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# Watergate, Judge Sirica, and the Rule of Law

Anthony J. Gaughan

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# Watergate, Judge Sirica, and the Rule of Law

Anthony J. Gaughan\*

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## I. INTRODUCTION

During his 2005 nomination hearing before the United States Senate, Chief Justice John Roberts declared, “Judges are like umpires . . . . The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role.”<sup>1</sup> Not all Supreme Court Justices have agreed with Roberts. In *Johnson v. United States*, Felix Frankfurter insisted, “Federal judges are not referees at prize-fights but functionaries of justice.”<sup>2</sup>

Although the umpire analogy has broad appeal, the reality is that many judges assume a role that goes far beyond that of a referee. “The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by[.]” Benjamin Cardozo famously observed.<sup>3</sup> Judges, Cardozo

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1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005), (statement of John G. Roberts, Jr.).

2. 333 U.S. 46, 54 (1948) (Frankfurter, J., dissenting in part).

3. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

stressed, “do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do.”<sup>4</sup>

No event demonstrated that fact more dramatically than the most famous and momentous political scandal in American history. The “Wars of Watergate,” as the historian Stanley Kutler has aptly described the epic 1970s political scandal, posed the United States with its most severe constitutional crisis since the Civil War.<sup>5</sup> Watergate involved fundamental issues of executive privilege, the separation of powers, presidential impeachment, and the rights of criminal defendants. It triggered sweeping political and legal reforms, from campaign finance to the independent counsel law. The scandal’s climactic outcome—the resignation of a President—remains a singular event in the life of our nation.

A lone federal district court judge, John Sirica, stood at the center of the Watergate storm. This Article examines the trial of the Watergate burglars, one of the most important criminal proceedings in modern American history. Sirica presided over the trial of five burglars arrested at the Democratic National Committee headquarters in Washington’s Watergate office complex on June 17, 1972. The break-in was part of a political espionage campaign conducted by aides to President Nixon, a fact that the administration would attempt feverishly to hide from the courts. Within days of the burglars’ arrests, Nixon directed his staff to obstruct the criminal investigation. By concealing the burglars’ ties to the White House, Nixon hoped to preserve his reelection chances in the 1972 presidential campaign. The cover-up initially worked. Nixon won reelection in a landslide, and investigators failed to establish any direct connection between the burglars and the administration.<sup>6</sup>

However, in January 1973, the truth began to emerge in Judge Sirica’s courtroom. The burglars’ trial—and, in particular, Sirica’s highly unorthodox approach to sentencing—shattered the administration’s wall of silence.<sup>7</sup> The original scope of the prosecution’s case focused solely on the break-in itself rather than on the extent of the conspiracy behind it. But Sirica’s aggressive intervention forced the truth out. The judge’s well-deserved reputation for harsh sentences and his relentless questioning of the witnesses on the extent of the Watergate cover-up spurred a race to the courthouse among key figures in the Nixon Administration. Within weeks of the trial’s conclusion, White House Counsel John Dean, Watergate burglar James McCord, and presidential aide Jeb Stuart Magruder decided to cooperate with prosecutors and testify against the administration.<sup>8</sup> After the trial, the Senate established an investigative committee,

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4. *Id.*

5. See generally STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1990) [hereinafter *THE WARS OF WATERGATE*].

6. See *infra* Part II.A (detailing the break-in and the initial cover-up); see also *infra* Part III (examining the collapse of the cover-up).

7. See *infra* Part III.B (detailing the sentencing), see also Part III.A. (detailing the trial’s role in breaking down the wall of silence).

8. See FRED EMERY, *WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF*

and the Justice Department appointed a special prosecutor. The administration fought for a year to prevent further exposure of its misdeeds, but the evidence of criminal activity became overwhelming. On August 9, 1974, Nixon resigned, the only President ever forced from office.

As a matter of public memory, Watergate has been celebrated as an example of how the “system worked.”<sup>9</sup> The battle over Watergate, historian Stanley Kutler has observed, “offered eloquent testimony that the nation had a serious commitment to the rule of law.”<sup>10</sup> In his autobiography, Judge Sirica asserted that the scandal vindicated the judiciary’s role in exposing executive branch wrongdoing. “Despite efforts in our executive branch to distort the truth, to fabricate a set of facts that looked innocent,” Sirica contended, “*the court system served to set the record straight.*”<sup>11</sup>

There is no question that Watergate’s ultimate outcome was just. As the break-in vividly demonstrated, a lawless streak ran deep in the Nixon Administration, starting with the President himself. Nixon fully understood the legal significance of his actions. He was an honors graduate of Duke University Law School<sup>12</sup> and in private practice had even argued a case before the Supreme Court.<sup>13</sup> Although a highly intelligent attorney, Nixon neither respected nor obeyed the law. The President deserved his fate.

But the rule of law in America is not based on outcomes. The rule of law rests on the means used to achieve justice. A fair trial requires strict adherence to the procedural and constitutional protections afforded to criminal defendants. To a remarkable degree, the Watergate trial failed to meet those basic requirements, particularly with respect to the right of criminal defendants to remain silent. Just as the Watergate scandal challenged the resilience of the American political system, the burglars’ trial tested the limits of the American criminal justice system.

Judge Sirica played a crucial role in the outcome of both the burglars’ trial and the larger Watergate scandal. Had Sirica confined matters to the narrow case brought against the burglars by the prosecution, the defendants may not have talked, and Nixon might well have survived to serve out his second term. Sirica’s pursuit of the truth in his courtroom riveted the nation. By openly challenging the White House’s version of events, he galvanized public opinion against the administration’s efforts to conceal its involvement in Watergate. But the Watergate trial also raised profound questions about the proper role of a trial

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RICHARD NIXON 298-300, 318-33, 364 (explaining the courtroom proceedings); *see also* KUTLER, *THE WARS OF WATERGATE*, *supra* note 5, at 260-64.

9. THEODORE H. WHITE, *BREACH OF FAITH: THE FALL OF RICHARD NIXON* 222 (1975).

10. KUTLER, *THE WARS OF WATERGATE*, *supra* note 5, at 618.

11. JOHN J. SIRICA, *TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON* 301 (1979).

12. STEPHEN E. AMBROSE, *NIXON: THE EDUCATION OF A POLITICIAN, 1913-1962*, at 83 (1987).

13. STEPHEN E. AMBROSE, *NIXON: THE TRIUMPH OF A POLITICIAN, 1962-1972*, at 82 (1989) [hereinafter *THE TRIUMPH OF A POLITICIAN*].

court judge. Sirica's controversial tactics confronted the D.C. Circuit Court of Appeals with a fundamental question: Is a judge always limited to the role of an umpire, or, under certain circumstances of national importance, may a judge take an active, investigatory role in the proceedings before the court? For his part, Judge Sirica had no doubt what the answer to that question was. Indeed, Watergate demonstrated that, within the confines of the courtroom, the authority of a trial court judge far exceeds that of the President of the United States.<sup>14</sup>

Consequently, the trial's historical legacy remains profoundly ambiguous. By forcing the burglars to cooperate with investigators, Sirica helped drive a criminal administration from office. But in the process, Sirica's intimidation of the defendants violated basic principles of judicial fairness and impartiality. Indeed, from the outset Sirica abandoned any pretense of impartiality. He worked with investigators to find ways to force the defendants to talk, and even counseled the prosecutors regarding trial strategy. Most troubling of all, at sentencing, Sirica imposed thirty-to-forty-year prison terms—far out of line with what the severity of the crime merited—to coerce the defendants into cooperating with prosecutors and Senate investigators. Sirica's abusive use of his sentencing powers flagrantly disregarded the Fifth Amendment right against self-incrimination and the Sixth Amendment right to trial by jury.<sup>15</sup>

In the end, Judge Sirica approached the case with an agenda of his own, one that was more aggressive than even that of the prosecution. The judge was far from a mere "umpire" in the proceedings. Justice Frankfurter's description of judges as "functionaries of justice" perfectly captured Sirica's conception of his own role during the Watergate trial. Yet, as Judge Learned Hand once observed, "Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."<sup>16</sup> Although Sirica's ends were laudable—exposing a criminal conspiracy that reached to the highest levels of the White House—the means by which the court achieved its goals were deeply problematic. The "system" may have worked in Watergate, but only in the final result.

## II. THE CRIME

### A. *The Watergate Break-In*

In 1968, the Republican nominee Richard Nixon won the presidency by a razor-thin margin over his Democratic opponent, Vice President Hubert Humphrey.<sup>17</sup> The close outcome made a deep impression on Nixon, which lasted

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14. See *infra* Part II (examining Sirica's intervention in the trial).

15. See *id.* (examining the trial and sentencing).

16. United States v. Marzano, 149 F.2d 923, 926 (2nd Cir. 1945).

17. AMBROSE, THE TRIUMPH OF A POLITICIAN, *supra* note 13, at 220 (Nixon won by less than one percentage point).

throughout his first term in office. He and his top aides feared the 1972 campaign would be equally tight.<sup>18</sup> Therefore, in 1971, the administration secretly took steps to enhance President Nixon's reelection prospects.<sup>19</sup> Those steps led directly to Watergate.

The Watergate burglary was the brainchild of former FBI agent G. Gordon Liddy and retired CIA operative E. Howard Hunt.<sup>20</sup> A graduate of Fordham Law School, Liddy had served as Bureau Supervisor for the FBI headquarters in Washington.<sup>21</sup> During his CIA career, Hunt participated in the 1954 overthrow of the left-wing government in Guatemala and the failed 1961 Bay of Pigs Invasion of Cuba.<sup>22</sup> Liddy and Hunt met when they both went to work for the White House during President Nixon's first term in office.<sup>23</sup>

As their first assignment on the administration's behalf, Liddy and Hunt led a "White House Special Investigation Unit," known informally as the White House "Plumbers."<sup>24</sup> Leaks to the press obsessed the President and his senior aides.<sup>25</sup> White House paranoia over internal leaks reached a peak in 1971, when a Defense Department consultant, Daniel Ellsberg, leaked a classified Pentagon report on the Vietnam War to the *New York Times*.<sup>26</sup> On the orders of senior Nixon aides, Liddy and Hunt organized a burglary of the offices of Ellsberg's psychiatrist, Dr. Lewis Fielding, in an effort to steal Ellsberg's medical records. The Plumbers hoped the records would discredit Ellsberg.<sup>27</sup>

Although the Fielding break-in failed to produce useful information on Ellsberg, the Plumbers' efforts caught the attention of the Committee for the Reelection of the President (CRP), a fundraising organization supporting the President's 1972 reelection campaign.<sup>28</sup> The CRP enlisted Liddy and Hunt to conduct political intelligence operations against the Democratic Party and its presidential nominee, George McGovern.<sup>29</sup> Knowledge of Liddy and Hunt's

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18. SAM J. ERVIN, JR., *THE WHOLE TRUTH: THE WATERGATE CONSPIRACY* 3 (1980).

19. *United States v. Haldeman*, 559 F.2d 31, 52 (D.C. Cir. 1976).

20. *Id.*; see also H.R. REP., *IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES: THE FINAL REPORT OF THE COMMITTEE ON THE JUDICIARY* 55-56 (1975) [hereinafter *FINAL REPORT*].

21. G. GORDON LIDDY, *WILL: THE AUTOBIOGRAPHY OF G. GORDON LIDDY* 53, 58, 93 (1980).

22. JIM HOUGAN, *SECRET AGENDA: WATERGATE, DEEP THROAT AND THE CIA* 4-5 (1984).

23. See *FINAL REPORT*, *supra* note 20, at 51 (noting that Hunt was Liddy's chief assistant); see also LIDDY, *supra* note 21, at 148.

24. *Haldeman*, 559 F.2d at 54-55 n.16 ("The Unit was named the 'Plumbers' since its mission was to stop leaks of classified information.").

25. ROBERT DALLEK, *NIXON AND KISSINGER: PARTNERS IN POWER* 315-16 (2007).

26. *Id.* at 310-12.

27. *U.S. v. Barker*, 546 F.2d 940, 943 (D.C. Cir. 1976).

28. *Id.* at 944; JEB STUART MAGRUDER, *AN AMERICAN LIFE: ONE MAN'S ROAD TO WATERGATE* 170-173 (1974).

29. See *Haldeman*, 559 F.2d at 52 ("Gemstone was the brainchild of G. Gordon Liddy, CRP's general counsel, who had been hired in late 1971 to develop plans for gathering political intelligence and for countering demonstrations.").

activities reached as high as Attorney General John Mitchell.<sup>30</sup> Although Mitchell rejected Liddy and Hunt's more ambitious plans—which included kidnapping anti-war protesters, using prostitutes to blackmail Democratic officials, and firebombing the Brookings Institution, a liberal think tank in Washington—the Attorney General approved a scaled-down political espionage campaign, code-named GEMSTONE.<sup>31</sup> One of the first missions of the GEMSTONE conspirators was to wiretap the phones at the Democratic National Committee (DNC) headquarters at the Watergate.<sup>32</sup>

Liddy and Hunt assembled a team of covert operatives headed by former CIA agent James McCord.<sup>33</sup> A lieutenant colonel in the United States Air Force Reserve, McCord was the security coordinator for the CRP.<sup>34</sup> Besides McCord, the burglary team consisted of four individuals with ties to both the anti-Castro Cuban community and the CIA: Bernard Barker, Frank Sturgis, Eugenio Martinez, and Virgilio Gonzalez.<sup>35</sup> Martinez and Barker had also participated in the break-in at Dr. Fielding's office.<sup>36</sup> Hunt told the burglars that they were part of a classified national intelligence program, and that the Watergate break-in was necessary to protect America from a "Communist conspiracy."<sup>37</sup>

The first Watergate break-in occurred on May 28, 1972.<sup>38</sup> McCord and his team entered the offices in the middle of the night and bugged selected DNC phones.<sup>39</sup> However, the eavesdropping devices did not work as planned, necessitating a second break-in.<sup>40</sup> In addition, Jeb Stuart Magruder, the Deputy Director of the CRP, instructed Liddy that the burglars needed to photograph files in DNC Chairman Lawrence O'Brien's office.<sup>41</sup> To improve their electronic

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30. FINAL REPORT, *supra* note 20, at 56, 58.

31. *Id.* at 56-58; LIDDY, *supra* note 21, at 171-72, 196-98.

32. LIDDY, *supra* note 21, at 181-86, 219.

33. *Id.* at 191; *see also* JAMES W. MCCORD, JR., A PIECE OF TAPE: THE WATERGATE STORY 16-19 (1974) (examining the meetings between Liddy and McCord).

34. CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN 20-21 (1974).

35. United States v. Haldeman, 559 F.2d 31, 52 n.9 (D.C. Cir. 1976); *see also* MCCORD, *supra* note 33, at 23 (noting that throughout Watergate, the national press and Senate investigators referred to them as the "Cubans.").

36. United States v. Barker, 546 F.2d 940, 944 (D.C. Cir. 1976).

37. United States v. Barker, 514 F.2d 208, 217 (D.C. Cir. 1975); BERNSTEIN & WOODWARD, *supra* note 34, at 234.

38. MCCORD, *supra* note 33, at 25.

39. *Id.*; *see also* LIDDY, *supra* note 21, at 233.

40. LIDDY, *supra* note 21, at 234-35. The lack of a clear explanation of the second bugging's purpose has given rise to a wide range of theories about the break-in, none of which have produced anything more than circumstantial and speculative evidence. *See, e.g.,* HOUGAN, *supra* note 22, at 161-75 (detailing the problems with the initial bugging and the decision to make another break-in); Phil Stanford, *Watergate Revisited: Did the Press—and the Courts—Really Get to the Bottom of History's Most Famous Burglary?*, 24 COLUM. JOURNALISM REV. 46, 46-49 (1986) (noting that a sex scandal might have prompted the break-in); LEN COLODNY & ROBERT GETTLIN, SILENT COUP: THE REMOVAL OF A PRESIDENT (1992) (putting forth alternate explanations about the break-in).

41. LIDDY, *supra* note 21, at 237.

collection efforts and to satisfy Magruder's request, McCord's team broke into the Watergate for a second time on June 17.<sup>42</sup>

The second Watergate break-in resulted in disaster for the burglars and the Nixon Administration. After twice finding tape on the lock of an interior door, a night watchman notified police of a possible burglary in progress.<sup>43</sup> At 2 a.m. on June 17, D.C. police caught the burglars while they were still inside the DNC offices.<sup>44</sup> None of them resisted arrest.<sup>45</sup> Monitoring the break-in from two neighboring hotels, Liddy, Hunt, and McCord's associate, Alfred Baldwin, a former FBI agent, escaped the scene.<sup>46</sup>

They would not remain free for long. As Jeb Stuart Magruder later observed, "McCord's arrest was a disaster, because he was CRP's security chief; the Cubans might not even know whom they had been working for, but McCord would be very hard to explain away."<sup>47</sup> Compounding the White House's problems, the burglars left a long trail of evidence behind them. Police confiscated an address book from one of the burglars that included Hunt's name and his White House phone number.<sup>48</sup> Investigators also turned up a key to the hotel room where Liddy and Hunt had observed the break-in.<sup>49</sup> Most critical of all, the police found thousands of dollars in cash on the burglars, and in Hunt's hotel room.<sup>50</sup> The FBI traced the money to the Miami bank account of the CRP, an account controlled by Bernard Barker, one of the burglars.<sup>51</sup> The ringleaders' predicament turned from bad to worse when, in exchange for immunity from prosecution, Baldwin agreed to testify against Liddy and Hunt.<sup>52</sup> On September 15, 1972, a grand jury indicted Hunt, Liddy, McCord, and the Cubans on charges of conspiracy, burglary, and illegal interception of electronic communications.<sup>53</sup>

In response, the White House mounted an epic stonewalling campaign.<sup>54</sup> As Jeb Stuart Magruder later acknowledged, the cover-up "was immediate and

42. *Id.*

43. EMERY, *supra* note 8, at 132-33.

44. MCCORD, *supra* note 33, at 29-31.

45. *Id.* at 31; *see also* Lawrence Meyer, *Watergate Defendant Claims 'Bugs' Legal*, WASH. POST, Jan. 17, 1973, at A1 (discussing the arrest of the Watergate burglars).

46. *See* E. HOWARD HUNT WITH GREG AUNAPU, *AMERICAN SPY: MY SECRET HISTORY IN THE CIA, WATERGATE, AND BEYOND* 212 (2007); *see also* LIDDY, *supra* note 21, at 246; MCCORD, *supra* note 33, at 32.

47. MAGRUDER, *supra* note 28.

48. EMERY, *supra* note 8, at 148.

49. LIDDY, *supra* note 21, at 245.

50. *Id.* at 262; *see also* EMERY, *supra* note 8, at 148; Meyer, *supra* note 45.

51. *See* *United States v. Liddy*, 509 F.2d 428, 433 (D.C. Cir. 1974) (explaining Liddy's role in converting Mexican checks into cash); FINAL REPORT, *supra* note 20, at 70-71; KEITH W. OLSON, *WATERGATE: THE PRESIDENTIAL SCANDAL THAT SHOOK AMERICA* 47-48 (2003).

52. EMERY, *supra* note 8, at 212.

53. *Liddy*, 509 F.2d at 431; *United States v. Barker*, 514 F.2d 208, 212 (D.C. Cir. 1975).

54. *United States v. Haldeman*, 559 F.2d 31, 53-55 (D.C. Cir. 1976) (detailing the early steps taken in the cover-up).



automatic; no one ever considered that there would *not* be a cover-up.”<sup>55</sup> An arrogant sense of self-confidence informed the administration’s decision. “It seemed inconceivable,” Magruder later wrote, “that with our political power we could not erase this mistake we had made.”<sup>56</sup> Although Hunt had an office at the White House and Liddy served as the CRP’s general counsel, Nixon’s Press Secretary Ron Ziegler publicly declared that no one in the administration had any role in Watergate.<sup>57</sup> Ziegler characterized the break-in as a “‘third-rate burglary’” unworthy of serious press attention.<sup>58</sup>

The denials worked. By the fall of 1972, the Watergate scandal faded from public attention. At the cover-up’s outset, Nixon himself did not see the burglars’ arrests as a threat to his presidency. As a June 1972 recording from the Oval Office’s audio-taping system later revealed, Nixon spent only six minutes discussing the cover-up during one of his earliest post-burglary strategy sessions.<sup>59</sup> In casual fashion, he ordered his aides to cover up White House involvement and obstruct the investigation.<sup>60</sup> He then spent an hour discussing unrelated topics.<sup>61</sup> Nixon was confident that investigators would never unearth the full scope of his administration’s role in the scandal.

For months, Nixon’s confidence seemed well-founded. After announcing the indictments in September 1972, the Justice Department declared, “We have absolutely no evidence to indicate that any others should be charged.”<sup>62</sup> That evening, White House Counsel John Dean assured the President that the “two former White House people” who were indicted—Hunt and Liddy—were “low level.”<sup>63</sup> Dean concluded that prosecutors did not have “very much of a tie” to the White House.<sup>64</sup> “Phase one of the cover-up was a success,” Dean later recalled.<sup>65</sup> “The doors that led to Magruder, Mitchell and many others were closed, at least for the present.”<sup>66</sup> Nixon, however, left nothing to chance. To ensure the burglars’ silence, the administration secretly funneled \$187,000 in cash to them as they awaited trial.<sup>67</sup>

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55. MAGRUDER, *supra* note 28, at 220.

56. *Id.*

57. AMBROSE, *THE TRIUMPH OF A POLITICIAN*, *supra* note 13, at 567.

58. EMERY, *supra* note 8, at 161.

59. RAYMOND PRICE, *WITH NIXON 360* (1977).

60. STANLEY I. KUTLER, *ABUSE OF POWER: THE NEW NIXON TAPES 67-70* (1998) [hereinafter *ABUSE OF POWER*] (detailing a recorded conversation between Nixon and Haldeman on June 23, 1972); *see also* WHITE, *supra* note 9, at 164.

61. PRICE, *supra* note 59, at 359-60.

62. AMBROSE, *THE TRIUMPH OF A POLITICIAN*, *supra* note 13, at 608.

63. KUTLER, *ABUSE OF POWER*, *supra* note 60, at 151.

64. *Id.*

65. JOHN DEAN III, *BLIND AMBITION: THE WHITE HOUSE YEARS 133* (1976).

66. *Id.*

67. *United States v. Haldeman*, 559 F.2d 31, 56 (D.C. Cir. 1976).

On October 3, 1972, the House Banking Committee rejected the request of Rep. Wright Patman of Texas for subpoena power to investigate Watergate.<sup>68</sup> One month later, Nixon won reelection with sixty percent of the popular vote.<sup>69</sup> He also carried forty-nine of fifty states, one of the biggest landslides in history.<sup>70</sup> As 1972 drew to a close, Watergate seemed destined to be a footnote in the history of Richard Nixon's presidency.

### B. *The Judge*

In January 1973, seven defendants went on trial for the Watergate break-in: the two ringleaders, Hunt and Liddy, and the five burglars, McCord, Sturgis, Gonzalez, Martinez, and Barker.<sup>71</sup> Watergate prosecutors Earl Silbert, Seymour Glanzer, and Donald Campbell, served in the United States Attorney's Office, which reported to the Nixon Justice Department.<sup>72</sup> Although Mitchell had resigned as Attorney General, his replacement, Richard Kleindienst, was a Nixon ally.<sup>73</sup> The day after the burglars' arrests, Liddy informed Kleindienst of the CRP's role in the Watergate break-in.<sup>74</sup> According to Liddy, Kleindienst responded by stressing that protecting the President was his top priority.<sup>75</sup> Through its control of the Justice Department, the Nixon Administration seemed well-positioned to limit the scope of the investigation.

No one appreciated the risk of White House interference more than Judge Sirica. Although a Republican himself, Sirica suspected a wide-ranging conspiracy reaching deep into the Nixon Administration.<sup>76</sup> Consequently, he saw exposure of the cover-up as a principal goal of the criminal trial. "From the beginning," Sirica later wrote, "it was my hope that the trial would bring out the truth, that, within the framework of the law, the trial would be the forum in which the unanswered questions of Watergate would be answered."<sup>77</sup> Sirica reasoned that with no congressional investigation underway, "[t]he United States District Court was left as the only branch of government trying to get to the bottom of Watergate."<sup>78</sup> The judge had no doubt who the principal antagonist was in his pursuit of the truth. Writing about the burglars' trial years later, Sirica revealed,

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68. EMERY, *supra* note 8, at 219-20.

69. AMBROSE, *THE TRIUMPH OF A POLITICIAN*, *supra* note 13, at 651.

70. *Id.*

71. *United States v. Barker*, 514 F.2d 208, 212 (D.C. Cir. 1975).

72. KUTLER, *THE WARS OF WATERGATE*, *supra* note 5, at 209; *see also* BERNSTIEN & WOODWARD, *supra* note 34, at 230.

73. *See* EMERY, *supra* note 8, at 171-72 (noting that Kleindienst would have rather resigned than prosecuted his predecessor Mitchell).

74. LIDDY, *supra* note 21, at 252.

75. *Id.* at 252-253.

76. SIRICA, *supra* note 11, at 44, 62.

77. *Id.* at 61-62.

78. *Id.* at 52.

“On more nights than I now care to remember, I would wake up after only a few hours of sleep, my heart racing, wondering what new stumbling block President Nixon and his associates would throw in front of me the next day.”<sup>79</sup>

Sirica was an unlikely hero. He had an undistinguished record on the bench.<sup>80</sup> A graduate of Georgetown, Sirica spent 30 years in private practice before President Eisenhower appointed him to the federal bench in 1957.<sup>81</sup> During his years as a federal district court judge, Sirica had a remarkably high rate of reversal by appellate courts.<sup>82</sup> His errors often involved basic procedural mistakes. In one case, Sirica denied a foreign corporation’s motion to quash service of process even though none of its officers, agents, or employees had been served with the plaintiff’s complaint.<sup>83</sup> In another, Sirica dismissed a Maryland plaintiff’s case on grounds of *forum non conveniens*, despite the fact that the plaintiff’s car accident occurred in the District of Columbia, D.C. residents witnessed the accident, D.C. police investigated the accident, and D.C. doctors treated the plaintiff’s injuries.<sup>84</sup>

Sirica believed that as a trial court judge, he had “to more or less shoot from the hip.”<sup>85</sup> His principal notoriety stemmed from his nickname “Maximum John,” a product of his penchant for imposing long prison sentences.<sup>86</sup> His strong inclination in favor of stiff sentences would prove crucial during the trial’s aftermath.

In the trial of the Watergate burglars, Sirica faced the greatest challenge of his career. Intense public interest in the case meant that Sirica’s actions would be more closely scrutinized than ever before. The magnitude of the challenge became clear even before the trial began. In December 1972, *Washington Post* reporters Bob Woodward and Carl Bernstein contacted members of the grand jury in an effort to discover the nature and content of the evidence the prosecutors had presented.<sup>87</sup> When Sirica learned of the reporters’ efforts to interview the jurors, he threatened to send Woodward and Bernstein to jail.<sup>88</sup> Only the intervention of the *Post*’s attorney Edward Bennett Williams—a close friend of Sirica’s—and the prosecution’s recommendation of leniency kept the

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79. *Id.* at 297.

80. See Harvey Katz, *Some Call It Justice: A Special Report on Washington Area Judges*, 5 WASHINGTONIAN 46, 52 (Sept. 1970) (noting that Sirica had a high reversal rate, and was known for making careless mistakes).

81. SIRICA, *supra* note 11, at 26, 39.

82. EMERY, *supra* note 8, at 237; see also KUTLER, THE WARS OF WATERGATE, *supra* note 5, at 260.

83. See generally *DeSanno & Son, Inc. v. Brown*, 313 F.2d 898 (D.C. Cir. 1963) (reversing Sirica’s decision).

84. *Caspar v. Devine*, 257 F.2d 197, 198 (D.C. Cir. 1958).

85. SIRICA, *supra* note 11, at 72.

86. Peter Osnos, *Unanswered Questions Plague a Tough Judge*, WASH. POST, Mar. 24, 1973, at A10; see also EMERY, *supra* note 8, at 238.

87. BERNSTEIN & WOODWARD, *supra* note 34, at 207-11.

88. SIRICA, *supra* note 11, at 54-55.

journalists out of jail.<sup>89</sup> Nevertheless, despite the judge's admonition, *Washington Post* editor Ben Bradlee directed his reporters to leave no stone uncovered in their pursuit of the story.<sup>90</sup> Indeed, the media's scrutiny of the case would only intensify in the weeks ahead.

The White House posed the most daunting obstacle to Sirica's pursuit of the truth. Nixon's aides worked behind the scenes to maintain the burglars' silence and to cover up all traces of the administration's involvement. Shortly after the burglars' arrests, Henry Petersen, head of the Justice Department's Criminal Division, promised White House Counsel John Dean that the prosecutors would not mount a "fishing expedition."<sup>91</sup> According to Dean, Petersen assured him that Earl Silbert, the chief Watergate prosecutor, was only "investigating a break-in . . . he knows better than to wander off beyond his authority . . ."<sup>92</sup> One month after the Watergate break-in, Chief of Staff Robert Haldeman assured the President that the Justice Department would not pursue investigative leads to the White House. Haldeman informed Nixon that Petersen was "directing the investigation along the channels that will not produce the kind of answers we don't want produced."<sup>93</sup> Haldeman also reported that Petersen believed the prosecutors "all are of the view that they don't want to indict the White House, they only want to indict the—they want to tighten up that case on that criminal act and limit it to that to the degree that they can . . ."<sup>94</sup>

Although he knew the reverse to be true, Attorney General Kleindienst publicly declared "the [Watergate] investigation was 'one of the most intensive, objective, and thorough investigations in many years.'"<sup>95</sup> Meanwhile, in the D.C. Jail, G. Gordon Liddy made plans to kill his fellow inmate and Watergate co-conspirator Howard Hunt, if necessary, to prevent Hunt from exposing the President's involvement in the cover-up.<sup>96</sup>

With its attention focused on the prosecutors, the administration never considered the possibility of an investigation mounted by the judicial branch. As Sirica later explained:

The whole case looked more and more like a big cover-up . . . . Perhaps some other federal judges would have limited themselves to ruling on objections. But one of the reasons I had always wanted to be a federal

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89. *Id.*; see also EVAN THOMAS, THE MAN TO SEE: EDWARD BENNETT WILLIAMS ULTIMATE INSIDER; LEGENDARY TRIAL LAWYER 276-77 (1991).

90. BEN BRADLEE, A GOOD LIFE: NEWSPAPERING AND OTHER ADVENTURES 346 (1995).

91. EMERY, *supra* note 8, at 172.

92. *Id.*

93. KUTLER, ABUSE OF POWER, *supra* note 60, at 102.

94. *Id.*

95. AMBROSE, THE TRIUMPH OF A POLITICIAN, *supra* note 13, at 607-08.

96. LIDDY, *supra* note 21, at 309.

judge was that, damn it, nobody could stop me from asking the right questions.<sup>97</sup>

His efforts to do so would transform the Watergate case from a “third-rate burglary” into the political scandal of the century.

### III. THE JUDGE AS INVESTIGATOR

#### A. *The Scope of the Prosecution’s Case*

As the White House had hoped, prosecutors initially took a narrow view of the case. Unable to produce evidence of a broader cover-up, the U.S. Attorney’s Office focused on the immediate facts at hand: the incontrovertible evidence that five burglars had broken into the DNC offices; the circumstantial evidence that they had broken in for the purposes of electronic eavesdropping; and the mounting evidence that Liddy and Hunt had directed the burglary.<sup>98</sup>

The judge was not pleased. Before empanelling the jury, Sirica made clear his unhappiness with the prosecution’s approach. On December 4, 1972, he convened a pre-trial hearing on the planned exhibits. At the judge’s insistence, the conversation moved to substantive matters. Sirica pressed Silbert “to trace the money found on the defendants.”<sup>99</sup> In response, Silbert noted that he lacked evidence identifying the ultimate source of the burglars’ funds as well as their motive for bugging the DNC headquarters.<sup>100</sup> Although the judge conceded that “technically, they didn’t have to prove a motive, only that seven men were guilty of the charges against them[.]” he urged the prosecutors to drill deeper.<sup>101</sup> In open court, Sirica declared, “This jury is going to want to know[:] what did these men go into that headquarters for? . . . Was their sole purpose political espionage? Were they paid? Was there financial gain? Who hired them? Who started this?”<sup>102</sup>

Although the prosecution declined to follow his advice, the judge refused to take no for an answer. He again met in chambers with Silbert a few days before the trial began.<sup>103</sup> According to Sirica’s memoirs, he told Silbert, “Earl, look, you’ve got a great opportunity in this case if you go right down the middle, let the chips fall where they may. Don’t let anybody put any pressure on you.”<sup>104</sup> The

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97. SIRICA, *supra* note 11, at 74-75.

98. See generally *United States v. Barker*, 514 F.2d 208, 212 n.5 (D.C.Cir. 1975); *United States v. McCord*, 509 F.2d 334 (D.C.Cir. 1974); *United States v. Liddy*, 509 F.2d 428 (D.C.Cir. 1974); *United States v. Hunt*, 514 F.2d 270 (D.C.Cir. 1975).

99. SIRICA, *supra* note 11, at 56.

100. *Id.* at 57.

101. *Id.*

102. Bob Woodward & Carl Bernstein, *Watergate Trial Judge Wants ‘Exploration’*, WASH. POST, Jan. 10, 1973, at A15.

103. SIRICA, *supra* note 11, at 58.

104. *Id.*

judge told Silbert about his own days as a prosecutor investigating corruption at the Federal Communications Commission. Sirica wanted Silbert to know of his own “direct experience” with exposing “cover-ups.”<sup>105</sup> In his autobiography, the judge explained, “I wanted the young prosecutor to know just how white-washers [sic] were engineered.”<sup>106</sup>

Sirica’s account suggests that he and Silbert met alone. If that was in fact the case, it constituted an *ex parte* communication in clear breach of the Code of Judicial Conduct. Although the Watergate trial long predated the District of Columbia’s adoption of the American Bar Association’s (ABA) 1990 Model Code of Judicial Conduct, basic judicial protocols applied to Sirica nevertheless. In 1924, the ABA adopted a predecessor to the Model Code, known as the “Canons of Judicial Ethics.” Section 17, which covered *ex parte* communications, directed that a judge “should not permit private interviews, arguments or communications designed to influence his judicial action . . . .”<sup>107</sup> Moreover, the Canons advised, “Ordinarily all communications of counsel to the judge, intended or calculated to influence action should be made known to opposing counsel.”<sup>108</sup>

As Sirica’s account demonstrated, his communications to Silbert clearly showed judicial partiality to the prosecution. Although the 1924 Canons did not expressly ban *ex parte* judicial advice to counsel, Section 34 emphasized the obvious fact that judges must be “impartial.”<sup>109</sup> To that end, the D.C. Circuit Court of Appeals required presiding judges to offer their trial recommendations while in the presence of counsel for all parties. For example, in *Jackson v. United States*, the D.C. Circuit directed, “[i]f a trial judge has definite ideas as to what lines of inquiry ought to be pursued, he is free to call both counsel to the bench, or in chambers and suggest what he wants done.”<sup>110</sup> The key point being, of course, that counsel from both sides must be included. By excluding defense counsel from his meeting with Silbert, and discussing with the prosecutor the line of inquiry he wanted pursued, Sirica’s pre-trial communication flew in the face of the judicial standard established by the D.C. Circuit in *Jackson*.

But Sirica had no interest in aiding the defense’s case. He wanted convictions and, more importantly, full confessions. In his autobiography, the judge revealed that on the eve of trial he privately hoped that his guidance to Silbert would prompt the prosecutor to cast a wider net. “Although I had no feeling that the break-in case could involve the president himself,” Sirica wrote in his memoirs,

105. *Id.*

106. *Id.*

107. CANONS OF JUDICIAL ETHICS § 17 (1924).

108. *Id.*

109. *Id.* § 34.

110. 329 F.2d 893, 894 (D.C. Cir. 1964).

“my instincts told me that if the truth came out, things could be difficult for some of the president’s friends and assistants.”<sup>111</sup>

To the judge’s consternation, the prosecution’s opening statement focused on the crime it could prove beyond a reasonable doubt—the Watergate burglary—and did not explore the possibility of a broader conspiracy. Although Silbert promised the jury that the evidence would show that the CRP had paid the burglars, he did not pursue the question of how high up the White House chain the conspiracy went.<sup>112</sup> “[F]rankly, I was disappointed[,]” the judge later recalled.<sup>113</sup> “When Silbert got around to discussing the money found on the defendants and the source of that money, I hoped he would unravel some of the mystery of this case[,]” Sirica wrote.<sup>114</sup> Although the prosecutor “made it clear . . . that the defendants had been paid by the president’s campaign committee[,]” the judge expressed dismay that “Silbert said not a word about whether or not they had known in advance about the break-in and bugging.”<sup>115</sup>

Sirica also objected to the prosecution’s focus on Liddy as the ringleader of the burglary. Silbert, Sirica complained, left “the impression with the jury that Liddy had somehow gone off on his own, had in effect misused the money and the authority that the president’s campaign aides had given him.”<sup>116</sup> The prosecution maintained that financial trouble motivated the burglars.<sup>117</sup> “The idea was apparently that these men had gone into the Democratic headquarters for the same reason a robber goes into a bank—they needed the money. This was the most limited view of the case it was possible to take, and it frustrated me[,]” Sirica explained.<sup>118</sup>

Indeed, the prosecution’s theory of the case played directly into the administration’s hands. As Jeb Stuart Magruder later admitted, “Once we at CRP denied any involvement in the Watergate break-in, it became necessary for us to develop a complicated cover story that would place the full blame on Gordon Liddy . . . .”<sup>119</sup>

The prosecutors’ narrow focus on the burglary attracted criticism far beyond Judge Sirica’s courtroom. Senator Sam Ervin of North Carolina accused the prosecutors of having “muffed” opportunities to tie the break-in to the White

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111. SIRICA, *supra* note 11, at 62.

112. Lawrence Meyer, *E. Howard Hunt Pleads Guilty in Watergate Case*, WASH. POST, Jan. 11, 1973, at A1.

113. SIRICA, *supra* note 11, at 62.

114. *Id.* at 63.

115. *Id.* at 63-64.

116. *Id.* at 64.

117. Meyer, *E. Howard Hunt Pleads Guilty in Watergate Case*, *supra* note 112.

118. SIRICA, *supra* note 11, at 64. The prosecutors’ narrow view of the case eventually led to an investigation by Archibald Cox, the Watergate special prosecutor. Cox’s review found no evidence that Silbert participated in the cover-up. RICHARD BEN-VENISTE & GEORGE FRAMPTON, JR., *STONEWALL: THE REAL STORY OF THE WATERGATE PROSECUTION* 24, 31 (1977).

119. MAGRUDER, *supra* note 28, at 228.

House.<sup>120</sup> Harvard Law Professor Archibald Cox charged that during the prosecution of the burglars “it became apparent that the Department of Justice was not investigating the charges as vigorously as the evidence then warranted.”<sup>121</sup> *Time* Magazine’s editors complained that the prosecutors “showed little zeal for tracing the source of the funds used by the men arrested at the Watergate or determining who had authorized the politically motivated crime.”<sup>122</sup> Senator Ervin concluded that “the prosecutors fell substantially short of prying open and presenting to the grand jury the truth respecting the Watergate affair.”<sup>123</sup>

The prosecution, however, had a plausible justification for taking a more limited view of the case—they had no concrete evidence of a broader conspiracy.<sup>124</sup> Nixon’s stonewalling campaign had worked, denying prosecutors evidence that would have implicated White House officials. From his perch in the White House, John Dean, the President’s counsel, directed a massive campaign of obstruction of justice.<sup>125</sup> Chief of Staff Robert Haldeman instructed White House aide Chuck Colson that “‘John Dean is handling the entire Watergate matter now’ . . . ‘and any questions or input you have should be directed to him and to no one else.’”<sup>126</sup> At Dean’s request, acting FBI Director L. Patrick Gray secretly destroyed evidence seized from Howard Hunt’s safe.<sup>127</sup> Dean and Haldeman also continued to funnel tens of thousands of dollars to the burglars for their silence.<sup>128</sup> Meanwhile, Assistant Attorney General Henry Peterson provided a steady stream of confidential information to the President and Dean, who in turn used that knowledge to further block the investigation.<sup>129</sup> In short, the full weight of the executive branch stood between the prosecutors and the truth.

The prosecutors also made a critical strategic error. In exchange for his testimony, they offered immunity to Baldwin, but not to any of the other defendants.<sup>130</sup> Baldwin had no knowledge of the conspiracy beyond the break-in

120. ERVIN, *supra* note 18, at 12.

121. KUTLER, *THE WARS OF WATERGATE*, *supra* note 5, at 334.

122. *Man of the Year, Judge John J. Sirica: Standing Firm for the Primacy of Law*, TIME, Jan. 7, 1974, at 10-11.

123. ERVIN, *supra* note 18, at 94.

124. *Confirmation Hearings on the Nomination of Earl J. Silbert to be United States Attorney: Hearing Before the S. Comm. on the Judiciary*, 93 Cong. 181 (1974) [hereinafter *Silbert Hearings*]; Interview with Earl Silbert, Oral History Project, D.C. Circuit Historical Society (Feb. 29, 1992), at 75, available at [http://www.dchcs.org/EarlJSilbert/silbert\\_transcript.pdf](http://www.dchcs.org/EarlJSilbert/silbert_transcript.pdf) (on file with the *McGeorge Law Review*).

125. See DEAN, *supra* note 65, at 131 (“The cover-up blistered on, with me throwing water on it.”).

126. KUTLER, *THE WARS OF WATERGATE*, *supra* note 5, at 239.

127. EMERY, *supra* note 8, at 197.

128. *United States v. Haldeman*, 559 F.2d 31, 56-58 (D.C. Cir. 1976); see also STEPHEN AMBROSE, *NIXON: RUIN AND RECOVERY, 1973-1990*, at 83-86 [hereinafter *RUIN & RECOVERY*] (detailing the continued demands for money).

129. DEAN, *supra* note 65 at 110-11, 131, 202-03; see also KUTLER, *THE WARS OF WATERGATE*, *supra* note 5, at 302-03, 307-10, 315-16.

130. EMERY, *supra* note 8, at 212.



itself, and thus his testimony only implicated the seven named defendants.<sup>131</sup> In contrast, Liddy, Hunt, and McCord all possessed highly incriminating information tying the break-in to senior figures at both the CRP and the White House. The prosecutors had no hope of turning Liddy, who was fiercely loyal to the administration, but the same was not true of Hunt and McCord.<sup>132</sup> Both feared long prison sentences and hoped the administration would pardon them.<sup>133</sup> Hunt and McCord's fear of prison created opportunities for the prosecution. Indeed, while the prosecution secured Baldwin's full cooperation in the investigation by offering him immunity,<sup>134</sup> they decided to pursue convictions of McCord and Hunt rather than offer full immunity.<sup>135</sup> This strategic decision nearly let the White House off the hook. Indeed, if Sirica had not intervened in the case when he did, the Nixon Administration would likely have succeeded in containing the scandal to the named defendants.

The judge faced problems of his own. His efforts to get to the bottom of the Watergate affair got off to a rocky start. Shortly after the trial began, Hunt withdrew his plea of not guilty and entered a plea of guilty on charges of burglary, wiretapping, and conspiracy.<sup>136</sup> In return for his guilty plea, the prosecutors agreed to drop the other three charges pending against him.<sup>137</sup> Sirica, however, was not satisfied. As he later related, "My unstated feeling was that the government had a good case against Hunt on all the counts in which he was named."<sup>138</sup> The judge also feared "the way the partial plea would look to the public."<sup>139</sup> On January 11, Sirica informed Hunt that he would not accept the plea to only three counts of indictment.<sup>140</sup> In an effort to pressure Hunt into talking, Sirica demanded that Hunt plead guilty to all six counts against him.<sup>141</sup> As the judge saw it, "[t]he trial was the only place, at that time, where we could learn the truth of the Watergate case. If Hunt simply pleaded guilty, took his medicine, and went to jail, the chance that we would ever find out what was going on in the case would be reduced."<sup>142</sup> Sirica's effort to force the former CIA operative to talk failed. Hunt not only maintained his silence on the scope of the Watergate

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131. See Lawrence Meyer, *Key U.S. Witness Tells of Bugging Democrats*, WASH. POST, Jan. 18, 1973, at A8 (detailing Baldwin's testimony against the other Watergate defendants).

132. See, e.g., LIDDY, *supra* note 21, at 306, 309 (detailing Liddy's preliminary plans to kill Hunt in order to protect the administration).

133. See *United States v. Haldeman*, 559 F.2d 31, 57 (D.C. Cir. 1976); see also FINAL REPORT, *supra* note 20, at 108-09.

134. BERNSTEIN & WOODWARD, *supra* note 34, at 65.

135. *Silbert Hearings*, *supra* note 124, at 181.

136. See *United States v. Hunt*, 514 F.2d 270, 271 n.2 (D.C. Cir. 1975) (noting that there was a conditional plea offer from the prosecution).

137. *Hunt v. Bittman*, 482 F. Supp. 1017, 1019 (D.D.C. 1980); see also SIRICA, *supra* note 11, at 67.

138. SIRICA, *supra* note 11, at 67.

139. *Id.* at 67-68.

140. *Id.* at 67; see also *Bittman*, 482 F. Supp. at 1019.

141. SIRICA, *supra* note 11, at 67-68.

142. *Id.* at 68.

conspiracy, but also agreed to plead guilty to all charges.<sup>143</sup> To reporters waiting outside the courtroom, Hunt declared that no “higher-ups” were involved in the conspiracy.<sup>144</sup>

Sirica’s intervention was extraordinarily improper. Although the plea agreement with Hunt held despite the judge’s reinstatement of the three additional counts, the episode displayed Sirica’s willingness to merge judicial functions with those of the prosecution. He had no grounds for doing so. The decision regarding what crimes to charge a defendant with resides solely with the executive branch, not the judicial branch. The Supreme Court underscored the point in *Bordenkircher v. Hayes*, declaring, “In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”<sup>145</sup> This would not be the last time that Sirica intruded upon executive branch functions during the Watergate trial.

On January 15, following Hunt’s lead, the four Cubans—Barker, Gonzalez, Martinez, and Sturgis—pleaded guilty to seven counts of conspiracy, burglary, and illegal interception of oral and wire communications.<sup>146</sup> Before accepting their guilty pleas, Sirica questioned each of them individually regarding the voluntariness of their guilty pleas and the scope of the Watergate conspiracy.<sup>147</sup> As Judge Skelly Wright of the D.C. Circuit Court of Appeals later observed, Sirica “went to great lengths in seeking to uncover [the burglars’] reasons for participating in the break-in and for deciding to plead guilty.”<sup>148</sup> Nevertheless, the burglars denied knowledge of a wider conspiracy and insisted that they were under no pressure to plead guilty.<sup>149</sup> Judge Sirica recognized the cover-up unfolding before his eyes. When Barker insisted that he did not know who funded the break-in, Sirica replied, “I am sorry, I don’t believe you.”<sup>150</sup>

Although procedurally proper, the thoroughness of Sirica’s plea colloquy posed a problem for the prosecution. By getting the burglars on record testifying under oath that there was no broader conspiracy beyond the seven charged defendants, the judge all but closed the door on using their testimony in the future. If, at a later date, the defendants cracked and decided to tell all they knew, their prior inconsistent statements would severely undermine their credibility as witnesses. The prosecutors undoubtedly recognized this fact. The *Washington Post* reported that during Sirica’s plea colloquy Silbert sat at the prosecution

143. *Id.* at 68-69.

144. *Id.* at 69; *see also* KUTLER, THE WARS OF WATERGATE, *supra* note 5, at 254; *Trials: Starting on Watergate*, TIME, Jan. 22, 1973, at 19.

145. 434 U.S. 357, 364 (1978).

146. *United States v. Barker*, 514 F.2d 208, 215-16 (D.C. Cir. 1975).

147. *Id.*

148. *Id.* at 215.

149. SIRICA, *supra* note 11, at 70.

150. *Barker*, 514 F.2d at 216.

table “shaking his head, frowning and staring down at his yellow legal pad . . . .”<sup>151</sup>

With five of the defendants having pled guilty, the number of defendants still contesting their charges shrank to two: McCord and Liddy. After Sirica completed the plea colloquy, the trial of McCord and Liddy resumed in earnest. However, the prejudicial effect on the jury of five defendants suddenly disappearing created grounds for a mistrial. As Gerald Alch, McCord’s attorney, argued, “‘No instruction’ . . . ‘can obviate the inference that these five men have pleaded guilty . . . after two days of deliberations to which the jury has not been privy.’”<sup>152</sup>

Nevertheless, Sirica decided to plough ahead. As the trial resumed, the evidence against McCord and Liddy mounted. The police caught McCord red-handed inside the Watergate building, and the evidence connecting Liddy to the break-in was overwhelming. The first witness to take the stand after the other defendants entered their guilty pleas was Thomas Gregory, a twenty-five-year-old Brigham Young University student. Gregory testified that Hunt hired him to spy on the campaign headquarters of Maine Senator Edmund Muskie, the early Democratic front-runner in 1972, and South Dakota Senator George McGovern, the eventual Democratic nominee.<sup>153</sup> According to Gregory, McCord had unsuccessfully attempted to place an eavesdropping device at McGovern headquarters.<sup>154</sup> Gregory also testified that he helped Hunt and Liddy surveil the Watergate prior to the May 28 break-in.<sup>155</sup>

As the prosecution’s case failed to produce evidence of a wider conspiracy, Sirica took an increasingly assertive role. During the prosecution’s examination, four officials from the CRP—Hugh Sloan, Jeb Stuart Magruder, Robert Odle, and Herbert Porter—testified that the CRP had given Liddy the funds recovered on the burglars.<sup>156</sup> They all insisted, however, that the funds were intended for lawful purposes, and that the CRP had no prior knowledge of the break-in.<sup>157</sup> When Silbert declined to probe the CRP officials further, Sirica became so exasperated that he began questioning witnesses himself. With the CRP’s employees denying knowledge of Liddy’s activities, Sirica resolved to expose the “big cover-up” himself.<sup>158</sup>

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151. Carl Bernstein & Bob Woodward, *Judge Pushes for Answers*, WASH. POST, Jan. 16, 1973, at A7.

152. Lawrence Meyer, *4 Watergate Suspects Plead Guilty: 2 Defendants Still on Trial*, WASH. POST, Jan. 16, 1973, at A1.

153. *Id.*

154. *Id.*

155. *Id.*

156. SIRICA, *supra* note 11, at 73-74.

157. *See id.* at 74 (noting that Sloan testified that he did not know what the money was to be used for); *see also* BERNSTEIN & WOODWARD, *supra* note 34, at 239-40.

158. SIRICA, *supra* note 11, at 74-75 (explaining that Sirica began questioning the witnesses following Silbert’s questioning).

Unlike the prosecutors, Sirica focused on ties between the White House, the CRP, and Liddy. Alfred Baldwin, the government's star witness, testified regarding Liddy and McCord's roles in the Watergate break-in, but he claimed that he could not remember the name of McCord's contact at the CRP.<sup>159</sup> Baldwin revealed that, on a daily basis, he gave the logs of monitored DNC phone conversations to McCord, who in turn personally delivered them to the CRP.<sup>160</sup> There was one exception. Before leaving for a business trip to Miami, McCord directed Baldwin himself to deliver the logs to the CRP offices.<sup>161</sup> McCord wrote a name on the envelope for Baldwin to use, but Baldwin could not remember the name at trial.<sup>162</sup> Baldwin testified that he gave the envelope containing the wiretap logs to a guard at CRP offices.<sup>163</sup> Sirica sarcastically responded, "You want the jury to believe that you gave it to a guard, is that your testimony?"<sup>164</sup> Nevertheless, Sirica's questions failed to elicit additional information from Baldwin.

The testimony of M. Douglas Caddy, a Washington lawyer, triggered a heated dispute. Caddy testified that both Hunt and Liddy called him in the early morning hours of June 17, 1972, to retain him as their lawyer.<sup>165</sup> The obvious implication was that Liddy and Hunt's retention of Caddy shortly after the burglars' arrests was not a coincidence. In response, Peter Maroulis, Liddy's attorney, objected on the grounds that the prosecution sought to use Liddy's exercise of his constitutional right to an attorney against him.<sup>166</sup> Although Sirica overruled Maroulis' objection, the judge instructed the jury to "'draw no adverse inference' from the fact that Liddy [had] retained a lawyer . . . ."<sup>167</sup>

One of the most controversial episodes of the trial occurred when Hugh Sloan, Treasurer of the Finance Committee for the Reelection of the President, took the stand. At the direction of Jeb Stuart Magruder, Sloan had funneled CRP funds to Liddy prior to the Watergate break-in.<sup>168</sup> Sloan also witnessed the earliest stages of the cover-up. Hours after the police arrested the burglars, Liddy returned to the CRP's offices to remove all the evidence he could find that tied the CRP to the burglars.<sup>169</sup> As Liddy later explained, there was "a lot of material in my office that was now white-hot and had to be destroyed immediately."<sup>170</sup> As

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159. *Id.* at 73; *see also* Meyer, *Key U.S. Witness Tells of Bugging Democrats*, *supra* note 131.

160. Lawrence Meyer, *Key Witness Can't Trace Wiretap Log*, WASH. POST, Jan. 20, 1973, at A1.

161. *Id.*

162. *Id.*

163. *Id.*

164. SIRICA, *supra* note 11, at 73.

165. Lawrence Meyer, *Witness Can't Recall Who Got Tapped Logs*, WASH. POST, Jan. 23, 1973, at A8.

166. *Id.*

167. *Id.*

168. MAGRUDER, *supra* note 28, at 198-99, 222-23.

169. LIDDY, *supra* note 21, at 248.

170. *Id.*

he carried documents to the shredding machine, he bumped into Sloan.<sup>171</sup> Liddy warned the CRP Treasurer, “Our boys got caught last night.”<sup>172</sup> Referring to McCord, a CRP employee, Liddy added, “It was my mistake and I used someone from here, something I told them I’d never do.”<sup>173</sup>

On the witness stand, Sloan testified that he did not know what Liddy meant when he said that the ““boys got caught last night.””<sup>174</sup> Liddy himself later recalled “Sloan looked bewildered” by the reference to “our boys.”<sup>175</sup> Although Liddy refused to testify during the trial, he subsequently confirmed that Sloan had no prior knowledge of the Watergate break-in.<sup>176</sup>

Nevertheless, Sirica did not buy Sloan’s story. “With Sloan still on the stand, I realized that if I didn’t step in fast, this whole parade would go by, right out of the courthouse, laughing at us[,]” Sirica recorded in his memoirs.<sup>177</sup> The judge excused the jury and took over the questioning himself.<sup>178</sup> He “aggressively examined” Sloan on the question of the amount of money Sloan had given to Liddy and the manner in which he laundered the money.<sup>179</sup> Sirica asked Sloan a total of forty-two questions.<sup>180</sup>

The judge correctly surmised that authorization of the payments to Liddy had to come from a source higher than any of the CRP witnesses. “Someone had to know what the money was for. Liddy had to be reporting to someone. Now here was Sloan, who had handled the money. I made up my mind very quickly, right there, to ask him some questions myself.”<sup>181</sup> During both the judge’s and the prosecution’s examination, Sloan testified that Magruder directed him to give Liddy \$199,000 in cash, but Sloan insisted that he did not know the purpose of the payments.<sup>182</sup> Sloan also revealed that former Attorney General John Mitchell and former Commerce Secretary Maurice Stans had approved the payments to Liddy.<sup>183</sup>

Despite Sirica’s skepticism, Sloan had testified truthfully.<sup>184</sup> In contrast, two of the witnesses who Sirica declined to question—Jeb Stuart Magruder and

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171. *Id.* at 249.

172. *Id.*

173. *Id.*

174. *United States v. Liddy*, 509 F.2d 428, 437 (D.C. Cir. 1974).

175. *LIDDY*, *supra* note 21, at 249.

176. *See id.* at 249 (noting that Sloan was “obviously not putting together his cursory exposures to the GEMSTONE budget with what I was saying”).

177. *SIRICA*, *supra* note 11, at 74.

178. *Liddy*, 509 F.2d at 437.

179. *United States v. McCord*, 509 F.2d 334, 346-47 (D.C. Cir. 1974).

180. *Liddy*, 509 F.2d at 437.

181. *SIRICA*, *supra* note 11, at 75.

182. *Id.* at 76.

183. *Id.* at 79.

184. *MAGRUDER*, *supra* note 28, at 232; *see also EMERY*, *supra* note 8, at 239 (“Sirica (wrongly) praised Magruder and (wrongly) berated Sloan as witnesses.”).

Herbert Porter—later admitted to committing perjury.<sup>185</sup> The judge had chosen the wrong CRP official to grill. Magruder claimed that he knew nothing of Liddy's illegal wiretapping activities against the Democrats.<sup>186</sup> He also claimed that he hired Liddy to serve solely as the CRP's lawyer, not to engage in covert activities.<sup>187</sup> Porter testified that the CRP gave Liddy \$100,000 to investigate whether radical groups planned violence during the 1972 presidential campaign.<sup>188</sup> Neither Sirica nor the prosecutors probed Magruder and Porter's stories.

Magruder expressed surprise at how smoothly his testimony went.<sup>189</sup> "I went in, took the oath, was questioned for about forty-five minutes, and left[,]" Magruder recalled.<sup>190</sup> "Neither the prosecutors (and I was their witness) nor the defense lawyers challenged my story."<sup>191</sup> When Magruder left the stand, Liddy smiled and winked at him.<sup>192</sup> As Liddy scornfully observed, Sirica "swallowed the perjury of Jeb Magruder whole but wouldn't believe poor Hugh Sloan who was doing his best to tell the truth."<sup>193</sup>

Three days later, Sirica decided "the jurors should have the benefit of the [Sloan] testimony taken in their absence."<sup>194</sup> He believed it necessary to "read the questions and answers to the jury so they could make their own judgments."<sup>195</sup> Both the prosecution and defense counsel objected.<sup>196</sup> Brushing aside their concerns, Sirica explained that he feared that "Sloan might have a lapse of memory, I don't know. I would rather read it from the record."<sup>197</sup> The judge later elaborated:

I exercise my judgment as a federal judge and chief judge of this court and have done it on many occasions and in the presence of the jury examined witnesses where I thought all the facts were not brought out by counsel on either side. As long as I am a federal judge I will continue to do it.<sup>198</sup>

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185. BERNSTEIN & WOODWARD, *supra* note 34, at 240 n.\*; MAGRUDER, *supra* note 28, at 280, 296.

186. Lawrence Meyer, *Liddy Indicated He Reported to 'Others', Witness Says*, WASH. POST, Jan. 24, 1973, at A3.

187. *Id.*

188. *Id.*

189. MAGRUDER, *supra* note 28, at 280.

190. *Id.*

191. *Id.*

192. *Id.* at 281.

193. LIDDY, *supra* note 21, at 284.

194. *United States v. Liddy*, 509 F.2d 428, 437 (D.C. Cir. 1974).

195. SIRICA, *supra* note 11, at 79.

196. Liddy, 509 F.2d at 437-38.

197. *Id.* at 437.

198. SIRICA, *supra* note 11, at 80.

The judge proceeded to read to the jury from the transcript of his interrogation of Sloan, including comments made during a bench conference with the attorneys.<sup>199</sup> In *Young v. United States*, the D.C. Circuit reversed two robbery defendants' convictions when the record showed that the jury might have overheard bench conferences at which the judge criticized defense counsel.<sup>200</sup> In the Watergate case, Sirica did not even bother to excise the bench conference from the transcript presented to the jurors.<sup>201</sup> Moreover, both Sloan's testimony and the bench conference included references to possible election law violations committed by Liddy.<sup>202</sup> Liddy's indictment did not contain those alleged violations, and thus should not have been presented to the jury.<sup>203</sup>

The D.C. Circuit Court of Appeals permitted trial judges to ask questions at trial for the purposes of clarification. In *United States v. Barbour*, the D.C. Circuit noted that "[a] trial judge is not 'a mere moderator' . . . His participation in the examination of witnesses may well be justified where the testimonial presentation promotes fuzziness, as where testimony is inarticulately or reluctantly given."<sup>204</sup> Furthermore, in *Griffin v. United States*, the court recognized "the right of a trial judge to make proper inquiry of any witness when he deems that the end of justice may be served thereby and for the purpose of making the case clear to the jurors."<sup>205</sup>

But Sirica had excused the jury before his examination of Sloan. His questions, therefore, fell far short of *Griffin's* directive that such questioning be "for the purpose of making the case clear to the jurors." The judge compounded the error by reading the transcript of Sloan's testimony to the jurors without giving them the benefit of live testimony to determine for themselves the truthfulness of the witness's statements.

The D.C. Circuit barred trial judges from turning such questioning into independent investigations of their own. Such questioning undermines judicial impartiality and risks unduly influencing the jury. The court insisted that at all times "the judge must remain 'a disinterested and objective participant in the proceedings,' and principles both fundamental and indestructible in our criminal law exhort him to hold to a minimum his questioning of witnesses in a jury trial."<sup>206</sup>

By focusing his questions on the culpability of CRP officials who were not named in the indictment, Sirica once again conflated judicial functions with those of the executive branch. For example, although the prosecution was convinced

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199. *Liddy*, 509 F.2d at 441-42 n.35.

200. 346 F.2d 793, 796 (D.C. Cir. 1965).

201. *Liddy*, 509 F.2d at 438.

202. *Id.* at 441-42 n.35.

203. *Id.* at 438.

204. 420 F.2d 1319, 1320-21 (D.C. Cir. 1969) (citing *Billeci v. United States*, 184 F.2d 394, 402 (D.C. Cir. 1950)).

205. 164 F.2d 903, 904 (D.C. Cir. 1947).

206. *Barbour*, 420 F.2d at 1321 (quoting *Billeci*, 184 F.2d at 403).

that Sloan did not know how the money was used, Sirica repeatedly pressed the witness on that point.<sup>207</sup>

Sirica: "You didn't question Mr. Magruder about the purpose of the \$199,000?"

Sloan: "No, sir."

Sirica: "Didn't anybody indicate what this money was to be used for?"

Sloan: "No, sir."<sup>208</sup>

Time and again Sirica returned to the question of what the CRP expected Liddy to do with the money.

Sirica: "Did anybody indicate to you by their action or by words or deed what this money was to be used for?"

Sloan: "No, sir."

Sirica: "You don't know what Mr. Liddy used it (the money) for?"

Sloan: "No, sir."

Sirica: "No idea?"

Sloan: "No, sir."<sup>209</sup>

Sirica's questioning of Sloan did not constitute an effort to clarify the witness testimony. It constituted a judicial investigation, which the D.C. Circuit expressly barred judges from engaging in. In *United States v. Green*, the D.C. Circuit observed that "although a federal judge in a criminal case has the power to participate in the examination of witnesses" to clarify matters for the jury, "this power should be sparingly exercised."<sup>210</sup> The court added that judicial restraint is particularly important "when the questioning is designed to elicit answers favorable to the prosecution . . ."<sup>211</sup> As the court warned in *Barbour*, "Interrogation of witnesses tends to assimilate the court's role with the advocate's, and may tread over the line separating the provinces of judge and jury."<sup>212</sup>

Sirica's questions implied that McCord and Liddy were part of a larger criminal conspiracy, which in turn signaled to the jury the judge's belief in the defendants' guilt. Five years before the Watergate trial, the Supreme Court

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207. Meyer, *Liddy Indicated He Reported to 'Others', Witness Says*, *supra* note 187.

208. *Id.*

209. Lawrence Meyer, *Sloan Testimony is Read to Jury in Watergate Trial*, WASH. POST, Jan. 27, 1973, at A1.

210. 429 F.2d 754, 760 (D.C. Cir. 1970).

211. *Id.*

212. *United States v. Barbour*, 420 F.2d 1319, 1321 (D.C. Cir. 1969)



emphasized that “any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.”<sup>213</sup> Likewise, the D.C. Circuit stressed in *Barbour*, “The presumption of innocence may be jeopardized by an assumption of guilt radiated by overzealous quizzing by the judge, and the right to fair trial may be imperiled by an apparent breach of the atmosphere of judicial evenhandedness that should pervade the courtroom.”<sup>214</sup> In *Whitaker v. McLean*, the D. C. Circuit noted that “a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial.”<sup>215</sup>

The judge’s suspicious attitude toward the defendants continued during closing arguments. In his closing appeal to the jury, Peter Maroulis, Liddy’s attorney, asserted that the four CRP officials called to testify during the trial were “without involvement and of course had no criminal intent.”<sup>216</sup> Sirica interrupted Maroulis to declare “that if the jurors ‘decide that Mr. Magruder or Mr. Odle or Mr. Sloan are involved in this alleged conspiracy, they can do it.’”<sup>217</sup> The judge’s outburst overlooked the fact that Magruder, Odle, and Sloan were not charged in the case. Realizing his error, Sirica conceded that the CRP officials are “not on trial. I will grant you that.”<sup>218</sup> Nevertheless, the judge showed no concern that the appellate court would overturn his rulings on appeal. At the end of the trial, he declared, “I’m not awed by the appellate courts. Let’s get that straight. All they can do is reverse me. They can’t tell me how to run my case.”<sup>219</sup>

The case went to the jury on January 30, 1973. After less than ninety minutes of deliberation, the jury found Liddy guilty on six counts and McCord guilty on eight counts of “conspiracy, burglary, and illegal interception of oral and wire communications.”<sup>220</sup> The conspiracy count carried a maximum penalty of five years in prison, the burglary counts a maximum of fifteen years, the attempted wiretapping counts a maximum of five years, and the illegal wiretapping counts a maximum of five years.<sup>221</sup> McCord’s two additional counts—illegal possession of a device for eavesdropping on oral communications and illegal possession of a device for eavesdropping on wire communications—each also carried a maximum penalty of five years.<sup>222</sup>

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213. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968).

214. *Barbour*, 420 F.2d at 1321.

215. 118 F.2d 596, 596 (D.C. Cir. 1941)

216. Lawrence Meyer, *Jury Expected to Get Watergate Bugging Case Today*, WASH. POST, Jan. 30, 1973, at A2.

217. *Id.*

218. *Id.*

219. *Verdict on Watergate*, TIME, Feb. 12, 1973, at 11.

220. *In re Liddy*, 506 F.2d 1293, 1295 (D.C.Cir. 1974); *United States v. McCord*, 509 F.2d 334, 339 (D.C.Cir. 1975); BERNSTEIN & WOODWARD, *supra* note 34, at 240.

221. Lawrence Meyer, *Ex-Aides of Nixon to Appeal*, WASH. POST, Jan. 31, 1973, at A1.

222. *Id.*

After the trial, Silbert told reporters ““there is no evidence of a wider conspiracy.””<sup>223</sup> Sirica disagreed. At the bond hearing a few days later, Sirica warned, “I am still not satisfied that all the pertinent facts that might be available—I say might be available—have been produced before an American jury.”<sup>224</sup> With the sentencing hearing pending, Sirica still had one last opportunity to force the defendants to cooperate with investigators.

### B. Sentencing

Sirica’s aggressive approach to the case stunned the Nixon administration. The White House realized that the threat of long prison sentences might spur Hunt and McCord to cooperate with prosecutors. On February 3, 1973, four days after the convictions of Liddy and McCord, Nixon and his aide Charles Colson privately lamented Sirica’s handling of the trial. The Oval Office taping system, which the president had installed in 1971, the same year Liddy and Hunt organized the White House “Plumbers,” recorded their conversation.<sup>225</sup> The President complained that Sirica’s “[g]oddamn conduct is shocking.”<sup>226</sup> He angrily asked Colson if Sirica was currying favor with the Democrats in hopes of gaining a Supreme Court appointment in the future.<sup>227</sup> “No. No[.]” Colson answered. “Sirica is a tough, hard-boiled law-and-order judge.”<sup>228</sup> Noting that Sirica was a Republican, Colson exclaimed, “I can’t understand what he’s doing . . . . The only thing that I can figure is that he—this case just got under his craw for some reason, and he is a hot-headed Italian . . . .”<sup>229</sup>

Cognizant of Sirica’s reputation for imposing long-sentences and chastened by the judge’s aggressive intervention during the trial, the burglars demanded more money for their silence. Hunt insisted that the White House pay him \$72,000 for personal expenses and \$50,000 for his attorneys’ fees.<sup>230</sup> He also issued a public warning to the White House. “A team out on an unorthodox mission expects resupply, it expects concern and attention[.]” Hunt told *Time* Magazine.<sup>231</sup> “The team should never get the feeling they’re abandoned.”<sup>232</sup> On March 21, 1973, John Dean warned Nixon, “We have a cancer—within—close to the Presidency, that’s growing.”<sup>233</sup> When Dean suggested that paying off the

223. KUTLER, *THE WARS OF WATERGATE*, *supra* note 5, at 335.

224. SIRICA, *supra* note 11, at 88.

225. AMBROSE, *THE TRIUMPH OF A POLITICIAN*, *supra* note 13, at 423.

226. KUTLER, *ABUSE OF POWER*, *supra* note 60, at 204.

227. *Id.*

228. *Id.*

229. *Id.*

230. *United States v. Haldeman*, 559 F.2d 31, 57 (D.C. Cir. 1976); KUTLER, *ABUSE OF POWER*, *supra* note 60, at 253.

231. *Trials: The Spy in the Cold*, *TIME*, Jan. 29, 1972, at 17.

232. *Id.*

233. KUTLER, *ABUSE OF POWER*, *supra* note 60, at 247.

burglars could cost \$1 million, Nixon replied, “We could get that.”<sup>234</sup> As his willingness to bribe the burglars demonstrated, the President understood the increasingly dire nature of the White House’s predicament.

Congress got involved one week after McCord and Liddy’s convictions. On February 7, 1973, the Senate established the Select Committee on Presidential Campaign Activities.<sup>235</sup> Although it had a broad charter to investigate the entire 1972 presidential campaign, the Senate committee quickly focused on the Watergate break-in.<sup>236</sup> Prior to the burglars’ sentencing, however, the Senate investigation went nowhere. As minority counsel Fred Thompson observed, the Senate committee had failed to produce evidence that Watergate was “something more than a ‘third-rate burglary . . . .’”<sup>237</sup>

Senate investigators recognized that the burglars offered the best opportunity to break the case open. To that end, the Senate committee’s chief lawyer tried to influence Sirica’s approach to the burglars’ sentencing. Before the hearing, Georgetown law professor Sam Dash, majority counsel for the Senate Watergate committee, met privately with Judge Sirica. Conscious of the impropriety of the Senate coordinating its efforts with the trial judge, Dash insisted that his purpose was merely to discuss unrelated matters with Sirica.<sup>238</sup> But in his *ex parte* meeting with Sirica, Dash made a point of bringing to the judge’s attention the unheralded—but in Dash’s opinion, highly significant—case of *United States v. Sweig*.<sup>239</sup> “When I met with Sirica I was careful to emphasize I was not recommending anything regarding his sentencing of the Watergate defendants,” Dash later wrote, “but I expressed the hope that one of them might give us information about the cover-up and I referred him to the Sweig case.”<sup>240</sup>

In *United States v. Sweig*, the Second Circuit held that the court could consider at sentencing a defendant’s failure to cooperate with investigators.<sup>241</sup> Martin Sweig was an administrative assistant to Rep. John McCormack of Massachusetts, the Speaker of the House of Representatives in the 1960s and early 1970s.<sup>242</sup> Prosecutors brought corruption charges against Sweig, but the jury only found him guilty of one count of perjury.<sup>243</sup> The trial judge sentenced Sweig to thirty months behind bars, citing Sweig’s “failure to cooperate with government officials in their investigation of influence peddling,” in the House of

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234. *Id.* at 254.

235. SAMUEL DASH, CHIEF COUNSEL: INSIDE THE ERVIN COMMITTEE—THE UNTOLD STORY OF WATERGATE 8 (1976).

236. FRED D. THOMPSON, AT THAT POINT IN TIME: THE INSIDE STORY OF THE WATERGATE COMMITTEE 195 (1975).

237. *Id.* at 19.

238. DASH, *supra* note 237, at 26-27.

239. 454 F.2d 181, (2d Cir. 1972).

240. *Id.* at 27.

241. 454 F.2d at 184.

242. DASH, *supra* note 237, at 26.

243. *Sweig*, 454 F.2d at 181.

Representatives.<sup>244</sup> However, if Sweig changed his mind and cooperated with prosecutors, the judge offered to “leave the door open for a reduction of sentence . . . .”<sup>245</sup>

On appeal, Sam Dash, Sweig’s attorney, contended that the judge’s use of his sentencing power to coerce cooperation with investigators violated Sweig’s right against self-incrimination.<sup>246</sup> The Second Circuit dismissed Sweig’s argument in a short opinion. The appellate court emphasized that the “sentencing judge has very broad discretion in imposing any sentence within the statutory limits . . . .”<sup>247</sup> In *Sweig*, the Second Circuit relied heavily on its ruling in *United States v. Vermeulen*.<sup>248</sup> In *Vermeulen*, the defendant, a French national, had pleaded guilty to the use of a fake passport and to making false statements in a U.S. Customs declaration.<sup>249</sup> At sentencing, the judge inquired as to why the defendant had repeatedly entered the United States under various aliases rather than under his own name, but the defendant declined to answer.<sup>250</sup> After informing the defendant that “he might be able to get some help in the reduction” of his sentence if he cooperated with investigators, the trial judge imposed consecutive five-year sentences.<sup>251</sup>

On appeal, Vermeulen contended that the court had imposed consecutive sentences to coerce him to cooperate with investigators in violation of his right against self-incrimination.<sup>252</sup> The Second Circuit disagreed. It held that the “sentencing Court did not impose a ‘price tag’ on appellant’s constitutional privilege to remain silent.”<sup>253</sup> Although the trial court inquired into whether the defendant “wished to cooperate with the public authorities by giving information . . . regarding *others* involved in illegal international narcotics traffic[.],” the defendant remained silent without invoking his Fifth Amendment right.<sup>254</sup> The Second Circuit concluded that because “the Fifth Amendment privilege was never raised” during the trial court proceedings, the defendant could not belatedly claim that his constitutional rights were violated.<sup>255</sup>

By his own admission, Dash hoped that by bringing Sirica’s attention to *Sweig* he could influence the outcome of the Watergate sentencing hearing. As he stressed to Sirica, a long sentence could inspire at least one of the burglars to

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244. *Id.* at 181-82.

245. *Id.* at 184.

246. DASH, *supra* note 237, at 26.

247. *Sweig*, 454 F.2d at 183.

248. *Id.* at 184.

249. 436 F.2d 72, 73 (2d Cir. 1970).

250. *Id.* at 74.

251. *Id.*

252. *Id.* at 75.

253. *Id.* at 76.

254. *Id.*

255. *Id.* at 77.

“give us [the Senate committee] information about the cover-up . . . .”<sup>256</sup> According to Dash, Sirica responded by saying that “he understood the committee was not making any request of him, as it had no right to do, and that he would study all the law and would sentence as he determined the interests of justice required.”<sup>257</sup> In fact, Sirica was already planning to impose severe sentences. “I scheduled March 23 as the day the defendants would reappear in my court to find out what time they would have to serve for their crimes[,]” the judge recalled.<sup>258</sup> “I knew right away that I would give all seven men fairly stiff sentences; for the next month and a half, I thought about just how to go about sentencing them . . . .”<sup>259</sup>

According to Sirica, his friend Clark Mollenhoff, the Washington correspondent for the *Des Moines Register*, brought Sirica’s attention to the practice of provisional sentencing.<sup>260</sup> Under provisional, or conditional, sentencing, judges could give defendants a few months to ponder their sentence before it became final. Mollenhoff suggested that such an approach might encourage the Watergate burglars to cooperate with prosecutors.<sup>261</sup> “The idea of delaying sentencing further and making the sentences conditional on some show of co-operation appealed to me[,]” Sirica explained.<sup>262</sup>

There was one crucial aspect to provisional sentencing: the applicable federal statute—18 U.S.C. § 4205(c)—directed that all provisional sentences “shall be deemed to be for the *maximum sentence* of imprisonment prescribed by law . . . .”<sup>263</sup> The statute created a three-month window, extendable for up to a total of six months, for the Bureau of Prisons to prepare a report to the judge on all facts pertinent to sentencing.<sup>264</sup> After receiving the Bureau’s sentencing recommendations, the judge had discretionary authority to do one of three things: place the prisoner on probation; reduce the length of the provisional sentence; or, most ominously for the Watergate defendants, “affirm the sentence of imprisonment originally imposed”—that is, impose the maximum sentence permissible under the law.<sup>265</sup> As Sirica later explained, “That law gave me a legal way to put off final sentencing until I could see just how well the defendants cooperated in the pending investigation.”<sup>266</sup>

The fact that investigators and journalists directly lobbied Sirica in an effort to influence his sentencing decision did not faze the judge. Apparently, he saw

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256. DASH, *supra* note 237, at 27.

257. *Id.*

258. SIRICA, *supra* note 11, at 89.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. 18 U.S.C. § 4205(c) (effective 1957; repealed 1976) (emphasis added).

264. *Id.*

265. *Id.*

266. SIRICA, *supra* note 11, at 90.

nothing improper in his consultations with outside parties. The fact was the judge welcomed any recommendation that would aid in his efforts to pressure the defendants to talk. “None of the defendants had made any move toward telling the full truth about the crime[,]” the judge emphasized.<sup>267</sup> “I began to wonder if, given a bit more time now that all seven had either pleaded guilty or been found guilty, they might reconsider their defiant stance.”<sup>268</sup>

The judge seemed to have a keen understanding of human psychology. As he suspected, fear of long prison sentences unnerved the burglars. Hunt demanded that the administration intervene to secure his release.<sup>269</sup> As a House Judiciary Committee investigation later revealed, “Hunt was very worried that Judge Sirica would give him a long jail sentence.”<sup>270</sup> After conferring with President Nixon, White House aide Charles Colson assured Hunt that the President would grant him clemency.<sup>271</sup> James McCord made similar demands. Conditions in the notorious District of Columbia Jail appalled him.<sup>272</sup> In February, while the Watergate burglars awaited sentencing, two inmates stabbed a guard in the cellblock adjoining McCord’s.<sup>273</sup> Even the stoical Liddy described the D.C. Jail as a violent, riot-prone facility marked by “a state of neglect, disrepair, overcrowding, and filth . . . .”<sup>274</sup> According to Liddy, prison officials admitted that the D.C. Jail “was *not* fit for human habitation.”<sup>275</sup> Although Liddy maintained his silence, the prospect of a long prison stay on behalf of protecting Richard Nixon’s presidency had no appeal for McCord. His cellmate Liddy suspected that “McCord was becoming unhinged by the pressure of events and imprisonment.”<sup>276</sup> In a letter to the White House, McCord warned that “‘all the trees in the forest will tumble’” if he faced a long prison stay.<sup>277</sup>

McCord made good on his threat. On March 20, three days before the sentencing hearing, he delivered a letter to Judge Sirica’s chambers.<sup>278</sup> It was the ultimate political—and legal—bombshell. In the letter, McCord declared, “There was political pressure applied to the defendants to plead guilty and remain silent.”<sup>279</sup> McCord informed the judge that witnesses had lied under oath: “Perjury occurred during the trial in matters highly material to the very structure,

267. *Id.* at 89.

268. *Id.*

269. *See* *United States v. Haldeman*, 559 F.2d 31, 57 (D.C. Cir. 1976) (noting that Hunt wanted a guarantee of a short sentence); *see also* FINAL REPORT, *supra* note 20, at 108-09.

270. FINAL REPORT, *supra* note 20, at 109.

271. *Haldeman*, 559 F.2d at 57.

272. MCCORD, *supra* note 33, at 70.

273. *Id.*

274. LIDDY, *supra* note 21, at 287.

275. *Id.*

276. *Id.* at 292.

277. *United States v. Haldeman*, 559 F.2d 31, 57 (D.C. Cir. 1976).

278. *United States v. Liddy*, 397 F. Supp. 947, 951 (D.D.C. 1975).

279. *Id.* at 952.

orientation, and impact of the government's case, and to the motivation and intent of the defendants.<sup>280</sup> Furthermore, he revealed that the "Watergate operation" included more than the seven named defendants and closed the letter by asking Sirica for "the opportunity to talk with you privately in chambers."<sup>281</sup> McCord's letter ensured that the Watergate scandal would not end with the burglars' trial.

To add to the drama, Sirica read McCord's letter aloud during the sentencing hearing.<sup>282</sup> He then imposed draconian sentences on the burglars. He sentenced Liddy to twenty years in prison; the former FBI agent would not be eligible for parole until he had served a minimum of six years and eight months behind bars.<sup>283</sup> Unlike the other defendants, who received provisional sentences, Liddy received a final sentence.<sup>284</sup> During the trial, Liddy had shown nothing but disdain for Judge Sirica, describing the judge's handling of the proceedings as "something one would expect in a Marx Brothers movie, not a United States District Court."<sup>285</sup> Judge Sirica reciprocated Liddy's animosity. In his autobiography, Sirica revealed that Liddy's "smart-alecky, cocky" attitude during the trial "annoyed me no end."<sup>286</sup>

However, for the other defendants, Sirica took the unique approach of combining provisional sentences, which Mollenhoff had recommended, with the offer of early release for cooperative defendants, which Dash had suggested. The judge provisionally sentenced Hunt to the maximum of thirty-five years in prison and he provisionally sentenced the four Cubans—Barker, Sturgis, Martinez, and Gonzalez—to the maximum of forty years behind bars.<sup>287</sup> The sentence, Hunt later revealed, "was so over and beyond anything I had conceived possible that I sat in stunned, nauseated silence."<sup>288</sup> After announcing the sentences, Sirica warned the defendants, "I may also properly suggest to you that in the interval . . . [before the imposition of final sentences] you give serious consideration to lending your full cooperation to investigating authorities."<sup>289</sup> In his decision, Sirica cited *Sweig* and *Vermeulen* as precedent for his extraordinary use of the sentencing power.<sup>290</sup>

The sentences were absurdly out of proportion to the crime. The defendants had been convicted of breaking and entering for the purposes of eavesdropping. The target of the break in was an office building, not a private dwelling. The

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280. *Id.*

281. *Id.*

282. *Id.* at 950-52.

283. *United States v. Liddy*, 509 F.2d 428, 432 n.3 (D.C. Cir. 1974).

284. *See id.* (detailing Liddy's sentence).

285. LIDDY, *supra* note 21, at 283.

286. SIRICA, *supra* note 11, at 71.

287. *Id.* at 118.

288. HUNT, *supra* note 46, at 287.

289. *United States v. Liddy*, 397 F. Supp. 947, 962 (D.D.C. 1975).

290. *Id.*

burglars did not carry guns, and they did not resist arrest. Normally, those factors would have weighed in favor of, at most, a sentence of moderate length. Nevertheless, Sirica imposed on the Watergate defendants sentences longer than some murderers receive. It was an extraordinary exercise of judicial discretion in sentencing.

These sentences were also in blatant defiance of appellate court mandates. The D.C. Circuit Court of Appeals had repeatedly overturned sentences that punished defendants for exercising their Fifth Amendment right to remain silent and their Sixth Amendment right to trial by jury. One of the cases involved none other than Sirica himself. In *Scott v. United States*, an eighteen-year-old defendant was convicted of robbing a bus driver with a toy pistol.<sup>291</sup> Frustrated by the defendant's refusal to plead guilty, Sirica imposed a five-to-fifteen-year-prison sentence, declaring at sentencing, "If you had pleaded guilty to this offense, I might have been more lenient with you."<sup>292</sup> Sirica had placed the defendant in an impossible quandary: if the defendant consented to Sirica's demands and pleaded guilty, he would get a shorter sentence but at the cost of forfeiting his right to appeal. Conversely, if the defendant preserved his right to appeal by maintaining his plea of not guilty, he would be punished with a longer prison sentence. Although the D.C. Circuit Court of Appeals affirmed the conviction, it overturned the sentence imposed by Sirica and remanded for resentencing. The Court of Appeals held that "the defendant paid a price for demanding a trial."<sup>293</sup> Sirica, the appellate court concluded, had placed an indefensible "pricetag" on the defendant's exercise of his constitutional right to a trial by his peers.<sup>294</sup>

Fifth and Sixth Amendment concerns applied with as much force to Hunt and the Cubans as to Liddy and McCord. Although Hunt and the Cubans had pleaded guilty to charges related to the Watergate break-in, they knew that if they cooperated with the prosecution, they likely faced additional criminal liability. For example, at Hunt's direction, Barker and Martinez had burglarized Dr. Fielding's office. The Watergate defendants had been involved in other activities, unknown to prosecutors that could have led to additional charges. Prior to sentencing, the U.S. Attorney's Office had not offered immunity to any of the defendants. As Earl Silbert later explained, the prosecution's strategy was to secure convictions and prison sentences first, and then attempt to get the defendants to talk by offering immunity.<sup>295</sup> Therefore, at the time that Sirica imposed his coercive sentences, all of the defendants faced the very real risk of self-incrimination if they cooperated with investigators.

291. See 419 F.2d 264 (D.C. Cir. 1969).

292. *Id.* at 269.

293. *Id.*

294. *Id.*

295. *Silbert Hearings*, *supra* note 124, at 181.



Ironically, Sirica might not have been in a position to impose such severe sentences if the defendants had known of a key fact suppressed by prosecutors. In the days after the Watergate break-in, the FBI conducted a search of the DNC's offices, but failed to turn up evidence of wiretaps.<sup>296</sup> During a two-day search on June 29 and 30, 1972, the FBI's technical team found no eavesdropping equipment on any of the DNC's telephones.<sup>297</sup> Dismayed by the FBI's failure, Assistant U.S. Attorney Earl Silbert demanded that the FBI conduct another search. On September 13, during the second search, the FBI found a device on the telephone of Spencer Oliver, a DNC employee at the Watergate.<sup>298</sup> Silbert concluded that the FBI had missed the device during its first sweep in June. However, the FBI disagreed, and insisted in an internal report to the U.S. Attorney's Office that the September bug was not present during the June 29-30 search.<sup>299</sup>

After the trial, McCord admitted that the bug found at the Watergate in September 1972 was placed by his team during the May 28 Watergate break-in.<sup>300</sup> In fact, one of the bugs placed on a DNC phone in May 1972, remained undetected until April 1973, when McCord revealed its location to investigators.<sup>301</sup>

But McCord did not make that admission until months after his conviction. During the trial, prosecutors did not have conclusive proof that the bug found in September 1972 was placed there by McCord's team. Instead, they had an FBI report that adamantly denied that the bug found in September 1972 was present during the FBI's search of the Watergate in June 1972. At a minimum, therefore, the FBI's report would have offered a defense to the charges of illegal interception of electronic and oral communications. The police had found eavesdropping devices on the burglars, which may have been enough to support attempted wiretapping charges.<sup>302</sup> But the lack of evidence of actual wiretapping would have enhanced the burglars' defense as well as reduced the maximum sentences available to Sirica.

Nevertheless, the prosecutors declined to provide the FBI's report on the June 1972 search to defense counsel, or even to inform them of its existence.<sup>303</sup> The issue did not surface publicly until the mid-1980s, a decade after Watergate, after the journalist Jim Hougan gained access to the FBI's files through the

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296. FBI Report on Watergate, File # 139-4089, at 35, available at <http://foia.fbi.gov/foiaindex/watergate.htm> (last visited Dec. 29, 2010) (on file with the *McGeorge Law Review*).

297. *Id.*

298. *Id.* at 35-37.

299. *Id.* at 34-37.

300. MCCORD, *supra* note 33, at 25.

301. *Id.*

302. KUTLER, THE WARS OF WATERGATE, *supra* note 5, at 187.

303. WATERGATE AND AFTERWARD: THE LEGACY OF RICHARD M. NIXON 43, 48 (Leon Friedman & William F. Levantrosser eds. 1992) [hereinafter WATERGATE & AFTERWARD].

Freedom of Information Act.<sup>304</sup> When asked about the issue at an academic conference at Hofstra University, Silbert acknowledged that he did not alert defense counsel to the existence of the FBI report.<sup>305</sup> However, in his defense, he pointed out that the burglars' attorneys never asked for the evidence, an unsurprising fact since they did not know of its existence.<sup>306</sup> He made the same point when questioned on the matter by the journalist Phil Stanford.<sup>307</sup>

Although the failure to volunteer the Watergate report to the defendants would clearly constitute prosecutorial misconduct today, the rules governing exculpatory evidence were much more ambiguous in 1973. Then, and now, the guiding case was *Brady v. Maryland*, which gave rise to the famous "Brady Rule."<sup>308</sup> In *Brady*, Maryland prosecutors withheld from a murder defendant the fact that one of his co-defendants had already confessed to the murder with which the defendant was charged.<sup>309</sup> The United States Supreme Court held that the prosecution's suppression of evidence of the co-defendant's confession violated Brady's rights under the Due Process Clause of the Fourteenth Amendment.<sup>310</sup> The Supreme Court concluded, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>311</sup> Thus, under the Supreme Court's ruling in *Brady*, prosecutors had a duty to offer exculpatory evidence *requested* by the defendant.

Not until 1976—three years after the Watergate trial—would the Supreme Court definitively expand the *Brady* Rule to require prosecutors to *volunteer* exculpatory evidence otherwise unknown to the defendant. In *United States v. Agurs*, the Court held that if the prosecution possesses evidence that "is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."<sup>312</sup>

However, in 1973, the year the burglars went on trial, the extent of the prosecution's duty to volunteer evidence to the defendant was unclear.<sup>313</sup> *Agurs*

304. See HOUGAN, *supra* note 22, at 244-52 (examining Hougans' discovery of the materials).

305. WATERGATE & AFTERWARD, *supra* note 315, at 43, 48; see also Stanford, *supra* note 40, at 48.

306. WATERGATE & AFTERWARD, *supra* note 315, at 43.

307. Stanford, *supra* note 40, at 48.

308. 373 U.S. 83 (1963).

309. *Id.* at 84.

310. *Id.* at 86.

311. *Id.* at 87.

312. 427 U.S. 97, 107 (1976). The literature on *Brady* and *Agurs* is extensive. See, e.g., Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982); Robert Hochman, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673 (1996); Stephen P. Jones, *The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence*, 25 U. MEM. L. REV. 735 (1995).

313. See Notes & Comments, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 145 (1964) ("Having recognized the prosecutor's constitutional duty to reveal evidence to the defendant the courts must now formulate standards to determine what kinds of evidence must be

itself arose from a District of Columbia case. When *Agurs* reached the Court of Appeals, the D.C. Circuit observed, “No clear consensus exists among the courts on the question of whether, in the absence of prosecutorial misconduct, a defense request is necessary to trigger the prosecution’s duty to reveal possibly exculpatory information in its possession.”<sup>314</sup> Thus, at the time of the burglars’ trial, the prosecutors were within the letter, but certainly not the spirit of the law when they declined to share the FBI’s report with the defendants.<sup>315</sup>

#### IV. THE AFTERMATH

##### A. *The Wall of Silence Breaks*

Sirica’s use of his discretionary sentencing power sent shock waves through the White House. During a March 23, 1973 meeting with Nixon that was captured for posterity by the Oval Office taping system, National Security Adviser Henry Kissinger lamented, “Where are the civil libertarians? Here the judge gives somebody a 55-year sentence in order to make him talk. Where is the protection of the Fifth Amendment?”<sup>316</sup> In contrast to his confidence before the trial, Nixon conceded to Kissinger that the Watergate investigation “is a worry.”<sup>317</sup>

Notwithstanding the deeply problematic nature of Sirica’s use of his sentencing power, the means he chose had the desired effect. Had Sirica taken a passive role in the case, it is entirely possible that the Watergate scandal would have ended with the trial, and Richard Nixon would have served as president until January 1977, when his second term expired. Instead, Sirica’s coercive approach breached the wall of silence. As *Washington Post* editor Ben Bradlee explained, the drama in Judge Sirica’s courtroom on March 23, 1973, set in motion the events that ultimately led to Nixon’s resignation. “[T]wo men made sure that Watergate would never die, and that Richard Nixon himself was going to pay a fearful price for his role in it[.]” Bradlee later related.<sup>318</sup> “The first was Judge John Sirica, and the second was James W. McCord, Jr.”<sup>319</sup> One of the

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revealed.”).

314. *United States v. Agurs*, 510 F.2d 1249, 1252 (D.C. Cir. 1975).

315. On the purpose of the *Brady* Rule see *United States v. Bagley*, 473 U.S. 667, 675 (1985)

The *Brady* Rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial[.]

*Id.*

316. KUTLER, ABUSE OF POWER, *supra* note 60, at 261.

317. *Id.*

318. BRADLEE, *supra* note 90, at 347.

319. *Id.* For a somewhat different analysis, see KUTLER, THE WARS OF WATERGATE, *supra* note 5, at 262.

cover-up's key architects agreed. Jeb Stuart Magruder later lamented, "Judge Sirica, by threatening the Watergate defendants with long sentences, had cracked one of them, and that was the beginning of the end for the cover-up. Except for Judge Sirica, I think the cover-up might have held."<sup>320</sup>

One hour after the sentencing hearing, McCord and his attorney met with Sam Dash.<sup>321</sup> As McCord later related, "I told Dash of my desire to cooperate with him and to give him my full knowledge on the Watergate operation and its aftermath . . . ."<sup>322</sup> The next day McCord revealed that Magruder and John Dean had participated in the Watergate conspiracy.<sup>323</sup>

On Monday, March 26, the *Los Angeles Times* broke the news that McCord had implicated Dean and Magruder.<sup>324</sup> Both of them realized that the first senior White House aide to cooperate with investigators would get the most favorable treatment at sentencing. As Stanley Kutler explained, the stress of the moment "proved too much for John Dean, who could cope no longer; the dominoes he had imagined had begun to totter. He had to let it all hang out."<sup>325</sup> In early April, Dean's attorney approached Watergate prosecutors on Dean's behalf to discuss plea terms.<sup>326</sup> Dean revealed his own role in the cover-up, and later implicated the President as well.<sup>327</sup> On April 14, Magruder and his attorneys also met with prosecutors.<sup>328</sup> The administration reeled as public furor over the scandal built. In late April, White House Chief of Staff Robert Haldeman, presidential aide John Ehrlichman, and Attorney General Richard Kleindienst all resigned under the threat of impending criminal indictments.<sup>329</sup> The Senate subpoenaed the President's entire domestic inner circle, including Haldeman, Ehrlichman, and Mitchell, to testify before the Watergate investigative committee.<sup>330</sup> The cover-up was in full collapse. As the historian and journalist Theodore White later observed, in April 1973, "Richard Nixon passed his point of no return."<sup>331</sup>

Nixon would fight on for more than a year, but his presidency was fatally damaged. In May 1973, Elliot Richardson, the new Attorney General, appointed Harvard Law professor Archibald Cox as the Watergate special prosecutor.<sup>332</sup> The

320. MAGRUDER, *supra* note 28, at 284.

321. DASH, *supra* note 237, at 31.

322. MCCORD, *supra* note 33, at 62.

323. DASH, *supra* note 237, at 34-35.

324. WHITE, *supra* note 9, at 205. McCord himself leaked the information to the *Los Angeles Times*. MCCORD, *supra* note 33, at 56-57.

325. KUTLER, *THE WARS OF WATERGATE*, *supra* note 5, at 274.

326. DEAN, *supra* note 65, at 229.

327. *Id.* at 235-37, 239-41, 256-57, 282-83, 307-27; *see also* BEN-VENISTE & FRAMPTON, *supra* note 118, at 102.

328. J. ANTHONY LUKAS, *NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS* 309 (1999); *see also* MAGRUDER, *supra* note 28, at 293-95 (discussing Magruder's decision to go to prosecutors).

329. LUKAS, *supra* note 340, at 337.

330. DASH, *supra* note 237, at 165.

331. WHITE, *supra* note 9, at 209.

332. BEN-VENISTE & FRAMPTON, *supra* note 118, at 17; *see also* KUTLER, *THE WARS OF WATERGATE*,

Watergate Special Prosecution Force, headed by Cox, replaced Silbert's team.<sup>333</sup> In late spring, the Senate Select Committee began live, televised hearings.<sup>334</sup> The hearings soon gave rise to another bombshell when White House aide Alexander Butterfield informed Senate investigators of the existence of an Oval Office taping system.<sup>335</sup> Butterfield's revelation sealed the administration's fate. It put investigators on notice of the existence of evidence that could incontrovertibly confirm the President's role in the cover-up.

For the remainder of 1973, and most of 1974, the battle between investigators and the White House centered on Cox's efforts to subpoena key Oval Office audiotapes. At Cox's request, Judge Sirica issued a subpoena ordering President Nixon to produce the tapes for *in camera* inspection by the court.<sup>336</sup> Nixon refused and appealed the decision.<sup>337</sup> The administration claimed that the separation of powers, and in particular the doctrine of executive privilege, barred the judicial branch from enforcing a subpoena against the President of the United States. Meanwhile, on a Saturday afternoon in October 1973, Nixon ordered Attorney General Richardson to fire Cox.<sup>338</sup> Both Richardson and his deputy, William Ruckelshaus, resigned rather than execute the President's order.<sup>339</sup> Later that night, Solicitor General Robert Bork ended the constitutional crisis by firing Cox.<sup>340</sup>

Although Nixon had succeeded in removing Cox, the "Saturday Night Massacre" devastated what was left of the President's reputation. An NBC poll found that seventy-five percent of the country opposed Cox's firing; a Gallup poll revealed that Nixon's approval rating had sunk to seventeen percent.<sup>341</sup> Soon after, the House of Representatives began impeachment hearings. Even worse for the President, Cox's replacement, Leon Jaworski, proved equally determined to subpoena the incriminating Oval Office audiotapes.<sup>342</sup> In July 1974, the Supreme Court ended the deadlock by affirming the trial court's order that the Nixon Administration hand over the subpoenaed audiotapes.<sup>343</sup> The subpoenaed tapes included the "smoking gun" tape that proved beyond doubt Nixon's personal involvement in obstructing the Watergate investigation. The President's position

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*supra* note 5, at 330.

333. JAMES DOYLE, NOT ABOVE THE LAW: THE BATTLES OF WATERGATE PROSECUTORS COX AND JAWORSKI 79 (1977).

334. AMBROSE, RUIN & RECOVERY, *supra* note 128, at 144.

335. DASH, *supra* note 237, at 177.

336. *In re Subpoena to Nixon*, 360 F. Supp. 1, 3 (D.D.C. 1973).

337. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

338. DOYLE, *supra* note 345, at 186-87.

339. BEN-VENISTE & FRAMPTON, *supra* note 118, at 138.

340. KUTLER, THE WARS OF WATERGATE, *supra* note 5, at 407.

341. AMBROSE, RUIN & RECOVERY, *supra* note 128, at 250.

342. DOYLE, *supra* note 345, at 249-52.

343. *United States v. Nixon*, 418 U.S. 683, 714 (1974).

became untenable. As Congress prepared to vote on three articles of impeachment, Nixon resigned from office on August 9, 1974.<sup>344</sup>

### B. *The Court of Appeals' Review of Sirica's Handling of the Trial*

The D.C. Circuit Court of Appeals unanimously affirmed the convictions of Liddy and McCord.<sup>345</sup> In *United States v. McCord* and *United States v. Liddy*, the court found only harmless errors in Sirica's handling of the proceedings. In *McCord*, Chief Judge Bazelon wrote the opinion for the unanimous court. "A superficial review of these events might support the inference that at least Judge Sirica communicated an appearance of inquisitorial attitude inconsistent with notions of a fair trial[.]" Bazelon observed.<sup>346</sup> "However, such a view assumes an exceedingly narrow interpretation of the responsibilities of a trial judge."<sup>347</sup>

The crux of the court's ruling lay in the D.C. Circuit's endorsement of Sirica's interventionist role in the trial. "No judge should remain aloof while the prosecution ignores important evidence . . . [.]" the chief judge stressed.<sup>348</sup> Bazelon even went so far as to liken the judge's role to that of the prosecutor. "The judge, like the prosecutor in this respect, is not a passive by-stander in the arena of justice, a spectator at a 'sporting event;' rather he or she has the most pressing affirmative responsibility to see that justice is done in every case."<sup>349</sup> In a footnote, Bazelon quoted from a Stanford Law Review article that expressly rejected the umpire analogy: "Despite the tendency to describe the American judge as passive or neutral, he is plainly more than a 'mere umpire.'"<sup>350</sup>

As a philosophical matter, the D.C. Circuit conceded the need for restraints on the scope of the judge's authority to intervene. "There are, to be sure, strict limits on the judge's power to intervene in the conduct of the trial, particularly in the examination of witnesses and the order of presentation of evidence[.]" Bazelon observed.<sup>351</sup> "These limits are premised on the primary role of counsel in the formulation of trial strategy and on the rule that the judge should not communicate to the jury an opinion on the guilt or innocence of the accused."<sup>352</sup> However, Bazelon offered only the vaguest description of the standard courts should apply when taking an active role in the proceedings: "When a trial judge intervenes in the conduct of a trial, we must determine whether the intervention is

344. AMBROSE, RUIN & RECOVERY, *supra* note 128, at 438.

345. 509 F.2d 334, 353 (D.C. Cir. 1974).

346. *Id.* at 347.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* at 347 n.41 (quoting A Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1022 (1974)).

351. *Id.* at 347-48.

352. *Id.* at 348.

in pursuit of justice and whether that intervention is consistent with the premises of the limits on intervention.”<sup>353</sup>

The D.C. Circuit ruled that Sirica’s pursuit of justice did not run afoul of limits on the court’s authority to intervene. “Judge Sirica’s conduct of McCord’s trial was consonant with these standards[,]” Bazelon concluded.<sup>354</sup> The court held that the “reading of Sloan’s testimony and the examination that preceded it were a proper exercise of the judicial function.”<sup>355</sup> Moreover, Sirica’s use of provisional sentencing had no prejudicial effect on the jury, since a guilty verdict had already been entered against McCord. “In sum,” the court concluded, “there was no prejudice to McCord by reason of Judge Sirica’s conduct of the trial. McCord’s contention that he deserves a new trial on that ground is without merit.”<sup>356</sup> In all, Judge Bazelon devoted only three paragraphs of the court’s opinion to Judge Sirica’s conduct of the trial.<sup>357</sup>

Likewise, in *United States v. Liddy*, the D.C. Circuit unanimously affirmed Liddy’s conviction.<sup>358</sup> Liddy had appealed his conviction on a number of grounds, including Sirica’s failure to individually examine the jurors during *voir dire*, the judge’s personal questioning of government witnesses, and the judge’s reading to the jury of testimony that included comments made by the attorneys during bench conferences.<sup>359</sup>

The court held that Sirica did not err when he admitted testimony that Liddy had resigned from the CRP because of his refusal to cooperate with the FBI.<sup>360</sup> Liddy’s counsel contended that the admission of such testimony into the record violated Liddy’s Fifth Amendment right against self-incrimination.<sup>361</sup> The Court of Appeals disagreed. Writing for the court, Judge Leventhal observed, “It was within the discretion of the trial judge to hold that the statement . . . [by Liddy regarding his reasons for resigning from the CRP] was admissible to establish his consciousness of guilt.”<sup>362</sup>

Judge Leventhal conceded that Sirica’s direct questioning of witnesses was disfavored. “Sound and accepted doctrine teaches that the trial judge should avoid extensive questioning of the witness and should rely on counsel to develop testimony for the jury’s consideration.”<sup>363</sup> Leventhal also warned that direct

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353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.* at 346-48.

358. 509 F.2d 428, 446 (D.C. Cir. 1974).

359. *Id.* at 432.

360. *Id.* at 446.

361. *Id.* at 445.

362. *Id.* at 446.

363. *Id.* at 440.

questioning could adversely affect a trial judge's objectivity.<sup>364</sup> He acknowledged that Sirica:

[N]ot only failed to seek an alternative to personal intervention, he declined the prosecutor's request to elicit the additional testimony by further questioning of Sloan in the jury's presence. . . . The problems are certainly not resolved by the trial judge's comment that Sloan "might have a lapse of memory, I don't know."<sup>365</sup>

Nevertheless, Leventhal concluded that Sirica's direct questioning "did not infringe upon the requirement of [a] fair trial."<sup>366</sup> Leventhal praised Sirica's active role in the case. "The precepts of fair trial and judicial objectivity do not require a judge to be inert."<sup>367</sup> Like Sirica, Leventhal insisted that a trial judge's role went well beyond that of an umpire. "The trial judge is properly governed by the interest of justice and truth, and is not compelled to act as if he were merely presiding at a sporting match. He is not a 'mere moderator.'"<sup>368</sup>

But Leventhal's opinion failed to acknowledge the obvious fact that responsibility rests with the prosecution, not the judge, to pursue "justice and truth." Under the American system of adversarial criminal proceedings, the state investigates and prosecutes crimes before a neutral judge and impartial jury.<sup>369</sup> Judges have neither the duty, nor the authority, to investigate crimes themselves.

The D.C. Circuit's failure to apply its previous rulings limiting judicial activism is telling. It suggests that the prevailing political winds of the day had a significant impact on how the D.C. Circuit viewed the Watergate trial. By the time the case reached the Court of Appeals in June 1974, the Nixon Administration was in its death throes. The judges on the D.C. Circuit knew that evidence of the administration's criminality might never have come to light without Sirica's intervention in the trial. Moreover, Sirica's emergence as a national folk hero in 1973 made clear to the appellate courts, and the White House, that the public overwhelmingly approved of the judge's tactics. The appellate court itself hinted that the political implications of the trial were central to its holding. The Watergate case, the D.C. Circuit noted, "involves the integrity of the nation's political system . . ."<sup>370</sup> As a result, Leventhal concluded:

Judge Sirica's palpable search for truth in such a trial was not only permissible, it was in the highest tradition of his office as a federal judge.

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364. *Id.* at 440-41 n.31.

365. *Id.* at 440-41.

366. *Id.* at 441.

367. *Id.* at 438.

368. *Id.*

369. Stephen Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 732 (1983).

370. *Liddy*, 509 F.2d at 442.



And although his execution of this objective presented problems, as must be acknowledged, they were not of a kind that deprived defendants of a fair trial.<sup>371</sup>

In summary, Leventhal announced, ““A defendant is entitled to a fair trial but not a perfect one.””<sup>372</sup>

The D.C. Circuit failed to see the irony in the fact that Sirica’s “ends-justify-the-means” attitude was precisely the same mentality that brought down the Nixon White House. The conclusion is inescapable that, by affirming Sirica’s abusive tactics, the D.C. Circuit failed in its duty to preserve the integrity and fairness of federal criminal proceedings in the District of Columbia. The D.C. Circuit was not alone in this failing. Despite the fundamental constitutional questions raised by Sirica’s tactics, and despite the trial’s pressing national importance, the United States Supreme Court denied certiorari petitions filed by Liddy and McCord.<sup>373</sup>

Understandably, Sirica delighted in the D.C. Circuit’s rulings on McCord and Liddy’s convictions. After so many reversals during his career by the Court of Appeals, Sirica took enormous satisfaction from the fact that the D.C. Circuit affirmed him in the most important trial of his career. In his autobiography, Sirica printed a long excerpt from Judge Leventhal’s opinion in the *Liddy* appeal.<sup>374</sup> Sirica interpreted the D.C. Circuit’s decision as not only a vindication of his handling of the Watergate trial, but also as an endorsement of an investigative role for trial court judges. As Sirica put it, “The opinion written by Judge Leventhal seems to me to protect the role of an active *and* fair judicial system.”<sup>375</sup>

### C. *The Sentencing Issue*

Ironically, although Sirica’s use of coercive sentences was the most controversial aspect of the trial, it received virtually no attention from the D.C. Circuit. The reason was simple: the issue was rendered moot for all but one of the defendants.

In November 1973, Hunt and the burglars appeared before Judge Sirica for final sentencing.<sup>376</sup> To a remarkable extent, Sirica had achieved his goal of getting the defendants to cooperate with prosecutors and Senate investigators. There was no longer any need to compel them to testify. Moreover, as Judge Sirica later

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371. *Id.*

372. *Id.* (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)).

373. *McCord v. United States*, 421 U.S. 930 (1975); *Liddy v. United States*, 420 U.S. 911 (1975).

374. SIRICA, *supra* note 11, at 122-25.

375. *Id.* at 122.

376. *Id.* at 120.

admitted, he “never had any intention whatsoever of putting those men in jail for thirty to forty years.”<sup>377</sup>

At final sentencing, Sirica slashed the prison terms he had assigned at the provisional hearing. He reduced Hunt’s term to a minimum of thirty months and a maximum of eight years.<sup>378</sup> He sentenced Barker to a minimum of eighteen months and a maximum of six years.<sup>379</sup> He gave Gonzalez, Martinez, and Sturgis each sentences of one to four years.<sup>380</sup> Finally, he sentenced McCord to one to five years behind bars.<sup>381</sup> Sirica subsequently reduced the sentences even more. In the end, only one of the Watergate burglars served more than fourteen months in prison for the break-in.<sup>382</sup>

The one exception was G. Gordon Liddy. In May 1975, Liddy petitioned Sirica for a reduction of his twenty-year sentence.<sup>383</sup> Sirica emphatically denied it.<sup>384</sup> The judge emphasized that Liddy:

[H]as not show[n] the Court the slightest remorse or regret for his actions, and has not given the Court even a hint of contrition or sorrow, nor has he made any attempt to compensate for his illegal actions by trying to aid our system of justice in its search for the truth.<sup>385</sup>

When Liddy appealed Sirica’s denial of his petition, the D.C. Circuit Court of Appeals affirmed, but issued no opinion.<sup>386</sup> Yet, in his denial of Liddy’s sentence reduction petition, Sirica expressly cited Liddy’s failure “to aid our system of justice in its search for the truth” as one of the reasons for the petition’s denial.<sup>387</sup> At a minimum, the serious legal and constitutional issues raised by *Liddy* deserved a written opinion by the D.C. Circuit. Nevertheless, four months later, the Supreme Court denied Liddy’s petition for certiorari.<sup>388</sup>

Finally, in April 1977, President Carter commuted Liddy’s sentence.<sup>389</sup> The former FBI agent was released from a federal prison in Connecticut after five years behind bars.<sup>390</sup>

The only appellate judge who wrote an opinion on Sirica’s use of the sentencing power to force the burglars to talk was D.C. Circuit Judge

377. *Id.* at 119.

378. *Id.* at 120.

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *See generally* *United States v. Liddy*, 397 F. Supp. 947 (D.D.C. 1975).

384. *Id.* at 950.

385. *Id.* at 949.

386. *United States v. Liddy*, 530 F.2d 1094 (D.C.Cir. 1976) (Table, No. 75-1753).

387. *Liddy*, 397 F. Supp. at 349.

388. *Liddy v. United States*, 426 U.S. 937 (1976).

389. LIDDY, *supra* note 21, at 355.

390. *See id.* at 359 (detailing Liddy’s release from prison).

MacKinnon. Judge MacKinnon addressed the issue in his dissenting opinion in *Mitchell v. Sirica*.<sup>391</sup> *Mitchell* involved a petition for writ of mandamus filed by former Nixon aides John Mitchell, Robert Ehrlichman, Kenneth Parkinson, Gordon Strachan, and Charles Colson, all of whom were indicted by the Watergate Special Prosecution Force.<sup>392</sup> As chief judge for the District of Columbia, Sirica assigned the case to himself.<sup>393</sup> In light of Sirica's prominent role in the Watergate burglars' trial, the White House aides petitioned the D.C. Circuit to order Sirica to disqualify himself as the presiding judge at their trial.<sup>394</sup> They maintained that Sirica's role in the burglars' trial, and his public statements indicating White House involvement in the cover-up, precluded him from impartially presiding over their case.<sup>395</sup>

Without hearing oral argument or writing an opinion, the D.C. Circuit denied the defendants' petition.<sup>396</sup> However, in a vigorous dissent, Judge MacKinnon chastised his fellow judges for treating the appellants so dismissively. The five judges in the majority, MacKinnon wrote, "completely deny petitioners a hearing in this court and then by a mere order without any written opinion, in effect deny petitioners their most fundamental rights."<sup>397</sup> In MacKinnon's view, the allegations merited an evidentiary hearing on the petitioners' claims. He observed:

[That Sirica's actions] in repeatedly interrogating witnesses concerning the involvement of others, in using the sentencing process to coerce testimony implicating higher officials, and in suggesting further grand jury inquiry of named individuals including a defendant here, publicly demonstrated an accusatory frame of mind that connected the present defendants to the crime with which they are now charged—obstructing the prosecution of the Watergate break-in.<sup>398</sup>

MacKinnon's dissent included a review of Sirica's use of his sentencing power to coerce the burglars to testify against Nixon's staff. MacKinnon took particular exception to the "extremely harsh sentences" that Sirica had provisionally imposed.<sup>399</sup>

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391. 502 F.2d 375 (D.C. Cir. 1974).

392. *Id.* at 376 n.2.

393. *See id.* at 377 (noting that the defendant's filed for a writ of mandamus ordering Sirica's disqualification); *see also* LEON JAWORSKI, *THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE* 104 (1976).

394. *Id.* at 376-77.

395. *Id.* at 378.

396. *Id.* at 376.

397. *Id.* at 376 (MacKinnon, dissenting).

398. *Id.* at 385 (MacKinnon, dissenting)

399. *Id.* at 384 n.17 (MacKinnon, dissenting).

MacKinnon pointed out that the federal sentencing statute upon which Sirica relied:

[W]as intended to aid the court in determining a proper sentence and not to aid the prosecutor through duress of the prisoner, in obtaining evidence of other offenses. There is nothing in either the language of the statute or its legislative history that indicates it was intended to be used to compel testimony.<sup>400</sup>

Most important of all, MacKinnon argued that Sirica had misapplied the *Sweig* and *Vermeulen* precedents. “The *Sweig* and *Vermeulen* decisions were instances where a lighter sentence than the offense justified was held out as inducement to the prisoner if he testified[,]” the judge noted.<sup>401</sup> “There is nothing improper in this. But this does not justify the imposition of a harsher sentence than the offense calls for, or the threat of such a sentence, because the prisoner refuses to disclose information the judge thinks he should.”<sup>402</sup>

This was a critical point, one ignored by Sirica. In both *Sweig* and *Vermeulen*, the trial judges attempted to entice the defendants to talk by offering shorter sentences than normal for the crimes they were convicted of committing. In contrast, in the Watergate case, Sirica imposed outlandish sentences—far longer than the crimes merited—in order to force the defendants to talk. *Sweig* and *Vermeulen* involved conserving the government’s resources by reducing sentences, whereas Sirica’s approach enhanced sentences for the purpose of coercing cooperation with authorities. The end result of Sirica’s approach was fundamentally different than that of the *Sweig* and *Vermeulen* cases. Thus, rather than constituting precedential authority for Sirica’s actions, *Sweig* and *Vermeulen* served as nothing more than a disingenuous justification for Sirica’s use of coercive sentencing.

But as a dissenting judge in a completely separate case, MacKinnon’s criticism of Sirica’s methods in the burglars’ trial had no effect. Moreover, the broad discretion granted to trial court judges at sentencing insulated Sirica from any serious scrutiny of his use of the sentencing power.

Yet, as the *Scott* case clearly showed, the D.C. Circuit was quite willing to overturn sentences that violated defendants’ Fifth and Sixth Amendment rights. G. Gordon Liddy’s sentence was a prominent exception. One cannot help but conclude that Liddy’s connection to the most notorious political scandal in American history, his open contempt for Sirica’s efforts to expose the conspiracy, and his refusal to cooperate with prosecutors influenced the D.C. Circuit’s view of his appeal. As revelations of the Nixon Administration’s criminal wrongdoing proliferated, the D.C. Circuit had no interest in overturning

400. *Id.*

401. *Id.*

402. *Id.*

a coercive sentencing practice that had proved so crucial to breaking the case wide open.

Ironically, although the D.C. Circuit saw no constitutional issues in Sirica's sentencing tactics, the Senate Watergate committee's chief counsel later expressed remorse about his own role in the coercive sentencing of the Watergate defendants. "I had mixed feelings about Sirica's use of the sentencing power to induce confessions, even though I had hinted to Sirica that such a strategy would help the committee and the grand jury[.]" Sam Dash acknowledged.<sup>403</sup> "I still thought, as I had argued in the Sweig case, it was an abuse of the sentencing function."<sup>404</sup>

During the Watergate era, the federal circuits split on the question of whether, and to what degree, trial courts may use coercive sentencing to force cooperation with investigators. The Third Circuit observed in *United States v. Garcia* that sentencing courts should not force defendants to face "a Hobson's choice: remain silent and lose the opportunity to be the objects of leniency, or speak and run the risk of additional prosecution."<sup>405</sup> The Fifth Circuit reached the same conclusion in *United States v. Rogers*.<sup>406</sup> Conversely, the Second, Seventh, and Ninth Circuits affirmed trial courts that used their sentencing power to encourage defendants to cooperate with the government, although none involved outrageously long sentences such as those imposed by Sirica in the Watergate case.<sup>407</sup>

The United States Supreme Court has never resolved the conflict among the circuits. Nevertheless, in *Estelle v. Smith*, the Supreme Court held:

The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."<sup>408</sup>

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403. DASH, *supra* note 237, at 30.

404. *Id.*

405. 544 F.2d 681, 685 (3d Cir. 1976).

406. 504 F.2d 1079, 1085 (5th Cir. 1974).

407. *United States v. Vermeulen*, 436 F.2d 72, 77 (2d Cir. 1970); *United States v. Chaidez-Castro*, 430 F.2d 766, 770-71 (7th Cir. 1970); *Gollaher v. United States*, 419 F.2d 520 (9th Cir. 1969).

408. *Estelle v. Smith*, 451 U.S. 454, 467-68 (1981) (internal citations omitted) (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); and *Malloy v. Hogan*, 378 U.S. 1, 8, (1964)).

## V. CONCLUSION

A. *The Burglars' Fate*

Prior to final sentencing in September 1973, the four Cubans—Sturgis, Barker, Martinez, and Gonzalez—attempted to withdraw their guilty pleas.<sup>409</sup> Their motion relied on a novel argument: they contended that when they broke into the Watergate, they believed that they had lawful authority to do so.<sup>410</sup> According to the burglars, they entered their guilty pleas on the mistaken belief that the national security of the United States required them to accept convictions rather than vigorously defend the case, which would risk exposing sensitive intelligence operations.<sup>411</sup>

Sirica denied the Cubans' motion on November 7, 1973, and the D.C. Circuit affirmed.<sup>412</sup> The appellate court noted that the burglars offered no evidence that any government official told them that they had a "patriotic duty" to remain silent and plead guilty.<sup>413</sup> The court further observed that "the proper question in this case is not whether appellants entertained the erroneous belief that silence was their duty, but whether this belief was, in an objective sense, reasonable in the circumstances."<sup>414</sup> The court ruled that it was not. "The guilty pleas were entered after the prosecution . . . had outlined a virtually airtight case that Hunt and Liddy had engineered the Watergate Break-in for purely partisan reasons[.]" the court concluded.<sup>415</sup> "After hearing all this, it was patently unreasonable for appellants to continue believing that they had been part of a legitimate 'national security' enterprise requiring their silence at trial."<sup>416</sup>

Hunt also attempted to withdraw his guilty plea, but as co-leader of the break-in, he had an even weaker claim than the burglars.<sup>417</sup> Indeed, if anyone understood the political nature of the break-in, it was Hunt. The D.C. Circuit unanimously affirmed Sirica's dismissal of Hunt's motion to withdraw his guilty plea.<sup>418</sup> But the D.C. Circuit did take the opportunity to finally curb some of Sirica's excesses. The Court of Appeals vacated the three counts that the judge had demanded Hunt plead guilty to before Sirica would accept his plea deal with the prosecution.<sup>419</sup>

409. *United States v. Barker*, 514 F.2d 208, 216 (D.C. Cir. 1975).

410. *Id.*

411. *Id.*

412. *Id.* at 218, 227.

413. *Id.* at 223.

414. *Id.* at 224.

415. *Id.* at 225.

416. *Id.*

417. *United States v. Hunt*, 514 F.2d 270, 270 (D.C. Cir. 1975).

418. *Id.* at 272.

419. *Id.* at 271 n.2.

Several years after the Watergate trial, Hunt and McCord sued their lawyers for malpractice.<sup>420</sup> Hunt sued his attorney, William Bittman and the law firm of Hogan & Hartson, claiming that they had inadequately represented him during the Watergate trial.<sup>421</sup> Hunt also accused Bittman of conspiring with the Nixon Administration to persuade him to plead guilty, and of having a conflict of interest for continuing to represent Hunt even after Bittman became a target of investigation for his covert transfer of White House hush money to Hunt.<sup>422</sup> The trial court granted summary judgment to Bittman and the firm on the grounds that the three-year statute of limitation had expired on Hunt's claims.<sup>423</sup>

McCord's malpractice suit was similarly unsuccessful. He sued his attorneys, F. Lee Bailey and Gerald Alch, "for malpractice, conspiracy to represent [him] incompetently, and conspiracy to deprive [him of his] civil rights."<sup>424</sup> The trial court granted the defendants' motion for summary judgment on grounds of collateral estoppel and failure to state a legally cognizable claim.<sup>425</sup> In a separate proceeding shortly after his conviction in 1973, McCord had unsuccessfully petitioned the trial court for relief through a writ of error *coram nobis*, during which he first asserted that he had been a victim of ineffective counsel.<sup>426</sup> In *United States v. McCord*, the D.C. Circuit affirmed the trial court's conclusion that McCord's claim of ineffective counsel lacked merit.<sup>427</sup> In affirming the trial court in *McCord v. Bailey* (McCord's malpractice case), the D.C. Circuit observed, "McCord seeks to relitigate issues concerning the quality of his criminal trial counsel that he raised in the course of the criminal proceedings. Having twice raised these issues and lost, McCord cannot raise the claims anew in a civil case."<sup>428</sup>

The D.C. Circuit also affirmed the trial court's holding that McCord's "official authorization" argument was inadequate to sustain a malpractice suit against his attorneys.<sup>429</sup> McCord claimed that his attorneys should have raised the

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420. See generally *Hunt v. Bittman*, 482 F. Supp. 1017 (D.D.C. 1980); *McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980).

421. *Bittman*, 482 F. Supp. at 1018, 1020.

422. *Id.* at 1020.

423. *Id.* at 1026. Hunt filed suit on September 30, 1977, four and a half years after his sentencing at the Watergate trial. Hunt claimed that the statute of limitations began to run either on the date that the Court of Appeals affirmed Sirica's denial of Hunt's motion to withdraw his guilty plea or on the day of his incarceration for his Watergate convictions, which began on April 25, 1975. The court disagreed, however, holding that Hunt's injury began to accrue on March 23, 1973, the date on which Hunt was first incarcerated following his provisional sentencing. *Id.*

424. *Bailey*, 636 F.2d at 608.

425. *Id.*

426. *Id.*

427. 509 F.2d 334, 343-45, 351-53 (D.C. Cir. 1974).

428. *Bailey*, 636 F.2d at 611. However, the D.C. Circuit did find that McCord had a colorable civil rights claim that the defendants conspired to violate his civil rights, and remanded for further proceedings. *Id.* at 618. Nevertheless, the D.C. Circuit found little merit in the claim, holding merely that it did not appear "frivolous," and thus should be resolved by the trial court. *Id.*

429. *Id.* at 611.

defense that his involvement in the Watergate break-in stemmed from his good faith belief that the break-in was legal because the Attorney General had authorized it.<sup>430</sup> The D.C. Circuit rejected McCord's argument. The appeals court held that it was "unimaginable" that McCord could make the necessary showing that "he had *some* objective basis to believe the Watergate operation enjoyed official sanction."<sup>431</sup> As the court emphasized, McCord worked for the CRP, not a government agency; his superior, G. Gordon Liddy, was likewise a CRP employee, and McCord himself had never had direct contact with any government officials.<sup>432</sup> The D.C. Circuit also noted, "McCord conceded before the Senate Watergate Committee that his bugging and surveillance all concerned political activities and that McCord himself harbored suspicions that the operations were unrelated to national security or other legitimate government interest."<sup>433</sup> The court concluded, therefore, that "to the extent there is an official authorization defense, it could not apply to McCord."<sup>434</sup>

### B. *The Trial's Legacy*

The outcome of the burglars' trial transformed Sirica from an undistinguished district court judge to a national icon. *Time* named Sirica its "Man of the Year" for 1973.<sup>435</sup> *Time* declared that by "stubbornly and doggedly pursuing the truth in his courtroom regardless of its political implications, [Sirica had] forced Watergate into the light of investigative day."<sup>436</sup> It noted that although Sirica claimed "no pretensions to legal erudition," the judge's commitment to finding out the truth behind Watergate broke the case wide open.<sup>437</sup> Judge Sirica, the editors concluded:

[S]imply did not believe that the seven lowly burglars who had wiretapped Democratic National Committee headquarters at Washington's Watergate complex in June 1972 were a self-starting team working alone. Injudicially, some have argued, but undeniably in the higher national interest, as others would insist, he applied pressure until he got a scandal-bursting response.<sup>438</sup>

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430. *Id.*

431. *Id.* at 612.

432. *Id.*

433. *Id.*

434. *Id.*

435. *Man of the Year, Judge John J. Sirica: Standing Firm for the Primacy of Law*, TIME, Jan. 7, 1974, at 1.

436. *Id.* at 8.

437. *Id.*

438. *Id.*



Not everyone was impressed by Sirica's performance. With much less fanfare, Chesterfield Smith, the president of the ABA, sharply criticized Sirica's coercive use of provisional sentencing. "We must be concerned about a federal judge—no matter how worthy his motives or how much we may applaud his results—using the criminal-sentencing process as a means and tool for further criminal investigation of others[.]"<sup>439</sup> Smith's successor, James Feller, took an even stronger position, likening Sirica's sentencing tactics to "the torture rack and the Spanish Inquisition."<sup>440</sup> Philip Kurland, a prominent University of Chicago constitutional law expert, called the sentences "'a form of extortion."<sup>441</sup> Sirica himself shrugged off the criticism. "I had no intention of sitting on the bench like a nincompoop and watching the parade go by[.]" he explained in his autobiography.<sup>442</sup> "If the action I took constitutes the action of a so-called 'activist judge,' I plead guilty to the charge."<sup>443</sup>

The Watergate prosecutors faced sharp scrutiny of their own. Charles Morgan, the director of the ACLU, accused Silbert and his fellow prosecutors of intentionally failing to pursue leads to the White House.<sup>444</sup> The ACLU director claimed that the prosecutors had simply parroted "the Nixon Administration's story to the Court and to the public."<sup>445</sup> When the Nixon Administration nominated Earl Silbert to be United States Attorney for the District of Columbia in 1974, a handful of Senate Democrats opposed the nomination. Senator James Abourezek of South Dakota asserted that it remained an open question "whether Mr. Silbert participated in a cover-up" by "deliberately limiting the Watergate investigation."<sup>446</sup> Senator John Tunney of California charged, "I think it is all too clear that the prosecutors were intimidated" by the Nixon White House.<sup>447</sup>

During his nomination hearings, Silbert defended his approach to the case on the grounds that, prior to McCord's letter to Judge Sirica, the prosecutors had no evidence of a wider conspiracy. Silbert explained that the only way to defeat a conspiracy to obstruct justice "is to get an insider" to testify against the conspirators.<sup>448</sup> But Silbert acknowledged that during the investigation and trial, the prosecutors "could not get any insider" to cooperate.<sup>449</sup> "That was our problem, and that is why we adopted the strategy we did, to indict and convict,"

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439. *Id.* at 19.

440. *Id.* For a contemporaneous critique of Sirica's approach to the trial by a former federal prosecutor, see George V. Higgins, *The Judge Who Tried Harder*, ATLANTIC MONTHLY, Apr. 1974, at 83-106.

441. *Man of the Year*, *supra* note 452, at 19.

442. SIRICA, *supra* note 11, at 127.

443. *Id.*

444. *Silbert Hearings*, *supra* note 124, at 5-6.

445. *Id.* at 18.

446. 94 CONG. REC. 32,273-74 (Oct. 8, 1975).

447. *Id.* at 32,288.

448. *Silbert Hearings*, *supra* note 124, at 181.

449. *Id.*

Silbert recalled, “and then immunize so that we could get inside to see what, if anything, there was to find out.”<sup>450</sup>

However, the thorough and probing nature of Sirica’s plea colloquy undermined the prosecution’s strategy. Had McCord followed the same tactic as Hunt—that is, plead guilty and deny White House involvement in the hope of receiving a presidential pardon—the prosecutors would have lost their best chance to tie the White House to Watergate. Sirica’s plea colloquy established a record that rendered almost useless any future testimony that was inconsistent with the witnesses’ previous sworn denials of White House involvement. Thus, in the end, Sirica’s outrageous tactics were far more effective at getting to the bottom of Watergate than the prosecution’s cautious strategy was.

Nevertheless, in defense of Silbert, the federal district court judges for the District of Columbia—including John Sirica—unanimously endorsed Silbert’s nomination.<sup>451</sup> Daniel Reznick, the president of the D.C. Bar, declared, “Those of us in the Washington legal community who know Mr. Silbert and his work consider him to be an outstanding attorney, a vigorous prosecutor and a person of integrity.”<sup>452</sup> The great majority of senators in both parties agreed. The Senate voted to confirm Silbert’s nomination by the overwhelming margin of eighty-four to twelve.<sup>453</sup>

Likewise, Judge Sirica’s detractors also remained in the minority. The undeniable fact was that Sirica’s methods had achieved a result that most Americans applauded. “From March 1973 onward,” Stanley Kutler observed, “Judge Sirica was lionized in the media by liberals and conservatives alike.”<sup>454</sup> Even Professor Kurland later softened his tone, concluding that Sirica “played an important and honorable, if not always correct, part . . . .” in the Watergate affair.<sup>455</sup>

Yet, as Harvey Katz of *Washingtonian* Magazine noted, the fact that Sirica became “the darling of many civil libertarians for his conduct in *United States v. Liddy*” was “one of the most astonishing of the many astonishing developments of Watergate.”<sup>456</sup> Indeed, rather than condemn Sirica, the director of the ACLU publicly chastised Silbert and his fellow prosecutors for not mounting a more aggressive investigation.<sup>457</sup> According to Gordon Liddy, Charles Morgan privately acknowledged that his organization would have challenged Sirica’s tactics if Liddy had been a more sympathetic defendant.<sup>458</sup>

450. *Id.*

451. *Id.* at 111.

452. *Id.* at 115.

453. 94 CONG. REC. 32,289 (Oct. 8, 1975).

454. KUTLER, THE WARS OF WATERGATE, *supra* note 5, at 260.

455. Philip Kurland, *The Power and the Glory: Passing Thoughts on Reading Judge Sirica’s Watergate Exposé*, 32 STAN. L. REV. 217, 228 (1979).

456. Harvey Katz, *Some Call It Justice II*, 8 WASHINGTONIAN 72, 127 (Sept. 1973).

457. *Silbert Hearings*, *supra* note 124, at 18.

458. LIDDY, *supra* note 21, at 285.

Regardless of whether Liddy's account is accurate, the fact that most lawyers, judges, and legal scholars endorsed—or at least did not condemn—Sirica's tactics spoke volumes about the political atmosphere of 1973 and 1974. Joseph Lord III, chief judge of the United States District Court in Philadelphia, proclaimed Sirica's conduct of the Watergate case as "nothing short of masterful."<sup>459</sup> William Byrne, the senior judge on the United States District Court in Los Angeles, called Sirica "a credit to the judiciary."<sup>460</sup> Judge Carl Rubin of the United States District Court in Dayton, Ohio, claimed that the "stature of every district judge in this country has been enormously increased by the example[of Sirica's] courage and dedication to principles we all hold dear." Judge Rubin added that "only the federal courts stand between the citizens and a state of near anarchy."<sup>461</sup>

As the alarmist tone of Judge Rubin's comments suggested, for most Americans the growing evidence that the United States had a criminal in the Oval Office outweighed procedural concerns about the legal and constitutional rights of the Watergate burglars. Although that view is understandable in light of the national crisis posed by Watergate, it should also be deeply troubling. Watergate's outcome has long been celebrated as evidence that the American political system could rid itself of a scoundrel in the White House. But the means by which the system reached that outcome showed that, under the extraordinary circumstances of Watergate, our nation's courts were willing to sacrifice the constitutional rights of criminal defendants in order to achieve a political objective. That is not a legacy any American lawyer, judge, or legal scholar should be proud of.

For his part, Judge Sirica never doubted the ultimate legacy of the Watergate trial. As he wrote in his autobiography:

What has always seemed to me important about the break-in trial is that those in other parts of the government who were trying to push the facts aside—to stop the search for truth at a point where only the seven original defendants had been brought to justice—encountered an active and objective judiciary that was beyond their control.<sup>462</sup>

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459. *Man of the Year, Judge John J. Sirica: Standing Firm for the Primacy of Law*, TIME, Jan. 7, 1974, at 15.

460. *Id.*

461. *Id.*

462. SIRICA, *supra* note 11, at 122.

G. Gordon Liddy was more blunt. “Just as I do,” Liddy wrote, “John Sirica believes the end justifies the means, and in the Watergate trial he put that philosophy into practice.”<sup>463</sup>

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463. LIDDY, *supra* note 21, at 282. In February 1999, the ABA House of Delegates adopted “black letter” standards for trial judges in criminal cases. In Standard 6-1.1 (“General Responsibility of the Trial Judge”), the ABA declared, “The purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.” CRIMINAL JUSTICE SECTION STANDARDS § 6-1.1(a) (1999), available at <http://www.abanet.org/crimjust/standards/trialjudge.html> (last visited January 1, 2011) (on file with the *McGeorge Law Review*).

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