

Post 11-7-74

The Watergate Conspiracy Trial—'A Travesty'

I must begin this letter by making certain points perfectly clear:

1. I have hated Richard Nixon ever since I became aware of politics, which was in 1952, when I was 10 years old.

2. I think that the conduct of those involved in the various Watergate scandals is indefensible, inexcusable, and probably criminal.

3. I very much on general principles would like to see people like Haldeman, Ehrlichman, and Mitchell go to jail.

The focus of this letter is to ask how in heaven's name a travesty like the Watergate conspiracy trial can be permitted to proceed as it is. Perhaps there properly is such a thing as "conspiracy," and, maybe there is such a thing as a Watergate conspiracy. But I am outraged by the way the Watergate conspiracy trial is being conducted. In particular:

1. The hearsay rules, while perhaps to some extent outmoded in the ordinary one-on-one trial, are crucial in a conspiracy prosecution. It is bad enough that the statements of one alleged co-conspirator can be used against another alleged co-conspirator who never heard them, acted in reliance upon them, or was even aware of their existence. It is incredible that Judge Sirica, who should have rescued himself to begin with, would permit unadulterated hearsay statements allegedly made by persons who are not even co-conspirators. There is no way at all to defend against such statements.

2. It is perhaps nice to think that Haldeman, Ehrlichman, Mitchell, and the others are finally getting "theirs" after what they did to others who were named as defendants in all sorts of conspiracy prosecutions, but this attitude is a continuation of the same double standard that these men helped bring to life. Conspiracy is more a concept than reality, and it easily can be a tool for irresponsible and/or lazy prosecutors. If it is to exist at all, it should be reserved only for situations where separate trials are impossible.

3. Judge Sirica justifies his violations of the rules of evidence by saying that he wants to get at the "T-R-U-T-H." That is not the purpose of a criminal trial. The purpose is to determine whether specific people engaged in, and should be punished for, specific conduct that had previously been determined unlawful. A criminal trial is a debilitating experience, and the rules of evidence, as well as other rules, are designed to make the proceedings fair for all concerned and permit society to inflict punishment with a clear conscience. Unfairness often occurs despite the rules, but there can be no hope for justice when the presiding judge deliberately slants them to favor the prosecution. (I exclude from this discussion the rule that an attorney cannot impeach a witness that he calls on behalf of his client, a rule that today makes no sense.)

4. The above can be answered, of course, the way Judge Sirica did. He

told the defendants that, if convicted, they can always appeal to the Court of Appeals. Judge Sirica, by his erratic and unprofessional behavior, is making a reversal of any conviction likely. If the convictions are overturned because of his errors, the trial will have been a complete waste of prosecutorial and judicial time, taxpayer money, and the lives of the defendants.

On appeal, an anomaly may occur. Many convictions are upheld under the "harmless error" rule, which permits a reviewing court to overlook error below on the ground that because the evidence was so overwhelming, the defendant surely would have been convicted even had there been no error. As is well known, the U.S. Court of Appeals here in the District usually divides five to four on most close criminal questions—five "liberals" and four "conservatives." Usually, the conservatives favor the prosecution and the liberals the defendants, but on this appeal the conservatives could well seek to have the convictions overturned while the liberals try to keep the defendants convicted. The outcome could well be more a function of politics than of the evidence of guilt. It is hard to think of a more revolting prospect.

I don't think that the pardon of Nixon should excuse his henchmen, but I find myself almost half-wishing that they be acquitted by the jury. There is too much travesty going on for me.

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