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THE ART OF THE COVER UP: WATERGATE

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A Special Prosecutor is appointed and empowered to find the facts about a crime by a high official. For obvious reasons, the appointment is an invitation to dramatic and public political battle. Even reliable accusations of crimes by a President—and the threat to the rule of law that ignoring them would pose—are fought with all the powers of his Administration. If the accusation is really reliable, the President’s aim is to obscure the truth and to hide the facts. He sees the Special Prosecutor as a danger to his continuing to hold the highest office in the most powerful nation in the world. The President has at his disposal: (1) a significant amount of trust by the citizens who elected him; (2) the intense loyalty of those aides who may have participated in the alleged crimes and may fear prosecution; (3) the capacity to maintain secrecy of records; (4) and the political apparatus to campaign to build distrust of the Special Prosecutor himself.

We have good reasons to entrust the investigation and trial to a Special Prosecutor with special resources rather than to whatever U.S. Attorney is located where the crimes may have taken place. The latter will not have the staffing, the experience, and the trust of even those fearful of the disruption caused by the prosecution of a President or his close aides. Nor may a U.S. Attorney enjoy the same level of support of a court and a grand jury, and a capacity of the same breadth to charge prospective witnesses in any trial

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against the President with crimes they have committed and to promise benefits in sentencing if they cooperate against the President.

The contest typically takes place at four levels. There is a contest for witnesses—the President relying on the loyalty of those he has hired as well as any hopes they have for benefit from the Administration; the Special

Prosecutor relying far more on the fear of prison sentences that could be alleviated only by providing testimony for the Special Prosecutor. The second battle ground is in the fight for the support of the court in obtaining evidence despite Presidential claims of national security or executive privilege. Third, the battle is carried out in public. Each of the two parties is fighting for trust, and the President is struggling to cast suspicion on the Special Prosecutor and his supporters. This is a fight of the President to be seen as victim rather than as perpetrator. The final stage is likely to involve an effort of the President to destroy, and the effort of the Special Prosecutor to preserve, the Special Prosecutor’s public trust, his legal authority, his alliances, and to destroy or disband the very office he has been trusted to run fairly and effectively.

The appointment of Archibald Cox as Watergate Special Prosecutor triggered all four stages of this contest against a once popular President Nixon. Special Prosecutor Mueller is in a contest in the same four stages against President Trump. A close look at how these played out at the time of Watergate may throw some light on how they are likely to turn out in our time of Russian interference in the process of election of a U.S. President.

I. INTRODUCTION.....	3
II. THE OPENING STAGE: THE TASK FACING COX.....	3
III. THE CHANGING STRATEGIES OF THE CONTEST: THE VIEW BEFORE BUTTERFIELD’S REVELATION	5
A. NIXON’S EARLY STRATEGY	5
B. COX’S EARLY STRATEGY	6
C. AFTER THE BUTTERFIELD REVELATION.....	7
IV. THE BETTER OPTION MADE POSSIBLE BY THE BUTTERFIELD REVELATION	9
V. A FINAL INGENIOUS SHOT BY THE NIXON TEAM.....	10
A. THE PLAN.....	10
B. COX’S PRESS CONFERENCE.....	11
VI. THE AFTERMATH	14
VII. HOW PARALLEL IS WATERGATE TO MUELLER’S INVESTIGATION? 15	
A. TRUMP AND NIXON	16

I. INTRODUCTION

Watergate is the subject of dozens of books. Much of what story is told, however, depends on the perspective. President Nixon's account is different from that of his primary in-house adversary, White House counsel John Dean. Their stories each differ from those of Nixon's loyal top aides, Robert Haldeman and John Ehrlichman. The Senate Select Committee on Presidential Campaign Activities had still another; so did Judge John Sirica. Mark Felt, the senior FBI official who systematically leaked to the *Washington Post* what the FBI was learning had his; and so did the various segments of the increasingly large and often skeptical public audience attending to every day's development. The grand jury and the prosecutors of the Watergate Special Prosecution Force (WSPF) had their distinct viewpoints using the powerful tools of the law to investigate what had happened, occasionally in competition with the Senate Select Committee and the media.

As with Watergate, only time will reveal the many perspectives of players in the current crisis threatening to engulf the Trump administration: the President, his ever-feuding staff, federal and congressional investigators, and members of the press.¹ While the legality of prosecuting of the President was in real doubt, the President's impeachment was certainly a plausible final outcome. Impeachment is analogous to indictment in federal criminal proceedings. The United States Constitution states that "The President [and others] shall be removed from Office on impeachment [by the House of Representatives]" and conviction after trial before the Senate. Benjamin Franklin noted at the Constitutional Convention that historically the removal of obnoxious chief executives had been by assassination but that he preferred the Constitutional power to impeach.

But even now, in the crowded field of Watergate commentators, there is an often missing perspective that centers on the intersection of the authority-based strategy of President Nixon and the trust-based strategy of the Watergate Special Prosecutor, Archibald Cox. This perspective is especially instructive today. The interaction culminated suddenly and dramatically in the "Saturday Night Massacre" on an October day in 1973 when a widely-distrusted President exercised his authority to bring about the departure of three highly-trusted subordinates: Attorney General Elliot Richardson; his Deputy, William French Smith; and Watergate Special Prosecutor Archibald Cox. It was the President who was forced to resign as the public and Congress shifted their trust in a torrent away from the President towards the Special Prosecutor. In retrospect, it was a contest that either side might have won and ultimately depended on who could better generate and preserve trust.

II. THE OPENING STAGE: THE TASK FACING COX

When Archie Cox was chosen Watergate Special Prosecutor, Jim Vorenberg and I, both colleagues of his at Harvard Law School, volunteered to help him set up the independent organization which the Senate Judiciary

Committee had demanded as the price of confirming Elliott Richardson as Nixon's new Attorney General.

The beginning would be difficult. Cox had to show doubters among the Congress, the media, and the career federal prosecutors that he could step into an investigation of a powerful President that was already underway and could continue and expand it without a pause. Simultaneously, he had to hire a large number of experienced prosecutors, assign them to a sensibly chosen set of investigations, pick leadership for each group, negotiate with the Department of Justice for where the office would be located, equip that new office, provide for security, staff its administrative side, and much more.

The task facing Special Counsel Robert Mueller was no less complex. With periodic rumors that President Trump intends to fire him, he must also serve each day as Special Counsel as if it could be his last.

Back then, absent Vorenberg's efficiency, there would have been no organization to promptly begin to investigate the administration. And if Cox had not quickly built the organization's deep loyalty both to him and to the job of finding the facts and building cases, the whole set of investigations and trials might have crumbled when Nixon fired Cox. In order to maintain public confidence in the new organization's operation, Cox needed someone highly capable with a reputation for absolute honesty; he wisely also hired as spokesman Jim Doyle as an advisor on—and spokesperson to—the press.

In the meantime, Cox assigned me initial responsibility for starting up the federal investigation of what was then an emerging second major scandal, the Ellsberg break-in. My role was to organize for a case second in importance only to the Watergate break-in itself: the trial of the White House "Plumbers," a team formed by the White House to deal with the leaks that concerned or irritated President Nixon almost as much as they do President Trump. Prior to Watergate, that team had illegally broken into the office of a psychiatrist, Dr. Fielding, looking for scandal that might humiliate his patient, Daniel Ellsberg. Nixon thought Ellsberg's leak of the massive Pentagon study of the Vietnam War threatened to undermine continued public support of that war. In 1972 the war was not especially popular.

I'll pause to note the timeline—which is relevant to the present: these processes take a long time and at the outset it can be difficult to know what is and is not a genuine scandal. When I left Cox's staff to return to Harvard Law School in the Fall of 1973, a team of very able prosecutors was in place to handle the Ellsberg case, which then was still a year off. Cox's successor, Leon Jaworski requested me to return in the summer of 1974, in order to keep conflicts about roles and trial strategy under control during this first trial. It wasn't until 1975, after the defendants in this case had been convicted, that I argued the appeal that upheld the convictions of the leaders of the group. Such investigations and prosecutions must be measured in years, not months.

By early 1973, it was clear that the Ellsberg break in—my area—would be only one of five or six areas of investigative and prosecutorial responsibility. A third break-in had occurred at the Brookings Institution; there had been illegal

wiretapping; campaign financing had been organized for secrecy to benefit large corporations; and a scandal surrounded the ITT case. And even more was emerging, all well within the jurisdiction and the guarantee of independence that Attorney General Richardson had given Cox to satisfy the Senate Judiciary Committee.

Cox needed to establish understandings with the powerful rival investigation of the Senate Select Committee, chaired by Democratic Senator Sam Ervin of North Carolina and Republican Senator Howard Baker of Tennessee. There would be predictable conflicts over who should do what and Cox could not allow himself to be taken as the representative of anything less than an equal force—the criminal justice system. Soon after we arrived, we learned that the Committee was planning to exercise its statutory power to grant immunity to the central witness, John Dean, in order to eliminate Dean’s Fifth Amendment privilege not to testify about anything that could be used in any way to incriminate him. Cox and the WSPF would then not be able to charge Dean, however deeply he might be involved, or to threaten prosecution if Dean didn’t cooperate in furnishing evidence against others—two of any prosecutor’s greatest powers to develop needed evidence.

Cox took me aside in those early days and told me he felt compelled by his new responsibilities to challenge in court any Congressional grant of immunity that could undermine his investigations and prosecutions. He asked me to check on whether such a legal challenge might win and with what arguments. After reading the statutes and talking to fine lawyers, I saw that there was absolutely no possibility that we would win. Still Cox wanted to send a warning shot across the bow of the Senate Committee. “I want you to argue it,” he said to me, “because I don’t want to lose my first case in this role.” I agreed and argued in a packed courtroom. A furious Senate staff demanded to know why Cox wasn’t there to argue the case. A somewhat bemused Judge Sirica never had a doubt about what the law commanded and he promptly ruled for the Senate’s right to grant immunity to Dean.¹

III. THE CHANGING STRATEGIES OF THE CONTEST: THE VIEW BEFORE BUTTERFIELD’S REVELATION

On July 12, 1973 Alex Butterfield, an aide to Haldeman in the Nixon White House, first revealed to the Senate Select Committee and then to the WSPF that most of Nixon’s conversations were recorded. Some of these recordings would tell, unequivocally, whether Nixon had arranged and participated in discussions to plan a cover-up of responsibility for the Watergate break-in.

a. NIXON’S EARLY STRATEGY

¹ Before Dean was granted immunity by the Senate, we bundled up all the evidence we already had collected against him. If we had later decided to prosecute Dean, we hoped to show our evidence was not the result of Senate testimony and thus protected by the grant of immunity.

Before Butterfield's revelation, Nixon knew that most of his close aides would agree to blame John Dean for all efforts to cover up the 1972 break-in at Watergate. Before Butterfield revealed the recordings, Nixon knew that his effort to persuade the public and Congress of his innocence might not be seriously threatened by Dean's description of the content of private discussions in the White House—after all few would believe Dean's story over that of nearly a dozen of Nixon's aides who would accuse Dean of arranging a cover-up and then blaming it on the President.

Still, Nixon had reason to worry. Much would depend on how well Nixon's men held up in the face of the powerful weapons of federal prosecutors: grand jury subpoenas commanding suspects to answer questions orally or to produce relevant documents; access to judicial warrants allowing physical searches; the right and capacity to threaten charges and convictions carrying long sentences unless a witness gave testimony against the subject of primary interest to the prosecutor; and much more. Social pressure would matter too. How many of Nixon's aides would decide that it was wiser to tell what they knew than risk very substantial punishments? If one or two did, would others follow? In the present, infighting in the current White House may create an even greater environment of distrust. Trump does not only have to worry about the loyalty of his current aides, but also of those members of his staff who have already been unceremoniously fired.

In the final stages of Cox's investigation, the result in terms of public and Congressional opinion and the prosecutor's prospects at trial would turn on which of the two rival stories told under oath—one by Richard Nixon's men and one by John Dean—would be believed. Nixon, who in October 1972 had won all but one state in his successful bid for re-election, could initially count on enjoying a far greater presumption of innocence than Dean. If the known facts seemed balanced in the amount of support they gave to Dean and to Nixon, surely Congress and the American people would give the President the benefit of the remaining doubt in deciding whether he should be charged criminally or impeached. That presumption would grow with the increasing salience and importance in those months of Nixon's crucial responsibility for national security and relations with China, the Soviet Union, and Israel.

The President's strategy at this stage was quite simple: use his aides and allies to undermine Dean's story and bolster his own. Hide evidence of early actions he took to cover up who was responsible for the break-in at Watergate (the first cover-up). Hide evidence of who was responsible for that first cover-up (a second cover-up). Maintain Republican support in Congress while undermining public support for and trust in Cox's investigation. On the other hand, Nixon had to recognize that the politically powerful have a special vulnerability to charges of cover-ups in a democracy. Where the overriding value is maintaining the rule of law, there are especially high costs to powerful people deceiving the Congress and the public about their commitment to legality. Prosecutors have a special role in this; they bring a distinct character and culture to this task that politicians fear.

b. COX'S EARLY STRATEGY

Like Nixon's, at the pre-Butterfield stage, Cox's strategy was straightforward: use the vast powers of a federal prosecutor to isolate, and apply pressure to, those who might know who was responsible either for the break-in or for the initial cover-up. Whether this strategy would implicate the President and his top aides sufficiently to charge them was far from clear. Cox had to fight against the sense among the public that the investigation had gone far enough and, to do so effectively, he had to play the prosecution very straight, thereby maintaining public support for the WSPF. What's more, he had to show progress.

The witness accounts—some true, some false—might well remain balanced overall in the eyes of the public. Or the public, influenced by the need for Nixon's skill in foreign policy in dangerous times, might place a greater and greater burden of proof on Cox and members of Congress. Or sizable popular constituencies might decide the President was being hounded excessively. General Alexander Haig, like Donald Trump thirty-five years later, predicted that the American people would become too bored with the seemingly everlasting story to continue to care at all. All that might be needed—then and perhaps now—was to sufficiently slow down the investigation to exhaust interest and tolerance.

It was paramount that the public not lose confidence in the WSPF, a real risk if it failed to produce important evidence. Likewise, public opinion might turn to distrust if the WSPF appeared biased against Nixon—a dilemma that Mueller faces as well. And the evidence of bias could even be created. On one occasion when Howard Hunt, a former CIA agent working with the “plumbers,” was being questioned, he told Jim Neal, the chief prosecutor of the break-in at Watergate, that Hunt would happily say whatever Neal wanted Hunt to say (true or false); so Neal should just tell Hunt what to say. Neal furiously rejected the offer. A less clear response, if it ever become publicly known, would surely have massively undermined confidence in the prosecution.

c. AFTER THE BUTTERFIELD REVELATION

Trump's tweets notwithstanding, there is no evidence of “tapes” of President Trump engaging in any conversations relevant to the currently unfolding series of presidential scandals, although there may be tapes of discussions among co-conspirators. But there were presidential tapes back then. When Butterfield revealed that the White House tapes contained irrefutable evidence as to whether Nixon's or Dean's story of who created the cover-up was true, the strategies had to change. And so they did.

Cox now had to focus sharply on obtaining those tapes. Whether they supported or refuted prosecution, the tapes would reveal who was responsible for the cover-up. At this point Cox already suspected that Dean was telling the truth; but, whoever was being honest, it was the responsibility of an honorable prosecutor to seek to obtain the evidence of the true facts, wherever this might lead. The Senate Select Committee would also subpoena the tapes instead of continuing to call, under oath, witnesses telling inconsistent stories in order to determine who was lying. Like Cox, the Senate Committee could only guess what the tapes would actually show.

For Nixon, the situation was vastly more complicated. He alone knew that the contents of the tapes would show that he was responsible for the attempted cover-up. Although much in the emergent record involves Nixon assuring even his closest aides that he had never attempted to mount a cover-up, he might have known, and could easily learn if he forgot, that these tapes would show that Dean was telling the truth, that Nixon was deeply involved in a cover-up. They would also implicate his closest aides.

Why, then, did Nixon not destroy the tapes when Butterfield first revealed their existence and before they were being subpoenaed—i.e. before the critical point at which destruction of evidence would become the crime of obstruction of justice? A number of his top aides told him to do just that. He deliberated and then decided not to. Destruction would surely have been taken as clear evidence of his guilt. He also wanted the tapes for the proud parts of his history in office. And he thought there was a good chance that an assertion of executive or national security privilege in the Supreme Court would reverse the lower courts' orders to produce the tapes.

The President had one more reason that he didn't destroy the tapes. Butterfields's revelation actually presented opportunities for Nixon. The best Nixon could get from the pre-Butterfield situation was a collection of inconsistent testimonies, enough perhaps to block formal charges against him or his top aides, but not enough to convince the many doubters that he hadn't engaged in an illegal cover-up. A Supreme Court decision that an overriding national interest in secrecy—expressed legally as an executive or national security privilege—protected him from having to reveal what had happened in the White House would be much better. He could describe withholding the tapes as a matter of a President's "responsibility" to say nothing in order to protect our national security and to maintain badly needed Presidential powers to consult close aides. Thus, declining to reveal their content would quite possibly seem simple patriotism in those years of Middle-East wars, changed relations with Russia, and opening to China.

Stated more broadly, the President's argument in the courts would be that no single-focused interest in the Watergate break-in and its aftermath—or of practically any single crime—was as important as protecting the conditions of privacy that all presidents require in order to exercise the many grave responsibilities of their office. Without protection of the secrecy of his conversations by executive and national security privileges, the tail of a minor case of burglary would be wagging the dog of ensuring the nation had a functioning chief executive.

Moreover, a distinguished law professor, Charles Wright of Texas, had recently joined the President's Watergate defense. He told the President he expected Nixon to win in the Supreme Court. The benefits of winning a case "protecting Presidential powers" important to everyone were far greater than the benefits of destroying the tapes. He might lose the case, but the cost of destroying the tapes or ignoring Supreme Court orders to deliver them to Cox, so as not to take those risks, would be certain and very great indeed.

IV. THE BETTER OPTION MADE POSSIBLE BY THE BUTTERFIELD REVELATION

From Nixon's perspective, the best option of all would be to convince the public—or at least the Republicans in Congress—that he would be acting in the national interest by withholding the tapes without even having to risk an adverse decision by the Supreme Court. Law professor Alexander Bickel of Yale had written an article describing a key element in a new plan to accomplish this happy outcome without risk. Since Cox “worked for” the executive branch, he worked for the chief executive, President Nixon, who could order Cox not to pursue the tapes in court and fire Cox if he disobeyed. The only great disadvantage of this path was that this high-stakes contest also directly challenged and limited the powers of the judiciary. Not everyone agreed that only the executive branch had claims on Cox's loyalty.

As October 1973 and the Saturday Night Massacre approached, the Cox team had requested judicial enforcement of a carefully limited subpoena seeking the White House tapes of a few critical conversations regarding a cover-up—conversations about which Nixon and Dean's accounts sharply disagreed. Cox's reason for seeking this evidence was to carry out his duty to pursue the grand jury and prosecutorial investigations. He was thus pitting quasi-judicial powers against claims of the needs of the chief executive.

The Senate Select Committee was at much the same time trying to subpoena a broad and less carefully defined set of recorded conversations for generalized use at its hearings. This pitted the more amorphous needs of the Congress against the claims of the executive. Judge Sirica enforced Cox's subpoena and rejected the Senate's request on grounds of executive and national security privileges.

Nixon's public and court argument in both cases was that a President's multitude of responsibilities for national security and domestic policies cannot be carried out without the secrecy that the evidentiary privileges provide. Cox's response was that the importance of the criminal investigation he had been charged with carrying out (and of the tradition that no one, not even the President, is above the law) warranted a very limited exposure of a very few taped conversations, carefully chosen for their great relevance. He viewed those few tapes as crucial to resolving a flat and critically important conflict among those who were testifying, and thus determining the responsibility of the President. He argued that the need for privacy in carrying out the broader responsibilities of the President would not be seriously endangered if Cox or a court was given the tapes in these very special circumstances. On the other hand, the applicability of the rule of law to the executive branch would be severely threatened by a broad Presidential power to withhold evidence.

An open-minded citizen or member of Congress could come out either way in this conflict of Constitutional and political claims. But Nixon could not plausibly claim to be the only one to decide which tapes should be secret; he was obviously too personally involved to be judge of the need for secrecy. Nixon's team, however, could and did argue strongly on behalf of the necessity of

respecting presidential privacy in exercising the broad principles of separation of powers and responsibilities.

A reversal on appeal of that part of Sirica's judgment that gave some tapes to Cox, if based on Constitutional principles, would leave Nixon free to refuse to turn over the tapes and to continue to conceal their content without having his strategy taken as a further confirmation of his guilt, his willingness to cover-up, and his sense of freedom from the normal rules of law. Rather, such a result in an appellate court would leave a relative stalemate between the factual support for Nixon's claims and the competing support for Cox's claims. Such a stalemate would probably prevent Nixon from either being formally charged with a crime or being impeached.

The President's new chief attorney, Charles Wright, had told Nixon the Supreme Court would be likely to support the President and provide much of the needed justification for withholding the tapes. Even if Nixon were to lose in the Supreme Court, he had Alexander Bickel's advice as a fallback position: Bickel had authored a widely read article arguing that a President doesn't have to go to court to preserve his position when he disagrees with a government attorney. The President always has a second option: simply order the subordinate (one of the President's attorneys) to withdraw from any position in litigation adverse to the President's position. If the attorney refuses, the President may fire him and thus remove him from the litigation.

V. A FINAL INGENIOUS SHOT BY THE NIXON TEAM

a. THE PLAN

From Cambridge, I could see how each move by Nixon's team had begun to fit into a new and quite ingenious strategy. That strategy went like this.

First, assert and defend a broad Constitutional claim: no one besides the President should be allowed to have, without the President's consent, either the contents of private communications with his aides, or any contents of conversations that include national security secrets. Such communications might have a variety of parts and contents, but revealing the contents *even to a judge* would compromise the privacy or secrecy necessary for the nation's Chief Executive to function in the national interest. As to the possibility of providing only those parts of any conversation that could be safely disclosed, the President or his designee—and no one else—could properly decide what was safe or dangerous. Only then should the uncensored parts be made available to the courts or Congress or the Special Prosecutor.

Of course, Nixon recognized that he would not be trusted to eliminate from the record only privileged matter and not, for example, unprivileged evidence of a crime. Therefore, as a second part of the strategy, he would also prepare to make the entire recording of a conversation, as well as a censored transcript prepared in the White House, available to a highly-respected Senator, John Stennis of Mississippi, to verify that the transcript prepared by the White House corresponded to the tape. Despite severe hearing limitations and a long and close friendship with the President, Stennis would be asked to certify that the transcript

prepared by the White House did not omit any relevant and unprivileged part of the tape he would listen to. (Note: This strategy relies on a President having highly credible and revered allies in Congress—a resource of which Donald Trump is in relatively short supply.)

Third, once so certified, the censored transcript and only that would be made available to the Senate Select Committee, the courts, and Special Prosecutor Cox. This was the proposed compromise that Nixon said would respect as much as possible of both the President's privacy and of the Special Prosecutor's and the Senate's pursuit of the truth about who, if anyone, was involved in a criminal cover-up of dangerous abuses of power by the U.S. government.

Nixon's argument was broadly that as President he had to look for a solution that protected the needs and powers of the Presidency and our national security as well as getting out the truth about an alleged crime of cover-up. Cox's broad argument for the rule of law was, Nixon argued, only one part of a much broader set of competing executive needs. Since the rights of the Senate and the Watergate Prosecutor to the tapes without any conditions or censorship were then being litigated, these two parties would both have to agree with any compromise in order to put it into effect.

The Stennis plan would need political support, so Nixon's people explained the proposal first to Senators Baker and Ervin, the Republican and Democratic leaders of the Senate Committee. They agreed to Nixon's proposal. Then he took the proposal, now endorsed by the Senators, to the Attorney General. If he, too, agreed to the compromise, Cox would have little support. Nixon supposed that in then rejecting the Stennis plan, Cox would appear to be arrogant and unreasonable—and ripe for firing.

All this took place on a Friday night. Saturday morning the whole WSPF assembled. Cox was going to explain himself to a press conference in the early afternoon. I went in and asked if I could help him in any way for the conference. "No, I think I can handle it, Phil" he politely and humorously explained. I left him alone, writing at his desk.

b. COX'S PRESS CONFERENCE

The news conference that Archie Cox gave the afternoon of the Saturday night massacre was critical in changing public opinion. Immediately afterwards some 50,000 telegrams were sent in to members of Congress and a score or more of representatives called for prompt impeachment of the President. What was it about that press conference that had such a powerful effect?

Archie appeared with his wife, Phyllis, as two long-time spouses standing bravely together in the face of the power of an angry President. Cox began by talking about his personal reaction to being in that position. His very manner "said" he wasn't afraid of the President. He dreaded only being prevented from continuing to discharge his responsibilities. He invited the audience to consider his personal reactions, saying he didn't feel "defiant," as a recent newspaper headline had described him. He said that he hated a fight, but protecting the law he cared greatly about was forcing him to say "no" to a presidential demand. He worried that he might be getting "too big for his britches," that what he saw as

principle could be vanity. He then added that he was brought up by his father to feel great respect for the President, but this situation involved defending basic principles established by the Senate and the Attorney General with the President's consent.

It was clear to Cox that each of these people and institutions had committed themselves to supporting a fair investigation of the facts surrounding the break-in and the cover-up; therefore that investigation must take place. It wouldn't be right to continue with only a pretense that there would still be a careful investigation as agreed to at the time of Richardson's confirmation. If there was to be merely a pretense of compliance with the mandate, the nation should be told.

He explained that he had come to talk about the importance of the rule of law to the citizens of the United States and the impossibility of reconciling what was demanded of him by the President with respect for the rule of law. He would have to choose whether he would obey the President or the law, and that choice was an easy, if painful, one for Cox. He said he recognized that he could and presumably would be fired, if not by Richardson or Ruckelshaus, by others with whom the President would replace them. The same had happened when Andrew Jackson was President. Cox said he might not have been the best man for the job he had taken on, but it had been given to him, and the responsibility was his. He spoke with confidence, without apparent emotion, and radiating love of his country and respect for its commitment to law.

Cox went on to say that it was now clear that the principles agreed to were no longer to be followed. The President had said that Senator Stennis and no one else would review the transcripts that Nixon would produce, in order to be sure that, except for privileged material, each fully covered what was on the tapes. That amounted to bald contempt of the courts that had demanded the tapes as part of the judicial process; and it was Cox's duty as an officer of the court to bring that to the court's attention.

Cox argued that the President's intention to revoke the agreement to support a thorough investigation was also made clear in a number of other ways. Nixon had prohibited Cox from seeking any other tapes or records by court process. Cox said that up until now, he hadn't been able to get information, much of which had been moved to Presidential files from the files of the President's staff; he couldn't even get accountings of what documents had been treated in that way. That too would carry forward with the new prohibition.

Finally, Archie recounted the past week of "negotiations" that the court of appeals had requested before making final its decision to enforce the subpoena. The court of appeals hoped there could be some sort of compromise on the availability of the privileges—executive and national security. Cox said that he had made an offer of frank discussions with the attorney general—discussions that unfortunately ended with the White House insisting on a plan like the Stennis plan. Cox nevertheless provided written comments on the White House plan, noting that no one man should be deciding the truth in this instance. Indeed that would be almost impossible, because even the standards to be applied under the

privileges haven't been stated at all precisely. Cox thus rejected the plan set forth by the White House, even though he very much feared that crucial parts of the Constitutional system to which he was deeply committed might not survive if Nixon, as head of the executive branch, simply rejected the legitimacy and enforceability of a Supreme Court decision ordering him to deliver the tapes.

Professor Wright had called Cox from the White House earlier that week saying that the President's team had four basic requirements for any agreement. He acknowledged that he already knew that Cox wouldn't accept these, and thus they were almost certainly a prelude to a confrontation. Wright gave a summary of what the White House demanded on a take-it-or-leave-it basis. Cox replied in writing, but got no answer to his reply until hours later as the bargaining deadline approached. That the President was trying to revoke the written agreement with Cox, the Department of Justice, and the Senate was, Cox said, unmistakably clear. That agreement had guaranteed no interference with any of the familiar steps of investigation that Cox might undertake, and indeed it had left to him the very scope of the investigation and what crimes would be investigated. The agreement was restated repeatedly at the judiciary hearings and accepted by Cox, Richardson, and Ruckelshaus—Cox could not be removed, they had agreed, except for gross improprieties.²

Cox went on to explain why he didn't just desist from exercising the powers that he was given and that were guaranteed, such as the power to subpoena tapes and documents. There were four great obstacles preventing him from operating under Nixon's terms rather than under the terms of confirmation of the Attorney General and the Deputy Attorney General, and the appointment of Cox as Watergate Special Prosecutor. But the four reasons were overwhelming. Becoming the clear and careful law professor that he was, Cox listed the four insuperable objections: a prosecutor cannot compromise with a person accused of seeking to cover up a crime. In that situation, you must adhere to established institutions and powers. Second, even if he agreed to the compromise it would prove unenforceable, no one would know what standards were to be applied. For example, how would anyone know whether there would be a real danger of harm to national security, if a tape relevant to one of the crimes was released to the prosecutor rather than being withheld on that basis?

Third, it was most unlikely that a summary of the tapes would be admissible in evidence to prove a case against the President or his aides. President Nixon had made clear that the tapes would not be made available, but the summary, certified by Senator Stennis, would probably not be usable at trial. The same problem would confront the defense attorneys, who would demand the originals and urge that the cases against their clients be dropped if the evidence was not available in an admissible form. Fourth and finally, it was clear that Cox was to be ordered not to subpoena any additional tapes or records, and not to pursue in

² A few weeks later, a distinguished federal judge, Gerhardt Gessell, ruled that Cox had not been effectively or properly fired because his firing did not comply with the charter that was agreed to. Indeed there was not even a pretense of complying with the terms of the charter creating the Watergate special prosecutor.

other ways the normal course of investigation. There could be no mistaking the fact that this would tamper improperly with the results.

I was at the hearing and found Archie's manner—conveying honesty, determination, and, above all, dedication to the rule of law—overwhelming even before Helen Gallagher, one of the senior reporters at the press conference, yelled goodbye to him, saying, "Mr. Cox, you are a great American." Something about his modest, self-questioning sense of being guided by responsibility, and empowered by an absence of fear, were as important as the arguments. Archie Cox represented a part of all of us that had been lost or compromised; we had missed that part until Cox brought it back.

Afterwards, Archie talked to the staff, telling them not to resign, but to stay on as best they could to carry out the pursuit of the facts bearing on responsibility for the cover-up and the break-in.

Nixon had welcomed the choice of Cox as special prosecutor, saying that he wasn't very bright (the appraisal was very wrong); Haig had welcomed the appointment of Cox, saying that he would mess up the cases so badly that they could never be tried (an appraisal wildly wrong) and Ziegler had said that they were lucky to have Cox because he was a lightweight (as wrong as either of the first two). The Nixon White House could not even measure cleverness, let alone the effects on citizens of an honest display of honor, responsibility, and wisdom. Nixon missed seeing Cox's capacity to enlist the deep commitment of the American people to its best instincts.

VI. THE AFTERMATH

How clever were the President and his men? They had put together a strategy that might well have worked, if Richardson or Ruckelshaus had agreed to fire Cox. But how likely was this when each had sworn publicly not to take that step except to respond to some form of egregious wrongdoing, and there was none? A regular mistake of Presidents is to think that they control events in a democracy, even when a widely trusted subordinate is prepared to openly challenge a generally distrusted President for acting unlawfully. Jim Doyle, Cox's press assistant, wrote that Richardson would not fire Cox, because after that Richardson would never feel welcome walking across the Cambridge Common. It was more than that. People like Cox and Richardson live for and by their honor. Even had he never intended to return to Cambridge, Richardson would not have agreed to take the step he had expressly agreed never to take. The same is true of Ruckelshaus.

Nixon had hinted to Richardson that he might have a place on the next Republican Presidential ticket if he fired Cox. He later assured Solicitor General Robert Bork, who agreed to fire Cox, of a Supreme Court nomination. If Richardson and Ruckelshaus still refused to fire Cox, what would each do, faced with an order they felt honor bound not to obey? If not fired, each would resign in an act of high political symbolism that would signify to everyone that what Nixon was proposing was a flagrant violation of his word and of the law. What in fact happened was that a political environment favorable to Nixon in September 1973 became riddled with rapidly increasing demands for

impeachment within days after the Saturday Night Massacre. A week later an NBC poll showed that for the first time more citizens favored impeachment than opposed it.

And what about the large and skilled group of prosecutors Cox had assembled and who were well along in their investigations? These prosecutors would proceed to bring the very cases Cox would have brought unless a new chief prosecutor stopped them at great cost to his reputation. He would be quite unlikely to do that.

Bork planned to replace the WSPF prosecutors with attorneys from the Department of Justice. But the public would have no confidence in a set of appointments and a structure that ultimately left determination of the facts in the hands of the president's supporters, who had tried so hard to hide them. And eliminating the special prosecution force and putting the leadership of any further investigations and prosecution into the hands of those Nixon trusted in the Department of Justice would not work; they and the investigators from the FBI would still likely let the world know what they were discovering.

After the Saturday Night Massacre Bork issued orders that no member of the Watergate staff should be allowed to remove any official documents from his office. But this plan to control access to the documents was already too late; the prosecutors would have already removed the most important evidence.

As to the looming legal issues, if Nixon were forced to appoint a replacement as special prosecutor, Cox's successor would almost certainly go to the Supreme Court. If Nixon's claims of privilege failed, the Court would issue a decision that, when executed, would clarify for everyone what Nixon already knew: that the tapes showed unmistakably that Nixon was responsible for the cover-up. The only "good thing" that could happen for Nixon would be if the Supreme Court ruled that he did not have to deliver the tapes.

On July 24, 1974, the Supreme Court rejected Nixon's offer to furnish edited transcripts to the House Judiciary Committee, and ordered the full tapes to be made available. At that point the President faced his final choice: comply and face impeachment for leading the cover-up; or refuse to comply and face impeachment for rejecting in peacetime the obligation of a President to obey the law as interpreted by the Supreme Court; or resign his office.

Three days later the House Judiciary Committee approved three articles of impeachment, the first being for obstruction of justice. Nixon resigned on August 8th as his Congressional support melted away.

VII. HOW PARALLEL IS WATERGATE TO MUELLER'S INVESTIGATION?

We should be careful not to over-analogize between Watergate and the current Presidential scandals—there is much that is different about them. But much is also similar and may be revealing about the future.

The biggest differences between the situation Cox faced in Watergate and the situation facing Mueller have little to do with strategies or personalities. Nixon, Republican, confronted a Democratic House of Representatives that quickly turned to impeachment when he seemed determined to abort Cox's

investigation. Trump faces a more friendly Republican-controlled House of Representatives and Judiciary Committee. No one quite knows how they would react to his firing Mueller.

Nixon's strategy directly threatened John Dean whose cooperation was critical to Cox; Trump may have no such all-knowing nemesis. And the contested truth about the Watergate events was on the tapes that Butterfield revealed. The truth about Trump's alliances with Russians may not have been recorded.

Still it's worth comparing the similarities and differences beyond these importantly different contexts. The comparison can be done in pairs: How similar are Cox and Mueller in all other ways; how similar is Trump to Nixon?

A. COX AND MUELLER

Mueller and Cox each came to the responsibility for investigating the President with the strongest reputation for integrity, growing out of their past roles: Cox, who had accomplished so much as Solicitor General, and Mueller as long the highly respected director of the FBI who had, among other things, refused to allow the FBI to take part in the waterboarding or other mistreatment of jihadists. Cox and Mueller each also saw the immense importance of maintaining trust in the honesty and nonpartisanship of their efforts. In each case the person being investigated had, in contrast, an extremely weak reputation for integrity. The *New York Times* and others had listed and counted scores of lies and instances of reckless indifference to the truth that characterized President Trump's short governmental career. President Nixon was known as "Tricky Dick" long before Watergate.

Mueller and Cox each excelled in most of the competences that finding the truth would require. Mueller was widely regarded as a top notch prosecutor; Cox, as a major figure in the development of Constitutional law in the 1960's. Each was wise enough to see that they must build staffs to compensate for what they personally lacked. Mueller may have needed appellate skills and familiarity with Constitutional law. Cox needed a staff that could compensate for his almost complete lack of prosecutorial experience. Each carefully built the staff he needed and in sufficient size to be effective.

It helped that the first strategy of each was the most traditional one for federal prosecutors: interviewing witnesses and offering to allow very frightened amateur criminals to escape prison only in exchange for furnishing information. Cox and Mueller each were investigating Presidents whose enemies could undo them. Nixon had made powerful enemies over decades. Trump made enemies as fast as he could among the supporters he would later need. Each had alienated many in the press, the courts, and the FBI, guaranteeing a vigorous investigation.

The final question for Mueller and Cox was the same: What did the President know, when, and what did he do about it including his role in any cover-up?

a. TRUMP AND NIXON

The contrast in characters, skills and personalities are far sharper between Trump and Nixon than between Mueller and Cox. Trump appears indifferent to his reputation for honesty or generosity. He was considered a congenital liar from

the start and never sought to bolster his credibility. He showed no respect for the other institutions of government such as the judiciary and the Congress. Trump attacked his nearest subordinates, including the Attorney General on whom he would have to rely. He relied primarily on the anger and resentment of his base for sustained support.

Nixon, by contrast, showed loyalty to those he relied on. He seems not to have even known of the Watergate break-in when it occurred. He very promptly stepped into a crucial role in the cover-up in order to protect his subordinates, as well as his own popularity. He had a surprising level of trust in, and respect for, the institutions which Trump consistently attacked. Nixon wouldn't destroy the tapes of his conversations, although members of his staff urged that he do so, and the tapes would later destroy his reputation and career. Nixon was responsive to judicial institutions and duly delivered the tapes on the command of the Supreme Court.

Nixon accepted his obligation to the solemn agreements with the Senate that required that only the Attorney General could fire the Special Prosecutor, Archibald Cox. Nixon, indeed, had sought out a leader for the Department of Justice, Richardson, who was widely respected as an entirely honorable man. The same was true of his choice of Ruckelshaus for Deputy Attorney General. It was not for any wisdom or any commitment to responsible leadership that Trump picked his cabinet members. His Deputy Attorney General, Rod Rosenstein, is highly unlikely to take action against Bob Mueller unless there is a serious display of improprieties—but that was not Trump's choice but rather his mistake.

It is hard to imagine Trump taking any of the steps Nixon took to ally himself with American traditions and institutions. Nixon loyally accepted the authority of the courts in litigating before them and in obeying when he lost. Nixon tried to win over Senators Ervin and Baker, and Elliott Richardson and Bill Ruckelshaus by showing them the amount of public support he could maintain with the other institutions of government including the Senate, the House, the courts and the press.

To win in a game with these stakes Nixon had to be politically subtle not heavy-handed. Nixon was at a great disadvantage once Butterfield had released knowledge of the tapes but still Nixon managed to use subtlety and intricate planning to come very close to successfully firing Cox. Only the unwillingness, in the final analysis, of Richardson and Ruckelshaus to go along with the spurious compromise blocked Nixon's plan, and that brave veto by those he had carefully chosen was exercised at a difficult time to do so—when the United States was almost at war in the Middle East and a plausible case could also be made that a compromise between privacy and investigation would be needed by future Presidents.

Free of all these moral restraints that Nixon more or less honored, where does this leave President Trump? Mueller will investigate, one after another, the individuals whose names are leaking out as part of the Russian connection. He will offer them deals in exchange for their answers to the questions about what

conduct Trump and his aides encouraged at a time when they knew they were turning to a hostile foreign power for support in the U.S. election.

That strategy is likely to work. As it does, we will not be able to rely for the truth on the level of belief in our institutions that Nixon felt. Trump has announced that he will consider firing the Special Prosecutor or substitute, for the justice officials to whom Mueller now reports, new ones more willing to fire Mueller. Trump has also made clear that he will consider pardons for those whom threats of prosecution could bring to provide evidence known only by a few insiders. But pardons leave each such member of the Trump inner circle without a Fifth Amendment privilege to protect him from being required to testify before a grand jury on pain of prosecution for either contempt of court or perjury. That is hardly a secure position. And it will certainly not be one that gathers trust as Nixon's final plan was intended to do.

Unless President Trump is innocent of conspiring with the Russians or covering up a conspiracy by others with the Russians, he will lose immense amounts of trust as the investigation goes on. He may not care, but much of the public will.