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The Making of the Attorney General: John Mitchell and the Crimes of Watergate Reconsidered

Gerald Caplan*

I. INTRODUCTION

Shortly after I resigned my position as General Counsel of the District of Columbia Metropolitan Police Department in 1971, I was startled to receive a two-page letter from Attorney General John Mitchell. I was not a Department of Justice employee, and Mitchell's acquaintance with me was largely second-hand. The contents were surprising. Mitchell generously lauded my rather modest role "in developing an effective and professional law enforcement program for the District of Columbia." Beyond this, he added, "Your thoughtful suggestions have been of considerable help to me and my colleagues at the Department of Justice." The salutation was, "Dear Jerry," and the signature, "John." I was elated. I framed the letter and hung it in my office. There it remained for several years until, following Mitchell's felony convictions, it engendered double-entendres and became the butt of humor.

Mitchell's accolades were not entirely formulaic. The Nixon Administration had poured resources into the criminal justice system in the District of Columbia.¹ The Police Department was better trained, better equipped, greatly enlarged, and supported by a newly created General Counsel's Office, which I headed. Its creation implemented a best practices recommendation of President Lyndon Johnson's Commission on Law Enforcement and Criminal Justice, aimed at making enforcement more law-conforming and effective.² But it was not only the police who benefited from administration largesse.³ The entire criminal justice system of the District, including the bail agency, the public defender, and the corrections department, were the beneficiaries of generous funding. President Nixon saw the District of Columbia as an ideal setting to implement his campaign promises to reduce crime.⁴ Thus, the Administration trumpeted the increase in sworn police personnel and its get-tough legislative proposals, such as preventive detention of dangerous suspects and no-knock entries for serving

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1. See JAMES ROSEN, *THE STRONG MAN* 72-73 (2008).

2. See Gerald Caplan, *Reflections on the Nationalization of Crime, 1964-1968*, 1973 ARIZ. ST. L.J. 583, 591 (1973) (providing background information about the Commission on Law Enforcement and Administration of Justice).

3. See *id.* at 616 (outlining the 1968 budgetary distribution).

4. ROSEN, *supra* note 1, at 72.

drug-related search warrants, and avoided taking credit for the substantial improvements to the criminal justice system as a whole, which it fostered.⁵

The first time I met Mitchell was in the midst of an anti-war demonstration at the Department of Justice on November 13, 1969. I was charged with bringing a written message to Mitchell at his office in the Department of Justice. A radical group, the “Yippies, . . . had secured a three-hour picketing permit to protest the trial of their leader, Abbie Hoffman, and other members of the Chicago Eight.”⁶ Several thousand unruly protesters surrounded the Department, chanting “One, two, stop the trial! Three, four, stop the war! Five, six, kill the pigs! Seven, eight, smash the state!”⁷ We were concerned. Should the protestors turn violent or attempt a forcible entry, the police would be unable to turn them away and many injuries would result. Moreover, there was reason to fear that violence would break out elsewhere in the District. A bridge might be blown up; there might be looting; some marchers might be armed.

When I arrived, I was escorted into the Attorney General’s conference room. Mitchell was sitting calmly at the head of a very long table with about twenty high-level agency representatives in attendance. John Ehrlichman, the President’s Chief Domestic Advisor, sat to his immediate left. Mitchell paused the meeting when I entered the room, looked my way, smiled, asked my name, and thanked me for my help. This show of courtesy during a time of great stress, I was to learn, was, like his letter to an outgoing employee, typical of the warmth and consideration that Mitchell extended to his colleagues and subordinates. For me, a young attorney working in the midst of disorder and danger, the Attorney General’s soft-spoken, pipe-in-hand, imperturbable manner was reassuring. Things were under control; we in law enforcement were doing the right thing.

And, in fact, this was so. The demonstrations in the city were largely peaceful. The District of Columbia Police, supported by other enforcement agencies and the military, acted with remarkable restraint. Moreover, the demonstration leadership, in particular their attorney, were forthcoming about when, where, and what they intended to do.⁸ The only significant unexpected occurrence was the intentional smashing of numerous windows and glass doors by some demonstrators.⁹ Several hundred were arrested without difficulty. There were no charges of police abuse or excessive force, though there were justified complaints about the excessive use of tear gas.¹⁰ The system worked the way it was supposed to work, which was no small achievement given the stress it was under and the potential for calamity.¹¹

5. *Id.* at 72-73.

6. *Id.* at 92.

7. *Id.*

8. *See id.*

9. *See* ROSEN, *supra* note 1, at 94.

10. *Id.* at 94-95 (describing the specific use and general effects of tear gas).

11. Memorandum from Jerry V. Wilson, Former Police Chief, D.C. Police Dep’t, to author (Mar. 19,

Now, nearly forty years after this demonstration and nearly as many since the foiled break-in at the luxury Watergate headquarters of the Democratic Party, a full-length, birth-to-grave biography of John Mitchell, entitled, *The Strong Man*, has been published.¹² It is, as I had hoped, revisionist, offering a more generous evaluation of the man and his service in office during those unsettling times when the Vietnam War and anti-war protests divided the nation and tested our democratic ways. Nonetheless, it was a painful read, chronicling Mitchell's downfall and the lawlessness of the President and his aides.

But for Watergate, Mitchell's legacy would likely be little more than a footnote to the Nixon Presidency. He would be remembered for his skill as a campaign manager in guiding Nixon through two remarkably successful campaigns for the presidency in 1968 and 1972 and for being the Attorney General who reset the scales of justice to favor law enforcement at a time when it was needed.¹³ Yet Mitchell's entire distinguished career, from Wall Street to Washington, has been reduced to but a prelude to scandal.¹⁴ Being the highest-ranking federal official convicted of a felony is his enduring commemoration. Although Mitchell suffered greatly—imprisoned, disbarred, disgraced, and ostracized—he is not remembered sympathetically.¹⁵ The triggering events of his downfall were largely of his own making. They were just deserts, not tragedy.

James Rosen's account of Mitchell's life is informed by documents that were unavailable to other chroniclers of the Nixon years or overlooked in the huge cache of official records, such as the Nixon White House tapes.¹⁶ Much of it is favorable to Mitchell or can reasonably be so interpreted. Some of it is eye-opening, even to those, like me, who followed the breaking events of the day. Most readers will find Rosen's effort to prove Mitchell innocent of the most serious allegation made against him—that he approved the break-in at Watergate—persuasive. Rosen's stated intent in writing the biography is to set

2009) (on file with the *McGeorge Law Review*). "I too was displeased by the overuse of tear gas, then and frequently thereafter. I also was irritated by the small number of arrests." *Id.* at 5 n.10.

12. ROSEN, *supra* note 1.

13. *Id.* at xv.

14. *See generally id.* at 14-114 (detailing the career of John Mitchell).

15. *Id.* at 440-98 (describing Mitchell's later years).

16. Rosen's research is remarkable for its vigor, thoroughness, and, most notably, its yield of fresh and relevant information. Rosen justifiably claims that his account is "not your father's Watergate." *Id.* at xxiv. Surprisingly, he managed to scour "whole archives of contemporaneous documents—[that] had never before been mined, or even requested for inspection, by the armies of earlier scholars. These included the internal files of the staff lawyers . . . in closed-door executive session." *Id.* at xxiii. In addition to digesting the voluminous secondary literature on Nixon, Watergate, and the convulsive events of the 1960s and the daily-deadline reportage of the Washington press corps, Rosen aggressively employed the Freedom of Information Act to "pr[y] loose hundreds of thousands of previously undisclosed documents and tape recordings." *Id.* Rosen may be the first scholar to make "the long march, on microfiche, through every sheet of Haldeman's and Ehrlichman's 200,000 pages of yellow-pad notes from their meetings with President Nixon." *Id.*

the record straight;¹⁷ in so doing, he brings to light unsettling evidence of Mitchell's poor judgment, misbehavior, and personal flaws. But his story of Mitchell's life, viewed as a whole, is nonetheless an advocate's account. Rosen's finger is on the scale, interpreting facts and drawing inferences unduly favorable to Mitchell. This ordinarily would be a basis for objection, but in context, it does not detract from the work. One can read the book, disagree with its conclusions, and still come away with a rich, enlarged understanding, because Rosen ordinarily positions his reader to second-guess him. Rosen is not the first biographer to develop a fondness for his subject, and Mitchell, however stone-faced and forbidding in public, was, in person, likeable (and indeed well-liked), good-humored, caring, and thoughtful.

Mitchell, by all accounts, was a private person, unforthcoming and unresponsive in situations that called for explanation. His brother said: "I don't think anyone really knew him. He lived within himself very much."¹⁸ Rosen finds Mitchell "notorious for his inscrutability,"¹⁹ and Nixon Presidential Aide John Ehrlichman described him as "'taciturn, aloof, a sort of Wall Street Gary Cooper."²⁰ Although every biographer observes discordant features in his subject—tendencies and predispositions that pull him in different ways—Mitchell's self-containment poses a special challenge, that of determining which elements are representative and configuring them in some plausible harmony. And, as with biographical production generally, there are offstage happenings of which the author knows nothing, and which, if known, would promote a more accurate depiction. My account of Mitchell's life differs in important particulars from that of Rosen. We share the same purpose, making sense of the heart-rending failure of an otherwise decent man to discharge the duties of his office. My analysis has led me, regrettably, to hold Mitchell more accountable.

What President Gerald Ford, Nixon's successor in office, referred to as "our long national nightmare"²¹ "began, as a matter of public record, in the early morning hours of June 17, 1972."²² District of Columbia Police Officers arrested five men inside the headquarters of the Democratic National Committee at the Watergate office complex.²³ These were not ordinary burglars. They were dressed in "business suits and rubber gloves, carrying cameras[] [and] sophisticated

17. National Review Online, Interview: The Book on Mitchell, June 27, 2008, <http://article.nationalreview.com/?q=ZjgyNDQ3OWNiMmM0OWNmZGJkYzBiNjY3NzRIYW1MTA> (on file with the *McGeorge Law Review*).

18. ROSEN, *supra* note 1, at 1.

19. *Id.* at xxiv.

20. *Id.* at 43 (quoting JOHN EHRLICHMAN, *WITNESS TO POWER: THE NIXON YEARS 75* (1982)). Ehrlichman also remarked, "[Later] I began to see that he wasn't as gruff and remote as he appeared. . . . [H]e was withdrawn and quiet, but hardly forbidding." *Id.*

21. *Id.* at xxv.

22. *Id.* at xvi.

23. *Id.*

electronics equipment.”²⁴ Police quickly linked them to Howard Hunt, a former CIA officer then on the White House payroll, and to Gordon Liddy, a former White House employee, then the General Counsel to the Committee for the Re-election of the President (CRP), which Mitchell chaired.²⁵ Prior to trial, at the instigation of John Dean (then-acting counsel to the President and previously Mitchell’s subordinate at the Department of Justice), the five began receiving secret payments: hush money to buy their silence as part of a cover-up attempt.²⁶ Dean was aided by Jeb Magruder, Mitchell’s deputy at the CRP.²⁷

The cover-up struggled along for several months, then crashed suddenly when one of the burglars, James McCord, “broke ranks” with his co-defendants (all of whom had pleaded guilty) and wrote the trial judge, John Sirica, a tell-all letter, which he read in open court.²⁸ McCord’s disclosures implicated Dean and Magruder and prompted them to negotiate favorable plea bargains in exchange for their testimonies.²⁹ Their testimonies led to indictments for perjury and obstruction of justice against the President’s ranking aides, including White House Chief of Staff, H.R. Haldeman; Chief Domestic Advisor, John Ehrlichman; and former Attorney General, John Mitchell.³⁰ In the summer of 1973, investigators discovered that “Nixon had surreptitiously recorded virtually all his meetings and phone calls, from February 1971 onward.”³¹ The tapes revealed Nixon’s early awareness and sporadic participation in the cover-up and induced his resignation in August 1974.³² A month later, President Ford pardoned him “for all crimes he committed ‘or may have committed’ while in office.”³³

Subsequently, investigators discovered that Hunt and Liddy had engineered an earlier break-in at the office of Daniel Ellsberg’s psychiatrist in an unsuccessful attempt to determine whether it was Ellsberg who leaked classified documents concerning conduct in Vietnam, the *Pentagon Papers*, to the press.³⁴ These events ballooned into a complex series of scandals, triggering a responsive succession of Congressional investigations and the creation of the Watergate Task Force, headed by an independent prosecutor.³⁵ The investigations resulted in

24. ROSEN, *supra* note 1, at xvi.

25. *Id.* at xvii.

26. *Id.*

27. *Id.*

28. *Id.* at xvii-xviii.

29. *Id.* at xviii.

30. ROSEN, *supra* note 1, at xviii.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

over fifty convictions of individuals and nineteen convictions of corporations.³⁶ John Mitchell was one of those convicted.³⁷

II. TALL TALES

Perhaps the most revelatory source about Mitchell's life prior to law school is Mitchell himself, who, as Attorney General, recounted events from his youth.³⁸ He told a *Newsday* reporter that he and his brother witnessed a fire burning at a school near where they lived: "Whole damned school went."³⁹ Recalling this event, "Mitchell began to chuckle, softly at first, then uncontrollably, until he was 'half bent' in laughter and brought back into the moment only by a coughing fit."⁴⁰ This memory prompted another: "You know I burned down the house in Blue Point."⁴¹ According to Mitchell, he lit some sparklers in his possession on a fourth of July day and accidentally set fire to the porch.⁴² These twin recollections would be unremarkable but for the fact that both are false.⁴³ The first was "a complete fiction" and the second nearly so—only "a couple of the leaves [under the porch] caught fire."⁴⁴ Other fictions related to athletic prowess.⁴⁵ Mitchell had been a good high school athlete, but he was neither the professional golfer he claimed to have been on *The Dick Cavett Show* nor a hockey player for the New York Rangers as cited in his obituary.⁴⁶ Nor was he the naval war hero that his lifelong friend, Richard Moore, proclaimed in his eulogy, no doubt relying on Mitchell as his source:⁴⁷

"[T]he only thing that most people know about [Mitchell's] war record is that John F. Kennedy served under him. . . . I never knew until yesterday that he received the Navy's treasured award for gallantry in combat—the Silver Star. Nor did I know that he had been twice wounded, receiving two purple hearts."⁴⁸

36. ROSEN, *supra* note 1, at xviii-xix.

37. *Id.* at xix.

38. *Id.* at 2-9 (recounting stories of Mitchell's early life).

39. *Id.* at 2

40. *Id.*

41. *Id.*

42. ROSEN, *supra* note 1, at 2.

43. *Id.* at 3.

44. *Id.*

45. *Id.* at 7-8 (providing some accounts of Mitchell's claims of athletic prowess).

46. *Id.*

47. *Id.* at 14-15.

48. ROSEN, *supra* note 1, at 15 (quoting the eulogy that Richard Moore delivered).

In fact, Kennedy did not serve under Mitchell and, according to naval files, Mitchell was never decorated.⁴⁹

Mitchell's motive in telling these whoppers was likely the commonplace one of impressing others or pleurably imagining events as he would like them to have been. But, in hindsight, given Mitchell's multiple convictions for perjury and his embroilment in factual disputes throughout his career, they seem portentous. Through numerous Congressional hearings, prosecutorial investigations, and criminal trials, Mitchell told lies and stuck to them, even when contrary evidence was indisputable. The most striking illustration relates to Mitchell's authorization of a cluster of FBI requests for wiretaps to detect security leaks to the media.⁵⁰ Four reporters and a dozen government officials were targeted.⁵¹ Although these wiretaps were later determined to be lawful and were perhaps understood that way at the time, Mitchell resolutely denied authorizing them.⁵² Two days after Mitchell's first denial, acting FBI Director William Ruckelshaus announced at a news conference that records of the wiretaps had been retrieved from the safe of Presidential Aide John Ehrlichman and that these records showed that Mitchell had, in fact, personally approved the requests (and had even erroneously assured then-FBI Director, J. Edgar Hoover, that no such records existed).⁵³ Beyond this, Ruckelshaus personally informed Mitchell in a letter marked "top secret" that the FBI had discovered fifteen requests for authorization that Mitchell had approved.⁵⁴ On one request, Mitchell, in his own handwriting, ordered the tap to be "installed as soon as possible"; on another, he indicated that the request came from "a higher authority"—presumably a reference to Nixon.⁵⁵ Nonetheless, Mitchell repeated his denials: "A pipe dream," he told *Time* in February 1973.⁵⁶ A year later, he again denied to a House of Representatives committee and separately told his trusting deputy, Richard Kleindienst, that he had not authorized the warrants.⁵⁷ Beyond these denials, Mitchell made several others, revealed in previously unpublished, classified interrogations of Mitchell by Watergate prosecutors and House of Representatives investigators. In all, Mitchell perjured himself on five separate occasions by denying his authorization of these warrants. Remarkably, Mitchell's recklessness and bravado did not result in prosecution.⁵⁸

49. *Id.* at 15-16.

50. *Id.* at 149-51 (providing background information on the wiretapping program).

51. *Id.* at 150.

52. *Id.* at 151.

53. *Id.* at 152.

54. ROSEN, *supra* note 1, at 152.

55. *Id.*

56. *Id.* at 153.

57. *Id.* at 153-54.

58. *Id.* at 495.

III. THE PATH TO RICHARD NIXON

Following graduation from the evening division of Fordham University's law school, Mitchell married his high school sweetheart, Bette Shine.⁵⁹ It was, at least on Mitchell's part, love at first sight.⁶⁰ The first time he saw her, he told a friend, "'That's the woman I'm going to marry.'"⁶¹ Rosen describes her as "an entrancing blonde, with a trim, athletic figure . . . and a glamorous smile," who had played basketball for her high school team.⁶² They married after Mitchell graduated from law school and they stayed married for twenty years.⁶³ The marriage likely experienced strains over time, though Bette viewed their divorce as something of a mid-life crisis for her middle-aged husband: "'John just walked in one morning and asked for a divorce.'"⁶⁴ Nonetheless, the divorce was amicable.⁶⁵ Mitchell, recalling his promise to take care of her forever, generously "agreed to pay Bette 35 percent of his gross annual income *regardless* of whether she remarried."⁶⁶ Eleven days after his divorce, Mitchell married Martha Beall, about whom more will be said later.⁶⁷

Mitchell began his professional career at the firm of Caldwell and Raymond, where he was exposed to the promise of government bonds as a way of financing public works.⁶⁸ Bonds could provide a way of exceeding debt ceilings without subjecting the issue to a ballot initiative.⁶⁹ Mitchell, sensing the power of tax-exempt bonds to revolutionize public finance, quickly gained recognition as an expert in the field.⁷⁰ While traversing the country, Mitchell met politicians and power brokers and made influential new friends.⁷¹ He was, as *Business Week* observed, "on a first-name basis with as many elected officials as any full-time politician in America."⁷²

In December 1966, Mitchell's career took a fateful leap. His law firm, at his insistence, merged with Richard Nixon's.⁷³ Thus began a lifelong relationship of fidelity and travail. "'John Mitchell, personally, wanted to be close to Richard Nixon,'" one of his new partners recalled.⁷⁴ "'That was a major motivator in his

59. *Id.* at 8.

60. ROSEN, *supra* note 1, at 8.

61. *Id.*

62. *Id.*

63. *Id.* at 8, 21 (detailing how the couple met and later describing the divorce and separation).

64. *Id.* at 20.

65. *Id.* at 21.

66. ROSEN, *supra* note 1, at 21.

67. *Id.*

68. *Id.* at 9.

69. *Id.*

70. *Id.* at 13.

71. *Id.*

72. ROSEN, *supra* note 1, at 27.

73. *Id.* at 30.

74. *Id.*

bringing his firm into this firm.”⁷⁵ In this, he was successful. Nixon came to admire Mitchell and to rely on him.⁷⁶ Mitchell was a self-made man, who navigated comfortably among the elite with “a bemused blue-collar contempt for their pretensions.”⁷⁷ He displayed an aura of calm and self-assurance that eluded Nixon.⁷⁸ And Mitchell was tough. Their relationship was cemented when Nixon asked Mitchell to become his campaign manager for his run for the presidency in 1968.⁷⁹ As one insider, William Safire, stated (or perhaps overstated): “John Mitchell was the rock upon which Nixon built his church.”⁸⁰

Mitchell was, by all accounts, a splendid campaign manager. Nixon gave him near complete autonomy and Mitchell took charge confidently and effectively. His achievement was summed up in *Business Week*: “[I]t was Mitchell who provided the administrative hand that made the Nixon machine a textbook operation. Even under the pressures of the tightening campaign, Mitchell is not recorded to have ever lost his temper, blamed anyone else for a mistake or even stalled a decision.”⁸¹ The *Times of London* similarly observed, “It is hard to imagine that a political campaign was ever run with such crisp, mechanical efficiency as Nixon’s drive on the presidency in 1968.”⁸² Mitchell’s diligence in managing this campaign contrasts sharply with his effort the second time around in 1972. Then, distracted by the Watergate investigations and his wife, Martha’s, breakdown, Mitchell lost focus, delegating some decisions and delaying others that were his to make.⁸³

IV. LAW AND ORDER

In his 1968 run for the presidency, Nixon made law and order an overarching issue.⁸⁴ This was a prudent response to elevated public concerns. In the 1960 presidential campaign, crime was hardly mentioned.⁸⁵ “A review of the subject index of the 1960 presidential campaign speeches of John F. Kennedy and Richard M. Nixon [does] not turn up such words as ‘crime,’ ‘police,’ [or] ‘law enforcement.’ Nor was crime discussed in . . . the party platforms of that year.”⁸⁶ “The 1964 presidential campaign signaled the entry of crime as a national

75. *Id.*

76. *See id.* at 33.

77. ROSEN, *supra* note 1, at 33.

78. *Id.* at 33-34.

79. *Id.* at 35.

80. *Id.* at 33.

81. *Id.* at 63.

82. *Id.* at 51.

83. ROSEN, *supra* note 1, at 321-24.

84. *Id.* at 48.

85. Caplan, *supra* note 2, at 585.

86. *Id.*

issue.”⁸⁷ Senator Barry Goldwater, the Republican candidate, promised that “as President, I’m going to do all I can to see that women can go out in the streets of this country without being scared stiff.”⁸⁸ Nixon followed suit four years later to cheering crowds.⁸⁹ Rising crime rates and civil disorder in urban areas nationwide following the murder of Dr. King created anxiety and prompted calls for aggressive law enforcement.⁹⁰ Nixon shrewdly targeted Lyndon Johnson’s Attorney General, Ramsey Clark, who was preoccupied with civil liberties and treated crime control advocates as thinly disguised racists.⁹¹ Nixon, to standing ovations, promised: “We are going to have a new attorney general of the United States of America!”⁹²

Nixon turned to Mitchell to be his tough-on-crime Attorney General.⁹³ Mitchell was a surprising choice, reflecting Nixon’s great confidence. A municipal bonds practitioner, Mitchell knew little about law enforcement and had made it abundantly clear that he wished to return to practice in New York.⁹⁴ There, the eccentric outbursts of his often intoxicated, volatile wife, Martha, would be less conspicuous.⁹⁵ Mitchell resisted Nixon’s entreaties. He was, as the *New York Times* observed in its obituary, “not personally ambitious.”⁹⁶ Moreover, the role that Nixon envisioned for Mitchell was unattractive. In person, a genial, warm man with a twinkle in his eye, Mitchell was instructed to adopt a steely, somewhat menacing public persona. Previously unpublished notes of Nixon’s Chief of Staff, H.R. Haldeman, outline the script Nixon had written for his Attorney General: “play tough SOB role—as crime fighter . . . time to go on real crusade—not just do good . . . put all PR effort we can into this area . . . don’t make John likable . . . make him a tough crime-fighter.”⁹⁷

Nixon was prescient. Casting personal inclinations aside, Mitchell promptly stepped into character. He exhibited the same sharp focus and confidence as Attorney General that he had displayed as campaign manager. At the time Mitchell assumed office, student demonstrations were at their peak.⁹⁸ Educators responded uncertainly to student protests; their mild, even conciliatory responses to demonstrators who seized their offices invited public unease and scorn.⁹⁹ As with the Administration’s war on crime, Nixon insisted that the Department of

87. *Id.*

88. RICHARD H. ROVERE, *THE GOLDWATER CAPER* 84 (1965).

89. *See* ROSEN, *supra* note 1, at 48.

90. *See id.* at 44.

91. *See, e.g., id.* at 48.

92. *Id.* at 49.

93. *Id.* at 70-71.

94. *Id.* at 65-66.

95. ROSEN, *supra* note 1, at 66.

96. *Id.* at 487.

97. *Id.* at 71.

98. *Id.* at 77.

99. *Id.* at 77-79.

Justice appear to be doing something about campus disorder.¹⁰⁰ Nixon's focus on appearances is clear from Haldeman's notes: "'Doesn't matter if we can do anything . . . must *say* something strong, though . . . show *no* sympathy.' On cue, [Mitchell] announced a plan to prosecute 'hard-line militants' who crossed state lines to foment riots on college campuses."¹⁰¹ This was largely political rhetoric, because maintaining law and order on campuses was not a federal responsibility. Moreover, the Administration was not as tough as it sounded; it was political and pragmatic. Mitchell was keenly aware of the dichotomy between words and deeds, and in an oft-quoted statement made to a group of African-Americans, he said so publicly: "'You will be better advised to watch what we do instead of what we say."¹⁰² This was a noteworthy admission, not so much for its duplicity, as was charged by political opponents, but rather for its demonstration of strategy. The Administration did not want to undermine its "Southern [S]trategy"¹⁰³ to build a Republican base by boasting of its genuine successes in the South and elsewhere in achieving racial integration, but it continued to pursue integration aggressively.¹⁰⁴ Nixon had a low opinion of African-Americans¹⁰⁵ and distrusted Jews, but he supported school desegregation and the State of Israel; Mitchell followed suit.¹⁰⁶ Nixon's marching orders were to "'just do what is right,"¹⁰⁷ and Mitchell followed orders.¹⁰⁸ Given the Republican Party's

100. *Id.* at 78.

101. ROSEN, *supra* note 1, at 78-79.

102. *Id.* at 489.

103. *Id.* at 44-47.

104. *Id.* at 129-30.

105. Mitchell shared Nixon's low opinion of African-Americans. Nixon told his Chief of Staff, H.R. Haldeman, that welfare reformers did not understand that "the *whole* problem is really the blacks. . . . There has never in history been an adequate black nation, and they are the only race of which this is true." *Id.* During an off-the-record meeting, CBS commentator Mike Wallace asked Mitchell if Nixon was going to speak to a group of black publishers that Hubert Humphrey, Nixon's opponent for the presidency in 1968, had addressed. Mitchell's response stunned him: "I don't want Dick to go over there. You can buy those monkeys, anyway." *Id.* at 126. Mitchell "still use[d] the word 'colored' in his conversation," *id.* at 127, and occasionally made anti-Semitic remarks, though not with the frequency and vitriol of his President and presidential aides, Ehrlichman and Haldeman. A *Newsweek* reporter recalls Mitchell referring to a *New York Times* reporter as "the Heb reporter" and "referring privately to Henry Kissinger as 'that kike.'" *Id.* Nonetheless, on one occasion, Mitchell accompanied a Jewish supporter of the President to Philadelphia to observe the arrival of a group of Russian Jews. Mitchell had cleared the way for their emigration from the colossal hardships they endured in the Soviet Union. As they disembarked, a witness observed Mitchell "crying openly, not bothering to wipe the tears from his face." *Id.* at 128. "Israel's ambassador to the United States, Yitzhak Rabin—later the state's prime minister—noted the 'growing . . . sympathy' for Israel within the Nixon administration, 'especially on the part of Attorney General John Mitchell.'" *Id.* at 127-28.

106. See ROSEN, *supra* note 1, at 128-31.

107. *Id.* at 130.

108. The statistics that Rosen relied upon to demonstrate Mitchell's achievement in desegregating southern schools through judicial action, see *id.* at 143 (reporting 6 percent of African-American children in desegregated classrooms before 1969; 20 percent in the fall of 1969, nine months into Nixon's Administration; and between 60 and 100 percent by 1970), seem on the high end. The numbers recorded by the U.S. Commission on Civil Rights for the period in question, 1968 to 1972, are substantially lower. See U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER *BROWN*: EQUALITY OF EDUCATIONAL OPPORTUNITY 61 (Mar. 1975)

“Southern [S]trategy,” neither Nixon nor Mitchell sought recognition for their achievement.¹⁰⁹ Years later, one civil rights historian concluded that, “contrary to conventional wisdom, contemporary federal affirmative action policy owes far more to the likes of John Mitchell, George Schultz and Richard Nixon than to Lyndon Johnson, a fact that stands in sharp contrast to the typical caricatures.”¹¹⁰

Mitchell also spoke about the need for standards and goals to upgrade the administration of criminal justice. He described its administration as “an astonishing tale of neglect.”¹¹¹ Mitchell pointed out that “[m]ost states have little or no basic training for police” and that, “[i]n some states, lower court judges and prosecutors are not attorneys.”¹¹² He reserved his harshest criticism for the prison system.¹¹³ “Most prisons and jails,” he asserted, “are overcrowded and antiquated”; conditions in some places were “not only deplorable, but in many cases inhuman.”¹¹⁴

Sometimes Administration rhetoric was so spirited that it alienated those who might well have been allies. Vice President Spiro Agnew’s speeches were perhaps the most excessive and supercilious.¹¹⁵ Agnew referred to anti-war activists as “an effete corps of impudent snobs,”¹¹⁶ and Mitchell, who was fond of Agnew, unrestrainedly followed his lead, labeling some leaders of the New Mobilization Committee to End the War in Vietnam “more than snobs[,] . . . active militants’ eager to ‘destroy . . . the institutions of government.’”¹¹⁷ Mitchell echoed FBI Director J. Edgar Hoover, who exaggerated the role of professional agitators and ignored widespread support for civil rights and criticism against the war in Vietnam: “Communists are in the forefront of civil rights, antiwar and student demonstrations, many of which ultimately become disorderly and erupt into violence.”¹¹⁸ In fact, most demonstrations were led by responsible, prominent individuals, peaceful in intent and execution. The New Mobilization demonstration, for instance, was led by peace leaders such as Senator George

(reporting 18.4 percent school desegregation in 1968 and 46.3 percent (the highest percentage on the chart) in 1972). Nonetheless, there is general agreement that substantial progress was made and that Mitchell’s efforts were praiseworthy. See ROSEN, *supra* note 1, at 144.

109. ROSEN, *supra* note 1, at 145.

110. *Id.* at 144.

111. Ken W. Clawson, *Mitchell Calls Criminal Justice an “Astonishing Tale of Neglect,”* WASH. POST, Feb. 20, 1971, at A1.

112. *Id.*

113. *Id.*

114. *Id.* at A5.

115. Prior to his selection as the vice presidential nominee, Agnew had been a corrupt Maryland governor. He continued to solicit bribes as vice president and eventually wound up as still another Nixon appointee at the dock. Agnew was allowed to plea nolo contendere in exchange for resigning his office. See, e.g., United States Senate, Spiro T. Agnew, 39th Vice President (1969-1973), http://www.senate.gov/artandhistory/history/common/generic/VP_Spiro_Agnew.htm (last visited Nov. 6, 2009) (on file with the *McGeorge Law Review*).

116. ROSEN, *supra* note 1, at 89.

117. *Id.*

118. *Id.* at 79.

McGovern (the Democratic Party's presidential nominee in 1972), Mrs. Martin Luther King, Dr. Benjamin Spock, and Yale Chaplain William Sloane Coffin.¹¹⁹ They did not threaten the populace; they represented it.

There were some exceptions.¹²⁰ The four-day May Day demonstrations sought to shut down the District by blocking bridges to the city and disrupting traffic.¹²¹ The fear of looting, however, was never realized. The only incident that even approached violence involved a demonstrator shoving a stick through the spokes of a moving police scooter, resulting in a broken leg for the falling officer. Over 12,000 arrests were made, many of which were preemptive and therefore of questionable legality,¹²² but most demonstrators were not detained for longer than their first court appearance the next day.¹²³

V. DISCORD

Although Mitchell faithfully carried out his President's directive to be the Administration's no-nonsense, law and order champion, Nixon grew dissatisfied with his performance.¹²⁴ Mitchell was not as cooperative and supportive as Nixon had hoped.¹²⁵ He opposed some of Nixon's pet projects and effectively derailed others.¹²⁶ If Nixon understood that saying no to the President is part of the Attorney General's job description, he nonetheless was resentful. It is probably true that all presidents at times resent sound legal advice. Both as heads of state and political leaders, presidents want to make things happen and, at times, see legal compliance as an obstacle on the course towards needed reform.¹²⁷ But Nixon was different. He brought with him to the Office of the Presidency a longstanding disdain for the law and a willingness to circumvent it, which he expected Mitchell to share.¹²⁸

119. *Id.* at 88-89, 92-93.

120. Rosen's discussion of the New Mobilization demonstration, November 13-16, 1969, brought one unrelated, long forgotten event to mind. At day's end, John Dean summoned Chief of Police Jerry Wilson and me into his office at the Department of Justice to discuss the estimate of crowd size we should release to the media. Dean argued that only about 250,000 protestors participated; our estimate was much higher, roughly 325,000. This was no small matter since, in negotiating with the demonstrators, we promised an apolitical, good faith estimate, though we understood that the Nixon Administration wanted a low estimate. Rosen, in passing, clears the air by noting this entry in the diary of H.R. Haldeman, President Nixon's Chief of Staff: "Official estimate 250,000 By our photo count, it was 325,000. Anyway, it was really huge." *Id.* at 92.

121. ROSEN, *supra* note 1, at 106-07.

122. *Id.* at 112.

123. *Id.*

124. *Id.* at 162-63.

125. *Id.*

126. *See id.* at 163, 180.

127. The tension between law and politics characterizes what little scholarship there is on the Office of the Attorney General. For a searching analysis, which focuses on the electronic surveillance of Martin Luther King and other questionable behavior during Robert Kennedy's term as Attorney General, see VICTOR S. NAVASKY, *KENNEDY JUSTICE* (1971).

128. ROSEN, *supra* note 1, at 162-63.

Mitchell deserves more credit for holding his ground than he has received.¹²⁹ The most tumultuous example is the decision to charge International Telephone and Telegraph (ITT) with antitrust violations.¹³⁰ The President's roughneck Domestic Advisor, John Ehrlichman, had given assurances to ITT on behalf of the President that the case would not go to trial.¹³¹ Mitchell overrode these assurances, and, when the trial court decided in favor of ITT, Mitchell, ignoring Ehrlichman's barbed admonition, allowed the adverse decision to be appealed to the United States Supreme Court.¹³² Nixon, inflamed by this insubordination, ordered John Ehrlichman to instruct Mitchell's deputy, Richard Kleindienst, to abandon the appeal to the Supreme Court."¹³³ Nixon, still hot, called Kleindienst himself and ordered him to fire Richard McLaren, the head of the Department's antitrust division.¹³⁴ In a recorded conversation between Nixon and Kleindienst, Nixon ordered "McLaren's ass . . . to be out within one hour [L]eave the Goddamned thing alone. . . . Don't file the brief. . . . [M]y order is to drop the Goddamned thing, you son-of-a-bitch! Don't you understand the English language? Is that clear?"¹³⁵ Kleindienst promptly informed Mitchell that he would resign rather than follow the President's order, and Mitchell met with Nixon the next day.¹³⁶ Mitchell argued that it would be a "bad political mistake" to terminate the legal proceedings and Nixon reluctantly acceded.¹³⁷ The following day, Mitchell told Kleindienst: "By the way, . . . your friend at the White House says you can handle your fucking antitrust cases any way you want."¹³⁸

Although routinely coming around to Mitchell's view in their face-to-face meetings, Nixon was not appreciative. "Mitchell . . . didn't want to be political,"¹³⁹ Nixon complained. He was particularly upset by the deliberate, careful way Mitchell was building the case against Daniel Ellsberg for leaking the *Pentagon Papers* to the *New York Times*.¹⁴⁰ Nixon ordered him to "[t]ry [Ellsberg] in the press. Everything, John, that there is on the investigation—get it out, leak it out. We want to destroy him in the press. Press. Is that clear?"¹⁴¹

129. Erwin Griswold, the former Dean of the Harvard Law School, who continued to serve as Solicitor General through Nixon's first term, recalled that Mitchell "shielded [him] from several matters . . . [and] served to protect [him] from a good deal of direct pressure" from Nixon appointees. *Id.* at xv.

130. See generally *id.* at 186-220 (providing background information on the ITT case).

131. *Id.* at 189.

132. See *id.* at 189-99.

133. *Id.* at 190.

134. ROSEN, *supra* note 1, at 191-92.

135. *Id.*

136. *Id.* at 193.

137. *Id.* at 194.

138. *Id.* at 195. Another example is Mitchell's proceeding with organized crime prosecutions after Nixon, concerned over alienating the Italian vote, ordered "no mafia prosecutions prior to election." *Id.* at 491.

139. *Id.* at 76.

140. See ROSEN, *supra* note 1, at 162-63.

141. *Id.*

On occasion, Mitchell's prudential counsel so annoyed Nixon that he began to yearn for the time when Mitchell would leave office. Nixon told Haldeman in a confidential memorandum in 1971: "Actually, when Mitchell leaves as [A]ttorney [G]eneral, we're going to be better off in my view John is just too damn good a lawyer, you know. He's a good, strong lawyer. It just repels him to do these horrible things, but they've got to be done."¹⁴² The horrible things to which Nixon was referring included the formation of the White House Special Investigations Unit, a secret group better known as "the Plumbers."¹⁴³ Nixon, having been rebuffed by Director Hoover, created the Plumbers to plug leaks to the media.¹⁴⁴ Under the direction of John Ehrlichman, the Plumbers committed a host of illegal acts, including a break-in at the office of Daniel Ellsberg's former psychiatrist.¹⁴⁵

Mitchell was more successful in his opposition to the infamous "Huston Plan," another, more ambitious set of proposals for covert domestic actions advanced by a twenty-eight-year-old White House employee, Tom Huston, who Rosen describes as "[i]mperious, abrasive, staunchly conservative, and mousy—an unsmiling executive-branch version of Woody Allen."¹⁴⁶ Huston, agitated by the FBI's refusal to participate, conspired with disgruntled officials from the CIA and FBI to develop the Plan.¹⁴⁷ He accurately characterized his proposals as "clearly illegal" and "highly risky," but insisted that, if carefully implemented, they would yield "the type of intelligence which cannot be obtained in any other fashion."¹⁴⁸ Nixon did not hesitate. He approved the Plan, but before it could be acted upon, Mitchell intervened and persuaded the President to change his position.¹⁴⁹ Mitchell found the Plan "both illegal and unwise."¹⁵⁰ Looking back, it is ironic that Mitchell, who opposed the White House covert activities that addressed realistic concerns over national security breaches, should find himself subsequently ensnared with the criminal schemes of Gordon Liddy that promoted no public good and whose only purpose was to subvert the presidential election of 1972.

142. *Id.* at 76.

143. *Id.* at 163.

144. *Id.*

145. *Id.*

146. ROSEN, *supra* note 1, at 492-94.

147. *Id.* at 493.

148. *Id.*

149. *Id.* at 493-94.

150. *Id.* at 493 ("I quite agreed with them," Mitchell testified at the Watergate cover-up trial, adding that the plan "was not something we in the Justice Department would certainly want to participate in. . . . It had, I think, to put it mildly, some illegal activities involved. . . . I called Mr. Haldeman and the [P]resident and objected to it.").

VI. BREAKING IN AND COVERING UP

Mitchell's downfall began with a seemingly innocuous meeting with three subordinates, John Dean, Jeb Magruder, and Gordon Liddy, at Mitchell's office on January 27, 1972.¹⁵¹ John Dean had been a Mitchell aide and was then serving as counsel to the President. Dean valued Liddy's reputation as an intelligence operative and had recruited Liddy to work for the CRP.¹⁵² A former FBI agent and prosecutor, Liddy maneuvered his way through the Treasury Department to a White House position. Fit, cocky, and something of a dandy, he passed himself off as an intelligence expert, although he had never worked for the CIA and had only worked for the FBI for five years.¹⁵³ He was an oddity if only because of his fascination with the Third Reich.¹⁵⁴ While at the White House, he arranged a "screening of *Triumph of the Will*, the landmark Nazi propaganda film."¹⁵⁵ He was prone to theatrics as well, such as firing a gun in a courtroom,¹⁵⁶ and, on more than one occasion, proving his fortitude by holding a match under his hand until the skin was singed.¹⁵⁷

Although Liddy held the title of General Counsel to the CRP, which Mitchell headed, his actual assignment was to run a well-funded, "first-class intelligence

151. *Id.* at 262.

152. ROSEN, *supra* note 1, at 260.

153. It is easy from a distance to dismiss Liddy as unbalanced or fanatical, but in person he could be captivating. He was intelligent, engaging, and had a good sense of humor. His shortcoming was judgment; he mistook the political process for a theatre of war and was obsessive in his need to prove his courage in battle. See generally G. GORDON LIDDY, WILL: THE AUTOBIOGRAPHY OF G. GORDON LIDDY (1980). On more than one occasion, Liddy offered to murder someone. He once offered the Nixon administration his services in killing syndicated columnist Jack Anderson. *Id.* at 207-10. Similarly, he volunteered his services as an assassin to Egil Krogh, a presidential aide: "'Bud, if you want anyone killed, just let me know.' He smiled and said, 'I will.' I reacted to his smile by saying, 'I'm serious.' 'I know you are,' said Krogh, his smile gone. 'I'll let you know.'" *Id.* at 195. Liddy earlier had told Krogh that if he were detected during the break-in at the home of Dr. Fielding (Daniel Ellsberg's psychiatrist), he would kill if necessary to avoid apprehension and to protect his accomplices from arrest. *Id.* at 169. Liddy's favored method for proving his courage to others was to burn his palm. On one occasion, Liddy sought to reassure a prospect for undercover work that he could not be forced to reveal her identity. "She didn't believe me and I was casting about for some way to convince her when I noticed she smoked. I told her to light her cigarette lighter and hold it out . . . and I locked my gaze upon her eyes and placed my hand, palm down over the flame. Presently the flesh turned black and . . . she smelled the scent of burning meat . . ." *Id.* at 190. Unsurprisingly, the prospect quickly and decisively declined Liddy's offer of employment. *Id.* Liddy was untroubled; he had proved his valor. Liddy pulled this stunt so many times that his palm was "burned out" and he had "to go back to where [he] started years before[, his] forearm," to impress a fellow inmate. *Id.* at 298. "The pain," Liddy reported, "was not as severe now because all the nerves in the . . . area had been destroyed." *Id.* Liddy's poor judgment was evidenced by his enlisting an employee of the Committee for the Re-Election of the President as one of the burglars in the Watergate break-in, allowing the investigators to immediately link the burglary to the Republican Party and its campaign manager, John Mitchell. Liddy accepted responsibility for the botched burglary and earnestly told an astonished John Dean: "'If someone wants to shoot me . . . just tell me what corner to stand on and I'll be there, O.K.?"' *Id.* at 257-58.

154. ROSEN, *supra* note 1, at 260.

155. *Id.*

156. *Id.* at 259.

157. LIDDY, *supra* note 153, at 190.

operation.”¹⁵⁸ Liddy was supposed to report to Jeb Magruder, the Deputy Director of the CRP.¹⁵⁹ Mitchell had met Liddy several months earlier, in November 1971, when he approved Liddy’s hiring.¹⁶⁰ They did not discuss covert intelligence gathering at the November 1971 meeting, but two months later, in January, they reconvened again in the Office of the Attorney General for a lengthy briefing by Liddy.¹⁶¹ Liddy, carrying an easel and a bundle of charts (three feet tall and four feet wide), came well-prepared to advocate his proposals.¹⁶²

Liddy’s first proposal, “Operation Diamond,” targeted unruly anti-war radicals to prevent them from interrupting the convention. The prevention method Liddy had in mind was to “kidnap and drug antiwar leaders and remove them to Mexico until the convention ended.”¹⁶³ Liddy proposed the creation of “special action groups,” a tasteless “reference to Nazi *Einsatzgruppen* units that liquidated 1.5 million Jews,” to get the job done.¹⁶⁴

Here, I think it prudent to pause, if only to take a deep breath and ponder how, if you were in Mitchell’s shoes, you might respond to Liddy. Mitchell did not respond as one might expect, by asking whether his three visitors were out of their minds. He did not throw the lot of them out of his office. Nor did he treat Liddy as a crackpot. Rather, he sought particulars. Mitchell asked who would do the kidnapping. “[M]embers of organized crime,” Liddy replied, describing them as “professional killers who have accounted between them for twenty-two dead so far . . . including two hanged from a beam in a garage.”¹⁶⁵ “And how much will *their* services cost?” Mitchell asked.¹⁶⁶ “Like top professionals everywhere, sir, they don’t come cheap,” Liddy replied.¹⁶⁷ Finally, Mitchell said, “[L]et’s not contribute any more than we have to the coffers of organized crime.”¹⁶⁸ During a break at Mitchell’s criminal trial, the presiding judge, John Sirica, focused on this moment and could not resist commenting to those present: “It’s too bad that Mr. Mitchell didn’t say, “Throw them out of here, get them out fast,” and you wouldn’t even be in this courtroom today. It’s too bad it didn’t happen that way.”¹⁶⁹

Another of Liddy’s proposals, “Crystal,” involved renting a luxury houseboat, planting it with bugs and wiretaps, and retaining “sophisticated call

158. ROSEN, *supra* note 1, at 260.

159. *Id.*

160. *Id.*

161. *Id.* at 262.

162. *Id.*

163. *Id.*

164. ROSEN, *supra* note 1, at 262.

165. *Id.* at 262-63.

166. *Id.* at 263.

167. *Id.*

168. *Id.*

169. *Id.* at 432.

girls” to “seduce and debrief Democratic politicians.”¹⁷⁰ Again, Mitchell remained impassive, listening, but not commenting.¹⁷¹ Other proposals, equally preposterous, included the “clandestine recruitment of unappealing hippies to endorse opposition candidates” and retaining “Cuban mercenaries to sabotage the air-conditioning system at the Democrats’ convention.”¹⁷² Mitchell did not approve of Liddy’s plans.¹⁷³ Commenting, “Gordon, that’s not quite what I had in mind,” he sent Liddy back to the drawing board.¹⁷⁴ Magruder later testified that Mitchell found Liddy’s grand plan unacceptable “both in its scope and its budget.”¹⁷⁵ The “type of activity discussed’ . . . was ‘way out of line.’”¹⁷⁶

A week later, Liddy, Dean, and Magruder met again in Mitchell’s office at the Department of Justice to review Liddy’s revisions.¹⁷⁷ It was their last meeting. The new agenda was “less spectacular.”¹⁷⁸ Magruder testified that the “call girl thing was out, the kidnapping was out.”¹⁷⁹ But what remained was still felonious—burglaries, wiretaps, and theft.¹⁸⁰ The four men also discussed who should be spied upon, according to Magruder.¹⁸¹ Dean initially testified that there “may have been something as to potential targets,” then modified his position, corroborating Magruder’s testimony.¹⁸² Those involved at the meeting were indeed “talking about targets, possible targets of electronic surveillance.”¹⁸³ Mitchell denied that prospective targets were discussed and his recollection may well have been accurate.¹⁸⁴ But it is hard to credit fully this denial, given Mitchell’s propensity for denial.

Even if such discussions never took place, it seems clear that, overall, the issues raised by Liddy’s proposals at the two meetings were strategic, not legal or ethical. The four men, three of whom were lawyers, understood that what was being proposed was unlawful. Perhaps there was an air of adventure in the room as they congenially contemplated how their schemes would play out. Nothing was decided, however. All agree that Mitchell did not approve of Liddy’s revised plan.¹⁸⁵ Liddy’s recollection was that the meeting ended with Mitchell “saying he

170. ROSEN, *supra* note 1, at 263.

171. *Id.*

172. *Id.* at 264.

173. *Id.*

174. *Id.*

175. *Id.*

176. ROSEN, *supra* note 1, at 264.

177. *Id.* at 265.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. ROSEN, *supra* note 1, at 266.

183. *Id.* at 267.

184. *Id.* at 266.

185. *Id.* at 264.

would think about Liddy's proposals and get back to him."¹⁸⁶ Had they known that Nixon would sweep to re-election by one of the largest landslides in American history, would they still have criminally conspired to steal the presidential election? Mitchell later stated, "I didn't spend a hell of a lot of time with Liddy. . . . I left the matter to Dean."¹⁸⁷ But what time Mitchell did spend with Liddy was too much.

Rosen assiduously tracks the various meetings and communications among Mitchell, Dean, Magruder, Liddy, and others implicated in the break-in and the cover-up. He makes two findings, well-supported by parsing the enriched factual setting he developed, both at variance with prevailing views: first, that John Dean bears primary responsibility for authorizing the break-in at Democratic Headquarters at the Watergate office complex;¹⁸⁸ and, second, that both Dean and Magruder massaged the facts and shifted blame to Mitchell to secure prosecutorial leniency.¹⁸⁹ As historians and most investigators have not credited Mitchell's denials, Rosen's account may well compel a reexamination of their analyses. Dean, it will be recalled, was the first to sense danger from the likelihood of criminal prosecution, and he won the race to the prosecutors to make a deal.¹⁹⁰ Magruder was not far behind.¹⁹¹ Magruder's initial testimony only served to implicate Dean, and, as Dean had already confessed, this was of marginal value to the Watergate prosecutors, who wanted to know whether Mitchell was implicated.¹⁹² Over time, Magruder and Dean revised their testimonies to say that he was involved. Rosen concludes that Mitchell was "a casualty of a wicked alliance between coconspirators eager to tell lies and prosecutors eager to believe them."¹⁹³ It could well have happened that way. This was Nixon's view. He did not believe that Mitchell gave the order. "Mitchell," he said, "is a smart man. He's too smart to ever get involved in a stupid, jackass thing like Watergate!"¹⁹⁴ I agree. "Smart" is the right descriptor. "Scrupulous" or "principled" would be inapt.

186. *Id.* at 267.

187. *Id.* at 261.

188. ROSEN, *supra* note 1, at 292-95.

189. *Id.* at 266-67, 298-303 (recounting Magruder's contested account of the events leading up to the Watergate scandal).

190. *Id.* at 294.

191. *Id.*

192. *Id.* at 294-95.

193. *Id.* at 298.

194. ROSEN, *supra* note 1, at 471. Startled by news of the break-in, Nixon struggled, as historians have, to fix culpability. But he became quite certain that Mitchell did not order or approve the Watergate burglary. Nixon said: "John wasn't mindin' that store. He was practically *out of his mind* about Martha in the spring of 1972! He was letting Magruder and all these boys, these *kids*, these *nuts* run this thing! The point of the matter is that if John had been watchin' that store, Watergate would never have happened." *Id.* at 470. Elsewhere, Nixon told Robert Mardian, a former Mitchell aide, that he was "sure that the decision was one that Haldeman, Ehrlichman and JNM were too smart to make." *Id.* at 446.

Nixon, nonetheless, ultimately blamed Mitchell. “We all know who the hell should have handled this,” Nixon told Haldeman.¹⁹⁵ “Goddamnit, it was Mitchell, and he wasn’t handling it.”¹⁹⁶ More sympathetically, Nixon noted that Mitchell’s attention was diverted away from the campaign and towards caring for his wife, who was edging toward a breakdown.¹⁹⁷ “He was unable to watch the campaign and as a result, underlings did things without his knowledge.”¹⁹⁸ Nixon was unable to recognize that his own embrace of unlawful conduct, evidenced, for example, by his approval of the formation of the Plumbers and of the Huston Plan, created a climate in which aides would, to court favor with Nixon or have an adventurous fling, concoct illegal schemes on their own. But he did recognize that Mitchell was a casualty largely of his own making. Magruder, Dean, and Liddy, among others, either reported to Mitchell or deferred to him.¹⁹⁹ Magruder was his subordinate at the CRP²⁰⁰ and Dean had been his subordinate at the Department of Justice²⁰¹ before moving to the White House. Mitchell may well have inadvertently led his aides to think that they had the discretion to act in his stead. As Dean later said, “John Mitchell is not a terribly responsive man”²⁰² He did not say yes and he did not say no. But he did present himself as a man who was open to suggestions of wrongdoing. That is why Liddy, Dean, and Magruder trudged to his office, proposals in hand, for what Mitchell’s prosecutor was to call Liddy’s “one-man crime wave.”²⁰³ Rosen emphasizes that “no court of law ever determined who did give the order,”²⁰⁴ but we all know who did not prevent what was preventable.²⁰⁵

That Mitchell was not the same man at the time of Watergate who had conscientiously and diligently run Nixon’s 1968 campaign is evinced by his oversight of expenditures at the CRP.²⁰⁶ Magruder submitted a payment request for \$83,000 for Gordon Liddy, which both Hugh Sloan, the CRP’s Treasurer, and his boss, Finance Committee Chairman Maurice Stans, declined to process without first securing Mitchell’s approval.²⁰⁷ When Mitchell, after admitting that he did not know what the payment was for, proceeded to approve, Stans was

195. *Id.* at 347.

196. *Id.*

197. *Id.*

198. *Id.*

199. *E.g., id.* at 264.

200. ROSEN, *supra* note 1, at 260.

201. *Id.* at 261-62.

202. *Id.* at 221.

203. *Id.* at 435 (recounting portions of the cross examination of Mitchell regarding some of Liddy’s proposed action plans).

204. *Id.* at xix.

205. Rosen recognizes Mitchell’s neglect of duty. “Mitchell never ordered the Watergate operation, never even heard a proposal targeting that site, but he’d sat at the pinnacle of American law enforcement and twice listened to Gordon Liddy propose similar crimes and never ordered Liddy arrested or fired.” *Id.* at 363.

206. ROSEN, *supra* note 1, at 279-80.

207. *Id.* at 279.

taken aback: “Do you mean, John, that if Magruder tells Sloan to pay these amounts or any amounts to Gordon Liddy that he should do so?” “That is right,” Mitchell answered.²⁰⁸ “Magruder is in charge of the campaign and he directs the spending.”²⁰⁹ But Mitchell, not Magruder, was campaign manager. Perhaps, ostrich-like, he did not want to know what Liddy and his crew were up to; perhaps, as Nixon suggested, Mitchell was simply overwhelmed by his wife Martha’s mental and physical collapse, about which more will be said later.²¹⁰

Unlike the other Watergate defendants, Mitchell expressed no remorse; he did not consider himself culpable.²¹¹ The closest he came to acknowledging guilt occurred privately to Richard Nixon, shortly after his indictment.²¹² Mitchell said he was “‘terribly chagrined that the activities of anybody attached to his committee should have been handled in such a manner’ and expressed regret he had ‘not policed all the people more effectively in his own organization.’”²¹³ Senator Weicker managed to wrest a concession from him during the hearing of the Senate Select Committee on Presidential Campaign Activities.²¹⁴ Weicker asked whether “Mitchell, as an officer of the court, felt he had done ‘the right thing’ withholding from the authorities his ex post facto knowledge of the Ellsberg break-in. ‘I think, in retrospect [coming forward] probably would have been the right thing to do,’ Mitchell conceded.”²¹⁵ Finally, Mitchell’s petition for a reduction in his sentence offered a carefully framed admission of sorts. “‘Counsel is authorized by Mr. Mitchell to advise the court that he is truly sorry for and regrets those actions of his that resulted in his conviction.’”²¹⁶

Elsewhere, Mitchell denied complicity. He told a former aide that “[t]he jail time he spent never bothered him a bit . . . except for the fact that . . . he knew he wasn’t guilty.”²¹⁷ He often stated, vaguely and, characteristically, without elaboration, “‘My mistake was in men, not in law.’”²¹⁸ The statement is hard to fathom. What mistake about men did Mitchell make? He knew he was keeping bad company. He knew that the Plumbers were acting outside the law and that Tom Huston proposed additional criminal undertakings. He also knew that his aides and those within his ambit of influence, particularly Dean, Magruder, and

208. *Id.* at 279-80.

209. *Id.* at 279.

210. *See infra* notes 223-46 and accompanying text.

211. In contrast, Ehrlichman stated that he had “‘abdicated my moral judgments and turned them over to someone else,’” and Haldeman apologized “‘for what I’ve done, for what I’ve been responsible for, for what’s been the result of the damage to many, many people, and, I think, to the whole governmental system. . . . I recognize my responsibility to atone.’” ROSEN, *supra* note 1, at 460.

212. *Id.* at 312-13.

213. *Id.* at 313.

214. *Id.* at 392-93.

215. *Id.* at 393.

216. *Id.* at 459.

217. ROSEN, *supra* note 1, at 463.

218. *Id.* at 444.

Liddy, were up to no good. Indeed, they discussed specifics with him. Mitchell did not rely on them to stay on the right side of the law, but rather to avoid detection. As to Mitchell's claim that his mistake was "not in law," surely committing or suborning perjury qualifies as a mistake in law, and Mitchell perjured himself on more than a few occasions.²¹⁹ He was convicted of perjury for coaching Jeb Magruder to testify falsely before the Watergate Grand Jury.²²⁰ But Mitchell, lifelong, held his ground: "'There's nothing I did that I wouldn't do again with a clear conscience.'"²²¹

Life would surely have gone better for Mitchell if he had, like Ehrlichman, Haldeman, and other defendants, said he was sorry. He would not have avoided disbarment, but he would have taken a big step towards rehabilitation and public forgiveness. But Mitchell, unlike his co-defendants, Dean, Magruder, Haldeman, Ehrlichman, and Liddy, was not about to write a memoir or go on a campus speaking tour or sell himself in any public forum. Perhaps the most important of the roads not taken was his decision not to shade his testimony to implicate the President and thereby gain leniency. However one views this resoluteness, it is accurate to say, as did Nixon and others, including the *Washington Post* in the first edition of its obituary, that Mitchell "'was a stand-up guy.'"²²²

VII. AND THEN THERE WAS MARTHA

Mitchell's sustained devotion to his second wife, Martha, was as remarkable as it was inexplicable. He was continuously embarrassed by the unpredictable behavior of his unbalanced, alcoholic wife, whose late evening and early morning crank calls to reporters made her a favorite of the media and a spectacle to everyone else.²²³ Some journalists, thrilled by her attacks on Nixon and her criticism of the war in Vietnam, "cast her as a lonely and brave heroine," ignoring palpable evidence of mental illness.²²⁴ "*Newsweek* crowned her 'the most liberated woman in the world,' notwithstanding Martha's own declaration . . . that she wondered how feminists 'have any respect for themselves.'"²²⁵ And the *New York Post* saw her "'as the essence of exquisite Southern charm,'"²²⁶ despite her habit of ruining social events by shouting down guests, throwing her shoes at her husband, and passing out.²²⁷ She once told a Senator: "'It's liberals like you who are selling this country down the river to the communists.'"²²⁸ She

219. *Id.* at 495.

220. *Id.*

221. *Id.* at 454.

222. *Id.* at 488.

223. ROSEN, *supra* note 1, at 398.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 404.

228. *Id.* at 399.

publicly taunted New York City Mayor John Lindsay, calling him “Lindsay.”²²⁹ “When I don’t like somebody,” she explained, “I usually have a nickname for them.”²³⁰

Other outbursts, where she addressed sensitive public issues, were more worrisome. Martha took aim at a landmark decision of the United States Supreme Court, *Swann v. Charlotte-Mecklenburg*,²³¹ which upheld the constitutionality of court-ordered busing, by telling reporters that the Supreme Court should be “extinguish[ed]” as “it’s absolutely asinine for those nine old men to rule against the people.”²³² Her criticism of Nixon, borne of jealousy, remained immoderate and constant, but her views on the war varied. She made headlines by saying “[t]he War Stinks,”²³³ but celebrated the incursion into Cambodia as “100 percent wonderful.”²³⁴ Later, we find her “urging friends to send their draft-age sons to Canada.”²³⁵

Martha’s rude outbursts at social events stood in stark contrast to Mitchell’s bearing, which was quiet, reserved, and solicitous. Wherever she went, Martha demanded attention. John Ehrlichman complained that at dinner parties, “You couldn’t conduct a separate conversation down at the other end of the table. She’d say, ‘You people down there, be quiet. I want to say something.’”²³⁶ Her instability was augmented by her alcoholic binges. Martha drank heavily, passed out frequently, and was prone to physical violence.²³⁷

Nonetheless, Mitchell was devoted to her and worried about her incessantly. Nixon records a “moving moment” in his memoir.²³⁸ When Nixon first learned that he had won the election and invited Mitchell to join him to get the presidency “planned out,” Mitchell declined.²³⁹ “A tear streamed down his face . . . ‘I think I’d better go up to be with Martha.’”²⁴⁰ Martha, more than Nixon or his work, seemed to be the centerpiece of his life.²⁴¹ Mitchell recognized the severity of her mental and emotional health problems. He told Haldeman that Martha might be “unable to cope with the strain of Watergate and expressed

229. ROSEN, *supra* note 1, at 399.

230. *Id.*

231. 402 U.S. 1 (1971).

232. ROSEN, *supra* note 1, at 399.

233. *Id.* at 401.

234. *Id.* at 400.

235. *Id.*

236. *Id.* at 403.

237. *Id.* at 404, 414.

238. ROSEN, *supra* note 1, at 56.

239. *Id.*

240. *Id.*

241. Mitchell’s devotion to Martha was well known. A law partner who shared a hotel room with Mitchell overheard him speaking to Martha on the phone before retiring. He described it as the “sweetest” and “very romantic” and said that “it went on for a long time.” *Id.* at 24. Unimaginably, Mitchell was talking “baby talk.” *Id.* At the time, the Mitchells had been married over a decade.

fear” that she might be suicidal.²⁴² But his options were few. Although Mitchell continued to publicly maintain a bemused indifference to the behavior of his wife and privately looked after her as much as one could, the stress he endured as a target of a criminal investigation forced a change in their relationship. One day Mitchell abandoned his efforts to manage his wife’s madness and walked out.²⁴³ What followed was a prolonged, nasty, costly, and public divorce,²⁴⁴ followed by Martha’s sudden collapse after contracting a rare and extremely painful form of cancer.²⁴⁵ Her demise was sadder than most. Martha died penniless and alone at the age of fifty-seven. Mitchell directed the funeral arrangements.²⁴⁶

VIII. NIXON AND MITCHELL

Mitchell and Nixon were drawn to one another from their first meetings, at which they discussed merging their law firms. Nixon admired Mitchell’s verve and confidence and came to perceive him as a valuable ally in making a second run for the presidency.²⁴⁷ Mitchell’s effectiveness as campaign manager²⁴⁸ cemented this admiration, as did Mitchell’s development and execution of a crime control strategy for the Administration.²⁴⁹ Their relationship easily survived a few bad calls by Mitchell, such as his two nominees for appointment to the Supreme Court, both of whom failed to obtain Senate confirmation.²⁵⁰ More annoying to Nixon were Mitchell’s objections to his covert intelligence initiatives.²⁵¹ Although Nixon more than once wished for an Attorney General who was more accommodating, he continued to value and admire Mitchell and remained close to him.²⁵²

Martha Mitchell was a thorn in their relationship. Mitchell seemed unable to stop the continuing stream of front-page stories featuring his batty wife.²⁵³ Her early-morning, alcohol-drenched calls to reporters included outbursts such as “I

242. *Id.* at 322.

243. *Id.* at 408.

244. Rosen writes: “In the annals of divorce, the dissolution of the Mitchell marriage, and the competing child-custody and property claims it engendered, surely rank among the longest, nastiest, costliest, and most painfully public of the media age.” ROSEN, *supra* note 1, at 407-08. Martha accused Mitchell of “cruel and inhuman treatment” and asserted that Mitchell played a “‘leadership’ role in the ‘Watergate break-in and cover-up.’” *Id.* at 407. She also set fire to Mitchell’s personal mementos and documents and discarded the rest of his belongings in the entryway. Mitchell testified that Martha’s harassment and instability impaired his preparation for his criminal trials and that her alcoholic binges rendered her “‘unfit’ to care for [their daughter], in whom she ‘instilled fear . . . and upon occasion . . . physical abuse.’” *Id.*

245. *Id.* at 416.

246. *Id.*

247. *Id.* at 200.

248. *Id.* at 44-56 (recounting Mitchell’s days as Nixon’s campaign manager).

249. *Id.* at 72-73.

250. ROSEN, *supra* note 1, at 116.

251. *Id.* at 163.

252. *Id.*

253. *Id.* at 398-400.

love the Democrats”²⁵⁴ and “I can’t get over saying colored.”²⁵⁵ Following Senator Fulbright’s vote against confirmation of Judge Carswell, Martha called Fulbright’s hometown newspaper and told it, “I want you to crucify Fulbright and that’s it! . . . [He] makes me so damn mad, I can’t stand it.”²⁵⁶ Nonetheless, when Haldeman suggested that Nixon ease Mitchell out of his position as campaign manager for his re-election, Nixon rejected it out of hand: “I can’t do that. I won’t do that to him. I’d rather, shit, lose the election. I really would.”²⁵⁷ It was the break-in at the Watergate that drove the two men apart.

Nixon recognized Mitchell’s role in the break-in, justifiably, as several of the most prominent players were under Mitchell’s wing. John Dean had served as his Associate Attorney General and was working closely with the campaign.²⁵⁸ Both Magruder, as Deputy Director of the CRP, and Liddy, as its General Counsel, reported to Mitchell.²⁵⁹ Nixon did not think Mitchell was directly implicated in the Watergate break-in. “I think John said, ‘Well, we’re trying to get the information . . . don’t tell me anything about it.’ You know, that’s the way you do it, thinking probably they were going to do it the way you always do, planting a person on the other side, which everybody does.”²⁶⁰ Nixon did blame Mitchell for carelessness in overseeing his staff, but again showed concern for Mitchell’s circumstances. “I would dump him,” Nixon told Ehrlichman, “it would kill him financially. John Mitchell has a serious problem with his wife. He was unable to watch the campaign and as a result, underlings did things without his knowledge.”²⁶¹ Mitchell, for his part, understood that continuing to serve as campaign manager might be a burden for Nixon and offered to resign. “If this thing escalates,” he told Haldeman, “I think it would be very good if I’m out of the place and you could say, ‘Well, there’s a whole new team over there.’”²⁶²

Just as Nixon at times ruminated on how pleasant it might be if Mitchell resigned as Attorney General, Mitchell at times found Nixon hard to take. He “derisively referred to Nixon as ‘Milhous’—the middle name Nixon loathed,” and insisted that Nixon lacked intelligence and resolve.²⁶³ “Nixon couldn’t piss straight in the shower . . . He’s about as complicated as my grandson.”²⁶⁴ But

254. *Id.* at 124.

255. *Id.* at 399 (internal quotation marks omitted).

256. ROSEN, *supra* note 1, at 123.

257. *Id.* at 321.

258. *See id.* at 260-61.

259. *Id.* at 260-62.

260. *Id.* at 321-22 (quoting Nixon).

261. *Id.* at 347. Nixon himself was unraveling during this period. Far from acting as a masterful, manipulative politician, Nixon, in his meetings with his aides, rambled in an unfocused manner confused by the welter of details and persons implicated in the wrongdoing. Aides noted that it was hard to follow his train of thought, that he was “genuinely confused by all of the conflicting accounts,” and that he betrayed “a seeming incoherence of speaking style.” *Id.* at 349.

262. ROSEN, *supra* note 1, at 322.

263. *Id.* at 35-36.

264. *Id.*

these outbursts, with one exception, were transient, inconsequential, and, of course, out of public view. The exception was driven by Mitchell's desire to avoid prosecution. His attorneys sought permission to take Nixon's deposition. They argued, somewhat opaquely, that "Mr. Nixon may have participated in a conspiracy which carefully excluded Mr. Mitchell's membership, and which was designed to have an extremely adverse effect on Mr. Mitchell's well-being."²⁶⁵ Apart from this, Mitchell's public remarks invariably manifested great admiration and respect for Nixon. Unlike many of his fellow Watergate defendants, Mitchell never attempted to trade information, real or fabricated, against Nixon in exchange for leniency or to avoid imprisonment. Instead, he gave the prosecutors an offer they could refuse, a promise to plead guilty if they ceased their pursuit of the President. Nor did he yield to the temptation of publishing a memoir or retrospective about his years in power, as did Haldeman, Ehrlichman, Dean, Magruder, Liddy, and others.²⁶⁶ Nor did Mitchell serve up dirt about Richard Nixon, of which there was an abundance, in order to delight university students or television audiences. His was a stoical display of loyalty.

Nixon frequently telephoned Mitchell both during Mitchell's criminal trials and his imprisonment from June 1977 to January 1979.²⁶⁷ On the Labor Day weekend following his release, Nixon gave a sixty-sixth birthday party in San Clemente for his former law partner, campaign manager, Attorney General, advisor, and friend.²⁶⁸ As Mitchell put it, "The [P]resident's going to have a cocktail party for me in San Clemente."²⁶⁹ About 250 people attended.²⁷⁰ Nixon toasted Mitchell, saying, "John Mitchell has friends . . . [a]nd he stands by them."²⁷¹ Nixon continued to stay close to Mitchell following his release. Mary Gore Dean, with whom Mitchell lived after the completion of his sentence, reported that Nixon would call on Mitchell's birthday or if something happened that he thought would interest Mitchell.²⁷² Henry Kissinger may have been right in stating that Nixon had no close friends, but Nixon was capable of compassion, solicitude, guilt, and affection, and he had a deep, abiding affection for John Mitchell. In his words, "John Mitchell I love."²⁷³

265. *Id.* at 426.

266. *See, e.g.*, JOHN W. DEAN III, *THE WHITE HOUSE YEARS: BLIND AMBITION* (1976); JOHN EHRLICHMAN, *WITNESS TO POWER: THE NIXON YEARS* (1982); H.R. HALDEMAN & JOSEPH DiMONA, *THE ENDS OF POWER* (1978); LIDDY, *supra* note 153; JEB STUART MAGRUDER, *AN AMERICAN LIFE: ONE MAN'S ROAD TO WATERGATE* (1974).

267. ROSEN, *supra* note 1, at 448, 458.

268. *Id.* at 466.

269. *Id.*

270. *Id.*

271. *Id.* at 467.

272. *See id.* at 448.

273. National Review Online, *supra* note 17. This quote also appears on the frontispiece to Rosen's book, following the table of contents. *See* ROSEN, *supra* note 1.

Throughout all the exigencies and perils in which self interest placed them at odds with one another, their relationship persisted until Mitchell's death in 1988. At life's end, we find Mitchell walking alone in the late afternoon on Georgetown streets, "a gray man plodding alone in his gray way," then falling dead of a heart attack at age seventy-five.²⁷⁴ At Mitchell's funeral, there he was, the man Mitchell referred to as "the president," prominently escorting Mary Gore Dean, arm-in-arm, to her seat in the front pew.

IX. LIFE AFTER PRISON

Mitchell served his sentence at the federal prison at Maxwell Air Force Base. The choice of Maxwell was dictated by concerns over Mitchell's safety and imposed an added hardship, as Alabama was a long way from his friends and children in New York and along the East Coast.²⁷⁵ Nonetheless, Mitchell maintained his sense of humor. When the press asked how he felt, Mitchell quipped, "It's nice to be back in Alabama."²⁷⁶ At Maxwell, he exhibited his usual bravado, made friends among the inmates, and adjusted to prison life. But he was a wounded man. "Like Viola in *Twelfth Night*, he 'sat like Patience on a monument, / Smiling at Grief,'"²⁷⁷ during his nineteen months in custody.

Mitchell did not entirely fade into obscurity following his release, as he might have liked. Alone among the Watergate defendants, he returned to Washington. There he reunited with the widow of a long-time friend, Mary Gore Dean, who had reached out to Mitchell during his criminal trial. "I just told him that . . . my husband would certainly want me to be his friend if he needed a friend right now."²⁷⁸ For Mitchell, she was an angel. He moved into Mary Dean's large and comfortable townhouse in Georgetown and made his home there until he died.²⁷⁹ Mrs. Dean's three children came to view Mitchell as a second father, the youngest calling him "Daddy."²⁸⁰ "It was absolutely wonderful how he brought so much happiness and light into our family," said Mary Dean.²⁸¹

But Mitchell struggled to earn a living. Friends had raised several hundred thousand dollars for him to help cover his legal bills, but most doors were closed to him when it came to securing employment.²⁸² He eventually came into contact with individuals who sought his intervention with former friends still in high

274. ROSEN, *supra* note 1, at 475, 487.

275. *Id.* at 451.

276. *Id.* at 455.

277. JEFFREY MEYERS, SAMUEL JOHNSON: THE STRUGGLE 182 (2008).

278. ROSEN, *supra* note 1, at 442.

279. *Id.* at 442-43.

280. *Id.* at 443.

281. *Id.*

282. *See id.* at 472.

places in government. Mitchell did make a few phone calls on their behalves, but, as it turned out, his most influential contact was Mrs. Dean's oldest daughter, Deborah. Deborah was the executive assistant to Samuel Pierce, the Secretary of Housing and Urban Development (HUD), whose two terms in office were marked by rampant corruption.²⁸³ Her reputation for being the person in the Secretary's office who could make things happen was well-deserved.²⁸⁴

When Mitchell was approached by an old friend, former Governor of Kentucky Louis Nunn, for assistance on behalf of a client whose loan increase request had been denied, he called Deborah Dean.²⁸⁵ Four months later, the decision was reversed and the increase granted. Mitchell was rewarded with a check for \$8,613.94 from Nunn.²⁸⁶ Deborah Dean sent Mitchell a copy of the internal HUD document announcing the favorable decision with "'Daddy. F.Y.I.'" scribbled on it.²⁸⁷ This success bred another. Nunn called Mitchell who called Dean and a loan was granted. This was a far bigger deal and Nunn sent Mitchell a check for \$75,000.²⁸⁸ Still another call to Deborah Dean by Mitchell yielded Mitchell \$60,000.²⁸⁹

These transactions and many others like them triggered an investigation by the Inspector General at HUD, which revealed "a five-year pattern wherein hundreds of millions of dollars . . . were allocated 'on an informal, undocumented, and discretionary basis.'"²⁹⁰ A subsequent investigation by a House subcommittee revealed "'rampant abuse, favoritism, and mismanagement.'"²⁹¹ The Department of Justice intervened, and Deborah Dean,

283. *Id.* at 478-79.

A five-year criminal investigation of Mr. Pierce ended in 1995 when he issued a statement to prosecutors acknowledging that "my own conduct failed to set the proper standard" at the housing department.

Prosecutors and Congressional investigators uncovered extensive evidence to show how Mr. Pierce's aides, who said they had been acting on his orders, distributed millions of dollars in housing subsidies to prominent Republican consultants at a time when the Reagan administration was sharply reducing the agency's budget. Under President Ronald Reagan, annual spending on subsidized housing programs dropped to \$8 billion from \$26 billion, cuts that Mr. Pierce defended.

The subsidy programs that came under scrutiny by prosecutors had been intended to help encourage the construction and rehabilitation of low-income housing.

Phillip Shenon, Obituary, *Samuel R. Pierce Jr., Ex-Housing Secretary, Dies at 78*, N.Y. TIMES, Nov. 3, 2000, at B13.

284. ROSEN, *supra* note 1, at 479.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 479-80.

289. *Id.* at 481.

290. ROSEN, *supra* note 1, at 482.

291. *Id.* Mitchell was not the only former Republican office-holder who was able to influence HUD officials.

Among the well-known Republicans who were found to have pressed Mr. Pierce for help were James G. Watt, the former interior secretary, and former Senator Edward W. Brooke, Republican of Massachusetts, who both received large consulting fees for housing projects; and former Housing

like the man she considered a second father, became a target of a special prosecutor in a national scandal. Had Mitchell lived, he would likely have joined her at defendants' table. He was designated "Unindicted Co-conspirator One," and Dean was "charged with conspiracy to defraud the government, acceptance of illegal bribes (in dealings unrelated to Mitchell)," and perjury—thirteen counts in all.²⁹² Convicted on all counts, she was sentenced to twenty-one months in jail.²⁹³

X. MITCHELL HIMSELF

I remember Earl Silbert, the first Watergate prosecutor, telling me, as we walked down M Street in Georgetown, that Mitchell was very well-liked by those who worked with him. That observation, so contrary to media depictions and Mitchell's taciturn, aloof bearing, is borne out by Rosen and indeed by everyone else, including the lead Watergate attorney who prosecuted Mitchell; Mitchell's comrades in the Navy; his fellow prisoners; his colleagues in the Department of Justice and in the Committee for the Re-Election of the President; and, for that matter, me. President Carter's Attorney General, Griffin Bell, a former federal judge, sympathetically noted that Mitchell's sentence was "'more than [that of] a bank robber'" and generously granted Mitchell medical furloughs for the treatment of his hip and for a stomach condition that required surgery, and granted him leave to visit his family after Christmas.²⁹⁴ For Special Prosecutor Leon Jaworski, receiving the fifty-page indictment of Mitchell from the Grand Jury was "'a heart-rending moment' . . . [He] 'had always liked John Mitchell.'"²⁹⁵ And James Neal, who aggressively prosecuted Mitchell, exhibited a genuine fondness for him. Two decades after the trial, Neal recalled Mitchell as "'a thoroughly delightful man.'"²⁹⁶ Mitchell had inscribed Neal's copy of *All the President's Men*, a popular account of the events leading to the prosecutions: "'To one of the nicest guys I know unfortunately cast in the wrong spot at the wrong time.'"²⁹⁷ "'I was convinced,' Neal wrote, 'that [Mitchell's] offenses emanated not from an evil soul but from a misguided and foolish loyalty to the president of the United States.'"²⁹⁸ Neal took the unusual step of writing to the Parole Commission in 1978, urging Mitchell's early release (which the Commission denied).²⁹⁹ We see affection for Mitchell everywhere, including from

Secretary Carla A. Hills, who received relief from the department for a legal client.

Shenon, *supra* note 283.

292. ROSEN, *supra* note 1, at 482-83.

293. *Id.* at 483.

294. *Id.* at 462-63.

295. *Id.* at 421.

296. *Id.* at 432.

297. *Id.* at 420.

298. ROSEN, *supra* note 1, at 420.

299. *Id.*

surprising figures. Even in prison, Mitchell made friends, among others “a recidivist criminal serving time for transporting stolen merchandise across state lines.”³⁰⁰

But Mitchell was not merely likable. He displayed a certain grace under pressure. He was remarkably able to maintain equanimity, wit, and humor during his long public ordeal. Following the reading of the jury verdict convicting him of five felonies, he turned to his downhearted lawyer and said, “Don’t take it so hard.”³⁰¹ Then he congratulated the one defendant who was acquitted and comforted another.³⁰² At the sentencing hearing for the defendants in *United States v. Mitchell*, when John Ehrlichman’s attorney asked the court to permit Ehrlichman to provide legal services to a tribe of Pueblo Indians in New Mexico as an alternative to incarceration, Mitchell stage-whispered to his attorney: “If they offer us Indians, turn ’em down!”³⁰³ Exiting the courthouse, Mitchell quipped: “It could have been a hell of a lot worse. They could have sentenced me to spend the rest of my life with Martha.”³⁰⁴ After a hippie interrupted his press conference by calling Mitchell a fascist and U.S. Marshals were dragging the youth from the room, Mitchell quipped, “It’s all right . . . He wasn’t on the jury.”³⁰⁵ As Mitchell was leaving the courtroom, a doctor shook his hand. “If you ever need a psychiatrist,” he said, “I’d be glad to help.’ ‘If I ever need a psychiatrist,’ Mitchell shot back, ‘I’ll plead guilty first.’”³⁰⁶

“Mitchell was the trial’s mystery man,” Fred Graham commented on *CBS Evening News*, “puffing his pipe, cracking occasional jokes, refusing to attack Richard Nixon”³⁰⁷ Nixon commented in his now famous interviews with David Frost that Mitchell “never lets his emotions show. Except he does have a quiver in his hand at times”³⁰⁸ Nixon probably knew better. In private, Mitchell acted like a man under extreme stress. During the later stages of Watergate, he drank heavily, and his close friend, Fred LaRue, who dined with him every night, sometimes put him to bed.³⁰⁹ LaRue worried that Mitchell would crack under the strain of prosecutions and perhaps commit suicide.³¹⁰ Everything was going wrong. Mitchell foresaw his future—prison, disbarment, and

300. *Id.* at 458.

301. *Id.* at 438.

302. *Id.*

303. *Id.* at 441.

304. ROSEN, *supra* note 1, at 442.

305. *Id.* at 256.

306. *Id.* at 257.

307. *Id.* at 439.

308. *Id.* at 470.

309. *Id.* at 378.

310. ROSEN, *supra* note 1, at 378. Martha Mitchell expressed similar concerns. John, she reported, was devastated by his indictment. “He wouldn’t go out. He ate at his desk. He let his hair grow and wouldn’t shave. . . . John didn’t want to see anyone. . . . He was drinking and taking tranquilizers. There were nights our daughter Marty, and I, and the maid, had to drag him to bed.” *Id.* at 241-42.

ostracism. But Nixon was right in noting that Mitchell had great resilience and fortitude and that he was loyal—to a fault, one might add.

XI. CONCLUSION

Rosen has lifted the veil on the events of Watergate. Drawing on fresh sources and providing a penetrating analysis of events, his conclusion that it was not Mitchell who approved the break-in at Watergate deserves respect and may well trigger a rethinking of Watergate by historians. But as rich as his research is, it still leaves Mitchell an enigmatic figure. We don't understand how someone as smart and seasoned as Mitchell would wind up disgraced. The stock explanations do not run deep. Rosen reports that they "split along a clear fault line. There were those who believed Mitchell's great mistake was marrying Martha Mitchell and those who believed it was allying himself with Richard Nixon."³¹¹ Martha was the leading proponent of the "blame-the-president" position and Nixon returned the favor, as noted earlier, by laying Mitchell's misfortune largely at her feet.³¹² Both have a point. I fall more in the "blame-Nixon" camp.

Nixon cast a long, dark shadow enveloping his top aides. They were subjected to unceasing diatribes against his political opponents and the press. Nixon saw himself surrounded by enemies. He told Henry Kissinger: "The press is the enemy. The establishment is the enemy. The professors are the enemy," Nixon told Kissinger in a recorded Oval Office conversation on December 14, 1972.³¹³ Nixon was a damaged man, angry, suspicious, vindictive, and overflowing with resentment over perceived and real mistreatment. He retailed his beleaguerment, his bunker mentality, to those around him, and they exhibited a remarkable capacity for adopting this skewed perspective, sharing Nixon's disdain for the law and for playing by the rules. In this atmosphere, it is unsurprising that along the way excesses would occur and poor judgment would be exercised. The President set the table and others, lacking judgment and inhibition, took seats.

Even though the White House tapes reveal that Nixon was unaware of Liddy's proposals and was stunned to learn of the break-in at the Democratic Headquarters, it is hard to imagine Watergate occurring in any other president's term. It may be an overstatement to say, as Samuel Johnson did, that "virtue is

311. *Id.* at 497.

312. *Id.*

313. E.g., Caroline Graham, "The Press, the Establishment, and Professors Are the Enemy"—Latest Archive Recordings Reveal Depth of Nixon's Paranoia, DAILY MAIL, Dec. 3, 2008, <http://www.dailymail.co.uk/news/worldnews/article-1091608/The-Press-establishment-professors-enemy--latest-archive-recordings-reveal-depth-Nixons-paranoia.html#> (on file with the *McGeorge Law Review*). The tapes were recorded between November 1972 and January 1973, shortly after his re-election and just before the Watergate scandal unfolded. *More Nixon Tapes, Records Being Made Public*, MSNBC, Dec. 2, 2008, available at <http://www.msnbc.msn.com/id/28012809>. Combined, the items consist of nearly 200 hours of tape and 90,000 pages of text documents. *Id.*

uncommon in all the classes of humanity,”³¹⁴ but Nixon’s cluster of advisors seemed uncommonly willing to break the law. Mitchell’s makeup made him less susceptible to Nixon’s world view, but he was not immune. Becalmed, Nixon could be thoughtful, shrewd, and, with an eye to posterity, high-minded. At these times, Nixon welcomed Mitchell’s cautionary counsel. But Nixon’s moments of tranquility were momentary. Like a sponge, he reverted to his original fixations,³¹⁵ which enveloped malleable, ambitious men like Dean and Magruder, extremists like Liddy, key advisors such as Ehrlichman and Haldeman, and, to a lesser, but more costly degree, John Mitchell.³¹⁶ When the Watergate investigators finally got their hands on Mitchell, he hunkered down and obdurately buried himself in a sea of denials, half-truths, and hair-splitting.

If Mitchell could have divorced his wife a few years earlier and been free to focus on his governmental obligations, if he could have turned down his appointment as Attorney General, or if he could have gracefully resigned once he learned of the White House shenanigans, undertakings that the FBI and CIA declined to perform, would it have served him well? If so, then one has to ask whether he was capable of taking such actions. Again, it would seem so. But perhaps this is just rear-view-mirror speculation. What does come through clearly about John Mitchell is that he was not dour and stern or unfeeling, as his public persona suggested. He was a thoughtful, caring, affable, humorous, witty companion, well-liked by prisoners and his prosecutors, generous to a fault to both of his wives, and devoted to the people with whom he worked and who worked for him. He was somebody special, a dear man in many ways. But the attractive qualities he exhibited—intelligence, perceptiveness, and balance—were not consistently manifested in his public life.

Rosen closes the book on Mitchell’s life with an anecdote in which a friend, over lunch one day, inquired of him, “If you had it to do all over again, what would you do differently?”³¹⁷ Mitchell responded by recalling an unannounced office visit in 1960 from a man named Bobby Kennedy. Kennedy, Mitchell claimed, was seeking Mitchell’s assistance to run his brother, Jack’s, presidential campaign. Mitchell declined, and when Kennedy persisted, Mitchell reports throwing him out of his office. “‘If I had it all over to do,’ Mitchell said with a

314. MEYERS, *supra* note 277, at 191.

315. Nixon was stung by President Eisenhower’s low opinion of him. Eisenhower saw him but a handful of times during his eight years as Vice President and, when asked during the height of Nixon’s campaign against John Kennedy to name one major idea of Nixon’s he had adopted during Nixon’s two terms in office, he quipped, “‘If you give me a week, I might think of one.’” Eisenhower National Historic Site, <http://www.nps.gov/archive/eise/quotes2.htm> (last visited Nov. 13, 2009) (on file with the *McGeorge Law Review*).

316. Confronted by the stressful, career-threatening extended Watergate investigations and trials, his behavior took a pathological bent in which, his aides reported, he ruminated in a rambling fashion, seeing enemies everywhere. In his conversation, he lost focus and continuity in his conversation. See ROSEN, *supra* note 1, at 349.

317. *Id.* at 497.

smile, 'I'd run Jack Kennedy's campaign.'"³¹⁸ Rosen swallows this story whole, wistfully treating it as something that might have been. More likely, it was another tall tale, but unlike those of battlefield and sports heroics, perhaps it is one to be treated gently, a reminder of sorts by a man long suffering and disgraced: "Remember me. I was once somebody."

I saw Mitchell one more time. It was after he had been released from Maxwell. He was sitting in the back booth of a Georgetown restaurant, The Guards, with Mary Gore Dean, and I was with a friend who was at the Department of Justice when Mitchell was Attorney General. My friend walked over to pay his respects and I joined him after a moment. Mitchell was cordial and gracious in his reserved way and we chatted briefly. I have no recollection of what pleasantries we exchanged, and I have no regrets over paying my respects. Much about John Mitchell warrants respect. His congratulatory letter is back on my office wall. I know that there is a case for taking it down; but there's no arguing with feelings, and, as of this writing, there it is.

318. *Id.* at 498.

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