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A Learned Profession

By Anthony Lewis

WASHINGTON — Suppose that during the trial of Daniel Ellsberg a friend or relation of Ellsberg's had had a little talk with the trial judge, William Matthew Byrne Jr. He asked whether Judge Byrne would be interested in a job paying \$42,500 a year, good for life and carrying great influence and prestige in American life. He did not make a firm offer but indicated that he might later—after the trial.

If that had happened, and been reported, the chances are that Ellsberg's friend or relation would now be facing criminal prosecution. The Federal bribery statute condemns anyone who, "directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent to influence any official act." In such cases intent is often inferred from the circumstances.

But something very like that was done—by the chief domestic adviser to the President of the United States. John Ehrlichman called Judge Byrne down to San Clemente, took him for a little walk outdoors, and asked him whether he would like to be director of the F.B.I. It was not a firm offer. That would come after the trial in which Ehrlichman and the President had such a consuming interest, and Judge Byrne might well think it could depend on the outcome of the trial.

According to Ehrlichman, he did those things with President Nixon's approval. Indeed, the President dropped in to say hello to Judge Byrne. Bribery happens to be one of the two specific "high crimes and misdemeanors" mentioned in the Constitution as grounds for impeachment. The other is treason.

Whether the evidence of the approach to Judge Byrne meets the standard of proof required under the Federal bribery statute cannot be known by an outsider. Perhaps time will tell.

What all of us may observe about that episode is the standard of legal ethics it reflects. Richard Nixon and John Ehrlichman are lawyers. When Ehrlichman was questioned about the approach to Judge Byrne, he said he had "scoured" the canons of ethics and could not find "where I had in any way infringed on them."

Is that really the ethical level of the American legal profession? Thousands of lawyers have been in Washington this week for the annual meeting of the American Bar Association, and the question has been very much on their minds: not the Ehrlichman-Byrne affair alone, but the involvement of so

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many Nixon Administration lawyers in the crimes of Watergate, and what that may say about the profession.

It is always easy to attack lawyers. Shakespeare and Dickens did, and much of the public today probably thinks of them as a selfish, obscurantist, insensitive lot, without principle, on sale to the highest bidder.

Easy, but I think mistaken. Of course there are unprincipled lawyers, and lately a number of them have wrongly been in positions of power. Lawyers often do represent vested interests, arguing the case of the polluter or the monopolist without sufficient independent reflection.

But American lawyers, more than any others in the world, also act as public conscience, as instruments of social change, as defenders of the weak and the abused. They must, or our society will fail. The responsibility follows from the extraordinary role given to law and the courts in the American constitutional system.

Just consider some of the things done recently by lower Federal courts around the country. They have entertained and decided whole new categories of environmental lawsuits. They have found the President's impounding of appropriated funds unlawful in many cases. One has held the bombing of Cambodia unlawful.

Those innovative decisions were made by trial judges, people from the ranks of the profession, many of them Republicans. Why have they taken those steps, drastically expanding the old limits on who may sue and for what? They have done so because it is the tradition of American law to expand the rights of the individual in response to abuses of official power.

What the American legal profession needs now, to remove the stain of Watergate, is to live up to its own best history. That is not a novel demand.

"To whom, if not to the lawyer, may we look for guidance in solving the problems of a sorely stricken social order?"

Justice Harlan F. Stone posed that question in 1934. He was writing about the ethics of lawyers, by which he meant not small niceties but their public responsibility. He warned against changed attitudes that had "made the learned profession of an earlier day the obsequious servant of business and painted it with the morals and manners of the market place."