Joseph L. Rauh Jr.

In Praise of the Prosecution Team

The panic inside the Nixon administration over the Watergate Affair is not too difficult to understand. What is far less comprehensible is the apparent hysteria which seems to drive so many on the other side (I guess I should say "our side") to accept uncritically any myth about Watergate that somehow becomes current.

One need only cite in this connection the twin mythology that deifies Judge John Sirica and denigrates the Watergate prosecutors. Thus, a liberal columnist, one of the nation's most thoughtful and brilliant, wants to build a monument to Sirica opposite the Justice Department on Pennsylvania Avenue and both the New Republic and the top official in the American Civil Liberties Union in the Nation's Capital want to dispense with the services of the Silbert-Glanzer prosecution team without any hearing or other consideration of their work to date. If, as I believe, someone should protest these inverted positions and speak up for the outstanding public service performed by Earl Silbert, Seymour Glanzer and Donald Campbell, the fact that the first two are good friends of our family could hardly justify craven silence in the face of general public acceptance of this twin mythology.

Mr. Rauh is former national chairman of Americans for Democratic Action and is now a practicing attorney in Washington.

Both myths appear to stem from the trial of the Watergate Seven and the judge's thinly veiled attacks on the prosecution there. Yet most of those who have joined in these pro and con warhoops have never taken the trouble to study any of the transcript of that trial. Everyone, including dedicated civil libertarians, was so busy enjoying the administration's discomfiture over the Watergate affair, that the unfairness of the trial conducted by Sirica went quite unnoticed.

The American Bar Association has set forth the trial judge's obligation very clearly: "The only 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." Sirica did not allow the proceedings to be so used; he *used them himself for the obvious "other purpose"* of getting at persons not on trial.

It seems ironic that those most opposed to Mr. Nixon's lifetime espousal of ends justifying means should now make a hero of a judge who practiced this formula to the detriment of a fair trial for the Watergate Seven. Indeed, Sirica was quite frank about all this with statements during the trial such as "I could care less about what happens to this case on appeal . . ." and "I could care less what the Court of Appeals does, if this case ever gets up there."

A few examples from the transcript should illuminate this point:

• Sirica interrupted attorney Henry R. Rothblatt's opening statement on behalf of defendants Bernard Barker, Eugenio Martinez, Frank Sturgis and Virgilio Gonzalez with this obviously prejudicial statement:

Of course the jury is going to want to know why the men went in there. Let's get down to the details and find out why they went in there if you have some evidence as to that. That is one of the crucial issues in the case. Who paid them. Did they get any money to go in there. Was it purely for political espionage. What was the purpose?"

Let us find out if we can what your defense is in this case. It is as simple as that.

All right. Counsel proceed. Proceed.

Mr. Rothblatt. *I will do my best.*

The Court: *Proceed. Don't let me tell you again. Proceed.*

• When Rothblatt subsequently withdrew from the case in opposition to guilty pleas by his clients, Sirica assigned a near-90-year-old attorney (albeit one of Washington's most distinguished attorneys of an earlier generation) to represent them, and he stood by helplessly while Sirica interrogated these defendants on matters totally irrelevant to the acceptance of their pleas of guilty.

• Sirica questioned Hugh Sloan concerning the persons who verified Jeb Stuart Magruder's authority to direct payments to defendant G. Gordon Liddy and then read the testimony to the jury despite its lack of relevance to the indictment and despite its obviously hearsay nature.

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• Sirica read to the jury a bench conference during which Liddy's attorney indicated that the testimony "would inure to the detriment of my client," causing Liddy's attorney to state that he could "no longer feel free in my own mind to raise legal arguments at the bench without the fear that they will later be read to the jury."

Silbert's prosecution team quite properly and quite admirably resisted Sirica's invitation to use the trial for purposes other than establishing the guilt of the accused and bore the judge's and the press' criticism in the silence appropriate to the situation. Their job was to obtain convictions of the defendants before the court and this they did with a skill and thoroughness born of extensive prosecutorial experience. Indeed, they had obviously determined their strategy with respect to the higher-ups long prior to obtaining the initial indictments, namely, (a) indict and convict the Watergate Seven, (b) take them before the grand jury with immunity from further prosecution and (c) utilize the information thus obtained to break the case. There is in that strategy, of course, something of a parallel to the way in which the Senate committee is proceeding.

With the help of Sirica's severe sentencing pronouncements (permissible under a recent decision of the Second Circuit Court of Appeals), the Watergate case has now been broken up to and including the Haldeman-Ehrlichman-Mitchell-Dean level. U.S. Attorney Titus' statement last week leaves no doubt that the prosecution team has a substantially completed case of "massive obstruction" of justice in the cover-up of both the Watergate and Ellsberg burglaries and possibly more. One witness, identified as Deputy Campaign Director Magruder, has already agreed to plead guilty and testify against his former associates and press reports indicate others are in the process of following suit. The forthcoming "comprehensive indictment" referred to by Titus and the testimony of co-conspirators in support of that indictment are thus virtually assured.

Despite their success in breaking the case, once it was clear that Elliot Richardson would be confirmed and Archibald Cox named as special prosecutor, the prosecution team quite correctly offered to resign in order to give Cox the complete freedom of action he required. When Cox asked the prosecution team to stay on, so that "there be no break or delay in the investigation," they quite rightly agreed to do so. How long they are kept on the job is now, of course, Cox's responsibility. But one can at least venture the hope that the Silbert team's long prosecutorial experience in general and their special expertise on this case in particular will not be lost to the "massive obstruction" of justice case soon to be tried against the top administration officials.

Cox has a tremendous job ahead and much that is important to our democracy rides with him. He has the burden of somehow providing a forum for a fair trial of the defendants in the face of Senate hearings, civil suits and a general public assumption of guilt. He alone can handle the question of how to deal with the President's possible involvement. He alone can do the liaison work with the Senate committee and a possible House committee of inquiry. He alone can determine how much farther than the massive obstruction of justice case already developed the special prosecutor's staff is to go. With all these and no doubt other things remaining to be done, it would be a tragedy if the services of the Silbert team were now lost to the upcoming prosecution.