

*Memorandum*

TO : Messrs. Jaworski, Ruth, Neal,  
Ben-Veniste

DATE: July 23, 1974

FROM : Philip A. Lacovara  
Counsel to the Special  
Prosecutor

SUBJECT: Motion to Recuse Judge Sirica in Watergate Case

As you know, defendants Mitchell and Parkinson have filed a petition for a writ of certiorari with the Supreme Court to review the June 7 decision of the Court of Appeals denying a writ of mandamus that had been sought by five of the original seven Watergate defendants to order Judge Sirica to recuse himself. We will be opposing this petition on the merits within the next week or so.

When the Court of Appeals, *en banc*, denied the petition, it did so without opinion in an order concurred in by five judges. Judge MacKinnon filed a brief dissenting opinion at that time. He stated he would file a longer written opinion at a later date and the majority also reserved the right to file an opinion at a later date. Today we received a copy of a 30 page dissenting opinion filed by Judge MacKinnon on July 9. As you know, I have always regarded recusal motions as raising extremely troublesome problems. Although I doubt very much that the Supreme Court will be inclined to take another Watergate case this soon, Judge MacKinnon's opinion is an excellent and effective analysis of the reasons why Judge Sirica should not have insisted upon remaining as trial judge.

We are treating the decision of the Court of Appeals as a decision on the merits upholding Judge Sirica. Nevertheless, even if the Supreme Court denies certiorari, the silence of the majority on the ground for its decision makes it highly unlikely that the "law of the case" principle will preclude the defendants from reopening this question on appeal from any convictions in this case. Thus, even a denial of certiorari will not get us "out of the woods" but since the decision was made at the outset to support Judge Sirica, I see no way to turn back now.

A copy of Judge MacKinnon's lengthy dissent is attached for your information.

Attachment

cc: Mr. Glazer