APPENDIX III

On the Twenty-Fifth Anniversary of the Saturday Night Massacre by The Honorable Laurence H. Silberman[1]

I was recently asked to speak on my personal recollections of the latter Watergate period, and I thought to give that talk again today. Some of the matters I will describe have been reported on–at least in part. But I dare say I will provide some fresh information and certainly some added context. You should be warned, however, I have concluded, after reading innumerable memoirs, that the author invariably portrays him or herself in an overly favorable light.

It is 25 years last October that the so-called Saturday Night Massacre occurred. Elliot Richardson, the Attorney General, was obliged to resign; Bill Ruckelshaus, the Deputy Attorney General, was fired; and the then third-ranking Solicitor General, Bob Bork, as Acting Attorney General, discharged Archibald Cox, the Watergate Special Prosecutor. The events that weekend in terms of dramatic impact rank with the fall of the Soviet Empire, the start of the Gulf War, and the recent impeachment proceedings. Still, we all tend to think of such events in personal terms. When I was asked for my reaction at a dinner that Saturday night, I responded that we knew that President Richard Nixon disliked and distrusted Harvard graduates, but this seemed a bit extreme. In a few months, however, I would replace Bill Ruckelshaus, who was a class ahead of me.

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[1] Of the United States Court of Appeals for the District of Columbia Circuit. This speech was delivered to the Federalist Society, Los Angeles Lawyers Division, Los Angeles, California, June 24, 1999.

First, and much more important, of course, the President had to find an Attorney General. That was dicey. It was apparent to all that only a Republican Senator would do. This was before the John Tower nomination, and it was still common wisdom in Washington that Senators or ex-Senators were easily confirmable. Yet, the White House did not dare to choose a Senator, thought too conservative. The choice came down to Senator Marlow Cook of Kentucky, a former state judge, or Senator Bill Saxbe of Ohio, the former Ohio Attorney General. Both were regarded as middle-of-the-road Republicans–not of the conservative wing but by no means part of the now nearly extinct species of liberal Republicans.

I suspect Saxbe was chosen because he had a reputation for unvarnished candor. Earlier that year, when he was asked whether he believed Richard Nixon's claim to be ignorant of the Watergate break-in, he answered that he was reminded of the fellow who played the piano in a house of ill repute for 20 years yet claimed he did not know what went on upstairs. After Nixon persuaded him to take the post, and assured him personally that he was innocent, Senator Saxbe relented. When his nomination was announced, he told the press that he believed the President.

Shortly thereafter, I was approached by Senator Saxbe and the White House personnel chief to ask whether I would be willing to be the Deputy Attorney General. I was then a partner in the Washington firm Steptoe & Johnson and had been Solicitor and Undersecretary of Labor in the first Nixon Administration. I had a reputation for being a decent manager–for a lawyer–which, as most of you know, is not really saying a lot. But my key attraction was that, like Senator Saxbe, I was a loyal Republican, and not a particularly liberal one, who could be confirmed. That was because I had been fired from the Labor Department after the 1972

election. I had made a mortal enemy in one Charles Colson by resisting his efforts to influence affairs in the Labor Department (I thought improperly). Colson, you may recall, was infamous for his reputed remark that he would walk over his grandmother to serve the President. I suppose there are some who would wish me to draw comparisons, but, as President Nixon was want to say, it would be wrong.

I will not try your patience by reviewing those bureaucratic battles. The point is that as a by-product of the Watergate investigation, they were revealed by *The New York Times* (July 1, 1973), and I was for a brief halcyon moment in my career a *New York Times* White Hat. To be sure, that I had much to do with the development of the Nixon Administration's affirmative action initiatives did not hurt in certain political circles either. So I was confirmable, and as it turned out, confirmed. As a *quid pro quo*, however, both Bill Saxbe and I were obliged to promise the Senate that we would adhere to the regulatory charter, which guaranteed the independence of the Watergate Special Prosecutor, unless he engaged in extraordinary improprieties.

It is a fair question to ask why was I willing to go back into the Administration? I actually had rebuffed White House solicitations to return to other senior positions in the summer of 1973, but it seemed to me that the Justice Department was unique. Because of the Special Prosecutor's mandate and the Department's obligation to protect his independence, joining the Department was not the same thing to me as joining the Administration in any other position.

After April 1973, I did not believe Richard Nixon. When a senior White House official suggested that I, like Bill Saxbe, should meet with the President as I was nominated, I told him that I, unlike Bill Saxbe, knew the cast of characters from my service in the first Nixon

Administration, and I did not believe the President, nor would I say that I did. Not surprisingly, there was no meeting, and I rather doubt that Nixon was ever told why. I suppose that his staff's acquiescence indicates rather clearly just how politically weak was the President.

As I think back on those days, I am struck by how anomalous was our position. Bill Saxbe and I were, of course, presidential appointees, and, as such, morally and politically obliged to do our level best to carry out the President's policies. On the other hand, the Special Prosecutor was a part of the Justice Department, therefore, even without our commitment to the Senate to support his independence, we would have felt obliged to protect and support him and his activities. The tension between those two conflicting pulls on conscience sometimes seemed unbearable. Each day it seemed that some event would force us to consider afresh what was our appropriate course–and there were no precedents. I sometimes felt that I was walking blindfolded through a moral and political minefield.

I remember, for example, in the spring of 1974 when Don Santarelli, then the head of the Law Enforcement Assistance Administration, one of the major components of the Department, visited Philadelphia, and in a burst of candor told a Philadelphia paper that, in his view, President Nixon should resign. With a heavy heart–I had enormous regard for Don's talent and character–I told him that as a consequence he had to resign. He asked me whether I disagreed with him, and I could not say yes–but I told him no matter how removed the Department was from the President on Watergate related matters the President was entitled to our loyal service on all other issues. We could not very well offer that service if we were publicly calling for his resignation. Don left quietly.

On two occasions, the Attorney General and I were approached by the adversaries

in the Watergate affair for help that we thought obliged to decline. The recounting of those incidents, I think, illustrates the difficulties we faced in steering the right course.

As you may realize, the most important legal issue in the famous case, *Nixon v. United States*, was not the matter which gained all the attention. Indeed, it was virtually swept under the rug in the Supreme Court's decision. That question was the jurisdictional one–the tenuous claim to Article III standing that a special prosecutor in the Justice Department asserted in suing his constitutional superior. When the President raised the point in his brief to the Supreme Court, Leon Jaworski–obviously worried–wrote to the Attorney General claiming that the President was, by that tactic, violating the charter. Jaworski's argument was that for the President to challenge the court's jurisdiction to adjudicate the tape case was, in effect, to threaten to put Jaworski out of business.

Jaworski asked us to intervene. Given my well-known views on jurisdiction, it should not be surprising that I was quite unsympathetic to Jaworski. After all, it is normally thought that a party, and particularly the government, has an obligation to raise a legitimate question as to a federal court's jurisdiction. There was no doubt that the issue was legitimate. I actually believed then, and still do, that the court lacked jurisdiction. The notion that the Special Prosecutor's charter–an Attorney General's regulation–was sufficient to give the Special Prosecutor constitutional independence from the President seemed almost frivolous to me. In any event, we rebuffed Jaworski and stayed neutral, but as it turned out, his fears were groundless. The Supreme Court was not about to permit mere constitutional limits on judicial power to prevent it from playing the dominant role to which it had grown accustomed.

The second event, which occurred on Tuesday, April 30, 1974, was a good deal

more dramatic. Bill Saxbe was off hunting, and I was Acting Attorney General. That was not unusual. Bill loved to hunt. When asked by a reporter how he could spend so much time on holiday, he explained that his deputy worked ungodly hours, had a good mind for detail, and was meaner than a junkyard dog. About mid-morning, after first being primed by a call from Al Haig, the President's Chief of Staff, I received a follow-up call from Jim St. Clair, the President's Special Counsel on Watergate matters. St. Clair was a prominent trial lawyer from a Boston law firm and a part-time lecturer at Harvard Law School, who had come onto the White House staff to defend the President. He somberly informed me that Jaworski was guilty of an "extraordinary impropriety." That was the magic phrase under the charter that constituted grounds for Jaworski's removal. To say I was paying close attention would be an understatement. He went on to explain that Fred Buzhardt, the White House Counsel, had been called before the Watergate grand jury. That action was an extraordinary impropriety because it pierced, or was an effort to pierce, the attorney-client privilege. I asked St. Clair, what attorney-client privilege? I expressed doubt that any government lawyer could have a conversation with a government official that would be privileged as against a Justice Department inquiry. I remember using as an example a Secretary of a Department who takes a bribe and then discloses it to the General Counsel of the Department. (As a former General Counsel, I had had occasion to consider the nature of the problem, if not that specific hypothetical.) Would not the General Counsel, I asked, have an obligation to turn that information over to the Justice Department? I do not recall his response, but I do remember his observing that he too was on the government payroll. I told him that was his problem. Our conversation was interrupted when my secretary came rushing into my office just before noon, pale as the proverbial ghost, to tell me the President was on the line. I

told a shocked St. Clair that I would have to ring off because his "client" was calling.

I have to pause at this point to explain just how unusual an event this was. President Nixon almost never spoke to his cabinet members other than at *pro forma* cabinet meetings–let alone to a number two. I recall a dinner in 1972 with three domestic members of his cabinet and several undersecretaries when each cabinet member confessed that he had had *no* meetings or conversations with the President. They all thought they were out of favor. The President dealt almost exclusively with a small handful of White House senior staff. It was widely believed that he did so because he did not wish to be lobbied on his cabinet members' pet policies. I have come to believe, however, that Nixon was well aware of just how dark and unpleasant to others his unguarded conversations could seem. The nature of his speech was apparent when the transcripts of his taped conversations were released. I think it was to protect his own reputation that he met with so few.

The nature of my conversation with the President, as well as an outline of other events that day, was reported by *The Washington Post* over five years later on December 28, 1979. That happened because a memo that I asked one of my three Associate Deputy Attorney Generals to write was disclosed under the Freedom of Information Act. But more about that presently.

The President started the conversation by asking me how I was doing in picking judges. In those days, the Deputy Attorney General's role in that regard–at least for the Administration–was dominant. I assured him that insofar as we had discretion, I was looking only for those who believed in Frankfurterite judicial restraint. (I did not realize back then that choosing prominent Republican trial lawyers was no guarantee of such a jurisprudential

commitment.) He then turned the conversation to the Connally case. John Connally, formerly Treasury Secretary, was under investigation for allegedly accepting a $10,000 gratuity from the Association of Milk Producers in return for his efforts to boost federal milk price supports. This matter was being handled by the Watergate Special Prosecutor's office, although Leon Jaworski was recused, and his Deputy Hank Ruth was in charge.

The principal witness against Connally, who allegedly had delivered the gratuity, was one Jake Jacobsen, who was already under indictment in Texas for allegedly lying to a federal grand jury and allegedly misapplying bank funds. The President complained that it was his understanding that someone in the Justice Department was planning to drop federal felony charges against Jacobsen in Texas in return for permitting Jacobsen to plead guilty to a misdemeanor and to testify against Connally in the District of Columbia proceeding. I was taken aback but reminded the President that the Connally case was being prosecuted not by the Justice Department but by the Watergate Special Prosecutor force, which had been guaranteed freedom of independence. The President responded that the Texas charges against Jacobsen had been brought by the U.S. Attorney under the supervision of the Justice Department and that the Department was permitting or engaging in an abuse of the plea bargaining process. I confessed that I was not familiar with the details of Jacobsen's plea bargaining but would look into the matter. He instructed me to do so and to call him back within the hour.

I called for Henry Petersen, the Assistant Attorney General in charge of the criminal division, who atypically had been a career attorney prior to his appointment. Although the circumstances were undoubtedly extraordinary, I recall, somewhat ruefully, that my awareness of the gravity of the situation was mixed with bureaucratic annoyance; I was more

than a little miffed that Petersen had not reported to me on the matter. Henry apologized for that omission and explained to me that the matter had been worked out with Hank Ruth, the Deputy Special Prosecutor. He assured me that, contrary to the President's assertion, Jacobsen was pleading guilty to a felony in the District of Columbia that was at least as serious as the one for which he was under investigation in Texas. I asked Henry what we would do under normal circumstances–if the Justice Department were not bifurcated? He convinced me that the criminal division would ordinarily drop one of the pending indictments of a defendant who pled guilty to the second–so long as the second was punished as severely. This would be so even in the absence of the defendant's willingness to testify against a target as significant as the former Treasury Secretary.

After thinking for a few moments, I called the President back. Somehow I was not surprised when the President immediately answered. The conversation, however, was not a pleasant one. I explained to the President that the Department's position was neither improper nor unusual. The President grew quite agitated, repeatedly interrupting me, and argued that the plea bargain was nothing but a disreputable plot to get Connally. He said, "I want it straight. I don't want any dancing around." In response to my explanation that the Department was handling the matter "normally," the President bellowed, "I don't want to hear about normal procedures. I want orders." He curtly told me to call Haig back in one hour and he hung up on me. It was a rather stunning experience to have the President of the United States angrily hang up the phone on you–particularly when you are only a 38-year-old Deputy Attorney General. It was clear to me by his excited phrase, "I want orders," that he meant he was giving me orders to change the Department's position on the Jacobsen plea.

I told my staff that the President had issued orders with which I could not comply, and therefore I was obliged to resign. One of my deputies, in a display of gallows humor, started to take my pictures down from the wall. Before going any further, however, I was required to report to the Attorney General, who was on a pheasant shoot on Shelter Island. It was not easy to get hold of Bill Saxbe when he was hunting, but, he always had FBI escorts, so I succeeded. He was not at all pleased to be dragged to the phone and listened rather impatiently to my report. When I asked him what I should say if I were asked by the White House as to his position on the matter, he responded–and I will remember this if I live to be 100–"Tell the President to go piss up a rope." He also said he did not agree with me about resigning. He would be damned if he would resign; the President would have to fire him. He then abruptly returned to his hunting, admonishing me not to bother him again.

I then called General Haig, described my conversations with the President, and told Haig that I planned to resign that day. He seemed stunned and asked me to wait at least long enough for him to find out more about the matter. He muttered something about Connally probably being in the Oval Office.

In the meantime, Bob Bork rushed into my office, having been brought up to date by one of my deputies, and said, "Not this time." He was not going to be left holding the bag again. If I resigned, he would follow.

Late in the afternoon Al Haig called back and said forget the whole matter; the President's call was to be erased. I did not think I could do so. What, or more important, *who*, had prompted the President to call me could be of legal significance. I was certain Haig was not complicit; he had been focused on the Buzhardt matter. But it was distinctly possible that

Connally might have been involved and that could suggest an effort to obstruct justice. I was therefore bound to inform Henry Ruth. I provided him with the memorandum. A few weeks later he brought it back explaining to me that he did not think he could make out an obstruction case.

I did not, however, tell Ruth about the subject of the St. Clair call, which had been eclipsed by the President's more dramatic intervention and was not thereafter mentioned to me by anyone. The White House was certainly entitled to make a claim to us at any time that the Special Prosecutor was guilty of an extraordinary impropriety. Even if we thought the claim unfounded, it did not seem appropriate to me to pass on that information to the Special Prosecutor.

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The denouement of the Nixon Presidency came in August of that year, after the Supreme Court's decision. The President had no alternative but to turn over the tapes, which included the so-called smoking gun. I learned about that particular tape when a young lawyer in the White House called and told me about it a week before it became public. About the same time, I was told that the Secretary of Defense, Jim Schlesinger, had instructed the top military not to obey any order from the President that could cause a military confrontation without his approval. Aware of this impending constitutional crisis, I resumed cigarette smoking.

But the President went peacefully. Unfortunately for him, my last service to his Administration was to prevent him from taking his papers. I do not recall who called whom, but I told General Haig that I objected to his taking his Presidential papers before the Department had an opportunity to give a formal legal opinion as to whether President Nixon owned them. I asked

the new Assistant Attorney General for the Office of Legal Counsel, Nino Scalia, nominated by Nixon, but appointed by Ford, to look into the matter and prepare an opinion for the Attorney General. As you will recall, the Department concluded the papers were indeed Nixon's, but in the meantime, Congress legislated and, in effect, seized them.

In early 1975, six months or so into the Ford Administration, Bill Saxbe went off as Ambassador to India. I was left as Acting for a short while, long enough to help get Ed Levi confirmed, and then to help the Administration find a replacement for me. I was utterly drained and insistent on leaving for a number of personal reasons.

Shortly after Nixon resigned, so did Leon Jaworski. We appointed the decent and capable Henry Ruth to succeed him. After several months, Hank came to me asking why any special prosecutor was needed. He pointed out that, after all, the need for that office was based on the premise that the Justice Department could not appropriately investigate President Nixon and his White House assistants. Jerry Ford was now President–which meant the justification of the office had disappeared.

I immediately agreed with him and arranged for us both to meet with the newly appointed Attorney General Levi. Hank repeated to Ed Levi what he had said to me, and I added the further point that it could be thought an insult to President Ford, and to us, to continue the Special Prosecutor's office. Ed Levi pondered and then asked about the Watergate convictions that were on appeal. What would happen, he asked, if any convictions were overturned? I responded that the Department would try them--that is what we got paid for. (Not, I hasten to remind Senator Biden, with big bucks.) Ed Levi, however, worried about the possibility of criticism if the Department lost any cases, so the Special Prosecutor's office stayed, and Ruth too,

for a while.

That turned out to be a fateful decision because the office remained in place through the fall of 1976, the election year. Ruth, who left in 1975, was replaced by none other than the present White House counsel, Charles Ruff, who had been on his staff. In the spring of 1976, an obviously malicious claim was brought to the FBI–an allegation that illegal maritime union money had been put into one of President Ford's congressional campaigns. I say obviously malicious because the charge was brought by a maritime union which was furious at the President for having vetoed the cargo preference bill, and it was supported by two bureaucratic enemies of the President. Of course, this had nothing to do with the Watergate Special Prosecutor's charter, but the Attorney General turned it over to Mr. Ruff because he thought it awkward for the Department to investigate a matter implicating the President. When I subsequently learned about it, I did not disagree with Levi's premise, but I was rather surprised that he did not conclude that the charge was frivolous and therefore could have been summarily rejected.

In any event, the matter took a long time to dispose of–long enough so that the existence of the investigation leaked during the fall campaign. It had a powerful impact. President Ford had virtually caught up with Jimmy Carter when the story broke. All the country had to hear was that Ford, too, was under investigation by the Watergate Special Prosecutor, and Ford's support dropped precipitously. Well, Ford lost narrowly, but that paved the way for Ronald Reagan's victory. And he appointed me to the bench. So everything happens for the best.