'A Sad Day'

Departing U.S. Attorney Whitney North Seymour Jr., after a New York grand jury indicted John N. Mitchell and Maurice H. Stans last week:

"This is a sad day in a series of sad days for those of us who are concerned about integrity in government and in the administration of justice.

"The one bright note on this day is that the grand jury's action in this district demonstrates the capability of federal law enforcement machinery to function effectively and impartially, without fear or favor, to bring criminal charges for violation of the law, no matter who is involved.

"The key ingredients to guarantee integrity in law enforcement are independence and commitment to the principle of even-handed justice. The action taken by the citizens who make up the special grand jury and the quiet and conscientious investigation conducted by the staff of the United States Attorney's office is a demonstration that that principle still is very much alive in the continuing traditions of this country."

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Lawyers and the Law

By Philip B. Kurland

The author, onetime law clerk to Supreme Court Justice Felix Frankfurter, is practicing constitutional law while on leave from the University of Chicago Law School.

IT WAS LORD COKE who told the king of England, however apologetically, that the crown was subordinate to God and the law. In the very notion of a "government of laws and not of men" it is implicit that none is exempt from the law's commands, however high his station or righteous his cause. It must be obvious that when revolutionaries and the establishment alike, the chic radical and the stalwart reactionary, the criminal and the officers of the law all find reasons to place themselves above the law, a constitutional democracy such as ours purports to be is in serious danger of destruction from within.

The point was cogently made in a play of a few years ago, Robert Bolt's "A Man for All Seasons." There, the following dialogue occurred between the Lord Chancellor of England, Thomas More, his daughter Alice and his son-in-law Roper:

Alice: While you talk, he's gone!

More: And go he should if he was the Devil himself until he broke the law!

Roper: So now you'd give the Devil benefit of law!

More: Yes, what would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned around on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then?

The Keepers of the Law

THE RELEVANCE to today is obvious enough, but there is another lesson to learn from More. Like so many involved in the Watergate affair—John Mitchell, John Dean, John Ehrlichman, L. Patrick Gray, G. Gordon Liddy, Herbert Kalmback, to name a few—More was a lawyer. And when his king told him to break the law he declined, and he suffered the king's wrath by the loss of his life. In the Watergate affair, however, there was neither a king nor a governmental threat to the lives of any of the lawyers who may have participated in, suborned or condoned the illegal acts.

Whatever one might properly expect of professional spies or advertising men, surely the lawyers owed a duty to the law whose keepers they are. Surely the ethics of the profession ought not be reduced to the morality of the political market place. However one may seek to excuse an excess of zeal, that excuse ought not suffice for the behavior of members of the legal profession. Zeal was not thought an excuse by most of us when the zealotry was that of the defense lawyers in the trial of the Chicago Seven. There is no more reason to accept it as an excuse in this case.

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One many quote eminent authority for the disdain in which they have held the legal profession. But, as has so often proved to be the case, de Tocqueville's analysis remains valid: "The profession of the law is the only aristocracy that can exist in a democracy without doing violence to its nature."

And yet, it must be conceded that the discipline of the bar has largely been destroyed by the growth of the community in which it operates. Where the community is small and the bar is small, self-discipline derives from the fact that each man has personal knowledge of the other's worth. With the anonymity of size, more formal means for discipline are required. Sadly, these means have so far been largely absent or inadequate.

The wrongdoing of lawyers who engage in breaking and entering, wiretapping, misrepresentation, or in sponsoring or condoning such activities, is generally left to the same medium that purports to constrain the wrongdoing of nonlawyers: the processes of the criminal law. In part this is because the bar is unwilling to undertake the discipline of one of its own members before the courts act, lest it prejudice his case, and unwilling to act afterward, except to add the sanction of disbarment to a judgment of guilt.

The Bar Waits for the Courts

THERE IS MACHINERY for investigation and castigation of wrongdoing lawyers. Bar associations and commissions are charged by the state courts with disciplining the legal profession. But however industrious or willing, the disciplinary functions are severely handicapped by the construction of the Constitution's Fifth Amendment privilege. In 1967, the Supreme Court, in *Spevack v. Klein*, held that in a proceeding to discipline a lawyer for professional misconduct, the lawyer could properly assert the privilege against self-crimination to preclude production of his records and compulsion of his testimony. It held further that the lawyer could not be disbarred for so pleading the privilege against self-crimination. This overruled a 1961 Supreme Court decision, *Cohen v. Hurley*, which had allowed the state to reject the privilege against self-crimination in disbarment proceedings.

It must be apparent, therefore, that the bar itself is impotent to act against any wrongdoing lawyers in the Watergate affair. Until such offenders are convicted, the plea of the Fifth Amendment privilege will halt inquiry; after conviction, the disbarment would follow almost as a matter of course. In the event of acquittal, the bar may be free to make its own determination, but it won't.

There is no doubt that, whatever its outcome, the Watergate affair will leave a deep stain on many cherished institutions: the presidency, the democratic electoral processes, the legal profession. And yet, the Watergate affair could ultimately do more good than harm. If it leads to a reversal of the movement of power to the executive branch and a restoration of the authority that rightfully belongs to Congress, if it leads to legislation to control and monitor the election processes so as to prevent the perversions that have so recently occurred, if it leads to a revival of the notions of duty and responsibility within the bar, Watergate will have proved a blessing —though a highly disguised one.

The lesson of Watergate is humility. What must be abated is both the arrogance of power and the power of arrogance. And this reform will depend upon the attention span of the American press and the American public. Watergate must not be permitted to die until the reform it requires is brought about. Nothing less than the survival of American democracy depends upon it.

One of the panels on the door of the United States Supreme Court shows Lord Coke telling England's King James that even the crown is subject to the law.