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**Judge Damon Keith: The Judicial Antidote to Judge Julius Hoffman - Challenging Claims of Unilateral Executive Authority**

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# Judge Damon Keith: The Judicial Antidote to Judge Julius Hoffman

## Challenging Claims of Unilateral Executive Authority

*Ellen Yaroshefsky\**

*From some of the highly-publicized trials of the 1960s—namely the trials of the Chicago Eight, Panther Twenty-One, and Weathermen—we can draw indispensable lessons about the role of the judges in upholding and promoting a fair justice system. The contrast to Judge Julius Hoffman’s notorious injudicious conduct in the Chicago Eight case is the courageous, thoughtful Judge Damon Keith, in the less publicized White Panther case in Detroit in the early 1970s. Judge Keith’s overriding sense of fairness exemplified the best of judicial independence in considering President Nixon’s claims of unilateral executive authority in United States v. Ayers and United States v. U.S. District Court. Judge Keith’s exemplary judicial conduct is an embrace of judicial independence that provides inspiration in current times.*

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\* Howard Lichtenstein Distinguished Professor of Legal Ethics and the Director of the Monroe H. Freedman Institute for the Study of Legal Ethics. Professor Bruce Green organized the Southeastern Association of Law Schools August 2018 workshop, *50 Years After Chicago 8*, that inspired this Article. I thank Gerald Lefcourt and William Bender for devoting the time for interviews and providing source materials, and Kevin Kim for his research assistance.

## INTRODUCTION

Judge Julius Hoffman, the infamous, irascible judge in the 1970 Chicago Eight case, is the iconic representation of much that can go wrong in a courtroom. Quick-tempered and exhibiting a lack of fundamental respect for lawyers and litigants who, in turn, disrespected his authority, Hoffman presided over a trial that was aptly described as a circus. This notorious disorderly trial of eight Vietnam antiwar activists indicted for conspiring, organizing, and inciting riots during the Democratic National Convention, went awry from its beginning. Before the trial began, four of the original lawyers indicated that they would withdraw from the case; Judge Hoffman issued bench warrants for the arrest of those lawyers.<sup>1</sup> Then the judge refused to postpone the trial until Charles Garry, lawyer for defendant Bobby Seale, recovered from a gall bladder operation. The confrontations continued throughout, and the actions and antics of the defendants in the courtroom were met with forty-seven contempt citations during that early phase and ultimately 175 contempt citations against the defendants and two of their lawyers.<sup>2</sup> The judge ordered Bobby Seale gagged and bound. William Kunstler, one of the defense lawyers said “This is no longer a court of order, your Honor, this a medieval torture chamber. It is a disgrace. They are assaulting the other defendants also.”<sup>3</sup> Ultimately, the case was reversed on appeal, and the Circuit court criticized Judge Hoffman for cumulative prejudicial remarks and the prosecution for inflammatory statements.<sup>4</sup> There was little question that Judge Hoffman’s conduct was outside the bounds of a reasonable jurist.

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1. Upon protest from law professors and groups of lawyers, the judge vacated the order. NORMAN DORSEN & LEON FRIEDMAN, DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT 56 (1973).

2. CONTEMPT: TRANSCRIPT OF THE CONTEMPT CITATIONS, SENTENCES, AND RESPONSES OF THE CHICAGO CONSPIRACY 10, at xviii, 9 (1970). This number includes the contempt citations against Bobby Seale, who was later severed from the case, causing the Chicago Eight to become the Chicago Seven. William W. Farrell, *The Chicago 7*, N.Y. TIMES (Nov. 4, 1973), <https://www.nytimes.com/1973/11/04/archives/once-more-with-decorum-the-chicago-7.html>.

3. *Id.* at 27. Ultimately, the case was reversed and sent back for retrial before a different judge. The government chose not to re prosecute because it did not want to reveal wiretaps against Bobby Seale. The contempt citations against Weinglass and Kunstler for actions such as refusing to sit down immediately after being ordered to do so, for making legal arguments after the judge had ruled on such matters, for cross examination beyond the scope of direct, and for making “invidious comparison[s] between the treatment the court afforded the witnesses called by the defendant as opposed to the treatment afforded witnesses called by the government” were reversed on appeal. *See In re Dellinger*, 461 F.2d 389, 396 (7th Cir. 1972).

4. *United States v. Dellinger*, 472 F.2d 340, 386–91 (7th Cir. 1972).

## I. THE 1960S AND CASES AGAINST POLITICAL RADICALS

A. *The Panther Twenty-One*

This was not the only infamous highly publicized case that focused on 1960s political radicals presided over by a judge who lost control of his courtroom.<sup>5</sup> The Panther Twenty-One case in New York is the second case of the era that led to handwringing by the bar and bench. On April 2, 1969, twenty-one Black Panther members were indicted and charged with conspiracy to kill several police officers and to destroy a number of police stations, department stores, the Bronx Botanical Gardens, and other buildings.<sup>6</sup>

The case was assigned to Judge John M. Murtagh who had been handpicked by the Manhattan District Attorney, Frank Hogan.<sup>7</sup> His biases against the defendants and defense lawyers were evident from the case's inception. The defendants consistently challenged the court's authority, its unfair rulings, and other conduct. Virtually from the day that Hogan picked Murtagh, as Lefcourt noted, it was an

all-out war once we knew how he had been selected. During pretrial hearings, the judge and the defense were at each other's throats. The government got daily copy of the transcripts from the day's proceedings, and we could not afford it. The court denied us a copy. It permitted the press to take up all the front rows thereby creating no room for the family of the defendants. There was an uproar. A daily uproar.<sup>8</sup>

The judge decided to discontinue the pretrial proceedings until the defendants told him they "consented to a trial conducted under the

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5. Interview with Gerald Lefcourt (Apr. 30, 2018) (notes on file with author); see generally DORSEN & FRIEDMAN, *supra* note 1.

6. *The Panther 21: To Judge Murtagh*, in LAW AGAINST THE PEOPLE 185, 185 (Robert Lefcourt ed., 1971) [hereinafter *To Judge Murtagh*]. "The Black Panthers, also known as Black Panther Party, was a political organization founded in 1966 by Huey Newton and Bobby Seale to challenge police brutality against the African American community." They instituted multiple social programs, including the popular program that provided free breakfast for school children, and participated in political activities. They garnered extensive support in urban centers with large African American communities, including Los Angeles, Chicago, New York, and Philadelphia. Nationally, The Black Panthers had roughly 2,000 members by 1968. *Black Panthers*, HISTORY (Feb. 8, 2019), <https://www.history.com/topics/black-panthers>.

7. In that era, "Mr. Hogan rather frequently pick[ed] his judges." MURRAY KEMPTON, THE BRIAR PATCH 27 (Da Capo Press 1997) (1973). Haywood Burns, one of the defense counsel, sought to challenge Hogan's handpicking Murtagh. Lefcourt, *supra* note 5; see also generally United States *ex rel.* Shakur v. Comm'r of Corr., 303 F. Supp. 303, 304 n.1 (S.D.N.Y. 1969) (citing Transcript of argument before Justice Murtagh at 8, *People v. Shakur*, No. 1848-69 (N.Y. Sup. Ct. May 5, 1969)). Gerald Lefcourt notes that one of the changes resulting from this case was that Chief Judge Judith Kaye changed the practice in New York to preclude such handpicked judges. Lefcourt, *supra* note 5.

8. Lefcourt, *supra* note 5.

‘American system of criminal justice.’<sup>9</sup> The defendants, who were unwilling to give such a statement of consent because, as they stated, it is the “Amerikan system of criminal justice” that we cannot abide,<sup>10</sup> wrote a lengthy letter to the judge about historical and current racism in American criminal justice system in its many manifestations, including excessive bail and current jail conditions.<sup>11</sup> It was the subject of significant media attention. Ultimately, the case resumed on April 7, 1970 and, in a remarkable outcome, the jury acquitted all of the defendants in just a few hours.<sup>12</sup> As with the judge that presided over the Chicago Eight trial, the books and literature on Black Panther Twenty-One portray Judge Murtagh as yet another biased judge in a 1960s political case.<sup>13</sup>

As a consequence of the Chicago Eight and Panther Twenty-One trials, and all the attendant publicity, the New York State Bar Association and the American College of Trial Lawyers appointed commissions due to the widespread concern in the bar that “tactics of trial disruption . . . have converted trials into spectacles of disorder and even violence.”<sup>14</sup> Chief Justice Warren Burger made numerous speeches about the importance of civility in the courtroom.<sup>15</sup> The ABA adopted a special report titled *The*

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9. Lefcourt, *supra* note 5; see also *To Judge Murtagh*, *supra* note 6, at 187.

10. *To Judge Murtagh*, *supra* note 6, at 185.

11. *Id.* at 185–86.

The response by the defendants addresses itself not so much to the particular action by the judge in halting the trial, but to the treatment inflicted on Black people under the “Amerikan [sic] system of criminal justice” throughout American history.

The district attorney’s office conducted the longest trial in New York history, spent over two million dollars, and put sixty-five witnesses on the stand. The three major police undercover agents, who had joined the Panther Party at its inception, before the majority of the defendants, testified that they had never seen or participated in the attempted murder of policemen, actual bombings, or the attempted bombings of police stations or public places. The judge had denied almost every defense motion before and during the trial including the requests to lower the prohibitively high 100,000 dollar bail set for most defendants and had ignored the defendants’ letter “To Judge Murtagh: From the Panther 21”; the hearings resumed on April 7, 1970.

*Id.*

12. “[T]he jury, composed of five Blacks, one Puerto Rican, and six whites, stunned the nation on May 13, 1971, when they acquitted all the defendants on all 156 charges. A number of jurors expressed the belief that the judge was biased throughout the trial.” *Id.* at 186.

13. “Judge Murtagh’s did not seem to be a temperament that would have impelled him to lively concern for the property and person of the criminal defendant unless the Supreme Court had guided him toward it.” KEMPTON, *supra* note 7, at 93. “By habit then, Justice Murtagh absorbed the police version of these events with the faith that assures accommodation between a judge’s deference to the higher courts and his sympathy for the problems of prosecutors . . .” *Id.* at 93–94.

14. DORSEN & FRIEDMAN, *supra* note 1, at 3 (quoting the preamble to the July 1970 Report of the American College of Trial Lawyers).

15. See, e.g., *Excerpts From the Chief Justice’s Speech on the Need for Civility*, N.Y. TIMES (May 19, 1971), <https://www.nytimes.com/1971/05/19/archives/excerpts-from-the-chief-justices-speech-on-the-need-for-civility.html> (“I urge that we never forget the necessity for civility as an

*Judge's Role in Dealing with Trial Disruptions.*<sup>16</sup> State legislatures passed new laws dealing with courtroom disruption.<sup>17</sup> New rules of court were adopted. Public discourse seemed to indicate deterioration of public confidence in the judicial system. This conclusion, however, appeared to be overblown. A study in New York, based upon responses to questionnaires of a wide range of lawyers, established that disorder in the courtroom was extremely rare and “has been overemphasized because . . . both public and bar tend to focus on dramatic and publicized confrontations without bearing in mind that these are highly exceptional.”<sup>18</sup>

### B. Judge Damon Keith: The Judicial Antidote

This was certainly true, and neither the bar nor the general public focused upon the antidote to Judges Hoffman and Murtaugh: Judge Damon Keith, then a relatively newly-appointed federal district court judge in the Eastern District of Michigan. In contrast to Judges Hoffman and Murtagh, Judge Keith presided over two cases involving political radicals accused of violent acts with many of the same issues such as electronic surveillance, but he conducted those cases in a fair-minded and exemplary manner that generated much less publicity.

One of the cases over which Judge Keith presided occurred in 1970, when John Sinclair, Lawrence Plamondon, and John Waterhouse Forrest were charged with various acts of conspiracy in what was known as the White Panther case.<sup>19</sup> Subsequently, the “Weathermen” were charged with conspiracy, various bombings, and other acts in another case assigned to Judge Keith.<sup>20</sup> In each instance, the judge was thoughtful and courageous, and his decisions and conduct have received insufficient attention outside of the state of Michigan. Lessons of the judicial conduct

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indispensable part—the lubricant—that keeps our adversary system functioning.”).

16. DORSEN & FRIEDMAN, *supra* note 1, at 4.

17. *Id.*

18. *Id.* at 9.

19. The White Panthers were a group of activists against the Vietnam War who modeled themselves after the Black Panther Party and claimed to be revolutionaries. Jeff A. Hale, *John Sinclair: The White Panther Party*, DEEP POL. F. (May 14, 2011, 3:03 PM), <https://deeppoliticsforum.com/forums/showthread.php?7071-John-Sinclair-The-White-Panther-Party#.W0oHVthKj-Y>.

20. The Weathermen were a radical group espousing revolution. They emerged in 1969 from the Students for a Democratic Society (SDS) and were known as SDS's militant wing opposing U.S. foreign policy, poverty, racism, and imprisonment. They became a committed small group of revolutionaries who were viewed as one of the most serious threats to the Nixon administration. The Weathermen engaged in symbolic bombings of institutions that they thought were the sources of imperialist and racist policies. Arthur M. Eckstein, *How the Weather Underground Failed at Revolution and Still Changed the World*, TIME (Nov. 2, 2016), <http://time.com/4549409/the-weather-underground-bad-moon-rising/>.

of the 1960s political cases—The Chicago Eight and the Black Panther Twenty-One—would not be complete without reference to him.<sup>21</sup>

## II. THE GOVERNMENT’S WARRANTLESS SURVEILLANCE

It is well-documented that during this era, the government spied upon domestic organizations and individuals, claiming that it was in the national interest to do so. It took Judge Keith to unearth and challenge these government claims which the Supreme Court ultimately declared unconstitutional in *United States v. U.S. District Court*.<sup>22</sup>

The common thread that runs throughout all of the political cases involving 1960s radicals brought to courts in the early 1970s is the Nixon administration’s warrantless electronic surveillance of many of the defendants and others who were targeted for their beliefs and actions. This era, called the Age of Surveillance, saw the great expansion of a “nationwide network of countersubversive [surveillance],” from its origins in the 1920s to be used as a tool in the political arena.<sup>23</sup> The government perceived 1960s radicals to be a significant and increasing threat because of their fear that they would cause a revolution. In earlier years, J. Edgar Hoover, the director of the FBI, was notorious for wiretapping suspected communists and associates in the 1950s, and for wiretapping Martin Luther King, Malcolm X, and Elijah Muhammad in the early 1960s.<sup>24</sup> Beginning in 1964, based on the “possibility of Communist infiltration,” the government engaged in warrantless electronic surveillance of the Student Nonviolent Coordinating

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21. There was some media attention focused upon Judge Keith’s cases but scant compared to the Chicago Eight and Black Panther cases. There have subsequently been academic articles and other writings about Judge Keith. See, e.g., PETER J. HAMMER & TREVOR W. COLEMAN, CRUSADER FOR JUSTICE (2013); Blanche Bong Cook, *A Paradigm for Equality: The Honorable Damon J. Keith*, 47 WAYNE L. REV. 1161 (2001) (discussing a range of affirmative action, civil rights cases as well as the *Sinclair* case); Edward J. Littlejohn, *Damon Jerome Keith Lawyer-Judge-Humanitarian*, 42 WAYNE L. REV. 321 (1996). The *Sinclair* case is also the focus of a doctoral dissertation. Jeff A. Hale, *Wiretapping and National Security: Nixon, The Mitchell Doctrine, and the White Panthers* (Aug. 1995) (doctoral dissertation, LSU Historical Dissertations and Theses), [https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=7014&context=gradschool\\_disstheses](https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=7014&context=gradschool_disstheses).

22. *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 321 (1972) (stating that “the Government’s concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance”).

23. FRANK J. DONNER, *THE AGE OF SURVEILLANCE* 245 (1981).

24. For the FBI’s file on Martin Luther King, Jr., see *FBI Records: The Vault—Martin Luther King, Jr.*, FED. BUREAU INVESTIGATIONS, <https://vault.fbi.gov/Martin%20Luther%20King%20C%20Jr> (last visited June 6, 2019). For the FBI’s file on Malcom X, see *FBI Records: The Vault—Malcom X*, FED. BUREAU INVESTIGATIONS, <https://vault.fbi.gov/Malcolm%20X> (last visited June 6, 2019).

Committee.<sup>25</sup>

Richard Nixon, shortly after his election in November 1968, engaged many intelligence agencies in his administration to propose extensive plans to respond to various domestic groups who opposed the government's foreign and domestic policies. Those agencies implemented a program of secret surveillance of many 1960s activists, including the defendants in the Chicago Eight trial, the Black Panthers, the White Panthers, the Weatherman, and many others.<sup>26</sup> Nixon, it was later learned during Watergate hearings,<sup>27</sup> considered antiwar activists, dissenters, and others who opposed his policies as domestic "enemies" who he believed to be subversives and unpatriotic. His Attorney General, John Mitchell, claimed that this warrantless surveillance of all these enemies was lawful and necessary in the "national interest," and became increasingly concerned that the programs and the surveillance were kept secret.<sup>28</sup>

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25. The Student Nonviolent Coordinating Committee (SNCC), founded in 1960 as a nonviolent direct-action group, emerged as a force in the southern civil rights movement largely through the involvement of students in the 1960 Freedom Rides, designed to test a 1960 Supreme Court ruling that declared segregation in interstate travel facilities unconstitutional. *Student Nonviolent Coordinating Committee (SNCC)*, STAN.: MARTIN LUTHER KING, JR. RES. & EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/student-nonviolent-coordinating-committee-sncc> (last visited June 6, 2019).

26. DONNER, *supra* note 23; ROBERT WILLIAMS, *POLITICAL SCANDALS IN THE USA* 14 (1998).

27. The Senate Watergate Committee was established to investigate the scandal that resulted from the burglary at the Watergate Hotel of the Democratic National Committee headquarters, any subsequent cover-up of criminal activity, as well as "all other illegal, improper, or unethical conduct occurring during the political campaign in 1972, including political espionage and campaign finance practices." It was formally known as the Senate Committee on Presidential Campaign Activities. It played a key role in gathering evidence that led the indictment of forty administration officials and the conviction of several of Nixon's aides for obstruction of justice and other crimes and led to the impeachment process of Richard Nixon that then ultimately led to his resignation on August 9, 1974. *See Select Committee on Presidential Campaign Activities (The Watergate Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/Watergate.htm> (last visited June 6, 2019); *see also Rufus Edmisten: Deputy Counsel, Senate Select Committee on Presidential Campaign Activities (Watergate Committee)*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/generic/EdmistenRufus\\_Watergate.htm](https://www.senate.gov/artandhistory/history/common/generic/EdmistenRufus_Watergate.htm) (last visited June 6, 2019).

28. The Nixon administration's subsequent challenge to the *New York Times* and *Washington Post* for publication of the Pentagon Papers was part and parcel of the administration's claim of protection of "national security." DONNER, *supra* note 23, at 247–48. The move toward expansion of Presidential power was dubbed "The Imperial Presidency." *See generally* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). The use of the "plumbers" who burglarized the Watergate Hotel and engaged in a range of other unlawful activities, established that "[f]or the first time in American history a chief executive organized an intelligence capability answerable only to himself and operating outside the legal-constitutional system, not only for the purpose of passive information-gathering but to develop aggressive means of injuring and neutralizing targets." DONNER, *supra* note 23, at 250.



A. *Katz v. United States and Alderman v. United States*

Mitchell's claim that warrantless surveillance was lawful if in the national interest had yet to be resolved by the Supreme Court. In the 1967 case, *Katz v. United States*, the Court held that electronic surveillance was governed by the Fourth Amendment, but it reserved the question of whether "safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security."<sup>29</sup> Congress had not "resolved the question of whether the president has inherent power to authorize electronic surveillance without obtaining a judicial warrant when national security is threatened."<sup>30</sup>

A few months later, in March 1969, the Supreme Court decided *Alderman v. United States*. The Court held that in a criminal trial, the government must notify the court of any electronic surveillance of the defendants.<sup>31</sup> If the court determines the eavesdropping to be illegal, the defendants were entitled to inspect the logs and summaries of the conversations to determine whether those overheard conversations had tainted the evidence in the case.<sup>32</sup> A government refusal to disclose the fact of surveillance orders would result in dismissal of the case.<sup>33</sup>

*Alderman* sent shock waves through the Nixon administration. Attorney General Mitchell and other government officials sought to reverse that decision without success. Mitchell testified before the Senate committee that "enforced disclosure of transcripts of countersubversive taps would endanger not only the safety of the nation but the lives of federal agents as well."<sup>34</sup> Nevertheless, *Alderman* remained the law at the time of these various cases.

On June 23, 1969, in the Chicago Eight case, the government answered the defense's request to disclose electronic surveillance pursuant to the *Alderman* decision. The government produced the affidavit of Attorney

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29. *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967).

30. DONNER, *supra* note 23, at 246. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act that authorizes federal courts to issue wiretap warrants at the Attorney General's request based upon probable cause that the individual is engaged in committing, or has committed, an enumerated crime. But

[t]he statute merely stated that nothing in it "shall . . . limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure for existence of the Government."

*Id.* at 245-46.

31. *See Alderman v. United States*, 394 U.S. 165, 175 (1969) (stating that "the general rule under the [Omnibus Crime Control and Safe Streets Act of 1968] is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant").

32. *Id.* at 181.

33. *Id.*

34. DONNER, *supra* note 23, at 247.

General John Mitchell asserting that “the President, acting through the Attorney General, has the inherent constitutional power to authorize electronic surveillance without judicial warrant” to protect the national security, and that the president could unilaterally determine the activities that threaten national security.<sup>35</sup> Consequently, the government asserted that the wiretaps were legal and that, in any event, these were so confidential and sensitive that the defendants and their attorneys should not be permitted to see them.<sup>36</sup> Mitchell had insisted that the domestic threat from various domestic organizations and individuals was more significant than foreign ones.<sup>37</sup> The eavesdropping was not necessarily to prosecute the target but to gather “domestic intelligence.”<sup>38</sup>

This warrantless surveillance, the subject of numerous motions in the Chicago Eight case, was upheld by Judge Hoffman who summarily denied the defense’s requests to obtain information about such surveillance and/or an evidentiary hearing.<sup>39</sup> Instead, he set the matter over for post-trial hearing. At that hearing, he denied the defense’s requests for disclosure and any other remedy.<sup>40</sup>

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35. *Id.* See Affidavit of the Attorney General of the United States of America, *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970); Affidavit of the Attorney General of the United States of America, *United States v. Ayers*, No. 48014 (E.D. Mich. filed Sept. 28, 1971).

36. Transcript of Hearing Before Judge Julius Hoffman on Feb. 20, 1970, *Dellinger*, No. 69 CR 180. See Affidavit of the Attorney General of the United States of America, *Dellinger*, No. 69 CR 180 (asserting the wiretaps were legal); Affidavit of the Attorney General of the United States of America, *Ayers*, No. 48014 (same). See also *United States v. Sinclair*, 321 F. Supp. 1074, 1076–79 (E.D. Mich. 1971) (noting the government’s assertion that the wiretaps were legal).

37. DONNER, *supra* note 23, at 247; see also *Sinclair*, 321 F. Supp. at 1079 (explaining the government’s argument “that the President should . . . have the constitutional power to gather information concerning *domestic* organizations which seek to subvert the Government by unlawful means” and then stating that that argument “is untenable”).

38. DONNER, *supra* note 23, at 247. In a California Black Panther case, *United States v. Smith*, 321 F. Supp. 424, 424 (C.D. Cal. 1971), the government disclosed the existence of such surveillance on appeal. Judge Ferguson, in declaring the surveillance unconstitutional, noted that

the government seems to approach these dissident domestic organizations in the same fashion as it deals with unfriendly foreign powers. The government cannot act in this manner when only domestic political organizations are involved, even if those organizations espouse views which are inconsistent with our present form of government. To do so is to ride roughshod over numerous political freedoms which have long received constitutional protection. The government can, of course, investigate and prosecute criminal violations whenever these organizations, or rather their individual members, step over the line of political theory and general advocacy and commit illegal acts.

*Id.* at 429.

39. Transcript of Hearing Before Judge Julius Hoffman on Feb. 20, 1970, *Dellinger*, No. 69 CR 180; see also *In re Dellinger*, 357 F. Supp. 949, 958–59 (N.D. Ill. 1973) (denying the surveillance disclosures on appeal).

40. Transcript of Hearing Before Judge Julius Hoffman on Feb. 20, 1970, *Dellinger*, No. 69 CR 180. The same government claims supported the burglary of the Watergate Hotel. As James McCord testified before the “Watergate Committee,” the Senate Select Committee investigating

B. *United States v. Sinclair and United States v. U.S. District Court*

On December 7, 1969, three defendants in *United States v. Sinclair*, the “White Panther case,” were charged with conspiracy to destroy government property, and one defendant was charged with bombing a Central Intelligence Agency recruitment office in Ann Arbor, Michigan.<sup>41</sup> These defendants, like the Chicago Eight and Panther Twenty-One defendants, were deemed domestic enemies whom the Nixon administration believed to be subversive and unpatriotic. This was the climate in which Judge Keith was assigned the Sinclair case.<sup>42</sup> It was the same electronic surveillance issue based upon the same Mitchell affidavit the defense filed in the Chicago Eight case before Judge Hoffman.<sup>43</sup>

In pretrial motions, just as in the Chicago Eight case, the defendants moved, pursuant to *Alderman*, to compel the United States to disclose certain electronic surveillance information and for an evidentiary hearing to determine whether this information tainted the case.<sup>44</sup> In response, the government filed the affidavit of Attorney General John Mitchell, acknowledging that its agents had overheard conversations in which one of the defendants had participated, and that the attorney general approved the wiretaps “to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.”<sup>45</sup>

The government claimed that the surveillance was lawful even if it was conducted without a warrant, as a reasonable exercise of the president’s power through the attorney general to protect national security.<sup>46</sup> The surveillance logs were filed under seal with Judge Keith for inspection.

On January 26, 1971, Judge Keith held that the surveillance violated

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the presidential election, he thought the Watergate burglary was legal because, like the Chicago Eight surveillance, it was authorized by the attorney general for national security and for “intelligence purposes.” See DONNER, *supra* note 23, at 246–47.

41. *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 299 (1972).

42. Another judge, Talbot Smith, was assigned the case but stepped away from it because he “feared for his safety and that of his family.” He suggested to his colleagues that Keith, the newest member of the bench, be appointed. Ultimately, there was a blind draw for the assignment and the case went to Keith. HAMMER & COLEMAN, *supra* note 21, at 142.

43. Compare Affidavit of the Attorney General of the United States of America, *Dellinger*, No. 69 CR 180, with *U.S. Dist. Ct. (Keith)*, 407 U.S. at 300 n.2 (“This affidavit is submitted in connection with the Government’s opposition to the disclosure to the defendant Plamondon of information concerning the overhearing of his conversations which occurred during the course of electronic surveillances which the Government contends were legal.”).

44. *United States v. Sinclair*, 321 F. Supp. 1074, 1075–76 (E.D. Mich. 1971).

45. *U.S. Dist. Ct. (Keith)*, 407 U.S. at 300 (quoting the Mitchell Affidavit).

46. *Sinclair*, 321 F. Supp. at 1076.

the Fourth Amendment.<sup>47</sup> Judge Keith wrote,

In the opinion of this Court, the position of the Attorney General is untenable. It is supported neither historically, nor by the language of the Omnibus Crime Act. Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today.<sup>48</sup>

He ordered the government to make full disclosure of the overheard conversations and “in the exercise of its discretion, further orders that an evidentiary hearing be held to determine the existence of taint, either as to the indictment or as to the evidence introduced at trial, be conducted at the conclusion of the trial of this matter.”<sup>49</sup>

Many have characterized the ruling as a “dramatic and unprecedented ruling [that] shook the nation. It was the first time a federal judge had ever challenged a sitting president’s authority to pursue a particular national security strategy.”<sup>50</sup> Judge Keith was the subject of extensive criticism. The Nixon administration was reportedly infuriated and took the unusual step of filing a writ of mandamus against the judge himself. The Sixth Circuit upheld Judge Keith’s decision.<sup>51</sup> Keith, who had been on the bench for only five years, thought the odds that the Supreme Court would uphold his decision were slim.<sup>52</sup> The Supreme Court granted certiorari and, in a stunning 8-0 opinion in *United States v. U.S. District Court*, the Court announced on June 19, 1972 that it agreed with Judge Keith’s ruling.<sup>53</sup> In powerful language, Justice Powell wrote:

Fourth amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect “domestic security.”<sup>54</sup>

The case became known as the “Keith Case.” The Mitchell doctrine

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47. *Id.* at 1077.

48. *Id.* at 1079.

49. *Id.* at 1080.

50. HAMMER & COLEMAN, *supra* note 21, at 138.

51. *United States v. U.S. Dist. Ct. (Keith)*, 444 F.2d 651, 669 (6th Cir. 1971). His ruling was controversial. Many of his colleagues thought that the judiciary should defer to the president in matters claimed to involve national security. “If the attorney general and the president of the United States think it’s needed to defend our national security, who are you, as a judge, to tell them otherwise?” HAMMER & COLEMAN, *supra* note 21, at 139 (emphasis omitted).

52. HAMMER & COLEMAN, *supra* note 21, at 140.

53. *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297 (1972). The Supreme Court permitted Arthur Kinoy, attorney for the defendants, to argue, without interruption, for more than an hour. Robert Mardian, Chief of the Internal Security Division of the Justice Department, was counsel for the government. He was one of the architects of the government’s sweeping, illegal surveillance program and was subsequently indicted for his role in Watergate.

54. *Id.* at 314.

was now unlawful.<sup>55</sup> The decision was heralded around the country as a triumph for civil liberties and constitutional rights.

Many Washington insiders believe that the Keith decision was key in Nixon's resignation, as after the Supreme Court had reached its decision [in *U.S. District Court*] on Friday, June 16, 1972, there was a leak that the decision would be announced publicly on Monday, June 19. Members of the Committee to Reelect the President had previously installed bugs at offices of Democrats in the Watergate building. The thinking goes that, in view of the impending Supreme Court ruling, the White House ordered the bugs be removed. Howard Hunt and the rest of Nixon's Plumbers came to the Watergate on Saturday night. The fallout from the break-in was what led to Nixon's resignation in 1974, and then to the investigation of the NSA itself in 1975 that exposed the rogue role of the NSA.<sup>56</sup>

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55. The Court readily dismissed various government arguments that resonate today in national security cases:

The Government argues that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. It is urged that the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security. We are told further that these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions. It is said that this type of surveillance should not be subject to traditional warrant requirements which were established to govern investigation of criminal activity, not ongoing intelligence gathering.

The Government further insists that courts "as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security." These security problems, the Government contends, involve "a large number of complex and subtle factors" beyond the competence of courts to evaluate.

....

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly, courts can recognize that domestic security surveillance involves different considerations from the surveillance of "ordinary crime." If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering.

*Id.* at 318–20 (citations omitted).

56. Bill Simpich, *Wiretapping in America: The Moment of Decision Is Near*, BANDERAS NEWS (Aug. 2006), <http://www.banderasnews.com/0608/nt-wiretappinginamerica.htm>. In the post-Watergate atmosphere, the Church Committee took a hard look at the NSA for the first time. It emerged that, from its inception in 1952 until mid-70s, the NSA worked hand in glove with Western Union in "Operation Shamrock," reading every telegram that came in and out of the United States. *An Impeachable Offense? Bush Admits Authorizing NSA to Eavesdrop on Americans Without Court Approval*, DEMOCRACY NOW! (Dec. 19, 2005), [https://www.democracynow.org/2005/12/19/an\\_impeachable\\_offense\\_bush\\_admits\\_authorizing](https://www.democracynow.org/2005/12/19/an_impeachable_offense_bush_admits_authorizing). Even more insidious was the exposure of

Beyond Nixon's resignation, Judge Keith's "order rocked the NSA," because it exposed the questionable practices of electronic surveillance.<sup>57</sup> The revelations ultimately led to numerous criminal charges including the indictment of FBI officials.<sup>58</sup>

Judge Hoffman, could, of course, have embarked upon a path of examining the Mitchell doctrine, but he blithely accepted the government's unconstitutional policy.

### III. *UNITED STATES V. AYERS*

*United States v. Sinclair* was not Judge Keith's only principled, courageous action involving government surveillance in that era. Earlier, Judge Keith had been assigned the July 23, 1970 indictment in *United States v. Rudd*, a case against Mark Rudd and twelve other members of the Weathermen for conspiracy to bomb a number of institutions including the New York City Police Department headquarters, the Presidio army base in San Francisco, a Long Island City courthouse, several banks in Boston and New York, and other institutions that they claimed to be the sources of imperialist and racist policies.<sup>59</sup>

This was not Keith's first involvement with the Weathermen. In July 1970, Guy Goodwin, the field commander and special litigation attorney of the Internal Security Division of the Justice Department, asked Judge Keith to sign off on an immunity order for a person known as Martha Real.<sup>60</sup> He did. Unbeknownst to Judge Keith, the information obtained in

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"Operation Minaret," revealing that, between 1970 and 1975, the agency also monitored the calls of "large numbers of anti-Vietnam war protesters who were violating no law." *Statement—James Bamford, NSA Lawsuit Client*, ACLU, <https://www.aclu.org/other/statement-james-bamford-nsa-lawsuit-client> (last visited June 6, 2019); see also JOSEPH C. GOULDEN, *THE BENCHWARMERS* 351 (1974) (explaining Keith's role in judicial independence).

57. JAMES BAMFORD, *THE PUZZLE PALACE* 291 (1982). Keith has been noted as "one of the foundations of our modern conception of privacy rights." Bob Talbert, *Current Crisis Has Echoes in Wiretap Ruling*, DETROIT FREE PRESS, Jan. 30, 1998, at 3C (quoting Jeff A. Hale).

58. Charles R. Babcock, *Gray, 2 High-Ranking Aides Are Indicted in FBI Break-Ins*, WASH. POST (Apr. 11, 1978), [https://www.washingtonpost.com/archive/politics/1978/04/11/gray-2-high-ranking-aides-are-indicted-in-fbi-break-ins/ed0c09a0-f8bd-4192-b090-38fe9147efbc/?noredirect=on&utm\\_term=.324f55de197b](https://www.washingtonpost.com/archive/politics/1978/04/11/gray-2-high-ranking-aides-are-indicted-in-fbi-break-ins/ed0c09a0-f8bd-4192-b090-38fe9147efbc/?noredirect=on&utm_term=.324f55de197b); Gerald Lefcourt, *Warrantlessness*, N.Y. TIMES (May 20, 1978), <https://www.nytimes.com/1978/05/20/archives/warrantlessness.html> (explaining why FBI claims were false and that J. Wallace La Prade, W. Mark Felt, and Edward Miller should be indicted).

59. See Criminal Docket, *United States v. Rudd*, No. 45119 (naming defendants William Ayers, Linda Evans, Dianne Donghi, Jane Spielman, Larry Grathwohl, Robert Burlinham, Bernadine Dohrn, Kathy Boudin, Cathy Wilkerson, Russell Neufeld, Ronald Fleigelman, and Naomi Jaffe). Larry Grathwohl was later discovered to be a government informant. DONNER, *supra* note 23, at 354.

60. FRANK J. DONNER & RICHARD I. LAVINE, *FROM THE WATERGATE PERSPECTIVE—KANGAROO GRAND JURIES*, 119 CONG. REC. 40,674, 40,679 (Dec. 11, 1973), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1973-pt31/pdf/GPO-CRECB-1973-pt31-3-1.pdf>.

connection with the order for Ms. Real stemmed from illegally obtained evidence that he later declared to be unlawful.<sup>61</sup> With the immunity order, Guy Goodwin proceeded to question Ms. Real about the items illegally seized in her apartment in Illinois in April 1970.<sup>62</sup> Goodwin questioned her about wiretapped conversations she had with people who became the defendants in the Weatherman case.<sup>63</sup> Also, unbeknownst to Judge Keith, Goodwin was the government contact for Larry Grathwohl, who later became the major infiltrator in the Weathermen organization and defense camp.<sup>64</sup>

*United States v. Rudd* was put on hold pending the decision in *United States v. U.S. District Court* and was reinstated by superseding indictment on December 7, 1972 against the same defendants. It was now called *United States v. Ayers*.<sup>65</sup>

In March 1973, the defense filed a motion to disclose electronic surveillance and for an evidentiary hearing on the sufficiency of the disclosure.<sup>66</sup> The government disclosed the existence of wiretaps but not a summary of their contents. The government characterized those wiretaps as not involving any direct overhearing of any of the defendants related to the case.<sup>67</sup> Apparently emboldened by the Supreme Court's decision in *U.S. District Court*, Keith did not accept the government's generalized contentions about surveillance and that issue ended up front and center in the *Ayers* case.<sup>68</sup> The defense provided extensive affidavits to the court regarding various indictments around the country brought by Guy Goodwin who had directed grand jury investigations against radicals

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61. *Id.*

62. *Id.* at 40,679–80.

63. *Id.*

64. Gerald Lefcourt, *Constitution Suspended 1969–1973: Those Who Seek Order by Sacrificing Liberty Deserve neither Liberty nor Order 15* (unpublished manuscript) (on file with author); see also DONNER, *supra* note 23, at 360.

65. Lefcourt, *supra* note 5; Criminal Docket, *United States v. Ayers*, No. 48104 (E.D. Mich. 1973) (on file with author).

66. Criminal Docket, *Ayers*, No. 48104; Motion for Disclosure of Electronic Surveillance: For an Evidentiary Hearing on the Sufficiency of Disclosure: And for a Pre-Trial Motion to Suppress Evidence and to Dismiss the Indictment on Account of Illegal Electronic Surveillance, *Ayers*, No. 48104; Reply to Government's Opposition to Defendant's Motion for Disclosure of Electronic Surveillance, for Full Investigation of Surveillance and for Further Relief, *Ayers*, No. 48104.

67. Reply to Government's Opposition to Defendant's Motion for Disclosure of Electronic Surveillance, for Full Investigation of Surveillance and for Further Relief at 38, *Ayers*, No. 48104.

68. See Criminal Docket, *Ayers*, No. 48104 (noting Judge Kieth's orders requiring "disclosure of certain illegal electronic surveillance" and multiple orders and hearings concerning the surveillance and its legality throughout the case).

nationwide.<sup>69</sup> The Mitchell affidavit was offered in each of these cases.<sup>70</sup>

This case was litigated in the climate of Watergate where, in January 1973, former Nixon aides, G. Gordon Liddy, and James W. McCord Jr., were convicted of conspiracy, burglary, and wiretapping in the Watergate scandal.<sup>71</sup> Five others pled guilty.<sup>72</sup> In April 1973, Nixon's top White House staffers, H.R. Haldeman and John Ehrlichman, and Attorney General Richard Kleindienst resigned.<sup>73</sup> Sam Ervin, chair of the Senate Watergate Committee had revealed "I have seen a document that exhibits totalitarian mentality—the Huston document."<sup>74</sup>

On June 3, 1973, the Washington Post reported that John Dean told the Watergate investigators that that he discussed the Watergate cover-up with President Nixon at least thirty-five times.<sup>75</sup>

On June 4, 1973, the day after the Washington Post story, Judge Keith held a lengthy hearing on the defense motion to suppress evidence and conducted an in-camera inspection of the logs of conversations and related materials.<sup>76</sup> The public revelations played prominently in the June 4th hearing. Keith stated unequivocally at that hearing: "I will not permit my courtroom to be used to launder illegally seized material."<sup>77</sup>

On June 5, 1973 Judge Keith "issued a sweeping order . . . for the Government to disclose whether it had used burglaries, sabotage,

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69. Lefcourt, *supra* note 5; *see e.g.*, DONNER, *supra* note 23, at 373 (explaining Goodwin's involvement in the grand jury proceeding against Vietnam Veterans Against the War).

70. Memorandum of Law in Support of Motion for Disclosure of Electronic Surveillance and for Other Relief, *Ayers*, No. 48104. *United States v. Dellinger* was among those cases, as well as cases whose popular names were the Vietnam Veterans Against the War case, Harrisburg case, Baltimore Panther case, Seattle Seven case, Camden 28 case, and others. *See* Letter from William Bender to Judge Damon Keith (Mar. 9, 1973) (on file with author) (including information that Arthur Kinoy, who argued *U.S. District Court* before SCOTUS and was counsel in the Chicago Eight trial, had been the subject of illegal surveillance); Letter from William Bender to Judge Damon Keith (May 31, 1973) (on file with author) (same). Many of those cases were dismissed or resulted in acquittals.

71. Lawrence Meyer, *Last Two Guilty in Watergate Plot: Ex-Aides of Nixon to Appeal: Jury Convicts Liddy, McCord in 90 Minutes*, WASH. POST (Jan. 31, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/013173-2.htm?noredirect=on>.

72. *Id.*

73. Lawrence Stern & Haynes Johnson, *3 Top Nixon Aides, Kleindienst Out; President Accepts Full Responsibility; Richardson Will Conduct New Probe*, WASH. POST (May 1, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/050173-1.htm>.

74. Lefcourt, *supra* note 5.

75. Carl Bernstein & Bob Woodward, *Dean Alleges Nixon Knew of Cover-up Plan*, WASH. POST (June 3, 1973), [https://www.washingtonpost.com/politics/dean-alleges-nixon-knew-of-cover-up-plan/2012/06/04/gJQAgyCJV\\_story.html?utm\\_term=.7a80f127d842](https://www.washingtonpost.com/politics/dean-alleges-nixon-knew-of-cover-up-plan/2012/06/04/gJQAgyCJV_story.html?utm_term=.7a80f127d842).

76. *See* Order of June 4, 1973, *United States v. Ayers*, No. 48104 (E.D. Mich. 1973) (on file with author); Louis Heldman, *U.S. Told to Reveal Illegal Acts*, DETROIT FREE PRESS, June 7, 1973, at 12-A.

77. Lefcourt, *supra* note 5.



electronic surveillance, agents provocateurs or other ‘espionage techniques’” against the defendants.<sup>78</sup> It specified that the government must disclose “‘whether and to what extent the White House staff [or] CIA, FBI, Department of Justice, Treasury or Defense Departments and the Secret Service participated [in] burglary, acts of sabotage’ or other illegal acts.”<sup>79</sup> The order specified that this included the Intelligence Evaluation Committee formed by John Dean to carry out the 1970 domestic intelligence plan known as the Huston Plan, as well as The White House Investigation Unit (known as the “plumbers”).<sup>80</sup> At the time, the full extent of the Huston Plan was not known by the court or the defense.

Judge Keith ordered the disclosure of certain illegal electronic surveillance, including the logs, and summaries of conversation.<sup>81</sup> A hearing was set for June 18, 1973.<sup>82</sup>

The government then turned over thousands of pages of overheard conversations of four of the fifteen defendants.<sup>83</sup> The hearing was postponed. Two weeks later, after defense attorneys provided the court with published reports that investigators for the Senate Watergate Committee had discovered illegal surveillance against the defendants, Judge Keith ordered the government to disclose any Watergate-type burglaries or espionage conducted against the defendants.<sup>84</sup> Defense counsel indicated that they would subpoena Watergate figures as well as administration officials engaged in intelligence work to testify at the evidentiary hearing. Defense counsel charged that their offices and homes had been burglarized and files ransacked.<sup>85</sup>

The government responded to Judge Keith’s order with a two-page affidavit from the FBI claiming that it was not in possession of any

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78. Agis Salpukas, *U.S. Forgoes Trial of Weathermen*, N.Y. TIMES (Oct. 16 1973), <https://www.nytimes.com/1973/10/16/archives/us-forgoes-trial-of-weathermen-disclosure-of-security-data-feared.html>; see also COMM. ON THE JUDICIARY U.S. SENATE 94TH CONG., THE WEATHER UNDERGROUND: REPORT OF THE SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS (1975), available at <http://li.proquest.com/elhpdf/histcontext/CMP-1975-SJS-0006.pdf>.

79. *U.S. Must Reveal Spy Acts*, DETROIT NEWS, June 19, 1973, at 10-A (alterations in original) (quoting the order).

80. This information was obtained by Watergate Special Prosecutor and the Senate Select Committee. Jeffrey Hadden, *Watergate Panel Probes Detroit Cases*, DETROIT NEWS, July 10, 1973, at 18-A.

81. Order of June 4, 1973, *Ayers*, No. 48104; Heldman, *supra* note 76.

82. Order of June 4, 1973, *Ayers*, No. 48104; Heldman, *supra* note 76.

83. Heldman, *supra* note 76.

84. *Id.*; *U.S. Must Reveal Spy Acts*, *supra* note 79.

85. Five lawyers subsequently established the burglaries of their homes and offices. Lefcourt’s home and office were burglarized several times. See Hadden, *supra* note 80; Lefcourt, *supra* note 64.

information developed from any government agency through unauthorized or illegal activity.<sup>86</sup> The court deemed this response wholly inadequate.<sup>87</sup>

On July 10, 1973, Judge Keith ordered the government to “fully respond with sworn answers to the Court’s inquiry into governmental misconduct” and that affidavits from each agency be filed by September 3, 1973.<sup>88</sup> Remarkably, he ordered that:

the defense and prosecution shall be permitted to call all witnesses deemed necessary and appropriate by them to further this inquiry into government illegality. The scope of the inquiry includes the activities of all named government agencies, employees or agents of the White House and private persons acting on behalf of agencies of government.<sup>89</sup>

The inquiry was not limited to the defendants but included Students for a Democratic Society and/or its Weatherman factions, and/or attorneys for any of those defendants.<sup>90</sup> He set the matter for an evidentiary hearing on September 24, 1973.<sup>91</sup>

On July 12, 1973, defense counsel William Bender wrote to Watergate Special Prosecutor Archibald Cox requesting that he make available the “substance of [his] investigation” so that the defense “may properly execute [its] responsibilities in this case—the presentation of all instances of government misconduct as they may relate to this pending prosecution.”<sup>92</sup> The defense subsequently filed additional letters and pleadings with the court regarding the extent and knowledge of the illegal electronic surveillance from other cases around the country. They filed affidavits in support of motions to dismiss the indictment as well as motions for more detailed information about the surveillance and an evidentiary hearing.<sup>93</sup>

In preparation for the September hearing, Attorneys Gerald Lefcourt and William Bender went to Washington D.C. and met with members of the Senate Judiciary Committee, prominent journalists, and former government officials. They developed a detailed understanding of the

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86. Hadden, *supra* note 80.

87. *Id.*

88. Order of July 10, 1973, United States v. Ayers, No. 48014 (E.D. Mich. 1973) (on file with author).

89. *Id.*

90. *Id.*

91. *Id.*; William K. Stevens, *Judge to Review Plea of Radicals*, N.Y. TIMES (July 10, 1973), <https://www.nytimes.com/1973/07/10/archives/judge-to-review-plea-of-radicals-scores-us-on-its-denial-of-charges.html>.

92. Letter from William J. Bender to Archibald Cox (July 12, 1973) (on file with author).

93. Criminal Docket, *Ayers*, No. 48104.

U.S. Department of Justice Internal Security Division and its sweeping surveillance through many government agencies of antiwar activists, environmentalists, consumer advocates, lawyers for radicals, and others designated as radicals. They were developing the list of witnesses for the September hearing including Tom Huston, the known architect of the 1970 surveillance blueprint, the Huston Plan.<sup>94</sup>

In the summer of 1973, as the defense prepared for the evidentiary hearing, Tom Charles Huston, the “Conservative Architect of Security Plan,” a researcher, and at that time, a project officer for the White House,<sup>95</sup> called Gerald Lefcourt and said that he would meet if Lefcourt came to Indianapolis and the meeting was kept confidential. Lefcourt agreed. They met at a quiet restaurant. Huston first searched Lefcourt and then told him “I will tell you whatever you want to know as long as you do not call me as a witness.”<sup>96</sup> They agreed.

Huston then revealed details about the 1970 Huston Intelligence Plan involving coordination among various agencies to conduct extensive surveillance.<sup>97</sup> Huston told Lefcourt that he was asked to draft an intelligence plan that was to be used only for “catastrophes.”<sup>98</sup> He proposed such a plan that involved coordination among many government agencies.<sup>99</sup> Huston told Lefcourt that on June 5, 1970, the president called a meeting involving the FBI, CIA, the National Security Agency, the Defense Intelligence Agency, and each of the military service intelligence apparatuses.<sup>100</sup> Within months, a plan was drafted that called for a large covert campaign of increased domestic spying with its main elements consisting of burglaries, wiretaps, infiltration on campuses, use of military intelligence operatives, and mail covers, which included opening mail and photostating it.<sup>101</sup> The plan specifically approved burglaries, which it acknowledged were clearly illegal.<sup>102</sup> All agencies signed off on it, and in July 1970, Richard Nixon authorized its implementation.<sup>103</sup>

Huston said that Robert Mardian, chief of the Internal Security

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94. Lefcourt, *supra* note 64, at 10–11; Interview with William Bender (May 15, 2018).

95. Christopher Lydon, *Conservative Architect of Security Plan Tom Charles Huston*, N.Y. TIMES (May 24, 1973), <https://www.nytimes.com/1973/05/24/archives/conservative-architect-of-security-tom-charles-huston-man-in-the.html>.

96. Interview with Gerald Lefcourt (June 21, 2018) (notes on file with author).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Salpukas, *supra* note 78.

102. Lefcourt, *supra* note 96.

103. *Id.*

Division of Department of Justice, came to him either in late 1970 or 1971 and said that the Justice Department wanted to implement the plan against domestic radicals. Huston told him that it would be illegal because the plan is for catastrophes only, and it calls for illegal activity.<sup>104</sup> Huston would not do it, but Mardian implemented it anyway, and after Judge Keith's decision in *United States v. U.S. District Court*, the government decided to continue with the Weatherman case only. Other cases marshalled by Guy Goodwin were either dismissed or not indicted.<sup>105</sup> Huston said that Nixon's denials that the government had implemented the Huston Plan were false.<sup>106</sup>

Such information from Huston was a major breakthrough. The defense now understood the sweep of illegal surveillance throughout many government agencies and the role of Robert Mardian, and of Guy Goodwin. The Internal Security Division had many resources, including sixty lawyers and dossier gathering with ties to White House, downward to the FBI, CIA, Treasury, Post Office, and local intelligence agencies.<sup>107</sup> The Huston Intelligence Plan had been used in many cases and was prepared by Guy Goodwin.<sup>108</sup> The defense previously knew of Goodwin's involvement in cases across the country. Now armed with additional information about the Huston Plan and its use in cases across the United States, they obtained the Plan.

As the defense lawyers travelled the country interviewing a wide range of former congressional aides, news media, and dozens of others who could prepare them for the task of proving, with subpoena power, the suspected "massive record of illegal espionage tactics never before seen in judicial history," Goodwin and other government lawyers strategized about ways to avoid it.<sup>109</sup>

The 1973 environment was a significant change from the 1970 indictment of the Weathermen. John Mitchell was no longer the attorney general and was under indictment.<sup>110</sup> Robert Mardian, no longer the head of the Internal Security Division, was testifying at Watergate hearings

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104. *Id.*

105. Lefcourt, *supra* note 5; Lefcourt, *supra* note 96.

106. Nixon's involvement in the implementation of the Huston Plan was to be one of the articles of impeachment against him. He resigned and therefore did not face impeachment. Lefcourt, *supra* note 5.

107. *Id.*

108. *Id.*

109. Lefcourt, *supra* note 64, at 27.

110. Anthony Ripley, *Federal Grand Jury Indicts 7 Nixon Aides on Charges of Conspiracy on Watergate; Haldeman, Ehrlichman, Mitchell on List*, N.Y. TIMES (Mar. 2, 1974), <https://www.nytimes.com/1974/03/02/archives/federal-grand-jury-indicts-7-nixon-aides-on-charges-of-conspiracy.html>.

hoping to avoid indictment. Vice President Agnew was under investigation, and the President of the United States was implicated in the Watergate burglaries.<sup>111</sup>

In response to Judge Keith's orders, the government failed to produce the required documentation and repeatedly filed motions for Extension of Time. The evidentiary hearing was postponed and was set for November 15, 1973.

Judge Keith's proposed evidentiary hearing that might expose other instances of government surveillance and illegality was unprecedented:

The hearing contemplated by Judge Keith's orders would have allowed the most searching inquiry into government intelligence apparatus yet conceived. Nowhere, not in any congressional committees, not in the media, and certainly no private group had ever undertaken what was about to be done in that Detroit courtroom. Officials from the White House, CIA, National Security Agency, the Treasury, Defense, and Justice Departments were on the verge of being put on the witness stand and questioned by hostile adversaries for defendants charged with a conspiracy to cross state lines with the intention of using and possessing explosives. The questioning would not have been the impartial debate presented vividly in most of the questioning of the Watergate Committee, but would have been the clearly partial, searching inquiry of criminal defense lawyers who were certain and had evidence of massive government misconduct.

. . . [T]he defense wondered how many officials would be forced to take the Fifth Amendment rather than to divulge illegal activities of the government.<sup>112</sup>

The hearing never occurred. On October 15, 1973, the government came before the court and submitted a motion and order for dismissal of the prosecution.

Ralph B. Guy Jr., United States Attorney for the Eastern District of Michigan, in presenting the Government's motion, said that in an effort to carry out Judge Keith's order sworn statements had been obtained from the White House, the Central Intelligence Agency, the Federal Bureau of Investigation, National Security Agency, the Department of the Treasury, the Department of Defense, the Secret Service and the Intelligence Evaluation Committee of the Justice Department that none of the agencies had engaged in any illegal conduct in the case.

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111. *Watergate and Related Activities, Phase I: Watergate Investigation: Hearings Before the Select Committee on Presidential Campaign Activities of the United States Senate*, 93d Cong. 2345–88 (1973) (testimony of Robert Mardian), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015078682583;view=1up;seq=5>. For the FBI's file on Agnew, see generally *FBI Records: The Vault—Spiro Agnew*, FED. BUREAU INVESTIGATIONS, <https://vault.fbi.gov/Spiro%20Agnew/#disablemobile> (last visited June 7, 2019).

112. Lefcourt, *supra* note 64, at 28.

Mr. Guy said, however, that the Government had chosen to dismiss the case because it would have had to disclose “foreign intelligence information deemed essential to the security of the United States.”<sup>113</sup>

Guy moved to dismiss the indictment against the four defendants who had appeared in court.<sup>114</sup> Many of the other defendants were underground. Keith dismissed against all defendants and did so with prejudice.<sup>115</sup>

The defense lawyers argued that the government dropped the case because a hearing would have demonstrated the abusive and unlawful government activities including widespread surveillance, burglaries, and mail searches.<sup>116</sup> In extensive press coverage, Gerald Lefcourt “called the case a ‘malicious prosecution, an abuse of the Bill of Rights from one end to another to punish the defendants’ without the aim of ever bringing them to trial. Mr. Guy disputed this, saying that ‘we had a good case.’”<sup>117</sup>

Judge Keith was the subject of a good deal of hate mail.<sup>118</sup> Nevertheless, he remained steadfast in his views of the significance of constitutional rights and went on to decide a wide range of civil rights cases.

#### IV. LESSONS FOR JUDGING

The 1970s cases of radical defendants in Judge Keith’s courtroom had the potential to be as explosive as those in the courtrooms of Judges Hoffman and Murtagh. What was so different about Judge Keith’s approach? The question is not answered by the fact that the notorious incidents in the Chicago Eight and Panther trials were primarily in trial and Judge Keith’s cases were in pretrial conduct. The antics in Judges Hoffman and Murtagh’s trials and the animus toward the defense were evident from the beginning of each of those cases.<sup>119</sup>

The bar and the bench explored this question by focusing on “when trial judges may act to control their courtrooms” in its examination of the Chicago Eight, Panther Twenty-One, and the Weatherman cases.<sup>120</sup> The guiding principle of that study was “[t]here is no substitute for a trial judge who knows how to run his courtroom.”<sup>121</sup> Significantly, the

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113. Salpukas, *supra* note 78.

114. Lefcourt, *supra* note 5; Lefcourt, *supra* note 96.

115. Lefcourt, *supra* note 5; Lefcourt, *supra* note 96.

116. Salpukas, *supra* note 78.

117. *Id.*

118. Letters from the Keith Archives at Walter Reuther Library at Wayne State Law School (on file with author).

119. See KEMPTON, *supra* note 7, at 27–29.

120. DORSEN & FRIEDMAN, *supra* note 1, at 93.

121. *Id.* (quoting Whitney North Seymour).

conclusions reached by the bar focused not only on what is currently called “procedural fairness”<sup>122</sup> but upon the court as an “exemplar of justice,” of “fairness, understanding, and even-handed application of the law.”<sup>123</sup> Judges who are and who are perceived to be fundamentally fair to both sides are less likely to be treated with disrespect. “The trial judge must be firmly in charge. He must create the impression that he is fair by being fair.”<sup>124</sup>

*Disorder in the Court* reported that Judges Hoffman and Murtagh used the heavy hands of government to control the defendants and that they engaged in “arbitrary, biased and vindictive remarks or rulings.”<sup>125</sup> The Seventh Circuit, in reversing the conviction in the Chicago Eight trial said that Judge Hoffman’s prejudicial conduct before the jury was “deprecatory of defense counsel and their case . . . [and] cumulatively, they must have telegraphed to the jury the judge’s contempt for the defense.”<sup>126</sup> Similarly, the prejudicial conduct of Judge Murtagh and Hoffman led to disruption in their courtrooms among other ills; the judges engaged in practices and pretrial rulings that were streamlined toward conviction.<sup>127</sup>

By contrast, Judge Keith had engendered great respect among the lawyers by exhibiting his overriding sense of fairness so lawyers knew that cases in his courtroom would be handled well.<sup>128</sup> As William Kunstler, famed lawyer in the Chicago Eight trial, said:

In Chicago, where Judge Hoffman turned off and didn’t want to deal with anything and the marshals in the courtroom were often confrontational, the defendants reacted accordingly. But the White Panther case was very different. I am often asked how judges can stop disruptive trials. One answer is to have more judges like Damon Keith. On the first day of trial, he called the prosecutors and defense lawyers into his chambers for a conference; he served, as I recall, very delicious buns and coffee. He broadly hinted to Len [Weinglass] and me that he did not expect this trial to be similar to Chicago. We assured him that

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122. See Emily Gold LaGratta & Phil Bowen, *To Be Fair: Procedural Fairness in Courts*, CRIM. JUST. ALLIANCE (Nov. 2014), <https://justiceinnovation.org/publications/be-fair-procedural-fairness-courts> (stating that “procedural fairness” refers to practices and procedures for courts to be “respectful, neutral, easy to understand and give people involved in the case have [sic] a voice, they can build trust in the law”).

123. DORSEN & FRIEDMAN, *supra* note 1, at 193.

124. *Id.*

125. *Id.* at 201–02.

126. *United States v. Dellinger*, 472 F.2d 340, 387 (7th Cir. 1972).

127. See KEMPTON, *supra* note 7, at 93–95.

128. Lefcourt, *supra* note 5; Lefcourt, *supra* note 96; Bender, *supra* note 94.

unless we had the same type of provocations that permeated the Chicago trial, we didn't expect any difficulties.<sup>129</sup>

One fundamental question from the Keith cases and from the Chicago Eight and Panther Twenty-One cases is: Why, in an adversary system, does the judiciary often exhibit an unbalanced trust in one party to a case—the government, particularly in highly charged political cases? It is crucial that “[j]udges and prosecutors . . . have a better understanding of the sense of unfairness or outrage that many representatives of political outgroups feel when the criminal law is invoked against them for what they view as their political opposition to the government.”<sup>130</sup> It is generous to note that Judges Hoffman and Murtagh lacked that perspective. Judge Keith, on the other hand, understood that sense of outrage and unfairness and was able not only to control his courtroom, but to embody the best of judicial independence. Among other virtues, Judge Keith was unwilling to treat the government's arguments with more deference than those of the defense. This is unusual. Judicial unbalanced trust in one party—the government—is all too common especially in the cases that do not receive extensive publicity.

Perhaps, at least after Judge Keith's decisions and the fallout from Watergate, some judges became more skeptical about blanket acceptance of various government assertions. Increased judicial independence and more equal treatment of parties in criminal cases is claimed to have grown from the 1970s electronic surveillance cases at least for some period of time.<sup>131</sup>

Some judges may have learned this lesson from Judge Keith, but anecdotal reports suggest otherwise. Many judges, particularly federal judges, are former United States attorneys and instinctively trust their former office's lawyers more than they trust lawyers for the defense. Compounding the affinity with former colleagues, cognitive bias among judges also plays a significant role in what is perceived as unequal treatment. Many judges, despite a presumption of innocence in criminal cases, expect that the government would not indict a case without operating lawfully and within the bounds of ethical rules and norms. Judges rely upon the accepted premise that the government has sufficient lawfully-obtained evidence to prove guilt beyond a reasonable doubt. Consequently, those judges are less likely to question actions and statements of government lawyers.

But perhaps the most fundamental question comparing these jurists is

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129. WILLIAM KUNSTLER, *MY LIFE AS A RADICAL LAWYER* 205 (1994).

130. DORSEN & FRIEDMAN, *supra* note 1, at 89.

131. Lefcourt, *supra* note 96.



beyond the issue of courtroom control. The more significant one is the courage of a judge in a highly politicized climate to question the actions of the government, notably where the court's conduct is carefully scrutinized in the press and by the public.<sup>132</sup>

Historical context is important, and the analogue to the current condition is overwhelming. Nixon was elected on a carefully crafted platform of a "war on crime" and a "Southern Strategy," designed to appeal to the Southern former democrats. He was deeply paranoid about the antiwar new left and the rising black militancy. He made it clear to his underlings that he was not going to let "them" do to him what they had done to L.B.J. Besides these motives, he was deeply committed to expanding executive power.<sup>133</sup>

As William Bender, counsel in *United States v. Ayers* notes:

For a single federal judge to stand up to these forces and to adhere to basic constitutional values is nothing short of remarkable, especially given the governmental disapprobation and the political blow back. Some of the press clippings and letters to the Judge certainly support this. This was judicial courage at its best. It would have been so easy for him to duck and avoid the showdowns in both cases.<sup>134</sup>

Is Judge Keith an anomaly on the bench? How does one explain his principled, courageous and courteous conduct? While explanations for judicial conduct are complex, Judge Jerome Frank noted that "the personality of the judge is the pivotal factor in law administration" and that his "political, economic and moral biases" affect almost all of his decisions."<sup>135</sup>

Judge Keith, [a prominent African American judge], credits his judicial vision [to his mentors and] to his student days at Howard. There, in the company of Justice Marshall, Dean Houston, and many others, Judge Keith came to accept the Constitution as a living document, which he believes offers insight, and even prescription, for correcting societal wrongs even if Congress is too weak or malevolent to act.<sup>136</sup>

Many have extolled Judge Keith's virtues, his remarkable history of significant accomplishments in law and in life that changed the course of the United States. As the former president of Wayne State University

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132. I have explored this issue in Ellen Yaroshefsky, *Aspiring to a Model of the Engaged Judge*, 74 N.Y.U. ANN. SURV. L. 393 (2019).

133. See DONNER, *supra* note 23, at 247.

134. E-mails from William Bender (June 7, 2018) (on file with author); E-mails from William Bender (June 13, 2018) (on file with author); Bender, *supra* note 94.

135. DORSEN & FRIEDMAN, *supra* note 1, at 85; see generally WHAT'S LAW GOT TO DO WITH IT? (Charles Gardner Geyh ed., 2011) (containing essays by legal scholars and political scientists examining judicial conduct).

136. Cook, *supra* note 21, at 1175–76 (footnote omitted). See also HAMMER & COLEMAN, *supra* note 21.

wrote in the introduction to the book about Judge Keith's life,

Judge Damon Keith is a giant. Every chapter of his life—as an active citizen, a prominent lawyer, a celebrated judge, a profound thinker, and a bold leader—is an eloquent testament to his passion for equality and for his willingness to commit that passion to action. . . . Judge Keith built a legacy as a fair and tenacious jurist unwilling to compromise on our country's most precious ideal—liberty and justice for *all* people.<sup>137</sup>

As Professor Blanche Cook noted:

Judge Keith has reached beyond the subjectivity of his own life to create a more equitable world, particularly in situations involving governmental abuse of power against its citizens and his adherence to “equal justice under the law.” Even in the face of peril and political pressure from the office of the presidency, Judge Keith . . . protect[ed] the rights of every citizen from the government's uninvited ear.<sup>138</sup>

Justice Stephen Breyer, in a tribute to Judge Keith said,

I cannot tell you just where, in his background, he learned to combine so effectively “head” and “heart.” Perhaps that ability reflects, in part, his own early experiences as the son of a Ford foundry worker, where he learned, as he put it, about an auto worker's need “to drag his sore bones out of bed on a freezing January day to go off and feed his family.” Perhaps, too, it reflects his experience of the evils of segregation.<sup>139</sup>

Judges with backgrounds such as Judge Keith's, whose judicial views flow from upholding a living constitution, are not among the scores of federal judges Donald Trump has appointed.<sup>140</sup> It may be that judges akin

137. HAMMER & COLEMAN, *supra* note 21, at vii. The Walter Reuther Library at Wayne State Law School has a Damon Keith collection. Its description of Judge Keith is:

Judge Damon Keith served in the U.S. District Court for the Eastern District of Michigan, and in the U.S. Court of Appeals for the Sixth Circuit. Judge Keith delivered several landmark rulings in civil rights and civil liberties cases and played an active role in various civic, cultural and educational associations, including the Detroit YMCA, the United Negro College Fund, and the Detroit National Association for the Advancement of Colored People (NAACP). He is the recipient of the NAACP's Springarn Medal, the American Bar Association's Thurgood Marshall Award, the Edward J. Devitt Award for Distinguished Service to Justice, and over thirty honorary degrees. Judge Keith's papers document important milestones in his career, his precedent-setting judicial decisions, his role in ensuring equal justice for all Americans, and the many honors and awards bestowed upon him for his dedication to civil rights and to the City of Detroit.

Drice, *Damon J. Keith Papers*, WAYNE ST. U. (Sept. 3, 2010), <https://reuther.wayne.edu/node/2678>.

138. Cook, *supra* note 21, at 1166. *See generally id.* (discussing a range of affirmative action, civil rights cases as well as *United States v. U.S. District Court*).

139. Stephen Breyer, *Tribute*, 42 WAYNE L. REV. i (1996) (cited in Cook, *supra* note 21, at 1174 n.39).

140. A reorientation of the courts has begun. *See* Edward Whelan, *Trump's Stellar Judges*, NAT. REV. (Jan. 22, 2018, 5:00 AM), <https://www.nationalreview.com/magazine/2018/01/22/trumps-stellar-judicial-nominations/>; *see also* Joseph P. Williams, *The Judicial Puppet Master*, U.S. NEWS

to Damon Keith will become more anomalous on the federal bench, but there remains hope, at least on the state level, and to some extent on the federal one, that his judicial philosophy, courage, and precedent will serve as a beacon and inspiration to other jurists.

Overall, judges need to engage in greater reflection about their role, their implicit biases, and their practices and sometimes take stances outside their comfort zone. Judges should be exceedingly capable of dodging controversy. They should judge in the narrowest sense, and this thoughtfulness may provide the judicial branch with improved reputation and stronger ability to take action when necessary.<sup>141</sup> Judges must move beyond such passive action and become more engaged judges to uphold justice.<sup>142</sup>

#### CONCLUSION

Judge Keith's conduct in *United States v. Sinclair* and *United States v. Ayers* is testament to the importance of an independent judiciary.

Keith's action . . . is a prime example of an independent federal judge interposing his authority between an executive action and the general citizenry. As the public now knows through the various Watergate-released disclosures, the Nixon administration had grandiose schemes for surveillance of domestic "enemies," political and otherwise; warrantless wiretapping of the sort used against [one of the plaintiffs in *Sinclair*] was a key weapon. But Judge Damon Keith, a jurist not answerable to a presidency which likened itself to a "sovereign" had the courage to say "no" . . . .<sup>143</sup>

The strength of the judiciary is rooted in the courage and independence displayed by Judge Damon Keith.

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(Oct. 27, 2017, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2017-10-27/leonard-leo-is-calling-the-shots-on-judicial-appointments>.

141. Nancy Gertner, *Opinions I Should Have Written*, 110 N.W. L. REV. 423, 432 (2016).

142. Yaroshefsky, *supra* note 132.

143. GOULDEN, *supra* note 56, at 351.