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'Arrogance of Power' in the Watergate Trial

By Monroe H. Freedman

Three of the most powerful political figures of recent times—John N. Mitchell, H. R. Haldeman, and John D. Ehrlichman—are currently being tried for involvement in the obstruction of justice that followed the Watergate burglary arrests.

One could rejoice that the villains have been overthrown and that the system is working. On the other hand, one could deplore the fact that the prosecution and trial of the defendants have been characterized by the same kind of abuse of official power that gave rise to Watergate itself.

For Watergate was not simply a handful of evil men. Rather, Watergate expresses an attitude, a state of mind. That attitude is now being manifested again, as we indentify those who are on *our* Enemies List, and set about, in the inelegant expression of John W. Dean 3d, to screw them.

In the Nixon Administration, White House officials arrogantly abused their power, without any sense of self-restraint, because they believed they were beyond control. Now, Judge John J. Sirica, having uncovered the obstruction of justice by abusing his judicial powers, has refused to permit the case to be heard by another judge in the same court.

It has been suggested that Judge Sirica acted properly in using the earlier trial not to administer justice in that case but to expose the suspected guilt of others who were not even on trial. Otherwise, it is argued, the truth would never have come out. However, Judge Sirica had a clear alternative to combining in himself the roles of judge and prosecutor. If Judge Sirica did indeed believe that the prosecutors were not doing an effective job, he had the power to appoint a special prosecutor to do it properly. In fact, a motion urging such an appointment was before the court. Had he taken that course, Judge Sirica could have maintained his own constitutional integrity as a judge, and still have seen the truth come out.

As it was, Judge Sirica was honored by Time magazine as its 1973 Man of the Year for that achievement. I recall being at a Washington night-club to enjoy a stand-up comic routine on Watergate; during the performance, Judge Sirica himself stood up, waving and smiling broadly, to acknowledge a standing ovation from the audience. Clearly, therefore, Judge Sirica is the very last person in the world to sit in impartial judgment in the trial of the case that he himself has been celebrated for uncovering. Were I one of the defendants, I would far prefer to be tried by a court presided over by Archibald Cox or Leon Jaworski.

But Judge Sirica sits on the case and, predictably, he has expressly set as his standard not the administration of justice in the matter before him, but, as he has spelled it out to the jury, the determination of t-r-u-t-h. As observed by one of our great jurists, Judge Bernard Botein, the American system of justice places a heavy emphasis on "respect for human dignity at every step" of a trial, and even though that system "may not prove to be the best means of ascertaining truth," it is "not to be undermined lightly in a democratic state."

If the real crime of Watergate is an arrogance of power that threatened to undermine democratic principles, what then can we say of a judge who asserts that a case will not be tried "according to the strict rules of evidence" applicable in other cases, and who boasts that he is not "awed by the Court of Appeals" that sits above him, because "they can't tell me how to try my case." Is that attitude essentially different from that displayed by Richard M. Nixon and Mr. Dean in the infamous conversation in which they decided it was time to use the power they had in order to screw their enemies simply because the power was theirs to use?

The prosecution effort is similarly flawed. If the defendants endeavored to obstruct justice by preventing criminal conduct from being uncovered, or if they aided and abetted that effort, then those are the crimes for which they should be prosecuted.

But, not content with proceeding on those substantive crimes, the Special Prosecutor's office has relied principally upon charges of conspiracy to commit the substantive crimes. Legal literature is filled with catalogues of prosecutorial evils that are inherent in conspiracy trials. Most seriously—as we see particularly with regard to such apparently peripheral figures as Kenneth W. Parkinson and Robert C. Mardian in the present case—the crime of conspiracy focuses away from individual guilt and toward guilt by association. In such a prosecution the act of one is attributable to the others, and may be proved by the most tenuous circumstantial evidence, hearsay evidence, and violation of the constitutional right to confront one's accusers.

Other counts in the case derive from Section 1001 of the Federal criminal code. That provision has been a target of civil libertarians for decades, because it is one of the most broadly and vaguely phrased criminal statutes imaginable. The crime consists of intentionally making "any false . . . statement" regarding "any matter" that is "within the jurisdiction of any department or agency" of the United States. That's it. The false statement may be made to anyone in the world. It need not have been made on notice or under oath, as would be true in a case of perjury in a courtroom. Yet, incredibly, the penalty for that vague offense is greater than that for perjury.

History shows that the original intent behind Section 1001 was to prevent people from obtaining governmental money, property, or privileges by presenting false claims to a governmental agency. In fact, the original title of the section was "Presenting False Claims." Moreover, United States Courts of Appeals have interpreted the statute as not covering statements made to the F.B.I. in the course of investigations. Nevertheless, the courts in the present case refer precisely to that—false statements made to the F.B.I. in the course of its investigations.

Judge Sirica did throw out the charges under Section 1001—not, however, before the trial, but after the prosecution had used those charges during the trial to justify admission of evidence that might otherwise have been excluded. In dismissing the Section 1001 charges, Judge Sirica reassured James F. Neal, chief trial prosecutor, that the evidence relating to those charges would nevertheless go to the jury. "That's all we care about," was Mr. Neal's revealing reply.

At another point in the trial, Mr. Neal admitted that "as a human being" he has "serious questions" about the propriety of the charges under Section 1001. What, we must ask, is Watergate about if not that—people doing as public officials things that "as human beings" they should have "serious questions" about? It is a failure to learn that lesson, I would submit, that is the ultimate betrayal of Watergate.

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