, Barker, Sturgis, Martinez, and Gonzalez. Perjury had indeed constituted a central part of the Watergate cover-up.[28]

On the evening of these indictments, Nixon met with his advisors in the Oval Office to discuss Watergate and the upcoming election. The president was pleased that the grand jury investigation had proceeded according to plan and that no indictments had been returned against higher campaign officials. Nixon then congratulated Dean for his role in accomplishing these results:

> Oh well, this is a can of worms as you know a lot of this stuff that went on. And the people who worked this way are awfully embarrassed. But the way you have handled all this seems to me has been very skillful putting your fingers in the leaks that have sprung here and sprung there.[29]

Also during this conversation, the president characterized Watergate as a political problem rather than a legal one.

Instead of addressing the illegalities that produced the problems created by the break-in, Nixon merely blamed Democratic politicians for attempting to use Watergate as a weapon to embarrass the administration:

> This is a war. We take a few shots and it will be over. We will give them a few shots and it will be over.... We have been (adjective deleted) fools for us to come into this election campaign and not do anything with regard to the Democratic Senators who are running, et cetera. And who the hell are they after? They are after us. It is absolutely ridiculous. It is not going to be that way any more.[30]

These comments and Nixon's approval of Dean's conduct of the grand jury investigation suggest that the president mocked the judiciary's independence. This failure to recognize the constitutional function of the courts would become even more blatant once the cover-up unravelled.

Meanwhile, Sirica was required to assign the Watergate break-in case to a particular judge. His authority to make this appointment stemmed from his role as Chief Judge of the United States District Court for Washington D.C.--a position which he held because of his seniority. After some consideration, Sirica assigned the case to himself primarily because his Republican connections would discourage critics from claiming that the proceedings were politically motivated. He then took steps to ensure that constitutional protections were afforded to all parties in the case. Sensitive to charges that the defendants could not receive a fair trial

bec

ord

par

pre

pre

to

suf

to

hav

tri

giv

ult

hav

arc

wh

per

hav

of

De

ru

ha

en

ho

Sh

Re

because of widespread publicity, the judge issued a "gag order" on October 4 that enjoined officials and affected parties from speaking to the media about the case.[31] Despite pressure from Democrats to have the case tried before the presidential election, he set the trial date for November 15 to make certain that the prosecution and defense would have sufficient time to prepare.[32]

In this context of pre-trial preparation, it is important to consider the extent to which an earlier proceeding would have altered the election results. According to Sirica, the trial could not have possibly started before late October given the mid-September indictments. Because the proceeding ultimately lasted about four weeks, the verdicts would still have been returned after the election. Moreover, the judge argued that the cover-up was "firmly in place" in November which would have precluded the case from unfolding during this period.[33]

An additional indication that an earlier trial would not have changed the election results was the desperate condition of George McGovern's candidacy. Following his nomination, the Democratic nominee selected Thomas Eagleton of Missouri as his running mate. When revelations began to emerge that Eagleton had been hospitalized for severe depression, McGovern fully endorsed his running mate. Due to growing political pressure, however, the nominee dumped Eagleton in favor of Sargent Shriver, a former director of the Peace Corps during the Kennedy administration. This episode gave McGovern a weak and

i

v

r

p

m

e

j

n

a

a

a

c

c

i

b

m

j

w

h

a

b

d

u

o

y

indecisive image which seriously reduced his chances for victory in the presidential election.[34]

Meanwhile, Republicans portrayed McGovern as a dangerous radical. Nixon's supporters and many conservative Democrats particularly opposed the nominee's proposals for a complete military withdrawal from Vietnam and a $1,000 payment for every American regardless of income. The electorate also inaccurately associated McGovern with the counterculture movement. Although McGovern attempted to raise Watergate as an issue by citing reports in the Washington Post that charged a cover-up was in place, the electorate remained unconvinced and re-elected Nixon in a landslide.[35] Because of the failure of McGovern's candidacy, therefore, it is difficult to conceive that an earlier Watergate trial would have resulted in Nixon's defeat.[36]

Meanwhile, Sirica prepared for trial. Due to an acute back ailment and various procedural delays, the trial date was moved from November 15 to January 8, 1973. On December 4, the judge held a pre-trial session to discuss evidentiary matters with attorneys involved in the case. During this conference, he became frustrated because Earl Silbert, assistant U.S. attorney, was unable to explain the motives for the Watergate break-in and to account for the money possessed by the defendants at the time of their arrests. To Silbert, these unanswered questions were irrelevant to his case because overwhelming evidence existed to obtain convictions at trial. Moreover, the prosecution believed that proceeding on the

basis of

strategy

Silbert,

limitin

the seve

Sir

definit

that a

Elect ha

the orig

of crim

prosecut

position

skirted

trial se

Despite

strategy.

would ad

upcoming

basis of unsubstantiated theories and accusations was a risky strategy that could lead to a mistrial or reversal on appeal. Silbert, therefore, preferred a conservative approach by limiting the prosecution's case to evidence relevant only to the seven defendants.[37]

Sirica disagreed. Although he did not claim to have any definitive explanations for Watergate, he vaguely suspected that a cover-up involving officials of the Committee to Re-Elect had been implemented. Moreover, the judge believed that the origins of the break-in were quite relevant to the issue of criminal intent regarding the seven men and that the prosecution was not zealously representing the government's position. As a result, Sirica reacted angrily when Silbert skirted the issues of origin and criminal intent at the pre-trial session:

> .... this jury is going to want to know somewhere along the line what did these men go into the headquarters for? What was their purpose? Was it their sole purpose to go in there for so-called political espionage or were they paid to go in there? Did they go in there for the purpose of financial gain? Who hired them to go in there? Who started this thing? There are a myriad of problems in this case that I can see coming up and so can you.[38]

Despite this plea, Silbert refused to alter the prosecution's strategy. This decision increased the likelihood that Sirica would adopt an especially interventionist posture during the upcoming trial.

1.
Was
Cas
Sir
& C

2.
Wa
Ti
Al
19

3.
(B
17

4.
Al

5.
Y

6
N
H

7

8
C
A
Y

9

1. "5 Held in Plot to Bug Democrats' Office Here." Washington Post, June 18, 1972, p. A1; "Suspect Aided, Fought Castro." Washington Post, June 18, 1972, p. A21; John J. Sirica, To Set The Record Straight, (New York: W. W. Norton & Co., 1979), pp. 43-44.

2. "GOP Security Aide Among 5 Arrested In Bugging Affair." Washington Post, June 19, 1972, p. A1; "White House Consultant Tied to Bugging Figure." Washington Post, June 20, 1972, p. A1; G. Gordon Liddy, Will (New York: St. Martin's Press, 1980), pp. 270-73.

3. Arthur M. Schlesinger, Jr., The Imperial Presidency (Boston: Houghton Mifflin Co., 1973), pp. 100-26, 131-47, 177-82.

4. Stanley I. Kutler, The Wars of Watergate (New York: Alfred A. Knopf, 1990), pp. 28, 57-74.

5. Theodore H. White, The Making of the President, 1972 (New York: Athenaeum Publishers, 19730, pp. 278-82.

6. Compare Fawn Brodie's Richard Nixon (New York: W. W. Norton & Co., 1981) with Gary Wills' Nixon Agonistes (Boston: Houghton Mifflin Co., 1970).

7. Kutler, pp. 33-56, 96-119.

8. The article was in fact based on a report from a British correspondent who had witnessed the bombing. See Stephen E. Ambrose's Nixon: The Triumph of a Politician 1962-1972 (New York: Simon and Schuster, 1989), p. 272.

9. Richard Nixon, RN: The Memoirs of Richard Nixon (New York: Grosset and Dunlap, 1978), pp. 386-89; Ambrose, pp. 272-73; Presidential statement May 22, 1973 in Watergate: Chronology of a Crisis, vol. 1 (Washington D.C.: Congressional Quarterly, 1973), p. 91.

10. Presidential statement of May 22, 1973, p. 92.

11. Anthony Lukas, Nightmare (New York: Viking Press, 1976), pp. 33-34; Theodore H. White, Breach of Faith: The Fall of Richard Nixon (New York: Athenaeum, 1975),pp. 134-36.

12. Meeting: The President, Haldeman and Dean, Oval Office, September 15, 1972 (5:27 - 7:17 p.m.) in The Presidential Transcripts (New York: Dell, 1974), pp. 37-38; John Dean, Blind Ambition (New York: Simon and Schuster, 1976), p. 316.

13. Nixon himself admitted that such was his intent. See RN, pp. 356-57, 541-44 and In The Arena, pp. 34-43.

14. "Ellsberg: From Hawk to Dove." New York Times, June 27, 1971, p. A27; Sanford Ungar, The Papers and the Papers (New York: E. P. Dutton & Co., 1972), p. 54.

15. Nixon, RN, p. 513.

16. Liddy, pp. 166-69; Nixon, pp. 514-15; Ambrose, pp. 465-66. Regarding the president's culpability for the Fielding break-in, it appears reasonably certain that Nixon did not know anything about the incident until after its occurrence in 1971. The White House tapes especially demonstrate this absence of presidential involvement. On March 17, 1973, the following conversation took place between Nixon and White House counsel John Dean:

> DEAN: .... The other potential problem is Ehrlichman's and this is--
>
> NIXON: In connection with Hunt?
>
> DEAN: In connection with Hunt and Liddy both.
>
> NIXON: They worked for him?
>
> DEAN: They--these fellows had to be some idiots as we've learned after the fact. They went out and went into Dr. Ellsberg's doctor's office and they had, they were geared up with all this CIA equipment--cameras and the like. Well they turned the stuff back into the CIA some point in time and left film in the camera. CIA has not put this together, and they don't know what it all means right now....
>
> NIXON: What in the world--what in the name of God was Ehrlichman having something (unintelligible) in the Ellsberg (unintelligible)?
>
> DEAN: They were trying to--this was part of an operation that--in connection with the Pentagon Papers. They were--the whole thing--they wanted to get Ellsberg's psychiatric records for some reason. I don't know.
>
> NIXON: This is the first I ever heard of this.

In addition to this conversation, no one has testified under

oath
and
Nixo
that
Ells

17.
cont
Road
O'Ne

18.
1976

19.

20.
pp.

21.
pers
Diar
Putn

22.
Banta

23.
32-3
Manch

24.

25.

26.

27.

28.
burgl
elect
p. 48

29.
Septe
Trans

30.

31.
state
preven

oath that the president approved any plans for the break-in, and no written evidence has been produced which proves that Nixon was involved. It is misleading, therefore, to suggest that the president ordered the plumbers into the offices of Ellsberg's psychiatrist.

17. Two autobiographies which discuss these illegal contributions are Jeb Magruder's An American Life: One Man's Road to Watergate (New York: Athenaeum, 1974) and Tip O'Neill's Man of the House (New York: Random House, 1987).

18. John Dean, Blind Ambition (New York: Simon and Schuster, 1976), pp. 72-73.

19. Lukas, p. 149; Kutler, p. 107.

20. Magruder, p. 195; Liddy, pp. 196-99; Dean, p. 79; Sirica, pp. 44, 48.

21. H.R. Haldeman candidly described this perspective in his personal diary which was recently published. See The Haldeman Diaries: Inside the Nixon White House (New York: G.P. Putnam's Sons, 1994), pp. 471-79.

22. William Manchester, The Glory and the Dream (New York: Bantam, 1980), p. 1280.

23. H.R. Haldeman, The Ends of Power (Times Books, 1978), pp. 32-35; H.R. Haldeman, The Haldeman Diaries, pp. 474-75; Manchester, p. 1291.

24. Magruder, pp. 238-39; Lukas, p. 243.

25. Magruder, p. 240.

26. Ibid., pp. 250-51.

27. Ibid., p. 263.

28. The defendants were specifically charged with conspiracy, burglary, and violations of federal statutes prohibiting the electronic surveillance of oral communications. See Sirica, p. 48; Magruder, p. 264.

29. Meeting: The President, Haldeman and Dean, Oval Office, September 15, 1972 (5:27 - 6:17 p.m.) in The Presidential Transcripts, p. 36.

30. Ibid., pp. 37-38.

31. This gag order was modified on October 6 to permit statements from members of Congress and the media so as to prevent the impediment of an extrajudicial investigation into

Watergate as a political issue.

32. It is unlikely that Sirica's decision to begin the trial after the election was politically motivated. His independence as a jurist, both before and during the Watergate period, suggest that he would not have made specific decisions from the bench to benefit candidates even from his own party. See Sirica, pp. 49-52.

33. Ibid., p. 52.

34. Nixon, pp. 653, 663.

35. The president polled 46 million votes against 28.5 million for McGovern.

36. Nixon, p. 543; Manchester, p. 1287; Carl Bernstein and Bob Woodward, All the President's Men (New York: Simon and Schuster, 1974), p. 197.

37. Sirica, pp. 56-58.

38. Ibid., pp. 57-58.

CHAPTER THREE

THE BREAK-IN TRIAL AND ITS SIGNIFICANCE

In late 1973, months after the conclusion of the Watergate break-in trial of the seven burglars, Bob Woodward suggested in an interview that Judge Sirica's role during the proceeding had been exaggerated in the national media. The cover-up, he argued, would have collapsed without his confrontations with the defense and that the prosecution had diligently presented its case despite Sirica's suggestions to the contrary. As noted above, Harvey Katz also doubted Sirica's contribution to the demise of the cover-up. In the September issue of the Washingtonian, he wrote that Sirica was one of two "unsuited" judges in the District and that his "countless legal errors, his short temper, [and] his inattentiveness to court proceedings" turned the trial into an inquisition that disregarded the constitutional rights of the defendants.[1]

This chapter argues that these criticisms are seriously misleading. Though short tempered on occasion, John Sirica's handling of the break-in trial demonstrated his conscientiousness and a determination to be fair to both the prosecution and defense while insisting that the facts of Watergate be revealed. Prosecutor Earl Silbert, however, declined to pursue the possibility of a cover-up during the

proceedi

confront

constitu

defendar

McCord

addresse

Waterga

Presider

role du

signific

On

before M

Watergat

inside

reporter

could be

were sea

announce

Alm

an inter

Howard H

Hunt had

arraignme

dramatica

On Decem

proceeding; as a result, Sirica assumed an activist and confrontational posture, without infringing on anyone's constitutional rights, which strongly encouraged the defendants to reveal their full knowledge of the case. James McCord complied and revealed the cover-up in a letter addressed to the court on March 20, 1973. From this point on, Watergate saturated the media and the public's attention until President Nixon's resignation in August 1974. Judge Sirica's role during the break-in trial was indeed historically significant.

I

On Monday morning, January 8, 1973, just twelve days before Nixon's inauguration to a second term as president, the Watergate break-in trial began. The proceedings took place inside a large ceremonial courtroom so that the numerous reporters, cameramen, and lawyers who were following the case could be accommodated. At ten o'clock, all seven defendants were seated with their attorneys as Judge Sirica entered to announce that court was in session.[2]

Almost immediately, before Sirica was able to continue, an interruption occurred. William Bittman, who represented E. Howard Hunt, stated that his client wished to plead guilty. Hunt had initially entered a plea of not guilty at his arraignment in September, but personal circumstances dramatically changed which led to this sudden announcement. On December 8, 1972, his wife Dorothy was killed in a United

Air Lin

Police c

purse ar

insuranc

investig

foul pla

finding

Board or

Hunt ca

aircraft

unravel.

deliveri

definiti

raced by

presiden

Irr

this tr

depresse

the trau

national

hoped th

sentence

interrup

would no

the pros

Sir

conduct

Air Lines jetliner crash near Midway Airport in Chicago. Police discovered more than $1,000 in cash in Mrs. Hunt's purse and learned that she had purchased $225,000 in flight insurance prior to departure. The FBI immediately investigated the possibility of sabotage and concluded that no foul play had caused the fatal accident to occur. This finding was confirmed by the National Transportation Safety Board on August 29, 1973. A second possibility, that Mrs. Hunt carried cash payments as hush money on board the aircraft, was considered after the Watergate cover-up began to unravel. Though plausible due to her undeniable role in delivering such payments after Hunt's September indictment, no definitive conclusions are possible because the cash was not raced by the FBI or police to anyone associated with the president's campaign.[3]

Irrespective of the dubious circumstances surrounding this tragedy, the incident devastated Hunt. Severely depressed, the former CIA agent felt that he could not endure the trauma of a lengthy trial that would inevitably receive national attention. He therefore decided to plead guilty and hoped that Sirica would reward him with a lenient prison sentence. The judge refused. He informed Bittman, during the interruption, that the trial had already started and that he would not permit defendants to enter guilty pleas until after the prosecution concluded its opening arguments.[4]

Sirica resumed the proceeding. His first task was to conduct the voir dire--the selection of a competent and

impart

system

who ma

determ

Sirica

and the

duratio

surrou

be hous

and tha

were fi

and wor

for tho

at home

his cor

potenti

then sp

individ

their k

to be

precon

consequ

granted

days, a

represe

backgro

in the e

impartial jury. Unlike state jurisdictions, the federal system assigns much of this responsibility to the trial judge who may ask potential jurors a myriad of questions to determine whether such individuals are qualified to serve. Sirica began decisively. He ruled that the pool of jurors, and the jury upon its selection, was to be sequestered for the duration of the trial to insulate its members from publicity surrounding the case. The judge further ordered that jurors be housed on the seventh and eighth floors of the courthouse and that they not be permitted to go home until deliberations were finished. He then asked the jury pool of about 260 men and women whether sequestration would create serious problems for those with children or infirm persons who needed attention at home. After a day long period of individual questioning in his conference room, Sirica dismissed more than 150 of these potential jurors. Over the objection of defense counsel, he then speeded up the process of voir dire by abandoning his individual questioning and asked the pool collectively whether their knowledge of the case would interfere with their ability to be fair and impartial. Only three replied that they had preconceived biases toward the defendants and were consequently dismissed. The prosecution and defense were then granted their customary peremptory challenges. After just two days, a jury was selected. Eight women and four men, representing a diverse age range from middle and working class backgrounds, were chosen. Six alternates were also selected in the event that one of more or the jurors could not continue

at any

court w

Or

argumer

Committ

operati

emphasi

crimina

wanted

the Re

preside

legal

intelli

demonst

given t

alleged

Silbert

else to

Liddy,

extraor

in 197

gatheri

Miamian

occasio

Th

was inc

Sirica'

at any point during the trial. The jury was then sworn in and court was adjourned for the day.[5]

On Wednesday January 10, Earl Silbert began his opening argument for the prosecution. Though acknowledging that the Committee to Re-Elect had encouraged intelligence-gathering operations which contributed to the break-in, Silbert emphasized that only the seven defendants were responsible for criminal wrongdoing. He also told the jury that the committee wanted to prevent anti-Nixon demonstrations from erupting at the Republican convention and other locations where the president was scheduled to campaign. Liddy, because of his legal and political experience, was asked to gather intelligence so that the administration could know about such demonstrations before they occurred. He was subsequently given the funds necessary to carry out these operations which allegedly costed CREEP approximately $235,000. At no time, Silbert insisted, did the campaign instruct Liddy or anyone else to take these funds and use them for political purposes. Liddy, however, was a political zealot who believed that extraordinary means were needed to defeat the Democratic Party in 1972. To that end, he created his own intelligence-gathering plans and recruited Hunt, McCord, and the four Miamians who broke into the Watergate on two separate occasions in 1972.[6]

This prosecutorial presentation was as inaccurate as it was incomplete; this, as is suggested below, directly led to Sirica's interventionist posture and confrontational tactics

during

signif

prepar

White

more

Silber

to the

After

the "b

Clarif

during the trial. Silbert's opening statement is also significant because it suggested that he had not thoroughly prepared for trial and that he had the means--despite the White House cover-up of Watergate--to investigate the break-in more fully. Illustrative of this lack of preparation was Silbert's inability to identify the source of the funds given to the defendants during his opening argument before the jury:

> Now the evidence that we will produce before you will show that Mr. Liddy from the time he received the assignment [to gather intelligence] until June 17 received about $235,000.... We don't have any records, the government doesn't have any records as to what happened to [most] of that money given to Mr. Liddy, but as you will listen to my opening statement you will listen also to the evidence received in court, the testimony of the witnesses, we will be able to account to you for approximately $50,000.... We cannot account for the rest.[7]

After these remarks, Silbert repeated his claim that Liddy was the "boss" who masterminded the break-in, and he failed to clarify the specific motive that led to the crime:

> Obviously, it was a political motive, political campaign.... The operation was directed against the Democratic Party, particularly Senator George McGovern, because of his alleged left-wing views.... The interests of the persons, the defendants in this case may vary, that is, the motivation of the defendant Hunt and defendant Liddy may have been different from the motivations of the four defendants from Miami, and they in turn may have had a different motivation than defendant McCord. Certainly the facts will suggest.... to you, based on the information that we produce before

> you, it was a financial motive here, financial motive.[8]

This description was incomplete. While there may have been some financial incentives for the Miamians to participate in the break-in, clearly the overriding motive for the operation itself was political. Moreover, Silbert's brief reference to the political considerations that existed was inaccurate because the burglars did not break into the Watergate to undermine the McGovern campaign directly; instead, they sought information from the Democratic Party's chairman of the national committee, Larry O'Brien, who Nixon and his staff especially disliked. Of course, this motive would not be revealed until the cover-up unravelled. Nevertheless, it was well known by the police, FBI, and the burglars themselves that McGovern's campaign did not operate at the Watergate. Had the senator's candidacy been Liddy's target, as Silbert suggested, it is far more likely that the campaign's national offices would have been broken into instead. The prosecution, therefore, had not adequately prepared its case because it did not consider this knowledge that was available; this failure had lingering consequences for the duration of the proceedings.

After recessing for lunch, Sirica resumed the trial and directed defense attorneys to proceed with their opening arguments. Gerald Alch, representing James McCord, was the first to address the jury. Taking advantage of Silbert's claim that financial motives existed for the break-in, Alch

accura

incide

intent

that M

Alch d

was re

hoped

among

H

the s

flambo

crimin

orders

for Wa

given

the ju

case b

law be

Sirica

day's

cautic

blood

genera

accurately declared that McCord did not participate in the incident to make money and therefore lacked the criminal intent which is required for conviction. He also suggested that McCord had been misled by the Committee to Re-Elect. Alch declined to specify how his client had been misled or who was responsible for providing inaccurate information, but he hoped that this general allegation would generate sympathy among jurors for McCord.[9]

Henry Rothblatt, who represented the four Miamians, was the second defense attorney to address the jury. In a flamboyant manner, he argued that his clients lacked any criminal intent because their motive was merely to follow orders from above; not knowing precisely who was responsible for Watergate, Rothblatt declined to speculate who may have given any such order. During the remainder of his remarks to the jury, the attorney sidestepped the relevant issues in the case by declaring that his clients could not have broken the law because of their respectable character in the community. Sirica, already annoyed with the general direction of the day's opening arguments, suddenly lost his temper. After cautioning Rothblatt to "keep an even keel" and not to let his blood pressure go up, the judge chastised him for making general and irrelevant arguments to the jury:

> I think you have gone about far enough.... If you want to argue these things later on and get dramatic about it, that is your business, but I don't want you to do it in the opening statement.... Let's get down to it. You

Fluste

then a

F

addres

urging

wished

breaki

commun

had al

on ad

interc

interc

this a

strong

less th

being r

January

on all

release

Facing

> have talked about motive. The government talks about motive. Of course, the jury is going to want to know why the men went in there. Let's get down to the details and find out why they went in there if you have some evidence as to that. That is one of the crucial issues in the case. Who paid them? Did they get any money to go in there? Was it purely for political espionage? What was the purpose? I think these are the things that might be discussed in a case like this.[10]

Flustered, Rothblatt appealed to the court for justice and then abruptly ended his statement.[11]

Following this unexpected exchange, William Bittman addressed the jury on behalf of E. Howard Hunt. Instead of urging an acquittal for his client, he announced that Hunt now wished to plead guilty only to the counts of conspiracy, breaking-and-entering, and interception of wire communications.[12] Bittman also declared that the prosecution had already accepted this partial plea which exonerated Hunt on additional counts of breaking-and-entering, attempted interception of oral communications, and attempted interception of wire communications. Sirica refused to accept this arrangement. He believed that the government had a strong case against Hunt on all six counts and that anything less than a full guilty plea would prevent the full truth from being revealed. The judge announced this decision on Thursday January 11. Bittman immediately arose to enter guilty pleas on all counts. Hunt was then escorted to jail and was released three hours later after posting a $100,000 bond. Facing reporters on his way out, the former CIA agent declared

that no higher-ups were involved in the break-in and that personal patriotism had led to his misguided criminal acts. Because this denial of White House or campaign involvement was not seriously scrutinized by the prosecution or police, it is clear that the cover-up remained in place despite the passage of seven months since the Watergate break-in.[13]

Later that day, the four Miamians notified Rothblatt that they, too, wished to plead guilty. Rothblatt strongly resisted because he believed that his clients were being pressured to follow Hunt's example. On Friday morning, these defendants asked Sirica to replace Rothblatt with someone who would obey their instructions. During secret conferences outside the jury's presence, the judge agreed and appointed Alvin Newmyer to represent the Miamians. Court was then adjourned for the weekend which gave Newmyer time to familiarize himself with the case.[14]

Over the weekend, several newspapers ran stories suggesting that the Miamians were being paid in return for their silence about the bugging and that Hunt was pressuring them to plead guilty. Seymour Hersh, writing for the New York Times on Sunday, claimed that the four men received payments averaging about $400 per month from unnamed sources. Bob Woodward and Carl Bernstein made similar claims in the Washington Post and wrote on Monday that increased payments were promised to the Miamians if guilty pleas were soon entered. In response, De Van Shumway--a spokesman for the Committee to Re-Elect--claimed that these accusations were

"outr

had a

denia

newsp

that

admir

purpo

guilt

point

admis

With

a num

the p

headq

in th

Repub

invol

the m

to re

inter

start

conspi

respon

Martin

"outrageously false and preposterous" and that John Mitchell had also denied the credibility of the stories. This vague denial, and the content of the allegations that appeared in newspapers that weekend, added to Sirica's growing suspicions that a cover-up was being implemented and that the Nixon administration was abusing his courtroom for political purposes.[15]

In court on January 15, Newmyer predictably entered full guilty pleas on behalf of his four clients. Convinced by this point that the four men were indeed being paid for this admission, the judge demanded that they approach the bench. With the jury temporarily outside the courtroom, Sirica posed a number of questions that he had unsuccessfully instructed the prosecutors to pursue in the case.[16]

"What purpose did you four men go into the Democratic headquarters for?" he asked. "Who, if anyone, hired you to go in there?.... Are other people--that is, higher ups in the Republican Party or the Democratic Party or any party--involved in this case?.... What was the motive?.... Who was the money man? Who did the paying off?" The Miamians declined to respond.[17]

Sirica then turned to Martinez hoping that individual interrogations would produce some answers. "I want you to start from the beginning and tell me how you got into the conspiracy," he demanded to know. "I don't care who [the responses] might help or hurt.... Don't pull any punches." Martinez ignored the substance of the question and lamely

stated
Silber
he was
myself
know w
report
Barker
the be
this p
Sirica
cooper
bills
his ar
operat
that h
sorry,
P
defend
Althou
prefer
under
Proced
when th
brought
were es
Be
was in

stated that the charges against him, as alleged by Earl Silbert, were factual. Irritated, Sirica asked Martinez how he was recruited for the Watergate break-in. "Maybe I offered myself," the defendant replied. The judge then demanded to know whether he had ever worked for the CIA as several news reports suggested. "Not that I know of," was the response. Barker interrupted and declared that none of the four men, to the best of his knowledge, had ever worked for the CIA. At this point, Liddy awoke from a nap and broke out in laughter. Sirica, clearly frustrated because of this behavior and non-cooperation, asked Barker to identify the origin of the $100 bills that were "floating around like coupons" at the time of his arrest. "I assume it was in connection.... to the operation at the Watergate," answered Barker who vaguely added that he received the money in a blank envelope. "Well, I'm sorry, I don't believe you," Sirica replied.[18]

Furious, the judge ended his questioning of the four defendants and reluctantly accepted their guilty pleas. Although Sirica suggested in his memoir that he would have preferred to reject them and to encourage the men to testify under oath before the jury, the Federal Rules of Criminal Procedure requires that judges ultimately permit guilty pleas when they are unconditionally made as to all of the charges brought by the prosecution. After Sirica did so, the Miamians were escorted out of the courtroom to jail.[19]

Before the judge was able to continue with the trial, he was interrupted again. This time, Gerald Alch and Peter

Marou

juror

defer

would

denie

only

in th

and e

The

just

conti

Media

becau

consi

exampl

presid

Maroulis arose and moved for a mistrial. They argued that the jurors would inevitably infer that the absence of five defendants meant that guilty pleas had been entered which would produce strong biases against McCord and Liddy. Sirica denied the motion. Alch, however, persisted and declared that only a mistrial would prevent reversible errors from occurring in the courtroom because of jury bias. The judge interrupted and expressed his views quite directly:

> I don't think there is any need to argue the point.... You have the record protected and if the court of appeals thinks that is error, that is their business, not mine. I am not concerned with what the court of appeals does. I am only concerned with what I do and if I do the right thing. I am not awed by appellate courts. Let's get that straight. All they can do is reverse me but they can't tell me how to try the case. All right, let's proceed.[20]

The jury re-entered, only to learn for the first time that just two defendants remained on trial. The proceedings continued.[21]

II

For the next two weeks, until the verdicts were rendered, media coverage and public interest in the trial declined because of national and international events that were considered more significant at the time. On January 20, for example, Richard Nixon was inaugurated to a second term as president. Although antiwar protests were held by critics of

the ad

inaugur

who had

in hono

defined

the oa

Evoking

declar

and or

House;

M

polici

this i

was bec

McGover

"closer

history

of imp

preside

centers

the administration, the majority of people who witnessed the inaugural supported the president and his policies.[22] Nixon, who had earlier declared January 19 to be a government holiday in honor of his inauguration, appeared confident and proudly defined his vision for the next four years in his speech after the oath was administered by Chief Justice Warren Burger. Evoking conservative Republican principles, the president declared that individual responsibility, hard work, and law and order would be emphasized more strongly by the White House; he urged Americans to accept this challenge as well:

> A person can be expected to act responsibly only if he has responsibility.... This is human nature. So let us encourage individuals at home and nations abroad to do more for themselves and decide more for themselves.... Let each of us remember that America was built not by government, but by people--not by welfare, but by work--not by shirking responsibility, but by seeking responsibility.[23]

Many Americans, particularly those who opposed Nixon's policies, believed that the pomp and ceremony which surrounded this inauguration was one more indication that the president was becoming too powerful and even imperial. Senator George McGovern declared that the United States under Nixon was "closer to one-man rule than at any [other] time in our history.... Fundamentally, we have experienced an exhaustion of important institutions in America. Today only the president is activist and strong while other traditional centers of power are timid and depleted."[24] Though perceptive

becaus
the po
commer
after
during
Januar
Vietna
Vietna
Govern
in exc
South.
with h
four y
thousa
insiste
South
fire p
units
collaps
the hea
peace
adminis
ceremon
an all
Waterga
impact

because the Nixon administration had attempted to strengthen the power of the executive branch, the wisdom of the senator's comments would not become apparent to most Americans until after the White House cover-up unravelled.[25]

A second event that captured the public's attention during the break-in trial was the signing of a peace accord on January 28 which ended America's military involvement in Vietnam. Signed by the United States, North and South Vietnam, and the Vietcong's Provisional Revolutionary Government, the pact called for the release of American POW's in exchange for the withdrawal of U.S. combat troops in the South. Although Nixon claimed that he had achieved "peace with honor," this same agreement could have been accomplished four years earlier before the deaths of an additional twenty thousand American troops. Contrary to Nixon's earlier insistence that all communist forces must be disbanded in South Vietnam before a United States withdrawal, the cease-fire permitted the Viet Cong and even some North Vietnamese units to remain which contributed to the South's ultimate collapse in 1975. These problems, however, did not dominate the headlines in January 1973; a national sigh of relief that peace had arrived was emphasized instead. Meanwhile, the administration announced just hours after the signing ceremonies that the draft was being immediately replaced with an all volunteer military. This, too, overshadowed the Watergate break-in trial as a newsworthy event because of the impact that the Selective Service System had on millions of

Americans who had been forced to serve in the army.[26]

The trial continued. Judge Sirica continued to hope, despite the guilty pleas, that the proceedings would uncover the full truth surrounding the Watergate break-in. To that end, he became increasingly irritated as witnesses were called to the stand. The testimonies of Jeb Magruder and Hugh Sloan especially convinced Sirica that higher ups were involved in Watergate and that the facts simply were not coming out in the courtroom. Magruder, who was involved with Liddy's plans before the break-in and was a key participant in the cover-up that followed, testified on January 23. He perjured himself when questioned by the prosecution:

> SILBERT: Mr. Magruder, did you ever give Mr. Liddy any assignment concerning the Democratic National Committee?
>
> MAGRUDER: No.
>
> SILBERT: Did you ever receive any report of any kind from Mr. Liddy concerning the Democratic National Committee offices and headquarters at 2600 Virginia Avenue, Northwest, here in the District?
>
> MAGRUDER: No.
>
> SILBERT: Did you ever give Mr. Liddy any assignment concerning Senator George McGovern's Campaign Headquarters at 410 First Street, Southeast, here in the District?
>
> MAGRUDER: No.
>
> SILBERT: Did you ever receive any intelligence information from him concerning those headquarters?
>
> MAGRUDER: No specific intelligence, no.[27]

No

testim

Sirica

decide

was CR

before

that

remai

money

defen

endors

quest

During

Not surprisingly, Silbert declined to challenge this testimony because it confirmed his basic theory of the case. Sirica, however, believed Magruder had lied. He thereupon decided to confront the next witness, Hugh Sloan, because he was CREEP's treasurer and knew about the payments to Liddy before the break-in.[28] The judge understood at this point that Sloan carried out the campaign's disbursement but remained unclear whether the treasurer was aware that the money would fund the break-in. After Sloan claimed that the defendants had committed illegal acts without an official endorsement or approval from higher ups, Sirica began his own questioning of the witness:

> SIRICA: Mr. Sloan.... What was the purpose of turning over $199,000 to Liddy?
>
> SLOAN: I have no idea.
>
> SIRICA: You have no idea?
>
> SLOAN: No, sir.
>
> SIRICA: You can't give us any information on that at all?
>
> SLOAN: No, sir. I was merely authorized to do so. I was not told the purpose?
>
> SIRICA: Who authorized you to turn $199,000 over to Liddy in cash?
>
> SLOAN: Jeb Magruder.
>
> SIRICA: For what purpose?
>
> SLOAN: I have no idea.[29]

During this round of questioning, Sirica became increasingly

frustra

Sloan

After f

telling

unable

the br

frustrated as he tried to elicit a more forthcoming response. Sloan refused to budge:

> SIRICA: You are a college student, aren't you?
>
> SLOAN: Yes, sir.
>
> SIRICA: I think you majored in history, is that correct?
>
> SLOAN: That is correct.
>
> SIRICA: What did you know about Mr. Liddy before the time all this cash was turned over to you?
>
> SLOAN: I just had known him through hearsay, that he had been an employee with the Treasury Department, a former FBI agent, a former consultant at the White House.
>
> SIRICA: You said you got some receipts, didn't you, for this money you turned over to him?
>
> SLOAN: No sir, I did not say that.
>
> SIRICA: Did you ever get any part of the $199,000 back?
>
> SLOAN: No, sir.
>
> SIRICA: You didn't know what Mr. Liddy used it for?
>
> SLOAN: No, sir.
>
> SIRICA: No idea?
>
> SLOAN: No, sir.[30]

After forty-two questions, Sirica was convinced that Sloan was telling the truth as to his own involvement but was either unable or unwilling to explain CREEP's full participation in the break-in. Based on this interrogation, the judge

concl

remai

Dean,

relev

there

quest

defer

recal

testi

could

recal

objec

of th

"undu

a mis

care

appea

doing

seeme

smili

what

that c

courtr

the ju

subseq

Wi

concluded that Magruder was entangled in the cover-up but remained unsure of the involvement of John Mitchell, John Dean, and other higher ups at the White House.[31]

Sirica also decided that Sloan's responses were indeed relevant to the charges against Liddy and Hunt, and he therefore announced on Thursday January 25 that his questioning would be read to the jury. The prosecution and defense objected. Silbert argued that Sloan should be recalled to the stand so that the jury could hear his testimony directly. Sirica refused and responded that Sloan could have a "lapse of memory" which would prevent him from recalling the facts he had enunciated to the judge. Maroulis' objection was more strenuous. He claimed that any recitation of the court's questioning of Sloan would give the testimony "undue weight" in the jurors' minds which would be grounds for a mistrial or reversal. Sirica bluntly retorted, "I couldn't care less what happens to this case on appeal, if there is an appeal. I am not interested in that. I am interested in doing what is right." The judge then noticed that Liddy seemed entertained by this response. "Now your client is smiling," Sirica angrily continued. "He is not impressed with what I am saying. I don't care what he thinks either. Is that clear to you?" The judge ordered the jury back into the courtroom, and Sloan's testimony was read aloud. In so doing, the jury received important evidence to consider in its subsequent deliberations.[32]

Witnesses continued to testify following this resolution

of

re

ac

re

pr

Ho

th

ap

ad

An

in

"e

no

ta

Hou

jus

po

Si

had

gre

the

the

Mar

beca

weak

with

of Sirica's questioning. The trial, however, continued to recede from national attention because the Vietnam peace accord remained newsworthy, and most of the testimonies reviewed additional specifics of the break-in which did not provide new insights to the case. At the same time, the White House cover-up remained in place which also contributed to this relative inattention. George Bush, the recently appointed Republican national chairman, unknowingly aided the administration in this scheme. Appearing on ABC's "Issues and Answers" on January 28, Bush declared that all Republicans, including Nixon and his closest associates, were doing "everything we possibly can" to ensure that dirty tricks do not recur in the GOP. Though conceding that Watergate had tarnished his party's image, he emphasized that the White House supported all efforts to bring guilty individuals to justice and that Republicans were determined to practice clean politics in the future.[33]

On Monday January 29, after two weeks of trial, Earl Silbert rested the prosecution's case. His earlier intention had been to call additional witnesses to the stand, but Sirica grew impatient and urged Silbert to wind up because much of the government's evidence seemed repetitive. The defense was then directed to present its case; three hours later, Alch and Maroulis also rested. Neither McCord nor Liddy testified because of the potential for cross-examination that would weaken their defense. Instead, just a handful of character witnesses--who worked with the defendants prior to Watergate--

were called to the stand and declared that the two men enjoyed excellent reputations. Defense counsel chose not to call witnesses who were familiar with the break-in because the tactic would have likely backfired.[34]

Later that day, closing arguments began. Silbert, the first to proceed, repeated the obvious to the jury--that Liddy and Hunt participated in the break-in and that criminal intent indeed existed. Though displeased with this narrow and incomplete summation, Sirica had little choice but to sit back and listen. It was simply too late for the prosecution to broaden its inquiry or for the court to obtain more facts from individual witnesses. After concluding his remarks, Alch addressed the jury and urged an acquittal for James McCord. He repeated his claim that criminal intent was lacking and suggested that his client broke into the Watergate to seek information that would prevent violence from erupting at the Democratic National Convention. Maroulis, also arguing that criminal intent failed to materialize, now declared that Liddy was merely an observer and that Hunt had actually masterminded the operation. Sirica adjourned for the day after the conclusion of Maroulis' statement.[35]

Next morning, the judge issued a series of jury instructions to establish guidelines for deliberations. Sirica repeated the crimes alleged to have been committed by Liddy and McCord, and he explained the specific elements that must be proven beyond a reasonable doubt for each. No mention was made of his suspicions that higher ups were involved in

Wate

off

wou

def

del

proc

verc

long

McCo

ente

consp

$100,

Wate

Watergate or that the defendants had lied to protect campaign officials from criminal prosecution. Indeed, such suggestions would certainly have produced a mistrial by prejudicing the defendants in the minds of jurors.[36]

At 4:32 that afternoon, Sirica retired the jury for deliberations. Ninety minutes later, the forewoman led a procession of jurors back into the courtroom to announce that verdicts had been reached. James Capitanio, the judge's longtime deputy clerk, arose and declared that Liddy and McCord had been found guilty on all counts of breaking-and-entering, interception of oral and wire communications, and conspiracy. Sirica set bail for the convicted defendants at $100,000 each, and sentencing was scheduled for March 23. The Watergate break-in trial had reached its conclusion.[37]

III

In the immediate aftermath of these proceedings, Sirica remained frustrated that the prosecution had been unable to show who hired and paid the burglars to enter the Watergate in June 1972. "I am still not satisfied," he declared in his courtroom, "that all the pertinent facts that might be available--I say might be available--have been produced before an American jury."[38] Unbeknownst to Sirica, the break-in trial was already causing panic to erupt at the White House. This development, which also suggests Sirica's significance and impact during this episode, occurred because the president and his aides were well aware of the judge's severe sentencing practices and feared that the burglars might reveal new information to avoid long prison terms. These anxieties clearly surfaced during Nixon's meeting with Dean on the morning of February 28, 1973:

> NIXON: What is the situation anyway with regard to the situation of the sentencing of the seven? When in the hell is that going to occur?
>
> DEAN: That is likely to occur, I would say, as early as late this week, but more likely sometime next week.[39]
>
> NIXON: Why has it been delayed so long?
>
> DEAN: Well, they have been in the process of preparing a pre-sentence report. The judge sends out probation officers to find out everybody who knew these people, and then he will....
>
> NIXON: He is trying to work on them to see who will break them down?

deva

In h

proc

cont

Seve

plea

mone

expe

auth

info

comp

Offi

he sa

DEAN: Well, there is some of that....

NIXON: You know when they talk about a 35 year sentence, here is something to think about. There were no weapons! Right? There were no injuries! Right? There was no success! Why does that sort of thing happen? It is just ridiculous! (Characterization deleted)[40]

The Watergate break-in trial was to be even more devastating for the White House than the president realized. In hindsight, it is clear that Sirica's handling of the proceedings and the results of the trial ultimately contributed to the demise of the Nixon administration. Several factors demonstrate this causation. First, the guilty pleas and convictions ensured that the nagging problem of hush money payments was going to become quite troublesome and expensive in the weeks and months ahead. John Dean, who had authorized the payments of such funds for months, decided to inform the president of his own actions because of these new complications. On March 21, Dean confronted Nixon in the Oval Office and began with an ominous description of the scandal as he saw it:

DEAN: We have a cancer within, close to the presidency, that is growing. It is growing daily. It's compounded, growing geometrically now, because it compounds itself. That will be clear if I, you know, explain some of the details of why it is. Basically, it is because 1) we are being blackmailed; [and] 2) people are going to start perjuring themselves very quickly that have not had to perjure themselves to protect other people in the line. And there is no assurance--

le
mo
ab
no
ad
hi
be
so
la
fa
tha
the
dep
he
inc
Bec
sup
fai
thi
Hou
and
unc

NIXON: That that won't bust?

DEAN: That that won't bust.[41]

Continuing, Dean traced the pattern of development which led to the Watergate break-in and informed Nixon that hush money had been paid since June to keep the seven men silent about CREEP's involvement in the burglary. He specifically noted that these payments were especially problematic for the administration because Haldeman, Ehrlichman, Mitchell, and himself were involved. The president replied that "we should be able to handle that issue pretty well" though expressing some annoyance that the defendants and others might file civil lawsuits in the near future. Dean, convinced that Nixon failed to appreciate the seriousness of the problem, stated that the burglars now demanded more money in exchange for their silence. Hunt was especially insistent. Still depressed because of his wife's death the preceding December, he was awaiting a potentially stiff sentences from Sirica including thirty-five years in prison and large fines. Because of this predicament, he demanded $72,000 in cash for support and $50,000 for legal fees. Hunt warned that a failure to provide this money would force him to reveal "seamy things" he had done for Ehrlichman while working at the White House; this included his involvement in the Ellsberg affair and other illegal activities.[42] The president seemed unconcerned that any such payments violated the law:

NIXON: How much money do you need?

> DEAN: I would say these people are going to cost a million dollars over the next two years.
>
> NIXON: We could get that. On the money, if you need the money you could get that. You could get a million dollars. You could get it in cash. I know where it could be gotten. It is not easy, but it could be done.... Just looking at the immediate problem, don't you think you have to handle Hunt's financial situation damn soon? It seems to me that we have to keep the cap on the bottle that much, or we don't have any options.[43]

That night, White House agents delivered $75,000 to Hunt's attorney, William Bittman. The Watergate break-in trial, and Sirica's potential fore imposing harsh sentences in the case, indeed contributed to the administration's deepening involvement in hush money payments.[44]

A second indication that the trial and Sirica's sentencing practices contributed to Nixon's demise was the McCord letter. On Tuesday March 20, just three days before sentencing, James McCord appeared outside the courtroom hoping to deliver a written message to the judge. Richard Azzaro, who was one of two law clerks working for Sirica, informed McCord that convicted defendants are not permitted to speak with judges in this manner.[45] Sirica then noticed the two men conversing and ordered Azzaro to have McCord send any message through his attorney or probation officer.[46]

In less than an hour, probation officer James Morgan delivered an envelope from McCord to the judge's chambers. Enclosed was a letter that uncovered major components of the

White House cover-up. McCord began by raising complications that this information could produce, and he was especially concerned that his family might suffer any number of consequences:

> There are further considerations which are not to be lightly taken. Several members of my family have expressed fear for my life if I disclose knowledge of the facts in this matter either publicly or to any government representatives. Whereas I do not share their concerns to the same degree, nevertheless, I do believe retaliatory measures will be taken against me, my family and my friends should I disclose such facts. Such retaliation could destroy careers, income and reputation of persons who are innocent of any guilt whatever.[47]

Yet despite these fears, McCord insisted that the interest of justice required him to come forward; he acknowledged that his fear of a lengthy prison sentence also led to this decision.[48]

Continuing, McCord wrote that political pressure had been applied to the seven defendants to plead guilty and remain silent; that perjury had been committed during the trial; that prosecutors had failed to identify others involved in Watergate; that the bugging was not a CIA operation; and that his personal motivations for participating in the break-in were "different than those of the others involved but were not limited to or simply those offered in [his] defense during the trial." The letter closed with a request for a private meeting with the judge to discuss these allegations because McCord suspected that the FBI and other agencies within the

Department of Justice remained involved in the cover-up and therefore could not be trusted.[49] Sirica immediately discussed these revelations with Todd Christofferson--his second law clerk. He remarked that the letter was dated on his birthday which made it the "best damned birthday present I've ever gotten.... I always told you I felt someone would talk. This is going to break the case wide open."[50]

It certainly did. On Friday morning, March 23, Sirica entered his courtroom and announced that he had a "preliminary matter" to take up before sentencing. He then read McCord's letter aloud before a shocked gathering of reporters, witnesses, and attorneys. After postponing the sentencing of McCord at the request of his lawyer, the judge proceeded to impose prison sentences on the remaining defendants. Liddy came first. Maroulis pleaded for leniency while citing his client's long professional background in the law and government service, but Sirica was unimpressed. He sentenced Liddy to a prison term of six years and eight months to twenty years. A $40,000 fine was also imposed.[51]

The judge then called Hunt for sentencing. Bittman reminded Sirica that his client had also devoted his life to government service which warranted a reduced prison sentence in his case. Hunt himself pleaded for leniency; he specifically attempted to evoke sympathy from the judge and emphasized his recent personal tragedies:

> Your Honor, I am the father of four children, the youngest a boy of nine.

Thou

CREE

will

defe

judg

year

coop

have

rece

apie

coop

imp

sti

fro

who

ter

pro

dis

cou

pub

dev

> Had my wife and I not lost our employment because of Watergate involvement, she would not have sought investment security for our family in Chicago, where she was killed last December.... I have lost everything, Your Honor.... My fate--and that of my family--my children--is in your hands.[52]

Though moved, Sirica believed that Hunt's knowledge about CREEP's Watergate involvement grossly exceeded his present willingness to talk; he was nevertheless convinced that the defendant might change his mind if pressured to do so. The judge therefore imposed a provisional sentence of thirty-five years in prison and a $40,000 fine; he informed Hunt that cooperation with any future investigations of Watergate would have an impact on his final sentence. The four Miamians received forty-year provisional sentences and fines of $50,000 apiece with the same opportunity for reductions should cooperation with investigators occur.[53]

These events on March 23 in Sirica's courtroom had the impact of a bombshell upon the news media and public. The stiff sentences, for example, produced an outcry of opposition from Nixon supporters as well as attorneys, like Harvey Katz, who believed that judges should not threaten lengthy prison terms as a means of coercing defendants to talk. Sirica's provisional sentences, however, were entirely within a district judge's authority and were not reversed by appellate courts which later reviewed the case. More shocking to the public, however, was the news of McCord's letter which devastated the prosecution's theory that Liddy had

masterminded the break-in. Because of this revelation, television networks and newspapers saturated Americans with Watergate coverage and would continue to do so until Nixon's resignation. For the first time, millions believed that Watergate represented a constitutional crisis in which prominent government officials played a major role. That McCord's letter helped to unravel the cover-up was especially understood by Sirica:

> In my opinion, this case would never have been broken if McCord had elected to stand pat and had not written the letter to me. That's my conclusion. Once that letter was made public, the parade of people trying to protect themselves began. This was just the beginning of the end. But there was no stopping it.[54]

The collapse of the Nixon administration had started.

A final significance of the break-in trial and Sirica's handling of the proceeding was the congressional response to the events that took place in the judge's courtroom. Shortly after the verdicts were returned on January 30, Sirica declared that the full story remained a mystery and that a Senate investigative committee should be established to investigate. On February 7 the Senate obliged. By a vote of seventy to zero, the Select Committee on Presidential Campaign Activities, commonly referred to as the Ervin committee, was created; its responsibility was to determine whether illegal, improper, or unethical activities transpired during the 1972 presidential campaign.[55]

By April 30, the need for such an investigation became especially apparent; on that day Nixon announced the resignations of Haldeman and Ehrlichman.[56] In addition, he stated that Dean would be leaving the White House and that Richard Kleindienst would be replaced by Elliott Richardson.[57] The new attorney general subsequently named Archibald Cox, a professor at the Harvard Law School, as special prosecutor. These events produced more media coverage of the scandal and led many Americans to suspect that the president was involved.[58]

On May 17 Senator Sam Ervin, a Democrat from North Carolina, convened the Select committee; these public hearings were dominated by the testimonies of extensive witnesses who charged the administration with illegal conduct that had transpired throughout the Nixon presidency. John Dean emerged as the president's chief accuser during the proceedings. His testimony began on June 25 with a 245 page opening statement that took one full day to read. The cornerstone of this introduction was that Nixon had participated in the cover-up since September 15 when the president was informed of the indictments against Liddy, Hunt, McCord, and the four Miamians. Dean also informed the committee of the existence of the "plumbers," White House enemies lists, and the administration's practice of using Internal Revenue Service audits as political weapons, and he accused Nixon of repeated lying since the Watergate arrests. Although several Republicans on the committee expressed some skepticism at

these allegations, Dean insisted that his statements were accurate and that he was prepared to stand by them in court if necessary.[59]

Americans were shocked. The administration, to be sure, denied the allegations and claimed that Haldeman and Ehrlichman's testimonies--which did not implicate the president in any criminal wrongdoing--were far more accurate. These denials, however, rang hollow because numerous witnesses, like Dean, also accused the White House and the Committee to Re-Elect of illegal conduct and dirty tricks operations against political opponents. Such accusers included, among others, James McCord, Bernard Barker, and E. Howard Hunt who took Sirica's provisional sentences quite seriously and hoped for reduced penalties in return for their cooperation. Because of these testimonies, the public learned that Watergate was not merely an isolated incident; rather, it was part of a systematic scheme to subvert the democratic process. Sirica's competent handling of the break-in trial, and his call for a Senate investigation, had indeed contributed to the unravelling of the White House cover-up.[60]

1. "A Man for this season." New York Times, November 4, 1973, VI, pp. 106-08; Washingtonian, September 1973, pp. 127-28.

2. E. Howard Hunt, Undercover (Berkeley Publishing Corp., 1974), p. 287; G. Gordon Liddy, Will (New York: St. Martin's Press, 1980), p. 279.

3. Judge Sirica, despite his overwhelming suspicions of wrongdoing in the Watergate case and outrage that hush money had been paid to the defendants, never raised Mrs. Hunt's cash as an issue. See Hunt, pp. 178-83; John Dean Blind Ambition (New York: Simon and Schuster, 1976), p. 168.

4. Hunt, pp. 283-87.

5. United States v. Liddy, 509 F.2d 428, 434-437 (1974); "Watergate Jury Picked In Two Days." Washington Post, January 10, 1973, p. A1.

6. "E. Howard Hunt Pleads Guilty in Watergate Case." Washington Post, January 11, 1973, p. A8; "Watergate Trial Hears Hunt offer to Plead Guilty." New York Times, January 11, 1973, p. 1, col. 8.

7. Sirica, p. 63.

8. Ibid., p. 64.

9. James W. McCord, A Piece of Tape (Rockville: Washington Media Services, 1974), pp. 53-57; Washington Post, January 11, 1973, p. A8.

10. Sirica, p. 66.

11. Ibid.

12. Hunt's earlier guilty plea included all counts of the indictment.

13. "Hunt Declares No Higher Ups in Plot." Washington Post, January 12, 1973, p. A1. Peter Maroulis, attorney for G. Gordon Liddy, delivered his opening argument after Hunt's full guilty plea was entered. Like Alch, he, too, claimed that his client lacked criminal intent and was therefore not guilty.

14. "Plea Shifts Hunted in Watergate Case." Washington Post, January 13, 1973, p. A1; Sirica, p. 69.

15. "4 Watergate Defendants Reported Still Being Paid." New York Times, January 14, 1973, p. 1, col. 1; "4 in Bug Trial Still Paid, Paper Says." Washington Post, January 14, 1973, pp. A1, 26; "Hunt Urges 4 to Admit Guilt." Washington Post, January 15, 1973, p. A1.

16. "Judge Pushes For Answers." Washington Post, January 16, 1973, pp. A1, 7.

17. Ibid.

18. Ibid.

19. Ibid., Wayne LaFave and Jerold Israel, Criminal Procedure (St. Paul: West Publishing Co., 1992), pp. 897-911.

20. Sirica, p. 72.

21. Ibid.

22. Public opinion polls revealed that this popularity was nationwide and that most Americans did not believe Watergate to be a major issue or problem at this point. See "Nixon Pledges 'A New Era.'" Washington Post, January 21, 1973, pp. A1, 14.

23. Ibid., p. A1.

24. "McGovern: U.S. Nearing 1-Man Rule." Washington Post, January 21, 1973, p. A1.

25. Ibid.

26. "War in Vietnam Officially Ends." Washington Post, January 28, 1973, p. A1.

27. Magruder, p. 280.

28. Conversely, Magruder was not confronted because Sirica did not believe that he could be pinned down on the money issue.

29. Sirica, pp. 75-76.

30. Ibid., pp. 77-78.

31. Ibid., pp. 79-80.

32. "Judge Reads Private Testimony to Jury." Washington Post, January 26, 1973, pp. A1, 7; United States v. Liddy, 509 F.2d 428, 437-442 (1974).

33. "GOP Chief Concedes Watergate Hurt Party." Washington Post, January 29, 1973, p. A1. No evidence suggests that Bush knew about or participated in the cover-up. His comments, however, reflect a significant degree of naivete and willful ignorance within the GOP regarding the administration's involvement in the scandal.

34. "Jury Expected to Get Bugging Case Today." Washington Post, January 30, 1973, p. A2.

35. Ibid.

36. "Last 2 Guilty in Watergate Plot." Washington Post, January 31, 1973, p. A1.

37. Ibid.; Sirica, p. 88.

38. Sirica, p. 88.

39.

40.
28,
Tra

41.
Mar
Tra

42.

43.

44.

45.
in
ste
rar

46.

47.
Was

48.

49.

50.

51.
197
bec
fut

52

53
Ch
im
19
yea
was
Bar
whi
yea

54.

55.
1980

39. Dean was simply incorrect here.

40. Meeting: The President and Dean, Oval Office, February 28, 1973. (9:12 - 11:55 a.m.) in The Presidential Transcripts, pp. 57-58.

41. Meeting: The President, Dean and Haldeman, Oval Office, March 21, 1973 (10:12 - 11:55 a.m.) in The Presidential Transcripts, p. 99.

42. Ibid., p. 108.

43. Ibid., pp. 110, 112.

44. Ibid., p. 112.

45. Ordinarily, such meetings occur only if the judge agrees in advance, and if the prosecutor, defense attorney, and stenographer are present. These arrangements are exceedingly rare.

46. Sirica, pp. 93-94.

47. "McCord: Members of My Family Fear for My Life." Washington Post, March 24, 1973, p. A10.

48. Ibid.

49. Ibid.

50. Sirica, p. 97.

51. Ibid.; United States v. Liddy, 397 F.Supp. 947 (D.D.C. 1975). This was a final sentence, not a provisional one, because Sirica believed that Liddy had little potential for future cooperation with authorities.

52. Hunt, pp. 300-301.

53. Sirica, pp. 118-19; "Watergate Perjury, Pressure Charged." Washington Post, March 24, 1973, p. A10. Sirica imposed final sentences on the break-in defendants in November 1973. Hunt received a sentence of thirty months to eight years imprisonment for his Watergate participation. McCord was given a more lenient sentence of one to four years. Barker was sentenced to a term of eighteen months to six years while the remainder of the Miamians received one to four years.

54. Sirica, p. 116.

55. Sam Ervin, The Whole Truth (New York: Random House, 1980), pp. 16, 20-21.

56. Haldeman resigned, at the request of the president, primarily because of his role in the cover-up after the break-in. Ehrlichman was similarly asked to give up his office because of his approval of the Fielding break-in and his role in the Watergate cover-up.

57. Dean was fired because he had approved hush money payments to the burglars. Moreover, he was no longer able to maintain the attorney-client relationship between himself and the president because of his decision to cooperate fully with prosecutors to prevent being sent to prison for a lengthy duration. Kleindienst, though a marginal player in the Watergate drama, resigned because of his close relationship with individuals who were intimately involved.

58. Stanley I. Kutler, The Wars of Watergate (New York: Alfred A. Knopf, 1990), pp. 329-332.

59. The Watergate Hearings (New York: New York Times, 1973), pp. 266-363.

60. See generally The Watergate Hearings (1973).

CHAPTER FOUR

THE BATTLE FOR THE TAPES--PHASE 1

John Dean's five day testimony before the Select committee in June 1973 was similar to James McCord's letter to Sirica the previous March in one major respect: they indicated to the public that the White House had orchestrated a cover-up of Watergate to protect Nixon's chances for a decisive victory in the 1972 presidential election. Unlike the McCord letter, however, Dean's allegations specifically accused Nixon of being involved in the conspiracy since September 15, 1972. Dean also charged the president with approving the payment of hush money to the burglars and an assortment of other schemes designed to block the Watergate investigation.[1]

Many Americans, including Judge Sirica, were skeptical of these allegations. Dean, the judge later wrote, had "a lot to lose and had been dealing carefully with the prosecutors trying to get immunity for himself. It seemed to me at the time that Dean might well be interested in protecting himself by involving the president than in telling the truth."[2] Sirica also believed that Dean's credibility remained weak because 1) he was Nixon's sole accuser during the hearings in the Senate; 2) the president adamantly denied all of the charges; and 3) his admitted criminal conduct made his

testimony appear somewhat suspicious despite the enormous detail that he had provided.[3]

The revelation of the White House taping system provided the means to test Dean's allegations. From the time of this revelation until Nixon's resignation thirteen months later, the battle for the White House tapes ensued; during this period, the judiciary and the Congress attempted to force the administration to surrender recorded conversations pertaining to the Watergate break-in and cover-up. This chapter considers the role of Judge Sirica, in the broader context of Watergate, during the first three months of this struggle. It specifically argues that Sirica's decisions resulted from his conscientious application of established judicial precedents to the facts of Watergate. The judge's personal feelings toward the administration and his notions of judicial activism were insignificant here. Such feelings and biases became more significant after President Nixon's dismissal of Archibald Cox on October 20; this shift is considered in chapter six.

I

On Friday July 13, 1973, as the Ervin committee continued to question witnesses about the Watergate break-in, congressional investigators privately interviewed former Haldeman aide Alexander Butterfield in preparation for his public testimony scheduled for the following week. Butterfield, an Air Force veteran and former military pilot, had become acquainted with Haldeman while they were classmates

at the University of Southern California. In 1969, Haldeman selected Butterfield to be his chief administrative aide at the White House; four years later, Butterfield resigned this position to become head of the Federal Aviation Administration. Now, just four months after beginning this new job, he was summoned to appear before the Ervin committee to answer questions about White House routine.[4]

Donald Sanders, a lawyer for the Republican minority serving on the Select committee, was one of several attorneys who interrogated Butterfield on July 13. Sanders suspected that a recording system existed in the White House because 1) Nixon was able to recollect his conversations with others in considerable detail; and 2) John Dean had earlier testified before the committee that Nixon would occasionally take him to a corner of the room while speaking in a low voice. Sanders therefore decided to confront Butterfield--hoping that any existing tape recordings would exonerate the president from charges of wrongdoing in the Watergate affair. The Republican attorney began his questioning by asking Butterfield why Nixon sometimes spoke with a low voice in the manner that Dean had described.[5]

"I was hoping you fellows wouldn't ask me that," Butterfield replied. "I've wondered what I would say. I'm concerned about the effect my answers will have on national security and international affairs. But I suppose I have to assume that this is a formal, official interview in the same vein as if I were being questioned by the committee under

oath.... Yes, there's a recording system in the White House." With the exception of Sanders, the committee's staff members were shocked. Although they realized that recording devices had been utilized by previous presidents--including Franklin Roosevelt, John Kennedy, and Lyndon Johnson--Nixon's taping system was unprecedented because its widespread and systematic use was a secret to all but a few aides in the White House. Most visitors to the Oval Office, therefore, had been taped without their knowledge or consent.[6]

On July 16, Butterfield appeared before the full Ervin committee and television cameras to make this revelation public. For the first time, Americans learned that the president was a secretive and suspicious man who made great efforts to ensure that all White House conversations were recorded to preserve his place in history:

> THOMPSON (minority counsel for the committee): Mr. Butterfield, are you aware of the installation of any listening devices in the Oval Office of the President?
>
> BUTTERFIELD: I was aware of listening devices, yes sir.
>
> THOMPSON: When were those devices placed in the Oval Office?
>
> BUTTERFIELD: Approximately the summer of 1970.
>
> THOMPSON: Are you aware of any devices that were installed in the Executive Office Building Office of the President? [sic]
>
> BUTTERFIELD: Yes sir, at that time.

> THOMPSON: Were they installed at the same time?
>
> BUTTERFIELD: They were installed at the same time.
>
> THOMPSON: Would you tell us a little bit about how those devices worked, how they were activated, for example?
>
> BUTTERFIELD: They were installed, of course, for historical purposes, to record the President's business and they were installed in his two offices, the Oval Office and the E.O.B. [Executive Office Building] Office.... There was no doubt in my mind they were installed to record things for posterity, for the Nixon library. The President was very conscious of that kind of thing. We had quite an elaborate set-up at the White House for the collection and preservation of documents, and of things which transpired in the way of business and state.[7]

In addition to this information, Butterfield revealed that tapes were also installed in the Cabinet Room, the Lincoln Room, on phones throughout the White House and Executive Office Building, and at Camp David where foreign leaders and American politicians occasionally visited.[8]

This revelation came as a complete surprise to the president, who was fighting pneumonia at Bethesda Naval Hospital, because he believed that the tapes would remain a secret. White House chief of staff Alexander Haig informed Nixon of the news just hours before Butterfield's public testimony on July 16. The president immediately ordered that the recording apparatus be dismantled, and he solicited advice from his aides as to whether the existing tapes should be

destroyed. Sharp disagreements emerged. White House lawyer Fred Buzhardt, Vice-president Spiro Agnew, and speech writer Pat Buchanan argued that the tapes constituted Nixon's personal property and should be destroyed before the Ervin committee or the special prosecutor issued subpoenas mandating that they be turned over for review. Haig, White House lawyer Len Garment, and Haldeman disagreed and suggested that destroying the tapes would leave an impression of guilt which would undermine Nixon's credibility in the long run. Besides, they insisted, the tapes would inevitably exonerate the president because he had done nothing wrong. Nixon agreed with this latter view. Though recognizing that the tapes contained "politically embarrassing talk," the president was confident that the White House could cite the materials to disprove Dean's allegation that he had conspired to obstruct justice over an eight month period. Nixon also believed that the other aides who had participated in Watergate would similarly turn against him to avoid prison sentences; the tapes would therefore provide some protection.[9]

With hindsight, it is clear that this strategy was doomed from the beginning. The most obvious problem was that the tapes contained overwhelming evidence that the president and his closest aides had indeed obstructed justice in the Watergate affair since June 23, 1972. Nixon, however, was oblivious to his legal guilt for two reasons. First, he refused to permit his lawyers--who could have alerted the president about legally troublesome conversations--to examine

the taped materials. The president himself declined to listen to the tapes at length this early after Butterfield's revelation; at the same time, he spent much of his time dealing with the ongoing negotiations with the Soviet Union, the economy, and other issues facing the nation. In short, Nixon attempted to convince himself that he had done nothing wrong, and by neglecting to examine the tapes and address Watergate in a forthright manner, he succeeded.[10]

Second, the president failed to perceive Watergate and the dispute over the tapes as a legal dilemma; instead, he considered the entire matter to be a political problem which necessitated a political response against opponents of his administration. In his memoir RN, Nixon repeatedly alluded to this perspective and frequently raised the conduct of other presidents--most notably John Kennedy and Lyndon Johnson--as a means of convincing the reader that his administration did not invent hardball politics and that his own activities and conduct was no worse than his predecessors. In his latest memoir, In the Arena, Nixon also suggested that his political opponents vicious attacks forced him to resign the presidency. "Watergate was not a morality play," he wrote, "but rather a political struggle. The baseless and sensationalistic charges, the blatant double standards, the party-line votes in congressional investigating committees, and the unwillingness of my adversaries and the media to look into parallel wrongdoing within the Democratic campaigns, all should tip off even the casual observer that the opposition was pursuing not

only justice but also political advantage." This perspective, and the failure to appreciate his legal problems after Butterfield's revelation, would ultimately undermine the administration's position as well as any remaining credibility it had with the American people.[11]

II

On July 17, while Nixon remained in the hospital, the battle for the White House tapes began. That day, Senator Ervin wrote a letter to the president requesting that the administration hand over to the Select committee any tapes and documents relevant to Watergate. Specifically, the committee asked that recordings of conversations between Dean and Nixon, which occurred in February and March 1973, be surrendered to verify Dean's allegations that were made during his testimony. Archibald Cox similarly requested that the president hand over these materials so that his office could prosecute any individuals involved in the Watergate break-in or cover-up. Five days later, the White House refused to hand over the tapes to both the Select committee and the special prosecutor. Nixon was somewhat vague in his rationale for this refusal, but he generally insisted that presidential conversations are confidential and that any disclosure would jeopardize national security. Later that day, Nixon wrote a letter to Congress refusing a private meeting with Sam Ervin and Howard Baker to discuss Watergate in general and the White House tapes in particular; in so doing, the president increased the tension

between his administration and Congress which made legislative Republican support for Nixon less likely in the future.[12]

In response to Nixon's refusal, the Select committee voted unanimously to issue a subpoena that broadened the scope of its earlier inquiry. Specifically requested were five taped conversations between Nixon and Dean, as well as a mass of presidential documents relating to the "activities, participation, responsibilities, or involvement" of twenty-five administration officials. This congressional action shocked the president because it had been 166 years since the nation's chief executive received a subpoena from any federal branch of government requesting that documents be handed over without prior consent. Nixon again refused to cooperate.[13]

Meanwhile, the special prosecutor similarly decided to confront the White House in response to Nixon's stonewalling tactics. On July 23, Cox filed a motion in federal district court to subpoena taped conversations about Watergate that had transpired since June 1972.[14] Judge Sirica granted Cox's request without hesitation. Though acknowledging that this approval constituted only the second time that a sitting president would be served with a subpoena, Sirica granted Cox's request because he believed that the Watergate grand jury needed to examine the tapes before it could adequately decide whether indictments of administration officials should be issued. In his memoir, the judge later wrote that he "gave little thought to the fact that the subpoena itself might raise objections, since serving it seemed the natural course

to follow" in the case. This rational suggest that Sirica considered the importance of public policy when issuing a rulings in the tapes litigation. The specific policy consideration here was that the criminal investigation needed to be continued and that the grand jury and prosecutors had to obtain the necessary evidence so that justice might be realized. The judge repeatedly considered public policy throughout the tapes litigation.[15]

That day, Sirica's order reached President Nixon. The specific ruling constituted a subpoena duces tecum which mandated that the White House produce the tapes or to show cause that they need not be produced. The president refused to comply on grounds of executive privilege. This doctrine, though unmentioned in the Constitution and federal statutes, is firmly rooted in the American political system because of the necessity that presidents must have some privacy--and even protection from legislative and judicial inquiries on occasion--if the executive branch is to function effectively. George Washington first asserted this privilege in 1792 when the House of Representatives wanted to examine materials in the president's possession relating to General St. Clair's defeat by Indians residing in Ohio; several years later, he similarly refused to submit documents dealing with Jay's Treaty when anti-Federalists expressed outrage against this controversial agreement between the United States and Great Britain. Subsequent presidents, including Thomas Jefferson and Harry Truman, also defied legislative or judicial requests

while claiming that compliance would undermine their policies by eroding existing confidentiality between parties. Although the term "executive privilege" was not used until Dwight Eisenhower enunciated it during his administration, it is clear that the substance of this doctrine existed before the presidency became an imperial institution during the twentieth-century.[16]

Watergate, however, was different. For the first time ever, the judiciary had ordered a president to produce documents and materials that he was determined not to surrender.[17] Moreover, the rationale of the subpoena was unrelated to national policy or military secrets of any kind; instead, Nixon was being ordered to hand over taped conversations because of alleged criminal conduct within his own administration. This kind of dispute was unprecedented,[18] and the issue that consequently arose was whether the president or the courts possessed the authority to determine the validity of Sirica's subpoena. Which branch of government, in short, had the authority to determine what the law is when disputes arise between the executive and judiciary? What were the limits of the executive privilege, if any? Could President Nixon simply ignore Sirica's order if he believed that compliance would harm the national interest? Or could the judiciary claim that courts could order rulings enforcing its decisions which would therefore make a sitting president criminally liable if compliance did not occur? These issues remained unresolved despite Sirica's approval of

Cox's request for a subpoena.

Nixon immediately asserted his right to resolve this impasse. In a letter addressed to Sirica on July 26, the president insisted that he could ignore judicial orders and that courts do not have the authority to decide the limits of executive privilege:

> White House counsel have received on my behalf a subpoena duces tecum issued out of the United States District Court for the District of Columbia on July 23rd at the request of Archibald Cox.... I must decline to obey the command of that subpoena. In doing so I follow the example of a long line of my predecessors as President of the United States who have consistently adhered to the position that the President is not subject to compulsory process from the courts. The independence of the three branches of our government is at the very heart of our Constitutional system. It would be wholly inadmissible for the President to seek to compel some particular action by the courts. It is equally inadmissible for the courts to seek to compel some particular action from the President.[19]

Sirica promptly read this letter in his courtroom before Archibald Cox and the grand jury to notify them of the administration's response to the subpoena. Cox immediately objected to Nixon's defense of executive privilege and argued that the separation of powers doctrine was not intended to permit presidents to withhold evidence in a criminal investigation. He then informed Sirica that Nixon's refusal to obey the subpoena had been reported to the grand jury which soon requested that the special prosecutor obtain an "order to

show cause" from the court to obtain compliance. Such an order, if signed by the judge, would require that White House lawyers appear in court to justify Nixon's refusal to surrender the taped materials. Sirica agreed and signed the order because he again believed, on grounds of public policy, that grand juries are entitled to obtain sufficient evidence in criminal investigations. Although this procedure is fairly routine in federal cases, the grand jury's approval of the court's show cause order moved Sirica emotionally because the process demonstrated to him that democratic institutions remained intact despite the growing constitutional crisis:

> It was quite a moment. Here was the grand jury made up of ordinary citizens from the District of Columbia, some of them poor people, telling the president of the United States, the most powerful man in the world, to turn over the tapes. If there was ever a moment that gave meaning to the idea that in our democracy, the people govern themselves, that was it. It was a moving experience to watch those faces as they challenged the president. I had always been proud of this country and thankful for the life it let me lead. But I was never prouder than that morning in July.[20]

Oral arguments before Sirica took place on August 22. As mandated by the show cause order, the White House sent Charles Alan Wright to defend the president's refusal to surrender the tapes. Wright, a constitutional scholar from the University of Texas Law School who worked for the Nixon administration on a part-time basis, acknowledged to the judge that Cox's criminal investigation of Watergate was important; but he

suggested that the testimonies of cover-up participants would suffice for the full truth to be revealed. He insisted that the president's privacy and his ability to govern were even more important than the grand jury's criminal investigation and that compliance with Sirica's subpoena would result in the judiciary's interference with Nixon's need for confidentiality inside the Oval Office. "There are in the United States today 400 district judgeships authorized by law," Wright declared. "A holding that the court has the power to pass on a president's claim of privilege as to his most private papers and to compel him to give up those papers would be a precedent for all 400 of those district judges....We must leave it to the good judgment of the president of the United States to determine whether the public interest permits disclosure of his most intimate documents."[21]

Cox strenuously disagreed. He insisted that Watergate had eroded the public's confidence in governmental institutions and that the proper remedy was to permit the special prosecutor's office and the grand jury to forge ahead with their investigations. Though acknowledging that there was no judicial precedent for the enforcement of the subpoena, he insisted that no man, not even the president, stood above the law and that courts must ultimately decide how the Constitution and statutes are to be interpreted in particular instances. Cox denied that national security could be jeopardized by the president's surrender of the tapes, and he repeated his earlier assertion that the material was

absolutely essential for his Watergate investigation to succeed.[22]

After two hours, oral arguments came to an end. Initially, Sirica was unsure as to what the proper ruling should be due to the unprecedented nature of this case. Although he agreed with Cox's general view that no citizen is above the law, the judge realized that his ultimate decision needed a constitutional foundation based on established judicial precedents--even though the factual circumstances such as these had never occurred. The specific problem, as Cox had acknowledged, was that no court had ever forced a president to comply with a judicial subpoena. Perplexed, Sirica thoroughly researched the law with the assistance of his clerk, Richard Azzaro. He particularly considered the rulings of Chief Justice John Marshall to determine what the Supreme Court had to say, if anything, about the executive privilege doctrine as a defense. Such study and extended reflection after the conclusion of oral arguments contradicts the image of Sirica as a quick, decisive, and sometimes impulsive jurist who viewed the law in simplistic terms. This reputation, to be sure, was frequently accurate, but his decisiveness ordinarily manifested itself during criminal trials when quick rulings are normally expected from the bench or when procedural decisions needed to be made immediately.[23] Sirica, however, proved far more reflective in difficult and complex cases when substantive issues were at stake, and he especially agonized over his decision in the Watergate tapes

litigation. "It's difficult to describe how worried I was about my impending decision," the judge later wrote. "I was frankly worried that I would miss some point of one argument or another, overlook the language in some previous case, misunderstood the importance of one point or another. What if I was wrong?" There seemed to be no clear or easy answers in this case.[24]

As Sirica pondered his decision, President Nixon defiantly defended his administration's handling of Watergate. In a tense press conference on August 22, just hours after Wright and Cox presented their oral arguments to Judge Sirica, the president insisted that his executive privilege defense was constitutional, and he ruled out any future compromise with either the special prosecutor or the Select committee:

> .... Mr. Wright, who argued the case, I understand very well, before Judge Sirica this morning, has indicated, to have the tapes listened to.... would violate the principle of confidentiality, and I believe he is correct. That is why we are standing firm on the proposition that we will not agree to the Senate committee's desire to have, for example, its chief investigator listen to the tapes, or the Special Prosecutor's desire to hear the tapes, and also why we will oppose, as Mr. Wright did in his argument this morning, any compromise on the principle of confidentiality.[25]

Reporters continued to raise questions about the administration's handling of Watergate. Finally, Nixon interrupted out of frustration:

> Just a moment. We have had 30 minutes of this press conference. I have yet to have, for example, one question on the business of the people, which shows you how we are consumed with this.... [L]et me tell you, years from now people are going to perhaps be interested in what happened in terms of the efforts of the United States to build a structure of peace in the world. They are perhaps going to be interested in the efforts of this Administration to have a kind of prosperity that we have not had since 1955--that is, prosperity without war and inflation. Now, our goal is to move forward then, to move forward to build a structure of peace. And when you say, do I consider resigning, the answer is no, I shall not resign.[26]

Nixon's intention of putting Watergate in the past floundered when Sirica issued his decision on August 29. As was the case with the judge's legal research after oral arguments, this ruling was also indicative of his reflective approach to substantive legal issues and his grasp of the complexities involved. Illustrative of this approach was his resolution of the primary issues involved in the litigation: whether the judiciary had the authority to decide the constitutionality of the executive privilege as a defense; and whether the federal district court could enforce its subpoena duces tecum requiring the Nixon administration to surrender the White House tapes.[27]

At the outset of his opinion, Sirica acknowledged the legitimacy of the presidential executive privilege despite its absence in the Constitution and federal statutes. Citing United States v. Reynolds (1953), the most recent Supreme

Court decision dealing with the doctrine, Sirica found that a claim of executive privilege is indeed appropriate when military secrets are at issue in the litigation. In that case, a military aircraft had taken flight for the purpose of testing electronic equipment with four civilian observers aboard. The plane suddenly crashed after fire broke out in one of the engines; six of the nine crew members and three of the four civilians were killed in the incident. The widows of the observers subsequently sued the United States for damages in a consolidated federal tort action. Specifically, the plaintiffs demanded that the Air Force submit its official accident investigation report and statements from the three surviving crew members on grounds that these documents were highly relevant to their case. The government refused and claimed that the materials contained military secrets and were consequently privileged against disclosure. Initially, the district court ordered that the documents be turned over to the plaintiffs because good cause for production had been shown. The secretary of the Air Force subsequently filed a formal "claim of privilege" which repeated the government's assertion that disclosure would reveal sensitive military secrets that might jeopardize national security. The district court then changed its decision and ordered the Air Force to submit the materials for an inspection by the judge to determine whether military secrets were actually contained in the materials. The court of appeals, over the government's objection, affirmed and insisted that a judicial inspection

would satisfy the constitutional rights of both plaintiff and defendant in this case.[28]

After granting certiorari,[29] the Supreme Court reversed these lower rulings in a six to three decision. Writing for the majority, Chief Justice Frederick Vinson concluded that a claim of privilege may be made, without judicial inspection of the requested materials, if the government can convince the court that any degree of disclosure would endanger national security. He emphasized that although courts must ultimately decide whether the use of the privilege is justified in specific instances, judges must make their determination without jeopardizing the security which the privilege was designed to protect. In this case, Vinson concluded that the government had made a sufficient showing that military secrets were contained in the official investigation report and other requested documents; as a result, the Air Force properly refused to turn these materials over to the plaintiffs.[30]

In citing this important decision, Sirica was well aware that the circumstances leading to Reynolds differed considerably from the Watergate tapes litigation. Unlike Reynolds, Cox's request for an enforceable judicial subpoena was part of a criminal investigation that had nothing to do with military secrets despite the administration's insistence that disclosure of the tapes would jeopardize national security. And unlike the Air Force investigation report at issue in Reynolds, the subpoena that Sirica had earlier signed was directed at materials containing specific presidential

conversations. This latter distinction created a jurisdictional dilemma for Judge Sirica. Although Reynolds granted courts the general authority to decide when the executive privilege may be invoked, it did not clarify whether the judiciary has specific jurisdiction over White House documents--especially when the materials contain recordings of intimate conversations and are deemed by the president to be his own personal property. Sirica, therefore, could not rely on Reynolds to determine whether his court had the authority to adjudicate Nixon's executive privilege defense.[31]

Instead, he turned to the only federal decision that bore some resemblance to the present dispute--United States v. Burr (1807). In this case, former vice-president Aaron Burr was tried for treason because of his alleged plot to detach portions of the recently acquired Louisiana Purchase from the United States, and then to combine this territory with Spanish dominions in Mexico located in today's American Southwest. From this territory, Burr hoped to establish an independent nation with himself and co-conspirator James Wilkinson as rulers; Wilkinson, however, betrayed Burr and the plot ultimately failed. John Marshall, who served as circuit judge for Virginia as well as Chief Justice of the Supreme Court, presided over the trial. During the proceeding, Burr discovered that Wilkinson had tampered with a letter that the former had forwarded to Jefferson in order to magnify Burr's alleged guilt and to hide his own involvement in the failed scheme. Having no access to the letter, the former vice-

president asked the court to issue a subpoena duces tecum requiring Jefferson to produce the document as evidence.[32]

Marshall agreed. "There is certainly nothing before the court," he wrote, "which shows that the letter in question contains any matter the disclosure of which would endanger the public safety....If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed." The chief justice then declared that evidence in a criminal proceeding may not be suppressed merely because the holder of such materials happens to be the president of the United States. "The propriety of introducing any paper into a case as testimony," he continued, "must depend on the character of the paper, not on the character of the person who holds it." After this order was issued, Jefferson agreed to produce the letter despite his initial reluctance to do so.[33]

The usefulness of this decision to the Watergate tapes litigation seemed somewhat limited as far as Judge Sirica was concerned. Although Marshall had firmly ruled that presidents are not above the law and that they may be subjected to a judicial subpoena, the case was decided at the circuit level which meant that its guidelines were not binding on other courts. Moreover, the decision was 166 years old; circumstances had changed and the presidency as an institution had indeed become more complex. Sirica, therefore, issued a balanced ruling that incorporated the general principles in

Burr while protecting the president's need for privacy and the special prosecutor's responsibility to conduct a thorough criminal investigation. He ruled that the judiciary has the authority to decide the limits of the executive privilege; that the executive privilege is not absolute with respect to presidential communications; that the federal district court had jurisdiction over the White House tapes; and that Nixon must turn over the requested materials to the court for an inspection in camera.[34] The degree to which the tapes were in fact privileged, either in whole or in part, would remain unanswered until Sirica examined them. Finally, the judge declared that only those portions of the tapes that were relevant to Watergate without disclosing military secrets would be turned over to Archibald Cox and the grand jury so that the criminal investigation could proceed.[35]

Richard Nixon's response to this decision sharply contrasted with Jefferson's voluntary compliance with Marshall's subpoena in United States v. Burr. From San Clemente, he issued a blunt statement announcing that the administration would not comply with the order. He added that the White House was considering an appeal as well as other options for "sustaining the president's legal position." Later, Nixon acknowledged that he indeed intended to appeal Sirica's decision and that his administration would only abide by a "definitive ruling" from the Supreme Court. Meanwhile, Archibald Cox also decided to file an appeal because he insisted that none of the White House tapes were protected by

the executive privilege and that the materials should consequently be turned over to him and the grand jury directly. This refusal from both sides to accept Sirica's balanced decision ensured that Watergate would become increasingly contentious in the days and weeks ahead.[36]

III

In his memoir, Man of the House, former Democratic representative and majority leader Tip O'Neill suggested that Watergate began to tarnish Nixon's ability to govern effectively during the late summer and early autumn of 1973. The president's mental health, O'Neill added, became questionable as he became more isolated from congressional leaders and other political figures who had previously interacted with him on a regular basis. O'Neill's speculation is certainly plausible. On August 20, just nine days before Sirica issued his decision, the president flew to New Orleans for an appearance before the Veterans of Foreign Wars. En route to this destination, Nixon heard that a threat had been made on his life. At the convention hall several hours later, he suddenly grabbed Press Secretary Ron Ziegler, pushed him toward reporters, and told reporters to keep their distance from the presidential party. The White House later claimed that this outburst never occurred, but Americans learned otherwise when CBS showed the incident on its evening news program that day. Speculation immediately arose, as O'Neill later suggested, that the president was unable to cope with

the pressures brought on by Watergate.[37]

As the special prosecutor and Select committee continued to demand access to the White House tapes, Nixon's decision-making ability indeed diminished during this period. At a time when the president could have cooperated with Archibald Cox and Senator Ervin, he persisted in his refusal to hand over any of the requested documents and to comply with Sirica's ruling. This decision, combined with the judiciary's renewed pressure for Nixon's compliance, directly led to what became known as the Saturday Night Massacre and impeachment proceedings against the president.

On September 11, this road to confrontation intensified when White House attorney Charles Alan Wright and Archibald Cox confronted each other once again during oral arguments before the court of appeals. Each expressed disagreement with Sirica's August 29 decision. Wright, for example, aggressively defended the administration's legal position on Watergate and even suggested that Nixon would disobey all adverse rulings from the courts. "The tradition is very strong that judges should have the last word," he insisted, "but in a government organized as ours is, there are times when that simply cannot be the case." Wright further declared that Sirica's ruling failed to recognize the separation of powers doctrine and threatened the "continued existence of the presidency as a functioning institution." In response, Cox repeated his assertion that the tapes should be turned over directly to his office and the grand jury because 1) none of

the materials in question were privileged, and 2) policy considerations warranted a prompt and thorough investigation of Watergate. Initially, the panel of seven judges urged both men to negotiate and compromise. Their unanimous memorandum on September 13 specifically recommended that Nixon voluntarily submit portions of the tapes to a group of lawyers representing each side who would then determine which of the conversations must be turned over to the grand jury.[38]

Cox agreed to pursue this proposal. On three separate occasions, he met with presidential attorney Fred Buzhardt to work out a mutually acceptable compromise. The special prosecutor specifically suggested that the White House prepare transcripts of the tapes which would then be read by a "third party" to verify their authenticity. The documents would subsequently be turned over to Cox and the grand jury for their continuing Watergate investigation. Buzhardt, who was denied any access to the tapes by the president, rejected this proposal. Cox soon discovered that no genuine compromise would be accepted because Nixon adamantly insisted that the tapes belonged to him alone. The negotiations between Cox and Buzhardt, therefore, collapsed. Both sides returned to the court of appeals within days to inform the seven judges that compromise was no longer possible.[39]

On October 12, the court issued its decision. In Nixon v. Sirica, a majority of five judges rejected both appeals and ordered the president to produce the tapes for in camera inspection. Before addressing the substantive issues in the

case, the court dismissed Cox's petition on procedural grounds. Citing the United States Code Annotated, the majority ruled that the special prosecutor had no standing to appeal Sirica's order. More specifically, the court declared that the United States--as a party in a criminal case--could not file an appeal unless the district judge 1) dismissed an indictment or granted a new trial after verdict or judgment against an accused defendant, 2) suppressed or excluded evidence during trial, or 3) granted the release of a person charged with an offense. Cox had attempted to convince the Court of Appeals that Sirica's order amounted to a suppression of evidence inasmuch as the judge improperly gave himself the authority to withhold taped materials from the special prosecutor during the inspection. The majority refused to accept this reasoning and pointed out that Sirica had not declared that any of the subpoenaed materials must be denied to the special prosecutor or the grand jury; instead, only those tapes that contained classified information pertaining to national security could be withheld. Policy considerations, therefore, justified Sirica's order for inspection which did not constitute a genuine suppression of evidence.[40]

The remainder of the appellate decision on October 12 addressed the substantive issues of presidential immunity from compulsory process and executive privilege. Both the majority and dissenting opinions are significant because of their impact on Watergate and the fall of the Nixon administration.

The decisions also reveal Sirica's strengths and weaknesses as a jurist and present contrasting views of the role of the judiciary when the executive branch is accused of illegal or improper conduct. According to the majority, the primary substantive issue was whether the president had the authority to withhold from the grand jury evidence in his possession that was relevant to an ongoing criminal investigation. Having rejected Cox's appeal on procedural grounds, the court turned to Nixon's petition. First, the administration insisted that the president was absolutely immune from the compulsory process of the judiciary so long as he remained in office. This position was baseless as far as the court was concerned because of Marshall's decision in United States v. Burr (1807) and the Supreme Court's ruling in Youngstown Sheet & Tube Co. v. Sawyer (1952).[41]

Burr, which Sirica cited to justify his decision, was downplayed by Nixon's attorneys who argued that Marshall drew a distinction between the issuance of a subpoena and an order for compliance with its provisions. The court of appeals, however, considered this distinction insignificant. "An order to comply," declared the majority, "does not make the subpoena more compulsory; it simply maintains its original force." The court further observed that Marshall did not distinguish a compliance order from an order to show cause as a means of weakening the judiciary's authority to obtain documents in a criminal investigation; instead, it was designed only to ensure that courts thoroughly consider the president's reasons

for not releasing the materials before compliance is ordered. Such protections were deemed by Marshall to be unnecessary when judges issue orders to show cause. In the Watergate tapes litigation, Sirica had granted the president ample opportunity to present his reasons for not releasing the White House tapes to the grand jury; as a result, the distinction in Burr between the issuance of and compliance with a subpoena duces tecum remained insignificant in the present case.[42]

The majority then cited Youngstown Sheet & Tube v. Sawyer to support its decision. In that case, the Supreme Court held that President Truman acted unlawfully when he directed Secretary of Commerce Charles Sawyer to seize and operate the nation's steel mills after the United Steelworkers threatened a strike. Judge Sirica briefly noted in his opinion that this case firmly supported Cox's view that presidents are indeed subject to the compulsory process of court. The Nixon administration contested this finding on appeal and suggested that Youngstown and the tapes litigation were distinguishable because Sawyer--not President Truman--had actually seized the steel mills in April 1952. That being the case, it was Nixon's position that the Supreme Court had not directed its ruling to Truman personally even though he had given his secretary of commerce the initial order to carry out the seizure; as a result, Sirica had erred by ruling that Youngstown mandated presidential compliance when judicial orders and subpoenas are issued.[43]

The court of appeals disagreed. According to the

majority, no evidence suggested that Youngstown would have been decided differently if Truman had been named in the lawsuit instead of Sawyer. The court further reasoned that the exercise of judicial review would become capricious if presidents were able to escape the compulsory process of the judiciary simply by directing a subordinate to comply with an illegal executive order. The appellate judges concluded that Youngstown, in addition to Burr, was indeed applicable to the Watergate tapes litigation insofar as these rulings discredited Nixon's claim that the president was absolutely immune from the compulsory process of courts while remaining in office. The majority also rejected the administration's argument that immunity could be inferred from the president's political mandate or from his vulnerability to impeachment. Such claims, according to the court, failed to recognize that sovereignty rested with the people, not the president, and that the impeachment clause in the Constitution did not grant or imply any executive immunity from judicial subpoenas and decrees. Judge Sirica, concluded the majority, reasonably issued the subpoena to President Nixon and appropriately ruled that the administration must comply with this order.[44]

Nixon's second contention on appeal, that the executive privilege is absolute with respect to presidential communications, was also rejected in the majority's opinion. In his brief to the court of appeals, White House attorney Charles Alan Wright continued to insist--despite Sirica's ruling to the contrary--that the administration's claim to an

executive privilege was absolute because of the separation of powers doctrine in the Constitution; as a result, Nixon had the discretion to decide for himself whether presidential communications would be released irrespective of the judiciary's authority to issue a subpoena. The appellate majority upheld Sirica's ruling on this issue in its entirety. It specifically affirmed the district court's finding that the judiciary could decide when presidents may exercise the executive privilege. "The court itself must determine whether the circumstances are appropriate for the claim of privilege," the majority declared. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." To suggest otherwise, the court reasoned, would permit presidents to abuse their authority under the guise of executive privilege in almost any circumstance. Though conceding that the privilege genuinely exists--despite its explicit absence in the Constitution--that majority firmly ruled that its scope was not absolute and that the judiciary had to balance a president's claim of confidentiality, with the grand jury's rights to obtain evidence, in order to determine its validity. In the Watergate tapes litigation, the court ruled that Nixon's claim of confidentiality was moot because several of the subpoenaed conversations had already been made public during televised hearings before the Select committee. In addition, the grand jury continued to insist that the tapes were necessary to complete its ongoing investigation of Watergate. The court of appeals consequently

concluded that no justification on grounds of confidentiality existed for depriving the grand jury of these materials; as a result, Nixon was ordered to promptly surrender the tapes as Sirica had ordered.[45]

The sole remaining question facing the appellate court was the specific manner in which the subpoena should be enforced. According to Sirica, the tapes had to be turned over to the district court for inspection to determine which conversations, if any, were subject to the executive privilege. All remaining tapes which did not fall under this limited privilege were to be given to the grand jury so that the Watergate investigation could be completed. Sirica's order, however, failed to provide specific guidelines for carrying out this inspection. How, for example, was the district judge going to distinguish between privileged tapes and those that were not? By which standard would Sirica make this determination? What procedure would be followed if either the president or special prosecutor disagreed with Sirica's findings after his initial inspection of the tapes? Hoping to leave room for maneuverability and individual discretion, Sirica had left these matters vague. He had hoped to inspect the tapes and to make the necessary decisions solely on the basis of his own best judgment and general authority as district judge.[46]

This failure to provide specific guidelines was consistent with Sirica's decision-making approach. Throughout his tenure as district judge, Sirica was reluctant to immerse

himself in the enormous complexities of criminal and civil procedure. Instead, he preferred to assume an engaging role that focused on the more substantive issues of such things as guilt or innocence, constitutional guarantees to a fair and speedy trial, and the rights of victims to attain justice in an imperfect society. This approach, however, created problems in the tapes litigation because of the numerous procedural problems that existed in this case. The Court of Appeals therefore determined that Sirica's vague approach for inspection of the tapes was unsatisfactory. Although it did not explicitly overrule the judge's order, the majority issued a modification which provided specific guidelines for inspection that were lacking in Sirica's original decision. It was determined that Nixon had the right to retain all White House conversations relating to national defense without turning them over to Sirica, Cox, or the grand jury. Consistent with the Supreme Court's decision in Reynolds, the president merely had to make a formal claim of privilege on grounds of national security to obtain permission from the district court to retain such tape recordings. Of course, Sirica could reject Nixon's claim as unreasonable and/or unfounded; but as the Court in Reynolds declared, such a rejection had to be based on the claim alone without any inspection of the documents in question.[47]

All remaining tapes, according to the court of appeals, must be turned over to Sirica for inspection. Should Nixon claim that any of these materials were privileged on grounds

other than national defense, his lawyers could itemize and index the tapes to show which parts of the conversations should or should not be disclosed to the grand jury. Ultimately, the final decision rested with Sirica as to which of these tapes unrelated to security were to be submitted. Finally, a reasonable time was given to the president for approval.[48]

The majority's opinion ended by emphasizing the "extraordinary nature" of the case. The court firmly denied that its decision threatened the "continued existence of the presidency as a functioning institution," and it rejected Nixon's argument that enforcement of the subpoena would jeopardize the nation's security or foreign policies abroad. Instead, the decision was simply designed to ensure that the president remained subject to the laws of the land and that criminal investigations be permitted to continue without interference from administration officials.[49]

The court's two dissenters, Judges MacKinnon and Wilkey, strongly attacked the majority's decision and articulated contrasting philosophies of the proper relationship between the judiciary and executive branch. MacKinnon agreed that the court of appeals had jurisdiction to hear the case but argued that the president's need for confidentiality in conversations with his aides was "at least as great as the need to protect military and state secrets."[50] The White House tapes, therefore, should be shielded from judicial scrutiny on the basis of an absolute executive privilege. Wilkey, by

contrast, dissented from the majority because of his conviction that the president, not the judiciary, should decide when the executive privilege is applicable in individual cases. The majority's decision, he argued, was "oppressive" and would seriously weaken the presidency as a federal institution. Wilkey concluded that elections and the impeachment process serve as checks to presidential abuses of power and that the judiciary should not meddle in the affairs of either the executive or legislative branches of government. Neither dissenting opinion criticized Sirica for technical errors in his August 29 opinion; instead, MacKinnon and Wilkey's arguments were based on philosophical differences with the district judge and appellate majority regarding the extent to which courts should confront the executive branch when White House officials are suspected of criminal wrongdoing.[51]

IV

Judge Sirica, upon learning of the decision from the Court of Appeals, immediately assumed that Nixon would ask the Supreme Court to consider the case for review. "Under normal circumstances, that would have been the next logical step for him to take," he later wrote. Circumstances, however, were far from normal in October 1973. War, for example, erupted in the Middle East when Syria and Egypt suddenly attacked Israel on Yom Kippur. This raised immediate problems for the Nixon administration because America's traditional ally, Israel,

appeared to be on the defensive despite its possession of weapons and material that had already been supplied by the United States. Fearing a superpower confrontation as well as an Israeli military defeat, the president immediately provided the Jewish state with additional weaponry which led to an Arab defeat and OPEC's decision to declare an oil embargo against the United States and other nations. Four days after the Yom Kippur War erupted, political scandal again shocked Americans when Vice-president Spiro Agnew pleaded nolo contendere--no contest--in a Baltimore federal court to charges that he had accepted bribes and payoffs as a county executive, governor, and vice-president. Upon Agnew's resignation from his office, Nixon selected Michigan Representative Gerald R. Ford for the empty position as Congress braced itself for the first vice-presidential hearings ever amidst continued charges of corruption involving the White House over Watergate. Ford was sworn in on December 6 after Congress confirmed his nomination.[52]

As the president wrestled with these international and domestic crises, he nervously weighed his options for responding to the appellate ruling of October 12. One possibility was to obey the decision and hand the tapes over to Sirica for inspection. Nixon, however, never seriously considered this option because he was well aware that disclosure would weaken, if not destroy, his remaining credibility with the American public.[53] The president genuinely considered the possibility of a direct appeal to the

Supreme Court; but this response was also rejected because a protracted legal battle over the White House tapes--in the immediate aftermath of the Yom Kippur War and recent embarrassment associated with Agnew's resignation--would likely have disrupted the nation and diminished Nixon's ability to govern even further. The president additionally feared that he could end up losing at the Supreme Court which would ultimately destroy his administration.[54]

Because of these risks of compliance and appeals, Nixon decided to pursue a third alternative: bypass the judiciary altogether and propose a compromise solution with congressional leaders. In hindsight, this decision to proceed with a political strategy was consistent with his belief that Watergate necessitated a political response instead of a legal one. Illustrative of Nixon's attempt to contain the political damage of the scandal are his notes which were written shortly after the decision from the court of appeals was released; no mention is made of the legal problems that his administration faced as a result of the Watergate break-in and cover-up:

> We must not kid ourselves; we must face these facts....Both Gallup and Harris show our support going down from 38 in Gallup to 32, and in Harris the number of resignation rising to 31, with 56 opposed....Aren't we in a losing battle with the media despite the personal efforts I have made over the past month particularly? Are we facing the fact that the public attitudes may have hardened to the point that we can't change them?[55]

Having decided to seek a political compromise, Nixon and White House Chief of Staff Alexander Haig hammered out the specifics which included several components. First, the subpoenaed tapes were to be turned over to a third party verifier who would compare them to a White House prepared transcript. Assuming that the transcripts were accurate, the written documents would then be submitted to the investigators and grand jury instead of the tapes themselves. The president selected Senator John Stennis--a conservative Democrat from Mississippi who supported Nixon's military policies--to serve as verifier. Second, Attorney General Elliot Richardson would fire Cox as special prosecutor, and the investigation would be returned to the Justice Department. Richardson balked at this scheme and complained that he had promised not to fire Cox unless "gross improprieties" had resulted from the special prosecutor's Watergate investigation. Hoping to save the administration's plan, Haig informed Richardson that dismissal was not absolutely necessary so long as Cox did not acquire access to the tapes or the verified transcripts.[56]

Toward the middle of October, Richardson met with Cox to solicit his approval of this compromise. The special prosecutor agreed to accept the plan only if changes were made so that the transcripts of the tapes would be declared accurate in a court of law; specifically, Cox insisted that his office be permitted to directly assist Stennis in preparing the transcripts which would alleviate suspicions that misleading or false statements existed in the documents.

The White House, however, ignored this proposal; instead, it issued a presidential statement on Friday October 19 which informed the public of Nixon's intention to proceed with the Stennis compromise as originally proposed by the administration:

> What matters most, in this critical hour, is our ability to act--and to act in a way that enables us to control events, not to be paralyzed and overwhelmed by them. At home, the Watergate issue has taken on overtones of a partisan political contest. Concurrently, there are those in the international community who may be tempted by our Watergate-related difficulties at home to misread America's unity and resolve in meeting the challenges we confront abroad.[57]

In this same statement, the president ordered Cox to desist from seeking additional evidence from the White House--an instruction which robbed the special prosecutor of the independence that Richardson had guaranteed him:

> Though I have not wished to intrude upon the independence of the special prosecutor, I have felt it necessary to direct him, as an employee of the executive branch, to make no further attempts by judicial process to obtain tapes, notes, or memoranda of presidential conversations. I believe that with the statement that will be provided to the court, any legitimate need of the special prosecutor is fully satisfied and that he can proceed to obtain indictments against those who may have committed any crimes. And I believe that by these actions I have taken today, America will be spared the anguish of further indecision and litigation about tapes.[58]

As President Nixon escalated his confrontation with Archibald Cox, John Dean and his lawyer, Charles Shaffer, made final arrangements for a plea bargain to avoid the possibility of a long prison sentence that could result from a conviction at trial. After months of negotiations with federal prosecutors, Dean agreed to plead guilty to one count of conspiracy to obstruct justice and defraud the United States. On Friday October 19, he and Shaffer entered Sirica's courtroom to make this announcement. Though heavily publicized, the procedure was quick and routine. "Mr. Dean," the judge began, "you have heard the charges against you, how do you plead?" Nixon's former counsel replied guilty. He then stated that his plea was voluntarily and that he now gave up his right to a trial by jury. In his memoir, Sirica recalled that Dean had initially tried to win total immunity from prosecution because of his cooperation with the government since April and his testimony before the Select committee in June. He also wrote that Shaffer was one of the "shrewdest criminal lawyers in town" who had tried to win this immunity for his client during long negotiations with federal prosecutors. This goal was not realized, however, because of Dean's heavy involvement in the cover-up. Sirica concluded that the government had negotiated a good deal with Shaffer in that prosecutors still had the right to charge Dean with perjury if his previous allegations were later proven false. The judge postponed sentencing to determine the extent of Dean's future cooperation with the government, and the

proceeding came to an end. Sirica then left town with his daughter Tricia for a weekend trip to Fairfield, Connecticut.[59]

Meanwhile, Archibald Cox decided that he would not surrender his right to proceed with his duties and to examine those tapes which were relevant to the Watergate case. On Saturday afternoon, Cox called a press conference and announced to hushed reporters that he fully intended to request additional tapes from Nixon regardless of any proposals to the contrary from the White House. Nixon, convinced that the special prosecutor had exceeded his authority and was trying to attack him personally, immediately decided to fire Cox. Richardson, who was ordered to carry out the dismissal, refused and resigned in protest. Deputy Attorney General William Ruckelshaus was then ordered to fire Cox; he, too, refused and was immediately fired. Finally, Solicitor General Robert Bork was directed to carry out the dismissal; he complied. That evening, Ronald Ziegler announced that Cox had been removed and that the president had abolished the office of special prosecutor.[60]

Almost immediately, television networks interrupted their regular programming to report these startling events. Sirica, who remained in Fairfield with his daughter, became angry as he watched what the media dubbed as the "Saturday Night Massacre" unfold on television. In addition to the announcement itself, Sirica also saw FBI agents physically taking charge of the special prosecutor's office. He

immediately decided to confront the president the following week in open court:

> In a normal case, someone who defied court orders as Nixon would be inviting, at least in my court, a stretch in jail for contempt. I knew I couldn't order the president arrested, although I must admit the thought occurred to me more than once that weekend. I didn't know what Congress would do. But I knew I had to act. This sort of defiance could not be tolerated if the role of the courts in our system of government was to continue to mean anything. I had a couple of long talks with [law clerk] Todd [Christofferson] as we began considering and rejecting various plans. Finally, we settled on a course of action to deal with the president's defiance. I asked Todd to start the paper work. I began actually to look forward to the confrontation that was coming on Tuesday.[61]

Congress also decided to confront the White House because of Cox's dismissal. By Tuesday October 22, twenty-one bills had been introduced in the House of Representatives calling for an impeachment investigation. Shortly thereafter, the House Judiciary Committee voted to give itself subpoena power in order to request evidence from the White House in the same manner that the Ervin committee was already able to do. Finally, the House of Representatives allotted one-million dollars on November 15 to initiate the process of impeachment. By this date, both Sirica and the Congress had placed Nixon into a no-win situation; he could either submit the tapes which he believed would damage his administration politically if not legally, or he could break the law by openly defying

court decisions. There was therefore little likelihood that Nixon could complete his second term as the nation's 37th president.[62]

1. John Dean, Blind Ambition (New York: Simon and Schuster, 1976), pp. 307-31.

2. John Sirica, To Set The Record Straight (New York: W. W. Norton, 1979), p. 135.

3. Ibid., pp. 135-36.

4. H.R. Haldeman, The Ends of Power (New York: Times Books, 1978), p. 196.

5. Sam J. Ervin, Jr., The Whole Truth (New York: Random House, 1980), pp. 186-88.

6. Donald Sanders, "Watergate Reminiscences." Journal of American History, March 1989, p. 1231; Richard Nixon, RN: The Memoirs of Richard Nixon (New York: Grosset & Dunlap, 1978), pp. 500-02.

7. The New York Times, The Watergate Hearings (New York: The Viking Press, 1973), pp. 436-37.

8. Ibid., pp. 437-38.

9. Nixon, pp. 902-04.

10. Tip O'Neill, Man of the House (New York: Random House, 1987), pp. 242-44; Nixon, pp. 898-906.

11. Richard Nixon, In The Arena: A Memoir of Victory, Defeat, and Renewal (New York: Simon and Schuster, 1990), pp. 41-42.

12. Ervin, pp. 209-10.

13. The Select committee promptly filed a legislative lawsuit in federal district court hoping that Sirica would order the president to comply with the congressional subpoena. On October 17, the judge ruled that the district court had no jurisdiction over the committee's suit because Congress had not enacted a statute authorizing this type of legal action against a sitting president. See Ervin, pp. 220-21.

14. Nine conversations, which transpired between June 1972 and March 1973, were specifically requested. See Sirica, pp. 138-39.

15. Sirica, p. 137.

16. Arthur M. Schlesinger, Jr., The Imperial Presidency (Boston: Houghton Mifflin Company, 1973), pp. 155-59.

17. Nixon, RN, p. 909; Sirica, p. 137.

18. Most previous subpoenas directed at the executive branch did not involve presidential papers or tapes; judicial orders requesting such documents were accepted by the president unlike Nixon's adamant refusals in the Watergate tapes litigation.

19. Sirica, pp. 137-38.

20. Ibid., p. 140.

21. Ibid., p. 153.

22. Ibid., pp. 154-55.

23. Sirica's approval of Cox's request to sign the subpoena represented this kind of procedural decision.

24. Ibid., p. 157.

25. The Nixon Presidential Press Conferences (New York: Earl M. Coleman Enterprises, Inc., 1978), p. 334.

26. Ibid., p. 340.

27. In re Grand Jury SUBPOENA Duces Tecum Issued TO Richard M. NIXON, or any Subordinate Officer, Official, or Employee with Custody or Control of Certain Documents or Objects, 360 F.Supp. 1(1973).

28. United States v. Reynolds, 345 U.S. 1, 3-5 (1953).

29. A grant of certiorari means that the Supreme Court has accepted a particular case for review.

30. 345 U.S. 1, 8-12.

31. 360 F. Supp. 1, 2-7.

32. Schlesinger, pp. 25, 31, 44, 426.

33. Melvin Urofsky, A March of Liberty (New York: McGraw-Hill Publishing Co., 1988), pp. 193-96.

34. In camera inspection is a procedure that takes place in the judge's private chambers or when all spectators are absent from the courtroom.

35. Sirica, p. 160.

36. Ibid.

37. Tip O'Neill and William Novak, Man of the House (Random House, 1987), pp. 253-55.

38. James Doyle, Not Above the Law: The Battles of Watergate Prosecutors Cox and Jaworski (New York: William Morrow and Co., 1977), p. 120.

39. J. Anthony Lukas, Nightmare (New York: The Viking Press, 1976), p. 416.

40. Nixon v. Sirica, 487 F.2d 700, 706-08 (1973); 18 U.S.C. 3731. It is not altogether clear why Cox--who thoroughly understood the federal statutes and had a talented legal staff larger than that employed by the Nixon administration to handle Watergate--filed this appeal in the first place. The most likely possibility is that Cox sincerely pursued the appeal because he was convinced that policy considerations justified a "loose interpretation" of the United States Code. Realizing that Watergate represented a constitutional crisis of enormous proportions, the special prosecutor undoubtedly believed that anything less than a full and immediate disclosure of the tapes to the grand jury would threaten the ongoing investigation of Watergate. As a result, Cox could well have hoped that the Court of Appeals would rule that the public's compelling interest in full disclosure would indeed necessitate a broad or loose interpretation of the Code as opposed to a narrow or legalistic approach. In short, Archibald Cox may have believed that the appellate court would not permit a jurisdictional "technicality" to block his legitimate appeal that was designed to protect democratic institutions and the pursuit of justice in the Watergate case. It is also possible--though far less likely--that Cox's decision to appeal was motivated by pure politics and that he knew full well that his petition to the appellate court would not succeed.

41. 487 F.2d 700, 708.

42. Ibid., at 709.

43. Ibid.

44. Ibid. at 709-11.

45. Ibid. at 714.

46. 360 F.Supp. 1, 7-11.

47. 487 F.2d 700, 721.

48. Ibid.

49. Ibid. at 722.

50. Ibid. at 730.

51. Ibid. at 730-39.

52. Nixon, pp. 920-22; Sirica, p. 163.

53. Here again, Nixon did not believe that the taped conversations would reveal any criminal wrongdoing on his part; rather, he feared that the "embarrassing talk" contained in these discussions would be politically damaging.

54. Nixon, pp. 928-29.

55. Ibid., p. 928.

56. Ibid., pp. 929-30; Sirica, pp. 163-64.

57. Nixon, p. 932.

58. Ibid., pp. 932-33.

59. Dean was the third administration official who pleaded guilty for participating in the Watergate cover-up. Jeb Magruder had earlier pleaded guilty to perjury, and Fred LaRue accepted responsibility for assisting in the payments of hush money to the Watergate burglars. See Sirica, pp. 165-66; Dean, pp. 339-40.

60. Nixon, p. 934.

61. Sirica, p. 169.

62. Ibid., pp. 168-69; Nixon, pp. 934-35; Doyle, pp. 186-99.

CHAPTER FIVE

THE BATTLE FOR THE TAPES--PHASE 2

Following the dismissal of Archibald Cox as special prosecutor, a new and more intensive round of the battle for the White House tapes began. The initial phase, which began with Alexander Butterfield's public revelation of the president's taping system and ended with the Saturday Night Massacre, was a relatively straightforward confrontation despite its dramatic and unprecedented nature. In response to repeated congressional and judicial requests for the release of specific tapes, Nixon adamantly refused to cooperate and cited executive privilege as his defense. Although the president made an appearance of seeking a compromise in October with Cox and congressional Democrats, stonewalling and uncompromising notions of the executive privilege remained his Watergate strategy until October 20, 1973.

The administration, however, shifted its tactics because of the firestorm of opposition surrounding Cox's sudden dismissal. Instead of outright confrontation, a more subtle strategy was adopted that sought to provide some disclosure of the tapes while preventing important components of the cover-up from being revealed. The White House, for example, permitted subpoenaed materials to be released to Judge Sirica for inspection but denied the Congress any access to these

conversations. Later, when the outcry for continued disclosure became even more intense, Nixon released edited transcripts but declined to hand over the tapes in their entirety--particularly with respect to the conversation on June 23, 1972 during which Nixon ordered Haldeman to solicit the CIA's involvement in the cover-up at its earliest stages.

Judge Sirica played an important and complex role during this second round of confrontation surrounding the White House tapes. Two aspects of this role are especially noteworthy. First, Sirica held exaggerated fears about the administration's initiatives to defend itself with respect to the tapes litigation. More specifically, he suspected that President Nixon sought to undermine democratic values and institutions and that someone inside the White House had tampered with the tapes prior to their disclosure. These fears and suspicions, which emerged most notably in early October and November of 1973 in the context of unexpected announcements from the administration, occurred primarily because the judge had become cynical by this point, as had most Americans, in light of Nixon's repeated abuses in the entire Watergate scandal to date. Because of this cynicism, Sirica believed that Nixon and his lawyers would rarely tell the truth in open court. This expectation proved false.

Second, despite cynicism and suspicions, Sirica protected the constitutional rights of all parties in the litigation and even resisted taking stronger measures against the White House that were available. Sirica's posture during this second

round of confrontation surrounding the tapes was therefore somewhat paradoxical. Though an activist judge with strong views and biases, he nevertheless presided over the litigation in a pragmatic manner and scrupulously adhered to the legal precedents and statutes required of judges to protect the rights of all litigants. The specific manner in which Sirica resolved this tension is the focus of this chapter.

I

Like most Americans, Judge Sirica was stunned by the sudden dismissal of Archibald Cox. Because of the president's action, the office of the special prosecutor had been abolished which returned the Watergate investigation to Henry Petersen, head of the criminal division at the Justice Department. Though uncertain what specific measures the White House would take next, Sirica became convinced that Nixon had acted illegally and was determined to end any thorough investigation of Watergate to save his presidency from impeachment. Recollecting these events with clear outrage in his memoir, Sirica wrote that the president had "lost his grip on reality" and that the rule of law and democratic values were in "terrible danger" because of Nixon's unwarranted action. The judge even likened the Saturday Night Massacre to a Latin American coup d'etat because FBI agents had physically taken charge of Cox's office immediately after the firing occurred.[1]

Such sentiments abounded in late October 1973.

Immediately after Robert Bork carried out Nixon's order to fire Cox, politicians, television correspondents, and journalists alike referred to the dismissal in apocalyptic terms suggesting that the White House had deceptively staged a coup to undermine the Constitution. "The country tonight is in the midst of what may be the most serious constitutional crisis in its history," declared John Chancellor of NBC. "That is a stunning development and nothing even remotely like it has happened in all of our history....In my career as a correspondent, I never thought I would be announcing these things." The dismissal reminded Senator Robert Byrd of a Nazi "brownshirt operation" using "gestapo tactics." Senator Edmund Muskie denounced the "smacks of dictatorship" that he believed to exist in the Nixon White House. Ralph Nader concluded that the president was "acting like a madman, a tyrant, or both."[2]

These and similar expressions were inconsistent with Nixon's genuine intentions. Although Cox's ouster demonstrated an arrogance of executive power as well as a lack of candor in responding to the Watergate scandal, no evidence seriously suggested that Nixon intended to establish anything comparable to a totalitarian dictatorship. Moreover, the president's unpopular action was not even remotely akin to a coup d'etat or threat to free expression as Judge Sirica believed. Indeed, dismissing Archibald Cox and abolishing the office of special prosecutor--however unwise this may have been politically--was technically within the president's

authority because Nixon had fired an employee of the executive branch. These reactions, however, are significant because they reveal the trauma that Watergate had inflicted on the nation by October 1973. Because Nixon had failed to disclose his Watergate involvement while dismissing his special prosecutor--despite previous pledges of cooperation--Americans became convinced that he was incapable of speaking the truth and that he was now behaving like a dictator who intended to undermine democratic values and institutions. Public opinion polls indicated that this sentiment was widespread among the public after Cox's firing. Sirica's fears demonstrate that he was no exception.[3]

Returning to Washington after Cox's dismissal, Sirica conferred with Todd Christofferson to discuss possible responses to Nixon's defiance. He briefly considered issuing an order for the president's arrest but quickly discarded the idea because such an action would have exceeded his authority as district judge. After hours of discussion, Sirica settled on a plan designed to force Nixon to comply with the court's subpoena for nine taped conversations. Specifically, he intended to declare Nixon in contempt and to levy stiff fines for each day that the administration refused to submit the tapes for inspection. Although a president had never faced such a remedy, this plan was supported by ample legal principles enunciated by the Supreme Court when it upheld fines against the United Mine Workers for refusing to end an illegal strike. Sirica later explained his rationale for the

fines in his memoir:

> I knew the president loved money. I knew he had expensive homes in Florida and California. So I decided to hit him in the pocketbook; I would fine him between $25,000 and $50,000 for each day the tapes weren't turned over. I think that would have brought him around in a short time. And since the court of appeals had supported the subpoena in the first place, I didn't doubt that they would uphold the fines. Wouldn't that have been a hell of a situation?[4]

This remedy, however, never went into effect. On the contrary, the proceedings held in Sirica's courtroom on Tuesday October 23 were surprisingly calm and lacked the confrontation that the judge and many legal observers expected. One reason for this development was that Nixon's attorneys announced to Sirica that the White House would hand over the tapes as the court had ordered. "Mr. Chief Justice, may it please the court," Charles Alan Wright began. "I am....authorized to say that the president of the United States would comply in all respects with the order of August 29 as modified by the court of appeals. It will require some time, as Your Honor realizes, to put those materials together, to do the indexing, itemizing [that] the court of appeals calls for....This president does not defy the law." Stunned, Sirica replied that he was pleased that the White House had made this decision. "I appreciate the efforts in that," he concluded. Sirica adjourned the court and retired to his chambers to prepare for the inspection of the nine subpoenaed

taped conversations.[5]

A second factor contributing to a calm courtroom atmosphere on October 23 was that Sirica remained a thoughtful jurist who sought to follow established procedures and legal precedents so long as they existed. Though traumatized by Watergate like most Americans, he was nevertheless determined to carry out his duties in a balanced manner that protected the constitutional rights of all parties in the litigation. Illustrative of this thoughtful demeanor was the manner in which Sirica presided over his court on Tuesday morning of October 23--before Wright announced that the administration would comply with the subpoena of August 29. During this session, Sirica issued a number of instructions and rulings which provided direction for the Watergate investigation now that a special prosecutor no longer existed. His first specific task was to reassure the two grand juries working on the case that their responsibilities remained intact despite Cox's removal.[6] Noticeably absent from his instructions were any inflammatory remarks suggesting that Nixon had staged any kind of coup or that democratic institutions were being threatened in any serious way:

> Members of the jury, I thought it prudent to call you here this morning to explain, in so far as possible, your present status....You are advised first, that the grand juries on which you serve remain operative and intact. You are still grand jurors and the grand juries you constitute still function. In this regard you should be aware that the oath you took upon entering this service

> remains binding on each of you....You are not dismissed except by this court as provided by law upon the completion of your work or the conclusion of your terms. Your service to date, I realize, has occasioned personal sacrifices for many of you and inconvenience for all of you....Nevertheless, you must be prepared to press forward. We rely on your continued integrity and perseverance.[7]

Later that morning, Sirica took additional measures indicative of his thoughtful and balanced approach. He rejected, for example, several proposals to circumvent Nixon's dismissal of Cox that rested on dubious constitutional grounds. These proposals came from John Banshaf, a George Washington University law professor and public-interest lawyer, and Cox himself. Banshaf, like millions of Americans, had been outraged by the president's firing of Cox and became convinced that the White House was governing in an abusive and undemocratic manner. He therefore attempted to intervene in the Watergate tapes litigation and appeared in Sirica's courtroom that morning to make two alternative requests. First, he moved that Sirica appoint a "special counsel" to the grand jury who would then assume Cox's former responsibilities in the case. Second, Banshaf requested that the judge issue an injunction nullifying Cox's dismissal and the disbandment of the special prosecutor's office and staff. Cox's request, articulated in a letter addressed to Sirica the previous day, also suggested that the court appoint a "special counsel" to the grand jury and asked that he be considered for this position:

> The [president's] dismissal clearly terminates any authority I may have had under the attorney general. I am anxious not to involve your court or any other in avoidable controversy....At the same time I am genuinely doubtful concerning my professional duty. The grand jury unanimously voted that I should seek to have the subpoena enforced, and the grand jury is, of course, wholly independent of the executive branch. Both the court of appeals and this court explicitly recognized that I appeared on behalf of the grand jury as well as an officer in the executive branch. In addition, as an attorney I am an officer of the court. It seems quite possible that my dismissal does not terminate my duties to the court in these capacities; and although I am reluctant to intrude myself, I wish not to shrink from any obligations.[8]

Sirica rejected these proposals in their entirety. Still convinced that Nixon's lawyers planned to snub the August 29 subpoena that afternoon, the judge felt bound not to appoint any sort of Watergate prosecutor because he feared that such an action would be interpreted as a decision on his part to take sides in the litigation. In addition, Sirica recognized that neither the Constitution nor the Supreme Court granted district judges the authority to appoint special prosecutors. Finally, Sirica was determined to preserve the independence of his court, and he believed that denying Banshaf's motion in particular would discourage lawyers not involved in the litigation from interfering. After adjourning for the morning, he reminded prosecutors to restrain from making inflammatory statements that could be interpreted as being prejudicial to the administration. Though personally angry at

the White House even to the point of analogizing Nixon's recent actions to that of a Latin American dictator, Sirica's rulings demonstrate that he did not lose his balance or constitutional sensibilities as district judge in this case. Even the judge's plan to levy stiff fines on the president was indicative of a thoughtful judicial posture because of the reflective manner in which he and Christofferson considered alternative responses to Nixon's noncompliance before making a final decision. Sirica's personal fears about White House intentions, therefore, had not seriously interfered with his ability to articulate reasonable and balanced decisions in this litigation despite the ongoing trauma that Watergate continued to inflict on the nation.[9]

II

On October 30, just one week after Wright declared that the president would comply with the subpoena, Sirica held a private conference with federal prosecutors and J. Fred Buzhardt--an attorney from Mississippi who had recently joined Nixon's legal staff--to discuss procedures for the upcoming inspection of the Watergate tapes. During this meeting, Buzhardt informed Sirica that two of the subpoenaed conversations had never been recorded. He explained that the first non-existent tape involved a telephone conversation between the president and John Mitchell on June 20, 1972--just three days after the break-in. Buzhardt claimed that no recording had been made because Nixon had called Mitchell from the residential part of the White House on a telephone not connected to the taping system. The second subpoenaed conversation, involving a meeting between the president and John Dean on April 15, 1973, was not recorded because the machine had allegedly run out of tape. Though embarrassed by this admission, Buzhardt insisted that the White House was committed to compliance with the subpoena and that all remaining conversations would be turned over as requested.[10]

Stunned, Sirica instantly suspected that Nixon and his lawyers were either lying or dragging their feet deliberately to avoid full disclosure. "Incredible!" he later wrote. "Every time I thought this case was on track, something happened to derail it. The subpoena for the tapes had

originally been issued in July. Here it was the end of October, and the White House was making the first public admission that two critical tapes didn't exist. I told the lawyers to appear in open court the next afternoon to begin a hearing on the missing tapes." This reference to the "missing tapes" also reveals Sirica's suspicions because the language implied that recordings of the conversations actually existed but that someone had illegally tampered with the materials to avoid disclosure. Believing that Buzhardt's explanation made little sense, the judge began to prepare for hearings to fully investigate the circumstances surrounding this latest disclosure; these proceedings were to continue until January 1974.[11]

As was the case with previous roadblocks in the Watergate investigation, Sirica's suspicions were no aberration. Americans overwhelmingly believed that Buzhardt's latest admission represented yet another attempt by the White House to stonewall the prosecution by circumventing the August 29 subpoena. Nixon was shocked to learn that the revelation of the missing conversations generated an almost equal amount of hostility as that which followed Archibald Cox's dismissal on October 20. Newspapers across the country, including the Atlanta Constitution, Boston Globe, Honolulu Star-Bulletin, and even the Detroit News which had supported the president, now urged Nixon to resign for the good of the nation. Politicians from both parties similarly expressed disappointment and frustration with the White House because of

its embarrassing disclosure. Senator James Buckley, a conservative Republican from New York who had supported Nixon, now suggested that the burden of proof had "dramatically shifted" in the Watergate tapes litigation. "As of this moment," he declared, "President Nixon has the clear burden of satisfying the American people that he has been speaking the truth." Senator Barry Goldwater wondered publicly whether Nixon's credibility had "reached an all-time low from which he may not be able to recover." And Senator Sam Ervin, though eloquent during the congressional hearings over which he presided, awkwardly remarked that "everything about this has been curious from the first day." Sirica's suspicions were widespread indeed.[12]

Nixon, however, was telling the truth. He and his staff, to be sure, had been sloppy in maintaining the tapes as well as preparing them for any possible disclosure. Moreover, the president had created enormous problems for his attorneys by refusing to permit them to examine the tapes directly.[13] Yet no evidence suggested that the two conversations at issue had ever been recorded. Ironically, Nixon would have been quite pleased to release the conversation of April 15, 1973. According to John Dean's testimony before the Senate select Watergate committee, the president remarked during this particular meeting that he had "only been joking" in suggesting that one million dollars could be raised as hush money for the Watergate burglars. He also testified that Nixon, during this same conversation, said that he was

"probably foolish" to have previously discussed executive clemency for E. Howard Hunt with Chuck Colson. Significantly, Dean did not claim that the president had proposed or even discussed illegal activity on April 15. There is little reason to suspect, therefore, that either Nixon or his aides would have tampered with tape recordings of this conversation to protect the administration from any additional inquiries.[14]

Despite this testimony, Sirica's suspicions persisted as his inquiry into the missing conversations began on October 31. Witness after witness described the details of the White House taping system and the conversations of June 20, 1972 and April 15, 1973. Perhaps the most revealing of these testimonies came from John Nesbitt and White House aide Stephen Bull. Nesbitt's credibility as a witness never came into question because he worked for the National Archives, not the Nixon administration, and was assigned to the White House to prepare a daily diary and telephone logs of the president's activities for the benefit of historians. Nesbitt testified that his telephone logs showed that Nixon's telephone conversation with Mitchell on June 20 had been placed from the second floor of the White House residence. Because the president's phone at that location was not connected to the administration's taping system, as Buzhardt had earlier told Sirica, it was inconceivable that the conversation could have been recorded and then destroyed or hidden. Nesbitt similarly exonerated the president with respect to the conversation with Dean on April 15. According to Buzhardt and the recollections

of Secret Service agents assigned to the White House, the administration's tape recorder had been set on Friday April 13 to run through the weekend on one five-inch reel containing enough tape for six hours of conversation. The recording device was not set to switch to a second reel after the six hours were completed because Secret Service agents had been told that little activity would take place in the Executive Office Building that weekend. This assumption proved false in that Nixon met with Dean for five hours and twenty-six minutes at this location on Saturday. Nesbitt, once on the stand, confirmed that the president had indeed met with Dean for more than five hours on April 14 and that there simply was not enough unused tape for his conversation on April 15 to be recorded. Prosecutors declined to question or challenge these statements, and Nesbitt's testimony came to an end.[15]

Stephen Bull, though lacking Nesbitt's credibility as a witness because of his closer association with the Nixon White House, also testified that no wrongdoing had occurred with respect to the two missing conversations. He claimed that Nixon listened to twenty-six tapes on June 4, 1973 to determine for himself whether he was guilty of illegal conduct in the entire Watergate affair thus far. Prosecutor Richard Ben-Veniste then demanded that the administration release any recordings of this review of the tapes. Buzhardt replied that he had no authority to produce any such recording, but he soon relented and brought this "tape of the tapes" into Sirica's courtroom. It showed that no record of the missing April 15

conversation existed. Bull's testimony also ended without any serious challenge or cross-examination from the prosecution.[16]

These and other testimonies still did not remove Sirica's suspicions that the White House had tampered with evidence in a criminal investigation. He therefore directed the hearings to continue and ordered a panel of experts to be appointed that would inspect all remaining tapes prior to his inspection to verify that no tampering had occurred with respect to these recordings. Sirica also demanded that the original tapes be submitted directly to the court for safekeeping, and he permitted the administration to make copies to assist the president's attorneys involved in the litigation. These actions, as well as the decision to hold extensive hearings on the missing conversations, again reveal Sirica's thoroughness and ability to grasp the enormous complexities involved despite his exaggerated fears and assumptions of presidential wrongdoing in this particular episode of Watergate.[17]

III

During the days after his dismissal of Archibald Cox, President Nixon expected that Henry Peterson would eventually be allowed to complete the Watergate investigation and that the public uproar surrounding the Saturday Night Massacre would ultimately diminish. Congress, however, insisted that a new special prosecutor be appointed which pressured Nixon to comply because he wished to block his impeachment and removal

from office in the House of Representatives and Senate. The president therefore directed acting attorney general Robert Bork to search for a replacement. Bork recommended that Leon Jaworski--a Democrat, former president of the American Bar Association, and practicing lawyer in Houston--be selected. Though initially reluctant to accept the position, Jaworski quickly agreed after the White House assured him that he could sue the president for evidence in court should an impasse arise during the remainder of the litigation. At the same time, Nixon was satisfied with Bork's recommendation because he had been told by several aides that Jaworski would be less partisan than Cox while striving to be fair and objective. Alexander Haig had even told the president that Jaworski believed Cox's staff to be excessively anti-Nixon and that the investigation should not be held captive to partisan politicians who were determined to impeach and remove Nixon from office. The administration therefore announced Jaworski's appointment on November 1; and the new special prosecutor quickly assembled his staff--with many Cox holdovers--to forge ahead with the prosecution's case.[18]

Following this announcement, many Americans doubted that any new selection from the White House would genuinely lead to a thorough Watergate investigation given Nixon's abrupt firing of Cox less than two weeks earlier. Many prominent newspapers, including the New York Times and Washington Post, denounced Nixon's choice and called for legislation that would give Sirica and other judges of the Federal District Court in

Washington D.C. the authority to appoint a special prosecutor without presidential approval. Bills to this effect were specifically considered in the House Select Subcommittee on Reform and Criminal Laws. On November 12, after four days of lively debate, the subcommittee formally approved the Special Prosecutor Act of 1973 in a five to four party-line vote. Under this bill, the federal district judges in the nation's capital would collectively appoint a three-judge panel which would then select the special prosecutor. The Judiciary Committee subsequently gave its approval for the legislation on November 13 which sent the bill to the entire House of Representatives for consideration.[19]

Similar proposals were also introduced in the Senate where the authorization of a judicially-appointed special prosecutor enjoyed solid Democratic support. On November 14, however, United States District Judge Gerhard Gesell ruled in Washington D.C. that acting attorney general Robert Bork had acted illegally when he fired Cox at Nixon's direction. Although the decision did not call for Cox's reinstatement, it emphasized that the special prosecutor should have the ability to function without interference from the president, Congress, or the courts. Using this same reasoning, the judge declared that Congress should reject the "most unfortunate" legislation for a judicially-appointed special prosecutor because Jaworski was entitled to the same independence that Nixon had refused to grant Cox. "The courts must remain neutral," Gesell concluded. "Their duties are not prosecutorial. The solution

lies in legislation enhancing and protecting that office as it is now established and not by following a course that places incompatible duties upon this particular court."[20]

Just hours after this decision was issued, Judge Sirica met briefly with reporters to discuss his views on the proposed legislation. "I think Judge Gesell is right," he said. "I do not know of any judge who thinks it's a good idea." Sirica further stated that Jaworski was highly competent to carry out his duties and that any judicial authority to replace him violated the separation of powers doctrine in the Constitution. These comments quickly put an end to the special prosecutor bills in the Congress despite the numerous endorsements this legislation had received. Jaworski and his legal staff would face no more congressional interference until President Ford's unpopular pardon of Richard Nixon in late 1974.[21]

By the time Sirica made this announcement to reporters on November 14, Nixon was already aware of yet another problem surrounding the White House tapes. Rose Mary Woods, his personal secretary, had told him on October 1 that she "might have caused a small gap" in a conversation involving the president and Haldeman on June 20, 1972. She explained that the gap, lasting for about four or five minutes, was created when she reached for the telephone while transcribing the tape and inadvertently pressing the recorder's delete button on the machine. Nixon seemed unconcerned at first because he believed that Sirica's subpoena did not include this June 20

conversation. The president quickly became alarmed, however, when Haig informed him on November 15 that Buzhardt had incorrectly interpreted Sirica's order and that the tape indeed had to be submitted for in camera inspection.[22] Haig also mentioned that the gap ran eighteen-and-a-half minutes which was a considerably longer duration than Woods' initial estimate.[23]

Six days later, Buzhardt appeared in Sirica's chambers in the presence of Jaworski to reveal this information to the court. He appeared, Sirica later recalled, as "pale as a ghost." Buzhardt bluntly informed the judge of the administration's discovery of the gap which he described as an "obliteration of the intelligence"; and he added that it "doesn't appear from what we know at this point that [the erasure] could have been accidental."[24]

"So there is a lapse?" Sirica asked.

"Yes. And the circumstance is even a little worse than that, Your Honor," the attorney confessed.

"I don't know how it could get much worse," countered the judge.

Buzhardt then stated that the gap had erased portions of a conversation that transpired just three days after the break-in and that Cox had subsequently requested the tape because he suspected that the president and his aides may have discussed various options for responding to the unexpected arrests at the Watergate. Even worse, the attorney acknowledged, White House lawyers discovered that Haldeman's

notes from the meeting on June 20 revealed that Watergate had indeed been discussed during the conversation. Buzhardt concluded that Woods remained responsible for the erasure, and he pleaded with Sirica to permit the White House to investigate the matter for at least three days before revealing the gap to the public.[25]

The judge refused. He immediately suspected that the White House was attempting to conceal evidence and that any delay would permit the administration to concoct new explanations for the erasure before the matter could be addressed in court. "I always find it better to bring these things out as fast as you can," Sirica told Buzhardt. "I am for disclosure as soon as possible. I just can't help it. It is a sad thing to have to report." The lawyers were ordered to appear in court at four o'clock that afternoon.[26]

About an hour-and-a-half later, the gap was announced to a hushed courtroom full of reporters. Without hesitation, Sirica ordered the White House to submit all seven reels of tape for June 20 to the court for safekeeping. Buzhardt objected on grounds that much of this material contained conversations not subject to the subpoena and hence protected by the executive privilege. The prosecution sharply disagreed with this reasoning and argued that no determination of any possible tampering could be made unless the full reels were quickly turned over. Sirica agreed and overruled Buzhardt's objection; he also warned that noncompliance would force him to issue a new subpoena that specifically called for all

conversations in the June 20 reels to be submitted. The judge concluded that he was taking these steps "not because the court [did not] trust the White House or the president," but was instead acting in the "interest of seeing that nothing else happened" to the remainder of the subpoenaed conversations from this particular date.[27]

Before adjourning for the weekend, Sirica announced the appointment of a six-member panel of experts to determine the "authenticity and integrity" of the tapes as well as possible explanations for the eighteen-and-a-half minute gap. His selections to the panel represented Sirica's weakest decision made during the aftermath of Buzhardt's disclosure because 1) the appointments were made suddenly without serious planning or reflection; and 2) a majority of the selections were experts in the theory of acoustics, not the practicalities of tape recorders. Sirica specifically appointed Richard Bolt, chairman of a private firm specializing in acoustics and computer technology; Franklin Cooper, adjunct professor of linguistics and fellow of the Acoustical Society of America; James Flanagan, electrical engineer and specialist in digital coding of speech and acoustics measurements; John McKnight, electrical engineer and audio systems consultant; Thomas Stockham, associate professor of computer science; and Mark Weiss, vice-president for acoustics research of the Federal Scientific Corporation. While it is true that a familiarity with acoustics was necessary to examine the buzzing noises that existed, this panel had little to no experience in

working with the Uher 5000 recorder which ran the tape when the gap was created. Sirica should therefore have selected a panel with a broader range of talents, knowledge, and experience that understood the intricacies of the specific machinery involved. The president and special prosecutor, however, were not without blame in this appointment because they both approved of the selections without verifying the backgrounds of the six men who were chosen. This neglect would cost the White House dearly in less than two months.[28]

Over the weekend, Sirica continued to suspect--as did many Americans--that someone inside the White House had intentionally tampered with the tapes to protect the president from charges of criminal wrongdoing.[29] He even worried that someone, possibly with connections to the administration or the media, might attempt to remove the tapes after the materials were delivered to the court the following Monday. To protect the evidence that was soon to be in his possession, Sirica again revealed his thoroughness by taking elaborate security precautions that exceeded the measures normally taken in a criminal case when documents or other materials are kept for safekeeping inside the federal district court:

> We....obtained an especially strong file cabinet-safe from the supersecret National Security Agency. It was installed in a corner of my chambers, right under my framed judicial commission signed by President Eisenhower. I chose three numbers from Lucy's birthdate, December 27, 1923, and then reversed them to form the combination 23-27-12. Todd and I both memorized the numbers, and we

> told them to no one else, not even Lucy. United States marshalls were put on twenty-four-hour duty outside my offices, and the security forces in the courtroom were told to be especially alert. Eventually, we added a closed-circuit television system to monitor the outside door to my chambers from a security post on the first floor of the courthouse.[30]

On Monday November 26, the White House delivered to Sirica the seven reels of tape for June 20, 1972. Also that day, the judge began a series of hearings to investigate the cause of the eighteen-and-a-half minute gap. Numerous witnesses, including Rose Mary Woods, Fred Buzhardt, and Alexander Haig, testified during these proceedings. Woods, the first to be called to the stand, was no stranger to Sirica's courtroom. Three weeks earlier, she had been a witness during the hearings which investigated Nixon's claim that two subpoenaed conversations did not exist. During her first appearance, Woods seemed indignant that she had to waste time in court, and she scoffed when asked if any precautions had been taken to assure that she did not accidentally hit the erase button:

> PROSECUTOR VOLNER: Were any precautions taken to assure you that you did not accidentally hit the "erase" button?
>
> WOODS: Everybody said "be careful"--which I am. I don't want this to sound like bragging, but I don't believe I am so stupid that they had to go over and over it. I was told "if you push the button, it will erase," and I do know, even on a small machine, you can dictate over something that removes it. I think I used every possible precaution not to

do that.

PROSECUTOR VOLNER: What precautions specifically did you take to avoid recording over it and thereby getting rid of what was already there?

WOODS: What precautions? I used my head. It's the only one I had to use.[31]

Returning to court on November 26, Woods repeated the administration's claim that the first four to five minutes of the gap was created when she reached for the telephone while accidentally pressing the delete button on the Uher 5000 recorder. Sirica found this explanation difficult, if not impossible, to believe. "I never quite believed that Rose Mary Woods caused the first part of the gap, at least in the way she described it," he later wrote. "Her story about the foot pedal being depressed as she reached over her shoulder to answer her phone appeared to me as ridiculous as the pictures of her re-enacting the scene. That story seemed to have resulted more from her talks with the White House lawyers before her testimony than from her independent recollection." In the courtroom, however, Sirica declined to attack her testimony directly. Instead, he merely asked why she had not mentioned any accidental deletions while testifying three weeks earlier:

SIRICA: Didn't you think on November 8 to tell everything you knew about what happened while you were making a transcript of these tapes? You were questioned very carefully and thoroughly. Didn't you think that was important?

> WOODS: I would say, Your Honor, that I would today but I didn't then. I think, if you may remember, that I was petrified, it was my first time ever in a courtroom, and I understood that we were talking only about the subpoenaed tapes [alleged to have been missing]. And I think all I can say is that I am just dreadfully sorry.[32]

The remaining noteworthy witnesses, Buzhardt and Haig, attempted to blame Woods for the problem in an effort to absolve themselves and the president from any responsibility. Buzhardt, for example, told the court that the hum on the latter portion of the erased tape sounded like the secretary's electric typewriter and her high-intensity desk lamp combined. That being the case, he suggested, Woods had lied when she claimed only to have produced a four to five minute gap. Haig later suggested on the stand that Woods was "very tired" when the erasure occurred and "did not realize how long she was away from the machine." Outside the courthouse, the White House chief of staff added that he knew plenty of women who thought they had talked for only a few minutes when they had really talked much longer. Frustrated, Sirica realized that very little would be learned from these testimonies.[33]

In January, the hearings finally came to an end. On balance, Sirica handled the proceedings reasonably well with the exception of his sudden appointments to the panel of experts who lacked the credentials necessary to form reliable conclusions about tape recording devices. Yet despite Sirica's competency as a jurist during this episode, no clear

evidence emerged that could explain the gap in question. Neither Sirica nor Jaworski--despite their strong suspicions of intentional wrongdoing--were able to recommend any specific indictments because of these inconclusive findings. Later that month, the panel of experts damaged Nixon's standing in the polls even further when it concluded that the gap contained between five and nine "separate and contiguous" erasures made by hand operated controls. This assertion, however, was sharply criticized by several electronics firms, Science magazine, the manufacturer of the Uher 5000, and others. In the end, no one had offered proof that Nixon or anyone else intentionally produced the erasure. The eighteen-and-a-half minute gap remains a mystery to this day.[34]

IV

On Saturday December 8, Judge Sirica and Todd Christofferson began listening to the tapes inside a small jury room next to the court. Not knowing what to expect, they began with a conversation on March 13, 1973 involving Nixon, Dean, and Haldeman. The judge was instantly struck by the president's frequent profanity and became quite angry. "I came up the hard way," he later wrote, "and the language was far from unfamiliar to me. But the shock, for me at least, was the contrast between the coarse, private Nixon speech and the utterly correct Nixon speech I had heard so often....I couldn't help remembering the rather self-righteous attack Nixon had made, during the 1960 television debates with John

F. Kennedy, on Harry Truman's salty language."[35]

Aside from the language, however, the conversation of March 13 did not prove that any of the three participants had committed criminal acts. Sirica and Christofferson therefore set aside the tape and listened to the reel from March 22, 1973 which also contained a conversation involving Nixon, Haldeman, and Dean. This discussion was somewhat more incriminating because the president spoke rather bluntly about a White House cover-up of Watergate. "I don't give a shit what happens," Nixon remarked. "I want you all to stonewall it, let them plead the Fifth Amendment, cover-up or anything else if it'll save it--save the plan."[36] These and other segments of this conversation confirmed Sirica's nine month suspicion that a conspiracy to obstruct justice had indeed transpired inside the White House. He concluded that this tape, combined with the testimonies of Dean and Magruder, could lead to indictments against Haldeman, Mitchell, and Ehrlichman. The larger issue of Nixon's specific involvement, however, remained a mystery. Although Sirica was well aware that Dean had implicated the president by authorizing hush money payments to the Watergate burglars, specific evidence remained lacking that would show that such approval had actually taken place.[37]

The following Monday, Sirica stumbled upon the evidence that implicated President Nixon when he and Christofferson listened to the tape of March 21. In this conversation, Dean reviewed the breadth of the cover-up and informed Nixon that

one million dollars in cash would be needed to keep the defendants silent about White House and campaign involvement in the scandal. Dean emphasized that E. Howard Hunt had grown especially angry and would tell everything he knew if payments were not forthcoming. The president's solution was a simple one. "Don't you, just looking at the immediate problem, don't you have to have--handle Hunt's financial situation?" he asked. "I mean that's worth it, at the moment...you better damned well get that done."[38] After listening to these words, Sirica felt a deep sense of betrayal and sadness because he had supported the Republican Party and Nixon's many campaigns for elective office over a period of twenty years:

> I had really hoped the president himself would not be so involved, that he would survive this scandal. After all, I had campaigned for him twice when he ran with President Eisenhower, in 1952 and 1956. I remembered the speeches I had made in 1952, shouting from the hilltops about the scandals in the Truman administration, urging the election of Ike and Nixon to clean up the government. Not that I had a big role in their election, but I had believed in them. I had spoken out for them. After listening to Nixon on tape, I felt foolish. I am a Republican. As angry as I had been at Nixon over the past months, as much as I had thought he was following the wrong course in opposing the release of the tapes, I still, in my heart, didn't want to hear what Todd and I had just listened to. We had voted for him in 1968 and again in 1972.[39]

Disillusioned and exhausted after listening hours of tape, they left the courthouse knowing that the president had

committed at least one impeachable offense because of his approval of illegal hush money payments. The judge suddenly became frightened and suspected that this discovery was only the tip of the iceberg of Nixon's actual Watergate involvement.[40]

Sirica's inspection of the tapes was far from over. Determined to be judicious and thorough despite his anger and disillusionment, he now considered whether any of the tapes in his possession were unrelated to Watergate and hence protected from disclosure under the umbrella of executive privilege. On December 19, the judge ruled that nearly all of two tapes and part of a third were indeed privileged and would not be submitted to the prosecution. The subpoenaed conversation of June 20, 1972 which involved Nixon, Haldeman, and Ehrlichman, was one recording that contained little discussion of Watergate.[41] Additionally, Sirica determined that the conversation on June 30, 1972 involving Nixon, Haldeman, and Mitchell, contained less than five minutes of discussion about Watergate which was also insufficient to justify submitting the tape to Jaworski. Finally, the judge ruled that fifteen minutes of a fifty-minute conversation on September 15, 1972 among Nixon, Haldeman, and Dean, was unrelated to Watergate; as a result, this portion was sent back to the White House along with the two other reels.[42]

On December 21, Jaworski received the tapes still included in the court's order from Sirica. He listened to the conversations and quickly concluded, as had the judge, that

Nixon and his aides had obstructed justice. Convinced that additional presidential conversations would provide needed evidence to be used at trial, the special prosecutor's office requested forty additional tapes from the White House on January 8, 1974. James St. Clair--who replaced Buzhardt as Nixon's leading Watergate attorney--formally denied this request on February 4 claiming that the president had already furnished sufficient evidence in the case. Should the prosecution have any additional requests, St. Clair continued, Jaworski must submit written interrogatories describing the needed conversations instead of simply demanding the tapes in public. The president's lawyer later informed the House Judiciary Committee that the Congress would receive no tapes at all to aid its ongoing impeachment inquiry. Because of these refusals, the battle for the tapes reached a new and difficult impasse that would continue until April.[43]

V

Though denied access to additional presidential conversations for the time being, Jaworski believed he already had enough evidence to request indictments from the primary Watergate grand jury. By February 12, he learned that his legal staff of young attorneys favored indictments against Nixon as well as his aides who were involved in the cover-up. Specifically, it was recommended that the president be charged with an assortment of offenses that included obstruction of justice, conspiracy to obstruct justice, bribery, being an

accessory after the fact, and misprision of felony. The grand jury also expressed its strong support for indicting Nixon at this time.

Judge Sirica strongly opposed such an action. Alarmed that an indictment of the president had now become a possibility, he told Jaworski that the grand jury would be acting irresponsibly if it pursued this course because the House Judiciary Committee represented the proper body for dealing with Nixon while impeachment proceedings continued. Jaworski reluctantly agreed and informed the grand jury that an indictment against Nixon was unacceptable at this time. After several jurors openly challenged the special prosecutor, an accommodation was reached: there would be no indictment, but the grand jury's findings concerning the president's involvement would be forwarded to the House Judiciary Committee to assist its impeachment inquiry. In addition, the jurors secretly named Nixon as an "unindicted co-conspirator" in order to ensure that the White House tapes would be admissible as evidence at trial.[44]

On Friday March 1, the day that the grand jury issued its indictments, Sirica met with the special prosecutor to review the procedure that would be followed in his courtroom. Jaworski later recalled that the judge appeared tense because of the enormous publicity generated in this case. After the meeting, Sirica entered the courtroom and began the proceeding. He then looked directly at Jaworski. "Do you have anything to take up with this court?" Sirica asked.

"May it please Your Honor, the grand jury has an indictment to return. It also has a sealed report to deliver to the court." Two envelopes were then handed to the judge. One contained the indictments; the second contained a preamble and description of evidence that the grand jury wished to forward to the House Judiciary Committee.

"Anything else?" Sirica asked Jaworski.

"Due to the length of the trial, conceivably three to four months, it is the prosecution's view that this case be specially assigned, Your Honor, and we so recommend."

The judge agreed and assigned the case to himself later that day. Before adjourning, he imposed a gag rule restraining extra-judicial statements to the press, and he ordered the grand jury to return in two weeks to consider other matters pertaining to the case. Finally, Sirica directed the clerk to distribute copies of the indictments to the lawyers and reporters present in the courtroom. The proceeding came to an end.[45]

Within minutes, the public learned that the indictments returned that day were unprecedented in terms of the number of high government officials involved and the severity of the charges. H. R. Haldeman, John Ehrlichman, John Mitchell, Chuck Colson, CREEP attorney Kenneth Parkinson, White House aide Gordon Strachan, and former assistant attorney general Robert Mardian were all charged with conspiracy to impede the Watergate investigation. All but Mardian were also charged with obstruction of justice, and all but Colson, Parkinson,

and Mardian were charged with perjury. Later that month, over the objection of these seven defendants, Sirica ruled that evidence gathered by the grand jury may indeed be forwarded to the House Judiciary Committee and that sending these materials would not jeopardize anyone's right to a fair trial. Finally, on March 9, the accused returned to Sirica's courtroom for their arraignment. They entered pleas of not guilty and requested that the customary mug shots and fingerprints be waived because of their former government positions. The judge refused and ordered the defendants to be booked immediately. With these indictments now secure, Jaworski returned once again to the tapes litigation which remained unresolved.[46]

VI

In his 1978 memoir RN, the former president expressed frustration because he had failed to convince the public that the battle for the White House tapes constituted a political struggle and that his opponents were not purely motivated by the pursuit of justice and morality. As proof, Nixon pointed out that the special prosecutor's office and congressional Democrats had an insatiable appetite for more tapes and would never be satisfied with the amount of evidence they had received until the administration was out of office.[47]

Though misleading, this claim is at least partially correct. Under the terms of Cox's original subpoena which was signed by Sirica, just nine tapes were required to be

submitted for inspection. These recordings were handed over despite the trauma of Cox's dismissal and the administration's delays with compliance. The president also delivered additional tapes to help prove that the White House had not destroyed subpoenaed materials during the controversies of the missing conversations and the eighteen-and-a-half minute gap. At the time, Buzhardt was assured by Jaworski that no additional recordings would be requested and that the prosecution had the evidence necessary to proceed with its case. Yet by January 1974, Jaworski was asking for an additional forty tapes. The House Judiciary Committee similarly asked for more recordings and materials to assist its own investigation and impeachment inquiry. Finally, on April 16, Jaworski entered a motion before Judge Sirica to subpoena sixty-four tapes and hundreds of additional documents allegedly relating to Watergate.[48]

Again, Jaworski's rationale for the subpoena remained the same: the materials would be needed to conduct a fair and thorough trial of Nixon's closest associates. While these materials were surely related to Watergate as Jaworski claimed, his repeated requests for more tapes contributed to Nixon's belief that the special prosecutor's office had permitted partisan politics to influence the direction of its investigation. The president realized, however, that he was in no political position to interfere with Jaworski's duties because of the public outcry that would result. He therefore decided to retain his strategy of partial disclosure hoping

that the judiciary would ultimately set limits to the special prosecutor's demands and that the congressional drive for impeachment would diminish as a result.[49]

This expectation of judicial restraint was never realized. On April 18, just two days after Jaworski's motion in court, Sirica signed a subpoena ordering Nixon to submit the sixty-four additional tapes and hundreds of written documents. The judge believed that the special prosecutor's request had raised the same constitutional issues that were resolved on August 29 when he ruled that the White House must turn over the nine original tapes requested by Archibald Cox. Sirica therefore made this latest decision relatively quickly and wrote a short opinion in the press room because the electricity was not working in his chambers that Saturday. A deadline of May 2 was issued for compliance.[50]

Hoping to circumvent the judiciary and Congress, Nixon announced on April 29 that over 1,200 pages of printed transcripts would promptly be released to the public. Sirica quickly discovered that the transcripts of conversations included in the original subpoena bore little resemblance to the actual tapes, and he particularly noticed that the "I don't give a shit" and other expletives had been deleted. The documents nevertheless shocked the public. Conservatives and liberals alike became outraged that a sitting president would resort to extreme profanity while participating in an illegal cover-up. Sirica, whose recent ruling was a major factor in Nixon's decision to release the transcripts, had once again

contributed to the unravelling of Watergate.[51]

Following its receipt of the transcripts, the House Judiciary Committee notified the president that the printed transcripts were unacceptable substitutes for the actual tapes. Jaworski similarly rejected the transcripts; at the same time he was stonewalled once again when St. Clair entered a motion in Sirica's courtroom on May 1 to quash the special prosecutor's subpoena for the sixty-four conversations. During oral arguments two weeks later, St. Clair claimed that because Jaworski technically worked for Nixon within the executive branch, there could be no legal controversy between them and hence no justiciability in the case; the subpoena, therefore, should not be enforced because Jaworski had a duty to obey the president. On May 20 Sirica rejected this argument and upheld the subpoena in its entirety. Noting that Richard Nixon had promised Jaworski genuine independence before accepting the position, Sirica declared that the special prosecutor was also protected by the congressional charter because it ensured that his office could investigate Watergate without interference from any branch of government. The next day, the Senate Judiciary Committee declared its support for the judge's decision and demanded that the White House tapes be released without delay.[52]

Nixon refused. Hoping to go on the offensive, St. Clair quickly filed a brief with the court of appeals and requested that Sirica's order be overturned. Jaworski then bypassed the court of appeals and asked the Supreme Court to issue a final

decision in this case. The prosecution pursued this strategy because it, too, wished to remain on the offensive in order to keep pressure on the White House for compliance. Moreover, Jaworski remembered that Nixon had stated that anything short of a "definitive" ruling might not be obeyed. When the Supreme Court agreed to review the case because of the serious constitutional issues that needed to be resolved quickly, the special prosecutor knew that the White House would shortly get its definitive ruling.[53]

On July 24, the Supreme Court released its opinion. In an eight to zero decision,[54] the justices affirmed Sirica's recent ruling on the subpoena as well as the constitutional principles enunciated by the judge in his earlier decisions in the Watergate tapes litigation. In the opinion, written by Chief Justice Warren Burger, four issues were specifically resolved. First, it was decided that Sirica's ruling on May 20 was appealable as a final order; as a result, the case was properly before the Supreme Court for review. At the outset, Burger acknowledged that judicial orders calling for the production of evidence in a criminal trial are generally not appealable unless the party seeking review openly resists the order and thereby risks a contempt citation. This rule, however, is not absolute. In this case, the justices reasoned that encouraging the president to flatly resist compliance with Sirica's order merely to obtain an appeal would be "unseemly" and would "present an unnecessary occasion for constitutional confrontation between two branches of

government."[55] As a result, the Court held that an exception to the requirement of submitting to contempt was appropriate and that the case could therefore be properly adjudicated.[56]

The second issue addressed in the opinion was whether justiciability was present. Under Article III of the Constitution, a dispute cannot be subject to a federal court's jurisdiction unless a bona fide case or controversy exists between two parties. In his brief to the Supreme Court, St. Clair had argued--as he did before Judge Sirica--that justiciability was lacking because the case constituted an intra-branch dispute between a subordinate and superior officer of the executive branch; as a result, two separate parties were not involved.[57]

The Court rejected this assertion. According to Burger, the "mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry."[58] He then cited United States v. ICC (1949) which observed that judges are required to look beyond the names that symbolize the parties to determine whether Article III has been satisfied. Applying this principle to the facts in U.S. v. Nixon, Burger affirmed Sirica's view that the special prosecutor had been granted specified and unique powers by the attorney general as a means of pursuing his investigation of Watergate. This delegation of authority directly gave Jaworski the power to contest a presidential claim of executive privilege if necessary to obtain relevant evidence.

The special prosecutor, therefore, was independent with respect to his legal duties and had the ability to pursue litigation against the White House despite his subordinate role within the executive branch. The justices consequently concluded that justiciability was present in the case.[59]

The next issue addressed by the Court was whether Sirica's issuance of the subpoena satisfied the requirements of Rule 17(c) in the Federal Rules of Criminal Procedure. This statute provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.[60]

In his argument before the Court, St. Clair claimed that the subpoena was "unreasonable and oppressive" because 1) the president was being subjected to a mere "fishing expedition" primarily designed to damage his administration; and 2) the contents of the tapes constituted inadmissible hearsay. As a result, Sirica violated Rule 17(c) by signing the subpoena.[61]

The justices disagreed. According to the Court, three hurdles pertaining to the tapes must be cleared before a

subpoena may be issued: relevancy, specificity, and admissibility. Burger had little difficulty in deciding that the tapes were relevant and specific to any future criminal trial of administration officials who had been indicted on March 1. Although the opinion does not address this issue at length, it suggests that Sirica's subpoena had been carefully tailored to the needs of a future prosecution at the time the order was issued. Little evidence suggested that the special prosecutor or the judge were simply making unreasonable requests as a means of hastening the impeachment process. This ruling shattered St. Clair's argument that Jaworski was primarily motivated by politics instead of pursuing a reasonable investigation governed by established legal principles.[62]

The Court likewise adjudged the tapes to be admissible. St. Clair's argument that the tapes were inadmissible hearsay was based on his belief that they were a collection of out-of-court statements by persons who would not be subject to cross-examination during trial. Burger, however, pointed out that most of the tapes contained conversations involving several defendants who would likely be cross-examined. He then provided specific examples in which this evidence could be used during trial that would not violate the hearsay rule. Following this determination, the chief justice concluded that the requirements of Rule 17(c) had been fully satisfied when Sirica issued the subpoena.[63]

The final and most critical issue addressed by the Court

was whether Nixon's claim of executive privilege could defeat Sirica's order to release the tapes. According to St. Clair, the president was entitled to an absolute privilege which would prohibit the judicial process from obtaining White House documents without his permission under any circumstances. This contention was based on two grounds which had earlier been asserted by the administration in Sirica's courtroom: first, there is a need for the protection of communications between high government officials to ensure an efficient decision-making process; and second, the doctrine of separation of powers grants the executive branch a strong degree of independence within its own sphere.[64]

The Court rejected this argument. At the outset, it cited Marbury v. Madison (1803) to dismiss St. Clair's suggestion that presidents may decide when executive privilege will be used. In that case, the Supreme Court held that Section 13 of the Judiciary Act of 1789 was unconstitutional; in so doing, it established the principle of judicial review and the right of courts to determine what the law is. Nixon, therefore, was not entitled to an absolute privilege merely because he had asserted it; instead, the judiciary would determine the extent to which presidential documents may be protected from judicial examination.[65]

The Burger opinion then rejected St. Clair's suggestion that a need for confidentiality and the separation of powers doctrine justified an absolute privilege. The Court reasoned that a release of communications between government officials

which are unrelated to national security would not seriously threaten the administration's ability to function as a governmental institution. Moreover, the separation of powers established by the Constitution was not intended to provide absolute independence for the executive, legislature, and judiciary; instead, the branches were to operate with reciprocity within the federal system. The chief justice concluded that any serious danger to a workable government originated from the White House because of its refusal to obey judicial orders.[66]

Following its refusal to accept an absolute privilege, the Court ruled that presidential communications are nevertheless "presumptively privileged" with respect to judicial or legislative examination. Quoting United States v. Burr (1807), as did Sirica, Burger stated that courts should not be permitted to "proceed against the president as against an ordinary individual."[67] Accordingly, the Court insisted that Sirica's subpoena was valid only if the special prosecutor's interest in its enforcement outweighed any legitimate interest of the White House in retaining possession of the tapes.[68] After considering the arguments made by St. Clair and Jaworski, Burger decided that even a presumptive privilege could not help the administration in this instance:

> We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of

> due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.[69]

The president, therefore, was ordered to fully comply with Sirica's subpoena.

Shortly after this ruling was issued, St. Clair appeared in Sirica's courtroom to make arrangements for the delivery of the tapes. The judge wondered whether the White House would tamper with the evidence or delete portions of conversations included in these materials, and he specifically believed that St. Clair was "dragging his feet" with the delivery to buy more time for Richard Nixon as president. This cynicism once again proved unfounded because St. Clair quickly delivered the tapes without deletions to the federal district court.[70] Among them was included the June 23, 1972 conversation during which Nixon approved Haldeman's plan directing the CIA to order the FBI to abandon its Watergate investigation. A transcript of this meeting was released immediately to the public:

> HALDEMAN: Now, on the investigation, you know, the Democratic break-in thing, we're back to the--in the, the problem area because the FBI is not under control, because Gray doesn't exactly know how to control them, and they have, their investigation is now leading into some productive areas, because they've been able to trace the money, not through the money itself, but through the bank, you know, sources--the banker himself. And, and it goes in some directions we

don't want it to go.... Mitchell came up with yesterday, and John Dean analyzed very carefully last night and concludes, concurs now with Mitchell's recommendation that the only way to solve this, and we're set up beautifully to do it, ah, in that....the way to handle this now is for us to have [CIA deputy director] Walters call Pat Gray and just say, "Stay the hell out of this....this is ah, business here we don't want you to go any further on it." That's not an unusual development.

* * *

PRESIDENT: All right. Fine.

HALDEMAN: And, and they seem to feel the thing to do is get them to stop?

PRESIDENT: Right, fine.

HALDEMAN: They say the only way to do that is from White House instructions. And it's got to be to Helms and, ah, what's his name...? Walters.

PRESIDENT: Walters.

HALDEMAN: And the proposal would be that Ehrlichman and I call them in....

PRESIDENT: All right, fine....Play it tough. That's the way they play it and that's the way we are going to play it.

HALDEMAN: O.K. We'll do it.[71]

Shocked that the president was involved in the cover-up less than one week after the break-in, Republican loyalists quickly abandoned their support for Nixon. At a meeting of the Senate Republican Policy Committee, the senators clearly felt betrayed that the administration had been deceptive from the beginning. Meanwhile, the House Judiciary Committee passed three articles of impeachment. The first charged the

president with a failure to "take care that the laws be faithfully executed" by seeking to obstruct the investigation of the Watergate break-in. The second article stated that Nixon had "abused the powers vested in him"; this abuse included the program of illegal wiretapping, the misuse of the FBI and IRS for political harassment, the creation of the plumbers, and other activities. Finally, the committee charged that the president had sought to impede the impeachment process by refusing to surrender the White House tapes to the Congress. Faced with a hopeless situation, Nixon announced his resignation on August 8 to be effective at noon the following day.[72]

VII

Judge Sirica, during the second battle for the White House tapes under consideration in this chapter, emerged as a popular and respected jurist because of his effectiveness and candid posture while confronting the Nixon administration's numerous abuses of power. He received several honorary degrees from universities, was named Time magazine's "Man of the Year" for 1973, and was given countless awards and recognitions from organizations and lawyers across the country. There was even talk of a possible "draft Sirica" movement to elect him as president of the United States in 976.

This popularity alone, however, tells us very little bout his performance as federal district judge between

October 20, when Nixon fired Archibald Cox, and the president's resignation on August 9, 1974. Nixon's public approval rating fell below twenty-six percent during this nine-and-a-half period, and Sirica's popularity in many ways was generated no differently than that of other public figures--like Cox, Jaworski, and Rodino--who also sought to uncover the truth behind Watergate. To accurately evaluate Sirica's performance, therefore, it is necessary to examine the specifics of his actions as well as the justifications he used to reach his decisions.

It is clear that the judge held exaggerated fears regarding the administration's Watergate strategies and responses during this specific period--especially when the White House acted in an unexpected manner or when sensational disclosures were made. Sirica believed, for example, that the president's firing of Cox was comparable to a Latin-American coup d'etat and that the administration was attempting to seriously undermine democratic values and institutions in order to block a thorough investigation of the scandal. Later, the judge privately assumed that someone inside the White House had tampered with the tapes when Buzhardt acknowledged that two subpoenaed conversations did not exist. He continued to believe that such tampering occurred even though credible witnesses testified that the administration's recorder had simply run out of tape during the conversation on April 15, 1973 and that Nixon's telephone was not connected to the taping system during the conversation on June 20, 1972.

On November 21, 1973 the judge acted impulsively when Buzhardt disclosed the eighteen-and-a-half minute gap because he 1) instantly assumed, without sufficient evidence, that an intentional erasure had occurred; and 2) selected, without serious reflection, a six-member panel of experts with dubious credentials just hours after the disclosure. Finally, Sirica believed that James St. Clair attempted to "drag his feet" in response to the Supreme Court's decision in United States v. Nixon. Specifically, the judge believed that the president's lawyer attempted to delay the administration's compliance with the ruling by not submitting the tapes quickly to the federal district court. This suspicion, too, proved unfounded.

To explain these reactions, it is important to emphasize that Sirica, like most Americans, had become especially cynical toward the White House once Nixon abruptly dismissed Archibald Cox in October 1973. After many traumatic months of cover-up, denials, fabrications, and unexpected revelations, the Saturday Night Massacre simply convinced much of the public that Nixon could never tell the truth about the Watergate break-in or come clean about his own personal involvement in the cover-up.

Ironically, this wave of cynicism came at a time when Nixon shifted tactics with respect to the Watergate tapes. Specifically, the president abandoned his absolute refusal to disclose any of the White House tapes, and he agreed to provide some cooperation--minimal though it was--with special prosecutor Leon Jaworski. Although some components of the

cover-up undoubtedly continued, it is no exaggeration to suggest that Nixon had become somewhat more willing to compromise by November 1973, if only for political reasons, to avoid impeachment and removal from office. This limited candor, combined with the public's growing cynicism, produced the exaggerated fears in the minds of millions of Americans in late 1973. John Sirica was no exception. In this light, his unwarranted suspicions are not at all surprising.

Yet despite these reactions, Sirica remained a thoughtful and conscientious jurist during this period. One indication of this reflective demeanor was his pragmatism and determination to issue balanced decisions based on a thorough examination of the facts. The extensive hearings that investigated the two missing conversations and eighteen-and-a-half minute gap are especially noteworthy because Sirica provided the opportunity for both litigants to present their cases through weeks of exhaustive proceedings. The judge never revealed his suspicions during these hearings and decided not to press for specific indictments from the grand jury because of the inconclusive findings that were reached. While it is true that the judge's assumption of presidential guilt contributed to his decision to hold the hearings, the manner in which they were conducted reveal a more balanced Sirica who made certain that the constitutional rights of both Nixon and Jaworski were respected despite the sensationalism that the Watergate scandal generated in the nation as a whole.

An additional illustration of Sirica's pragmatism, balance, and thoroughness was the manner in which he examined the tapes beginning on December 8, 1973. Though outraged and shocked after discovering that Nixon was deeply involved in the cover-up, Sirica realized that the purpose of his examination had little to do with determining the president's guilt or innocence. Instead, he needed to decide whether any or all of the subpoenaed tapes remained subject to the executive privilege before their delivery to Jaworski and his staff. After thoroughly listening and re-listening to the materials with Todd Christofferson, the judge delivered a balanced decision that returned two tapes and part of a third to the White House because they had very little to do with Watergate. This ruling demonstrates that Sirica strove to be fair and thorough despite his overwhelming anger and frustration with the president and his administration.

A second indication that Sirica remained a thoughtful jurist during the second phase of the tapes litigation is that he recognized the constitutional limits to his authority despite his preference for judicial activism in the courtroom. Illustrative of this recognition was his refusal to support legislation that would have given federal district judges in Washington D.C. the authority to appoint a new special prosecutor. According to Sirica, the appointment of special prosecutors remained an executive function because of its jurisdiction over the Justice Department; as a result, both the judiciary and the Congress had the duty to stay out of

this appointment process. Aside from this constitutional perspective, Sirica also believed that Jaworski was highly competent and prepared his case with dedication and commitment. For these reasons, the judge publicly announced his opposition to judicially-appointed special prosecutors which ended the congressional attempt to overturn Nixon's appointment of Leon Jaworski in November 1973.

Sirica additionally revealed that he recognized limits to the authority of district judges when he discouraged Jaworski from recommending to the grand jury an outright indictment of Richard Nixon. This discouragement had little to do with the judge's opinion as to whether the president should at some point be brought to trial. Indeed, Sirica personally wanted Nixon to be tried for his participation in the Watergate cover-up, and he bitterly opposed Gerald Ford's pardon which made such an outcome all but impossible. Instead, the judge opposed an outright indictment because the Congress was conducting an impeachment investigation into the very same charges that the grand jury was considering. So long as this congressional inquiry continued, Sirica believed it was imprudent to drag Nixon into court while he remained president of the United States. He never regretted this decision despite Ford's subsequent pardon.

Finally, Sirica's thoughtful and conscientious demeanor was evident from his ability to adhere to established legal precedents, statutes, and procedural guidelines in his courtroom. Despite the unprecedented nature of Watergate as

a constitutional crisis, Sirica nevertheless managed to cite previous judicial rulings as a means to support his decisions during this period. This tendency was especially visible in April and May of 1974 when he issued two rulings ordering Nixon to submit sixty-four tapes to the special prosecutor so that the investigation could proceed. Similarly, the grand jury's indictments of Nixon's close White House aides were conducted no differently than other cases in which individuals are accused of felonious conduct. Even Sirica's plan to levy fines against the president was supported by ample legal precedents enunciated by the Supreme Court because of its decision to uphold fines against the United Mine Workers for refusing to end an illegal strike during the 1940's. It is important to emphasize that not one appellate court reversed any of Sirica's decisions that were issued during the second phase of the Watergate tapes litigation. Had he not adhered to legal precedents, federal statutes, and procedural guidelines in his courtroom, Sirica's errors would undoubtedly have been nullified or remanded for further consideration.

In the end, Sirica's personal opinions and assumptions regarding the president's handling of Watergate proved to be insignificant. His belief that Nixon sought to undermine democracy when he fired Archibald Cox, for example, did not infringe upon anyone's rights--including the president's--because the judge kept his opinions to himself and worked within established legal precedents to formulate an appropriate judicial response to the unpopular dismissal. The

judge later believed that someone inside the White House had destroyed evidence in a criminal investigation when Buzhardt revealed, on two separate occasions, that two conversations did not exist and that an eighteen-and-a-half minute gap existed on one of the subpoenaed tapes; but the hearings which addressed these matters were thorough and tended to prove, despite Sirica's suspicions to the contrary, that Nixon had not tampered with the recordings at issue. Although the six-member panel of experts which investigated the gap was collectively inexperienced with the practicalities of tape recorders, its controversial conclusions did not influence any of Sirica's subsequent rulings on the tapes or lead to any specific indictments from the grand jury. Finally, the judge's belief that St. Clair intentionally delayed the administration's compliance with United States v. Nixon had no impact in his courtroom because the White House promptly submitted the tapes to Sirica as required. He was, despite his imperfections, a thoughtful and conscientious jurist.

1. John J. Sirica, To Set The Record Straight (New York: W. W. Norton, 1979), pp. 168-69.

2. Richard Ben-Veniste and George Frampton, Jr. Stonewall: The Real Story of the Watergate Prosecution (New York: Simon and Schuster, 1977), pp. 141-44; Richard Nixon, RN: The Memoirs of Richard Nixon (New York: Grosset & Dunlap, 1978), pp. 934-35.

3. "Pressure for Impeachment Mounting." Washington Post, October 21, 1973, p. A1; Sirica, pp. 168-72.

4. Sirica, pp. 179-80.

5. "Nixon Agrees to Yield His Tapes; GOP Leaders Warned President." Washington Post, October 24, 1973, p. A1; Sirica, pp. 177-78. In his memoir, Sirica claimed that Nixon had backed away from confrontation because his lawyers warned him

that a contempt order would result in continued noncompliance. Though the president surely wished to avoid being held in contempt, this argument alone is misleading. Throughout the episode, Nixon considered Watergate to be a political problem, not a legal one. Stunned by the public outcry and calls for impeachment after his dismissal of Cox, the president simply concluded--after consulting with congressional Republican leaders--that some level of disclosure was necessary to save his administration. Nixon fundamentally believed that Sirica's August 29 ruling was unwise and that the White House would have been justified in ignoring it altogether. Impeachment politics, however, forced him to reconsider, and he finally gave Wright the authority to announce the administration's compliance with the utmost reluctance. See Nixon, pp. 935-37, 943-44.

6. The primary Watergate grand jury received the case immediately after the break-in in June 1972. The August 1973 grand jury, by contrast, was impaneled to investigate illegal conduct that was indirectly related to the Watergate break-in and cover-up; this included such matters as the government setting of milk-price supports, illegal corporate campaign contributions, and the controversy surrounding an antitrust suit against the International Telephone and Telegraph Corporation. See Sirica, p. 172.

7. Sirica, pp. 173-74.

8. Ibid., pp. 175-76.

9. Ibid., pp. 179-81.

10. "Key Mitchell, Dean Tapes Don't Exist, Sirica Told by White House Counsel." Washington Post, November 1, 1973, pp. A1, 3.

11. Sirica, pp. 181-82.

12. "Two Key Conversations; Prosecutors Believe President Evasive." Washington Post, November 1, 1973, pp. A1, 6; Stephen Ambrose, Nixon: Ruin and Recovery, 1973-1990 (New York: Simon and Schuster, 1991), pp. 161-62.

13. Only Alexander Haig had unlimited access to the materials at this stage of the litigation.

14. "Two Key Conversations; Prosecutors Believe President Evasive." Washington Post, November 1, 1973, pp. A1, 6.

15. "Court Hears White House Explanation; Nixon Lawyers: Tape Ran Out." Washington Post, November 2, 1973, pp. A1, 8.

16. Ibid.

17. Ben-Veniste, pp. 158-65; Sirica, pp. 182-88.

18. Leon Jaworski, The Right and the Power (New York: Pocket Books, 1977), pp. 1-10; Nixon, pp. 943-44.

19. "Hill Still Seeking Special Prosecutor." Washington Post, November 2, 1973, pp. A1, 6; "House Group Approves Prosecutor Bill." Washington Post, November 14, 1973, p. A5.

20. "Cox's Ouster Ruled Illegal; No Reinstatement Ordered." New York Times, November 15, 1973, pp. 1, 34; "Court Rules Bork's Firing of Cox was Illegal." Washington Post, November 15, 1973, pp. A1, 3.

21. New York Times, November 15, 1973, pp. 1, 34; Washington Post, November 15, 1973, pp. A1, 3.

22. The subpoena alone did not specify that the conversation of June 20 had to be submitted, but a supplemental document to the ruling did.

23. Nixon, pp. 948-49.

24. By accidental, Buzhardt meant that the tape recorder could not have malfunctioned on its own.

25. Sirica, pp. 190-91.

26. Ibid., p. 191.

27. This weak declaration of trust was inconsistent with Sirica's personal suspicions which are readily apparent throughout his autobiography. See also "Another Tape Found Faulty, Sirica Is Told." Washington Post, November 22, 1973, pp. A1, 8; Sirica, p. 192.

28. Washington Post, November 22, 1973, p. A8.

29. Public opinion polls taken after Buzhardt's disclosure revealed that only one-third of the electorate believed that no tampering had occurred.

30. Sirica, p. 192.

31. Jaworski, p. 31.

32. Sirica, pp. 195-96.

33. Ibid., p. 122.

34. Ben-Veniste, pp. 183-86; Nixon, pp. 950-52.

35. Sirica, pp. 203-04.

36. Ibid., p. 205.

37. Ibid.

38. Meeting: The President, Dean and Haldeman, Oval Office, March 21, 1973 (10:12 - 11:55 a.m.) in The Presidential Transcripts (New York: Dell, 1974), p. 112; Sirica, p. 207.

39. Ibid., p. 209.

40. Ibid.

41. This was the same tape that contained the eighteen-and-a-half minute gap.

42. J. Anthony Lukas, Nightmare (New York: The Viking Press, 1976), p. 463.

43. Jaworski, pp. 99-108.

44. Ibid., pp. 115-19; Sirica, pp. 214-18; Ben-Veniste, pp. 237-49.

45. Jaworski, pp. 120-21; Sirica, p. 215; Ben-Veniste, pp. 249-50.

46. Jaworski, pp. 128-29; Sirica, pp. 215-16; Nixon, p. 988.

47. Nixon, pp. 975, 990-93.

48. Ibid., pp. 990-93; Jaworski, pp. 103-110.

49. Nixon, pp. 992-95.

50. Sirica, p. 220.

51. Presidential address on April 29, 1974 in Watergate: Chronology of a Crisis, vol. 2 (Washington D.C.: Congressional Quarterly, 1974), p. 408.

52. Jaworski, pp. 157-60; Sirica, pp. 223-24; Ben-Veniste, pp. 280-82.

53. Jaworski, pp. 175-76.

54. Justice Rehnquist did not participate.

55. U.S. v. Nixon, 418 U.S. 683, 690-92 (1974).

56. Ibid.

57. Ibid. at 692-93.

58. Ibid. at 693.

59. Ibid. at 693-97.

60. Ibid. at 698.

61. Ibid. at 698-700. Sirica did not discuss Rule 17(c) at length in any of his Watergate decisions.

62. Ibid. at 700.

63. Ibid. at 684-85.

64. Ibid. at 703-07.

65. Ibid.

66. Ibid. at 707.

67. Ibid. at 708.

68. Ibid.

69. Ibid. at 713.

70. All sixty-four tapes were delivered by August 5.

71. Meeting: The President and H. R. Haldeman, Oval Office, June 23, 1972 (10:04 - 11:39 a.m.) in U.S. News and World Report, August 19, 1974, pp. 69-70.

72. Edward W. Knappman and Evan Drossman (ed.), Watergate and the White House (New York: Facts on File, Inc., 1974), p. 342; Lukas, pp. 563-64.

CHAPTER SIX

CATHARSIS OR ESCAPE FROM JUSTICE?
THE COVER-UP TRIAL, A PRESIDENTIAL PARDON,
AND THE END OF A CRISIS

In his 1982 memoir Witness to Power, John Ehrlichman sharply criticized the judges who presided over the two trials during which he was prosecuted for criminal wrongdoing while he served as Nixon's domestic advisor at the White House. Judge Gerhard Gesell, who presided over the Fielding break-in trial in mid-1974, seemed "very bright and quick" but also appeared determined to achieve the "unpopular result" of conviction in large part because of his obvious and blatant hostility towards the defense throughout the trial.[1]

Judge Sirica, by contrast, struck Ehrlichman as an inept jurist who was hasty, careless, and even capricious in the manner in which he presided over the well-publicized trial of Nixon's former associates. As proof, the former domestic advisor pointed out that Sirica's voir dire of prospective jurors failed to disclose that one member of the jury pool who was later selected had been a close friend of an employee of Leon Jaworski. Another juror, according to Ehrlichman, wrote a letter to the judge announcing her bias in favor of the prosecution but was nevertheless permitted to remain on the jury despite the objections raised by the defense. In

addition to these flaws, Ehrlichman charged that Sirica was "unduly influenced" by the Washington Post, Washington Star, and television networks because of his desire for publicity and fame for himself. For these reasons, he concluded that the unqualified to preside over the cover-up case and contributed to the unjust convictions of innocent public servants who were ultimately sent to prison for acts that were believed at the time to be in the best interests of the nation.[2]

These accusations, though consistent with the views of Sirica's liberal and Democratic critics before Watergate, were misleading because they did not accurately describe the judge's actual handling of the cover-up trial in 1974 and 1975. While Sirica undoubtedly welcomed coverage from the media in his courtroom, he periodically imposed limits and gag orders on the press which angered many reporters.[3] Ehrlichman's charge that the voir dire appeared "careless and capricious" was also unfounded. The entire process, for example, lasted over seven days and filled more than two thousand pages of printed transcript because of the thoroughness with which Sirica conducted this portion of the proceeding. To ensure that the rights of the defendants were protected, the judge permitted defense attorneys to excuse fifteen men and women from the jury without cause while allowing the prosecution to dismiss only six. Although he did not excuse the two jurors that Ehrlichman felt were strongly biased, the Court of Appeals later concluded that it had "no

doubt" that the jury was genuinely impartial in the case.[4]

Aside from the inaccuracies in Ehrlichman's assessment of Sirica, his recollection contained another serious weakness in that he failed to consider the broader issue of whether the cover-up trial was generally fair in a constitutional sense despite any errors or imperfections from the bench during the proceeding. In addition, Ehrlichman declined to consider whether justice was served in the end despite the prosecution's inability to try Richard Nixon for his role in the scandal. This chapter addresses these issues in the context of Sirica's handling of the Watergate cover-up trial and Gerald Ford's pardon of the former president in 1974.

I

Following the indictments of Nixon's former associates on March 1, 1974, Sirica assigned himself to the cover-up case. This selection was not a foregone conclusion before the indictments were handed down. According to a federal statute which regulates the appointments of judges to the judiciary, the chief judge is required to resign his/her position at the age of seventy even though the individual may remain on the bench as a life appointee beyond that date. Sirica celebrated his seventieth birthday on March 19, 1974--just eighteen days after the indictments were issued--and resigned his administrative position as required by federal law. Had the indictments occurred after March 19, self-appointment would not have been possible.[5]

Yet even with the authority to self-appoint, Sirica was initially unsure whether he wished to preside over the upcoming trial of Nixon's former associates. Having spent over forty-five years as a practicing attorney and jurist, and over twenty months as the Watergate judge, Sirica had grown tired of the pressures that had grown enormously since the June 17, 1972 break-in. Moreover, he realized that his colleagues in the District of Columbia were qualified to handle the case and that a just and fair result in the proceeding did not depend on self-appointment.[6]

Aside from these reservations, however, Sirica strongly believed that he was the "best qualified" judge to try the case because of his long experience with the complex constitutional issues associated with Watergate. He was also convinced that a decision not to appoint himself to the cover-up trial would create an appearance of maintaining a judicial double standard despite his public remarks to the contrary. This concern became especially worrisome when Judge Sherman Christensen, a personal friend and federal judge from Utah who was temporarily serving on the District's court of appeals, told Sirica that a refusal to take the case would appear as though he was willing to try the "little people" for their Watergate involvement but could not bear the pressure when the "big names" came to trial for their role in the scandal. In his memoir, Sirica recalled that other friends shared Christensen's views which contributed to his self-appointment to the cover-up trial on March 1, 1974.[7]

Shortly after the indictments were handed down that day, Leon Jaworski and his staff began the task of preparing for trial. At this early stage, neither he nor Judge Sirica could predict the final outcome of the ongoing impeachment inquiry because 1) the president had not yet released the tape of the June 23, 1972 conversation that would lead to his ultimate downfall; 2) the House Judiciary Committee had not yet endorsed Nixon's impeachment; and 3) the White House retained the support from a sufficient number of Republican senators who intended to block conviction should the House impeach the president. Because of this uncertainty surrounding Nixon's fate, Jaworski shelved the incriminating evidence that his office and the Justice Department had assembled against the president, and he continued to follow Sirica's recommendation that no criminal charges be filed until the impeachment process reached its final conclusion.[8]

In the meantime, prosecutors and defense attorneys prepared for the trial of the individuals who were indicted: John Mitchell, H. R. Haldeman, John Ehrlichman, Charles Colson, Kenneth Parkinson, Gordon Strachan, and Robert Mardian. Jaworski's case against these seven defendants rested primarily on the ability of his office and the House Judiciary Committee to successfully subpoena the White House tapes which contained the bulk of the evidence needed to obtain convictions. The prosecution also intended to use the testimonies and sworn statements of other former White House and campaign officials as evidence at trial; such statements

included those provided by John Dean and Jeb Magruder whose lawyers had negotiated pleas with the Justice Department in 1973 to avoid the certainty of trial and the possibility of prison sentences for their clients. Jaworski had little doubt that a strong case could be made against the defendants so long as the battle for the White House tapes resulted in disclosure of the subpoenaed conversations.[9]

As Jaworski and his staff prepared the prosecution's case, several developments occurred during this pre-trial stage that was initiated from the defense. Charles Colson and Gordon Strachan, for example, were severed from the case in large part because of successful legal maneuvering by their attorneys. David Shapiro, who was one of several lawyers representing Colson, approached Jaworski weeks after the indictments and stated that his client wished to plea bargain so long as 1) Colson could plead guilty to one misdemeanor only; and 2) a judge other than Sirica would impose sentence. This bold request was unacceptable to Jaworski because Colson was under indictment in the Fielding break-in case as well as the Watergate cover-up, and each included felonies that were punishable by lengthy prison sentences. The special prosecutor realized that a guilty plea to a mere misdemeanor would likely result in no jail time--particularly if the case were reassigned to another judge--which would make a mockery of the prosecution given Colson's pervasive criminal conduct while working for the Nixon administration. After several negotiations between the attorneys involved, Jaworski accepted

a plea to obstruction of justice in the Fielding break-in to the extent that Colson had promoted a scheme to "defame and destroy the public image and credibility of Daniel Ellsberg and those engaged in the defense of Ellsberg." All charges included in the cover-up indictment were dropped in this agreement. The special prosecutor also acquiesced to Shapiro's demand that sentencing be reassigned to another judge. Sirica later agreed to these arrangements because he believed that one less defendant would simplify the upcoming trial. Judge Gerhard Gesell then sentenced Colson to one to three years in prison and fines totalling $5,000. Nixon's former "hatchet man" was later called as a witness in the Fielding case, and his testimony ultimately contributed to the convictions of Ehrlichman, Liddy, and other members of the Special Investigations Unit that had orchestrated the break-in to embarrass Daniel Ellsberg in 1971.[10]

The second defendant severed from the cover-up case, Gordon Strachan, had played a relatively minor but significant role in the conspiracy because he allegedly destroyed records describing the wiretaps at the Watergate after the arrests on June 17, 1972. Because of this single act, the grand jury indicted him for obstruction of justice--a felony which meant that a prison sentence became a virtual certainty for the accused if convicted. Haldeman's former aide, however, had been granted immunity from prosecution by the Senate Watergate Committee in exchange for his testimony before the indictments were handed down on March 1. Although Jaworski believed that

his office could prosecute Strachan without relying on his testimony, his lawyer Jack Bray successfully convinced prosecutor James Neal that the indictment nevertheless violated his client's immunity which necessitated a dismissal of charges. Privately, Jaworski worried that bringing Strachan to trial could jeopardize convictions against the remaining defendants because Bray would make frequent evidentiary objections pertaining to the immunized testimony from 1973. The special prosecutor therefore dropped Strachan from the case leaving five defendants scheduled to face trial for their larger roles in the Watergate cover-up.[11]

The severance of Colson and Strachan was not the only pre-trial activity initiated by the defense. Almost immediately after Sirica appointed himself to the case on March 1, defense attorneys filed a series of motions and petitions to have the Judge Sirica disqualified on grounds that his long experience and involvement with the Watergate proceedings had made him personally biased against the defendants in this case. Specifically, they suggested that James McCord's letter to Sirica--which alleged that higher-ups in the administration were involved in the conspiracy--and the tapes litigation had already convinced the judge beyond a reasonable doubt that Nixon's former associates were guilty; as a result, a fair and balanced trial was unlikely unless someone else presided over the proceeding.[12]

Sirica rejected this argument and refused to disqualify himself from the case. Contrary to the defense's assertion,

he believed that his familiarity and experience with Watergate enabled him to protect the rights of the defendants and that he was more responsive to issues of fairness than his critics from the White House believed. Moreover, Sirica was well-aware that any legal errors to the detriment of the defense could be used as grounds for reversal if convictions followed; the judge's reputation, therefore, strongly contributed to his determination to preside over the cover-up trial in a fair and balanced manner that protected the rights of all parties involved.[13]

This claim of fairness for the defense was consistent with Sirica's conduct once the trial began in October, 1974. In his memoir Stonewall, Richard Ben-Veniste specifically recalled that the defense was granted the permission to remove a greater number of potential jurors from the jury pool than was required by the Federal Rules of Criminal Procedure; this ruling from the bench, according to Ben-Veniste, made matters more burdensome for the prosecution because unanimous verdicts are necessary for convictions. "Our task in selecting the jury in the cover-up case," he wrote, "would be more onerous than in the usual criminal prosecution because Judge Sirica had tentatively ruled that the defendants would be permitted more 'peremptory challenges' than the number to which they were statutorily entitled, while the prosecution would be held to its statutory minimum....Here, the defense would have fifteen challenges to our six. The disparity could prove significant in the tactical duel that occurred when both sides

exercised their peremptory challenges against the array of potential jurors, each side trying to select the best possible jury."[14]

During the pre-trial stage, however, defense attorneys remained unconvinced that Sirica would ultimately insist on a fair and balanced proceeding, and they consequently tried a new tactic to get the him off the case after their unsuccessful motion for disqualification. In August, shortly after Nixon's resignation, the defense moved for a change in venue to get the trial moved outside of Washington D.C. The defendants' attorneys specifically argued, when making this request before Judge Sirica, that their clients could not receive a fair trial in the District because the public's heavy attention to Watergate--and the Democratic Party's overwhelming support inside the city--would produce a prejudicial jury that made convictions a virtual certainty. A second motion was simultaneously made that requested a delay in the trial, which was scheduled to begin in early September, because of the publicity surrounding Nixon's resignation that affected all jurisdictions where a trial could conceivably take place.[15]

Sirica denied each of these motions. He strongly believed, because of his experience in the break-in trial, that juries inside Washington could be fair so long as they were instructed properly from the bench. Sirica had little doubt that he could issue the necessary instructions to produce reasonable verdicts in the case, and he also realized

that he could issue a directed verdict acquitting the defendants if the jury returned convictions unsupported by the evidence introduced at trial. The court of appeals subsequently issued a ruling affirming Sirica's denial of a change in venue, but it reversed the judge on his refusal to delay the proceeding. An "advisory opinion" was therefore issued which recommended a three to four week delay with the expectation that the public's attention on Nixon's resignation would recede. Sirica reluctantly granted a three-week delay and set a new trial date for October 1. The beginning of trial on that date would once again thrust Watergate into the national headlines which discredited the defense's argument that the public's attention on the scandal could subside at all during this period in 1974.[16]

II

On Wednesday August 28, just nineteen days after Nixon's resignation, President Gerald Ford appeared before reporters in the White House for the first press conference of his presidency. Buoyed by a Gallup Poll showing that 71 percent of Americans approved of his performance as president, and pleased that his relationships with Congress and the press had begun quite well, Ford believed that a press conference on live television would reflect his optimism and could demonstrate his ability to tackle the nation's domestic and international problems that needed to be solved.[17]

Because of this confidence, the president was annoyed

when his advisors, Robert Hartmann and Paul Miltich, warned him beforehand that the White House press corps would be interested in one issue only--Richard Nixon. Specifically, they predicted that reporters would want to know what the new administration intended to do about the former president and how the disposition of his tapes and papers was going to be handled. Ford still believed that the economy and other national concerns would dominate the press conference, but his hopes soon evaporated. The first question of the evening came from Helen Thomas from United Press International. "Mr. President," she asked, "aside from the special prosecutor's role, do you agree with the bar association that the law applied equally to all men, or do you agree with Governor Rockefeller that former President Nixon should have immunity from prosecution? And specifically, would you use your pardon authority, if necessary?"[18]

Ford replied that it would be "unwise and untimely" to make any commitment on the issue of a presidential pardon because Jaworski had not yet filed any charges and no court or jury had undertaken any action in the matter. Four questions later, a reporter reworded Thomas' question and wanted to know whether a pardon remained an option depending on what the judiciary might do in the days and weeks ahead. "Of course, I make the final decision," Ford said. "And until it gets to me, I make no commitment one way or another. But I do have the right as president of the United States to make that decision."

"And you are not ruling it out?" the reporter asked again.

"I am not ruling it out," Ford replied. "It is an option and a proper option for any president."

After several additional questions about Nixon and Watergate, the subject finally shifted to the economy when reporters asked Ford to describe his administration's strategy for fighting inflation. But the subject returned almost immediately to Richard Nixon. Visibly irritated by this point, the president again repeated that he could not elaborate or "make any comment during the process of whatever charges are made" against Nixon. The press conference then ended, and Ford walked back to the Oval Office deeply frustrated that he had not been able to highlight his domestic and international agenda to give his presidency momentum and clear direction.[19]

Later that evening, Ford met with his advisors to discuss the press conference. This meeting, he recalled five years later, forced him to consider the possibility of pardoning Nixon for the first time. "I had to get the monkey off my back," the former president wrote. "I was already struggling with the question of who had jurisdiction over the papers and tapes, and that was cutting into my work schedule more and more every day. It intruded into time that I urgently needed to deal with a faltering economy and mounting foreign policy problems all over the world. With these critical issues pressing upon me--and the nation--I simply couldn't listen to

lawyers' endless arguments about Nixon's tapes and documents or answer constant questions about his legal status. But just what should--and could--I do?"[20]

Over the next several days, Ford told his advisors that he was considering a pardon but remained unsure for two reasons. First, he needed to ascertain whether the president had the specific legal authority to immunize Nixon from any Watergate-related prosecutions at this time. Ford quickly discovered, with the assistance of his former law partner and advisor Phil Buchen, that he indeed had the authority to proceed on the basis of long standing legal precedents that pre-dated the ratification of the Constitution; these principles were subsequently reaffirmed in the Constitution and in court decisions in which the power of the president to pardon was at issue. Second, Ford wanted an assessment from Jaworski concerning the amount of time that would lapse before Nixon could be given a fair trial if indicted and the areas currently under investigation at the special prosecutor's office. After meeting with Buchen on September 4, Jaworski informed the White House that a "period from nine months to a year, and perhaps even longer" would be needed to protect Nixon from prejudicial pre-trial publicity before the proceeding could be started; the former president, therefore, could not be tried with Mitchell, Haldeman, Ehrlichman, and the other defendants who were indicted in the cover-up case. Jaworski was silent about the specific areas of investigation in his office, and he declined to express an opinion as to

whether a pardon of Nixon was advisable or justified under existing circumstances.[21]

This letter was especially troublesome to President Ford. Reading between the lines, he easily surmised that the one-year delay predicted by Jaworski would be followed by a lengthy trial and conviction given the incriminating evidence that Ford knew was available. Because of Nixon's insistence that he had not violated any laws, the new president assumed that a series of appeals would be filed--a process that would take years to resolve. Determined to prevent Watergate from dominating the national headlines and his administration, Ford decided to grant the pardon. He explained this action to the nation in a live telecast on Sunday morning, September 8. "Ladies and gentlemen," he began, "I have come to a decision which I felt I should tell you and all of my fellow American citizens as soon as I was certain in my own conscience that it is the right thing to do....After years of bitter controversy and divisive national debate, I have been advised and I am compelled to conclude that many months and perhaps years will have to pass before Richard Nixon could obtain a fair trial by jury in any jurisdiction of the United States under governing decisions of the Supreme Court." Under this scenario, Ford continued, "ugly passions would again be aroused. And our people would again be polarized in their opinions. And the credibility of our free institutions of government would again be challenged at home and abroad." He then read and signed the proclamation granting a "full, free and absolute pardon

unto Richard Nixon for all offenses against the United States" that were committed or may have been committed between his first inauguration until his resignation on August 9, 1974.[22]

Americans were outraged. Almost instantly, Ford's approval rating in the Gallup Poll plummeted from 71 percent to just 49 percent. Three days after the announcement, the Senate passed a resolution, by a vote of 55 to 24, opposing any additional Watergate pardons until the legal process--including all appeals--was exhausted. The New York Times, in a scathing editorial, charged that "[t]his blundering intervention is a body blow to the president's own credibility and to the public's reviving confidence in the integrity of its government....[B]y recklessly pushing aside special prosecutor Leon Jaworski and the grand jury and the trial jury as well, President Ford has failed in his duty to the Republic, made a mockery of the claim of equal justice before the law, promoted renewed public discord, made possible the clouding of the historical record, and undermined the humane values he sought to invoke." The Washington Post was just as critical and bluntly accused Ford of continuing the Watergate cover-up that would inevitably plague the new administration because of the president's lapse in judgement.[23]

Judge Sirica's reaction to the pardon, though not directly related to his preparation for the cover-up trial, is nevertheless significant because it reveals once again that his personal interpretation of Watergate-related events mirrored that of the American public at large. Moreover, the

judge's reaction to Ford's announcement must be considered to understand his later sentencing decisions after the trial reached its conclusion in January 1975. In his memoir, Sirica devoted an entire chapter to the Nixon pardon not only to express his disapproval of Ford's decision; he also wanted to explain that the pardon and its timing caused considerable problems for lawyers involved in the cover-up trial that was soon to begin. "From my point of view," he wrote, "the fact that the judicial process did not run its course has had.... unfortunate consequences. The initial evidence presented was compelling enough to cause the grand jury to name the [former] president as an unindicted co-conspirator in March 1974....Once Nixon had left office, the grand jury was again ready to indict him, but was waiting for the grand jury to be selected in the cover-up case so that the trial would not be delayed by the publicity. Jaworski, as he has since told me, was prepared to approve an indictment."[24]

Sirica acknowledged in this recollection of the pardon that he initially opposed Ford's act because of its sudden timing, not the act itself. More specifically, he wanted the president to wait until a jury had been selected and sequestered in the cover-up case which would have prevented the pardon from becoming an issue during the proceeding. The judge, however, changed his opinion and later believed--as did most Americans--that Ford should have allowed the prosecution to try Nixon for his role in the Watergate scandal. Had such a trial taken place, he argued, a "final verdict would have

put the president's guilt or innocence beyond dispute. No one then could wonder whether or not he had done wrong. No one, not even Nixon himself, could any longer argue that his fate was the product of politics rather than the result of justice being served."[25]

Because of Ford's pardon, Sirica added, Nixon kept himself above the law, received a large government pension, and retired to his "lovely home in San Clemente" while his former associates went to jail for their participation in the cover-up. "All of my life as a lawyer and judge," he wrote, "I have always tried to treat white-collar criminals like other criminals. It still bothers me that Richard Nixon escaped that equal treatment. I feel that if he had been convicted in my court, I would have sent him to jail."[26]

This assessment, though articulated out of sincerity based in part on his frustrations arising from the Watergate experience, failed to consider the specifics of the case and the divisions in America which made Ford's pardon quite reasonable despite the public's outcry against it. No evidence, for example, suggests that the president's action directly interfered with the cover-up trial in general or the selection of the jury in particular. In fact, Sirica's own professionalism and conscientiousness kept the pardon outside the entire trial despite the enormous sensationalism that accompanied Ford's unexpected decision. Jaworski never argued that the pardon interfered with his staff's ability to prosecute the case, and Richard Ben-Veniste was unable to

specify how the pardon contributed to any real problems during the trial despite his complaint that Ford's act created impressions of a legal double standard in the minds of potential jurors. In short, the pardon had no significant impact on the trial despite the opinions of Sirica, Ben-Veniste, and others who believed that Nixon should have been prosecuted for his alleged criminal conduct.[27]

A second weakness in Sirica's assessment of the pardon is that he failed to consider the prerequisites for a fair trial of the former president. Would a delay in the proceeding have been necessary, as Jaworski suggested, because of the widespread publicity associated with the case? If so, for how long? Would a change in venue have been needed because of the Democratic Party's overwhelming support in Washington D.C.? If so, what location would have been appropriate? Finally, how would the proceeding have been conducted after the selection of a jury? Would gag orders and sequestration have been necessary to prevent prejudicial publicity from influencing the jury, or would less restrictive measures have been sufficient? These and related issues would undoubtedly have confronted any judge who received the case after Nixon's expected indictment from the grand jury. Such questions, to be sure, were hypothetical because of the pardon. Sirica's analysis, however, was also hypothetical inasmuch as he assumed that a Nixon trial would have permitted the judicial system to "run its course" and that a sense of justice would have been realized despite the divisions and controversy that

the scandal had produced. As the judge who had handled the Watergate case from the very beginning, Sirica's critique of the pardon would have been more credible had the practical considerations involving a Nixon trial been considered.

Finally, the judge's critique of Ford's decision failed to consider the conditions in the nation which made the pardon a justifiable act. While Ford remained unsure as to whether he would issue the pardon, Major Bob Barrett--a military aide at the White House--remarked to the president that all Americans had become "Watergate junkies. Some of us are mainlining, some are sniffing, some are lacing it with something else, but all of us are addicted. This will go on and on unless someone steps in and says that we, as a nation, must go cold turkey. Otherwise, we'll die of an overdose."[28]

This analogy of Watergate to drug addiction, though simplistic, resonated with President Ford because of his inability to refocus the nation's attention to the economy, the energy crisis, negotiations with the Soviet Union, and other issues that needed to be addressed. Sirica, however, neglected to consider just how the United States would cope with its domestic and international problems while Watergate continued to divide the public and absorb the public's attention; instead, he simply claimed that a Nixon trial was necessary for justice to be served and that the pardon permitted the former president to "get away" with his wrongdoing. His critique, in hindsight, seems shallow because of the protracted legal battles that Nixon faced which

outlasted those of his former subordinates who were tried and convicted in the cover-up trial. More importantly, the public's outrage over the pardon gradually diminished as Americans turned their attention to the economy and other issues just as Ford had hoped.[29]

III

On October 1, the cover-up trial began in the crowded ceremonial courtroom on the sixth floor inside the U.S. Courthouse in Washington. At 9:29 that morning, Judge Sirica called the case of United States v. John Mitchell et al. to order and began the procedure for jury selection. He was thorough and even combative because of the numerous potential problems during this beginning phase of the case. Sirica realized, for example, that a rigorous selection process was necessary to find jurors who had not yet made definitive conclusions regarding the guilt or innocence of the defendants because of the overwhelming publicity associated with Watergate. He also realized that the jury would be sequestered for a lengthy period due to the likelihood that the trial would continue for months; as a result, many prospective jurors could not serve, or would claim that they were unable to serve, because of economic, family, or medical difficulties at home. Finally, the judge worried that individuals with some connection to the case would fail to disclose their complete backgrounds during the voir dire, and he wanted to make certain that these individuals were not

chosen so that a mistrial or reversal did not occur later on.[30]

Because of these potential problems, Sirica took the unusual step of explaining the consequences of lying to potential jurors during the selection process. "The following admonition," he warned, "is not given for the purpose of intimidating, coercing or frightening this jury panel or any member of the panel....I want each prospective juror to understand that should it develop after this case has been tried and the jury dismissed, or at any other time during the trial of this case, for example, that any juror has knowingly, intentionally, or deliberately failed to answer truthfully any of the questions I am about to propound or that may be propounded by the attorneys for the parties in this case to the prospective jurors, that juror could be cited for contempt of court and he or she might receive a jail sentence as a consequence."[31]

Despite this warning, roughly ninety members of the jury pool attempted to avoid serving in the case and expressed a variety of excuses that seemed rather dubious to both Sirica and the attorneys. Dizziness, high blood pressure, and even hemorrhoids were cited as hardships that made jury duty unreasonable. One individual claimed that she was "under the doctor" because of a bad pancreas; and another complained of suffering from phlebitis--the same illness then ailing Richard Nixon. At the same time, Sirica suspected that several potential jurors with serious economic and medical hardships

were afraid to explain their difficulties because of the extensive media attention given to this case. Frustrated that the voir dire could produce an inadequate or unreliable jury, the judge moved the proceeding to his smaller courtroom that was completely sealed off from the press. Reporters complained as Sirica ordered the windows covered with paper so that privacy could be guaranteed during the questioning. This measure, combined with his earlier warning, succeeded in producing specific and seemingly honest responses from members of the jury pool.[32]

The voir dire continued for seven additional days. To expedite the process, Sirica became actively involved in the questioning as he had done during the break-in trial in 1973. By Wednesday October 9, some 171 veniremen had been excused from the pool for "cause"--either because they were incapable of rendering fair and impartial verdicts in the case or because service on a sequestered jury would cause substantial hardships at home. Attorneys then exercised their peremptory challenges that permitted each side to excuse potential jurors for almost any reason so long as they did not discriminate along racial or gender lines. Sirica later recalled that the entire process favored the defense rather significantly because 1) none of the veniremen who believed that Ford's pardon of Richard Nixon was unfair to the accused were disqualified by the court or removed "without cause" by the prosecution; and 2) the judge granted the government just six peremptory challenges while the defense, as described above,

received fifteen.[33] Gradually, the list of prospective jurors narrowed as attorneys from both sides excused those individuals whom they believed would not return favorable verdicts for their respective clients.[34]

On Friday October 11, a jury of nine women and three men--predominantly African-American--was selected. Though diverse in age, ranging from twenty-seven to sixty-eight, the jurors were predominantly middle-class and Democratic. Specifically selected were Gladys Carter, an office machine operator and supporter of the Democratic Party; Ruth Gould, a loan specialist at the Department of Agriculture and a Democrat; Dock Reid, a doorman at a local hotel and a Democrat; John Hoffer, a retired supervisor at the Interior Department and a Republican; Marjorie Milbourn, a retired international relations officer and Democrat; Roy Carter, a George Washington University logistics coordinator and Democrat; Thelma Wells, an unemployed Republican who devoted much of her time to the study of Eastern religion; Anita King, a matron in the Washington D.C. public schools and a Democrat; and Lucille Plunkett, a coffee maker for Government Services, Inc. and a Democrat. Also chosen to serve on the regular jury but whose political affiliations were either unclear or non-existent, were Sandra Young, a local pharmacist assistant; Vanetta Metoyer, a sales clerk at a local Kresge's variety store; and Jane Ryon, a retired secretary at the Justice Department.[35] With the completion of voir dire, Sirica swore in the twelve regular jurors and six alternates, and the attorneys turned

their attention to substantive phase of the trial that would determine the guilt or innocence of the accused former Nixon officials.[36]

IV

On Friday October 12, the same day that the cover-up jury was sworn in, Leon Jaworski submitted his resignation as special prosecutor. In a letter addressed to Attorney General William Saxbe, he wrote that the "bulk of the work entrusted to the care of [his] office" had been successfully discharged and that all remaining responsibilities could now be turned over to someone else. With this letter, Jaworski attached a memorandum which declared that Ford's pardon of Richard Nixon was constitutional and that the special prosecutor's office would be unwise and even unprofessional to challenge the president's unpopular decision. In a harsh editorial, the New York Times condemned Jaworski's resignation as well as his recommendation to leave the Nixon pardon unchallenged. "Leon Jaworski is leaving office under conditions that border on desertion of duty," the editors claimed on October 14. "While Mr. Jaworski deserves the nation's thanks for the job he did, there can be no applause for the jobs he left undone or for the manner in which he failed to do them. The plain fact is that the job he was appointed to do is not yet done and he considerably reduced the likelihood that it ever will be."[37]

Events in Sirica's courtroom, however, discredited this

accusation. Three days after Jaworski's resignation, Richard Ben-Veniste opened the case for the prosecution. He boldly asserted that the cover-up of the Watergate break-in began just hours after the initial arrests were made, and it lasted more than one year involving all five defendants on trial as well as former president Nixon. During this period, Ben-Veniste argued, the cover-up conspirators resorted to lies, shredding of documents, manipulation of the FBI and CIA, and the payment of some $400,000 in hush money to the burglars to block the Watergate investigation and to prevent the scandal from tarnishing the Nixon administration. Mitchell and Mardian, for example, urged Jeb Magruder to destroy his Gemstone file immediately after the White House learned of the arrests on June 17, 1972. Shortly thereafter, Haldeman ordered Gordan Strachan to clear out all files that dealt with the burglary. Ehrlichman, suggested the prosecutor, urged John Dean to "deep-six" the contents of a safe then in E. Howard Hunt's possession which contained incriminating documents linking the burglary to Nixon's re-election campaign. And on June 23, just six days after the arrests, Haldeman urged the president to approve of a new plan directing the CIA to order the FBI to stay out of the Watergate investigation for security reasons.[38]

The cornerstone of the government's case, continued Ben-Veniste, was the payment of hush money which involved each of the five defendants. More than $400,000, he emphasized, went to the burglars to buy their silence. "A massive and covert

operation," Ben-Veniste stated, enabled these funds to be raised in secrecy so that leaks to the media about the break-in did not occur before the 1972 presidential election. The scramble for cash, however, became somewhat frantic when the president's personal attorney, Herbert Kalmbach, decided to end his involvement in this illegal scheme. As the Watergate burglars continued to demand more money, Mitchell solicited funds from Nixon's close friend Bebe Rebozo who delivered $50,000 in cash to a White House aide; he later claimed that he did not know how the money was going to be used. This latter surprised many jurors because Rebozo's alleged involvement, whether intentional or unintentional, had not yet been made public. Ben-Veniste again emphasized the significance of this hush money phase of the conspiracy, and he asked the jurors to question how and why such payments were made at the very time when the defendants claimed that the administration was not involved in either the Watergate break-in or cover-up of the burglary.[39]

Following the prosecution's opening statement, Sirica directed the defense to proceed with their remarks. John Wilson, a longtime friend of Sirica and the leading defense attorney in the case who represented Haldeman, announced that he would deliver his opening statement after the prosecution presented its evidence and completed its case. So, too, did William Hundley who represented Mitchell. William Frates, a noted attorney from Miami, then rose to address the jury on behalf of Ehrlichman. In a dramatic tone, he declared that

his client was merely an innocent pawn in the scandal and that the president and Dean--the real Watergate culprits--attempted to blame Ehrlichman for their own wrongdoing. "Richard Nixon," Frates charged, "deceived, misled, lied to and used John Ehrlichman to cover-up his own knowledge and his own activities....In simple terms, John Ehrlichman had been had by his boss, who was the president of the United States." The attorney then suggested that Dean had blatantly lied to the Select committee in 1973 insofar as he accused Ehrlichman of illegal activities to cover-up his own Watergate involvement. Objecting to this allegation, Ben-Veniste complained that Frates' opening statement constituted nothing more than "sheer argument" which should be postponed until the defense introduced its evidence. Sirica realized that this argument had been made because the prosecution intended to make Dean its chief witness in the case, and he overruled the objection immediately. "These people must get a fair trial," the judge said of the five defendants. "The more information the jury gets, the better. Let's let the truth in this matter come out once and for all. Let's give both sides as much latitude as we can."[40]

The remaining arguments that day were delivered on behalf of Robert Mardian and Kenneth Parkinson who played relatively minor roles in the cover-up. David Bress, representing Mardian, emphasized that his client was the only defendant on trial for conspiracy alone, and he denied the prosecution's claim that Mardian had requested Liddy to contact Attorney

General Richard Kleindienst, at Mitchell's order, so that the Watergate burglars could be released from jail just days after the June 17 arrests. In an angry tone, Bress accused the government of dragging his client into the case because of mere suspicion; this allegation angered Sirica who was losing patience with the attorney's sensationalism and dramatics. "I thought you were going to make an opening statement on what the evidence will show," he said. Moments later, after Bress concluded his remarks, Sirica defined criminal conspiracy for the jury to prevent misunderstandings at this early stage of the trial. "The essential elements [of this crime]," the judge explained, "are simply a mutual understanding or agreement to achieve an unlawful purpose--or even a lawful purpose by unlawful means--and one or more over acts to carry it out." To be convicted of this crime, he continued, an individual must "knowingly participate in the scheme....One overt act is sufficient, and the other conspirators need not join in it or even know about it."[41]

Jacob Stein, representing Kenneth Parkinson, delivered the last opening statement before the prosecution's introduction of evidence. In contrast to Bress, Stein assumed a quiet and scholarly demeanor as he calmly stated that his client lacked any motive for participating in a conspiracy to obstruct justice or to cover-up Watergate in any way. More specifically, he denied that Parkinson had transmitted Hunt's requests to the White House as the prosecution alleged. Though acknowledging that his client had served as a prominent

attorney for the Committee to Re-Elect the President, Stein pointed out that he did not hold this position for long and resigned in July 1972 when it became clear that the campaign was sanctioning illegal activities to ensure Nixon's re-election in November. For these reasons, Stein concluded, an acquittal remained the only verdict that could be supported by the evidence.[42]

As a result of these opening arguments by the defense delivered thus far, the jury had learned at least some of the strategies that three of the defendants would use during the trial. The jurors were not told, however, that the defense intended to distract and confront Sirica by suggesting that he was committing a variety of reversible errors during the proceeding that would result in a new trial if convictions were returned. The remainder of this chapter considers the degree to which the judge made any such errors by discussing several rulings that were issued over the objection of the defense. The impact of this aggressive defense is then explored by considering the extent to which the judge became more confrontational toward the defendants as a result of these tactics.

V

Judge Sirica had strongly intended, even before the trial began on October 1, to have former President Nixon appear as a witness during the proceeding. In his memoir, he recalled that he intended to ask some of his own questions to the

former president so that the truth behind the scandal would come out.[43] The defense and prosecution also wanted Nixon to testify, and each side issued subpoenas for the former president to appear in person during the proceeding.[44]

Nixon's health, however, rapidly deteriorated in September and October which made such an appearance unfeasible. On the night of September 8, just hours after Ford announced the Nixon pardon to a shocked public, the former president noticed a stabbing pain that was a classic warning sign of recurring problems associated with phlebitis. Dr. John Lungren, Nixon's personal physician, noticed that his patient's left leg was seriously swollen and warned that this recurrence of phlebitis could be life-threatening because of a possible blood clot in the leg. Nixon, who had neglected earlier signs of this condition during his presidential visits to the Soviet Union and Middle East that summer, again brushed off his doctor's warning and refused to go to the hospital.[45]

Eight days later the swelling worsened. Lungren again insisted that Nixon go to the hospital, and this time, he agreed. There, tests revealed that a blood clot had travelled from the left leg to the lung--a very serious and life-threatening condition. Lungren immediately prescribed anticoagulant medications to shrink the clot, and Nixon was released from the hospital on October 4 in stable condition.[46]

Two-and-a-half weeks later, more swelling appeared in the left leg forcing the former president to be hospitalized a second time. Doctors discovered that surgery was necessary

because numerous blood clots had formed despite the use of medications. Following the procedure, Nixon lapsed into post-operative shock, slipped into a coma, and nearly died. He slowly improved during the next several days and was removed from the critical list despite his weakened condition. He returned to San Clamente on November 14.[47]

Despite these events, the defense attorneys in Sirica's courtroom insisted that their clients could not receive a fair trial without Nixon's appearance in Washington even though they declined to specifically explain why such an appearance was necessary or justified. Haldeman and Ehrlichman's attorneys especially demanded that the testimony take place because they believed that the jury would blame Nixon for the cover-up instead of their clients. Wilson and Frates consequently urged Sirica to grant a continuance in the proceeding until the former president was well enough to be questioned.[48]

The judge, in response to these requests, appointed a team of three physicians to examine Nixon and to report back to the court. Two of the examiners, Nixon later recalled, were visibly embarrassed by the whole episode as they "each took turns poking and pinching and pulling and doing the other things that doctors do during an examination." On November 29, the medical team unanimously concluded that Nixon could not possibly testify either in Washington D.C. before the jury or by deposition in San Clemente because of his weakened condition.[49]

The defense argued, after hearing this report, that the trial could be delayed for as long as necessary to wait for the former president's health to improve. Again, however, the attorneys failed to explain why this request was necessary or why a fair trial for the defendants required Nixon's testimony. Frustrated, Sirica ruled that the trial would proceed on schedule without a continuance, and that Nixon's testimony was unnecessary in the case because of the vast amount of evidence that was already available to the defense.[50] Wilson and Frates immediately planned to appeal this ruling despite the medical team's conclusion. The Court of Appeals later held that Sirica had committed no error by his ruling and that Nixon's appearance would have likely made no difference in the trial's final outcome. The defense's strategy of raising Nixon's appearance as an issue to discredit the judge had therefore failed.[51]

At about the same time that Nixon's ability to testify remained at issue in Sirica's courtroom, a second evidentiary dispute erupted which involved the White House tapes. All along, the prosecution intended to introduce Nixon's recorded conversations into evidence because of the incriminating value of these materials. Because of the lengthy litigation surrounding the tapes that resulted in Nixon's resignation, neither Sirica nor the defense attorneys had any doubt that the conversations would become a key ingredient in the prosecution's case. The nagging problem for the defense, however, was that the prosecution's ability to introduce the

tapes into evidence jeopardized any realistic chance for the jury to acquit the defendants. Their attorneys, therefore, devised a plan to prevent this from occurring and to antagonize Sirica at the same time.[52]

On Wednesday October 23, John Wilson began this strategy during his cross-examination of John Dean. For several days, Dean had testified that Haldeman and the other defendants had participated in the Watergate cover-up from the very beginning. These allegations were confirmed when the jury listened to several of the White House tapes that the prosecution had introduced into evidence. Concerned that these tapes were damaging to his client Haldeman, Wilson attacked the credibility of the recordings and printed transcripts which enabled the jurors to read and listen to the conversations simultaneously. His method for doing so, however, came as a complete surprise to Judge Sirica. During his cross-examination of Dean that Wednesday, Wilson asked a series of questions regarding a taped conversation between the president and Dean on February 27, 1973 that the prosecution did not intend to introduce into evidence. Nixon's former counsel then acknowledged on the stand that prosecutors had earlier requested that he vouch for the accuracy of this conversation because of apparent discrepancies between the tapes and Dean's recollection of the dialogue during his testimony before the Watergate Select committee in 1973. He further explained to the court that he could not make the voucher because his recollection continued to differ from the

recording which led to the prosecution's decision not to introduce the tape into evidence.[53]

At this point during the cross-examination, Sirica sent the jury out of the courtroom so that he could determine whether Wilson's line of questioning was appropriate because the February 27 tape was not at issue. Dean then told the judge that his testimony before the Select committee was indeed accurate and that the tape from February 27 had not recorded the entire conversation which made it incomplete. Specifically, Dean stated that the tape--as well as the printed transcript of the recording--did not include Nixon's characterization of Haldeman and Ehrlichman as "principals" in the Watergate cover-up which he insisted had been made during this conversation. Wilson, hoping to undermine Dean's damaging testimony and to create an impression that Nixon had tampered with the tapes, told Sirica that he wished to continue his line of questioning and that he intended to attack the credibility of all tapes because of the possibility that evidence had been destroyed. The prosecution objected and repeated its position that the February 27 recording would not be introduced into evidence during the government's case which made Wilson's line of questioning irrelevant.[54]

Sirica, hoping to reach a compromise, allowed Wilson to continue his cross-examination but ruled that the prosecution could question Dean before the other defense attorneys had the opportunity to do so. Wilson objected and declared that the judge was required to allow each defense lawyer to question

Dean before allowing prosecutors to approach the witness. This objection irritated Sirica because he now believed that Wilson had a hidden agenda of creating as much disruption as possible in the courtroom. "I felt he was trying to annoy me as much as possible by objecting and objecting and arguing and arguing," he later wrote. "Any lawyer can make any objection he sees fit. The judge rules on the objection. The lawyer has then made his record clear and can use that record to fashion an appeal after the trial is over. But Wilson never quit."[55]

Sirica refused to modify his ruling, but Haldeman's attorney persisted anyway. "If the prosecutor wants to lead you into error," he charged, "that is his business. I want a fair trial here. I want to try to save you from error, although it may be to our advantage for you to commit error....all I can do is to call [the ruling] to your attention that it is error and put it in my error bag which is getting bigger and bigger." Convinced that Wilson was trying to lead him into error despite his claim to the contrary, Sirica refused to budge. "If this case gets to the court of appeals and if I commit error, I am sure the court of appeals will correct it at the proper time. I do what I think is right. I don't have one eye on the court of appeals when I make a decision."[56]

Not surprisingly, the admissibility of the White House tapes ultimately reached the court of appeals in 1976. At that time, Wilson argued that the recorded conversations

should not have been introduced at trial because, among other things, Richard Nixon did not consent to the interception of the conversations even though he installed the taping system in the first place. Wilson also declared that the recordings were simply unreliable because of the theoretical possibility that the president or his aides had tampered with the materials. The panel of judges rejected these claims. "The determination of a District Judge to admit tape recordings rests in his sound discretion," the majority held. "The decision in this case to admit the tapes, leaving to the jury the question of their weight, falls far short of an abuse of that discretion." With this ruling, the defense again failed to discredit Sirica as a means to exonerate the defendants. More importantly, the defense attorneys were unable to demonstrate--both at trial and during the appeal--that Sirica's decision regarding the admissibility of the tapes had jeopardized their clients' rights to a fair trial.[57]

As the defense continued to challenge and confront Judge Sirica, the prosecution continued to present its case before the jury. During this phase of the trial, some 130 documents and pieces of physical evidence were introduced in addition to the numerous witnesses who testified that the five defendants had covered up the administration's Watergate involvement. In his memoir, Sirica recalled that John Dean's nine-day testimony and the White House tapes especially damaged the defense because of the general consistency between Dean's responses and the recorded conversations which were introduced

into evidence. The opportunity for the jury to listen to the tapes in their entirety, according to Sirica, aided the prosecution because of the vivid details with which the participants of these conversations discussed the cover-up and other aspects of Watergate. Over the defense's objection, the judge permitted portions of the tapes to be played that contained discussions between Nixon and Dean over Sirica's handling of the break-in trial. Dean, in one instance, remarked that the judge was a "peculiar animal" because of his harsh sentencing of E. Howard Hunt that had been handed down in the aftermath of his wife's death in a plane crash the previous December. Nixon agreed. "That son-of-a-bitch gave him thirty-five years," he exclaimed. This conversation, in the context of over twenty hours of tapes that the prosecution played to the jury in court, convinced Sirica that the defense faced an uphill battle to exonerate the defendants in his courtroom.[58]

Because of this mounting evidence, the defense's attempt to discredit Sirica continued. William Hundley, for example, began his defense of Mitchell on November 26 by entering a motion for severance from the case on grounds that the judge had improperly permitted Haldeman and Ehrlichman to portray the former attorney general as the architect of Operation Gemstone. Sirica denied the motion. Shortly thereafter, Huntley objected to the judge's decision to permit Mitchell's testimony before the Select committee to be introduced at trial on grounds that the ruling violated the hearsay rule.

Sirica overruled the objection and allowed the introduction of this evidence because the traditional prohibition against hearsay was inapplicable in this instance and the jury needed to know about Mitchell's testimony in order to determine whether he committed perjury as the prosecution charged. During Ehrlichman's defense, Frates renewed his attack on Sirica when he accused the judge of improperly allowing the prosecution to discuss his client's involvement in the Fielding break-in on grounds that this information was prejudicial to his client and that the Watergate cover-up was not "directly related" to the Ellsberg affair.[59]

A final noteworthy example of the defense's confrontational tactics to discredit Sirica was Wilson's objection to the judge's jury instructions. This illustration is particularly significant because it reveals that the defense resorted to frivolous claims as a means to divert the court's attention from the more substantive issues of the proceeding as much as possible. Wilson's specific objection here concerned Sirica's definition of "corroboration" just before the jury was sent out to deliberate. The judge, in explaining this concept to the jury, stated that a verdict of not guilty was required if the prosecution has "presented only one witness who has testified to the falsity of a defendant's Senate testimony, and no independent corroborating evidence of the falsity of the defendant's testimony." This instruction, according to Wilson, constituted reversible error because Sirica had not instructed that the "corroborative evidence

necessary to sustain a perjury conviction is that which tends to show the perjury independently." Sirica overruled the objection because he did not find any significant difference between the two definitions. This ruling, as were as Sirica's earlier denials to requests and objections from the defense, were reviewed by the Court of Appeals in 1976 and were denied. Again, the defense failed to demonstrate that Sirica had erred during the trial or that his handling of the proceeding had jeopardized the defendants' right to a fair trial.[60]

VI

In his recollection of the 1973 break-in trial, Sirica described his frustration when prosecutor Earl Silbert declined to broaden the scope of his case beyond the seven men who were accused of committing the Watergate burglary. He became especially appalled and willing to respond when witness after witness blatantly lied on the stand when asked about the possibility of White House involvement in either planning the break-in or covering up CREEP's involvement of the incident. "I'm sorry, I don't believe you," the judge scolded the four Miamians when they claimed that the cash in their possession had not originated from the Committee to Re-Elect. Because of the McCord letter, which became the first tangible piece of evidence that linked higher-ups to the scandal, Sirica imposed lengthy provisional sentences on the defendants to coerce them to cooperate with the FBI and prosecutors so that the case could be solved in a speedy manner.[61]

During the cover-up trial, Sirica was no less concerned that the administration's full Watergate involvement was not being revealed or discussed in his courtroom. On one occasion during the lengthy proceeding, he remarked out of frustration--amidst Wilson's attempt to disrupt him--that the trial's fact-finding mission had not yet been completed despite the prosecution's effort's thus far. "What we are trying to get, members of the jury, is the truth of what happened....You can sum up the case in one little word at the proper time--an objective finding by the jury of the truth, T-R-U-T-H. That is what we are trying to find out about the whole picture.[62]

This admonition, however, did not prevent the defendants from covering up their own Watergate involvement. One by one, each of the five men denied any criminal behavior in the scandal and blamed others for the wrongdoing that occurred. Yet despite these persistent denials, and the defense's ongoing attempt to disrupt and discredit the judge, Sirica exercised greater restraint in terms of confronting the defendants than he had been during the break-in trial. Moreover, his reputation as a tough judge who handed down maximum prison sentences and fines did not apply to the trial of the former White House and campaign officials. Several developments and events during the proceeding illustrate this relative lack of confrontation and reluctance to issue harsh sentences in this case.

First, Sirica declined to question four of the five defendants as well as witnesses whom he believed to have lied

on the stand. His only major confrontation occurred during John Mitchell's testimony which began on November 26. That day, the former attorney general and director of the Nixon re-election campaign adamantly denied that he approved of the Watergate break-in or that he had later covered up the incident to protect the president. More specifically, Mitchell insisted that he had not participated in the payment of hush money to the burglars in general or to E. Howard Hunt in particular. With these denials, Sirica sent the jurors back to their motel and began examining the witness himself. Why, he asked, had $429,500 been paid to the burglars unless the Committee to Re-Elect had "some obligation to these people?"

Mitchell replied that he did not know; he was still trying to solve this puzzle himself. "I can't enlighten you, your honor," he stated. "I didn't start it. I didn't make the decision. I didn't have anything to do with it."

The prosecution objected and declared that the record of the trial thus far indicated that Mitchell had indeed participated in the cash payments. Sirica, however, already knew that Mitchell was involved in this scheme. He resumed his questioning.

"Why was it necessary," the judge asked, "to give all these thousands of dollars unless something was done for that committee....Why didn't someone say, 'Why do we owe you anything?'"

"I haven't got a satisfactory answer yet in my own mind,"

Mitchell responded. "I haven't been able to understand why all these thousands and thousands of dollars had to be given to these men who broke into Democratic national headquarters unless there was some obligation or unless there was something wrong."

Sirica never asked what it was that could have gone wrong. Instead, he turned the questioning back to the attorneys and directed the proceeding to continue. As the remaining defendants appeared on the stand to deny their complicity in the cover-up, the judge refrained from interrupting their testimonies altogether. This restraint, when compared with the judge's frequent interruptions during the break-in trial, indeed revealed a less confrontational demeanor toward defendants who refused to testify to their complete knowledge of the scandal and the degree of White House involvement in it.[63]

A second illustration of this restraint was Sirica's dismissal of two of the charges against Mitchell and Ehrlichman even though he believed that they had likely violated the laws in question. The judge made this decision on November 25--one day before his questioning of Mitchell--when he threw out charges that Mitchell and Ehrlichman had lied to the FBI during its investigation of the Watergate break-in. His reasons for doing so, Sirica explained to the court, was his distaste for the statute under which the two men were charged because its provisions threatened five-year prison terms for making unsworn false statements to FBI

agents. The prosecution, surprised that Sirica would make such a decision in light of his reputation, declined to challenge the ruling because of the numerous criminal charges that remained. In his memoir, Sirica vaguely wrote that his dismissal of the two charges was made for "technical reasons." These reasons, however, reduced the likelihood that Mitchell and Ehrlichman would face lengthy prison sentences in the event of conviction.[64]

Finally, Sirica's sentencing in the cover-up case also revealed his reluctance to punish the defendants for failing to explain their complete knowledge about the Watergate scandal during the trial. The convictions which produced these sentences were handed down by the jury on January 1, 1975 after sixty-four days of trial and just two days of deliberations. That day, Mitchell, Haldeman, Ehrlichman, and Mardian were convicted on all remaining counts for their roles in the Watergate cover-up; Parkinson, who was the least involved of the five defendants, was acquitted. Relieved that at least some justice had finally been realized in the case, Sirica thanked the jurors for their service and advised them not to speak to reporters on their way out of the courtroom. He vacated his gag order which prohibited the attorneys from talking to the media and adjourned the proceeding at 5:03 that afternoon.[65]

On Friday February 21, the defendants faced Sirica one last time for sentencing as their attorneys made final pleas for leniency. John Wilson, for instance, reminded the court

that Nixon had also participated in the Watergate cover-up and that any prison sentence imposed on Haldeman would constitute a greater penalty than the former president would ever endure. Ira Lowe, a young attorney who was recently retained by Ehrlichman, requested that his new client be sentenced to public service work among Native American communities in New Mexico instead of prison. Lowe explained that his recommendation was fair to both society and to Ehrlichman because public service would not "cost the taxpayers a peso." Shrugging his head at this rationale, William Hundley declined to make a statement on behalf of Mitchell and told Sirica that he wanted to get the sentencing over with as quickly as possible. Mardian's attorney also declined to issue a statement.[66]

Before pronouncing sentence, Sirica explained that he had given "careful and serious thought" to the appropriate sentences by considering several factors for each convicted defendant in this case: the possibility of rehabilitation, the extent to which incarceration would protect society and attain justice, and the deterrent effect that would likely result from the penalties handed down. That said, the judge sentenced Haldeman, Ehrlichman, and Mitchell to a prison terms of 2 1/2 to 8 years; later, he reduced the penalties to one to four years because of favorable reports from probation officers indicating that the three men expressed "sorrow and regret" for their crimes. Mardian was sentenced to ten months to three years imprisonment but was released in 1976 when the

Court of Appeals overturned his conviction on grounds that damaging evidence from Haldeman, Mitchell, and Ehrlichman justified a severance from the case. Although each of the defendants complained that Sirica had imposed harsh sentences that were unjustified in this case, he could have imposed as much as twenty-five years imprisonment on Haldeman, Mitchell, and Ehrlichman for their role in the Watergate cover-up. Mardian could have received up to fifteen years for his lesser involvement in the scandal.[67]

With hindsight, then, it is clear that Sirica's posture toward the defense during the cover-up trial was relatively less confrontational and more restrained than his activist and interruptive approach during the break-in trial even though the defendants in both proceedings refused to reveal their complete knowledge of Watergate in court. Explaining the reasons for this shift in demeanor is a delicate issue because Sirica never acknowledged that such a change had occurred. Instead, he simply informed his readers why individual decisions were made and left any remaining questions open to interpretation.

Irregardless of whether his posture differed between the two trials at all, it is certain that any explanation of Sirica's degree of severity or confrontation towards criminal defendants must consider not only the circumstances surrounding the particular case at issue but also the reasons why his reputation as "Maximum John" emerged in the first place. Throughout his tenure as district judge, Sirica

established a pattern of maximum sentencing when criminal defendants remained unrepentant of their wrongdoing despite overwhelming evidence that led to their convictions at trial. To a lesser extent, he tended to stiffen the penalty when guilty individuals refused to cooperate with investigators in their respective cases or when defendants and their lawyers abused Sirica's courtroom during any of the proceedings prior to sentencing. There is no dispute that unrepentence and a lack of cooperation with federal investigators--despite the guilty pleas of the four Miamians--were noticeable factors during the break-in trial of 1973, and these are two obvious explanations for the judge's decision to impose lengthy provisional sentences on the defendants during that proceeding.

Too much, however, can be made from these explanations. To an even greater extent than the break-in trial, unrepentence and a lack of cooperation with investigators persisted throughout the cover-up trial as defense lawyers attempted to undermine Sirica's credibility. While it is true that the judge's reduction of the sentences occurred because of favorable probation reports indicating that Haldeman, Ehrlichman, and Mitchell appeared remorseful, the initial penalties of 2 1/2 to 8 years were substantially lighter than they could have been because of the serious crimes for which these three men had received convictions. It is misleading, therefore, to suggest that non-cooperation and unrepentence alone can explain Sirica's contrasting demeanors during the

two criminal trials of Watergate.[68]

Other factors, however, played a more decisive role. In terms of Sirica's degree of restraint prior to sentencing, two developments were especially influential. First, Earl Silbert was noticeably passive during the break-in trial, in sharp contrast to Ben-Veniste and his colleagues, which prompted Sirica to assume an activist role during the first proceeding. The judge's specific complaint, as discussed in chapter three, was that Silbert refused to consider the possibility of a cover-up and to broaden the scope of his inquiry to White House officials. This frustration is clear in Sirica's recollection of this episode:

> I think Silbert was naive and somewhat inexperienced. I don't think it ever occurred to him that people like John Mitchell, Jeb Magruder, and Herbert Porter would lie before a grand jury....I also think Silbert was too trusting of his superiors in the Justice Department. After the break-in trial, when Silbert was bringing witnesses before the grand jury in his investigation of the cover-up of the break-in, he appeared one day in my office and asked if I would permit the grand jury to leave the courthouse to take a witness's testimony. Without asking why, I said no. "Bring the witness here," I told him. He then said he had hoped that would be my answer. He later told me that the witness in question was John Mitchell, scheduled in the spring of 1973 for his second appearance before the grand jury. Silbert told me the request had come to him from Henry Petersen, head of the criminal division in the Justice Department. Had I been in Silbert's shoes that spring, I'd have said no to Petersen myself.[69]

In sharp contrast to Silbert's conservative approach to trying cases, Ben-Veniste, James Neal, and the other members of the prosecution assigned to the case were highly aggressive and confrontational during the cover-up trial of 1974 and 1975. Sirica was especially impressed with Neal because of his thoroughness. "He seemed prepared for every turn of events," the judge later wrote. "Not a single legal question arose that he hadn't apparently anticipated and had ordered researched by his staff.... More than any other lawyer in the case, it was Neal who dominated the courtroom." Because of this aggressiveness and thoroughness, Sirica had little reason to interfere with the questioning of witnesses or to admonish the defendants for denying any wrongdoing during their testimonies. The prosecution's competency, therefore, encouraged Sirica to exercise restraint during the trial and to instead establish the parameters of the procedure while each side confronted each other in the presence of the jury.[70]

In addition to the prosecution's tactics, the availability of the White House tapes as evidence also increased Sirica's reluctance to confront the defense. Unlike the break-in trial which lacked the introduction of any evidence pointing to a White House cover-up, the existence of the tapes to be used as evidence against Nixon's former associates seemed to clinch the prosecution's case as far as Sirica was concerned. "The jury and the court heard the whole thing--the profanity, the scheming, the plotting, the development of false stories as one layer after another of the

cover-up began to disintegrate....It was a solid case so difficult to defend that I really couldn't imagine what the defendants' lawyers would or could do."[71] Given the incriminating nature of the taped conversations, Sirica had little reason to fear that the details of the Watergate cover-up would not be enunciated in his courtroom during the trial; as a result, there was no justifiable need for him to confront the witnesses as a means of uncovering the scandal. The tapes spoke for themselves.

Finally, Ford's pardon of the former president contributed to Sirica's relative leniency toward the defense during the cover-up trial--particularly with respect to his sentencing of Haldeman, Mitchell, Ehrlichman, and Mardian. In this context, it is important to once again emphasize that Sirica strongly opposed Ford's unpopular decision in early September, 1974--just weeks before the cover-up trial began. The judicial process, according to the judge, had not run its course because of the pardon. Although the grand jury was fully prepared to indict Nixon outright in March 1974, Jaworski and Sirica had favored postponing such an action because the president remained in office and the impeachment process had not reached its conclusion. Nixon, however, escaped impeachment and removal from office by resigning, an act which permitted him to maintain secret service protection and a budget to maintain an office. Once Nixon left the presidency, the special prosecutor's office was prepared to recommend an indictment from the grand jury, but Ford's pardon

once again--according to the judge--blocked any real attempt to hold him accountable for his participation in the Watergate cover-up and other criminal conduct during his administration.

In his memoir, Sirica boldly asserted that Nixon should have been indicted immediately after leaving the White House. "And then," he concluded, "no matter how long it took, [the former president] should have stood trial. I take this view not because I would wish any more suffering on Nixon and his family, but because I feel it would have been better for the country if the legal process had been allowed to run its course....I would feel better knowing that the final processes of our system of justice had been permitted to function."[72]

Of course, the judge never asserted that the pardon contributed to his relatively light sentences that he imposed on the four cover-up defendants who were convicted. Such a causation, however, nevertheless existed. According to Sirica, Nixon was primarily responsible for Watergate because he had created the conditions within the administration that encouraged and facilitated the scandal to emerge. His subordinates, though undoubtedly guilty of serious criminal wrongdoing, had simply acted in a manner that was considered acceptable because of Nixon's direction, pressure, and encouragement from above. And yet, argued Sirica, the former president was "not treated in the same way as the other defendants....His associates served time in jail. He received a large government pension, and retired to his lovely home in San Clemente. I think people still wonder whether the concept

of equal justice under law really applies if one climbs high enough in terms of wealth, power, or influence. All of my life as a lawyer and judge, I have tried to make the idea of equal justice mean something. I have always tried to treat white collar criminals like other criminals. It still bothers me that Richard Nixon escaped that equal treatment."[73]

Given this perspective and frustration, it is not at all surprising that Sirica imposed substantially less than maximum penalties on the cover-up defendants and that he lowered their sentences even further later on. Had Nixon been awaiting trial at that time, it is not likely that these decisions would have been made because of the judge's reputation and history of handing down maximum penalties to convicted individuals who refused to tell the whole truth in court. The pardon, therefore, had a significant influence on Sirica's actions as the Watergate case finally came to an end.

This influence, and the circumstances surrounding Gerald Ford's pardon of the former president, reveals what may have been the greatest paradox of the entire Watergate drama. President Ford, believing that the pardon was necessary to end the trauma and to heal the nation, made a decision that drained Sirica's determination to punish wrongdoing in as rigorous a fashion as he had since his appointment to the federal bench in 1957. Sirica's conscientiousness as a jurist was not enough to produce equal justice under the law in the Watergate case.

1. John Ehrlichman, Witness to Power (New York: Simon and Schuster, 1982), p. 395.

2. Ibid., pp. 395-98.

3. During the trial, for instance, Sirica sealed off the courtroom from the press during voir dire by covering the windows with paper; this guaranteed at least some level of privacy so that the prospective jurors could feel free to answer the judge's questions honestly.

4. United States v. John Mitchell, et al., 559 F.2d 31.

5. Sirica, p. 242.

6. Ibid.

7. Ibid.

8. Leon Jaworski, The Right and the Power (New York: Pocket Books, 1977), pp. 109, 115-20.

9. Ibid., pp. 130-43.

10. Charles W. Colson, Born Again (Old Tappan: Chosen Books, 1976), pp. 225-32; Jaworski, pp. 187-88.

11. Jaworski, p. 302.

12. Richard Ben-Veniste and George Frampton, Jr., Stonewall: The Real Story of the Watergate Prosecution (New York: Simon and Schuster, 1977), pp. ; Sirica, pp. 242-43.

13. Sirica, p. 243. Privately, Sirica suspected that the defense believed that the he would insist on a fair trial but that the sentences would be unreasonable given the stiff prison terms imposed on the Watergate burglars. These suspicions were later confirmed when John Wilson, attorney for H. R. Haldeman, approached Sirica in his chambers with Jaworski during the beginning of trial and offered to enter a guilty plea if the judge would specify the sentence that would follow. Sirica refused to involve himself in any type of plea bargaining; as a result, Haldeman decided to return to court hoping for an outright acquittal. See Jaworski, pp. 324-25 and Sirica p. 244.

14. Ben-Veniste, pp. 316-17.

15. Sirica, pp. 244-45; Jaworski, p. 293.

16. Sirica, pp. 244-45; Jaworski, pp. 324-27.

17. Gerald R. Ford, A Time To Heal (New York: Harper & Row, 1979), pp. 156-57.

18. Cannon, p. 371.

19. Ford, pp. 157-59.

20. Ford, p. 159.

21. Jaworski, pp. 290-92.

22. Ford, pp. 177-78.

23. Ibid., pp. 178-79; NYT cite.

24. Sirica, p. 234.

25. Ibid., p. 235.

26. Ibid.

27. Jaworski, pp. 294-301; Ben-Veniste, p. 317.

28. Ford, p. 160.

29. For a good discussion of Richard Nixon's legal battles after his resignation from the presidency, see his In the Arena: A Memoir of Victory, Defeat, and Renewal. (New York: Simon and Schuster, pp. 19-45.

30. Sirica, pp. 262-63; Ben-Veniste, pp. 319-20.

31. Sirica, p. 263.

32. "Cover-up Trial Begins: 90 Potential Jurors Balk At Serving." Washington Post, October 2, 1974, pp. A1-3; Sirica, p. 263; Ben-Veniste, pp. 320-21.

33. Ten of the defense's challenges were allocated to the five defendants as one collective unit; this required the attorneys to coordinate their strategies during this intricate process. The remaining peremptories were exercised by each defendant on his own. See "Juror Challenges Limited by Sirica." Washington Post, October 5, 1974, p. A3.

34. Ben-Veniste, p. 326.

35. Helen Pratt, a retired maid with an unidentified political affiliation, was chosen as an alternate juror and replaced Plunkett, without explanation from the court, during the first day of opening arguments.

36. "Jury Selected For Watergate Cover-Up Trial." Washington Post, October 12, 1974, pp. A1-8.

37. Jaworski, pp. 256-57.

38. "Nixon Took Part in Cover-Up Plot, Prosecutor Says: Jury Is Told Of $400,000 Hush Money." Washington Post, October 15, 1974, pp. A1, 16; Ben-Veniste, pp. 339-40; Sirica, p. 268.

39. Washington Post, October 15, 1974, pp. A1, 16; Ben-Veniste, p. 340.

40. "Ehrlichman Accuses Nixon of Lying." Washington Post, October 16, 1974, pp. A1, 8.

41. Ibid., p. 8.

42. Ben-Veniste, pp. 341-42.

43. There was little doubt in Sirica's mind that Nixon would tell the truth as a witness in the cover-up trial because President Ford's pardon did not include such crimes as perjury or any other illegal acts committed after the resignation.

44. Sirica, p. 287; Ben-Veniste, p. 338.

45. Richard Nixon, In The Arena, p. 22.

46. Ibid.

47. Nixon, pp. 22-24.

48. United States v. Haldeman, 559 F.2d 31 (1976) at 80-81.

49. Nixon, p. 24.

50. The prosecution accepted Sirica's ruling without comment.

51. 559 F.2d 31, 82-88; "Sirica Picks 3 Doctors to Check Nixon." Washington Post, November 14, 1974, pp. A1, 18.

52. Sirica, p. 272; "Sirica, Defense Clash: Haldeman's Lawyer Calls Ruling Unfair." Washington Post, October 24, 1974, pp. A1, 10.

53. Ibid.

54. Ibid.

55. Sirica, p. 272.

56. Ibid., pp. 272-73.

57. 559 F.2d 31, 109.

58. Sirica, pp. 279-80.

59. 559 F.2d 31, 88-97.

60. Ibid. at 97-104.

61. Sirica, pp. 63-81, 117-19.

62. "Sirica Seeks 'Truth.'" Washington Post, October 28, 1974, pp. A1, 6.

63. "Sirica Quizzes Mitchell on Payments in Watergate Break-in." Washington Post, November 27, 1974, pp. A1, 10.

64. "Mitchell Denies Cover-Up." Washington Post, November 26, 1974, pp. A1, 6; Sirica, p. 280.

65. "Mitchell, Haldeman, Mardian, Ehrlichman Guilty on All Counts: One of 5 Defendants In Cover-up Trial, Parkinson, Cleared." Washington Post, January 2, 1975, pp. A1, 8.

66. "3 Get 2 1/2 to 8 Years in Cover-Up." Washington Post, February 22, 1975, pp. A1, 4.

67. Ibid.; Sirica, pp. 293-94.

68. Another possible cause--Nixon's departure from office--is also problematic as an explanation for the contrast. Though relieved by the president's resignation and fully aware that the White House cover-up could not continue, no evidence suggests that this relief changed Sirica's view of the case or prompted him to exercise more restraint toward the defense during the latter trial.

69. Sirica, pp. 84-85.

70. Ibid., p. 261.

71. Ibid., pp. 279-80.

72. Ibid., p. 235.

73. Ibid.

CHAPTER SEVEN

CONCLUSION

I

John Sirica continued his service as federal district judge after his involvement with the Watergate proceedings ended. Though suffering a near fatal heart attack in his chambers on February 5, 1976, he continued to preside over criminal and civil cases--albeit on a part-time basis--until his retirement in September 1986 at the age of 82.[1] Although his entire career spanned more then sixty years as a lawyer and judge, only Sirica's three-year involvement with Watergate sparked the nation's attention and transformed him into an American folk hero because of his relentless and well-publicized pursuit of justice and accountability. How can his role during the Watergate period be assessed historically after more than twenty years since President Nixon's resignation?

In the final chapter of his memoir, Sirica argued that patriotic duty was the primary contribution made by individuals, like himself, who confronted the Nixon administration and exposed the crimes that were committed. "I hope we have learned the value of citizens who do their duty, who do the work set out for them by our laws and our system of government," he wrote. "Like the scores of common citizens

who served unselfishly on the grand juries and trial juries in the Watergate cases, or the lawyers who prosecuted and defended in those cases to the very best of their ability.... the so-called heroes of Watergate were no more than people doing what was right, doing their jobs whether they were scared or exhausted or being criticized, or were all alone." Sirica believed that it was this commitment that made his own participation personally fulfilling and significant between 1972 and 1975. "I think I did do something for my country," he concluded. "I think I did my job as best I could. I think I did my duty as a citizen and as someone fortunate enough to hold a position of public responsibility in our system of government."[2]

This assessment, while illustrative of Sirica's views and perspectives after his involvement in the proceedings ended, leaves two issues unresolved under consideration in this study: first, what were the dimensions of, and the reasons for, Sirica's historical significance within the context of Watergate? and second, how can the judge's role during this period illuminate our contemporary understanding of the scandal that drove Richard Nixon from office in 1974?

Throughout the Watergate episode, and during the three to four years following the conclusion of the cover-up trial, few Americans seriously questioned Sirica's significance as a judge whether they approved or disapproved his decisions. The judge's "Man of the Year" recognition from Time in 1973, his nine honorary degrees from colleges and universities, his

twenty-two awards from various legal organizations and associations, the "Draft Sirica for President" organization in 1976, and the wide circulation of his autobiography all suggest that his Watergate role was indeed considered important and influential at the time.

With hindsight, it is clear that Sirica was historically significant as well because of the enormous impact that directly resulted from his decisions and rulings during the break-in trial in 1973, the battle for the White House tapes from July of that year until Nixon's resignation, and the cover-up trial in 1974 and 1975. The judge's confrontation with the Watergate burglars, for example, occurred in large part because he realized that Earl Silbert had not prepared his case thoroughly or sufficiently. This confrontation, combined with the likelihood that Sirica would impose lengthy provisional sentences on the defendants, contributed to James McCord's confession that higher White House and campaign officials had engineered a multi-faceted cover-up of the June 1972 break-in. Although Sirica credited McCord for this revelation and wrote that the Watergate case would "never have been broken" if he had "elected to stand pat," McCord acknowledged in his own memoir and in the letter itself that the probability of harsh sentencing led to his willingness to confess. Once the letter was revealed to the public, Sirica recalled, the "parade of people trying to protect themselves began. This was the beginning of the end." Sirica's contribution to this result is clear indeed.

A second source of the judge's historical significance were his rulings, beginning with the decision on August 29, 1973, that ordered President Nixon to submit recorded White House conversations to the federal district court for inspection. Had these rulings not been issued, it is virtually certain that the administration would have succeeded in keeping the tapes secret, and this lack of disclosure would have prevented the likelihood of impeachment and conviction of the president in 1974. Of course, Sirica's decisions are important not only for what they ordered but why they were made. Legal precedent, the administration's widespread illegal activity which was unrelated to national security, and the grand jury's criminal investigation all contributed to Sirica's thorough and well-researched decisions that required disclosure of the tapes. The significance of legal precedent, and Sirica's adherence to the Supreme Court's rulings on the issue of presidential power, are especially evident when judicial confrontations with the executive branch are considered historically. Between 1790 and 1956, for example, the Supreme Court adjudicated approximately 800 cases dealing with presidential power. Of these, only thirty-eight, or less than five percent, were decided against the president. The Supreme Court, therefore, has expanded, rather than contracted, presidential authority in many instances.[3]

This has been especially true when national security issues needed to be resolved. The Supreme Court, for instance, decided that the president's war powers are

virtually unreviewable; that these powers may be extended into postwar periods; that he may order the execution of aliens; that 100,000 Japanese-Americans may be relocated and confined; and that the Gulf of Tonkin Resolution constituted sufficient congressional ratification for continued American combat in Vietnam.[4]

The Court, however, has ruled against presidents on matters not related to national security. Thus, it decided that specific provisions of the New Deal were unconstitutional; that the president does not have an unlimited ability to dismiss independent agency commissioners; that Harry Truman could not legally order the federal government to seize major steel mills during a strike; and that the president does not have unlimited discretion to refuse to spend money appropriated by Congress.[5]

Also unrelated to national security was Watergate. Despite Nixon's assertions to the contrary, his administration participated in Watergate solely for domestic political purposes. This factor, in addition to the extensive criminal conduct of the White House, contributed to Sirica's decision which compelled an incumbent president to do an affirmative act. Because of the established legal doctrines on the issue of presidential power and the executive privilege as discussed in chapters four and five, it is not at all surprising that the Supreme Court upheld Sirica's rulings on the tapes in U.S. v. Nixon.[6]

It has occasionally been suggested that the legacy of

"Earl Warren liberalism" contributed to the activist demeanor of the judiciary during Watergate. This is a misleading assumption. In U.S. v. Nixon, each Nixon appointee, except William Rehnquist who did not participate, voted against the president. Judge Sirica, who had participated in Republican Party politics and voted for Nixon, certainly did not have a strong liberal reputation within the federal judiciary. Moreover, the Warren Court limited its judicial activism to civil rights, criminal procedure, and first amendment issues; its legacy does not include confronting executive presidential power. Although it invalidated numerous state and local laws, the Warren Court was reluctant to challenge presidential decisions during its tenure despite the increased powers of the executive branch during its tenure. Legal precedents dating from the late eighteenth to the twentieth-centuries, not Warren Court liberalism, contributed to Sirica's decisions which mandated disclosure.

As was suggested in chapter five, Judge Sirica occasionally overreacted to Richard Nixon's handling of Watergate during the second phase of the tapes litigation, and he specifically believed that the president had destroyed or tampered with recorded conversations when evidence failed to support this claim. In this respect, the judge's personal feelings and reactions differed little from the American public at large which also distrusted the White House rather severely after Archibald Cox's dismissal on October 20, 1973. Although Sirica's emotions sometimes led to impulsive

reactions from the bench--as illustrated by the sudden appointment of a panel of experts with dubious credentials to investigate the eighteen-and-a-half minute gap--his adherence to legal precedents and federal statutes enabled the administration to receive a fair hearing throughout the litigation. Sirica's impulsiveness, in short, was tempered by his conscientiousness and professionalism.

Finally, the judge's Watergate role is historically significant because of his handling of the cover-up trial. To be sure, his specific actions throughout this proceeding had little impact on events outside the courtroom because of Nixon's resignation and the end of the constitutional crisis associated with Watergate. It is important to emphasize, however, that the trial occurred at a time when the public's disillusionment with government became especially high because of the scandal. Gerald Ford's pardon of his predecessor, however justified it may have been, re-enforced this disillusionment because it created an appearance that the cover-up was continuing even after the collapse of the Nixon administration. The criminal trial of the former president's associates, and Judge Sirica's competent and visible handling of the proceeding, demonstrated that at least some justice was still attainable and that the judiciary was still capable of functioning well despite the trauma of Watergate. This significance was realized by Sirica both before and after the cover-up trial began. "I thought beforehand, and I believe even more strongly now," he wrote, "that this was probably the

most important criminal trial ever conducted in this country. That meant that not only were the president's lieutenants on trial, but so were the courts themselves. The nation was watching to see if justice would be done, if a fair and final verdict would be reached. In a sense, I felt I faced almost as much of a trial as did Mitchell, Haldeman, Ehrlichman, and the others."[7]

As was pointed out in chapter six, the competencies of the prosecution and overwhelming evidence against the defendants primarily contributed to four convictions in January 1975. Unlike the break-in trial, Sirica had little need to confront the defense or to interrogate witnesses at length because the jury received sufficient evidence to reach balanced verdicts without interference from the bench. Sirica's role, however, was nevertheless important because his conscientiousness and thoroughness prevented reversible errors from occurring despite the politically charged atmosphere and the defense's attempt to undermine the judge's credibility. In the end, Sirica's reduction of the sentences demonstrated that he was not an inquisitional judge who unfairly imposed harsh sentences in an arbitrary manner; his reputation as Maximum John did not accurately describe the judge's handling of the cover-up trial or severity of the sentences imposed.

II

To what extent can Judge Sirica's involvement in the Watergate proceedings contribute to an insightful and complete understanding of the constitutional dimensions of the scandal

that drove President Nixon from office? More specifically, does the judge's role during the Watergate episode support or discredit interpretations of the scandal that have been articulated by various scholars since 1974? To answer these questions, it is helpful to briefly consider sociologist Michael Schudson's 1992 study, Watergate in American Memory, which explores the many ways the public's attitudes regarding the Nixon administration have changed over time. One observation the author makes is that four constructions of Watergate have emerged in the American psyche which explain 1) how and why the Watergate scandal occurred, and 2) the appropriate lessons that can be drawn from the experience. The two dominant constructions, Schudson argues, are conservative and liberal constitutionalism. The former, held by opponents of post-Watergate legislative reforms that were enacted during Ford's presidency, may also be labeled "The System Worked" constitutionalism because it argues that Watergate demonstrated the ability of American political and legal institutions to respond to serious scandals that occasionally emerge. Because of the inherent durability of these institutions, no special safeguards, like electoral reform or judicially-appointed special prosecutors, are necessary to prevent future Watergates from occurring; the Constitution and the values it espouses are sufficient.[8]

Liberal constitutionalism, by contrast, suggests that the "system almost did not work" because the lawlessness of the Nixon White House abused democratic institutions that are

frequently weakened by human error and frailty. Good luck and the diligence of public servants, however, forced the president and his subordinates to be held accountable for their wrongdoing which led to the downfall of the administration. "Our system worked," Walter Mondale wrote, "but it worked only with the aid of a good deal of luck and a great deal of hard work." Recognizing that Nixon's cover-up nearly succeeded, liberal constitutionalists have advocated electoral reforms--such as those that were enacted between 1974 and 1976--to prevent serious political abuses and corruption from recurring in the future.[9]

The remaining constructions of Watergate, proposed by the radical Right and Left, emphasize that the scandal represented a mere symptom of deeper and more fundamental weaknesses in American political institutions. According to the former view, articulated most notably by British historian and journalist Paul Johnson, Watergate constituted a "media Putsch" and "maelstrom of hysteria" in which Nixon was ruthlessly driven from office by a conspiracy of liberal media elites and Democrats on Capitol Hill who refused to accept the results of the 1972 presidential election. Because of the "self-righteous political emotion" in which anti-democratic elites in New York and Washington succeeded in forcing the president to resign, the North Vietnamese army and Viet Cong were encouraged to renew their attacks against South Vietnam and to destabilize the non-communist governments in Cambodia and Laos. "Watergate was a mess and nothing more," Johnson

wrote. With minor variations, this position was Nixon's own construction of Watergate because it completely absolved him from any criminal responsibility in the scandal as well as blame for the fall of Saigon on April 30, 1975.[10]

According to the radical Left, Nixon's abuses as president were consistent with the growth of the "imperial presidency" that had grown especially powerful since the administration and New Deal programs of Franklin Delano Roosevelt. Although proponents of the liberal view have also recognized that the bureaucratization of the executive branch contributed to Watergate, thinkers of the Left have also suggested that the press and political establishment permitted the nation to focus on Nixon's specific abuses while failing to address deeper weaknesses of the "system" which led to the scandal in the first place. The president, therefore, became the system's sacrificial lamb that enabled an inherently corrupt political order to remain in power. Proponents of this construction, among others, included the San Francisco-based "Bay Area Kapitalistate Group," leftist intellectual Noam Chomsky, and historians Burton Bernstein and Leo Ribuffo.[11]

Although Schudson does not discuss Sirica in this context, the judge's involvement during the Watergate proceedings can be considered as a means to test the reliability of these four constructions. The centrality of Sirica's role between 1972 and 1975, and his decisions requiring disclosure of the White House tapes to the district

court, raise immediate problems for thinkers of the radical Right and Left. Paul Johnson, for example, declined to consider why a Republican judge would confront the White House so decisively because Sirica was not part of the liberal "antidemocratic" establishment that was ultimately responsible, in his view, for destroying President Nixon in 1974. Similarly, the author downplayed the erosion of Nixon's Republican congressional support as a significant political development because he blamed Democratic politicians for stirring up anti-Nixon hysteria in the country which made this abandonment of support an all but certain outcome. Irresponsible and elitist liberals, therefore, undermined the Nixon administration according to Johnson; this conclusion is unsupported by the evidence in this study which demonstrates that Sirica's participation in the proceedings significantly contributed to this result.[12]

The radical Left similarly has left little consideration for the role of Sirica to have carried much significance--but for very different reasons than those proposed by Johnson. Although leftists have differed amongst themselves in their interpretations of Watergate, most agree that Nixon's resignation removed a mere symptom, as opposed to the underlying causes, of the scandal. Perhaps the most troubling aspect of Watergate, according to these thinkers, is that politicians, judges, and other representatives of the establishment did not address the underlying political causes of the illegal conduct that occurred. This failure has not

surprise leftist intellectuals because of their assumption that these officials were mere puppets of the very institutions that perpetuated America's chronic and long-standing problems that led to Watergate. To be sure, this construction gives some credit to Sirica, Rodino, Jaworski, and others for exposing the Watergate cover-up within the confines of their particular offices and limited authority to act. The radical Left, however, underestimates the significance of the judge and his activities, as Barton Bernstein, Noam Chomsky, and Leo Ribuffo have done, because of their assumption that politicians and judges were unable to solve America's structural problems that produced the scandal. The difficulty with this view is that Sirica's independence as a jurist--and his repeated confrontations with President Nixon, Earl Silbert, and other lawyers involved in the proceedings--discredit this conclusion.[13]

Unlike the constructions proposed by the radical Right and Left, both conservative and liberal constitutionalism explain Watergate especially well with respect to Sirica's extensive role during the Watergate proceedings. To determine the reliability of these interpretations, it is helpful to consider 1) Sirica's views regarding the lessons of Watergate, and 2) distinctions between the judge's phases of involvement between 1972 and 1975. To an extent, Sirica's general assessment of Watergate resembled conservative constitutionalism because of his conviction that American democratic institutions made the system function well; this

success, in turn, enabled the nation to respond to the scandal by demanding accountability for the illegal deeds that occurred. "Everyone has a tendency to find heroes, to claim that individual acts of decency or bravery or devotion bring about great historical events," he wrote. "But I think the lesson of Watergate is quite the opposite. I firmly believe it was our system of government and our system of law that ended that crisis and saved the very constitutional form of government that gave us that system and those laws." The judge then became more specific in his explanation of the Nixon administration's collapse. "The judiciary," he continued, "was the critical branch of government in the resolution of the Watergate crisis....It was the courts and the law that throughout this crisis could compel that the truth be told. Despite efforts in our executive branch to distort the truth, to fabricate a set of facts that looked innocent, the court system served to set the record straight."[14]

A closer examination of Sirica's analysis, however, indicates that his views were more consistent with liberal constitutionalism than its conservative counterpart. "I don't mean to suggest that our system guarantees that misuses of power such as were engineered by the Nixon White House will always be found out," the judge acknowledged. "There were, without doubt, some amazing accidents, some incidents of pure good fortune, that helped save us." Frank Wills' discovery of the tapes on the door at the Watergate during the break-in, as

well as Nixon's fateful decision to record his conversations inside the White House, were two such incidents. Combined with this "good fortune," according to Sirica, were the efforts of such men as Bob Woodward, Carl Bernstein, Peter Rodino, Sam Ervin, individual members of the Watergate grand juries, and himself who ultimately held Nixon and his associates accountable for their behavior. In this same assessment, Sirica applauded the pre and post-Watergate political reforms that have reduced the likelihood that similar types of abuses will recur in the future. He especially endorsed the independence of the Federal Election Commission, strong campaign laws which require candidates for national office to disclose the sources of contributions, and the public financing of campaigns. Finally, he proposed new legislation--which is presently advocated by the Clinton administration--that would impose stricter regulations on contributions from special interest groups to individual politicians. All of these views are consistent with the liberal constitutionalist construction of Watergate because they emphasize the importance of individual participation and added institutional safeguards to ensure that the political and legal establishment can endure the trauma of scandal.[15]

Irrespective of Sirica's recollection, the reliability of the conservative and constitutionalist constructions depends on the specific phase or aspect of the Watergate period under consideration. The conservative interpretation, for example, explains Watergate especially well with respect to Sirica's

handling of the tapes litigation. In this instance, the "system" indeed worked--as proponents of this view argue--because existing legal precedents and statutes enabled the federal judiciary to confront the administration's refusal to submit the tapes for inspection and to facilitate the grand jury's investigation of the cover-up. It is important to emphasize in this context that Judge Sirica, throughout the tapes litigation, justified his rulings requiring disclosure on the basis of previous decisions issued by federal courts even though Watergate was unprecedented in terms of its magnitude and type of illegal conduct that occurred within the executive branch. Sirica, therefore, did not abandon the traditional role of district judge when he ordered the Nixon White House to surrender the tapes; his conscientious application of existing legal doctrines was sufficient to achieve this result.

Conservative constitutionalism, however, does not accurately construct the Watergate episode with respect to the significance of the break-in trial. Here, Sirica stepped outside the traditional role of district judge when he 1) assumed the prosecution's duties of confronting witnesses during testimonies; 2) urged Congress to initiate its own investigation of Watergate after the jury returned its verdicts; and 3) issued severe provisional sentences as a means to coerce the convicted burglars to reveal their complete knowledge of the break-in. Liberal constitutionalism, by contrast, reliably assesses the

significance and impact of the trial because Sirica's activist and confrontational posture--combined with James McCord's decision to cooperate by writing his revealing letter to the judge on March 20, 1973--empowered the judiciary to function more effectively; the strengths of the "system" alone were not enough to hold the Nixon administration accountable in this instance.

On a broader level, Sirica's involvement in the proceedings suggests that Watergate constituted a multi-faceted subversion of the Constitution which nearly succeeded--despite the strengths of the judiciary and the contributions of individuals who unravelled the cover-up. Since 1974, it has been suggested that Richard Nixon was the most corrupt president in American history and that Watergate was unprecedented because of the severity of the crimes that were committed.[16] At the same time, others have argued that Nixon committed some of the same types of abuses as other modern presidents but was villainized because his wrongdoing was exposed.[17]

Neither assertion is historically reliable. The long and complex record of John Sirica's involvement in the Watergate proceedings suggests that the scandal was unprecedented because of the pervasive pattern and specific purpose of the illegal activities that occurred, not because of the severity of the crimes themselves. Though outraged with the Nixon administration, Sirica was well aware that previous presidents--including Lyndon Johnson, John Kennedy, and

Franklin Roosevelt--had sanctioned such abuses as illegal wiretapping, the use of federal agencies to harass political opponents, and obstruction of justice. The judge's anger with the White House, however, was that Nixon and his subordinates had repeatedly perpetrated the illegal activity while attempting to undermine the judiciary during its cover-up of the break-in. It is this repeated pattern of abuse that transformed Watergate from a "third-rate burglary," as Ronald Ziegler described the incident in June 1972, to an unprecedented constitutional crisis that divided a nation and its people. Despite this pattern, it is almost certain that Nixon would have survived Watergate politically had it not been for Sirica's determination and persistence during the break-in trial and his decisive handling of the tapes litigation which demonstrated that Nixon was personally involved in Watergate from the very beginning. That the judge performed his duties in a conscientious manner without violating the constitutional rights of the president or his subordinates suggests that his historical reputation is likely to remain a positive one in the years ahead.

1. Sirica died on August 14, 1992 from cardiac arrest at Georgetown University Hospital in Washington D.C. See "Sirica, 88, Dies; Persistent Judge In Fall of Nixon." New York Times, August 15, 1992, pp. 1, 9.

2. Sirica, pp. 302-03.

3. Theodore C. Sorenson, Watchmen in the Night: Presidential Accountability after Watergate (Cambridge: M.I.T., 1975), p. 121.

4. Ibid., pp. 122-25. See Johnson v. Eisentrager, 339 U.S. 763 (1950); Ludecke v. Watkins, 335 U.S. 160 (1948); Ex Parte Quinn, 317 U.S. 1 (1942); and Korematsu v. U.S., 323 U.S. 214

(1944).

5. Sorenson, p. 49. See also Schechter Poultry Corp. v. U.S., 293 U.S. 388 (1935); Humphrey's Executor v. U.S., 295 U.S. 602 (1935); Youngstown Sheet and Tube Co., v. Sawyer, 343 U.S. 579 (1952); and Train v. City of New York, 420 U.S. 35 (1975).

6. Sorensen, p. 121.

7. Sirica, pp. 241-42.

8. Michael Schudson, Watergate in American Memory (New York: Basic Books, 1992), p. 26.

9. Ibid., pp. 26-27.

10. Ibid., p. 27.

11. Ibid., p. 28.

12. See "Destiny Derailed, Then Triumphant." Los Angeles Times, July 16, 1990, p. B-5; "In Praise of Richard Nixon." Commentary, October 1988, pp. 50-52.

13. See Noam Chomsky, "Watergate: A Skeptical View." New York Review of Books, September 20, 1973, p. 8; Leo Ribuffo, "Watergate and Mugwumps." Dissent, Winter 1974, pp. 94-97; Barton Bernstein, "The Road to Watergate and Beyond: the Growth and Abuse of Executive Authority Since 1940." Law and Contemporary Problems, 1976, pp. 83-85.

14. Sirica, pp. 299, 301.

15. Ibid., p. 298.

16. Individuals who have held this view include Edward Kennedy, Bob Woodward, Carl Bernstein, and Arthur M. Schlesinger, Jr.

17. Former members of the Nixon administration and its conservative supporters have accepted this suggestion.

BIBLIOGRAPHY

BIBLIOGRAPHY

Court Opinions and Documents

Ex Parte Quinn, 317 U.S. 1 (1942)

Humphrey's Executor v. United States, 295 U.S. 602 (11935)

In re Grand Jury SUBPOENA Duces Tecum Issued to Richard M. NIXON, or any Subordinate Officer, Official, or Employee with Custody or Control of Certain Documents or Objects, 360 F.Supp. 1 (1973).

Johnson v. Eisentrager, 339 U.S. 214 (1944)

Korematsu v. United States, 323 U.S. 214 (1944)

Ludecke v. Watkins, 335 U.S. 160 (1948)

The Nixon Presidential Press Conferences. New York: Coleman Enterprises, 1978.

Nixon v. Sirica, 487 F.2d 700 (1973)

The Presidential Transcripts. Washington: The Washington Post, 1974.

Schechter Poultry Corp. v. United States, 293 U.S. 388 (1935)

The Senate Watergate Report, volumes one and two. Dell, 1974.

Train v. City of New York, 420 U.S. 35 (1975)

United States v. Haldeman, 559 F.2d 31 (1976)

United States v. Liddy, 509 F.2d 428 (1974)

United States v. Liddy, 397 F.Supp. 947 (D.D.C. 1975).

United States v. Nixon, 418 U.S. 683 (1974)

United States v. Reynolds, 345 U.S. 1 (1953)

The Watergate Hearings. New York: Viking Press, 1973.

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)

Autobiographies and Writings of Contemporaries

Agnew, Spiro T. Go Quietly . . . or else. New York: William Morrow, 1980

Ben-Veniste, Richard and George Frampton. Stonewall. New York: Simon and Schuster, 1977.

Bernstein, Carl and Bob Woodward. All the President's Men. New York: Simon And Schuster, 1974.

Colson, Charles. Born Again. Old Tappan: Chosen Books, 1976

Dean, John W. Blind Ambition. New York: Simon and Schuster, 1976

Ehrilichman, John. Witness to Power. New York: Simon and Schuster, 1982.

Ervin, Sam. The Whole Truth. New York: Random House, 1980.

Ford, Gerald R. A Time To Heal. New York: Harper & Row, 1979.

Haldeman, H.R. and Joseph DiMona. The Ends of Power. New York: Times Books, 1978.

Haldeman, H.R. The Haldeman Diaries. New York: G.P. Putnam Sons, 1994.

Hunt, E. Howard. Undercover. Berkeley Publishing Corp, 1974.

Jaworksi, Leon. The Right and the Power: The Prosecution of Watergate. New York: Reader's Digest, 1976.

Liddy, G. Gordon. Will. New York: St. Martin's Press, 1980.

Magruder, Jeb. An American Life: One Man's Road to Watergate. New York: Atheneum, 1974.

McCord, James. A Piece of Tape. Washington Media Services, 1974.

Nixon, Richard. In the Arena: A Memoir of Victory, Defeat, and Renewal. New York: Simon and Schuster, 1990.

Nixon, Richard. RN. New York: Grosset and Dunlap, 1978.

Sirica, John J. To Set The Record Straight. New York: W.W.

Norton, 1979.

Stand, Maurice. The Terrors of Justice. New York: Everest House, 1978.

Unger, Sanford. The Papers and the Papers. New York: E.P. Dutton and Co., 1972.

Woodward, Bob, and Carl Bernstein. The Final Days. New York: Simon and Schuster, 1976.

Magazines and Newspapers

New York Times, 1971-1975, 1992

Time, 1973-1974.

U.S. News and World Report, 1973.

Washingtonian, September 1973.

Washington Post. 1972-1975, 1992.

Journals and Reviews

Dissent, Winter 1974.

Journal of American History, March 1989.

Law and Contemporary Problems, 1976.

New York Review of Books, September 20, 1973.

Other Published Works

Ambrose, Stephen. Nixon: Ruin and Recovery 1973-1990. New York: Simon and Schuster, 1991.

Brodie, Fawn. Richard Nixon. New York: W.W. Norton and Co., 1981.

Cannon, James. Time and Chance: Gerald Ford's Appointment With History. New York: Harper Collins Publishers, 1994.

Griffith, Robert. The Politics of Fear. Lexington: University Press of Kentucky, 1990.

Knappman, Edward W. and Evan Drossman (ed.), Watergate and the White House. New York: Facts on File, Inc., 1974.

Kutler, Stanley I. The Wars of Watergate. New York: Alfred A. Knopf, 1990.

LaFave, Wayne and Jerold Israel. Criminal Procedure. St. Paul: West Publishing Co., 1992.

Lukas, J. Anthony. Nightmare. New York: Viking Press, 1976.

Manchester, William. The Glory and the Dream. New York: Viking Press, 1976.

Molenhoff, Clark. Game Plan for Disaster. New York: W. Norton and Co., 1976.

Noggle, Burl. Teapot Dome: Oil and Politics in the 1920's. Louisiana State University Press, 1962.

Parmet, Herbert. Eisenhower and the American Crusades. New York: The Macmillan Company, 1972.

Perrett, Geoffrey. America in the Twenties. New York: Simon and Schuster, 1982.

Rogin, Paul. The Intellectuals and McCarthy: The Radical Specter. Cambridge: The M. I. T. Press, 1967.

Safire, William. Before the Fall. New York: Doubleday, 1975.

Schlesinger, Arthur, M. The Imperial Presidency. Boston: Houghton Mifflin Co., 1973.

Schudson, Michael. Watergate in American Memory. New York: Basic Books, 1992.

Werstein, Irving. Shattered Decade. New York: Charles Scribner's Sons, 1970.

White, Theodore. Breach of Faith: The Fall of Richard Nixon. New York: Atheneum, 1975.

White, Theodore. The Making of the President, 1972. New York: Atheneum, 1973.