

## Opening Statement

# WATERGATE INSPIRES AFTER 40 YEARS

DON BIVENS

The author is a litigation partner with Snell & Wilmer LLP, Phoenix, and chair of the Section of Litigation.

The audience sat rapt as Bill Ruckelshaus—former Deputy Attorney General of the United States—shared lessons for lawyers from Watergate, now 40 years past. Ruckelshaus resigned his number two position at the Justice Department rather than carry out President Nixon’s order to fire special Watergate prosecutor Archibald Cox. Ruckelshaus’ first-hand description of events was riveting. He spoke at the Section’s recent Fall Leadership meeting, during a program I had the privilege of moderating. Ruckelshaus’ remarks should be required reading for every lawyer in America.

Ruckelshaus took us back to the “Saturday Night Massacre” of October 20, 1973. President Nixon had refused to comply with a court order to turn over White House tape recordings to the special prosecutor. Archibald Cox intended to enforce the court order. Nixon dug in. As Ruckelshaus noted, “Cox was getting too close” to evidence that would ultimately

topple Nixon’s presidency. Nixon directed Attorney General Elliot Richardson to dismiss Cox immediately as the special prosecutor. Richardson refused to comply, and he resigned as attorney general.

Nixon then ordered Ruckelshaus, as next in line at Justice, to dismiss Cox. Ruckelshaus likewise refused and resigned. Both lawyers recognized that they owed a higher duty to the rule of law than to the demands of their client the president. Ultimately, Solicitor General Robert Bork would be the one to fire Cox.

“When I was asked to discharge Cox,” said Ruckelshaus, “not only did I think there was no justification, I felt he should have been commended for the way he was conducting his responsibilities. When it came time to decide what to do, there was no way I could carry out the president’s wishes.”

Offering lessons to be drawn from the Watergate saga, Ruckelshaus spoke so effectively that I will quote him at length.

“I honestly think that lawyers should take a great deal of pride in the fact that the rule of law prevailed, that no man is above the law, including the president of the United States. We were able to assert the reality of that principle over a period of months, even several years, that resulted in a dramatic change in the leadership of the country. And the country survived.”

He continued, “I also think that unfortunately the result of what the president did, sort of collectively and over several instances and months, has contributed to today’s erosion of trust in government in general that is really a very difficult problem for this country.”

Ruckelshaus observed that today some people in America “don’t believe that government has much of a role in a lot of our lives where, absent the government’s involvement, an awful lot of bad things will happen.”

Ruckelshaus then brought the room to a hush with his insightful description of the legal system that holds America together. Sitting next to Ruckelshaus, I got chills up my spine, and I was hardly alone.

“I think what we have fundamentally lost sight of is the definition of freedom. Freedom is not the absence of restraint. That’s license.

Freedom is a system of restraints, a system of rules, laws, and norms that guide conduct in a free society, within which all of us are permitted to exercise our individual freedoms. And until we get back to a better understanding of that, part of which I think has been eroded by the events of Watergate, our country will continue to suffer.”

The room was soundless. Then erupted with applause.

Ruckelshaus struck a chord in all of us, reminding us perhaps of why we became lawyers in the first place. Reminding us that, as lawyers, we are stewards of a justice system that strives daily to balance individual responsibilities against individual freedoms for the larger benefit of

our free society under the rule of law. As litigators, we play a pivotal role in guiding our clients through that balancing process, sometimes in court, sometimes in settlement, sometimes in straight talk about what can and cannot be done.

Ruckelshaus reminds us too that, regardless of the circumstances, lawyers owe a higher duty to the rule of law than to the dictates of any client. Even if that

---

## As lawyers, we are stewards of a justice system that strives daily to balance individual responsibilities against individual freedoms.

---

client is president of the United States.

Back to 1973. One of the first prominent members of the public to speak out against the actions of President Nixon was the President of the American Bar Association, Chesterfield Smith. During a later interview, Smith recounted:

“When he [Nixon] couldn’t get anybody to fire Cox he eventually got Bob Bork to fire Cox. When he fired him he sent the FBI in. They went down and went into Archibald Cox’s office and started looking for all of the things to take over and take control of.

The FBI moving in on an independent prosecutor. The FBI moving in on the court system, and taking it over. And people all over America got scared.

I remember I thought this can’t be happening. We have a court system. This case is being litigated. If you lose a case in court, you have to do what the judge says, or you have to appeal him. And the

president has got to do what Judge Sirica said, or appeal him.”

Only 10 days after Nixon fired Cox, prominent Houston litigator Leon Jaworski became the special prosecutor and pressed the investigation forward. A fact you may not know? Leon Jaworski had just served as president of the American Bar Association.

Bill Ruckelshaus was not the only participant. Equally compelling was Richard Davis who, at age 27, was one of the youngest people on the special prosecutor’s staff under both Cox and Jaworski. Davis shared what happened inside the special prosecutor’s office during and after the Saturday Night Massacre, including placement of key documents in a safe deposit box to preserve the status of the investigation as of Cox’s firing.

A third participant in the program was Egil “Bud” Krough, who in 1973 was a young lawyer on the White House staff. Krough was placed in charge of the Special Investigations Unit, later to become notorious as “The Plumbers.” Within days of the Saturday Night Massacre, Krough pled guilty to invading the right of an American citizen to be free from unreasonable search and seizure. “The Plumbers” broke into the office of Daniel Elsberg’s psychiatrist, looking for information to use against Elsberg for his release of the Pentagon Papers.

Krough tendered his guilty plea to Leon Jaworski, and Krough insisted on being sentenced before providing any testimony to the special prosecutor. Leon Jaworski accepted the plea on those terms. Krough served time in prison for his crime and lost his license to practice law. Years later, his license was reinstated at the urging of, among others, Leon Jaworski.

I have good news. The Section made a high-quality video of this Watergate program; members can purchase it for \$5, non-members for \$60. The program qualifies for CLE Ethics credit in many states. To watch the video, go to <http://apps.americanbar.org/abastore> and enter

product code CELT13LLWVID. Many who attended this program live described it as the best program the Section has ever produced. If true, that would be saying something. One of the best reasons to belong to the Section of Litigation is your access to high-caliber CLE and programs specifically designed to litigators. Take advantage of your membership. After all, that is why you belong.

If you would like to share your own lesson or anecdote from Watergate, let me hear from you. My email is [dbivens@swlaw.com](mailto:dbivens@swlaw.com). ■

*Postscript:* My previous column in Litigation, “Five Traits of the Best Lawyers I Know,” invited readers to share their own views on traits of best lawyers. Many of you offered great suggestions. Let me share two here:

Judge Michael D. Hawkins of the Ninth Circuit Court of Appeals wrote: “I would add that the best lawyers are confident without being arrogant. They know the soft spots of their own case and anticipate the questions from the bench that focus on those spots.”

Sheldon Finkelstein, of New Jersey, wrote: “As another trait of best lawyers, their word is their bond. It’s true in law and true in business.”