1974

Comment

Geoffrey C. Hazard, Jr.
UC Hastings College of the Law, hazardg@uchastings.edu

Comment

By Geoffrey C. Hazard, Jr.

The "deplorable state of legal ethics" in Washington is a matter that rightly should concern all who are interested in our profession. Many critics of the profession would like to believe, and would have us believe, that the professional misbehavior of the lawyers involved in the Watergate transactions is merely representative of misbehavior that is characteristic of our profession. On the other hand, the apologists for the profession suggest that the wrongdoers are, in the familiar cliche, "just a few bad apples" and that the rest of our profession is exempt from any proper suspicion that it is engaged in similar misbehavior. So long as the discussion proceeds in terms of generalities of this sweep, I am afraid we will not get very far. It becomes necessary, therefore, to take a somewhat longer look at the situation that gave rise to the events associated with "Watergate." In doing so, it may be useful to think of the immediate context of the wiretapping, the breaking in, and the cover up, and then to look at the larger context in which these activities occurred.

Directing attention first to the Watergate events themselves, it is important to note that the number of lawyers who were involved was very small and that all of them were working in one way or another for only two high officials, the President and Mr. Mitchell. Putting the point differently, if we eliminated all the people who were reporting to someone besides these two individuals, there are very few people left who had anything to do with the scandal. This in turn suggests that the immediate "Watergate" problem evidences no general deterioration in the ethics of the bar in Washington, let alone anywhere else, but simply the influences and expectations that were at work in the campaign being conducted by the Committee to Re-Elect the President. This fact in turn suggests either that the problem is attributable to a breakdown in leadership and administrative discipline, which is the assertion made by and on behalf of the President and Mr. Mitchell, or that the leadership itself indulged and encouraged the kind of behavior that occurred. Either interpretation is possible and both are consistent with a more general point about ethical behavior that may be worth calling to mind.

Ethical behavior is, generally speaking, a function of structure and milieu. That is, people by and large will behave honorably and conscientiously in proportion as they are expected to do by others present in the situation in which they are called upon to act. This is especially true if appropriate regard is given to the real expectations

GEOFFREY C. HAZARD, JR. Professor, Yale Law School. B.A. Swarthmore College; L.L.B. Columbia Law School; Professor of Law, University of California, University of Chicago; associate, Hart, Spencer, McCullock, Rockwood & Davies, Portland, Oregon; executive director, American Bar Foundation; co-author, "Pleading and Procedure" and "Research in Civil Procedure."

in the situation, and not those that are merely professed for public relations or other external purposes. Hence, the pertinent question is whether the system of expectations in the Committee to Re-Elect the President was conducive to fidelity to law, candor, truthfulness, and other virtues that make up ethical behavior. The answer provided by events seems clearly to be that the system of expectations was not conducive to this kind of behavior. Quite the contrary, it seems clear that the moral frame of reference out of which the Watergate events arose was myopic and strongly self-justifying. On that assumption the consequences that flow from the situation seem quite unsurprising. Moreover, it is not too harsh to attribute responsibility for them to the highest officials involved; that is what leadership entails.

If this analysis is correct, then it is also likely that change in the milieu will change expectations and that change in expectations will change behavior. Quite clearly a change in milieu has come about since the Watergate hearings. We may confidently suppose, therefore, that Watergate will not repeat itself in anything like its original form, and thus also have some confidence in the conclusion that the situation was an isolated instance rather than a symptom of a more general condition.

Yet if one reflects further on the matter, it seems evident that much of the ethical tone exhibited by the Watergate participants was itself a reaction to a still larger milieu that they perceived in Washington. We need not pause at this point to ask whether this perception was wholly accurate or whether it justified the reaction to it. That is, the conduct of the Watergate participants could have been quite exaggerated and wholly unjustified, but nevertheless consistent with the system of expectations they perceived to be operative in the inner workings of government. Put very simply, they thought what they were doing was not much different from what had been going on in Washington for a long time.

"What had been going on in Washington" included wiretapping and surveillance, condoned through at least five previous administrations. On a more subtle but also more pervasive plane, it included patronage, special funds, and pork-barreling as common currency of political exchange. On a still more subtle but even more pervasive plane, "what had been going

on in Washington" was that the Government had become very importantly a set of procedures for dispensation of privilege. The devices through which dispensation is made are familar: tax exemption, tax incentive, special regulation, special exemption from regulation, subsidies, and various spending enterprises shaped for the special benefit of particular interests. The devices all had the sanction of technical legality, and were invariably justified by claims that in one way or another they served the public good. These contrivances were fashioned in legislation and administrative regulation, in a continuously evolving governmental process in which the turn of a phrase could mean millions and sometimes billions of dollars to particular interest groups.

The oil industry, with its extraordinary depletion allowances, of course, comes quickly to mind. But the highway, shipbuilding, and aerospace industries have all done just about as well as a result of their interest in public policy making. And there are of course many other illustrations. What we have now is a corps of people in Washington spending about one-quarter of the gross national product through the mechanism of turning phrases in government legislation and administrative regulations. And the people who actually turn those phrases are the lawyers—lawyers for the committees of Congress, lawyers for the Executive Office, lawyers for the agencies, lawyers for the lobbyists. As instruments of the system of dispensation, they fulfill its expectations on a wholesale basis in quite the same way as the lawyers involved in Watergate fulfilled the expectations held of them. In this perspective, the transformation of money and power through the Committee to Re-Elect the President is only symbolic of very much larger transformations accomplished through the media of taxing and spending laws that are enacted and amended and lobbied as the everyday business of contemporary Washington. And because so much money and so much power turns on the outcome of those procedures, the prospects of corruption in the larger setting, no less than in the small setting of Watergate itself, are surely manifest.

If the roots of the situation are as deep as this analysis suggests, then the problem of remedies must be conceived on a similarly large scale. The remedial forces in fact have existed all along. They have served as counters that on the whole have been, in my judgment, effective to maintain a fairly decent level of probity in the face of very severe temptation. One of the counterforces has been the idea of professional affiliation, expressed both in the organization of the legal profession and in the creed professed by its members as a code of ethics. That affiliation and those ethical affirmations have the very purpose of changing the lawyer's ethical milieu in the direction of disinterestedness and civic concern. Hence, we may rejoice that there was and is a subsisting legal profession with enough strength of will and moral fiber to pass preliminary judgment on the rightness of what was done and to take appropriate steps to remedy what was done wrong.

The effect of this professional influence would not have been much,

however, without the presence of two more weighty counterbalances. One of these was the power of Congress, exerted through the investigation conducted by the Erwin committee. The other, and perhaps most important of all, was the power of the press.

It seems not an exaggeration to say that the press emerges as the hero of the Watergate scandal—playing an instrumental part in exposing serious illegality on the part of high officials and thereby contributing to the integrity of government itself. It seems fair to say that without the influence of the press, the power of Congress might never have been mobilized. It seems certain that without the coercion of publicity generated by the press, the bar would have been very slow to express its concerns in the matter. If that is so it seems just, in passing, for those of us in the bar who are, quite rightly, concerned with infringement of fair trial by a free press, to recognize that in this instance at least it was a free press that has made possible a fair trial of issues of official probity that might otherwise have been suppressed.

Discussion

Q. This is addressed primarily to Professor Dam. You examine three possible ways to cure the cancer which may well be invading the lawyers and other people in Washington. They may be centrally located under only two people, but I suspect that may not be true. Those three ways, if I paraphrase you correctly, are criminal laws; ethical standards which might get lawyers removed from the Bar; and old-fashioned conscience. Do you have an opinion which one of these ways might be most effective?

MR. DAM: There is a role for all three. I have tried to suggest that the statutory path has a rather limited horizon for some of the reasons that were better stated by Professor Hazard than by me, such as the subtlety of some of the situations people find themselves in and the role of the milieu of the office in which one finds oneself. It does appear, as he points out, that there were clear-cut violations of some criminal statutes about which there should be relatively little ambiguity. If that is so, that would show that merely making something into a statutory command does not necessarily change behavior. I do think that there is a role for the improvement of the disciplinary standards of the Bar. I must say, though, that it would be a better way to proceed if those standards were more seriously, rigorously and uniformly enforced within the practicing Bar and preferably before one raised them for lawyers in government. We could easily get into a situation where a change in enforcement, really changing the underlying rule as perceived by the people, would come very close to being an *ex post facto* change. Not that the rules might not be there or that you could not point to some provision; but since those provisions are not being followed very systematically as to the private Bar, it does create for me a problem of conscience to impose them suddenly on government lawyers for something they did several years ago.

There is also another path, although one on which it is difficult to make