# Battle of Watergate TV Fixes On Free Press vs. Fair Trial

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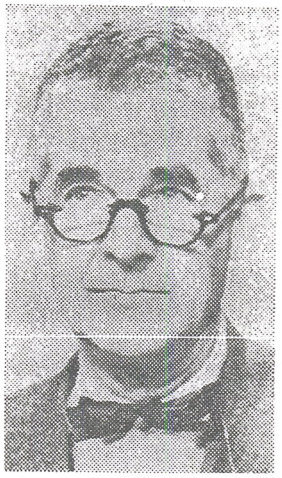
By George Lardner Jr.
Washington Post Staff Writer

When the first Watergate defendants were indicted last September, the morning newspaper of one of Florida's biggest cities ho-hummed the details to its readers deep on an inside page — in a section otherwise devoted to classified ads.

Other papers in other towns treated Watergate with a similar yawn. Even so, the Justice Department was ostensibly worried about the potentially prejudicial impact of congressional hearings on the forthcoming trial, which was to be held in Washington where the topic was still Page One.

"The public interest in a prompt and successful prosecution may be imperiled by widely publicized hearings at this time," Assistant Attorney General Henry E. Petersen warned last Sept. 29 of a prospective House investigation, which was promptly squelched. "And the basic right of the defendants to a speedy, fair and impartial trial may be jeopardized."



**ARCHIBALD COX**
**. . . wants TV blackout**

It was a doubtful proposition last September, at least in most jurisdictions of the federal courts. But now, paradoxically, in a case with no actual defendants awaiting trial, the question has seriously been raised as to whether a fair and impartial jury can be found anywhere in these United States in light of all the publicity. Watergate has become that explosive.

The debate, for the moment, is between special Watergate prosecutor Archibald Cox, who would love to see Watergate back in the classified ads, and the Senate select Watergate committee headed by Sen. Sam J. Ervin Jr. (D-N.C.), who considers a more prominent pursuit of the truth of paramount importance.

So far, Ervin appears to be winning the instant argument over nationally televised hearings for the expected confessions of former White House counsel John W. Dean III and former Nixon campaign deputy Jeb Stuart Magruder.

**See FAIR, A22, Col. 1**

## FAIR, From A1

But the issue goes deeper than that. When crimes are traced to the White House, can both fair trials and a free press have their day?

Sworn in May 25, Cox waited less than a week before raising the point, first privately asking chief Senate Watergate counsel Samuel Dash and Ervin to postphone their hearings, and then, when they declined, pressing the committee with an outspoken public letter.

In a passage that defense lawyers seem sure to toss back at him one day, Cox even asserted the fear that pretrial publicity about the scandal could "prevent fair trials from ever being held" (emphasis in letter).

Somewhat more guardedly, one of his top deputies, Phillip B. Heymann, contended in federal court here four days late that television coverage of Dean's and Magruder's testimony would seriously — "not hopelessly, but seriously"—threaten the prospect of fair trials "at an early date."

"We're between the devil and the deep blue sea," Heymann told reporters after the hearing in acknowledging that the arguments would doubtless come back to haunt the prosecution. "Sure, what we're arguing now will be used by defense lawyers later."

Evidently, however, Cox feels strongly that televising Dean's and Magruder's testimony—compelled from them under grants of immunity from prosecution—into millions of homes across the nation could cripple his hopes of any convictions. Without restrictions on news coverage, Cox warned U.S. District Court Judge John J. Sirica in a 13-page brief, the result might be "complete amnesty to these witnesses and all those who acted in concert with them."

### A Biased Nation?

The concept of a county's entire populace disqualified from jury duty because of notions conveyed by the televised testimony of two men is somewhat startling, but Cox was plainly asserting it.

"While it is impossible to judge at this time the precise impact of this publicity on the conduct of the forthcoming cases, there is, at the least, a significant possibility that the committee's recommendation will imperil the government's ability to empanel an unbiased jury for the trial of any offenses charged," Cox declared.

It is a stance that has produced sharp, and conflicting reactions in the legal community, including some arched eyebrows over former Solicitor General Cox's potential savvy as a criminal prosecutor.

Even with Watergate, "you can have both fair trials and a free press," says University of Pennsylvania law professor Louis B. Schwartz, who recently served as staff director on a national commission to reform the federal criminal code. "It's like the Kennedy assassination. It's a case of enormous provocation. And in cases like that, there is an unavoidable compromise. A certain amount of screaming is permissible when the thing screamed about is big enough. The press has done only what it should do."

At the same time, Schwartz feels, there are plenty of antidotes, "a whole series of legal remedies" that can ensure fair trial. Among them are continuances of the trials "until the furor has died down," careful examination of prospective jurors for prejudice, and firm and explicit instructions to the jury to "start fresh"

structions from the judge to with what they hear in the courtroom.

"I would never say it's acceptable or desirable for people to come into a jury box with an opinion," Schwartz said. "But there is no rule that every juror must enter the box without an opinion."

Unlike murders and other bloody crimes involving just one defendant who may be the target of a community's ire, he added, Watergate is a complex case certain to include a variety of defendants whose individual involvement is far from settled in the public's mind.

**Legitimate Worry**

"Cox had something legitimate to worry about," Schwartz said of all the Watergate publicity. "If I were prosecuting the case, I'd feel it my responsibility to voice my concern to Sen. Ervin.

"But he took a stronger line—and got cuffed for it, quite properly. Archie is not the most sensitive guy to political lines and boundaries. Maybe it's the solicitor general in him. The solicitor general has always exercised a godlike judgment role. He's the keeper of the royal conscience. That's not exactly what's called for here."

Washington attorney Nathan Lewin is another who sees no need for the press to pull back on Watergate.

"If Daniel Ellsberg, Jack Ruby and Sirhan Sirhan could get a fair trial," he says, "these guys certainly can. I don't know if people have more of an opinion about John Dean than Jack Ruby. And I submit that the average guy does not have an opinion about whether John Mitchell is guilty of the offense of bugging and tapping or obstruction of justice."

Lewin also disagrees with Cox's claims, in his letter to the Watergate committee, that continued disclosures at the hearings and in the press would encourage the concoction of "fabricated explanations" and increase the difficulty of getting truthful information from potential witnesses.

"Almost everything he said in that letter does not apply to Watergate," Lewin declared. "The best breaks have come after stories appeared in the press. And only a reckless, incompetent lawyer would tell his client that he can stop worrying once he appears on TV. When the times comes, Cox is going to be pulling out all the arguments on the other side."

**Cox Supporters**

The special prosecutor, however, is not without supporters for the side he's on now. Among them is Associate Justice Paul C. Reardon of the Massachusetts Supreme Court, best known as the architect of the so-called Reardon Report, a 1968 fair-trial, free-press study that was the basis for the first major overhaul of the American Bar Association's code of ethics in 60 years. The report recommended sharp restrictions on out-of-court statements about pending criminal cases, standards that, Reardon says, are beginning to be enforced in many states.

As Reardon sees the Watergate case, "the press has done an excellent investigative job," but "certainly we're very fast approaching the point where it's becoming impossible" to have fair trials.

"It's in the notorious case that the system comes under its greatest strain," Reardon said. "And this is unparalleled in our history. Cox has said it may prove impossible to prosecute those who are guilty. But there's another side. There are possible indictees who may be innocent. At the present juncture, their rights are being eroded—in a way that's not in the best tradition of the Constitution."

Reardon, whose initial intervention led to a 1969 Massachusetts Supreme Court order forbidding a public inquest into the Chappaquiddick accident involving Sen. Edward M. Kennedy (D-Mass.), said he feels the Watergate publicity has reached a point where it poses dangers not only to the Sixth Amendment's fair-trial guarantees but also to the First Amendment's guarantee of a free press. He said he sees a risk of restrictive court decisions growing out of continued publicity and suggested that the press is being short-sighted in pursuing it.

"They [the press] don't know who their friends are," Reardon said. "I think people ought to start pulling back." He said he was confident that "the truth will come out in the adversary process" of the courtroom, without any further prodding from the press or Congress.

Still other lawyers suggest that perhaps the time has come to compromise openly the traditional notion of an impartial jury.

"The fact is that the only jury you'll get in Watergate now that is fair in the traditional sense is an awfully uninformed jury," says one prominent Washington attorney. "It's impossible to find anybody who isn't an idiot who hasn't heard about the sensational aspects. What we're probably going to have to recognize is that in the television age, we probably have a new ballgame and that we've got to settle for less. Perhaps just jurors who have 'no fixed opinions.' "

Judge Sirica has promised a ruling Tuesday on the Senate committee's application for immunity orders for Dean and Magruder, which Cox contends should contain restrictions against radio and television coverage of their congressional testimony.

At Friday's court hearing, however, committee counsel Dash maintained that all the pertinent court precedents were really on his side.

**Court Precedent**

One that could prove prophetic for any Watergate trials was a 1952 decision by the First U.S. Circuit Court of Appeals in Boston involving Denis W. Delaney. A Democratic appointee, Delaney had, in order, been ousted by President Truman, indicted by a federal

grand jury, investigated by a House subcommittee at heavily publicized hearings, and convicted on Jan. 22, 1952, three months after the hearings, for taking bribes and falsifying tax returns.

In reversing Delaney's conviction, the Court of Appeals said it had no quarrel with the House subcommittee which was fully entitled "to decide whether considerations of public interest demanded at that time a full-dress public investigation," even though Delaney was already under indictment. But the court added that "so far as the modern mass media of communication could accomplish it," Delaney's character had been "pretty thoroughly blackened and discredited as the day approached for his judicial trial."

The trial judge, in declining to put off Democrat Delaney's trial any longer than he did, had observed that most of 1952 was an election year anyway, with no one month before November offering better prospects than another month. But the appeals court held that Delaney's trial should have been postponed until "the hostile atmosphere engendered by all the pretrial publicity" had substantially evaporated even if that meant a delay "until after the election."

The appeals court emphasized at the same time that it was dealing with a former public official already under indictment. In cases involving damaging publicity for unindicted officials, the court said:

"Such a situation may present an important difference from the instant case. In such a situation, the investigative function of Congress has its greatest utility . . . Also, if as a result of such legislative hearings, an indictment is eventually procured against the public official, then in the normal case there would be much greater lapse of time between the publicity accompanying the public hearing and the trial . . ."

Tailoring that to the Watergate case, Dash contended that since indictments are still said to be three months off, with trials "six months to a year away," the effects of pretrial publicity now would be minimized.

If it hasn't been, defense lawyers, again relying on Denis Delaney, could ask for more time.

A one time student of Cox's at Harvard law school, Dash took great relish at Friday's hearing in offering one other precedent for Judge Sirica's consideration: a 1962 Supreme Court decision upholding the conviction of Carpenters Union president Maurice A. Hutcheson for refusing to answer questions put to him by the Senate Labor-Management Rackets Committee.

The questions involved the alleged use of union funds to forestall a state bribery indictment in Indiana against Hutcheson and two other union officials. The union president chose not to invoke the Fifth Amendment against self-incrimination, which his lawyers said could be used against him back home in the state courts. Instead, Hutcheson simply protested that the interrogation was unfair in light of his upcoming state trial and constituted an abuse of Congress's investigatory powers.

The Supreme Court sustained Hutcheson's contempt-of-Congress conviction by a 4-to-2 vote.

It was, Dash observed, a victory for the government and for the official who argued the case before the Supreme Court: Solicitor General Archibald Cox.