

How Much is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act

Ciara Torres-Spelliscy*

INTRODUCTION

Unlike Athena who sprung fully formed from Zeus's head, federal laws are generated over time by historical and political pressures. The Federal Election Campaign Act (FECA 74)¹ and the Foreign Corrupt Practices Act (FCPA)² were products of the byzantine Watergate scandal.³ These federal statutes grew out of a dark chapter in American history when the Nixon Administration peddled policy outcomes to rich individuals and corporations willing to spend staggering sums. FECA 74 attempted to

* Ciara Torres-Spelliscy is an Assistant Professor at Stetson University College of Law where she teaches Constitutional Law, Election Law, and Corporate Governance. She would like to thank her Stetson research assistants Max Holzbaur, Andrew Graf, and Jordan Sager for their help investigating this slice of American history. She would also like to thank Former Chief Counsel to the Church Committee, F.A.O. Schwarz Jr., President of Democracy 21, Fred Wertheimer, Executive Director of the American Judicature Society, Seth Andersen, and Professor Nicholas Stephanopoulos for reading an earlier draft of this piece and providing invaluable comments. Finally she would like to thank Glynn Torres-Spelliscy whose insights about the FCPA inspired her.

¹ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. § 431 et seq. (1976)); see also LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* 14 (1996) ("Other than the Nixon and Agnew resignations, the most significant result of Watergate was campaign finance reform."); Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611, 684 ("In 1974, as part of a major post-Watergate campaign reform effort, Congress passed the Federal Election Campaign Act Amendments.").

² Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1, et seq. (1982)); see also Jennifer S. Martin, *The House of Mouse and Beyond: Assessing the SEC's Efforts to Regulate Executive Compensation*, 32 DEL. J. CORP. L. 481, 529 (2007) ("[T]he Foreign Corrupt Practices Act (FCPA) takes a substantive-based regulatory approach to curb specific corporate conduct. Congress, in the post-Watergate period when concern over corruption was high, amended the securities laws to involve the SEC in corporate governance.").

³ Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 348-59 (2000) (arguing that the Watergate scandal set in motion a chain of investigations that eventually led to the adoption of the Foreign Corrupt Practices Act); J. Lee Johnson, *A Global Economy and the Foreign Corrupt Practices Act: Some Facts Worth Knowing*, 63 MO. L. REV. 979, 980 (1998) (stating that "[t]he American disaster known as Watergate eventually led to the Foreign Corrupt Practices Act").

regulate campaign finance in domestic federal elections,⁴ while the FCPA bars bribery of foreign officials (including through campaign donations).⁵

The two statutes have had decidedly different fates. FECA 74 got its wings clipped by the Supreme Court in 1976 in *Buckley v. Valeo* and was never fully implemented as written.⁶ Meanwhile, the FCPA was allowed to flourish and remains a powerful anti-corruption tool abroad.⁷ Back at home, the U.S. has continued to struggle with how to regulate money in politics. The current Supreme Court apparently tolerates only a bare minimum of regulation. Reminding the Justices and ourselves why we have these reforms in the first place is both fitting and proper. This is also a good opportunity to re-examine these issues in light of the new evidence in Nixon's 1975 grand jury testimony, which was released in late 2011.⁸

Voluminous tomes have already been written on the Watergate scandal, and I cannot, in so compressed a space, do justice to the utter complexity of events. Rather, I can hone in on a few exemplars to elucidate broader points. And so I will start with one of the more infamous quotes from Nixon's own tapes. When White House Counsel John Dean told President Richard Milhous Nixon that there was a "cancer on the presidency," and that more hush money would be needed to keep the cover-up of the Watergate break-in secret, Nixon responded without much hesitation that he knew where he could get a million dollars in cash.⁹ The President was used to having vast resources at his fingertips due to the

⁴ See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. § 431 et seq. (1976)).

⁵ See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1, et seq. (1982)).

⁶ Joel Gora, *Don't Feed the Alligators: Government Funding of Political Speech and the Unyielding Vigilance of the First Amendment*, 2011 CATO SUP. CT. REV. 81, 87 (2011) ("Almost all questions of the constitutional validity of campaign finance rules trace back to the fountainhead of *Buckley v. Valeo*. *Buckley* involved an across-the-board challenge to the sweeping changes in federal campaign finance law wrought by the Federal Election Campaign Act of 1971 and its post-Watergate amendments in 1974.")

⁷ John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 25, 26 (2012) ("In the last few years, however, the number of FCPA prosecutions has skyrocketed and the payment of hundreds of millions of dollars in penalties or fines has been the routine, almost commonplace result of such investigations."); Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 417 (2010) ("By many measures, 2010 was a banner year for FCPA investigations. Ongoing FCPA investigations implicate numerous Fortune 500 and other well-known companies . . .").

⁸ See Adam Nagourney & Scott Shane, *Newly Released Transcripts Show a Bitter and Cynical Nixon in '75*, N.Y. TIMES, Nov. 10, 2011, <http://www.nytimes.com/2011/11/11/us/newly-released-transcripts-show-a-combative-richard-nixon.html?pagewanted=all>.

⁹ President Richard M. Nixon Watergate Tapes, "Cancer on the Presidency" with John Dean & H.R. Haldeman, HISTORY AND POLITICS OUTLOUD, Mar. 21, 1973, 10:12 AM to 11:55 AM, <http://www.hpol.org/transcript.php?id=95> (quoting John Dean, "We have a cancer within, close to the Presidency, that's growing. It's growing daily. It's compounding, it grows geometrically now because it compounds itself. . . . (1) [W]e're being blackmailed; (2) uh, people are going to start perjuring themselves [sic] very quickly that have not had to perjure themselves to protect other people and the like."); *id.* (quoting President Nixon, "What I mean is, you could, you could get a million dollars. And you could get it in cash. I, I know where it could be gotten.").

House tape recorders were humming along at all hours of the day.¹⁵ Like the Blagojevich tapes, the Nixon tapes reveal quid pro quo corruption. Without the Watergate investigation, the public may have never known about these tapes.

The word “Watergate” itself is an instant Rorschach test. For some, “Watergate” is one of DC’s most recognizable edifices.¹⁶ For others, “Watergate” is a synonym for the Nixon Plumbers’ DNC burglaries,¹⁷ the White House cover-up,¹⁸ the Senate hearings,¹⁹ or the first presidential resignation in U.S. history.²⁰ When I use the word “Watergate,” as a campaign finance lawyer, I mean the stunning examples of quid pro quo corruption in the Nixon White House. Lastly, when I state my fear that we are poised for a second Watergate, I mean an epic money-in-politics scandal.²¹

Forty years after Watergate, the money-in-politics problem may be even worse than in Nixon’s day. Corporations could not spend money in favor of Nixon (directly or indirectly) without breaking federal law. After *Citizens United v. FEC*,²² publicly traded companies can legally purchase an unlimited supply of political ads and they can dump millions of dollars at a time into Super PACs to support (or oppose) federal candidates, including a sitting President.²³

¹⁵ See CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* 331 (1974) (“Nixon bugged himself.”); *U.S. v. Nixon*, 418 U.S. 683, 683–84 (1974) (requiring Nixon to release the Watergate tapes); STANLEY I. KUTLER, *ABUSE OF POWER*, 637–38 (1997) (“Butterfield . . . acknowledged that ‘there is tape in the Oval Office.’”).

¹⁶ See generally Drew Lindsay, *The Watergate: The Building That Changed Washington*, WASHINGTONIAN, Oct. 1, 2005, available at <http://www.washingtonian.com/articles/people/1754.html> (discussing the history of the Watergate building complex).

¹⁷ Alfred E. Lewis, *5 Held in Plot to Bug Democrats’ Office Here*, WASH. POST, June 18, 1972, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2002/05/31/AR2005111001227.html>; Richard L. Hasen, *The Nine Lives of Buckley v. Valeo* in *FIRST AMENDMENT STORIES* 351 (Richard W. Garnett & Andrew Koppelman eds., 2012) (“The secret cash allowed for all kinds of out-of-sight dirty tricks, such as breaking into offices of rivals, planting spies with opposition campaigns, and attempts at outright bribery of officials.”).

¹⁸ Karen De Witt, *Watergate, Then and Now*, N.Y. TIMES, June 15, 1992, at A1 available at <http://www.nytimes.com/1992/06/15/us/watergate-then-and-now-who-was-who-in-the-cover-up-and-uncovering-of-watergate.html?pagewanted=all&src=pm>.

¹⁹ *Watergate Leaks Lead to Open Hearings*, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/Watergate_Investigation.htm (last visited April 2, 2012).

²⁰ *Richard M. Nixon*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/richardnixon> (last visited April 2, 2012).

²¹ I am not alone in worrying about a second Watergate. See Bruce Freed & Karl Sandstrom, *Dangerous Terrain: How to Manage Corporate Political Spending in a Risky New Environment*, CONF. BOARD REV., Winter 2012, at 25, available at <http://www.politicalaccountability.net/ht/a/GetDocumentAction/i/6057> (“The very practices of Watergate—corporate cash being funneled secretly to a campaign—are now on full, legal display. It’s the players in the new political-money world that are shrouded in secrecy, and the full impact of that secrecy is not yet understood.”).

²² *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

²³ Super PACs are federal PACs that run independently of federal candidates and are permitted to raise unlimited money from unlimited sources, with the exception of money from a foreign person. See generally Dan Eggen & T.W. Farnam, *New ‘Super PACs’ Bringing Millions into Campaigns*, WASH. POST, Sept. 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/>

Part I of this essay will focus first on: (A) the pay-to-play culture in the Nixon White House, (B) the selling of Nixon's ambassadorships to large campaign contributors, (C) the illegal corporate campaign contributions to the Committee for the Reelection of the President (CREEP), as well as (D) international corporate political expenditures. Next, Part II of this essay will discuss two of the post-Watergate reforms that responded to these problems: Congress's expansive Foreign Corrupt Practices Act (FCPA) in 1977²⁴ and the very ambitious Federal Election Campaign Act of 1974 (also known as FECA 74).²⁵ This piece will argue that the scale of these post-Watergate reforms was justified by the magnitude of the quid pro quo corruption in the Nixon White House.²⁶ This essay will close in Part III by making the case that in 2012, in this post-*Citizens United* environment, Congress should take a similar approach and embrace both (A) securities law reforms, as well as (B) campaign finance reforms, to ensure the integrity of our democratic processes.²⁷

I. DIRTY MONEY FOR DIRTY TRICKS

Deep Throat, who we now know was the FBI's Mark Felt,²⁸ told *Washington Post* reporters Bob Woodward and Carl Bernstein, who were digging into the connection between the White House and the Watergate burglary, to follow the money trail.²⁹ The money that had paid for the

AR2010092706500.html (describing the super PAC model and its effects on campaigns); Trevor Potter, *Super PACs: How We Got Here, Where We Need to Go*, CAMPAIGN LEGAL CTR. BLOG (Dec. 2, 2011), http://www.clcblog.org/index.php?option=com_content&view=article&id=444:super-pacs-how-we-got-here-where-we-need-to-go (quoting speech by Trevor Potter regarding implications of the *Citizens United* decision and the resulting Super PACs); PUBLIC CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF *CITIZENS UNITED* ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS I (Jan. 2011), available at <http://www.citizen.org/documents/Citizens-United-20110113.pdf>. (assessing the impact of *Citizens United*).

²⁴ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1, et seq. (1982)).

²⁵ See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. § 431 et seq. (1976)).

²⁶ See SENATE SELECT REPORT, *supra* note 13, at XXIII (“[This report] is also an appraisal of the events that led to the burglary and its sordid aftermath, an aftermath characterized by corruption, fraud, and abuse of official power.”).

²⁷ For related works by this author see generally Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the US Should Adopt the British Approach*, RISK MANAGEMENT AND CORPORATE GOVERNANCE 391 (Routledge 2011) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474421; Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders A Voice*, BRENNAN CTR. FOR JUSTICE 5-6 (2010), available at http://brennan.3cdn.net/54a676e481f019bfb8_bvm6ivakn.pdf.

²⁸ David Von Drehle, *FBI's No. 2 Was 'Deep Throat': Mark Felt Ends 30-Year Mystery of The Post's Watergate Source* WASH. POST, June 1, 2005, at A1, available at http://www.washingtonpost.com/politics/fbis-no-2-was-deep-throat-mark-felt-ends-30-year-mystery-of-the-posts-watergate-source/2012/06/04/gJQAwseRIV_story.html.

²⁹ *Ex-FBI Official: I'm 'Deep Throat'*, MSNBC.COM, June 1, 2005 8:47:37 PM ET, http://www.msnbc.msn.com/id/8047258/ns/us_news/t/ex-fbi-official-im-deep-throat/.

DNC burglary came from CREEP.³⁰ The CREEP bank accounts were flush with funds from large donors.³¹ As it turns out, the money in CREEP came from legitimate campaign contributions, illegitimate money from rich individuals seeking federal appointments, and cash from illegal and laundered corporate sources.³²

When prosecutors asked about the source of the million dollars from the “cancer on the presidency” discussion with John Dean, ex-President Nixon testified before a grand jury in 1975, “I was referring to funds we could get And what I meant . . . is I had a number of friends who are very wealthy, who if they believed it was a right kind of a cause would have contributed a million dollars, and I think I could have gotten it within a matter of a week.”³³ Some of those wealthy friends had donated extraordinarily large sums to the 1972 reelection campaign.³⁴ Enabling the particularly large contributions was a gap in the federal disclosure laws from February to April 1972.³⁵ This money was used for all sorts of dirty tricks, ranging from the sophomoric to the criminal, including the Ellsberg and Watergate break-ins.³⁶

Furthermore, Nixon had taken great pains to set up the Committee for the Reelection of the President (CREEP), as a committee separate from the Republican National Committee (RNC). This gave him greater control over the campaign funds, without the normal party discipline.³⁷ Moreover,

³⁰ BERNSTEIN & WOODWARD, *supra* note 15, at 77 (“Two of President Nixon’s top campaign officials each withdrew more than \$50,000 from a secret fund that financed the bugging of Democratic headquarters”); SENATE SELECT REPORT, *supra* note 13, at 1181 n.54 (“[T]he Watergate break-in was financed by money from the Committee to Re-Elect.”).

³¹ RICHARD REEVES, *PRESIDENT NIXON: ALONE IN THE WHITE HOUSE* 463 (First Touchstone ed., Simon & Schuster 2002) (donors to CREEP pre-April 7, 1972 included “W. Clement Stone of Combined Insurance Co., who contributed at least \$2 million; Richard Mellon Scaife, \$1 million; Arthur K. Watson of IBM, \$300,000 . . . [and] Robert Vesco of International Controls Corporation, the target of Federal fraud investigations, \$200,000 . . .”).

³² Hasen, *supra* note 17, at 351 (“Major corporations gave large sums to the Nixon campaign—the usual request was for \$100,000—despite the longstanding prohibition on corporate giving to federal candidates.”).

³³ Nixon Dep. 151, June 23, 1975 (third part), *available at* <http://www.gpo.gov/fdsys/pkg/GPO-NARA-WSPF-NIXON-GRAND-JURY-RECORDS/pdf/GPO-NARA-WSPF-NIXON-GRAND-JURY-RECORDS-21.pdf> [hereinafter Nixon Dep. (third part)].

³⁴ *Id.* at 135–36; Hasen, *supra* note 17, at 351 (“[T]he [Nixon] campaign’s disclosures revealed million-dollar contributions from some individuals, as well as millions of dollars in illegal contributions from corporations.”).

³⁵ REEVES, *supra* note 31, at 462 (“But there was no law. The Corrupt Practices Act of 1972, a compromise bill that passed both houses of Congress by huge margins and was signed into law by the President on February 7 The new law would not take effect until April 7—sixty days after the President signed it In those sixty days, the President and his committee collected more than \$20 million—almost \$2 million of it in cash—with no requirement or intention to name names and amounts.”).

³⁶ *Id.* at 369 (campaign funds paid for the break-in of Daniel Ellsberg’s psychiatrist); *id.* at 424 (campaign funds paid for other dirty tricks); Mary Ferrell Foundation, *Watergate*, <http://www.maryferrell.org/wiki/index.php/Watergate> (last visited April 20, 2012) (dirty tricks included pranks and crimes).

³⁷ SENATE SELECT REPORT, *supra* note 13, at 1213 (statement of Senator Weicker (“[T]he

the lines between campaigning and law enforcement were blurred by the fact that U.S. Attorney General John Mitchell was in charge of CREEP.³⁸ As the Senate Select Committee Report on Watergate detailed, Attorney General Mitchell “held this dual role while a number of large campaign contributors, such as the Association of Milk Producers, the Hughes Tools Co., and International Telephone & Telegraph [ITT] had important [antitrust] cases under investigation by the Justice Department.”³⁹

A. The Pay-to-Play Culture in the Nixon White House

Leon Jaworski, the Watergate Special Prosecutor who replaced Archibald Cox, had his work cut out for him in 1974. *Time Magazine* summarized the scope of his investigation including “the possible ‘sale’ of ambassadorships to large contributors; the Administration’s settlement of an antitrust suit against ITT; . . . discus[sion] [of] increased dairy supports; . . . the Watergate cover-up conspiracy; [and] the location of the tape containing an 18½ minute gap”⁴⁰ In short, the Special Prosecutor was investigating a massive pay-to-play culture as well as an attempt at the highest level of the government to hide that culture from the public.

In his 1975 grand jury testimony, former President Nixon denied participating in any pay-to-play exchanges as Commander in Chief—stating specifically:

I want to be quite categorical That has no reference to Government contracts; it has no reference whatsoever to a . . . pay-off, . . . [P]eople who had contributed [could get] invitations, for example, to the White House dinners, . . . [or] possibly . . . to go to [a] funeral”⁴¹

Thus, all that he admitted was that contributors got more access to the White House.

Despite Nixon’s sanitized memory of the day-to-day workings of his administration, evidence strongly suggests that a pay-to-play culture had taken hold in his White House.⁴² The Administration could leverage its power as the law enforcement branch to extract large campaign contributions from people and companies facing federal liabilities. Instances of pay to play included dropping federal investigations and anti-trust cases. As Richard Reeves noted, “The contributors [to CREEP] . . . included several executives and companies in trouble with the Justice

process that led to Watergate emasculated important party functions. It began with the decision to take the party’s leader, and his reelection out of the Republican Party and into an independent entity, unresponsive to the checks and balances of party politics . . . [CREEP] was a political disaster.”)

³⁸ *Id.* at 1184 (“[The] Attorney General . . . ran the President’s reelection campaign while still in office at the Justice Department.”).

³⁹ *Id.* at 1205.

⁴⁰ *Watergate: Pressing Hard for the Evidence*, TIME MAGAZINE (April 1, 1974) (internal numbering omitted).

⁴¹ Nixon Dep. (third part), *supra* note 33, at 128.

⁴² J. ANTHONY LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS 139–40 (1976).

2012]

How Much is an Ambassadorship?

69

Department or the Internal Revenue Service, or seeking government contracts.”⁴³

For example, executives from the oil company Amerada Hess gave \$250,000 to CREEP.⁴⁴ Hess was facing an investigation by the Interior Department about a refinery in the Virgin Islands.⁴⁵ According to historian J. Anthony Lukas in his book, *Nightmare*, “[s]everal weeks after the large contribution, that investigation was dropped.”⁴⁶

In another case, the Hughes Tool Co. faced antitrust problems in a deal to purchase a Las Vegas hotel and an airline.⁴⁷ Hughes gave \$100,000 to a friend of President Nixon.⁴⁸ “At the time the money was being transferred, a representative of the corporation met with the Attorney General. [And] [t]he antitrust problems were subsequently resolved.”⁴⁹

Even before President Nixon had officially secured his party’s nomination in 1972, financing the Republican convention was spearheaded by a public corporation.⁵⁰ Specifically, ITT pledged \$400,000 for the 1972 Republican National Convention. At nearly the same time, the DOJ settled an antitrust suit against ITT.⁵¹ President Nixon personally intervened in the ITT case.⁵² However, the only criminal prosecutions in the ITT matter arose out of incomplete testimony by the Attorney General Kleindienst before Congress.⁵³

The Nixon Administration also tried to tilt the executive branch into the service of the reelection effort. The Watergate Senate Select Committee’s Final Report explained that in a Cabinet meeting in 1972, Fred Malek, who served in the dual capacity as Special Assistant to Nixon and as Deputy Chief of CREEP, communicated the White House’s “plan to

⁴³ REEVES, *supra* note 31, at 463.

⁴⁴ *Id.* at 140.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ SENATE SELECT REPORT, *supra* note 13, at 1205.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ WILLIAM A. DOBROVIR ET AL., *THE OFFENSES OF RICHARD M. NIXON: A GUIDE FOR THE PEOPLE OF THE UNITED STATES OF AMERICA* 55–59 (1973).

⁵¹ *Id.* at 55 (stating that ITT pledged \$400,000 in contributions to the Republican National Convention which led to “the government’s approval of the ITT-Hartford Fire Insurance merger and settlement of two antitrust suits against ITT”); *see also* U.S. v. Int’l Tel. & Tel. Corp., 349 F. Supp. 22, 29 n.8 (D. Conn. 1972), *aff’d sub nom.*, Nader v. U.S., 410 U.S. 919 (1973).

⁵² DOBROVIR, *supra* note 50, at 68 (stating that certain Administration memos “directly involve” President Nixon, and alluded that the President and Attorney General Mitchell had “agreed upon ends” in the resolution of the ITT case).

⁵³ SENATE SELECT REPORT, *supra* note 13, at 1175 (“The [ITT] suit was dropped on Presidential order, but when the Attorney General was questioned about the President’s role by a Senate committee in March, he lied.”); WATERGATE SPECIAL PROSECUTION FORCE REPORT 60 (Oct. 1975) (“Former Attorney General Richard Kleindienst pleaded guilty on May 16, 1974, to a charge of failing to give accurate testimony at his 1972 confirmation hearings, regarding White House influence on the anti-trust suit. . . . California Lieutenant Governor Ed Reinecke was convicted after trial on July 27, 1974, of one count of perjury in connection with his testimony at the same hearings. . . . [T]here was insufficient evidence to allow the initiation of [another] criminal case.”).

make the Departments more responsive to the political needs of the administration.”⁵⁴ The Report went on to explain:

It was this program that led to evidence of *quid pro quos* for the contracts from the Department of Health, Education, and Welfare, the Department of Housing and Urban Development, the Department of Labor, the Department of Interior, the Office of Economic Opportunity, the Office of Minority Business Enterprise, the Federal Home Loan Mortgage Association, the General Services Administration, ACTION, and the Veterans’ Administration.⁵⁵

This all flew in the face of the Hatch Act, which bars politicizing the government.⁵⁶ As the Senate Select Committee Report rued, “So much for our independent Departments and Agencies.”⁵⁷

President Nixon personally profited from pay to play. Besides funding the Plumbers’ various escapades for his political benefit, Nixon’s household also benefited from the money in his campaign coffers.⁵⁸ For example, he purchased diamond earrings for his wife Pat for her sixtieth birthday using campaign funds.⁵⁹

B. Selling Ambassadorships

Ironically, as a presidential candidate in 1968, Nixon was elected on a “law and order” platform.⁶⁰ Today, his name is synonymous with illegality and scandal.⁶¹ A distasteful detail revealed in the televised Watergate investigations by the Senate Select Committee⁶² was that rich individuals seeking U.S. ambassadorships paid for the privilege of appointment.⁶³ In

⁵⁴ SENATE SELECT REPORT, *supra* note 13, at 1210.

⁵⁵ *Id.*

⁵⁶ The Hatch Act, 5 U.S.C. §§ 7321–7326.

⁵⁷ SENATE SELECT REPORT, *supra* note 13, at 1211.

⁵⁸ LUKAS, *supra* note 42, at 366.

⁵⁹ *Id.* at 367 (money for the earrings was from Nixon’s 1968 campaign).

⁶⁰ MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 296 (1996).

⁶¹ John Herbers, *In Three Decades, Nixon Tasted Crisis and Defeat, Victory, Ruin and Revival*, N.Y. TIMES, April 24, 1994, at 30, available at <http://www.nytimes.com/learning/general/onthisday/bday/0109.html> (“So strong was the stigma of the Watergate scandals that it tended to obscure Mr. Nixon’s accomplishments.”); see also Hunter S. Thompson, *He Was a Crook*, ROLLING STONE, June 16, 1994, available at <http://www.theatlantic.com/magazine/archive/1994/07/he-was-a-crook/8699/> (“He was not only a crook but a fool. Two years after he quit, he told a TV journalist that ‘if the president does it, it can’t be illegal.’”).

⁶² The fact that the Watergate hearings were televised meant that the general public could tune in to witness history unfold. Among the viewers were Supreme Court Justices. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 345 (First Simon & Schuster paperback ed., 2005) (“The damaging news from the Senate Watergate hearings blared forth day after day from a portable black-and-white television set perched on a table in [Justice] Stewart’s outer office. . . . Occasionally, another Justice would stop by to savor or deplore the latest revelation.”).

⁶³ See Bruce D. La Pierre, *Campaign Contribution Limits: Pandering to Public Fears about “Big Money” and Protecting Incumbents*, 52 ADMIN. L. REV. 687, 692 n.29 (2000) (noting that President Nixon received contributions of three million dollars from persons seeking ambassadorial appointments, and a contribution of \$100,000 from an ambassador seeking a more prestigious posting);

the run up to the 1972 election, Herbert Kalmbach, President Nixon's personal attorney, relayed Nixon's fundraising instructions, one of which was, "[a]nybody who wants to be an ambassador must give at least \$250,000."⁶⁴ This is a stunning amount to demand a donor to produce, given that \$250,000 in 1972 would be equal to nearly \$1.4 million in 2012 dollars.⁶⁵

Concerning the matter of Nixon's Ambassadors, the Senate Select Committee's final report highlighted this juxtaposition:

In a February 25, 1974, news conference, President Nixon denied that his administration was involved in the practice of brokering ambassadorships. He declared, "Ambassadorships have not been for sale and I would not approve an ambassadorship unless the man or woman was qualified clearly apart from his contribution." That very day, his personal attorney and one of his principal fundraisers, Herbert Kalmbach, became the first person in recent times to be convicted for "selling an ambassadorship," in violation of title 18, United States Code, section 600.⁶⁶

Mr. Kalmbach was convicted of promising the U.S. Ambassador to Trinidad, J. Fife Symington, a more prestigious European ambassadorship in exchange for \$100,000 in campaign donations.⁶⁷ Mr. Kalmbach served six months in jail for this behavior.⁶⁸

Apparently, Mr. Symington was not alone in giving large campaign donations with the expectation that an ambassadorial appointment would be the reward.⁶⁹ The Ambassador to France, Arthur Watson, gave \$300,000 to CREEP, and the Ambassador to Britain, Walter Annenberg, gave \$250,000, before their respective appointments.⁷⁰

The Luxembourg ambassadorship was purchased by Dr. Ruth B. Farkas.⁷¹ Originally, she considered being the Ambassador of Costa Rica in 1971.⁷² The price for the post Mr. Kalmbach suggested was \$250,000.⁷³ Dr. Farkas's response to this price was, "Well, you know, I am interested in Europe, I think, and isn't two hundred and fifty thousand dollars an awful

Farrell, *supra* note 10 (noting that President Nixon followed the "traditional American practice" of naming rich donors to luxury ambassadorships such as Luxembourg and El Salvador).

⁶⁴ REEVES, *supra* note 31, at 462.

⁶⁵ *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited April 2, 2012).

⁶⁶ SENATE SELECT REPORT, *supra* note 13, at 492.

⁶⁷ *Id.* at 492–93.

⁶⁸ LUKAS, *supra* note 42, at 135; KUTLER, *supra* note 11, at 575 ("Herbert Kalmbach pleaded guilty in February 1974 to several campaign violations, and in return for his testimony, all other charges were dropped.")

⁶⁹ See Senate Select Report, *supra* note 13, at 494.

⁷⁰ *Id.*

⁷¹ Lawrence Van Gelder, *Ruth Farkas, 89, Nixon's Ambassador to Luxembourg, Dies*, N.Y. TIMES, Oct. 22, 1996, available at <http://www.nytimes.com/1996/10/22/nyregion/ruth-farkas-89-nixon-s-ambassador-to-luxembourg-dies.html?src=pm> (quoting Senator Gale W. McGee of Wyoming, "The money—that's par for the course. It used to be a cheaper price—but that's Nixon inflation.")

⁷² LUKAS, *supra* note 42, at 136–37.

⁷³ *Id.* at 137.

lot of money for Costa Rica?”⁷⁴ Later the Farkas family was offered the Luxembourg post for \$300,000 to which Mr. Farkas, Ruth’s husband, reportedly replied, “Done!”⁷⁵ In August of 1972, the White House sent a letter of intent to the Senate indicating Dr. Farkas was up for the Luxembourg post, pending FBI clearance.⁷⁶ In September of 1972 she started making payments.⁷⁷ Six days after her final installment of the \$300,000 payment, her nomination was delivered to the Senate in February 1973.⁷⁸

The recently released grand jury testimony of former President Nixon does not clarify exactly what happened with his ambassadorial appointments. In his testimony, although he pointed fingers at the bad motives of Democratic presidents,⁷⁹ Nixon flatly denied under oath that he ever sold an ambassadorship.⁸⁰ While he expressed his disdain for career ambassadors,⁸¹ he did admit he gave “top consideration to major financial contributors mainly for the reason that big contributors in many instances make better ambassadors, particularly where American economic interests are involved.”⁸² Prosecutors asked Nixon about five specific donors and their ambassadorial ambitions. In response, Nixon related in his testimony that, “[t]he only awareness that I have had with regard to Mr. [Kingdon] Gould or any of the five⁸³ that you mentioned or any ambassadors at all is the understanding that if a contribution be made that they would be given consideration for a post, but that no absolute commitment could be made.”⁸⁴

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*; see also SENATE SELECT REPORT, *supra* note 13, at 494 (quoting Senator Pell, “Benelux seems to be the most expensive place on which to be appointed because Mrs. Farkas, who is ambassador to Luxembourg, and she wasn’t appointed until her contribution had been put to the barrelhead even though an agreement had been received 6 or 8 months earlier, contributed \$300,000 . . .”).

⁷⁹ Nixon Dep. 25–26, June 23, 1975 (first part), available at <http://www.gpo.gov/8A20EAB6-7D53-4113-A75D-725544A2B97E/FinalDownload/DownloadId-C65DFDED43D49F1B5DC571FFDA6995E9/8A20EAB6-7D53-4113-A75D-725544A2B97E/fdsys/pkg/GPO-NARA-WSPF-NIXON-GRAND-JURY-RECORDS/pdf/GPO-NARA-WSPF-NIXON-GRAND-JURY-RECORDS-19.pdf> (Nixon testifying, “Bill Bullitt, for example, was probably the best ambassador to Russia . . . Now he didn’t get his job because he happened to shave the top of his head. He got his job because he contributed a half million dollars to Mr. [Franklin] Roosevelt’s campaign. . . . Pearl Mesta wasn’t sent to Luxembourg because she had big bosoms. Pearl Mesta went to Luxembourg because she made a good contribution [to Truman.]” [hereinafter Nixon Dep. (first part)]).

⁸⁰ *Id.* at 27 (“I can’t believe that I would have ever have made any commitment to him or anyone else to be an ambassador for a financial contribution.”).

⁸¹ *Id.* at 25 (“As far as career ambassadors, most of them are a bunch of eunuchs, and I don’t mean that in a physical sense, but I meant it in an emotional sense, in a mental sense.”).

⁸² *Id.* at 35.

⁸³ Five here refers to the following five individuals Ruth Farkas, J. Fife Symington, Jr., Vincent deRoulet, Cornelius V. Whitney and Kingdon Gould, Jr. *Id.* at 6.

⁸⁴ *Id.* at 53.

2012]

How Much is an Ambassadorship?

73

The closest Nixon comes to admitting any impropriety in his grand jury testimony was the following statement in which he explained why certain large contributions were returned to contributors when an ambassadorship was not granted:

[If] financial contributors . . . felt they had a commitment and we couldn't keep it, [we'd] return their money . . . [S]ome over-zealous person may have used the word "commitment," may have even used the words, "we've got the deal made" . . . and [if] we were unable to make an appointment . . . I felt the only honorable thing to do was to return the contribution . . .⁸⁵

Here, Nixon comes perilously close to saying that if the White House could not produce the desired quo, then they gave back the donor's quid.

The Senate Select Committee investigating Watergate said of the Nixon ambassadorships: "[O]ver \$1.8 million in Presidential campaign contributions can be attributed in whole, or in part, to persons holding ambassadorial appointments . . . [And] [s]ix large contributors, who gave an aggregate of over \$3 million, appear to have been actively seeking such appointments at the time of their contributions."⁸⁶ The Watergate Special Prosecutor did not prosecute any of the Nixon Ambassadors, citing an inability to prove a prior quid pro quo arrangement.⁸⁷

The matter of selling ambassadorships was brought up at oral argument before the Supreme Court in *Buckley v. Valeo*, by Deputy Solicitor General Daniel M. Friedman:

There's no need to go into any detail with that sorry and sordid story [of the 1972 election] . . . It's a matter of public knowledge. The huge campaign contributions. The gifts from people who wanted to be ambassadors. The campaign specific large contributions [done] with anticipation of government actions, such as the milk producers. The large number of corporate officials who were convicted and many of whom pleaded guilty to illegal campaign contributions.⁸⁸

Even though Mr. Friedman spoke to the Supreme Court Justices as if all of them in the room were painfully aware of the corruption of the Nixon White House, by the time that the actual *Buckley* Supreme Court opinion was written, the selling of ambassadorships and the illegal corporate campaign contributions were nowhere to be found in the text of the

⁸⁵ *Id.* at 46.

⁸⁶ SENATE SELECT REPORT, *supra* note 13, at 494.

⁸⁷ WATERGATE SPECIAL PROSECUTION FORCE REPORT, *supra* note 53, at 78 ("Although contributors of large campaign sums obviously received Administration responses to their desires to serve as ambassadors, a crime is not proved unless the prosecution can show a prior quid pro quo arrangement, i.e., a prior commitment of support for the position in exchange for a forthcoming contribution. Such proof is available only if one of the participants in such a conversation admits the express commitment. However, each official and fundraiser involved denied having made promises of appointments and WSPF was unable to prove the contrary.")

⁸⁸ Oral Argument of Daniel Friedman at 56:29–57:09, *Buckley v. Valeo*, 424 U.S. 1 (No. 75-436), available at http://www.oyez.org/cases/1970-1979/1975/1975_75_436.

decision.⁸⁹ This silence in the *Buckley* Supreme Court decision has left a knowledge gap for lawyers and lay persons alike who did not experience Watergate firsthand. All the *Buckley* Supreme Court opinion explained is that something sinister happened in the 1972 election without elaboration:

To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.⁹⁰

Thus, *Buckley*, the seminal post-Watergate case, inexplicably omits these key facts of quid pro quo corruption.⁹¹

C. Illegal Corporate Contributions to CREEP

On top of selling ambassadorships, which was illegal under 18 U.S.C. § 600,⁹² another type of fundraising in the Nixon reelection campaign was equally illegal under 18 U.S.C. § 610.⁹³ Corporations at the time of the 1972 election could not give a direct contribution to federal candidates for office because of a very old federal ban called the Tillman Act of 1907.⁹⁴ This ban is still in effect, even after *Citizens United*,⁹⁵ in light of a 2003 Supreme Court case called *Beaumont*.⁹⁶

⁸⁹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁹⁰ *Id.* at 26–27.

⁹¹ *Id.* at 27 (“Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”).

⁹² 18 U.S.C. § 600 (1970) (“Whoever, directly or indirectly, promises any employment, position, work, compensation, or other benefit, provided for or made possible in whole or in part by any Act of Congress, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in any election, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.”).

⁹³ 18 U.S.C. § 610 (1970) (“It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office . . .”).

⁹⁴ The Tillman Act, Pub. L. No. 36, 420 Stat. 864 (1907); see *United States v. U.S. Brewers Ass’n*, 239 F. 163, 168 (W.D. Pa. 1916) (upholding the Tillman Act and finding, “[t]hese artificial creatures [e.g. corporations] are not citizens of the United States, and so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed”).

⁹⁵ There is one lower court case post-*Citizens United* which held that the Tillman Act could not be used in that particular case. *U.S. v. Danielczyk*, 791 F. Supp. 2d 513, 519 (E.D. Va. 2011) (holding the federal Tillman Act’s ban on corporate donations unconstitutional as applied to a specific corporation). The *Danielczyk* case is currently on appeal.

⁹⁶ *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 154 (2003) (explaining “the [corporate contribution] ban has always done further duty in protecting ‘the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.’”) (internal citations omitted); *id.* at 163 (“The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the Government regulate campaign activity through registration and disclosure . . .”).

So then, as now, corporations were (and are) legally banned from giving corporate treasury funds to a federal candidate, including a sitting President seeking funds for his reelection. But this did not stop those in charge of CREEP from seeking illegal corporate contributions. The reason corporate officers gave corporate money to the President's reelection campaign was to "avoid possible retaliation by the Nixon administration."⁹⁷ According to some of the corporate executives who testified before the Senate Select Committee investigating Watergate, the fundraising by CREEP was the equivalent of a shake down by a mobster—pay up or else.⁹⁸ Since many of the companies in question had matters pending before federal regulators, they paid when asked. As George Spater⁹⁹ of American Airlines testified:

There were two aspects: would you get something if you gave it, or would you be prevented from getting something if you didn't give it? . . . Most contributions from the business community are not volunteered to seek a competitive advantage but are made in response to pressure, for fear of the competitive disadvantage that might result if they are not made . . .¹⁰⁰

And so pay American Airlines did, first monetarily,¹⁰¹ and then with a misdemeanor criminal conviction.¹⁰²

Gulf Oil's Vice President of Governmental Relations, Claude Wild, said he decided to arrange a \$50,000 contribution from Gulf Oil's general treasury funds to CREEP so that his company would not be on a "blacklist" or at the "bottom of the totem pole" when it came time for someone in Washington to return his phone calls.¹⁰³ Another corporate executive, the Chairman of Ashland Oil Co., Orin Atkins, viewed the corporate contributions to CREEP as a necessary "calling card, something that would get us in the door and make our point of view heard."¹⁰⁴

Whatever the reasons executives gave post hoc for the political contributions, the fact remained that it was illegal for corporations to contribute, thus giving to CREEP opened the payers and the payees to

⁹⁷ HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, & POLITICAL REFORM* 19 (4th ed. 1992) ("Officials of the corporations that donated [pre-Watergate] claimed they did so not to obtain favors, but to avoid possible retaliation by the Nixon administration.")

⁹⁸ See e.g., Jill Abramson, *Return of the Secret Donors*, N.Y. TIMES, Oct. 16, 2010, at K1, available at <http://www.nytimes.com/2010/10/17/weekinreview/17abramson.html?pagewanted=all> ("The Committee for the Re-Election of the President was also illegally hauling in many millions of dollars from corporations, many of which felt pressured into making contributions.")

⁹⁹ *N.O.B.C. Reports on the Results of Watergate Related Charges Against Twenty-nine Lawyers*, 62 A.B.A. J. 1337, 1337 (1976) (noting Spater was publicly admonished by the First Department of New York).

¹⁰⁰ LUKAS, *supra* note 42, at 128–29 (quoting Spater).

¹⁰¹ *Id.* at 129 ("These terrors proved compelling and American [Airlines] paid its tithe.")

¹⁰² Joseph Berger, *George A. Spater Dies at 75; Author and Airline Executive*, OBITUARY, N.Y. TIMES, June 15, 1984, at D19.

¹⁰³ SENATE SELECT REPORT, *supra* note 13, at 470.

¹⁰⁴ *Presidential Campaign Activities of 1972 Senate Resolution 60: Hearings before the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong. 5442 (1973) (quoting Orin Atkins).

liability.¹⁰⁵ The risk of this illegality was borne by shareholders in the publicly traded companies involved, who were unwittingly underwriting this behavior.¹⁰⁶ As Michael Holt argued in a piece written in the immediate aftermath of Watergate, “[f]or corporate shareholders, one of the most disturbing findings was the large number of illegal corporate campaign contributions.”¹⁰⁷

1. The Milk Man Always Rings Twice

The clearest example of quid pro quo corruption in the Nixon White House involved the dairy industry. The Associated Milk Producers Incorporated (AMPI) sought increased federal price supports in exchange for a pledge of \$2 million in contributions to CREEP.¹⁰⁸ The D.C. Circuit Court once noted: “[t]he record before Congress was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions.”¹⁰⁹ The D.C. Circuit Court also noted the subterfuge of the milk producers’ splitting up the \$2 million into many smaller contributions to avoid discovery:¹¹⁰

Since the milk producers, on legal advice, worked on a \$2,500 limit per committee, they evolved a procedure, after consultation . . . with Nixon fund raisers, to break down the \$2 million into numerous smaller contributions to hundreds of committees in various states which could then hold the money for the President’s reelection campaign, so as to permit the producers to meet independent reporting requirements without disclosure.¹¹¹

The \$2,500 contribution level was picked not only to avoid disclosure, but also to avoid triggering the IRS gift tax, which kicked in at \$3,000 at the time.¹¹²

The obfuscation nearly worked. As the Senate Select Committee’s Report detailed, “the milk producers could report the contributions [to the 100 intermediate] . . . committees, without the ultimate beneficiary, the

¹⁰⁵ 18 U.S.C. § 610 (1970).

¹⁰⁶ See JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 118 (2010) (“The hierarchical structure of corporations made it possible for a handful of decision makers to deploy those resources and combine them with the massive but underutilized capacities of their far-flung organizations. These were the preconditions for an organizational revolution that was to remake Washington in less than a decade—and, in the process, lay the critical groundwork for winner-take-all politics.”).

¹⁰⁷ Michael D. Holt, *Corporate Democracy and the Corporate Political Contribution*, 61 IOWA L. REV. 545, 545 (1975).

¹⁰⁸ REEVES, *supra* note 31, at 308–09 (“[T]he President personally traded higher federal milk production subsidies for more than \$2 million in secret campaign funds for 1972.”).

¹⁰⁹ Buckley v. Valeo, 519 F.2d 821, 839 n.37 (D.C. Cir. 1975).

¹¹⁰ *Id.* at 839 n.36 (D.C. Cir. 1975) (“Looming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports.”).

¹¹¹ *Id.* (internal citations to the SENATE SELECT REPORT omitted).

¹¹² LUKAS, *supra* note 42, at 125 (“Each [AMPI] committee was to receive only \$2,500, to take advantage of an IRS rule eliminating the gift tax for contributions under \$3,000.”).

President's campaign, being disclosed.¹¹³ And, moreover, the names of the committees were meant to be innocuous, such as the one ironically named, "Americans United for Honesty in Government."¹¹⁴

The Agriculture Department was not prepared to accede to the dairy industry's request for increased federal price supports, but President Nixon reversed the Department's decision.¹¹⁵ President Nixon's personal intervention in the milk price supports was explained by one court in the following manner:

On March 23, 1971, after a meeting with dairy organization representatives, President Nixon decided to overrule the decision of the Secretary of Agriculture and to increase price supports. In . . . a meeting held by Herbert Kalmbach at the direction of John Ehrlichman, the dairymen were informed of the likelihood of an imminent increase and of the desire that they reaffirm their \$2 million pledge.¹¹⁶

Reporter Richard Reeves suggested that in the deal with the dairy industry, "Nixon got \$2 million for charging American consumers \$100 million."¹¹⁷

Nixon's taping system picked up details of the dairy deal. John Ehrlichman, the President's Counsel, is heard to say on the tapes, "better go get ourselves a glass of milk. Drink it while it's still cheap."¹¹⁸ Then, laughter is heard on the tape.¹¹⁹ Nixon himself was informed of the deal by Charles Colson, Special Counsel to the President.¹²⁰ The head of AMPI and one of its lobbyists eventually went to prison for this conduct.¹²¹

The exchange of campaign money for milk price supports shows that contributions were given for specific governmental actions. One dairyman who participated in the deal described the reality of quid pro quo corruption from an insider's perspective:

If dairymen are to receive their fair share of the governmental financial pie that we all pay for, we must have friends in Government. I have become increasingly aware that the sincere and soft voice of the dairy farmer is no match for the jingle

¹¹³ SENATE SELECT REPORT, *supra* note 13, at 615.

¹¹⁴ *Id.* at 693.

¹¹⁵ *Id.* at 1209 ("[I]t is important to note that the legitimate functions of the Agriculture Department were circumvented and interfered with.")

¹¹⁶ *Buckley*, 519 F.2d at 839 n.36 (internal citations to the Senate Select Committee's Final Report omitted).

¹¹⁷ Peter Overby, *Illegal During Watergate, Unlimited Campaign Donations Now Fair Game*, NPR: IT'S ALL POLITICS (Nov. 16, 2011, 12:01 AM), <http://www.npr.org/blogs/itsallpolitics/2011/11/16/142314581/illegal-during-watergate-unlimited-campaign-contributions-now-fair-game> (quoting Richard Reeves); REEVES, *supra* note 31, at 309 ("Nixon asked how much the raising of the [milk] support price would cost the government. 'About \$100 million,' [Secretary of Agriculture Clifford] Hardin answered.")

¹¹⁸ LUKAS, *supra* note 42, at 121 (quoting Ehrlichman).

¹¹⁹ *Id.*

¹²⁰ SENATE SELECT REPORT, *supra* note 13, at 612–14, 616.

¹²¹ Overby, *supra* note 117 (referencing jail); see also D. Bruce La Pierre, *Campaign Contribution Limits: Pandering to Public Fears about 'Big Money' and Protecting Incumbents*, 52 ADMIN. L. REV. 687, 692 n.29 (2000) (noting a contribution of two million dollars from the dairy industry to President Nixon's re-election campaign).

of hard currencies put in the campaign funds of politicians . . . We dairymen cannot afford to overlook this kind of economic benefit. Whether we like it or not, this is the way the system works.¹²²

As it turns out, money from the dairymen paid for part of the Ellsberg break-in.¹²³ The dirty money paid for dirty tricks.

The Watergate Special Prosecutor's office investigated President Nixon on ten separate matters, including the milk price supports.¹²⁴ Because Nixon was pardoned by President Ford, the American public never learned the full extent of his Administration's illegal activities.¹²⁵

2. But Wait, There's More

What corporate donors to CREEP (other than AMPI) were getting in return for their campaign money was less clear, other than vague assurances from the White House to be helpful in pending federal matters.¹²⁶

As Senator Ervin stated in the Watergate Senate Select Committee Report:

[T]hey [the President's men] exacted enormous contributions—usually in cash—from corporate executives by impliedly implanting in their minds the impression that the making of the contributions was necessary to insure that the corporations would receive governmental favors, or avoid governmental disfavor, while President Nixon remained in the White House. A substantial portion of the contributions were made out of corporate funds in violations of a law enacted by Congress a generation ago.¹²⁷

An exemplar of these larger trends was American Airlines which “was susceptible to [] pressure [for corporate contributions] because the company had at least twenty important matters pending before various federal agencies, among them a proposed merger between American and Western airlines.”¹²⁸

American Airlines was not exceptional in giving to CREEP. All told, twenty-one companies pleaded guilty to charges alleged by Watergate special prosecutor Archibald Cox of making illegal corporate contributions

¹²² SENATE SELECT REPORT, *supra* note 13, at 671 (quoting a letter from dairyman William Powell, President of Mid-Am).

¹²³ *Id.* at 688.

¹²⁴ Michael K. McKibbin, *On Executive Clemency: The Pardon of Richard M. Nixon*, 2 PEPP. L. REV. 353, 376 n.90 (1975).

¹²⁵ James M. Naughton & Adam Clymer, *Gerald Ford Dies; Nixon's Successor in '74 Crisis was 93*, N.Y. TIMES, Dec. 27, 2006, at A1.

¹²⁶ LUKAS, *supra* note 42, at 126 (“[A]irlines, oil companies, and defense industries [] looked with hope and apprehension to Washington. There have been rumors that Nixon campaign officials drew up a list of corporations that had particular ‘problems with the government,’ but investigators have been unable to find it.”).

¹²⁷ SENATE SELECT REPORT, *supra* note 13, at 1098 (Statement of Senator Ervin).

¹²⁸ LUKAS, *supra* note 42, at 128.

totaling \$968,000.¹²⁹ Among the list of companies that ran afoul of the corporate campaign finance laws in Nixon's reelection campaign were several marquee names, many of which are still around today.¹³⁰ As Former FEC Chair Trevor Potter stated in a speech last year:

It is usually forgotten now how many major corporations were found to have violated the law: ITT, American Airlines, Braniff, Ashland Oil, Goodyear Tire & Rubber, Gulf, Philips, Greyhound—those were just a few of the well-known corporations caught up in the Watergate campaign financing scandal: 31 executives ended up being charged with criminal campaign violations, and many plead guilty.¹³¹

Other companies ensnared in the Watergate corporate contribution scandal included Minnesota Mining & Manufacturing Co. (more commonly known as “3M”), Carnation Co., American Ship Building Co., Diamond International Corp., The Hertz Corp., Lehigh Valley Cooperative Farmers, Inc., and Northrop Corp.¹³² As this list shows, they were not fly by night operations; rather, they were blue chip American companies breaking the law. Northrop faced additional liability because it was a government contractor at the time the corporation donated, which was barred under the Hatch Act.¹³³

Another aspect to consider is that this illegal corporate money was not given to CREEP by some rogue employee. The source was typically either from a corporation's in-house governmental relations shop, or in some cases, the head of the company.¹³⁴ For example, the Watergate Special Prosecution Force Report, noted that “[d]uring the months following President Nixon's resignation . . . George Steinbrenner [who was the Chairman] and the American Ship Building Company pleaded guilty to charges of conspiracy and making an illegal campaign contribution [to CREEP]”¹³⁵ Indeed, American Ship Building engaged in an elaborate ruse where executives were given bogus bonuses and then they gave the

¹²⁹ ALEXANDER, *supra* note 97, at 18.

¹³⁰ *Id.*

¹³¹ *Trevor Potter's Keynote Address at Conference Board's Symposium on Corporate Political Spending*, CAMPAIGN LEGAL CTR. BLOG (Oct. 21, 2011), http://www.clcblog.org/index.php?option=com_content&view=article&id=437%3Atrevor-potters-keynote-address-at-conference-boards-symposium-on-corporate-political-spending-10-21-11 (quoting Trevor Potter's keynote address).

¹³² See SENATE SELECT REPORT, *supra* note 13, at 507–10 (listing contributions solicited by Herbert Kalmbach); *id.* at 446–92 (detailing illegal corporate contributions from thirteen companies); KUTLER, *supra* note 11, at 435 (listing corporations as breaking the campaign finance laws during Nixon's administration including, among others, 3M, Carnation Company and the American Ship Building Company).

¹³³ WATERGATE SPECIAL PROSECUTION FORCE REPORT, *supra* note 53, at 159. Northrop Corporation entered a guilty plea to violation of 18 U.S.C. § 611, illegal campaign contributions by a government contractor. *Id.*

¹³⁴ See KUTLER, *supra* note 11, at 435; Trevor Potter's Keynote Address, *supra* note 131.

¹³⁵ WATERGATE SPECIAL PROSECUTION FORCE REPORT, *supra* note 53, at 19.

excess money to political candidates to disguise the corporate source of the money.¹³⁶

Another jarring dimension of the corporate donations to CREEP is the dollar figures involved. According to the Senate Select Committee's final report, Goodyear gave \$40,000,¹³⁷ Ashland Oil gave \$100,000,¹³⁸ Gulf Oil gave \$100,000,¹³⁹ Philips Petroleum gave \$100,000,¹⁴⁰ and Northrop gave \$150,000.¹⁴¹ And recall, these figures are all in 1972 dollars. If this last figure is translated into 2012 dollars, \$150,000 in 1972 would roughly equal \$800,000 today.¹⁴²

Moreover, because the corporate campaign contributions were illegal, the companies paying them to CREEP often had to launder the money through a foreign subsidiary or a foreign bank in order to make the payment.¹⁴³ Payments were often made in cash and in person since neither side wanted the paper trail that accompanies a check.¹⁴⁴ These details came to light in Senate testimony by Claude Wild, Vice President of Government Affairs of Gulf Oil.¹⁴⁵

Mr. Wild gave a grand total of \$100,000¹⁴⁶ and pleaded guilty of violating the federal election laws¹⁴⁷ for his donation of corporate funds to

¹³⁶ REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES SUBMITTED TO THE SENATE BANKING, HOUSING AND URBAN AFFAIRS COMMITTEE 36 (May 12, 1976), available at http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1970/1976_0512_SECQuestionable.pdf (http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1970/1976_0512_SECQuestionable.pdf [hereinafter SEC REPORT ON ILLEGAL CORPORATE PAYMENTS]) (“[S]elected employees were paid bonuses of \$30,000 in 1970, \$25,000 in 1971 and \$42,325 in 1972. After receiving these bonuses . . . the selected employees would be directed to contribute the remainder to various political figures.”).

¹³⁷ SENATE SELECT REPORT, *supra* note 13, at 465.

¹³⁸ *Id.* at 459.

¹³⁹ *Id.* at 469.

¹⁴⁰ *Id.* at 489.

¹⁴¹ *Id.* at 486.

¹⁴² *CPI Inflation Calculator*, *supra* note 65 (to translate 1972 dollars in 2012 dollars multiply by roughly 5.3).

¹⁴³ See BERNSTEIN & WOODWARD, *supra* note 15, at 52–54 (discussing money from Gulf Resources and Chemical Co. to CREEP that had moved through Mexico); *id.* at 54 (quoting Miami investigator Martin Dardis, “It’s called ‘laundering’ You set up a money chain that makes it impossible to trace the source.”).

¹⁴⁴ *Profile: Committee to Re-elect the President (CREEP)*, HISTORY COMMONS, http://www.historycommons.org/entity.jsp?entity=committee_to_re_elect_the_president_1 (last visited April 7, 2012) (discussing how President Nixon’s finance director, the financial chief of CREEP, used a Mexican money laundering system to collect illegal donations from corporations).

¹⁴⁵ For example, Sam Dash, Chief Counsel, Watergate Committee asked Claude Wild, V.P. Government Affairs of Gulf Oil: “Did you make a contribution to the president’s reelection effort?” Claude Wild replied: “Well, I did. I called the controller of one of our companies in the Bahamas and told him I needed \$50,000, and he brought it to me.” Sam Dash asked: “In what form was the \$50,000?” Mr. Wild said: “It was in cash.” *Black Money: Transcript*, FRONTLINE (April 7, 2009), <http://www.pbs.org/wgbh/pages/frontline/blackmoney/etc/script.html>; SENATE SELECT REPORT, *supra* note 13, at 469 (quoting Mr. Wild and Mr. Dash).

¹⁴⁶ SENATE SELECT REPORT, *supra* note 13, at 469–70.

¹⁴⁷ Wyndham Robertson, *The Directors Woke Up Too Late at Gulf*, FORTUNE, June 1976, at 121

CREEP.¹⁴⁸ Later investigations revealed that the \$100,000 was only the tip of the iceberg, and that \$5.4 million returned to Gulf Oil from foreign countries in off-book transactions.¹⁴⁹ This money was used for political contributions, gifts, and related expenses.¹⁵⁰

However, Gulf Oil was not alone in laundering political donations.¹⁵¹ American Airlines paid \$100,000, which was drawn from a New York bank, routed through a Swiss account of a Lebanese agent, and then transferred back to a different New York bank.¹⁵² Meanwhile, Braniff Airlines gave CREEP a \$40,000 donation by billing a Panamanian company, owned by a Braniff manager, for “expenses and services,” and forwarding cash from the transaction from Panama to Dallas, then on to an agent of CREEP.¹⁵³ The 3M Company misappropriated corporate funds for secret domestic political contributions. “The assets of the [3M] secret fund were generated through fictitious foreign insurance premiums . . . and through kickbacks by a foreign legal consultant.”¹⁵⁴ Even on the so-called “smoking gun” tape, which proves that Nixon was part of the Watergate cover-up, White House Chief of Staff Bob Haldeman informed President Nixon of money for the DNC burglary being traced through a Mexican bank.¹⁵⁵

Given the sensitive nature of information regarding the illegal sources of campaign funds, the record of donors to CREEP was a closely held secret. The donor list was kept in a locked drawer by Rose Mary Woods, Nixon’s personal secretary.¹⁵⁶ The list, known as “Rose Mary’s Baby,” did

(surmising that Gulf’s directors delayed an internal investigation into Claude Wild’s illegally authorized payments to President Nixon’s reelection campaign until the SEC increased pressure on the company); WATERGATE: A BRIEF HISTORY WITH DOCUMENTS 212, 213 (Stanley Kutler ed., 2d ed. 2009) (noting that Claude Wild received a \$1,000 fine on November 13, 1973 after pleading guilty to making illegal campaign contributions to President Nixon’s reelection campaign); FRONTLINE, *supra* note 145 (reporting Claude Wild’s campaign contributions for CREEP and his utilizing offshore banks to facilitate a \$50,000 payment to President Nixon’s campaign).

¹⁴⁸ SENATE SELECT REPORT, *supra* note 13, at 473 (“Gulf Oil Co. and Wild were fined \$5,000 and \$1,000, respectively, for making illegal corporate contributions to the Presidential campaign of President Nixon.”); *Shlensky v. Dorsey*, 574 F.2d 131, 135 (3d Cir. 1978) (noting that Mr. Wild donated \$100,000 of Gulf Oil’s funds to President Nixon’s reelection campaign, and subsequently pled guilty to criminal charges of violations of the Federal Election Campaign Act).

¹⁴⁹ SEC REPORT ON ILLEGAL CORPORATE PAYMENTS, *supra* note 136, at 37.

¹⁵⁰ *Id.*

¹⁵¹ LUKAS, *supra* note 42, at 130 (“Northrop, Goodyear, and Ashland Oil also laundered their contributions through foreign subsidiaries or agents.”); *see also* HERBERT E. ALEXANDER, FINANCING THE 1972 ELECTION 514 (1976) (discussing the laundering of contributions from American Airlines).

¹⁵² LUKAS, *supra* note 42, at 129.

¹⁵³ *Id.*

¹⁵⁴ SEC REPORT ON ILLEGAL CORPORATE PAYMENTS, *supra* note 136, at 38.

¹⁵⁵ Multisuperhands, *Nixon: Raw Watergate Tape: ‘Smoking Gun’ Section*, YOUTUBE (Apr. 4, 2011), http://www.youtube.com/watch?v=_oe3OgU8W0s (broadcasting a June 23, 1972 audio recording of Richard Nixon and Bob Haldeman conversing in the Oval Office where Nixon said, “He didn’t [get the money] from [CREEP] though; this is from Stans,” to which Haldeman replied, “Yeah. It is. . . . It’s directly traceable and there’s some more through some Texas people . . . that went to the Mexican bank which they can also trace to the Mexican bank. They’ll get their names today.”).

¹⁵⁶ Abramson, *supra* note 98.

not become public until it came to light in the course of a lawsuit by the good government watchdog Common Cause.¹⁵⁷

D. The International Corporate Slush Funds

Of course, it takes two to tango. The quid pro quo corruption in the Nixon White House would not have been possible without individuals and corporations who were willing to pay. The Nixon Administration did not have a monopoly on venality. There were plenty of corporations in particular who seemed eager to either bend or break the rules.

The more investigations prosecutors, Congress, and the SEC performed, the deeper the rabbit hole of corporate donations went.¹⁵⁸ Corporate donations flowed not just to Nixon's campaign, but also to Democratic candidates as well.¹⁵⁹ In Nixon's grand jury testimony, he pointed fingers at the Democrats.¹⁶⁰ For example, Nixon said to prosecutors, "I trust . . . that you are pursuing with the same tenacity . . . the over 150 charges of campaign violations that are in your files with regard to Democratic candidates and with regard to the McGovern campaign . . ." ¹⁶¹ Nixon, however, did not admit he or his associates solicited any illegal contributions. He testified, "[B]ecause of the presidential pardon . . . I can admit anything with impunity, but you are not going to use me to try to nail somebody else I am not going to be loose with my tongue and try to cooperate with you in a vendetta . . ." ¹⁶²

Nixon was correct about one thing: the problem of money in politics was a bipartisan one, and corporate donors were playing both sides of the fence. As J. Anthony Lukas reports:

Several companies that made corporate contributions in 1972 have now conceded that their gifts came from large political "slush funds" which in some cases had been in existence for more than a decade. The largest discovered so far—\$10.3 million—belonged to Gulf Oil, which acknowledged that it used the money for political contributions and "related activities" here and abroad between 1960 and 1974 [3M] conceded that between 1963 and 1972 it doled out at least \$634,000 in 390 contributions to politicians of both parties. Northrop spent \$476,000 since 1961, Phillips Petroleum spent some \$585,000 in ten years, and Ashland Oil \$801,165 in eight years—both excluding their 1972 contributions to Nixon.¹⁶³

¹⁵⁷ *Id.*; see also CONRAD BLACK, RICHARD M. NIXON: A LIFE IN FULL 748 (2007) ("In this period of no obligatory disclosure of political contributions, the Republicans received astounding sums—over \$20 million, as it turned out—and the only record of the large donors was kept by the faithful and vigilant Rose Mary Woods. The list was known around Washington as 'Rose Mary's Baby.'").

¹⁵⁸ H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 3–4 (1998) (arguing that the Watergate scandal sparked an SEC investigation which ultimately led Congress to enact the Foreign Corrupt Practices Act).

¹⁵⁹ See Nixon Dep. (first part), *supra* note 79, at 25–26.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 69.

¹⁶² *Id.* at 40.

¹⁶³ LUKAS, *supra* note 42, at 127; see also SEC REPORT ON ILLEGAL CORPORATE PAYMENTS, *supra* note 136, at 36–39 (same).

Furthermore, the corporate political spending was not just bipartisan; it was also international.¹⁶⁴ In the aftermath of Watergate, federal investigations revealed that hundreds of American corporations had made questionable or illegal payments both domestically and to foreign governments—including campaign contributions.¹⁶⁵

II. REFORMS INSPIRED BY WATERGATE

A. The Foreign Corrupt Practices Act¹⁶⁶

Stanley Sporkin, then Director of SEC Enforcement, was curious about how corporate payments from publicly traded corporations, revealed during the Watergate investigations, could make their way into a presidential campaign when such donations were patently illegal.¹⁶⁷ He remarked, “What sparked my interest was the fact that these were cash payments to the Committee to Reelect the President which came directly out of the corporate treasuries. And I knew that was illegal.”¹⁶⁸ Mr. Sporkin continued:

How does Gulf Oil record a transaction of a \$50,000 cash payment? I wanted to know, what account did they charge? Do they have an account called “Bribery”? And so I decided to ask one of my investigators to go out and find out how they did it When we looked into these funds, we found out they were not only being used domestically in the United States for illegal campaign contributions, but we found that the same monies were being used to bribe officials overseas in connection with the companies’ business.¹⁶⁹

Such overseas bribery was not illegal under the U.S. law at the time of the 1972 election.

The press reports of American companies giving money to foreign officials had enormous impacts abroad. As Laura E. Longobardi reported:

¹⁶⁴ ALEXANDER, *supra* note 97, at 20 (reporting on U.S. corporations’ international political spending as revealed by the Watergate investigation and noting that “millions of [corporate] dollars [were] known to have been given to politicians in Italy, Korea and other countries”).

¹⁶⁵ Torres-Spelliscy, *supra* note 27, at 405.

¹⁶⁶ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977); *see also* S. REP. NO. 95-114 at 1, 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098.

¹⁶⁷ *See* FRONTLINE, *supra* note 145; SEC REPORT ON ILLEGAL CORPORATE PAYMENTS, *supra* note 136, at 2 (“In 1973, as a result of the work of the Office of the Special Prosecutor, several corporations and executives officers were charged with using corporate funds for illegal domestic political contributions. The Commission recognized that these activities involved matters of possible significance to public investors, the nondisclosure of which might entail violations of the federal securities laws. . . . The Commission’s inquiry into the circumstances surrounding alleged illegal political campaign contributions revealed that violations of the federal securities laws had indeed occurred.”).

¹⁶⁸ *See* FRONTLINE, *supra* note 145; Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 92 (2010) (“Although the focus of the Watergate hearings was the attempted burglary of the DNC headquarters, what former SEC enforcement chief Stanley Sporkin found most interesting were illegal contributions to the Nixon reelection campaign made by corporate executives.”).

¹⁶⁹ FRONTLINE, *supra* note 145.

The discovery of payments by Lockheed to the Prime Minister of Japan, for example, forced his resignation and chilled relations between the two countries. Reports that Lockheed had paid Prince Bernhardt of the Netherlands \$1 million compelled him to relinquish his official functions. Finally, reputed payments by Lockheed, Exxon, Mobil, Gulf and other corporations to the Italian Government caused the Italian President to resign and strained United States relations with Italy, the surrounding Mediterranean area and the entire North Atlantic Treaty Organization (NATO) alliance.¹⁷⁰

In other words, President Nixon was not the only head of state to resign in the wake of Watergate. Rather, the impact was felt in capitols across the globe.

The revelations of corporate political slush funds resulted in the SEC's requiring voluntary disclosure by public corporations of questionable foreign and domestic political payments.¹⁷¹ One aspect of the questionable payments that most disturbed the SEC was the obfuscation involved. As the SEC reported to Congress in 1976: "The almost universal characteristic of the cases . . . has been the apparent frustration of our system of corporate accountability which . . . [requires] not omit[ing] or misrepresent[ing] material facts. Millions of dollars . . . have been inaccurately recorded in corporate books and records to facilitate the making of questionable payments."¹⁷² The SEC explained to Congress the depth of the deception by publicly traded companies included "falsifications of corporate financial records, designed to disguise or conceal the source and application of corporate funds misused for illegal purposes, as well as the existence of secret 'slush funds' disbursed outside the normal financial accountability system."¹⁷³ Not surprisingly, central among the legislative fixes to this problem was a strict requirement to keep accurate books and records.¹⁷⁴

The scope of the questionable and illegal payments was quite vast, occurring not just among a few bad apples, but rather in hundreds of top American firms.¹⁷⁵ The Senate Report on this investigation noted:

¹⁷⁰ Laura E. Longobardi, *Reviewing the Situation: What is to Be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 433 (1987) (internal citations omitted); see also Bixby, *supra* note 168, at 93 ("These revelations caused the resignation of many important officials in Japan, the Netherlands, Italy, and other countries, as well as considerable public outcry in the United States."); Mark Levin, *Lighting Up the Foreign Corrupt Practices Act: A Case Study of U.S. Tobacco Industry Political Influence Buying in Japan*, 34 N.C. J. INT'L L. & COM. REG. 471, 473 (2009) (stating that Congress enacted the far-reaching Foreign Corrupt Practices Act in the midst of political reforms that emerged from the Watergate scandal).

¹⁷¹ SEC REPORT ON ILLEGAL CORPORATE PAYMENTS, *supra* note 136, at 3–5 (describing the SEC's voluntary disclosure program).

¹⁷² *Id.* at 2.

¹⁷³ *Id.*

¹⁷⁴ 15 U.S.C. § 78m (2010).

¹⁷⁵ SEC REPORT ON ILLEGAL CORPORATE PAYMENTS, *supra* note 136, at 16–35 (listing firms involved).

Recent investigations by the SEC have revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars. These revelations have had severe adverse effects. Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people. The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered.¹⁷⁶

Or as the Department of Justice put it, post-Watergate investigations by the SEC revealed: “The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties.”¹⁷⁷ The GAO reported that, in total, 450 companies admitted making \$300 million in questionable or illegal payments.¹⁷⁸ These SEC investigations prompted the Congress to pass the FCPA.¹⁷⁹

The major purpose of the Foreign Corrupt Practices Act of 1977 (FCPA) was to prevent corporate bribery of foreign officials that came to light in post-Watergate investigations.¹⁸⁰ Thus, the FCPA is one of many reforms inspired by Watergate.¹⁸¹

The FCPA amended the Securities Exchange Act of 1934 to require registered issuers to keep detailed books, records, and accounts that accurately record corporate payments and transactions.¹⁸² The FCPA also requires SEC registered issuers to institute and maintain an internal

¹⁷⁶ S. REP. NO. 95-114, at 3.

¹⁷⁷ *Foreign Corrupt Practices Act: Antibribery Provisions*, U.S. DEPT. OF JUSTICE (undated), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>.

¹⁷⁸ U.S. GENERAL ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS: REPORT TO THE CONGRESS 1 (1981).

¹⁷⁹ Claudius O. Sokenu, *FCPA & Global Anti-Corruption Insights: An Update on Recent Foreign Corrupt Practices Act And Global Anti-Corruption Enforcement, Litigation, And Compliance*, 1949 PLI/CORP 225, 231 (Winter 2012) (“In the maelstrom of outrage that followed the Watergate scandal, and in response to the SEC’s extensive investigation into questionable (or illegal) payments by United States corporations to foreign government officials, politicians, and/or political parties, Congress enacted the FCPA . . .”).

¹⁸⁰ Ashcroft & Ratcliffe, *supra* note 7, at 25 (“In 1977, the United States Congress passed the U.S. Foreign Corrupt Practices Act (‘FCPA’) following a series of corruption scandals highlighted by the Watergate investigation and the resulting resignation of President Richard Nixon. While Watergate itself highlighted political corruption, the investigation shed a corresponding light on corporate corruption and bribery.”); MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41466, FOREIGN CORRUPT PRACTICES ACT (FCPA): CONGRESSIONAL INTEREST AND EXECUTIVE ENFORCEMENT 1 (2010), available at <http://www.fas.org/sgp/crs/misc/R41466.pdf>.

¹⁸¹ Kevin E. Davi, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, Or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 498 (2012) (“A mix of moralism and self-interest motivated the initial enactment of the FCPA. The FCPA was passed in direct response to evidence uncovered in the course of investigations sparked by the Watergate scandal.”); Gary M. Elden & Mark S. Sableman, *Negligence Is Not Corruption: The Scienter Requirement of the Foreign Corrupt Practices Act*, 49 GEO. WASH. L. REV. 819, 819 (1980) (noting that “[i]n response to Watergate era revelations that United States businesses were engaging in bribery abroad, Congress enacted the Foreign Corrupt Practices Act of 1977”).

¹⁸² *Id.*; 15 U.S.C. § 78m(b) (2010).

accounting control system.¹⁸³ Thirdly, the FCPA prohibits domestic corporations, whether or not registered with the SEC, from bribing a foreign official, a foreign political party, party official, or candidate for the purpose of obtaining or maintaining business.¹⁸⁴

The FCPA applies to political contributions abroad if they are made with corrupt motives.¹⁸⁵ The SEC has brought a few cases under the statute for foreign political contributions.¹⁸⁶ In one case, Schering-Plough gave \$76,000 to a charity headed by a Polish official that purchased health materials for Polish hospitals.¹⁸⁷ In another case, Titan paid \$3.5 million to an agent in Benin who funneled the money to the election of Benin's incumbent president.¹⁸⁸

Congress also enacted the FCPA to restore public confidence in the integrity of the American capital markets.¹⁸⁹ In a speech supporting the passage of the FCPA, then-SEC Commissioner John R. Evans argued for the need for transparency and highlighted the risk posed to the soundness of the financial markets by these foreign bribes: “[These overseas payments] . . . raise questions regarding the quality and integrity of professional corporate managers and whether they are fulfilling their obligations to their boards of directors, shareholders, and the general public.”¹⁹⁰

For decades the FCPA lay fallow—rarely enforced.¹⁹¹ But the statute has enjoyed a post-9/11 renaissance.¹⁹² Nearly thirty-five years later, the FCPA serves as a powerful anti-corruption tool outside of the United States.¹⁹³ The U.S. was the first country, via the FCPA, to criminalize the

¹⁸³ SEITZINGER, *supra* note 180, at 1; 15 U.S.C. § 78m(b)(2)(B) (2010).

¹⁸⁴ SEITZINGER, *supra* note 180, at 1; 15 U.S.C. §§ 78dd-1, 78dd-2 (2010).

¹⁸⁵ ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK, A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS 146 (2d ed. 2012).

¹⁸⁶ *Id.* at 148–49.

¹⁸⁷ *Id.* at 148 (explaining *In Re Schering Plough*).

¹⁸⁸ *Id.* at 149 (explaining *United States v. Titan*).

¹⁸⁹ Statement on Signing S. 305 Into Law, 2 PUB. PAPERS 2157 (Dec. 20, 1977) (statement by President Jimmy Carter) (“Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments”); *see also* H.R. Rep. No. 95-640, at 7 (1977), *available at* <http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf> (“The payment of bribes to influence the acts or decisions of foreign officials . . . is unethical. . . . But not only is it unethical, it is bad business as well In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.”).

¹⁹⁰ John R. Evans, *Of Boycotts and Bribery, and Corporate Accountability*, SEC. AND EXCH. COMM’N NEWS 9 (Oct. 5, 1976), *available at* <http://www.sec.gov/news/speech/1976/100576evans.pdf>.

¹⁹¹ Ashcroft & Ratcliffe, *supra* note 7, at 26 (“Despite its noble intent, over the first several decades of its existence the FCPA remained a largely unenforced and nearly dormant piece of legislation.”).

¹⁹² *Id.* (“Senior officials for the U.S. Department of Justice (“DOJ”) . . . have gone so far as to declare the FCPA to be second only to the prevention of terrorism as an agency priority.”).

¹⁹³ *See* T. Markus Funk & M. Bridget Minder, *Bribery of Foreign Officials [FCPA]*, BLOOMBERG LAW REPORTS: CORPORATE AND M&A LAW 1 (Dec. 29, 2011), *available at*

practice of bribing foreign officials, and was alone in doing so for two decades.¹⁹⁴ In 1997, the FCPA was expanded to cover extra-territorial jurisdiction over U.S. companies and U.S. nationals in non-U.S. companies.¹⁹⁵ At the same time, the Organization for Economic and Cooperative Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions was signed in 1997.¹⁹⁶ This convention has thirty-four signatories, including the U.S., and is meant to criminalize bribery among many of America's trading partners.¹⁹⁷

The FCPA is enforced jointly by the SEC and DOJ.¹⁹⁸ FCPA penalties have increased in severity over time, as the SEC and DOJ have sought not just penalties and fines, but also disgorgement of profits and jail time.¹⁹⁹ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) builds on this foundation by containing a whistleblower bounty provision that allows informants to possibly recover up to 30% of FCPA judgments in excess of \$1 million.²⁰⁰ In the past decade, the number of FCPA enforcement cases has been trending higher.²⁰¹ Today, the FCPA is enforced with full weight of the law and on a regular basis with fines as high as \$800 million.²⁰²

B. The Federal Election Campaign Act of 1974

After Watergate, the American public clamored for changes to the way money in politics was regulated.²⁰³ As I have already alluded to, the

http://www.perkinscoie.com/files/upload/LIT_12_01funkminderfcpayear-in-review.pdf (“2011—like 2010—witnessed boundary-pushing FCPA enforcement actions, with more FCPA trials than in any prior year and the longest prison sentence (15 years) ever imposed under the FCPA.”); see also Peter Dreier & Donald Cohen, *Wal-Mart's Honest Graft*, DISSENT MAG., June 21, 2012 (contrasting FCPA and domestic election law).

¹⁹⁴ ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 2 (2010); but see Susan Rose-Ackerman & Sin-Ad Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U. ANN. SURV. AM. L. 433 (2012) (refuting the U.S. Chamber's arguments in favor of weakening the FCPA).

¹⁹⁵ Danforth Newcomb & Philip Urosky, *Eyes on Your Bribe*, THE EUROPEAN LAWYER, Dec. 2007/Jan. 2008, at 48.

¹⁹⁶ TARUN, *supra* note 185, at 55.

¹⁹⁷ *Id.* at 55–56.

¹⁹⁸ *Id.* at 248–49 (DOJ and SEC conduct parallel investigations).

¹⁹⁹ *Id.* at 248 (“mega settlements of \$100 million or more will continue”); Sherman & Sterling LLP, *Recent Trends and Patterns in FCPA Enforcement (Feb. 13, 2008)*, in NATIONAL INSTITUTE ON THE FOREIGN CORRUPT PRACTICES ACT (ABA Center for Continuing Legal Education 2008).

²⁰⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 922–924, 124 Stat. 1376, 1841–50 (2010).

²⁰¹ Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, at A1 (SEC and DOJ conducted 140 FCPA investigations in 2009).

²⁰² TARUN, *supra* note 185, at 248 (the ten top FCPA fines from 2008–2011 ranged from \$70 million to \$800 million).

²⁰³ Hasen, *supra* note 17, at 352 (quoting ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW (1988) (“[W]ell over 25 percent of all mail [sent to members of Congress] in the post-Watergate period [was] . . . on campaign finance, far more than on any other issue.”)).

Foreign Corrupt Practices Act was only one of the reforms to come out of Watergate. The scandal also inspired campaign finance reformers as well.²⁰⁴ The Federal Election Campaign Act of 1974 (FECA 74) was that signature reform.²⁰⁵ As the Senate Select Committee explained, “[Our] major legislative recommendations relate to the creation of new institutions necessary to safeguard the electoral process . . . the committee is hopeful that, despite the excesses of Watergate, the Nation will return to its democratic ideals established almost 200 years ago.”²⁰⁶ The concrete legislative suggestions by the Senate Select Committee included:

Draft a code of candidate responsibility, with appropriate disciplinary rules and grievance procedures, to be enforced through a Federal Elections Commission Require Federal candidates and officeholders to fully disclose all sources of income and assets or liabilities over \$1,500 . . . for publication in the Congressional Record Prohibit candidates for Federal elective office from accepting cash contributions over \$50 or spending more than \$10,000 in personal funds.²⁰⁷

The final version of FECA 74 contained many of these basic elements, though the details, like the dollar thresholds, changed during the legislative drafting process.²⁰⁸ At the urging of advocates, the new law contained public financing, which was not among the original suggestions by the Senate Select Committee. FECA 74 included “hard money” \$1,000 contribution²⁰⁹ and expenditure limits,²¹⁰ improved disclosure,²¹¹ the formation of the Federal Election Commission (FEC), and the Presidential Public Financing System.²¹² FECA 74 was challenged in the landmark Supreme Court case of *Buckley v. Valeo*.²¹³ Referring to FECA 74, the *Buckley* lower court wrote, “Congress knew there were no absolute guarantees that its reforms . . . would achieve the objective of curbing the excesses of campaign financing permeated by contributions of monied and

²⁰⁴ Thomas E. Mann, *The Rise of Soft Money*, in INSIDE THE CAMPAIGN FINANCE BATTLE, at 18 (“The fund-raising scandals associated with Watergate and the committee to reelect President Richard Nixon—featuring attaché cases stuffed with thousands of dollars, illegal corporate contributions, and conduits to hide the original source of contributions—led Congress to return to the campaign finance drawing board. In 1974 they produced major amendments to FECA, which constituted the most serious and ambitious effort ever to regulate the flow of money in federal elections.”).

²⁰⁵ SENATE SELECT REPORT, *supra* note 13, at xxiii (“The committee’s enabling resolution . . . instructs the committee . . . to determine whether new legislation is needed ‘to safeguard the electoral process by which the President of the United States is chosen.’”).

²⁰⁶ *Id.* at xxv.

²⁰⁷ *Id.* at 1229.

²⁰⁸ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1266 (1974).

²⁰⁹ *Id.* § 101, 88 Stat. 1263.

²¹⁰ *Id.* § 101, 88 Stat. at 1265.

²¹¹ *Id.* § 201, 88 Stat. at 1272–75.

²¹² *Id.* § 208, 88 Stat. at 1279–81.

²¹³ WOODWARD & ARMSTRONG, *supra* note 62, at 396 (“The [*Buckley*] case presented more than twenty constitutional questions.”).

2012]

How Much is an Ambassadorship?

89

special interests. But Congress knew, too, that the perfect can be the enemy of the good”²¹⁴

When *Buckley* reached the Supreme Court, the review of the law turned into an exercise in judicial line editing of the FECA 74 statute. Consequently, what was left after the Supreme Court’s handiwork was a law that no one in Congress had voted for, nor what President Ford signed.²¹⁵ *Buckley* was a “split the baby” decision worthy of King Solomon.²¹⁶ The decision not only diced the statute; it also splintered the Court.²¹⁷

The *Buckley* Supreme Court upheld voluntary public financing,²¹⁸ the FEC²¹⁹ and FECA’s disclosure requirements.²²⁰ The Court decided that contributions could be constitutionally limited, but independent expenditures could not.²²¹ The Court found under the magic words test that express advocacy could be regulated, but nearly identical sham issue ads could not.²²² Similarly, the Court ruled under the major purpose test that political action committees (PACs) could be regulated, but very similar political organizations could not.²²³ Within the *Buckley* structure are many of the loopholes which allow many of the same practices that FECA 74 was meant to prevent,²²⁴ like soft money to political parties,²²⁵ sham issue

²¹⁴ *Buckley v. Valeo*, 519 F.2d 821, 840 (D.C. Cir. 1975).

²¹⁵ Kenneth J. Levit, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 469, 473 (1993) (stating that the Court essentially rewrote the 1974 Federal Election Campaign Act by ruling selectively on several of its components); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 884 (1987) (stating that although the state’s main purpose was to equalize the relative ability of individuals and groups to influence the outcomes of elections with the 1974 Federal Election Campaign Act, the Court found this justification to be constitutionally illegitimate).

²¹⁶ Hasen, *supra* note 17, at 346 (“The Supreme Court too was divided on the law’s [FECA’s] constitutionality, and it produced a Solomonic unsigned opinion that left both sides in the litigation partly unsatisfied.”).

²¹⁷ SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN LIBERAL CHAMPION (2010) (Brennan proposed a single opinion signed by all nine justices. Instead “[t]he end result was an unsigned opinion for the Court . . . [and] five separate opinions concurring in part and dissenting in part . . .”).

²¹⁸ *Buckley v. Valeo*, 424 U.S. 1, 85–86, 143 (1976).

²¹⁹ *Id.* at 109–43.

²²⁰ *Id.* at 65–67, 143.

²²¹ *Id.* at 26–27 (contribution limits); *id.* at 46–47 (expenditures); *see also* Monica Youn, *First Amendment Fault Lines and the Citizens United Decision*, in MONEY, POLITICS AND THE CONSTITUTION 98 (2011) (“[T]he contribution/expenditure distinction has survived less as settled doctrine than as détente: the demarcation line where both sides lay down their arms out of exhaustion, rather than as a result of negotiated surrender.”).

²²² *Buckley*, 424 U.S. at 44 n.52.

²²³ *Id.* at 79–80.

²²⁴ Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53, 55 (1987) (arguing that despite the existence of a comprehensive regulatory scheme, few, if any, congressional goals were actually met due to the decision rendered in *Buckley*); E. Joshua Rosenkranz, *Introduction*, in IF BUCKLEY FELL, A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 3 (E. Joshua Rosenkranz ed. 1999) (“The Court’s distinction between contributions and spending means the government cannot limit how much of the family fortune a Steve Forbes can sink in his own campaign. It means no end to the money chase that consumes candidates. And it means no lid on the funds a nominally independent player, like the AFL-CIO or a wealthy benefactor, may spend on television ads promoting a candidate.”).

²²⁵ Soft money was the money collected by political parties between 1976–2002 that was not

ads,²²⁶ and the use of nonprofits to mask the true sources of money in politics.²²⁷ In contrast to the FCPA, which is still in force and has been expanded overtime, FECA 74 never got off the drawing board. Or as one author put it, “the Supreme Court dismantled FECA [74] before it took effect”²²⁸ Thus, the impact of these two post-Watergate reforms appears to have more saliency abroad than at home.²²⁹

III. WATERGATE’S LESSONS FOR TODAY

So what lessons does the Watergate experience have for the present day, especially in the post-*Citizens United* world, and what are some of the problems that persist despite the sweeping legislation that was passed to address Watergate?²³⁰

The problem of money in politics is as real now in 2012 as it was in 1972. On one hand, in 2012 a single individual cannot currently write a \$100,000 check to a presidential campaign.²³¹ Thanks to post-Watergate reforms, individuals have a hard money limit of \$2,500 which democratizes how presidential campaigns are run.²³² The fact that presidential candidates now rely on millions of small donors in order to run a campaign is no accident.²³³

subject to FECA’s hard money contribution limits. Soft money became illegal under BCRA in 2002. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 133 (2003) (explaining BCRA “takes national parties out of the soft-money business.”). The soft money ban is still in effect. *Republican Nat. Comm. v. Fed. Election Comm’n*, No. 09-1287, 130 S. Ct. 3544 (2010) (summarily affirming lower court ruling upholding the soft money ban for political parties).

²²⁶ *McConnell* closed the sham issue ad loophole by making it clear “that the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled.” *McConnell*, 540 U.S. at 105.

²²⁷ THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, *CITIZENS UNITED AND THE 2010 MIDTERM ELECTIONS* (Dec. 2010), available at <http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf> (discussing undisclosed spending in the 2010 midterm election).

²²⁸ Frank J. Sorauf, *What Buckley Wrought*, in *IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS* 13 (E. Joshua Rosenkranz ed. 1999).

²²⁹ I am not the first to compare the strength of the FCPA to the weakness of domestic federal election laws. See Trevor Potter, *Pity the Watchdog in a Lion’s Den*, *WALL ST. J.*, Aug 2, 1994, at A14. (“To much of the country, these [corporate PAC] contributions look like attempted bribery, or a protection racket. In all likelihood, such contributions would violate the Foreign Corrupt Practices Act if engaged in by a U.S. company anywhere else in the world.”).

²³⁰ To be fair, many have argued that long before *Citizens United*, corporate political power was already vast. See, e.g., HACKER & PIERSON, *supra* note 106, at 293 (“[T]he *Citizens United* majority was kicking on an open door. As our tour of winner-take-all politics has demonstrated, those with the greatest economic resources already have ample opportunity to deploy their formidable advantages in politics.”).

²³¹ *Contributions*, FED. ELECTION COMM’N, (Feb. 2011), <http://www.fec.gov/pages/brochures/contrib.shtml#Chart> (listing \$2,500/person/election limit).

²³² *Id.*

²³³ Michael J. Malbin, *Small Donors, Large Donors and the Internet: Rethinking Public Financing for Presidential Elections after Obama*, in *PUBLIC FINANCING IN AMERICAN ELECTIONS* 36, 49 (Costas Panagopoulos ed., 2011) (“The total amount he received over the primary season in amounts of \$200 or less (\$212 million) nearly equaled what Clinton or McCain received from all sources combined. Almost three-quarters of the financial advantage Obama ultimately held over Clinton can be explained by his advantage in small contributions.”).

On the other hand, as explained above, *Buckley* resulted in “the system we have today: unlimited spending, with candidates forced to raise the sums in relatively small discrete amounts, and to compete in a campaign arms race, all the while worried that a bored millionaire will decide to ‘self-finance’”²³⁴ The litigation that followed *Buckley* only made matters worse. Key campaign finance protections have eroded in the past forty years because of the Supreme Court.²³⁵ Congress raised federal contribution limits from \$1,000 to \$2,000 in 2002 and indexed them for inflation so that they grow larger and larger over time.²³⁶ Because of lax regulation at the FEC, post-Watergate disclosures can be evaded by the use of intermediaries.²³⁷ And the FEC is typically deadlocked on key enforcement decisions and rulemakings.²³⁸ In contrast to the hundred million dollar fines which give the FCPA teeth, FECA’s largest fine was a \$3.8 million civil penalty.²³⁹ Finally, as a sad testament to the deterioration of a once noble reform, only one presidential candidate made use of the Presidential Public Financing System in the 2012 election.²⁴⁰

In 2012, corporate money may play a more deleterious role in elections because the modern Supreme Court has left fewer campaign finance regulations intact for corporations than existed in 1972.²⁴¹ In

²³⁴ MICHAEL WALDMAN, *A RETURN TO COMMON SENSE* 69 (2008).

²³⁵ See *Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449, 481 (2007) (“*WRTL II*”) (invalidating the federal source restriction for ads which were not the functional equivalent of express advocacy); *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744–45 (2008) (invalidating the federal Millionaires Amendment); *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (invalidating federal corporate political expenditure bans).

²³⁶ The FEC has a chart with current contribution limits, which may be viewed at <http://www.fec.gov/pages/brochures/contriblimits.shtml>.

²³⁷ Bruce F. Freed & Jamie Carroll, *Hidden Rivers: How Trade Associations Conceal Corporate Political Spending, Its Threat To Companies, And What Shareholders Can Do*, CTR. FOR POLITICAL ACCOUNTABILITY, 1–2 (Jan. 1, 2006), available at <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932>; CIARA TORRES-SPELLISCY, *TRANSPARENT ELECTIONS AFTER CITIZENS UNITED* (2011). This lack of transparency at the FEC could come to an end soon. See *Van Hollen v. FEC*, 1:11-cv-00766-ABJ, slip op. (D.D.C. Mar. 30, 2012) (finding the FEC acted beyond its authority when it narrowed electioneering communications disclosures), *aff’d*, No. 12-5117 (D.C. Cir. May 14, 2012).

²³⁸ R. SAM GARRETT, CONG. RESEARCH SERV., R40779, *DEADLOCKED VOTES AMONG MEMBERS OF THE FEDERAL ELECTION COMMISSION (FEC): OVERVIEW AND POTENTIAL CONSIDERATIONS FOR CONGRESS*, 5 (2009), available at http://www.hvjlw.com/upload_files/CRS_FEC_Deadlocks.pdf; Marian Wang, *FEC Deadlocks (Again) on Guidance for Big-Money Super PACs*, PROPUBLICA (Dec. 2, 2011, 1:21 PM), <http://www.propublica.org/article/deadlocks-again-on-guidance-for-big-money-super-pacs>; Kathleen Ronayne, *Federal Election Commission Deadlocks in Discussions About New Disclosure Rules for Political Advertisements*, OPEN SECRETS BLOG (June 16, 2011, 3:26 PM), <http://www.opensecrets.org/news/2011/06/federal-election-commission-deadlocks.html>.

²³⁹ See TARUN *supra* note 185 (listing FCPA penalties up to \$800 million), but compare with Press Release, Federal Election Commission, *Federal Home Loan Mortgage Corporation (“Freddie Mac”) Pays Largest Fine in FEC History* (Apr. 18, 2006), <http://www.fec.gov/press/press2006/20060418mur.html> (listing \$3.8 million FEC fine).

²⁴⁰ Catalina Camia, *Roemer Qualifies for Federal Matching Funds*, USA TODAY, Feb. 3, 2012, <http://content.usatoday.com/communities/onpolitics/post/2012/02/buddy-roemer-matching-funds-federal-election-commission-1>.

²⁴¹ *Citizens United*, 130 S.Ct. 876, 909 (2010) (invalidating federal corporate political expenditure

Nixon's time, under the Taft Hartley Act, it was not legal for American Airlines to run ads supporting his candidacy, but now such expenditures are perfectly legal.²⁴²

Citizens United allows corporations to spend treasury funds on two types of political advertisements. The first is independent expenditures—these are the ads that use *Buckley v. Valeo*'s magic words such as “vote for or vote against,” or “support or oppose.”²⁴³ The other type of ads that *Citizens United* allows is electioneering communications or what some call “sham issue ads.” These are ads that purport to discuss an issue and have a candidate in them. The whole point of this type of sham issue ads was to avoid the federal corporate independent expenditures ban. Because of McCain-Feingold, these sham issue ads were regulated from 2002–2010.²⁴⁴ But post-*Citizens United*, we are now back to where the law was in 1907 (pre-Taft Hartley). Because the Tillman Act is still in effect, corporations cannot give directly to a federal candidate,²⁴⁵ but they can spend unlimited funds independently in support of or against candidates. So in other words, they cannot give \$2,500 directly to a candidate for President, but they could under *Citizens United* potentially buy Super Bowl ads supporting (or opposing) a candidate.²⁴⁶

Congress responded to the problem of Watergate's quid pro quo corruption with both changes to the election law in FECA 74 and through the securities laws in the FCPA in 1977. Now, post-*Citizens United*, I would argue that both campaign finance responses and securities law responses are required.²⁴⁷

A. Corporate Law Reforms

Following the money in politics, as Mark Felt suggested to Woodward and Bernstein, remains a challenge.²⁴⁸ Forty years later, one issue that has persisted long after Watergate is the need for better disclosure of the sources of campaign financing so that the public can keep an eye on who is

bans).

²⁴² Amendment to the National Labor Relations Act, Pub. L. No. 80–101, 61 Stat. 159 (1947).

²⁴³ Independent expenditures contain “magic words of express advocacy,” which come from a 1976 Supreme Court case, *Buckley v. Valeo*'s footnote 52, which listed examples of words that would render an ad subject to regulation under the Federal Election Campaign Act (FECA). The *Buckley* list includes: “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject.” *Buckley v. Valeo*, 424 U.S. 1, 44 n.52.

²⁴⁴ Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 3 ELECTION L.J. 251, 254 (2004); see generally ROBERT F. BAUER, MORE SOFT MONEY HARD LAW (2004) (explaining the multiple ways McCain-Feingold changed existing federal election law).

²⁴⁵ Tillman Act, Pub. L. No. 59–36, 420 Stat. 864 (1907).

²⁴⁶ Sam Issacharoff, *On Political Corruption*, in MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED* 131 (2011).

²⁴⁷ See generally Torres-Spelliscy, *Corporate Political Spending*, *supra* note 27; Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 27.

²⁴⁸ *Ex-FBI Official: I'm 'Deep Throat'*, *supra* note 29.

seeking to influence politics through money.²⁴⁹ In today's post-*Citizens United* world, we have a growing problem of undisclosed corporate and union money because of pre-existing disclosure loopholes.²⁵⁰ The problem is black box spending, which is not a new one, but is only likely to grow after *Citizens United*.²⁵¹ The black boxes are political nonprofits such as social welfare organizations (501(c)(4)s) and trade associations or business leagues (501(c)(6)s).²⁵² If corporate spending is funneled through one of these groups, then voters and shareholders alike are left in the dark about where the money is coming from in federal elections.²⁵³ In short, if a political donor wishes to remain anonymous, they just need to go through an opaque intermediary like a trade association or 501(c)(4).²⁵⁴ One of the ways to solve this problem is establishing stronger post-*Citizens United* SEC rules. There is a petition pending before the SEC right now²⁵⁵ requesting a new SEC rule which would require transparency for political spending by publicly traded corporations.²⁵⁶ As of the time of this writing, the SEC had received over 285,000 public comments in support of a new transparency rule.²⁵⁷

²⁴⁹ See SABATO & SIMPSON *supra* note 1, at 152 (“Corrupt practices flourish in the shadows.”); Torres-Spelliscy, *Transparent Elections*, *supra* note 237 at 6–7.

²⁵⁰ Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 26 NEXUS: CHAP. J. OF L. & PUB. POL’Y 59, 60 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1833484.

²⁵¹ The average publicly-traded corporation has not agreed to voluntarily disclose its political spending. See Paul Denicola, Bruce F. Freed, Stephan C. Passantino, & Karl J. Sandstrom, *Handbook On Corporate Political Activity: Emerging Corporate Governance Issues*, THE CONFERENCE BOARD, (2010), at 6 available at <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/id/4084> (noting that disclosure by for-profit corporations is still not the norm finding “as of October 2010, seventy-six major American corporations, including half of the S&P 100, had adopted codes of political disclosure. However, a similar shift toward political disclosure has not yet taken place outside of the S&P 100”); Heidi Welsh & Robin Young, *Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies*, SUSTAINABLE INV. INSTITUTE 8 (Nov. 2011), available at http://www.irrcinstitute.org/pdf/Political_Spending_Report_Nov_10_2011.pdf (“106 [of the S&P 500] do not appear to spend, 99 companies in the index both spend and report (in some fashion) and 278 companies spend and do not report on it (two-thirds of the spenders).”).

²⁵² 26 U.S.C. § 501(c)(4), (c)(6) (2006).

²⁵³ According to the instructions for FEC Form 9, “[i]f you are a corporation, labor organization or Qualified Nonprofit Corporation making communications permissible under [11 C.F.R.] 114.15 and you received no donations made specifically for the purpose of funding electioneering communications, enter ‘0’ (zero).” *Instructions for Preparing FEC Form 9*, FED. ELECTION COMM’N (undated), available at <http://www.fec.gov/pdf/forms/fecfrm9i.pdf>; see also FEC FORM 5 REPORT OF INDEPENDENT EXPENDITURES MADE AND CONTRIBUTIONS RECEIVED, FED. ELECTION COMM’N (2009), available at <http://www.fec.gov/pdf/forms/fecfrm5.pdf>.

²⁵⁴ Freed & Carroll, *supra* note 237, at 1–2.

²⁵⁵ See Commissioner Luis A. Aguilar, *Shining a Light on Expenditures of Shareholder Money*, SEC. AND EXCH. COMM’N (Feb. 24, 2012), available at <http://electionlawblog.org/wp-content/uploads/aguilar.pdf>.

²⁵⁶ Ciara Torres-Spelliscy, *Comment Submitted to the Securities and Exchange Commission Endorsing a New Rule on Transparency of Corporate Political Spending* (Nov. 2, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1955950.

²⁵⁷ Securities and Exchange Comm’n, *Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities*

Another parallel between then and now is the corporate governance problem caused when corporate managers spend corporate funds on politics.²⁵⁸ What these managers are spending is what Justice Brandeis once termed, “other people’s money.”²⁵⁹ As Columbia Professor John Coffee once put it, when it comes to corporate political spending, “managerial and shareholder interests are not well aligned.”²⁶⁰ So then, as now, there is the problem of shareholders unwittingly underwriting political spending without a consent mechanism.²⁶¹ During Watergate, the \$100,000 in illegal contributions was the issue; today, the potential for unlimited legal corporate political expenditures should worry investors.²⁶²

The U.K. has already tackled the corporate governance problem created by corporate political spending.²⁶³ They changed their law a dozen years ago to require a shareholder vote before a public company could spend in politics.²⁶⁴ This model from the U.K. Companies Act should be adopted here to protect investors from modern corporate political spending. This could be accomplished by passage of the Shareholder Protection Act, which has been introduced in both Houses of Congress.²⁶⁵

[File No. 4-637], <http://www.sec.gov/comments/4-637/4-637.shtml> (last visited May 9, 2012).

²⁵⁸ Comment of Dr. Susan Holmberg, *A Cost-Benefit Analysis of Corporate Political Spending Disclosure*, SEC. AND EXCH. COMM’N 4 (Nov. 2, 2011), available at <http://www.sec.gov/comments/4-637/4637-12.pdf> (discussing the SEC Petition File No. 4-637) (“In the CPA [corporate political activity] context, there is considerable potential for personal advantages to corporate executives, particularly prestige, a future political career, and star power (Hart 2004) or to help political allies (Aggarwal et al. 2011).”).

²⁵⁹ LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY & HOW THE BANKERS USE IT* (1914).

²⁶⁰ John C. Coffee, Jr., *Testimony Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services, United States House of Representatives*, 1 (Mar. 11, 2010) available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/coffee.pdf.

²⁶¹ See Michael Hadani, *Institutional Ownership Monitoring and Corporate Political Activity: Governance Implications*, 65 J. BUS. RES. 944 (2011); John Coates, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?*, 1 (Harvard Center for Law, Econ. & Bus., Discussion Paper No. 684, Sept. 21, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680861; Remarks of John Coates, *Can Shareholders Save Democracy, Accountability After Citizens United* Symposium (Apr. 29, 2011), available at http://www.brennancenter.org/content/pages/accountability_after_citizens_united; Rajesh Aggarwal, Felix Meschke & Tracy Wang, *Corporate Political Donations: Investment or Agency?* 2 (Working Paper, June 25, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670.

²⁶² Elizabeth Kennedy, *Protecting Shareholders after Citizens United* (Brennan Center 2011) (noting that “[n]ow . . . there are no rules to prevent a manager from breaking out the corporate checkbook and doling out thousands of company dollars to support the candidate of his choice. And, there are no requirements that a company tell its shareholders when this happens.”).

²⁶³ Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U.S.F. L. REV. 479, 497–502 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1853706.

²⁶⁴ Political Parties, Elections and Referendums Act 2000, c. 41, §§ 139–140, & sch. 19 (2000) (Eng.).

²⁶⁵ H.R. 2517, 112th Cong. (2011), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_cong_bills&docid=f:h2517ih.txt.pdf; S. 1360, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.1360>.

B. Campaign Finance Reforms

Thoughtful money-in-politics reforms, like accurate disclosure and public financing, are also needed to compliment securities law reforms because the issue of corruption has not gone away. The risk that those in power will shake down those with financial wealth remains a live issue.²⁶⁶ During the *McConnell* litigation before the Supreme Court, an ex-CEO declared under oath:

When sitting Members solicit large corporate and union contributions, the leaders of these organizations feel intense pressure to contribute, because experience has taught that the consequences of failing to contribute or failing to contribute enough may be very negative. Business and labor leaders believe based on their experience, that disappointed Members, and their party colleagues, may shun or disfavor them because they have not contributed.²⁶⁷

This insider account should give us great pause about what may be going on behind closed doors.²⁶⁸ This sounds eerily similar to the way Mr. Spater framed the issue of corporate political spending before the Senate Watergate investigators in the 1970s.

Pending campaign finance legislation in Congress could go a long way in revitalizing the way our elections are run. In the House, Rep. Chris Van Hollen has introduced the DISCLOSE Act, which would provide transparency to the source of money in federal elections.²⁶⁹ Meanwhile, Senator Durbin has introduced the Fair Elections Now Act in the Senate.²⁷⁰ Fair Elections would give candidates for Congress an incentive to focus on small dollar donors by matching low contributions with federal dollars.²⁷¹ Combined, these reforms could provide candidates with an alternative to the current system which increasingly relies on secretive private money.

²⁶⁶ *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 125 n.13 (2003) (“[V]arious business leaders attest that corporate soft-money contributions are ‘coerced’ . . . and that ‘[b]usiness leaders increasingly wish to be freed from the grip of a system in which they fear the adverse consequences of refusing to fill the coffers of the major parties.’”).

²⁶⁷ Declaration of Gerald Greenwald at 3–4, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (No. 02-0582), available at http://www.campaignlegalcenter.org/attachments/BCRA_MCCAIN_FEINGOLD/McConnell_v_FEC_District_Court/708.pdf. Mr. Greenwald was the Chairman of United Airlines. *Id.* at 1.

²⁶⁸ Far too often, what goes on behind closed doors is not just unethical; it is illegal. See CORPORATE FRAUD TASK FORCE, REPORT TO THE PRESIDENT iii (2008), available at <http://www.justice.gov/archive/dag/cftf/corporate-fraud2008.pdf> (federal task force reporting to President George W. Bush, “[From] July 2002 [through April 2008], the Department of Justice has obtained nearly 1,300 corporate fraud convictions. These figures include convictions of more than 200 chief executive officers and corporate presidents, more than 120 corporate vice presidents, and more than 50 chief financial officers.”).

²⁶⁹ H. R. 4010, 112th Cong. (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4010ih/pdf/BILLS-112hr4010ih.pdf> (providing for greater transparency of political spending in federal elections).

²⁷⁰ S. 750, 112th. Cong. (2011), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_cong_bills&docid=f:s750is.txt.pdf (providing for public financing in Congressional elections).

²⁷¹ *Id.*

CONCLUSION

The scope of what went wrong in Nixon's White House is difficult to comprehend forty years after the fact.²⁷² Twisting the executive branch to the will of the reelection effort meant violations of the separation of powers, the rule of law, and the integrity of party politics. As Senator Weicker noted in the Senate Select Report, ultimately "dirty tricks [] were aimed at the voter."²⁷³ By 1977, even Nixon appeared to understand the depth of what he had done. He told reporter David Frost, "I let down the country, I let down our system of government and the dreams of all those young people that ought to get into government, but will think it is all too corrupt"²⁷⁴

In 2012, with an unprecedented amount of money pumping through the first post-*Citizens United* presidential election,²⁷⁵ America faces the scary potential for a second Watergate. As former Republican Presidential candidate Senator John McCain put it recently, "I predict to you there will be a major scandal associated with the Supreme Court decision on *Citizens* [] *United*. There is too much money washing around."²⁷⁶ Meanwhile, former White House Counsel Bob Bauer argued that the whole campaign finance system needs modernization.²⁷⁷ I could not agree more.

We do not live in a Greek myth. Subsequently, we must craft legislative reforms the hard way through the political process. In the 1970s, the revelations of Watergate shocked Congress and two Presidents out of their complacency to enact strong reforms. We should not have to repeat history's mistakes before Congress and the President are motivated

²⁷² See Carl Bernstein & Bob Woodward, *Woodward and Bernstein: 40 years after Watergate, Nixon was far worse than we thought*, WASH. POST, June 8, 2012, http://www.washingtonpost.com/opinions/woodward-and-bernstein-40-years-after-watergate-nixon-was-far-worse-than-we-thought/2012/06/08/gJQAlsi0NV_story.html.

²⁷³ SENATE SELECT REPORT, *supra* note 13, at 1219.

²⁷⁴ *Great Interviews of the 20th Century, 'I have impeached myself,'* THE GUARDIAN Sept. 7, 2007, <http://www.guardian.co.uk/theguardian/2007/sep/07/greatinterviews1> (Edited Transcript of David Frost's interview with Richard Nixon broadcast in May 1977).

²⁷⁵ Center for Responsive Politics, *2012 Presidential Candidate Fundraising Summary*, <http://www.opensecrets.org/pres12/index.php> (showing as of April 19, 2012, over \$361 million dollars has been raised by presidential candidates); see also Center for Responsive Politics, *Independent Expenditures*, <http://www.opensecrets.org/pres12/index.php?src=hp> (showing as of April 19, 2012, \$91,239,120 spent independently on the 2012 presidential race).

²⁷⁶ Jon Ward, *John McCain Goes Off Message, Predicts 'Major Scandal' Related To Unlimited Political Giving*, HUFFINGTON POST (Jan. 25, 2012), http://www.huffingtonpost.com/2012/01/25/john-mccain-campaign-finance_n_1231341.html.

²⁷⁷ Sophy Bishop, *Former White House Counsel Bauer Speaks to HLS Students*, HARVARD LAW SCHOOL (Nov. 18, 2011), http://www.law.harvard.edu/news/2011/11/18_former-white-house-counsel-bauer.html (quoting Bob Bauer) ("This whole area is going to have to be rethought from the ground up. There is a political deadlock, a regulatory deadlock, and a constitutional decision-making trend, that I think has completely overwhelmed the Watergate reforms. I don't think we're going to live in a country in which people tolerate a free-for-all on money, where those who have the most basically carry the debate and hope to carry the day. I think that there's going to be some serious thinking about how the structure we currently have, as damaged as it is, can be rebuilt perhaps along some more modern lines").

2012]

How Much is an Ambassadorship?

97

to tackle the problem of money in politics once more. Democracy deserves to defend itself. Another Watergate is not inevitable if reasonable policy changes, like those suggested here, are put in place.