Watergate's Unanswered Questions: 40 Years of Hindsight

From My Remarks

John W. Dean

INTRODUCTION

The following material has been adapted from my remarks at this symposium. This is not a transcript of that talk, but rather a few edited selections of the subjects I addressed. If this material appears a bit disjointed, that is because this was a question and answer session, and I have summarized and digested matters that arose. Also, because I am currently working on a book about the unanswered questions relating to Watergate, the items I have pulled from my remarks relate more to the process of writing the book than the content of the book. (Plus, extemporaneous remarks do not always translate well from the spoken to the written form.)

A. Uncovering & Organizing the Conversations

No information is more historically important, nor more fundamental to understanding Watergate, than the question of how could a political figure as savvy and intelligent as Richard Nixon make such a mess of his presidency? It is a question I am trying to answer in my work-in-progress. The only way to answer this question is to fully and carefully examine what Nixon did, when he did it and why he did it. Most of that information can be found in Nixon's secretly recorded White House conversations.

I thought at the time I started this book project that nearly all the important information in these recorded conversations was easily available. I assumed that as soon as Nixon's tapes had become public, someone had transcribed the material that might be of interest or importance. I was aware that the Watergate Special Prosecutor Force (WSPF) had transcribed about eighty conversations, although I soon discovered many of these transcripts are only portions of conversations and most are not very accurate since they were merely first drafts. About twenty of the WSPF transcripts are excellent because they were used in the cover-up trial, so the parties involved listened to them, heard what they heard, and made corrections in the transcripts. There are another sixty transcripts prepared

for the WSPF by Federal Bureau of Investigation (FBI) secretaries that are really only very rough drafts, and almost useless. In addition, historian Stanley Kutler, in his book *Abuse of Power: The New Nixon Tapes*, published only partial transcripts of three hundred and twenty Watergate related conversations. In total, I found four hundred mostly partially transcribed conversations relating to Watergate and realized that this is barely the tip of the iceberg.

To my surprise, no one had ever bothered to assemble a comprehensive catalog of all of Nixon's Watergate-related conversations from June 20, 1972, his first day back at the White House following the arrests of the burglars at the Watergate, to July 13, 1973, when the plug was pulled on the taping system after Alex Butterfield informed the Senate Watergate Committee about its existence. When I completed that cataloging process I found that there are almost two thousand Nixon conversations relating to this subject—some very brief while others are quite long. The audio quality of the conversations varies greatly. Recorded telephone calls are generally the most audible. Many of the room conversations are virtually impossible to hear, which means they are almost impossible to transcribe. Fortunately, the technology has improved since the Nixon era, so I have been able to take the tapes from the National Archives and improve their audio quality to some degree. I have digitized conversations that the National Archives had not yet digitized.

In short, my initial assumption that most of Nixon's Watergate-related conversations had been transcribed was very wrong. In fact, these conversations have been largely ignored, and no one outside the National Archives staff has ever listened to the bulk of these conversations. To understand this history these conversations are essential. I have had a team of graduate students working on the transcripts for over a year and we are now well beyond the halfway point. There is no way to follow what really happened, and why, without full transcripts. And, frankly, it is fascinating what I am discovering.

We know the general story regarding Nixon's activities in Watergate but we don't know how it unfolded day-by-day, week-by-week, and then year-by-year. For his memoir, Nixon had his secretaries transcribe conversations during the first few weeks after the arrests at the Watergate. It appears they transcribed about thirty conversations. Yet to understand how Nixon dealt with Watergate, it is necessary to go far beyond the first weeks of activity to learn what Nixon was learning, when he was learning it, and why he was learning it. To understand his actions it is necessary to appreciate what was provoking him, and what actions he took as he acquired information.

One of the striking things I've learned is how little information the President was given early on. He was not told some of the most important information relating to the cover-up by his top aides: White House Chief of Staff Bob Haldeman and his top domestic policy adviser John Ehrlichman.

Nixon was not informed of the fact that following the leak of the so-called Pentagon Papers (a classified study of the origins of the war in Vietnam) there had been a White House sanctioned break-in of Daniel Ellsberg's psychiatrist's office by Gordon Liddy and Howard Hunt to get information to discredit Ellsberg for his role in leaking this information, and that two of the men who were used in the Ellsberg break-in were in the D.C. jail after being arrested during the Watergate break-in. Not surprisingly, this fact was a matter of real concern to John Ehrlichman, because he had approved the Ellsberg break-in, yet he withheld this information from the President. In fact, the reelection committee, which had authorized the Watergate break-in, might have been cut loose to fend for themselves had there not been that link back to the White House. But Nixon was not given this information for months, and not until after his White House was deeply involved in a cover-up.

Needless to say, new information is emerging from my transcripts, and not merely because no one else has transcribed most of these conversations but also because I hear things that nobody hears. For example, in October 1972 I visited Henry Petersen, the head of the Criminal Division at the Justice Department, who informed me that Mark Felt, the number-two man at the FBI, who we now know was Deep Throat, was leaking information. A lawyer for *Time* magazine had informed Petersen that Felt was leaking and they were concerned they might be getting grand jury information, which is unlawful. After Petersen shared this information, I took it back to the White House and told Haldeman, who in turn reported it to Nixon. Stanley Kutler, in his transcripts of this October 19, 1972 conversation, did not hear what I heard. At one point Kutler has Nixon saying to Haldeman, after being told about Felt's leaking, "You know what I'd do with him, the bastard?" Kutler's transcript never answers the question. But I heard Nixon say something very different, as have others I have asked to listen to my tapes, which have been scrubbed with the latest technology. On my copies it is very clear that Nixon said, "You know what I'd do with him: Ambassadorship." A huge difference. This is what Nixon would later do with Central Intelligence Agency (CIA) Director Richard Helms, appointing him ambassador to Iran to move him out and keep him happy. So I am finding information on these recorded conversations that others have missed because not only is the technology better, but because I know the players and the circumstances.

B. Nixon's Grand Jury Testimony

While doing research for my work-in-progress at the National Archives, I rediscovered testimony of Richard Nixon that I had actually forgotten about, probably because it had been sealed and would, I thought, never be available. Nixon had testified, after he resigned from office, before the last Watergate Grand Jury. Because he had been pardoned by President Ford for any and all of his conduct while President, he had no

criminal exposure nor could he rely on the Fifth Amendment to not answer questions. That pardon, however, did not include anything after he had resigned. Thus, when testifying before a grand jury he risked being charged with perjury if he was not truthful. At the time Nixon appeared before the grand jury, the WSPF was still actively investigating a campaign contribution to Nixon from billionaire Howard Hughes; misuses of the Internal Revenue Service for political purposes during the Nixon presidency; the sale of ambassadorships by the Nixon White House; and the eighteen and a half minute gap on a June 20, 1972 conversation that had been subpoenaed by the special prosecutor. Under the Federal Rules of Criminal Procedure, grand jury proceedings are secret and these records typically remain sealed forever. Thus, only a handful of people knew what Nixon had said when asked about these matters during his testimony, and they were prohibited by law from revealing this information.

When in Washington doing research, I lamented this fact to a friend, Alan Morrison, an associate dean at George Washington University School of Law. Alan asked me if I was aware that the Second Circuit had released the secret grand jury testimony of Richard Nixon in the Alger Hiss case during the McCarthy era, as well as grand jury testimony from Julius and Ethel Rosenberg. I had not been aware, and Alan explained that this grand jury testimony had been released because of its historical importance. He said that the chief judge of the federal district court where a grand jury sits has it within his or her power to release such historic testimony. Alan, who had been one of the cofounders of the Public Citizen Litigation Group, thought they might be interested in representing historians interested in Nixon's June 1975 grand jury testimony. I spoke with Stanley Kutler, and he was very interested in leading this effort, and working with Public Citizen. He assembled a who's who group of American historians to join in a petition requesting the court disclosure of Nixon's grand jury testimony. The action was filed in the U.S. District Court for the District of Columbia, and after examining the facts submitted for the interested historians by Public Citizen, Chief Judge Royce Lamberth unsealed Nixon's grand jury testimony. The Nixon Presidential Library has posted the material online, and it is revealing.

C. Mark Felt's (or Deep Throat's) Misinformation

Mark Felt, who was in charge of the FBI's day-to-day investigation of Watergate, and who we now know was the infamous Deep Throat (mythologized by the movie "All the President's Men"), is one of the most celebrated leakers in American history. Felt, as the associate director of the FBI, was the number-two man during Watergate, knew virtually everything the FBI knew. Indeed, his initials are on countless documents that crossed his desk during that investigation. For that reason, I find it incredible that Felt provided a remarkable amount of totally inaccurate information.

In their book, *All The President's Men*, Woodward and Bernstein set forth the information they learned from Deep Throat. I once had occasion to gather all that information and was surprised by how much of the information was bad. More recently, in working on my book, I have discovered that Felt was providing information that he appears to have concocted, for it is nowhere to be found in the FBI files. As the Nixon-recorded conversations show, we knew Felt was leaking, and that he was doing it to undercut the acting FBI Director Patrick Gray. We knew that Felt wanted the job of FBI director, and he apparently believed that by leaking, it would show Nixon that Gray could not control the FBI.

Recently, a very able investigative journalist and historian, Max Holland, has written a terrific book about Mark Felt, *Leak: Why Mark Felt Became Deep Throat*, and further confirmed our perception at the time about Felt's motives. Watergate cannot be fully understood without appreciating the issues Max Holland has addressed in his book.

D. Reforms After Watergate

Watergate caused Washington to reexamine the way it did business, and that, in turn, provoked many reforms. This is not the time or place to catalogue those reforms, rather I merely want to point out that most of those post-Watergate reforms have vanished. A few examples will make the point. The Senate Watergate Committee recommended, and Congress approved, the creation of an Independent Counsel Law, a prosecutor who could investigate a President, Vice President and other high level officials—and not be fired by the President, as had happened during Watergate. Congress adopted a number of new campaign finance and reporting laws and created the Federal Elections Commission. In the aftermath of Watergate, investigative journalism saw a dramatic increase, with most every news organization encouraging such reporting. In brief, new formal and informal restrictions were imposed on presidents; from controlling their ability to enter wars, to the way they handled their presidential papers, not to mention how they campaigned for the office.

As we approach Watergate's fortieth anniversary, I find it striking that virtually all of these post-Watergate reforms have disappeared for one reason or another. The Independent Counsel Act is gone. Congress allowed it to expire after both Republicans and Democrats were adversely affected by the law. Campaign finance reform has been affected by a number of U.S. Supreme Court rulings, most recently by *Citizens United*, which has produced a new flood of money into the 2012 presidential campaign cycle. The Federal Elections Commission is still in existence, but it is something of a joke, for this bi-partisan group cannot agree on anything. Even investigative journalism has become the exception rather than the norm, because journalism has been changed by the Internet and investigative journalism is not always profitable.

Nonetheless, there is a distinctive exception to the disappearance of the post-Watergate reforms. During my testimony before the Senate Watergate Committee, I commented about the fact that a disproportionate number of lawyers found themselves on the wrong side of the law during Watergate. The American Bar Association (ABA) took note of this fact as well, and assembled a commission to examine legal ethics and professionalism. I was told by several involved in the ABA's undertaking that my testimony had been something of a trigger. In the years following Watergate, the ABA developed a Model Code of Professional Conduct, required separate bar examinations on ethics, and created a program for continuing legal education, which is mandatory in many states. These ethics and professionalism reforms imposed by organized bars, state by state in the aftermath of Watergate, have remained very much in place. They are as important today as they were in the years immediately after Watergate when the ABA, and state bars, decided they were going to do something to address the kinds of mistakes attorneys made during Watergate.

E. The Watergate CLE

In December of 2010, I received a call from a friend in Cleveland, Jim Robenalt, who is a partner in the multi-state law firm Thompson Hine. Jim had just completed a Continuing Legal Education (CLE) course that had examined the tragic shootings at Kent State University on May 4, 1970. Since this tragedy occurred while I was the Associate Deputy Attorney General of the United States, he was curious about my recollections, which were few because I had not been involved with the matter. However, it provoked a conversation about how typically boring CLE classes can be made very interesting by drawing on lasting lessons from historic events. To make a long story short, Jim (a presidential scholar when not practicing law) and I decided to assemble a CLE based on Watergate.

I had spoken at CLEs for years, and had always been disappointed by the use made of this history as a teaching tool. Given the fact that so many attorneys made mistakes during Watergate, there is an abundance of material from which to draw. Jim Robenalt, who specializes in complex business litigation, typically represents business entities, and as he began looking at the rules of professional conduct that emerged from Watergate (and later Enron), he noticed dramatic changes in the rules of professional conduct relating to entities. For instance, following Watergate the role of White House Counsel vis-à-vis the President and the Office of the President of the United States have been clarified (White House counsel represents the office, not the person who is elected to the office), and when we applied the ABA's Model Code of Professional Conduct to the events that occurred during Watergate, we discovered very telling results.

To clarify our thinking, we wanted to talk with an expert, and I knew one who had knowledge of Watergate: Ronald Rotunda. Rotunda had been

an attorney with the Senate Watergate Committee and with whom I had spoken about these events several years earlier. Best of all, I discovered Ron was The Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University School of Law, which was only about an hour's drive from my home. I called him, told him what Jim and I were doing, and asked if he would walk me through the ABA's Model Code in the context of Watergate, and he graciously agreed to do just that, which helped us focus our attention. Based on information from Professor Rotunda and with Jim's skill and experience as a trial lawyer, we narrowed the program to focus on the first week at the Nixon White House following the arrests at the Watergate. It was during that week that the die was cast for the Watergate cover-up, so the mistakes made that week provided a powerful teaching tool for what an attorney should not do when representing an entity with a powerful person in charge. More strikingly, had the ABA's Model Code existed in June 1972, I sincerely believe it would have changed history.

Jim and I gave a two-hour edition of The Watergate CLE at Chapman University School of Law the day before this symposium, with Ron Rotunda joining us. Working with Ron led not only to the development of our CLE program, but to this Watergate Symposium, where we have all had a chance to visit this history. My sincere thanks to Ron, Chapman University Law School, and the editors of this journal for organizing and bringing together some of those involved in making this history and providing the opportunity to examine its meaning for attorneys today.

Chapman University School of Law

Transcription of 2012 *Chapman Law Review* Symposium: "The 40th Anniversary of Watergate: A Commemoration of the Rule of Law"

Panel 1: "President Nixon's Secret Tapes: Evidence that Politically, Legally and Historically Defined Watergate (and More)"

Friday, January 27, 2012

Moderator:

John W. Dean[*]

[*] John W. Dean served as Counsel to the President of the United States from July 1970 to April 1973. Before becoming White House counsel at age thirty-one, he was the chief minority counsel to the Judiciary Committee of the U.S. House of Representatives, an associate director of a law reform commission, and an associate deputy attorney general at the U.S. Department of Justice.

His undergraduate studies were at Colgate University and the College of Wooster, with majors in English Literature and Political Science; followed by a graduate fellowship at American University to study government and the presidency. He then entered Georgetown University Law Center, where he received his J.D. with honors in 1965.

John recounted his days at the Nixon White House and Watergate in two books: *Blind Ambition* (1976, with new extended afterword in 2010) and *Lost Honor* (1982). After retiring from a business career as a private investment banker, Mr. Dean returned to writing best-selling books and lecturing, as well as becoming a columnist for *FindLaw*'s Writ (from 2000 to 2010). He currently writes a bi-weekly column for *Justia.com*.

Mr. Dean's other books include: *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court* (2001), *Warren G. Harding* (2003), *Worse Than Watergate: The Secret Presidency of George W. Bush* (2004), *Conservatives without Conscience*

Panelists:

Scott Armstrong[**]
Alexander Butterfield[***]

John Dean: This is really a unique panel this morning. I take special delight in being able to moderate. I am the guy who thought I was taped; Scott is the guy who thought there might be taping; and Alex is the guy who knew there was taping. They have been together once before, almost forty years ago when they brought this information to the public, but also, realizing the historical importance of what they were doing, they paused to make a record of it. That record, made many years later in the Journal of American History, is a fairly detailed account. What I thought would be interesting this morning is to reminisce about these events, where we can serve as your fact witnesses. I thought that since this program is being recorded—appropriately—by C-SPAN, that what I would do is adopt my favorite television questioner's approach, that of Brian Lamb, and be rather blunt and right to the point and let the program really evolve around the very special guests we have this morning. So let me start with you Scott, and ask, where did you go to school? That is a very Brian Lamb type of question.

(2006), *Broken Government: How Republican Rule Destroyed the Legislative, Executive, and Judicial Branches* (2008), and *Pure Goldwater* (2009).

While working on his next book, Mr. Dean continues as a visiting scholar and lecturer at the University of Southern California's Annenberg School of Communications (since 2003), and as a regular on-air contributor to "*Countdown With Keith Olbermann*" on CurrentTV. Mr. Dean is also engaged in an extended continuing legal education series that examines the impact of the American Bar Association's Model Rules of Professional Conduct on select historic events, like Watergate.

[**] After attending the University of California and a distinguished career with the United States Air Force, Alexander P. Butterfield took the post of Deputy Assistant to the President in 1968. In 1972, President Nixon appointed Mr. Butterfield as the Administrator of the Federal Aviation Administration. Mr. Butterfield was tangentially drawn into the Watergate scandal after Hugh Sloan mentioned Mr. Butterfield was in charge of President Nixon's "internal security." In July of 1973, Mr. Butterfield appeared before the Senate Committee and revealed the details of the taping system that President Nixon used to monitor his conversations. The testimony to the Senate Committee served to launch the investigation which eventually compelled President Nixon to release the tape recordings. Mr. Butterfield remained administrator of the Federal Aviation Administration under President Gerald Ford and resigned from the post in March of 1975.

[***] Scott Armstrong initially began studying philosophy at Yale University at the age of 17. As an investigator for the Senate Watergate Committee, Mr. Armstrong conducted an interview with Alexander Butterfield which led to the investigation and discovery of President Nixon's White House taping system. Soon after, Mr. Armstrong began working as a reporter for *The Washington Post*, where much of his coverage focused on the Watergate scandal. Mr. Armstrong later founded the National Security Archive, a non-profit group that obtains and publishes declassified documents acquired through the Freedom of Information Act. Mr. Armstrong is currently the executive director of the Information Trust.

Scott Armstrong: Yale University.

John Dean: Alex, how about you?

Alex Butterfield: I started at UCLA, and then went into the Air Force, and everyone said I would never continue, having dropped out of school. But I did, thanks to the University of Maryland, which was worldwide. I went to the University of Maryland in Munich, and then I went to eight other campuses in Europe and in Libya. I eventually did my final semester in Maryland. That was my undergraduate.

John Dean: Scott, what did you do when you got out of Yale?

Scott Armstrong: I went to law school for a brief time. I didn't like it. I thought it was an inferior way to catalogue the world, [laughter] a second rate epistemology, so I quit. I got involved in correctional reform—reform of the criminal justice system. I was running a program for men coming out of prison just before Watergate.

John Dean: Alex, if I recall, while in the service, at one point you were at the Pentagon, and you had dealings as liaison with the Johnson White House, so you later went to the Nixon White House with some experience in the operations. Tell us a little about how you got the job for the Johnson White House, what you did, and how that might have educated you about working in the Nixon White House.

Alex Butterfield: I'll try to be brief. I tend not to be. When I came back from Vietnam, I went into the policy division of war plans in Air Force headquarters at the Pentagon. Shortly thereafter, within about six months, I was called down by the Director of the Joint Staff, Lieutenant General Burchinal, who told me about an opening in the immediate office of the Secretary of Defense. My specific job: I was the military assistant to the Secretary of Defense for White House matters. I was told every time the Secretary of Defense went to the White House, I was to go with him, even if it meant running alongside his car and jumping in while it was moving, you make sure you get over there. Oftentimes McNamara left me—I'm this little Lieutenant Colonel that he hardly recognized—but I eventually spent at least twenty hours a week in the Johnson White House. I was usually there doing some errand for the Secretary, and there is an awful lot of interplay between the Defense Department and the White House.

John Dean: So you got to understand some of the basic and broad mechanics of how the place operated?

Alex Butterfield: Yes I did, especially around the Oval Office. I came to know Johnson, and all of his key people.

John Dean: Scott, long before you got involved in Washington, you had a longtime friend who would influence a lot of your life, and you, probably, some of his life. Would you describe to this group who that person is, and what that influence was?

Scott Armstrong: Well, two years ahead of me in high school in Wheaton, Illinois, was a fellow named Bob Woodward. I was from the other side of the tracks from Bob, and I really wasn't focused on college, and Bob got me interested in the Ivy League, and encouraged me to come to Yale where he had gone. I got married when I was seventeen years old, and Bob helped me make that transition because I lived off-campus at Yale. Later, when Bob was in the military, I would come to Washington for anti-war marches. He was working in the Pentagon, and I would stay with him. It was ironic. Over one evening conversation sometime around the beginning of Watergate, I was down in Washington and Woodward was telling me about this fellow named John Dean, who was the embodiment of evil at this point because he was working on behalf of John Mitchell, and was very loyal to Mitchell. I was told that John Dean had been recommended to go to the White House by Mitchell, and Dean was working behind the scenes to cover up this thing called Watergate—this was right at the beginning—and we had this conversation about loyalty, and I said, "Isn't it possible for a person to be loyal to something good?" By that point, we determined Mitchell may not be the embodiment of good. There was a time before we realized that attorney generals can lie like everybody else, and run things out of their office that are inappropriate. And so I volunteered this notion that someday I'd like to find somebody good to work for in Washington and do something reasonably decent.

John Dean: Alex, how did you end up at the Nixon White House?

Alex Butterfield: I was minding my own business in Australia. I was what they call the Senior U.S. Military Officer in Australia. The Commander-in-Chief of the Pacific Theater was John McCain's father, Admiral McCain. I had just heard that I was going to be given another two years there. Australia is an idyllic assignment, unless you're ambitious. It's left field, it's Siberia, you do not want to be there if you are coming up for promotion.

John Dean: Contrary to some revisionist interpretations, you were not with the CIA in Australia?

Alex Butterfield: No. There were actually twenty-two Defense Department activities, which I oversaw. I didn't command anything, but in Australia there were about twenty-two Defense Department activities and about 600 U.S. troops there. So I was desperate. I didn't want to do another two years there. I had to get out of there. We were confined to our hotel in New Guinea, it was raining, and I read in the New Guinea Tok Talk—which is their newspaper—all about this guy Bob Haldeman, who was going to be the Chief of Staff to this new President that had just been elected. Haldeman and I, it was built up that we were close friends. We were not close friends, but we were friends at UCLA because of our girlfriends, who were sorority sisters and very good friends. I thought I'd write Bob a letter and mention all of my Washington experience, because

this California mafia would be hungry for a guy like me—I was hoping—who knew how Washington worked.

John Dean: Tell us also in a summary overview what you would do when you arrived at the White House.

Alex Butterfield: It all worked out with Haldeman, and I was called in there, and I thought I was going to have a military job, and I found out at the last minute that I wasn't, so I left the military. It was my own choice to leave, but I felt that it was tradition if I was going to be in a policy-making position that I should leave the military. Haldeman said, "You and I will be the only ones working for the President. This man doesn't like to work with a lot of people. If he likes you, we will be the two guys through whom he will work with his staff." And then he said, "I have to introduce you at exactly the right time." I thought he meant later that day, or maybe the next day. Thirteen days later, he took me in hurriedly and out of breath, and that was a spectacle. I've never met a stranger person in my entire life. I've never met anyone who had so much trouble meeting me.

John Dean: Describe that. Physically? Conversationally?

Alex Butterfield: First of all, it wasn't the right time. Haldeman was waiting for this right time, but he suddenly had to go to California. He came in breathlessly to me and said, "We've got to go and see the President right now. We have to introduce you. I didn't want it to happen this way." He could see what was coming, knowing Nixon as well as he did. I couldn't imagine what the problem would be just to say hello to the President and tell him how honored I was to be there. So we rush in sort of out of breath. Nixon gets up from his desk, and Bob said his little piece. Then I said how honored I was. And then the President—I have to stand up to tell you this—the President says [a series of guttural sounds], and he sort of circled his hand. It was like charades. I couldn't believe that he couldn't utter a word. Then he started doing this with his foot on the rug [rubs his foot back and forward on the ground]. I was perfectly at ease there for a while, then I noticed I was doing this back and forward on the rug [repeats the same motion]. The man never did say a word, just guttural sounds and hand circling. I saw him do it many times later, and I understood. Finally Haldeman just grabbed me and said, "Alex will be here tomorrow."

John Dean: Scott, what were you doing when Alex was heading toward the White House?

Scott Armstrong: Well, at that point I was still in community-based corrections, trying to get people out of prison, trying to shut down major institutions. It was before Watergate, before I got into the business of putting members of the community into prisons.

John Dean: Staying friendly with Woodward in this period?

Scott Armstrong: Yeah, and there was literally a time as Watergate was breaking open, and we knew it was breaking open because James McCord, one of the burglars, who had been the former Chief of Security of the CIA, had written a letter to the judge. As it was breaking open, I got a call from Woodward recalling our conversation about being loyal to the good, and he said, "You're going to get a call from a guy named Sam Dash—Chief Counsel of the Watergate Committee—a wonderful man." Dash was having trouble finding investigators and he offered Woodward a job, and Woodward said—in those days it was true—you couldn't go back and forth between the press and government. So Dash said, "Who should I get?" Woodward said, "We should get someone that would be a good journalist, but wasn't. Someone who is not an academic, but a practical investigator." He recommended me, and said that I would get a call from Dash. Dash called and offered me a job.

John Dean: Alex, one day you got a request from Larry Higby to install the taping system. Can you lay that fundamental fact out there for the audience?

Alex Butterfield: Larry Higby was Bob Haldeman's staff assistant. Bob had three staff assistants. We called them the Beaver Patrol. They were all young—twenty-three, twenty-four years old—and Larry was the main guy, Haldeman's closest staff assistant. And everybody wanted a Higby. If you had a Higby, you had some status there in the White House. But if Higby came in and said something, you knew it came from Haldeman. He came into my office one day, and my office then, I had taken over Haldeman's office adjoining the Oval Office, and Haldeman had moved from the grand office down the hall where we had put Spiro Agnew, and we had to kick the Vice President out so Haldeman could take that office. Nixon was the first President to put the Vice President in the West Wing or give him an office there. So Higby said, "Bob wants me to tell you that the President wants a taping system installed in the Oval Office, and he wants to make sure it's a good taping system, and he'll talk to you more about it later."

John Dean: Did you know why he wanted it?

Alex Butterfield: No, I didn't then. That's all Larry said.

John Dean: You understand now it was because the earlier staff's system of keeping up with their reports to the President's file about their meetings broke down. Do you agree with that?

Alex Butterfield: I was not aware of that if it happened.

John Dean: It did happen.

Alex Butterfield: It did? The way it was explained to me, we had a postal strike, and I heard the President say, "It's too bad that when we had that postal strike, and we solved it so well—we brought people in, the cabinet members came in, everyone contributed to the solution—and it's

too damn bad we hadn't recorded all of that." I just assumed it was for the book of course that would always follow his presidency, and we had a system going at that very time where we had someone sitting in taking notes whenever someone came in that wasn't a staff member. At first it was for taking notes, which intimidated the guest. Then it was supposed to be just a color report, where you wrote immediately after the meeting. Those were called "memos for the President's file," and I kept those memos. We had that system, and I assumed at the time that the tapes supplanted that process, but it didn't. When we put the tapes in, we still kept taking the memos for the President's file. He was big on keeping things for the record.

John Dean: Where was the equipment placed?

Alex Butterfield: Haldeman just said one thing: "Don't have the military do it." The military could have done it. There's the WHCA—White House Communications Agency—run by an army three-star general. Lots of military people around the White House. Haldeman thought the military might screw it up, that was the intimation. The military guys can be transferred, and we didn't want anyone to know about this. The Secret Service were the best people to go to. The Secret Service had a technical security division. I worked with them all the time. I was the conduit with the Secret Service for Nixon, so I called Al Wong, who ran the division, and told him what the President wanted to put in, and he sort of said, "Here we go again." He didn't say quite those words, but the intonation was we've done this before. And of course they had. So, in the President's office, they put microphones on the mantle. I don't know how many, but up on the mantle, in the base of the lamps. And in his office, they embedded six microphones on the surface of his desk, coming up from the bottom. That came back to bite them because people often drank coffee at the President's desk, especially his aides, and you've got those coffee cups rattling. Anything at his desk really wasn't picked up as clearly as it might have been.

John Dean: In fact, when you dragged a coffee cup across the desk, it sounds like a train going through the Oval Office.

Alex Butterfield: And it was voice activated.

John Dean: Why was it voice activated?

Alex Butterfield: They just decided—I had nothing to do with it—they put it in and when it was in, they just told me.

John Dean: It wasn't because no one thought Nixon could hit the switch at the right time without being conspicuous?

Alex Butterfield: That makes a good story, and that would be true.

John Dean: Back to locations, the Oval Office—

Alex Butterfield: The Oval Office, I guess the Cabinet Room at that time or was that a little later? I'm not sure. The Cabinet Room, there was

a switch under the desk that called the people from the staff mess to come up and bring coffee, so we just put a Haldeman and a Butterfield button under there. I forget whether Haldeman was to turn the tapes on, or whether my name was to turn the tapes on. Nixon would never do anything like that. You couldn't ask him—he's not going to look for buttons—

John Dean: Or find them.

Alex Butterfield: Or find them, that's right. So I did. I was the Cabinet Secretary, which was another one of my additional duties, and I sat right behind the President just off to the right at all cabinet meetings, so when the President would be brought in—and they announced the President often, even in the White House—"Ladies and gentlemen, the President of the United States." So he would come in from the Oval Office to the Cabinet Room. When everyone stood, I would just reach forward and hit the button that turned the tapes on.

John Dean: How about telephones?

Alex Butterfield: They were on the office phones in the Oval Office. I think it was a little later we did the President's EOB office. All Presidents have an office over in the Executive Office Building. Big office, sort of a lounge room, sitting room, private library.

John Dean: Any in the residence?

Alex Butterfield: Yes, upstairs—correct me if I'm wrong here Scott, it's been forty-one years since we put them in—over in the Lincoln Sitting Room where the President spent a lot of his time, on the second floor of the residence, there was a tape on that telephone. All of these tapes came down to a—there's a Secret Service sub-command post underneath the Cabinet Room that runs over toward the Oval Office. Right across the hall from that little Secret Service command post is a little locker room where the Secret Service guys change clothes if they have to. It's just a long skinny room. Inside the wall of that room, they put a metal door, and in there, that's where all the tapes were running. Much later, we installed tapes in the President's office in Camp David. Haldeman didn't know about that. The President said, "Don't tell Haldeman." I had no idea why.

John Dean: How many people knew of the system?

Alex Butterfield: I think about seven to begin with. The President, Haldeman, Higby, and I. Later I had Haldeman's permission to tell my secretary. She was a very trusted person. She was one of five secretaries who were cleared to go with the President to Camp David, that sort of thing. She knew only about the Cabinet Room, because she had to turn it on one day when I wasn't there. The Cabinet Room also turned on from the telephone in my office. There were two buttons for the Cabinet Room. One on my phone in my office, and one under the cabinet table.

John Dean: Before we turn directly to Watergate, let me ask you Scott: what did you do after you worked for the Senate Watergate Committee? Just to round out this introduction.

Scott Armstrong: Rather than go back to Boston and become a deputy commissioner of corrections, I took a job with Woodward and Bernstein to help them write a book called *The Final Days*. That led to a job at the *Washington Post* and then later Woodward and I did a book called *The Brethren* on the Supreme Court, and I continued on as a journalist.

John Dean: Let me ask you about *The Final Days*. To me, it is the best record, but it is of course undocumented, as is Bob's style, and it's held up remarkably well over the years, as an account with some dispute from the Nixon people about whether he was talking to portraits in the final days or not, as he roamed around the White House. How comfortable are you after all these years with the reporting that was done to gather that material?

Scott Armstrong: Very comfortable. We did hundreds of in-depth interviews, talking to people several different times, off the record, but we got as many documents as we could—we basically reconstructed—it was much like the Watergate investigation became, after a certain point—a reconstruction of very detailed events so that we had multiple sources and multiple materials on each one.

John Dean: I happen to think that *The Brethren* by Scott and Bob Woodward is one of the most remarkable pieces of journalism that goes inside the Supreme Court like no book had ever done before, or since. I happened to re-read the material on *U.S. v. Nixon*—the tapes case—it is a blow-by-blow description—we're going to touch on it a little bit as we get toward the end of this session this morning. And Scott worked on that, and it really gives some insight into how that case was resolved from the get-go, right through the issuing of the decision. We'll come back to how this all unfolded, but Alex, tell us about your post-government career?

Alex Butterfield: I feel like the guy that was going to the moon when he was asked what are you going to do, and he said, "Well, I plan to cry a lot." I cried a lot. I was looking for a job, and it was difficult, because I was not the most popular guy in town because of my testimony to the Senate. My other testimony before the judiciary committee during the impeachment was behind closed doors, and I was the first of eight witnesses in June or July of 1974. I really didn't cry a lot, but I did lose a lot of Air Force friends. People didn't seem to understand or know the context. Or if they did, then they obviously assumed that I should lie, or plead the Fifth.

John Dean: We'll get into that. Let's turn to Watergate. Scott, when did you first hear of the break-in at the Democratic headquarters? Any recollection of where you were?

Scott Armstrong: I was in Boston. I read it in the papers. I followed the *Washington Post* closely because my friend Woodward was there, and there was this thing he was reporting on called Watergate, and it didn't quite make any sense in the beginning.

John Dean: Alex, how about you? When did you first learn about the arrests at the Watergate?

Alex Butterfield: I guess that morning, Saturday morning. I heard something about it on the radio coming in, but when I got there the Secret Service called me. It was quite early on Saturday morning. The Secret Service or the FBI was asking me if a guy named Hunt was on our payroll or worked at the White House, and I looked it up—I had a book right there that had all of that in it—and I reported that he worked for Chuck Colson.

John Dean: What had happened is, Howard Hunt's name had come up fairly quickly, because at the scene of the arrests, where the Cuban-Americans were staying at the Watergate hotel, the police got a subpoena and went in, and found that Howard Hunt had written a check for six dollars and change to a Maryland country club for one of the burglars to take back to Mexico and mail from Florida so he could get out of town dues paid. It was a pretty direct clue that Hunt was somehow connected, and started the police on trying to find out who E. Howard Hunt was. They also quickly found by subpoena—apparently there were a couple notebooks in the Watergate Hotel rooms where the burglars were staying and also in one of their cars—a notebook showing the initials "H.H. White House," and Hunt's number at the White House, so this is one of the reasons Alex very quickly got a call. Alex, just to follow up with you, when you heard about the break-in, what was your first reaction?

Alex Butterfield: We did it. No really, I just felt I knew for sure that we did it, and that the President had to know about it. I'd been there three and a half years by that time and that's the way things operated. I saw things—everything that happened, Nixon was the choreographer, the director of everything, and if he knew about it, Haldeman knew about it. They were the two that had to know about anything that happened, and I still feel that White House aides don't go off and handle things willy-nilly. They're as conscious as anyone, or more so, that anything they do reflects on the presidency, so I don't think there's a lot of careless stuff going on there. I still feel that way. Although, since I've been here talking to Scott and John, who are far more erudite about this thing, and have a far more thorough knowledge than I—I defer to their wisdom, but that's what I saw up close. I was in and out of his office all day, sat in on a lot of conversations with him, and Nixon in his very funny way, ran the show.

John Dean: Scott, how about you? What was your first reaction when it started to unfold and you learned of Woodward's reporting?

Scott Armstrong: Well, you've got to go back in time to what a different world it was. It was a very partisan environment, not just partisan

Democrat-Republican, but because of the Vietnam War. My generation was trying to shut down the Vietnam War, and felt very powerful, but we were outsiders, and the establishment was closed. And here were reporters, and eventually the Watergate Committee—I think I was the sixth person on the Democratic side, the majority side—there were seven Senators, four Democrats, three Republicans. There was a sense of partisanship that was kind of twofold— Republicans, who were protecting Nixon, and Democrats, who for partisan reasons might want to go after him, and then there was us—I was twenty-seven years old at the time—Jerry Garcia and the Grateful Dead were my notion of how I should dress for work, which was a lot different than either the White House or the Senate at that time. So there was a skepticism, and I remember on my first day of work, I interviewed Haldeman and Ehrlichman, who had just resigned, and they went back and reported to the White House that they had been interviewed by a group including a "White Panther," who had actually been allowed to ask them questions. They thought that was quite bizarre. Within a day or so, I realized how deeply divided things were at the Committee because John had just come in and was beginning to tell the majority staff—Democrats—what was really going on. John was providing a roadmap to it, and we were—at least my position was—we were skeptical, we had to find out what was really going on. John reported that Howard Baker, who was the Senator that was the minority Co-Chair of the Committee, had backchannels to the White House, and had conversations with John and other people. This was quite astounding, the notion that we were running a committee, and yet there was this backchannel to the White House. Baker stopped having meetings, because he knew that John had now reported this to the majority staff. We weren't telling the minority staff what was going on, because of the fear of them undercutting John, or doing something to cover up further. The question was—we were having executive sessions where there was some exchange between the majority and the minority, and that information was getting back to the White House—so they assumed that it was somebody close to Baker. His staff director—a fellow named Fred Thompson, later to become a senator, and now a spokesman for reverse mortgages on late night T.V.—Thompson was too busy. We couldn't figure out how he could do it—we kind of monitored his phone calls frankly to make sure. The assumption was it might be Jim Johnson—I think that's his name—Baker's administrative assistant. So I came into the office one day, and Dash said, "We've got to figure out if he's the source. Can you help us?" We had an executive session. I followed Johnson. He jumped into a cab, I jumped into a cab—just like the movies—and he got out at the old Executive Office Building—the portion of the White House where most of the staff worked, and went in the side doors, the staff entrance. So I went back and reported this and he said, "Well, we still don't know who he's reporting to," and I said, "Well, give me a second." I went over to the phone and called up the staff counsel we thought he might be working with—I think it was Buzhardt's office—Fred

Buzhardt had come over from the Pentagon. He was kind of their go-to guy for these sinister and mysterious things—so I call up Mr. Buzhardt's office and I said, "Can I speak to Mr. Johnson? I need to speak to him." And so they brought him to the phone, and he was quite surprised to hear me, saying, "Why are you calling me?" I said, "Just to prove you're there." He resigned that night because it was considered to be such a breach of trust that he had immediately left an executive session—a very private meeting at the Senate—and then went over to report to the White House. That was it, he was done. So that was the kind of atmosphere in which we were working. The majority staff was working with John—we were testing his ideas—he was still the evil John Dean who had worked for Mitchell and had been responsible for the cover-up, and we were trying to understand and follow the details that he gave, and trying to establish them independently, and we weren't doing a very good job up through the time that John testified. Just before he testified, Nixon said, "You have to stop the committee hearings," because Leonid Brezhnev, the Premier of the Soviet Union, was coming to the United States—a big détente meeting—and we couldn't have Watergate going on during that period. This gave us a little bit of a reprieve, a little respite. So just before that we began saying, "This is not the way to investigate," and I'm serious when I say that the law, the criminal process in particular, but even the law when applied to the Senate context—you can't just go around questioning people under oath. You have to go work around the edges. One of the things that we found out was that there were all these invisible people in the White House, and these invisible people were to some extent the lower-level staff, but particularly women. We didn't have any women professional staff members at the time. The White House didn't have very many. It was the secretarial staff. It was an invisible world. And here we would be, going into the White House, and get nothing from these senior staff members. But if you talked to their secretaries, and they felt comfortable, if they weren't represented by someone from the White House staff—including, remarkably—John's secretary, who was an extremely forthright person, and gave us enormous help, and that's where we began to realize that we could reconstruct things. There was a day I remember going to the Monaco Restaurant, right near Capitol Hill. They have paper tablecloths over the regular white tablecloths, and we sat there, and I made an organization chart of the White House. The question was: here's Nixon [indicating the top of the chart] and here's Dean [indicating below Nixon]. We already knew from John's testimony that John didn't have notes other than the material that he gave us, which was very limited on the subject of his meetings with the President. So there wasn't going to be paper documentation. So we had to figure out who else would know, so we made a satellite chart of all the people that were in touch with Nixon, and all the people that were in touch with Dean. And in the middle of this, there was this guy that controlled everything that came in and out of the President's office—named Alexander Butterfield—and lots of other people. We began

going down that list, particularly talking to their secretaries. So that was the process that we were using to reconstruct things.

John Dean: Amongst the development of the satellite chart, I wonder if you ever had occasion to go over to the DNC and actually visit those facilities where the arrest occurred?

Scott Armstrong: We did, but we didn't have—again, it was all under these odd circumstances. The Democratic staff going over to see the Democratic National Committee . . . . We were not really investigating as much as we were just looking at the scenery—although we were skeptical.

John Dean: Were you able to fill in your satellite chart as to who was there that you might want to reach?

Scott Armstrong: Yes.

John Dean: Did you ever find the fact that I hired one of the first female attorneys in the White House?

Scott Armstrong: I had forgotten that part. We were looking for people that were knowledgeable of the interactions that John was having with the President.

John Dean: I just wanted to share that. Let's proceed along. You developed the satellite chart. You noticed some people you had not talked to . . . some you had started to talk to. Tell us how you reached Alex Butterfield.

Scott Armstrong: Well, what happened was Butterfield was on a list of people, and we were going through it. You've got to look at the Senate side. We had no women in the professional staff. We had a lot of women around—they were stenographers and secretaries, and what not—but they were just as bright. I was one of those people, because I was from the Jerry Garcia era, who understood that women were human beings, and I liked to spend time with them. They were just as intellectually vibrant and perceptive. And because they were invisible, people said things all the time in those days, and didn't think there was anyone else in the room if there were just women there. The same thing was true of our staff, and I treated these women with respect, and one day, about eleven o'clock at night, I was working late. This staff was very dedicated, and they worked around the clock. This woman came by—we were in a converted auditorium and we had open work areas, little cubicles—and she said, "I'm about to put a memo that you would like to see on the desk of the deputy Republican staff member." I wouldn't go into his cubicle as a matter of principle, but she said, "I will lay it out," and I went there and read it leaning over, and it was this remarkable account that was being given to Fred Thompson—the minority staff director—from Fred Buzhardt, who was inside the White House, who was their go-to man to continue the cover-up, if you will, and Buzhardt was telling Thompson what to ask Dean about his meetings. So I saw this and said, "Wow," and went to Sam

Dash—the majority Democratic staff director—and said we've got to get a copy of this, and he arranged quietly to get a copy of this. There was an extraordinary amount of detail. Very much what John had told us, but always with a little twist at the end, in which it was John that was covering up, and the questions were all oriented that way. By this point John had testified—when I'm seeing this memo for the first time—and I said, "This is why the Republican questions were so pointed." This was not a sharp staff—these were not the sharpest knives in the drawer. They were spoons, if anything. But they were asking pretty pointed and direct questions of John, and this is where they came from. And I thought, "Wow, this is really interesting," so in one of the first interviews on this satellite chart, was this former Air Force colonel who had left the White House and went over to the FAA. So I called up and said, "We would like to talk to you about procedures and whatnot about how things are run at the White House. It will be a very informal interview." He agreed to come.

John Dean: So no idea there is a taping system. It is a fishing expedition at this point?

Scott Armstrong: It was a fishing expedition, but from my point of view, once I had this bizarre memo from Thompson, there were two things that were important to me. One was, how was this reconstructed by the White House? I thought it probably came out of Nixon's attempt to come up with an account, but I thought that process would be interesting. I wasn't thinking tapes. The second thing that was important to me was—remember that Howard Baker had been embarrassed by John's testimony about the backchannel, and his chief of staff had to resign when that was discovered—so I was thinking that now Thompson was going to have to resign, and Baker probably was going to leave the committee. I was very naïve, but that was my belief.

John Dean: I've got to be frank, and one of the reasons I did ask you in the pre-session before I appeared publically, I decided to let Howard Baker know that I knew he had a backchannel to the White House, because I had written the President's talking papers and helped facilitate and set up the meeting. Rather than pull the rug out from underneath him publically, I felt I would gently tug on it privately—which I did. In a sense, I think it neutered him. He said, "What else do you know that I should be careful about?" I knew from my meetings with Sam Dash in preparation of my appearance that Howard [Baker]—much to the frustration of Sam Dash—seemed to be always taking anti-positions to my testimony in private, but as soon as the majority would resolve that they needed my testimony, he would come out and make it look like it was his position, so I tried to use this strategically when I did. Tell us what happened once you got Alex in there?

Scott Armstrong: It was Friday the thirteenth, which was not something that occurred to me at the time. It felt like one hundred and ten degrees and we met in the air conditioned basement of the Dirksen office

building, in a little room that was maybe fifteen by twenty, that was never cleaned because we were afraid it would be bugged. It had originally been very formal, with hearing tables and felt covers, but over the course of months of interviewing constantly, it was just filthy. There were dust balls the size of soccer balls on the floor. Everybody that came in with an attorney—the attorneys smoked cigars in those days, so there was a permanent cloud that never left the room and came down to where the edge of the door was. In this unpleasant circumstance, Alexander Butterfield walks in not accompanied by counsel, which was very rare. We start going through and I was methodical. I went through what every drawer in his office held. I went through every procedure. I went through how they kept track of the President's time, who took notes, how they gave him briefing memos, how they recorded the briefing memos, or whatnot. It was quite enlightening. For three hours—it must have bored him to death—but it was very useful for us. We found out what the presidential calendar is, how the Secret Service monitored what he did, and when they destroyed those things or didn't. And then at the end of it, I took out this bizarre Thompson memo. I took off the front part that indicated exactly what it was, and gave him the part that described the meetings between the President and Dean.

John Dean: And they were set up like a transcript?

Scott Armstrong: It was like a summary of a transcript. Everything had a twist that Dean was the one responsible for whatever the evil act was at the end. But none of this had been available, or came out publically. It was not known. I handed this document to Alex, and asked, "Can you explain, given the systems you just described, how this would be reconstructed? What's it from?" We went through the President's dictabelts, all the different things—I was thinking it was a document created by Nixon based on what they thought Dean would testify to. It was very precise and detailed. As my recollection is, Alex took it and looked at it—he had been very straightforward. I asked, "Could this have come from the President's recollection on a dictabelt?" "No, too detailed for that." "Could this have come from somebody else being present at the meetings?" "No, John would have been the only note taker," and we already knew that John didn't have notes. So we went on like this, and I said, "Well where did this come from?" Alex took it and very deliberately set it down in front of himself and said, "Well, let me think about that for a minute." The questioning went on—I finished up the questioning—Don Sanders, a very skilled FBI agent, very fair—

John Dean: Before we get to Don, let me turn to Alex at this point. Alex, let's back up just a little bit, and get in your head when you got called to come up to the Senate. What were you thinking and what were you anticipating?

Alex Butterfield: I had called Howard Baker on Sunday to see if I could come over and see him, only because he was a Republican and the Co-Chairman of the Watergate Committee.

John Dean: This was before you were in there?

Alex Butterfield: No.

John Dean: Back all the way up to before you even arrived, when you get a call to come up and visit with the Senate.

Alex Butterfield: Alright, I said I'd be free Friday at two o'clock, and I was very conscious of the fact that I was due to go to the Soviet Union the following Tuesday, and I'd be gone for almost three weeks.

John Dean: And do what in the Soviet Union?

Alex Butterfield: I was leading a government-industry trade group cutting a ribbon at a trade fair, and then the FAA was going to be negotiating—we hoped—with the Soviets, a contract to upgrade their air traffic control system.

John Dean: At that point you were the administrator of the FAA.

Alex Butterfield: Yes.

John Dean: So not an unimportant trip?

Alex Butterfield: No, not an unimportant trip. I had been at the FAA for four months from when I left the White House. So I met with these people, and—

John Dean: Were you worried about the tapes coming out?

Alex Butterfield: No, not really, but they were the only thing that hadn't come out. Throughout your testimony, which preceded mine by about three weeks, I thought a lot about the tapes. I said, "There they are, I know about them." Only seven— maybe eight—people knew about them. Four Secret Service guys, Haldemen, Higby, myself, and my secretary only knew partially about the tapes in the Cabinet Room. So no, but I thought I would be called as I usually was, to tell people about the White House. I worked right there in the office that adjoined the Oval Office. Process questions—I was good for process questions. And I thought it would be more of the same. Of course I thought about the tapes, but I did not think it would be likely to get anything on the tapes.

John Dean: And you had no question at that point of their significance?

Alex Butterfield: Yes, those things were running all the time. The only thing I remember differently from what Scott just said—I remember getting that piece of paper early on, shortly after two o'clock in that four-hour session with the staff. Scott was the lead investigator, and I remember there was only one sheet of paper, and when he said, "Where might this have come from," I looked at this thing and it looked exactly like a

transcript—a verbatim transcript. It had a "P" for President, a "D" for Dean, and it made sense. I didn't follow the discussion, but I thought to myself that this had to come from the tapes . . . the very thing I'm worrying so much about. So I just hemmed and hawed and said, "Gee, this looks very detailed, the President had great retentive powers, but this is too detailed for that."

John Dean: Your mindset at this point is, you don't want to be perceived as a whistleblower, but you really understand the importance of this evidence, and maybe you do have to reveal it. You're really in a conflicted state at this point.

Alex Butterfield: Absolutely. Yes. I'd hate to be the one, and I felt as if I were a peripheral person really. I wasn't that involved in Watergate, or the cover-up. Anyway, I said—finally—in a sort of panic, threw it back down, it slid out to the center of this little conference table, and said, "Let me think about that for a while," and to my great relief, they went on to other items, until Scott turned it over to Sanders, representing Fred Thompson—he was the minority deputy counsel—and he started with a few preliminary questions, and then said, "You had mentioned the dictabelt," and I had mentioned a dictabelt. The President dictated things on the dictabelt—personal letters to family members, to a few contributors—and Rose Woods was the grand mogul of the dictabelt. No one was supposed to touch them except Rose. He said, "Apart from the dictabelt, was there ever any other listening device in the Oval Office?" And as I said to my wife at breakfast that morning, "I guess if they ask me a direct question, I will just have to answer it." I knew it would be the end of my career, certainly in Washington. I just knew that. Nixon was so set on this thing being an absolute secret—and it was an absolute secret for all that time. We know that from what's on the tapes. So, I said, "I'm sorry you asked that question. Yes, there was, and that's where this document had to have come from." And then we spent forty-five minutes describing the system. I felt reasonably sure that they had not heard that from any previous witness. That secret of Nixon's was too closely held. I remember being more concerned about foreign dignitaries, who had been in our President's office—bugged—and the repercussions from that, than I did about the domestic fallout. And I hated to be the one to do that. I knew that Haldeman hadn't come up yet.

John Dean: When foreign dignitaries stayed at Camp David, you actually removed the facilities, is that not correct?

Alex Butterfield: Yes.

John Dean: Alright, let's go to what happened, as soon as you get this information from Butterfield on Friday the thirteenth—

Scott Armstrong: There's one other aspect—I went back later and looked at the stenographer's notes, and this is what she had down. Sander's asked a number of different questions, and in those days, we were

kind of leading the investigation, and it was like being followed by a member from the minority staff. They were kind of just there to make a showing and figure out what we were learning. The questions jumped around a little, and then he asked the question, then Dean testified. He said that at one point in one of the meetings, Nixon went over to the corner of his EOB office and lowered his voice when he was talking about the clemency questions, or I had the impression they might have been money conversations. But at any rate, Sanders said, "Dean thought that the President lowered his voice, and Dean speculated that the President's conversations might have been recorded. Did Dean know what he was talking about?" and Alex's answer was "No. Dean wouldn't have known. There were very few of us that knew, but that's where this came from," and picked up the document. The way it affected me was, I thought he was answering my question, rather than Sanders' question, until I looked at the transcript later. As soon as we heard that, this little tingle went up my spine. We then asked him the nature of this system, and I think Alex said, "I think you guys must know"—I had the impression that he thought Sanders and I were working together to try and trap him—it apparently wasn't his reaction, but he then described in detail how it was constructed. I tried to imply that we knew this all along, and we just needed a little bit more. Of course we had no idea. The question then became, how do we get to this material quickly? He told us who else knew about it, how it was organized and run. We had to get to it, at least from my point of view, before it was destroyed. We had to do something to nail it down. So, as we're walking out of the room, Alex said, "Now remember, I need to leave the country later next week for this very important meeting with the Russians." We're beginning to think "Wait a minute. We're putting him in the hands of the Russians?" I can already see a civil air disaster if Brezhnev decides to do Nixon a favor. So, I run back into the conference room and call upstairs to Sam Dash. I said, "Sam, Sam, I need to come talk to you." He said, "What are you so excited about Scott? It can wait." It was either his wife's birthday or their anniversary. He said, "Sarah will kill me if I'm late, I've got to leave right now." So I blurted out "Sam, Nixon taped all of his conversations," and he said, "Oh, well come on up!" Even then, he only spent about five minutes because he was so worried. His wife was a very formidable force. He got this down, called Rufus Edmisten, who was Senator Ervin's closest aide. I then began the process of trying to find out who knew about the tapes. I called Al Wong, the Secret Service man who by this point had gone to the Supreme Court as their chief clerk, so I was calling him at the Supreme Court to find out his version about it. He actually started to talk with us, and then he decided he should confer back with the Secret Service. I was trying to track down Higby, and a fellow named Steve Ball, who later was a confirming source. But to get this thing documented and get affidavits and get something on paper so that we could then make sure it wouldn't be destroyed.

John Dean: As you can see from this chronology, we are at about the halfway point, and the entire focus of Watergate shifts with this revelation of the tapes.

End Transcript

Watergate and Vietnam: The Cold War Origins of a Constitutional Crisis

*Stephen M. Griffin**

Watergate is usually thought of as the scandal and constitutional crisis which followed the June 1972 burglary of the Democratic National Committee headquarters at the Watergate complex in Washington, D.C. by persons associated with President Nixon's reelection committee and the subsequent cover-up, led by Nixon himself, of White House involvement in the burglary.

As such, it is regarded as a domestic crisis centrally involving President Nixon's efforts to undermine his political opponents.[1] Legal scholars at least are not familiar with the substantial evidence showing that the origin of much (though certainly not all) of what we call "Watergate" lies in the foreign policy of the Johnson and Nixon administrations.[2] It has long been appreciated by historians of the Vietnam War that there was a meaningful link between Watergate and the domestic intelligence operations used to counter the war's critics.[3] In this respect, there is a case to be made that this symposium should have been held in 2011, the fortieth anniversary of the White House-ordered break-in to the office of Daniel Ellsberg's psychiatrist in Los Angeles.

In this essay, I situate Watergate within the context of the Cold War and the Vietnam War in particular. This perspective might be called

* Rutledge C. Clement, Jr. Professor in Constitutional Law, Tulane Law School. I thank the participants at the conference for their comments. This essay is drawn from a larger project on war powers. The project is based on an extensive review of diplomatic history and is tentatively titled *Long Wars and the Constitution: Presidents and the Constitutional Order From Truman to Obama* (Harvard University Press, forthcoming 2013).

1 *See, e.g.*, WILLIAM BUNDY, A TANGLED WEB: THE MAKING OF FOREIGN POLICY IN THE NIXON PRESIDENCY 470 (1998); JOHN YOO, CRISIS AND COMMAND 371 (2009).

2 BUNDY, *supra* note 1, at 472.

3 *See* GEORGE C. HERRING, AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950–1975, at 299–300 (4th ed. 2002); ROBERT MANN, A GRAND DELUSION: AMERICA'S DESCENT INTO VIETNAM 687 (2001); MARILYN B. YOUNG, THE VIETNAM WARS: 1945–1990, at 238, 260–61 (1991).

"Watergate as foreign policy." Certainly Nixon's misdeeds ran in many directions besides those connected with the June 1972 burglary.[4] To see Watergate afresh and understand how it makes sense as a crisis of what I call the "Cold War constitutional order" requires some rearranging of standard understandings.

The premises of the Cold War order, generally supported by the public, required presidents to have the ability to respond if necessary with the full panoply of military force to the challenge of communist expansion.[5] President Johnson was simply the latest heir to this legacy.[6] When the Vietnam War did not go as expected, the presidency became a cockpit of tension and frustration.[7] The strains of war led Johnson and his successor Richard Nixon to a fixated concern with internal security. They turned the capacities of the intelligence agencies, built-up during the Cold War, inward against American citizens.[8] This was one of the key causes of Watergate.[9]

This essay elaborates on this foreign policy explanation of Watergate in three parts. In Part I, the scene is set by showing how an increased concern with internal security by both the Johnson and Nixon administrations flowed from the Vietnam War. Part II concentrates on the Nixon administration and sets Watergate within the context of Nixon's foreign policy and the Cold War more generally. Part III explains why Watergate was a genuine constitutional crisis and how it, somewhat ironically, came to interfere with Nixon's conduct of foreign policy.

I. FROM JOHNSON TO NIXON: VIETNAM AND INTERNAL SECURITY

War imposes unique psychological stress on the inhabitant of the Oval Office. The risks attendant to war and the personal responsibility that any President would feel for the men and women under his command tend to occupy the mind and crowd out everything else. Because LBJ and his top advisers made the decision for war without any meaningful participation by

4 For useful accounts of the events surrounding the Watergate scandal, see generally FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON (1995); KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION (1997); STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON (1990) [hereinafter KUTLER, WATERGATE]; STANLEY I. KUTLER, ABUSE OF POWER: THE NEW NIXON TAPES (1997) [hereinafter KUTLER, ABUSE]; J. ANTHONY LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS (1988); MICHAEL SCHUDSON, WATERGATE IN AMERICAN MEMORY: HOW WE REMEMBER, FORGET, AND RECONSTRUCT THE PAST (1992).

5 *See* Stephen M. Griffin, *Reconceiving the War Powers Debate* 39–40 (Tulane Univ. School of Law, Working Paper No. 11-06), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943652http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943652http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943652.

6 ROBERT DALLEK, FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961–1973, at 105–06 (1998) [hereinafter DALLEK, JOHNSON].

7 *Id*. at 155–56.

8 EMERY, *supra* note 4, at 4–5.

9 *See id*.

Congress, the stress was all the greater.[10] Consider that *fewer than six months* after his muted July 1965 announcement that he was escalating the war, LBJ and his administration were under extraordinary strain.[11] Even in the fall of 1965, the administration could sense that the public was not strongly behind the war.[12] While this may have troubled them, it would not matter if their expectations of quickly forcing North Vietnam to negotiate had worked as planned.[13] When this did not occur by the end of the year, the administration plunged into a series of recriminations and a fruitless debate about a bombing halt.[14]

Somewhat unexpectedly, the decision for war had narrowed the range of options available to the President. Once LBJ chose bombing as the method to force North Vietnam to negotiate, bombing had to work.[15] This had the further effect of making administration policy hostage to the responses of the governments in both South and North Vietnam.[16] LBJ could sense that now he *had* to win or his presidency would be forever discredited.[17] A war fever took hold in the executive branch, creating a vicious circle, which undermined effective policymaking as officials saw that the President wanted only good news and interpreted new developments in their most favorable light.[18] It did not help that they were susceptible to the same distortions in viewpoint that afflicted the President; they also knew that their personal credibility was on the line.[19]

Under the strains of war, the Johnson administration's attitude toward critics took a hard set. By early 1966, LBJ thought that Senate critics such as J. William Fulbright were actually under communist influence.[20] The ideological domestic downside of the Cold War associated with McCarthyism had returned with a vengeance. Federal Bureau of Investigation (FBI) Director J. Edgar Hoover encouraged LBJ in his belief that critics of the war were subversives and operated from the worst motives.[21] All of the major intelligence agencies—the FBI, the Central Intelligence Agency (CIA), National Security Agency (NSA), as well as the Army—developed covert domestic intelligence programs aimed at

10 DALLEK, JOHNSON, *supra* note 6, at 155–56, 283.

11 *Id*. at 344–45.

12 *Id*. at 290–91.

13 *See id*. at 284–85.

14 *See id*. at 345–46.

15 *See id*. at 343.

16 *See id*. at 240–41.

17 *See* FREDRIK LOGEVALL, CHOOSING WAR: THE LOST CHANCE FOR PEACE AND THE ESCALATION OF WAR IN VIETNAM 369–70 (1999).

18 DALLEK, JOHNSON, *supra* note 6, at 103, 356–57, 377–78, 388, 470–71; LOGEVALL, *supra* note 17, at 370–72. *See also* DAVID KAISER, AMERICAN TRAGEDY: KENNEDY, JOHNSON, AND THE ORIGINS OF THE VIETNAM WAR 460–61 (2000).

19 *See* DALLEK, JOHNSON, *supra* note 6, at 470; KAISER, *supra* note 18, at 462; LOGEVALL, *supra* note 17, at 389.

20 DALLEK, JOHNSON, *supra* note 6, at 352.

21 *Id*. at 367.

monitoring and disrupting opposition to the war.[22] Presidents Johnson and Nixon both believed that the antiwar movement was inspired by agents of international communism.[23] When careful investigation by the intelligence agencies showed this to be false, they in effect ordered the agencies to prove the relationship.[24]

How did the strains of war and internal security affect Nixon?[25] When he took office, there were still well over 500,000 U.S. troops in Vietnam with combat action continuing at a high tempo.[26] Nixon rejected the option of a quick withdrawal in favor of a strategy that had several elements in pursuit of his overall goal of "peace with honor"—a negotiated settlement in which the North Vietnamese would somehow be persuaded to withdraw their forces and guarantee the viability of the South Vietnamese government.[27] Roughly, Nixon's policy with respect to Vietnam was to satisfy domestic pressure for an end to the war by withdrawing U.S. forces, but slowly enough to preserve meaningful military options.[28] To compensate for the withdrawal, the U.S. would build up South Vietnam's ability to resist, a process of "Vietnamization," which had begun under Johnson.[29] More ambitiously, Nixon wanted to reframe the war against a new global strategy of détente with the Soviet Union and opening relations with China. He felt sure that these leading communist states could bring pressure to bear on North Vietnam.[30]

Sooner than Nixon anticipated, his Vietnam strategy involved him in new military responses, as North Vietnam continued to exert significant pressure—especially by using its sanctuaries in Cambodia, which was nonetheless a neutral country.[31] At the same time, the reaction of the antiwar movement and the public generally was always a concern.[32] So

22 *Id*. at 486–87.

23 *Id*. at 489 (discussing Johnson's beliefs); MELVIN SMALL, THE PRESIDENCY OF RICHARD NIXON 70 (1999) (discussing Nixon's beliefs).

24 DALLEK, JOHNSON, *supra* note 6, at 489; SMALL, *supra* note 23, at 70.

25 For histories of Nixon's administration and foreign policy, see generally BUNDY, *supra* note 2; ROBERT DALLEK, NIXON AND KISSINGER: PARTNERS IN POWER (2007) [hereinafter DALLEK, NIXON]; RAYMOND L. GARTHOFF, DÉTENTE AND CONFRONTATION: AMERICAN-SOVIET RELATIONS FROM NIXON TO REAGAN (rev. ed. 1994); DAVID GREENBERG, NIXON'S SHADOW: THE HISTORY OF AN IMAGE (2003); JEFFREY KIMBALL, NIXON'S VIETNAM WAR (1998); RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA (2008); SMALL, *supra* note 23. For useful memoirs and biographies, see generally WALTER ISAACSON, KISSINGER: A BIOGRAPHY (2005); RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON (1978).

26 Henry Kissinger, *Vietnam's Lessons,* L.A. TIMES, May 31, 2007, http://www.latimes.com/news/opinion/commentary/la-oe-kissinger31may31,0,3265672.story.

27 KIMBALL, *supra* note 25, at 72–73.

28 *Id*.

29 *Id*. at 73; *see Military: 1969 – Vietnamization*, GLOBALSECURITY.ORG (May 7, 2011, 2:05 PM), http://www.globalsecurity.org/military/ops/vietnam2-vietnamization.htm.

30 Don Keko, *Nixon and Détente*, EXAMINER.COM (Aug. 12, 2001), http://www.examiner.com/american-history-in-national/nixon-and-detente

31 President Richard M. Nixon, *Address to the Nation on the Situation in Southeast Asia*, MEKONG.NET, http://www.mekong.net/cambodia/nixon430.htm (last visited Mar. 20, 2012).

32 KIMBALL, *supra* note 25, at 166.

when Nixon decided to bomb Cambodia early in 1969, his first year in office, he determined it would have to be conducted in secret, something difficult to do with a major military operation.[33] When news of the operation leaked, Nixon was upset and ordered FBI Director J. Edgar Hoover to wiretap the phones of administration aides and journalists.[34]

Major antiwar protests were scheduled for the fall of 1969. At roughly the same moment, Nixon was considering "Duck Hook," a major strike to force North Vietnam to settle the war on U.S. terms.[35] Nixon knew that this expansion would require unusual "mental resolve" and a "go-for-broke public relations campaign, in which he would have to expend most or all of his political capital to survive 'the heat.'"[36] Duck Hook was dropped, but the idea of the decisive intervention remained.[37] Nixon appreciated by the end of 1969 that the war was now his responsibility in full.[38] Taking control of the war amid hostile domestic opposition would mean going on the offensive both abroad and at home.[39] In April 1970, Nixon ordered U.S. troops to invade border regions in Cambodia to eliminate the North Vietnamese sanctuaries.[40] It was characteristic of Nixon's Vietnam strategy that all of these deliberations occurred in secret; thus Nixon shared his plans with very few people other than Henry Kissinger, his National Security Advisor.[41] This occasioned intense stress, as Nixon considered it an operation he knew would be perceived as expanding the war.[42]

Nixon did not foresee how much crisis management the Cambodian invasion would impose on his administration. Universities all over the U.S. demonstrated in protest and several of Kissinger's aides resigned.[43] Under considerable pressure, Nixon began to act erratically.[44] In the period leading up to the invasion, he seemed hyperactive to his subordinates, indulging in an "aggressive mania" as he attempted to steel himself for ordering a major military operation without congressional or public support.[45] The invasion of Cambodia was perceived, not without cause, as a major expansion of the war by members of Congress and the antiwar movement.[46] The unprecedented backlash and public protest that was the

33 DALLEK, NIXON, *supra* note 25, at 118; KIMBALL, *supra* note 25, at 131.

34 KIMBALL, *supra* note 25, at 136.

35 *Id*. at 159.

36 *Id*. at 160.

37 *Id*. at 170–71.

38 *Id*. at 169–70.

39 *Id*. at 170.

40 *Context of 'April 24–30, 1970: Nixon Orders Invasion of Cambodia; Kissinger Staffers Resign Rather than Participate in Coordination'*, HISTORY COMMONS, http://www.historycommons.org/context.jsp?item=a04242670parrotsbeak&scale=2#a04242670parrotsbeak (last visited Mar. 20, 2012).

41 *Id*.

42 KIMBALL, *supra* note 25, at 196–97.

43 *Id*. at 213.

44 DALLEK, NIXON, *supra* note 25, at 198–200, 205; ISAACSON, *supra* note 25, at 260–62.

45 *See* KIMBALL, *supra* note 25, at 204.

46 *See id*. at 221.

result of the Cambodian invasion was the turning point that gave significant credibility and impetus to efforts already underway to curb the war-making power of the executive branch.[47]

It was at this moment, amid the superheated atmosphere produced by the Cambodian invasion, when Nixon summoned the chiefs of the major intelligence agencies to chastise them for not cooperating more effectively against the nation's *domestic* enemies.[48] It would have been appropriate for Nixon to raise this issue with respect to foreign enemies, as the lack of cooperation between Hoover's FBI and the CIA had been causing trouble for many years.[49] But like Johnson, Nixon was convinced that the antiwar movement was inspired and led by communist agents.[50] Not only was this false, a fact that the intelligence agencies had already confirmed, but it also illustrated the Nixon administration's isolation from reasonable voices within the antiwar movement with which it could have had a meaningful dialogue about how to wind down the Vietnam War.[51] Nixon, however, had worked himself into such a temper that he saw antiwar protesters on campuses as terrorists threatening the state itself.[52] As summarized by historian Jeffrey Kimball, "[t]he Vietnam War heightened Nixon's sense of world crisis, contributed to his emotional tension, compounded his personality disorders, and influenced his stratagems and tactics for dealing with home-front and foreign issues."[53]

The solution to the lack of cooperation among the intelligence agencies was later known as the Huston Plan, after the White House aide who wrote it at Nixon's direction.[54] The plan called for the centralization of domestic intelligence activities in the White House and involved aggressive, illegal measures such as break-ins to combat domestic protest.[55] When FBI Director Hoover objected, fearing disclosure of illegal activities, the plan was formally abandoned.[56] Informally, however, these options continued to percolate at the White House.[57] If the intelligence agencies would not take suitable action on their own, the White House itself would go operational and conduct break-ins and wiretaps in pursuit of information that would discredit its political enemies.[58] This effort was a principal origin of what came to be known as Watergate.[59]

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47 *Id*. at 220–21.

48 KUTLER, WATERGATE, *supra* note 4, at 98–99.

49 SMALL, *supra* note 23, at 56.

50 Tom Wells, *Running Battle: Washington's War at Home*, *in* LONG TIME GONE: SIXTIES AMERICA THEN AND NOW 75, 89 (Alexander Bloom ed., 2001).

51 SMALL, *supra* note 23, at 70.

52 DALLEK, NIXON, *supra* note 25, at 208; GREENBERG, *supra* note 25, at 82.

53 KIMBALL, *supra* note 25, at 225.

54 *See* KUTLER, WATERGATE, *supra* note 4, at 96–101 (detailing the Huston Plan).

55 LUKAS, *supra* note 4, at 33.

56 *Id*. at 32–34.

57 *Id*. at 35–37.

58 *See id*.

59 *See generally* PERLSTEIN, *supra* note 25.

II. NIXON, THE COLD WAR, AND WATERGATE

To understand Nixon's presidency in the context of the Cold War, we should keep in mind that Nixon always intended to be a foreign affairs President. He wanted to be remembered in history as someone who brought peace to the United States and the world.[60] Nixon retained beliefs with respect to foreign policy that he had formed as Senator, and as Vice-President in the Eisenhower administration.[61] He accepted the verities of the Cold War and saw the conflict between the United States and communist countries as central.[62] At the same time, he perceived strategic opportunities arising from the relatively new conflict between the Soviet Union and China.[63] Nixon saw Vietnam in this context. It was a war he had to settle, but on a global basis with terms favorable to the U.S.[64]

It was crucial to Nixon's conception of his presidency that he wanted to carry out this far-reaching strategy entirely in secret in order to announce it at the right moment to secure his place as one of the greatest presidents in history, confound his political opponents, and achieve reelection.[65] This meant that during his administration an enormous amount of diplomatic and military activity occurred off the bureaucratic books.[66] This did not bother Nixon, as he entered office with grievances against a number of government agencies centrally important to foreign policy, such as the State Department and the CIA, which he felt had mistreated him as Vice-President.[67] Partly for this reason, he resolved to be his own Secretary of State and he and Kissinger centralized control of foreign affairs and national security policy in the White House.[68] The State and Defense Departments, as well as the CIA, were often cut out of both formulating and implementing policy.[69] The White House and especially the national security staff thus went "operational" in foreign affairs from the beginning of Nixon's presidency.

This organizational setup assisted Nixon in making swift, decisive moves to advance U.S. interests. With respect to intelligence policy, for example, John Ranelagh makes the valuable point that although the CIA had become something of a status quo agency by the late 1960s, Nixon did

60 GARTHOFF, *supra* note 25, at 30; SMALL, *supra* note 23, at 60–62.

61 *See America and the Cold War: The Truman, Eisenhower and Kennedy Years*, ACADEMIC AMERICAN, http://www.academicamerican.com/postww2/coldwar.html (last updated Jan. 5, 2012) (describing the views on foreign policy which were dominant while Nixon was Vice-President).

62 JOHN RANELAGH, THE AGENCY: THE RISE AND DECLINE OF THE CIA 546 (1987); ROBERT D. SCHULZINGER, A TIME FOR WAR: THE UNITED STATES AND VIETNAM, 1941–1975, at 332 (1997).

63 SMALL, *supra* note 23, at 64–65; *Sino-Soviet Border Clashes*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/war/prc-soviet.htm (last visited Apr. 7, 2012).

64 *See* SMALL, *supra* note 23, at 65.

65 *Cf*. *id* at 61–62.

66 *See id*. at 54.

67 *Id*. at 55; DALLEK, NIXON, *supra* note 25, at 84.

68 *See* DALLEK, NIXON, *supra* note 25, at 84–85; SMALL, *supra* note 28, at 51–52.

69 DALLEK, NIXON, *supra* note 25, at 84–85; SMALL, *supra* note 23, at 51–52; RANELAGH, *supra* note 62, at 499–501, 538–39, 540–41.

not want to be a status quo President.[70] He wanted aggressive action to create a more favorable balance of power.[71] Historian Kimball has argued persuasively that Nixon's "madman theory" of exercising power in unpredictable ways was related to the Eisenhower administration's "massive retaliation" policy.[72] While Nixon saw himself as an American Charles de Gaulle, a world leader in the grand European manner, his chief diplomat Kissinger thought the primary objective of the government was order.[73] Neither Nixon nor Kissinger believed in democratic governance in foreign affairs in the sense of building support for their policy in Congress and the Senate.[74]

Any breach in the wall of secrecy around the White House, and thus Nixon's and Kissinger's diplomatic efforts was therefore a mortal threat.[75] It was all the worse if the breach could be traced to someone who was part of the antiwar movement, a movement which to them was inspired by foreign communists and led by revolutionary terrorists.[76] Thus the administration had a severe reaction in June 1971 to Daniel Ellsberg's leaking of the Pentagon Papers to major newspapers including the *New York Times*.[77] The Papers were a secret Department of Defense history of the Vietnam War ordered by Robert McNamara during the Johnson administration.[78] Nixon commanded his aides to destroy Ellsberg's credibility and, by extension, the credibility of the antiwar movement in the eyes of the public.[79] Unbelievably, Nixon and his aides planned to dig up information on both Ellsberg and the Johnson administration by committing illegal break-ins.[80]

Nixon's remarks on the Pentagon Papers and Ellsberg, recorded by his taping system in the White House, leave an indelible and disturbing impression. Nixon believed the young lawyers on his team did not have the proper attitude:

> These kids don't understand. They have no understanding of politics. They have no understanding of public relations. John Mitchell is that way. John is always worried about is it technically correct? Do you think, for Christ sakes, that the *New York Times* is worried about all the legal niceties? Those sons of bitches are

70 *See* RANELAGH, *supra* note 62, at 546.

71 *Id*. at 546, 552; KIMBALL, *supra* note 25, at 33.

72 *See* KIMBALL, *supra* note 25, at 76–77; Francis A Boyle, *The Relevance of International Law to the 'Paradox' of Nuclear Deterrence*, 80 NW. U. L. REV. 1407, 1413 (1986).

73 BUNDY, *supra* note 1, at 517; ISAACSON, *supra* note 25, at 45; KIMBALL, *supra* note 25, at 2, 148; SMALL, *supra* note 23, at 61–62.

74 ISAACSON, *supra* note 25, at 206–07, 327, 486–87; KIMBALL, *supra* note 25, at 189; SMALL, *supra* note 23, at 61–62, 242.

75 DALLEK, NIXON, *supra* note 25, at 208.

76 *Id*.

77 *See* KUTLER, ABUSE, *supra* note 4, at 3–37; KUTLER, WATERGATE, *supra* note 5, at 110.

78 Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1 DUKE L.J. 1, 9 (1981).

79 *See* KUTLER, ABUSE, *supra* note 4, at 3–37.

80 *Id*.

> killing me. I mean, thank God, I leaked to the press [during the Hiss controversy]. This is what we've got to get—I want you to shake these (unintelligible) up around here. Now you do it. Shake them up. Get them off their Goddamn dead asses and say now that isn't what you should be talking about. We're up against an enemy, a conspiracy. They're using any means. *We are going to use any means*. Is that clear?[81]

Nixon went on to refer to a scheme to burglarize the Brookings Institution, a Washington think tank, to retrieve classified documents on Vietnam he believed might be in its possession.[82] He continued, "Did they get the Brookings Institute raided last night? No. Get it done. I want it done. I want the Brookings Institute's safe *cleaned out* and have it cleaned out in a way that it makes somebody else [responsible?]."[83]

The Special Investigative Unit (commonly known as "the Plumbers"), a team set up in the White House to combat leaks, was available to conduct the projected break-ins.[84] One was carried out in September 1971—a burglary of the office of Ellsberg's psychiatrist in Los Angeles.[85] Once this occurred, Nixon and his men were ensnared in a criminal conspiracy.[86] Everyone involved in the operation knew something that could be of mortal danger to Nixon and his top aides in the White House.[87] Historians have argued that when the burglary at the Watergate complex was discovered in June 1972, Nixon had to lead a cover-up of this operation to ensure that the links between the Ellsberg and Watergate burglaries would not be discovered.[88]

These operations were carried out in the main by E. Howard Hunt, who had recently retired from the CIA.[89] Hunt had participated in various CIA operations, including the Bay of Pigs.[90] Nixon and his aides believed that Hunt could be relied on to carry out the kind of operations originally anticipated in the Huston plan.[91] When Hunt needed men to help him, he turned to Cubans who had been trained by the CIA to commit acts of sabotage against Castro.[92] Many of these same people were involved in the 1972 break-in at the Watergate complex along with James McCord, a former chief of security at the CIA.[93]

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81 *Id*. at 8. John Mitchell was the Attorney General. *John Newton Mitchell*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/ag/aghistpage.php?id=66 (last visited Apr. 8, 2012).

82 *See* KUTLER, ABUSE, *supra* note 4, at 8.

83 *Id*.

84 KUTLER, WATERGATE, *supra* note 4, at 111–12; KUTLER, ABUSE, *supra* note 4, at 28.

85 KUTLER, ABUSE, *supra* note 4, at 28.

86 *See* NIXON, *supra* note 25, at 841–42.

87 SMALL, *supra* note 23, at 238, 276.

88 *See e.g*., SMALL, *supra* note 23, at 238, 276. For Nixon's remarks in his memoirs see NIXON, *supra* note 25, at 841–42.

89 RANELAGH, *supra* note 62, at 521.

90 *Id*.

91 *See* KUTLER, ABUSE, *supra* note 4, at 3–6, 27–28.

92 LUKAS, *supra* note 4, at 94–97.

93 SMALL, *supra* note 23, at 255.

After the Watergate burglars were arrested, the leading idea among Nixon's men was to quash the FBI investigation by claiming that Watergate was a CIA operation having to do with the Bay of Pigs.[94] Nixon was later convicted in the court of public opinion by the disclosure of a June 23, 1972 tape in which Nixon ordered his chief of staff, H. R. Haldeman, to order the CIA to carry out this plan.[95] CIA Director Richard Helms and his deputy Vernon Walters were confident that Watergate had nothing to do with the Bay of Pigs and resisted White House overtures to assist with the cover-up.[96]

Ironically, there was an important sense in which Watergate *did* relate to the Bay of Pigs. The various break-ins were carefully planned, requiring training, discipline, and knowledge of specialized equipment.[97] The men carrying them out could not be ordinary criminals—that would leave the administration too vulnerable to involvement with unpredictable characters. The Kennedy and Johnson administrations invested significant resources in training a covert army of operatives against Castro.[98] After the Bay of Pigs invasion failed in 1961, these operatives were based in the Miami area.[99] In this respect, the Cold War efforts against Castro, particularly in the Kennedy administration, became braided together with Nixon's efforts to destroy domestic opposition to his war policies in a very dangerous way. It is likely that the break-ins could not have occurred as they did had these operatives, accustomed to living above the law, not been available to the administration.[100] The Cuban operatives were hard-line anticommunists who perhaps believed they were acting to protect the United States against the communist-inspired antiwar movement.[101]

Nevertheless, once they were caught, the imperatives of a criminal conspiracy took over.[102] This put the President of the United States in the incredible position of being vulnerable to blackmail by the Watergate burglars.[103] The country was fortunate that Hunt and his fellow conspirators simply wanted Nixon to give them money to pay for their defense and expenses.[104] Suppose they had wanted changes in government policy? This dire possibility was a logical consequence of the President becoming involved in a conspiracy to break the law.

94 KUTLER, ABUSE, *supra* note 4, at 61–62, 67–70.

95 *Id*. at 67–70. *See also* KUTLER, WATERGATE, *supra* note 4, at 218.

96 KUTLER, WATERGATE, *supra* note 4, at 221; RANELAGH, *supra* note 62, at 522–30; SMALL, *supra* note 23, at 277.

97 *See* LUKAS, *supra* note 4, at 94–101, 190–93, 196–200.

98 *Id*. at 95.

99 *Id*. at 95–96.

100 *Id*. at 94–96.

101 *See* KUTLER, WATERGATE, *supra* note 4, at 254.

102 *Id*. at 248–49 (detailing issues such as "hush money").

103 *Id*. at 249.

104 *See id*.

If Watergate had simply been a matter of the June 1972 burglary and the subsequent rather improvised cover-up, it might be appropriate to view it as an external hindrance to the administration's foreign policy initiatives.[105] But Watergate was inextricably connected with the foreign policy of the Nixon administration and thus with the Cold War itself.[106] The maintenance of the Cold War, and any conventional war such as Vietnam, required an enormous effort on the part of the government to maintain morale on the domestic front.[107] President Truman had the public behind him when he went to war in Korea in June 1950, despite the lack of congressional authorization, given that the preceding three years had seen a rising public concern over the communist challenge.[108] Nixon's task of garnering public support for military actions in Vietnam was far more difficult, and thus suggested the waning of the Cold War. He knew the Vietnam War was unpopular and that the end would at least have to be in sight by the time he ran for reelection.[109] He decided to combat the antiwar movement with all the means available to him, including intelligence capabilities built since the 1950s.[110] This pushed the entire political system into a constitutional crisis.[111]

III. WATERGATE AS A CONSTITUTIONAL CRISIS

Watergate has been regarded as a paradigm case of a constitutional crisis, not simply in the heat of the moment, but in the sober reflection of history.[112] However, a few knowledgeable and historically-minded scholars have surprisingly claimed that it was not.[113] The problem with these accounts may be an overemphasis on the fact that the Watergate crisis ended in Nixon's prospective impeachment and resignation, procedures allowed by the Constitution, rather than with riots and troops in the streets.[114] Although we can be thankful that Nixon did not attempt to retain

105 This appears to be the view of diplomatic historians with experience in government. *See* BUNDY, *supra* note 1, at 470; GARTHOFF, *supra* note 25, at 458–59, 485.

106 *See* GARTHOFF, *supra* note 25, at 458–59.

107 *See, e.g.*, KIMBALL, *supra* note 25, at 165–67 (discussing having Nixon speak at universities and devising a POW plan to help alleviate negative public opinion over the Vietnam War).

108 GARY R. HESS, PRESIDENTIAL DECISIONS FOR WAR 31–32 (2d ed. 2009).

109 KIMBALL, *supra* note 25, at 62; SMALL, *supra* note 23, at 64–67.

110 *See supra* Part I.

111 *See generally* Griffin, *supra* note 1.

112 *See, e.g.*, GREENBERG, *supra* note 25, at 333–34; John W. Dean, *forward* to WATERGATE AND THE RESIGNATION OF RICHARD NIXON: IMPACT OF A CONSTITUTIONAL CRISIS, at x (Harry P. Jeffrey & Thomas Maxwell Long eds., 2004); KUTLER, WATERGATE, *supra* note 25, at 209, 316; THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH 118–19 (2006); SEAN WILENTZ, THE AGE OF REAGAN 8 (2008).

113 *See* Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 712, 742 (2009) (calling the events and aftermath of Watergate a political crisis); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2131 n.175 (2002) (stating that "the Nixon episode led to substantial constitutional conflict, and eventually to constitutional change, but not to crisis").

114 U.S. CONST. art 2, § 4 (discussing impeachment of the President, Vice-President and civil officers of the U.S.); U.S. CONST. amend. XXV, § 1 (stating that if the President should, among other

his office by force, the inescapable *constitutional* aspect of Watergate was how all of the circumstances I have highlighted flowed from Nixon's abuse of his office, an office whose powers had been greatly altered by the post-1945 constitutional order. Nixon's extreme abuse of his powers was not the only reason Watergate was a constitutional crisis; the consequences of Watergate also mattered. One consequence was that it rendered Nixon ineffective as President, especially with respect to foreign policy.[115]

By the time of Nixon's inauguration for his second term in January 1973, the Watergate cover-up was in a deep predicament.[116] The blackmail demands of the burglars were escalating and various parties in the White House saw themselves as under threat of being implicated in the cover-up.[117] As a result, Nixon would be effective as President for only three more months. At the beginning of the pivotal month of April 1973, Nixon's popularity and standing with the public were still intact.[118] But Nixon had conceded to his chief of staff H. R. Haldeman that governance would become impossible if public pressure increased.[119] By the end of the month, a mounting series of disclosures had forced him to dismiss Haldeman and John Ehrlichman, his two most essential aides.[120]

After the dismissal of Haldeman and Ehrlichman, Nixon sank into a depression and for some periods could not function as President.[121] During the October 1973 Arab-Israeli war, Nixon was incapacitated by the sudden crisis, which followed from his dismissal of special prosecutor Archibald Cox, and was unable to make crucial foreign policy decisions.[122] Another special prosecutor, Leon Jaworski, was appointed, and Nixon's time in office (until his resignation in August 1974) was consumed by Watergate.[123] He could not take meaningful action, for example, in addressing the serious energy crisis in the winter of 1973, which was the consequence of the war in the Middle East.[124]

Watergate was also a constitutional crisis because in some sense, Nixon willed it to be. Arguably like other conservatives during the 1970s, he sensed the high degree of entrenchment liberals had achieved in

things, resign, the Vice-President shall become President).

115 *See* GARTHOFF, *supra* note 25, at 458–59.

116 KUTLER, WATERGATE, *supra* note 4, at 247–51.

117 *Id*.

118 SMALL, *supra* note 23, at 282.

119 KUTLER, WATERGATE, *supra* note 4, at 263.

120 *Id*. at 318–20.

121 *See* DALLEK, NIXON, *supra* note 25, at 544–45; KUTLER, WATERGATE, *supra* note 4, at 324–25; SMALL, *supra* note 23, at 270–71. See also Nixon's revealing comments in his memoirs. NIXON, *supra* note 25, at 848–49.

122 BUNDY, *supra* note 1, at 433, 440; DALLEK, NIXON, *supra* note 25, at 522, 528; ISAACSON, *supra* note 25, at 514, 531.

123 ISAACSON, *supra* note 25, at 514; KUTLER, WATERGATE, *supra* note 4, at 427–29.

124 *See* FRANKLIN TUGWELL, THE ENERGY CRISIS AND THE AMERICAN POLITICAL ECONOMY: POLITICS AND MARKETS IN THE MANAGEMENT OF NATURAL RESOURCES 105 (1988).

institutions both inside and outside the government.[125] It is likely he was weary of struggling with a persisting Democratic Congress and the interest groups that supported the Democratic Party. After the 1972 election in particular, he was obsessed with seeking revenge on the many people and groups whom he believed had wronged him.[126] As he recounted in his memoirs: "In this second term I had thrown down a gauntlet to Congress, the bureaucracy, the media, and the Washington establishment and challenged them to engage in epic battle."[127] Another self-willed moment of crisis occurred when Nixon fired special prosecutor Cox and earned the whirlwind of an impeachment inquiry.[128] The significant point is that Nixon deliberately generated crises as a way of coping with the unwelcome reality that there were effective limits on his ability to reorder the policy universe. He certainly had no scruples about challenging any checks and balances the original Constitution put in his way. This was the most fundamental reason why "Watergate"—Nixon's way of managing the burdens of the Cold War—was a constitutional crisis, but one intimately linked to the pursuit of the nation's foreign policy.

CONCLUSION

Watergate can be usefully understood as part of an immense drama in which the constitutional order with respect to foreign policy and war powers founded after 1945 became increasingly unstable. The appalling costs of the Vietnam War and the crash of Nixon's presidency showed the jerry-built and provisional character of the Cold War constitutional order. The qualitative difference that war makes to government reasserted itself with a vengeance and showed that the kind of deliberation allowed by the post-1945 order was shockingly inadequate. The premises of the Cold War order would never again be sufficient by themselves to compel the nation to engage in conventional war. A further consequence was the crippling legacy of the loss of trust in government. While Vietnam and Watergate were not the only causes of the decline of trust in government in the 1960s and 1970s, they were significant contributors to a decline that was permanent in the sense that it has never been restored to the level prevailing before the war.[129] In this respect, we are still dealing with the consequences of Vietnam and Watergate.

125 NIXON, *supra* note 25, at 761–62.

126 ISAACSON, *supra* note 25, at 474.

127 NIXON, *supra* note 25, at 850.

128 KUTLER, WATERGATE, *supra* note 4, at 427–29.

129 *See* Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 3 ANN. REV. POL. SCI. 475, 480–81 (2000).

Watergate, Multiple Conspiracies, and the White House Tapes

Arnold Rochvarg[*]

On January 1, 1975, John Mitchell, former United States Attorney General, John Ehrlichman, former Chief White House Assistant for Domestic Affairs, H.R. Haldeman, former White House Chief of Staff, and Robert Mardian, former Assistant Attorney General, were convicted of conspiracy[1] for their involvement in what is generally known as "Watergate."[2] The Watergate conspiracy trial, presided over by Judge John Sirica, had run from October 1, 1974 until December 27, 1974.[3] The trial included the in-court testimony of most of the figures involved in the Watergate scandal,[4] and the playing of thirty of the "White House tapes."[5] The purpose of this Symposium article is to discuss whether the evidence presented at the Watergate trial is better understood as evidence of multiple conspiracies, as argued by two of the defendants,[6] or as a single conspiracy as argued by the prosecution. The article first will set forth the law on multiple conspiracies and apply that law to the evidence presented at the Watergate conspiracy trial. The article will then discuss whether the admission into evidence of certain White House tapes premised on the single conspiracy view may have prejudiced any of the convicted defendants.

I. THE LAW OF MULTIPLE CONSPIRACIES

It is not uncommon at a criminal conspiracy trial, or on appeal from a conviction of conspiracy, for a defendant to argue that a guilty verdict for

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1 18 U.S.C. § 371 (2006).

2 United States v. Haldeman, 559 F.2d 31, 54 (D.C. Cir. 1976), *cert. denied sub nom.*, Ehrlichman v. United States, 431 U.S. 933 (1977). Mitchell, Ehrlichman and Haldeman were also convicted of various substantive offenses such as obstruction of justice, perjury, and false declarations before a grand jury or court. *Haldeman*, 559 F.2d at 54.

3 *Haldeman*, 559 F.2d at 130 n.284.

4 *Id.* at 51. The most notable exceptions were former President Nixon and Gordon Liddy, neither of whom testified. *Id.*

5 *Id.* at 108.

6 Both Mitchell, *Haldeman*, 559 F.2d at 91–92, and Mardian, *Mardian*, 546 F.2d at 975, raised multiple conspiracy arguments on appeal.

the conspiracy charged in the indictment is inappropriate because the evidence at trial established that there were several separate conspiracies.[7] Criminal indictments typically charge a group of defendants with being conspirators in a single conspiracy.[8] From the prosecution's perspective, a single conspiracy charge is advantageous because it permits acts and statements of any of the defendants to be used against the other defendants. Defendants usually argue for multiple conspiracies to avoid having the acts and statements of others being admitted against them, as well as to demand severance to obtain a separate trial.[9] This section of the article will discuss the various approaches courts have taken when deciding whether evidence establishes a single conspiracy or multiple conspiracies.

A. Chain or Hub and Spoke Conspiracies

Some courts, when discussing the multiple conspiracy issue, focus on whether the conspiracy is a "chain" or a "hub and spoke" conspiracy.[10] A chain conspiracy is treated as a single conspiracy, while a hub and spoke conspiracy is treated as proof of multiple conspiracies.[11]

The classic case involving hub and spoke conspiracies is *Kotteakos v. United States*,[12] a 1946 opinion from the United States Supreme Court. The criminal scheme in *Kotteakos* involved the procurement of fraudulent loans to defraud the Federal Housing Administration.[13] Simon Brown was the "common and key" figure in all of the fraudulent loans.[14] Brown agreed with thirty-six persons to fraudulently procure loans for a five percent commission.[15] The multiple conspiracy issue presented was whether the various persons for whom Brown procured loans were all conspirators in one conspiracy along with Brown.[16] The Court viewed the defendants other than Brown as spokes emanating from the center hub (Brown) who were all independent of each other.[17] The proof at trial "made out a case, not of a single conspiracy, but of several, notwithstanding, only one was charged in the indictment."[18]

The hub and spoke analogy has been discussed by many courts in conspiracy prosecutions involving several criminal schemes.[19] It is a

7 Herbert Wechsler, et al., *The Treatment of Inchoate Crimes in the Modern Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 980 (1961).

8 United States v. Townsend, 924 F.2d 1385, 1389–90 (7th Cir. 1991).

9 Kotteakos v. United States, 328 U.S. 750 (1946).

10 United States v. Chandler, 388 F.3d 796, 807 (11th Cir. 2004).

11 United States v. Swafford, 512 F.3d 833, 842 n.3 (6th Cir.), *cert. denied*, 555 U.S. 936 (2008).

12 *Kotteakos*, at 754–55.

13 *Id*. at 752.

14 *Id*. at 753.

15 *Id*.

16 *Id*. at 758.

17 *Id*. at 754–55.

18 *Id*. at 755.

19 *See, e.g.*, *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 327 (3d Cir. 2010); United States v. Chandler, 388 F.3d 796, 807 (11th Cir. 2004).

popular argument in wide-ranging drug conspiracies,[20] as well as in conspiracy cases involving a small number of defendants in non-drug cases.[21] For example, a hub and spoke conspiracy was found in *United States v. McDermott*,[22] which involved an investment banker who was having an affair with an adult film star. As part of his affair, McDermott passed on insider financial information to his paramour.[23] Unknown to McDermott, the film actress was having an affair with another man, and during that affair, she passed on the insider information to him.[24] Together they made profits of over $170,000 in stock trades.[25] The Second Circuit reversed McDermott's conviction of a single conspiracy involving all three persons.[26] In this case, the adult film actress was the hub and the two men were the spokes with no conspiratorial relationship.

To be contrasted with hub and spoke conspiracies is the single chain conspiracy. In the single chain conspiracy, each defendant is viewed as linked to every other defendant despite the lack of direct communication or contact with each other.[27] Most chain conspiracy cases involve the production, distribution, and sale of illegal drugs.[28] For example, *United States v. Bruno*[29] held that smugglers, middlemen, and sellers of narcotics were all members of one conspiracy under the chain conspiracy approach, despite the lack of evidence of any cooperation or communication between the smugglers and any sellers or between the different sellers in different states.[30]

B. The Agreement

Some courts, when discussing the multiple conspiracy issue, focus on the agreement among the defendants.[31] The classic case here is *Braverman v. United States*,[32] which involved a conspiracy to violate federal tax laws.[33] The United States Supreme Court held that the "precise nature and

20 *See, e.g.*, United States v. Swafford, 512 F.3d 833 (6th Cir.), *cert. denied*, 555 U.S. 936 (2008); United States v. Caldwell, 589 F.3d 1323 (10th Cir. 2008); United States v. Mathis, 216 F.3d 18 (D.C. Cir.), *cert. denied*, 531 U.S. 972 (2000).

21 *See, e.g.*, United States v. Kemp, 500 F.3d 257 (3d Cir. 2007), *cert. denied*, 552 U.S. 1223 (2008); United States v. Chandler, 388 F.3d 796 (11th Cir. 2004).

22 United States v. McDermott, 245 F.3d 133 (2d. Cir. 2001).

23 *Id.* at 138.

24 *Id.* at 136.

25 *Id.*

26 *Id.* at 142.

27 United States v. Robinson, 547 F.3d 632, 641 (6th Cir. 2008).

28 *Id.*

29 United States v. Bruno, 105 F.2d 921 (2d Cir. 1939), *rev'd on other grounds*, 308 U.S. 287 (1939).

30 *Id.* at 922.

31 *See, e.g.*, United States v. Trainor, 477 F.3d 24 (1st Cir. 2007); United States Court of Appeals for the Third Circuit Pattern Jury Instructions § 6.18.371H (2010).

32 Braverman v. United States, 317 U.S. 49 (1942).

33 *Id.* at 50.

extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects."[34]

It is possible for various persons to be parties to a single agreement, and thus co-conspirators in a single conspiracy, even though they do not know the identity of the other members of the conspiracy or are unaware of the acts of the others.[35] Nor does a single conspiracy become multiple conspiracies because members drop out or are added.[36] A defendant can be part of a single conspiracy even if that defendant played only a small part during a short time period of that conspiracy.[37] Additionally, just because there are different subgroups operating in different places, it does not mean that there is more than one conspiracy.[38] In all of these circumstances, as long as there is a single agreement to which all defendants agreed, there is one conspiracy of which all defendants are guilty.[39]

C. Common Goal or Purpose

Another approach to the multiple conspiracy issue focuses on whether the defendants charged with conspiracy had a common goal or purpose. In *Blumenthal v. United States*,[40] the Supreme Court found a single conspiracy to acquire and sell whiskey at higher-than-authorized prices even though there were several agreements because all the defendants "sought a common end."[41] The multiple agreements were viewed not as proving different conspiracies, but rather as "essential and integral steps" towards a common goal.[42] Courts typically define the "common goal" element of a single conspiracy broadly. For example, in *United States v. Moore*,[43] several correctional officers were found guilty of a single conspiracy for engaging in sexual relations with female inmates.[44] The defendants argued that a single conspiracy did not exist because there were separate agreements among different defendants to engage in sex with different inmates.[45] The Eleventh Circuit rejected this multiple conspiracy argument, holding that the officers "had the common goal of trading sex with inmates for contraband."[46] Elaborate drug conspiracy convictions have been viewed as a single conspiracy despite the possible existence of separate agreements. Courts have found a single conspiracy based on

34 *Id*. at 53.
35 *See, e.g*., Kilgore v. State, 305 S.E.2d 82, 90 (Ga. 1983).
36 United States v. Portela, 167 F.3d 687, 699 (1st Cir.), *cert. denied*, 528 U.S. 917 (1999).
37 United States v. Padilla, 982 F.2d 110, 115 (3d Cir. 1992).
38 United States v. DiPasquale, 561 F. Supp. 1338, 1357 (E.D. Pa. 1983).
39 *Id*.
40 Blumenthal v. United States, 332 U.S. 539 (1947).
41 *Id*. at 559.
42 *Id*.
43 United States v. Moore, 525 F.3d 1033 (11th Cir. 2008).
44 *Id*. at 1038–39.
45 *Id*. at 1041–42.
46 *Id*. at 1043.

common goals of selling speed,[47] trafficking cocaine,[48] stealing money from a union,[49] and defrauding the federal government.[50]

When discussing the common purpose aspect of single or multiple conspiracies, courts also consider whether the conspiracies were acting at cross-purposes with each other.[51] For example, in *United States v. Camiel*,[52] multiple conspiracies were found, contrary to the single conspiracy charged in the indictment, when the alleged single conspiracy consisted of two antagonistic factions.[53]

II. WATERGATE TRIAL EVIDENCE OF DIFFERENT CONSPIRACIES

The evidence presented during the Watergate conspiracy trial could be viewed as supporting four different conspiracies: (1) the Ellsberg Break-In Conspiracy; (2) the Watergate Break-In Conspiracy; (3) the Cover-Up Conspiracy; and (4) the White House Conspiracy.

A. The Ellsberg Break-In Conspiracy

Daniel Ellsberg was a military analyst who worked at the RAND Corporation after serving at the Pentagon under Secretary of Defense Robert McNamara.[54] Because of his high-level security clearance, Ellsberg gained access to a group of highly classified documents regarding the Vietnam War, which became known as the "Pentagon Papers."[55] These documents demonstrated that the American public and Congress had been deceived about many aspects of the Vietnam War.[56] Ellsberg secretly made copies of these documents and provided them to *The New York Times* which, in June, 1971, published excerpts and commentary.[57] Ellsberg also provided copies to *The Washington Post* and other newspapers.[58]

The Nixon administration was very concerned about the publication of these Vietnam War documents.[59] Attorney General Mitchell ordered *The*

47 *See, e.g.*, United States v. Kelly, 892 F.2d 255, 259 (3d Cir. 1989), *cert. denied*, 487 U.S. 1006 (1990).

48 *See, e.g.*, United States v. Richardson, 532 F.3d 1279, 1285 (11th Cir. 2008), *cert. denied*, 555 U.S. 1120 (2009); United States v. Portela, 167 F.3d 687, 695–99 (1st Cir.), *cert. denied*, 528 U.S. 917 (1999).

49 United States v. Hemphill, 514 F.3d 1350, 1362–63 (D.C. Cir.), *cert. denied*, 555 U.S. 1020 (2008).

50 United States v. Huff, 609 F.3d 1240, 1244 (11th Cir. 2010).

51 *Kelly*, 892 F.2d at 260.

52 United States v. Camiel, 689 F.2d 31 (3d Cir. 1982).

53 *Id.* at 36.

54 *F.B.I. Continues Investigation of How Times Got Documents*, N.Y. TIMES, June 18, 1971, at 15 [hereinafter *F.B.I. Investigation*].

55 *The Covert War*, N.Y. TIMES, June 13, 1971, at 38.

56 Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES, June 13, 1971, at 1.

57 *Id.*; *F.B.I. Investigation*, *supra* note 54, at 15.

58 Chalmers M. Roberts, *Documents Reveal U.S. Effort in '54 to Delay Viet Election*, WASH. POST, June 18, 1971, at A1.

59 Max Frankel, *Court Step Likely, Return of Documents Asked in Telegram to Publisher*, N.Y.

New York Times to cease publication of the leaked information.[60] When the newspaper refused, the government sued to restrain publication.[61] Most significant to Watergate, in response to the Ellsberg leaks, a group known as the "Plumbers" was organized inside the White House under the supervision of John Ehrlichman to deal with national security leaks.[62]

One of the projects of the Plumbers was to discredit Daniel Ellsberg.[63] A plan was devised to break into the offices of Ellsberg's psychiatrist, Dr. Lewis Fielding, to obtain medical records on Ellsberg which the White House hoped would destroy Ellsberg's credibility.[64] Ehrlichman approved this covert operation after receiving assurances that it could not be traced back to the White House.[65] On September 3, 1971, a group including Gordon Liddy, Howard Hunt, and Bernard Barker burglarized Dr. Fielding's medical office—nothing on Ellsberg was found.[66]

The public did not learn of the Plumber's' break-in until April of 1973 when, during the criminal trial of Ellsberg for violating the Espionage Act of 1917, information about the Plumbers' burglary was revealed.[67] This revelation, along with revelations that the government had engaged in illegal wiretapping of Ellsberg, and that the presiding judge, William Matthew Bryne, Jr., had been offered the directorship of the FBI by John Ehrlichman, led to the dismissal of all charges against Ellsberg.[68]

More than three full days at the Watergate conspiracy trial were devoted to evidence involving the White House Plumbers' break-in of Ellsberg's psychiatrist's office.[69] Although this evidence was most relevant to John Ehrlichman, the prosecution's position at the Watergate trial was that it was "admissible against all [defendants] even though only Ehrlichman had been personally involved in the actual authorization."[70] The prosecution argued that the burglary of Ellsberg's psychiatrist's office established a motive for the Watergate conspiracy charged in the indictment.[71] Some of the same persons who participated in the Ellsberg

TIMES, June 15, 1971, at 1.

60 *Id*.

61 Fred P. Graham, *Argument Friday, Court Here Refuses to Order Return of Documents Now*, N.Y. TIMES, June 16, 1971, at 1; *Texts of Government Papers in Complaint Against the Times and Judge's Order*, N.Y. TIMES, June 16, 1971, at 18.

62 Earl Krogh, *The Break-In That History Forgot*, N.Y. TIMES, June 30, 2007, at A17.

63 *Id*.

64 *See Text of Ruling by Judge in Ellsberg Case*, N.Y. TIMES, May 12, 1973, at 14.

65 *The Plumbers*, N.Y. TIMES MAG., July 22, 1973, at 197.

66 *Id*.

67 *See* Martin Arnold, *Ellsberg Lawyers Weigh New Motion for Dismissal*, N.Y. TIMES, Apr. 30, 1973, at 1.

68 *See Guilty: The Government*, N.Y. TIMES, May 12, 1973, at 32.

69 Brief for Robert C. Mardian at 4 [hereinafter MARDIAN'S BRIEF], United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976).

70 Brief for the United States at 256 n.342 [hereinafter GOV'T BRIEF], United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1977) (No. 75-1381).

71 *See* Seymour M. Hersh, *Prosecutors Feel Motive in Cover-Up Was Wish to Hide Ellsberg Burglary*, N.Y. TIMES, Mar. 3, 1974, at 41.

psychiatrist break-in had also participated in the Watergate break-in, most prominently Gordon Liddy and Howard Hunt.[72] Moreover, the Ellsberg break-in conspiracy evidence explained Hunt's threats after his Watergate burglary arrest and conviction to expose the "seamy things" he had done for the White House if his money demands were not met.[73]

B. The Watergate Break-In Conspiracy

The Committee to Re-elect the President (CRP) was organized to run Richard Nixon's re-election campaign.[74] It was understood that John Mitchell would leave the post of Attorney General to become the head of CRP, but until that time, the nominal head of CRP was Jeb Magruder.[75] In November of 1971, Mitchell, still Attorney General, along with John Dean, who was Counsel to the President, interviewed Gordon Liddy for a position at CRP.[76] Liddy had been recommended to Dean by Egil Krogh,[77] who was in charge of the "Plumbers" and supervised by Ehrlichman.[78] During the interview, there was discussion of CRP's intelligence needs.[79] After being hired, Liddy, along with Howard Hunt, began developing a political espionage plan.[80] At a meeting in January of 1972, Liddy presented to Mitchell, Dean and Magruder a plan he called "Gemstone."[81] This $1,000,000 plan included burglaries, electronic surveillance, kidnapping, and prostitutes.[82] Mitchell rejected the plan as not "quite what [he] had in mind."[83] About one week later, Mitchell, Magruder, Dean and Liddy met again in Mitchell's office.[84] The new plan's budget was now $500,000.[85] The revised plan still included burglaries and wiretaps.[86] Mitchell refused to give approval to this scaled-down plan on the basis that it was still too costly.[87] Dean commented at this meeting that the Attorney General's office was not the place that such plans should be discussed, and suggested that Magruder be Liddy's point person to provide cover for Mitchell.[88]

72 *See* Bob Woodward & Carl Bernstein, *Break-In Memo Sent to Ehrlichman*, WASH. POST, June 13, 1973, at A1.

73 *See Transcript of Nixon Talks of March 21, 1973*, WASH. POST, May 1, 1974, at A20; Walter Pincus, *Hearing Howard Hunt*, WASH. POST, Sept. 23, 1973, at C6.

74 THEODORE H. WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON 153 (1975).

75 *Id*.

76 Gov't Brief, *supra* note 70, at 11; Transcript of Record at 2627, 7675, United States v. John N. Mitchell, et al., Criminal No. 74-110 (D.D.C 1975) (on file with author) [hereinafter Transcript].

77 Gov't Brief, *supra* note 70, at 11 n.8; Transcript at 7654–56.

78 *Id*. at 11 n.8.

79 *Id*. at 12; Transcript at 4117–20.

80 Gov't Brief, *supra* note 70, at 12.

81 *Id*.

82 *Id*.

83 *Id*.; Transcript at 2628–31.

84 Gov't Brief, *supra* note 70, at 12.

85 *Id*.

86 *Id*.

87 *Id*.

88 *Id*.; Transcript at 2632–34.

Dean reported what occurred at this meeting to Haldeman.[89] Both Dean and Haldeman agreed that the White House should not be involved with CRP's illegal intelligence plans.[90] However, Gordon Strachan, who was Haldeman's assistant, was kept informed by Magruder of Liddy's plans.[91] When Mitchell, on March 30, 1972, approved a budget of $250,000 for Liddy, Magruder informed Strachan of Mitchell's approval.[92] Thereafter, Liddy began receiving money from CRP to implement his plan.[93]

On Memorial Day weekend, a team of burglars directed by Liddy and Hunt broke into the Democratic National Committee (DNC) headquarters in the Watergate office complex.[94] The burglars photographed some documents and installed wiretaps on telephones.[95] A couple of weeks later, Magruder showed Mitchell some of the photographs and information from the wiretaps.[96] Mitchell expressed dissatisfaction, and Magruder conveyed Mitchell's reaction to Liddy.[97] Liddy explained to Magruder that the listening devices were not working properly, but that this would be fixed.[98] Liddy and Hunt then organized a second break-in of the DNC offices.[99] This second break-in occurred on June 17, 1972.[100] This break-in led to the arrest of not only Hunt and Liddy, but also James McCord, who was employed as security director at CRP, as well as other men, including Eugenio Martinez and Bernard Barker, who had participated in the break-in of Dr. Fielding's office.[101] Hunt, Barker and three of the burglars pled guilty to the burglary of the DNC offices.[102] McCord and Liddy pled not guilty, but were convicted at trial.[103] Neither testified.[104] Shortly before the sentencing of all of those guilty in the DNC Watergate office burglary, McCord sent a letter to Judge Sirica stating that there had been pressure exerted upon him and the others to remain silent.[105]

The prosecution presented the evidence of the planning and execution of the burglaries at the DNC offices at Watergate to establish motive for the conspiracy charged in Count I of the Indictment against Mitchell,

89 *Haldeman*, 559 F.2d at 53.
90 Gov't Brief, *supra* note 70, at 12; Transcript at 2635–36.
91 *Haldeman*, 559 F.2d at 53.
92 *Id*. at 52.
93 Gov't Brief, *supra* note 70, at 13; Transcript at 3276–77.
94 Gov't Brief, *supra* note 70, at 13; Transcript at 4139–44.
95 Gov't Brief, *supra* note 70, at 13.
96 *Id*.
97 *Id*. at 13–14.
98 *Id*. at 14.
99 *Id*.
100 United States v. Haldeman, 559 F.2d 31, 52 (D.C. Cir. 1977).
101 *Id*. at 52 n.9. The other two men arrested inside the DNC offices were Frank Sturgis and Virgilio Gonzales. *Id*.
102 CONG. QUARTERLY, WATERGATE: CHRONOLOGY OF A CRISIS 10 (Wayne Kelley ed., 1975).
103 *Id*.
104 Gov't Brief, *supra* note 70, at 32.
105 CONG. QUARTERLY, *supra* note 102, at 10.

Ehrlichman, Haldeman and Mardian. Although it appears it would have been possible for Mitchell and perhaps Haldeman to have been charged with conspiracy to burglarize the DNC offices, none of the defendants at the Watergate conspiracy trial were charged with conspiracy relating to the actual break-ins of the DNC offices in May and June of 1972.

C. The Cover-Up Conspiracy

Once it became known that McCord had been arrested along with others at the DNC offices at Watergate, various acts were committed in order to cover up the fact that CRP and White House officials had planned and organized the break-in.[106] The prosecution's evidence covered a wide range of conspiratorial acts.[107]

Shortly after learning of McCord's arrest, Mitchell, Mardian, Magruder and Fred LaRue, another CRP official, arranged for Liddy to seek Attorney General Richard Kleindienst's aid in getting McCord released from jail.[108] Mitchell, Mardian, Magruder and LaRue also participated in the issuance of a press release, approved by Haldeman, that denied that McCord's involvement with the DNC break-in was related to his employment at CRP.[109]

In order to further disassociate any connection with those arrested at the DNC offices at Watergate with CRP or the White House, Magruder destroyed all papers relating to Liddy's Gemstone plan.[110] The prosecution introduced evidence that implicated Mitchell, Mardian, LaRue, Dean, and Strachan in this. Strachan also reported to Dean and Haldeman that he had destroyed DNC wiretap reports and Watergate-related memos that he had kept in his files. Additionally, Dean met with Ehrlichman and Charles Colson, Special Counsel to the President, and they discussed having Hunt leave the country.[111] When Colson disclosed that Hunt had a safe in the Executive Office Building that might contain embarrassing information, Ehrlichman instructed Dean to have the safe opened and have its contents removed.[112]

Evidence was presented about attempts to thwart the FBI investigation into the Watergate break-in.[113] Dean, Haldeman, Ehrlichman, and Mardian were implicated in trying to get the CIA to take responsibility for the break-in.[114] They also tracked the FBI investigation into the DNC burglary to

106 United States v. Haldeman, 559 F.2d 31, 53–54 (D.C. Cir. 1977).
107 CONG. QUARTERLY, *supra* note 102, at 9.
108 United States v. Mardian, 546 F.2d 973, 975 (D.C. Cir. 1976).
109 *Id*.
110 *Haldeman*, 559 F.2d at 53–54.
111 CONG. QUARTERLY, *supra* note 102, at 112.
112 *Haldeman*, 559 F.2d at 54.
113 CONG. QUARTERLY, *supra* note 102, at 820.
114 *See id*. at 66.

determine if the FBI had any information tying the burglary to CRP or the White House.[115]

Once it became clear that Liddy would be identified as the leader of the burglary team, the conspirators developed various cover stories to explain why approximately $199,000 in CRP funds had been given to him.[116] Such cover stories included that the money had been earmarked for security at the upcoming Republican convention and for security for surrogate speakers.[117] Magruder rehearsed with Dean and Mitchell the false cover story he intended to give to the grand jury investigating the Watergate burglary.[118] False information was also given to the FBI and the grand jury by Mitchell and Ehrlichman.[119]

The cover-up also included the payment of hush money to those guilty of the Watergate burglary.[120] The persons involved with the hush money payments included Herbert Kalmbach and Anthony Ulasewicz.[121] As well as payments of cash to the burglars, there were suggestions from the White House of presidential clemency for the burglars.[122]

The efforts to keep the burglars quiet and not implicate anyone at CRP or the White House appeared to be successful. Nixon had won a landslide re-election in November 1972.[123] During the early winter of 1973, Hunt had pleaded guilty, as had four of the burglars.[124] Although McCord and Liddy pleaded not guilty and went to trial, neither testified.[125] None of those involved in the burglary tied it to CRP or the White House.[126] But inside the White House, Nixon, Haldeman, Ehrlichman and Dean were especially concerned about Hunt.[127] Hunt's demands for money continued after his guilty plea.[128] Things changed, however, on March 19, 1973, the day of sentencing for those guilty of the Watergate break-in, when McCord wrote a letter to Judge Sirica revealing that the burglars had been forced to

115 CONG. QUARTERLY, *supra* note 102, at 812.

116 *Haldeman*, 559 F.2d at 54.

117 Gov't Brief, *supra* note 70, at 22.

118 *Id*. at 23.

119 *Haldeman*, 559 F.2d at 59.

120 *Id*. at 55–57.

121 Gov't Brief, *supra* note 70, at 26 n.33.

122 *Haldeman*, 559 F.2d at 56–57.

123 David S. Broder, *Nixon Wins Landslide Victory; Democrats Hold Senate, House*, WASH. POST, Nov. 8, 1972, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2002/06/03/AR2005111001233.html.

124 CONG. QUARTERLY, *supra* note 102, at 10.

125 Gov't Brief, *supra* note 70, at 32.

126 *See The Watergate Files*, GERALD R. FORD LIBRARY & MUSEUM, http://www.ford.utexas.edu/museum/exhibits/watergate_files/content.php?section=1&page=d (last visited Mar. 22, 2012).

127 *Haldeman*, 559 F.2d at 59.

128 *See id*. at 57 (explaining that Hunt decided to plead guilty and then demanded $122,000 "to settle his financial affairs before sentencing").

remain silent, that perjury had been committed, and that others were involved in the break-in.[129]

D. The White House Conspiracy

McCord's letter led to significant developments. Within a month of the letter, Dean began cooperating with the prosecutors.[130] Shortly thereafter, Magruder and LaRue met with the prosecutors.[131] Most of the evidence presented at the Watergate conspiracy trial covering events after McCord's March 1973 letter focused on how Haldeman, Ehrlichman, and Nixon sought to justify their actions in the pre-McCord letter period.[132] Much of this evidence was presented through the White House tapes.[133] Nixon told Ehrlichman that everyone should "have a straight damn line[:] . . . we raised money for a purpose that we thought was perfectly proper."[134] There were discussions in the White House to have Dean, Mitchell and Magruder take all the blame in return for clemency.[135] It was thought at one point by those within the White House that no investigation was likely of what happened after June 17, 1972 (the date of the break-in) if Mitchell would step forward and admit his guilt for what happened before June 17.[136] Mitchell, however, was unwilling to take the blame.[137]

Dean was also seen as a possible scapegoat. On one White House tape, Nixon told Ehrlichman and Haldeman that Dean should be told to "look down the road . . . that there's only one man that could restore him to the ability to practice law."[138] After Dean refused Ehrlichman's invitation to meet, Nixon, Haldeman and Ehrlichman discussed a plan where the "scenario" would be that when Dean failed to write a report on Watergate as requested by Nixon, Nixon became suspicious and assigned Ehrlichman to conduct an investigation, and Ehrlichman's investigation revealed that Dean was the main culprit.[139] On the White House tapes, there was discussion of the need "to put the wagons up around the President."[140] False testimony by Haldeman and Ehrlichman was part of this conspiracy. Haldeman testified falsely before the Senate Select Committee about Nixon's response to raising $1,000,000 for the burglars—Haldeman

129 *Id*. at 58.
130 *Id*.
131 *Id*.
132 *Id*.
133 United States v. Mardian, 546 F.2d 973, 978 (D.C. Cir. 1976).
134 *Haldeman*, 559 F.2d at 59 n.25.
135 *Id*. at 57.
136 *See id*. at 58.
137 *Id*.
138 Gov't Brief, *supra* note 70, at 38.
139 *See Haldeman*, 559 F.2d at 58, 59; Audio Tape: Transcript of a Recording of a Meeting Between the President, H.R. Haldeman, and John Ehrlichman in the Oval Office, (April 16, 1973, at 10:50 to 11:04 A.M.) (available online at http://www.lib.berkeley.edu/MRC/watergate.html).
140 Gov't Brief, *supra* note 70, at 39.

testified that Nixon stated "it would be wrong"—and Ehrlichman testified falsely before the grand jury about his knowledge of the payment of hush money.[141]

E. The Conspiracy in the Indictment

Count One of the Indictment charged all defendants with conspiracy to obstruct justice, make false statements to a government agency, commit perjury, make false declarations, and defraud the Central Intelligence Agency, the Federal Bureau of Investigation, and the Department of Justice, in connection with the federal investigation of the Watergate break-in and related matters in connection with the trial of the Watergate burglars.[142] In paragraph eleven of the Indictment, the purpose of the conspiracy was stated as "concealing and causing to be concealed the identities of the persons who were responsible for, participated in, and had knowledge of (a) the activities which were the subject of the investigation and trial [of the Watergate burglaries], and (b) other illegal and improper activities."[143] The "investigation" set forth in paragraph eleven was described in paragraph three as the investigation that began "on or about June 17, 1972" to determine whether crimes "had been committed" and to "identify" those who "had committed, caused the commission of, and conspired to commit such violations."[144] Additionally, paragraph one of the Indictment described the arrest of the Watergate burglars on June 17, 1972, and paragraph four referenced the indictment of the Watergate burglars.[145]

The Indictment in paragraph sixteen listed forty-five overt acts in chronological order, beginning with Mitchell's request to Mardian on June 17, 1972 to tell Liddy to seek the help of Attorney General Kleindienst in obtaining the release of one or more of the burglars arrested at the DNC offices at Watergate, and ending with Ehrlichman telling Egil Krogh on March 22, 1973 that Ehrlichman did not believe that Hunt would reveal the burglary of Ellsberg's psychiatrist.[146] All of the overt acts of the conspiracy charged in the indictment occurred during the period of what I have labeled the "Cover-Up Conspiracy."[147] The majority of the overt acts concerned the payment of hush money to the burglars during this timeframe.[148] As discussed above, the evidence presented at the trial

141 *Haldeman*, 559 F.2d at 59.

142 *Id*. at 120.

143 *Id*.

144 *Texts of the Indictments by Watergate Jury in Alleged Ellsberg Break-in Conspiracy*, N.Y. TIMES, Mar. 8, 1974, at 14.

145 Indictment of John N. Mitchell, Harry R. Haldeman, John D. Ehrlichman, Charles Colson, Robert C. Mardian, Kenneth W. Parkinson, Gordon Strachan at 102–04 (1973) [hereinafter Indictment], *available at* http://watergate.info/judiciary/APPII.PDF.

146 *Id*. at 109–17.

147 *See* discussion *supra* Part II(C).

148 Indictment, *supra* note 145, at 109–17.

covered events outside the time frame of the conspiracy charged in the indictment.[149]

The government's position was that its case at the Watergate conspiracy trial established a single extensive conspiracy

> to obstruct a federal grand jury investigation into the 1972 burglaries and bugging of the DNC headquarters in the Watergate building and related matters. This conspiracy began within hours after the arrest of the burglars on June 17, 1972. The conspiracy was prompted by two considerations: that the Watergate break-in had been approved by CRP officials and members of White House staff, and that two leaders of the Watergate burglary, Hunt and Liddy, had previously engaged in other unlawful activities for the White House, including the 1971 Ellsberg psychiatrist burglary. The conspirator's motivation was their desire to protect the Nixon administration.[150]

The government's position was also that "from its inception, the conspiracy necessarily included an agreement to conceal its existence and membership."[151]

III. WAS WATERGATE A SINGLE CONSPIRACY OR MULTIPLE CONSPIRACIES?

As the previous discussion has outlined, the evidence at the Watergate trial could be viewed as proving four separate conspiracies, not the single conspiracy charged in the indictment. On the other hand, perhaps the evidence is better described as a single conspiracy. Earlier in this article, various approaches to the multiple conspiracy issue were discussed.[152] This section will discuss these different approaches to the evidence presented at the Watergate conspiracy trial.

It would appear that the evidence at the Watergate conspiracy trial did not demonstrate multiple conspiracies under the hub and spoke approach. Watergate did not emanate from one hub; no one person was at the center of the scandal. Various persons took leadership roles at different times. Although certain persons were more central to the conspiracy—for example, John Dean—and others clearly played only a minor role—for example, Fred LaRue—the minor figures cannot be viewed as mere spokes. Moreover, in a hub and spoke conspiracy, each of the conspiratorial spokes is usually acting independently of the others and is usually unaware of what other conspirators are doing.[153] Although in the Watergate conspiracy, each defendant was not aware of every move made by the other conspirators, there was awareness that the others were involved in similar

149 The first acts listed in the indictment occur in 1972; the evidence presented at the trial covered events beginning in 1971. *See The Plumbers*, *supra* note 65.

150 Gov't Brief, *supra* note 70, at 47-48.

151 *Id*. at 176.

152 *See* discussion *supra* Part I.

153 *See* discussion *supra* Part I(A).

conduct aimed at hiding the roles played by CRP and White House personnel in the DNC break-in.[154]

Compared to the hub and spoke conspiracy, the evidence presented at the Watergate trial fits better into the single conspiracy chain conspiracy. Watergate could be viewed as four conspiracies linked together. Even though there may have been no direct communication or contact among all of the conspirators, each played an important role in a conspiratorial scheme to obtain intelligence on political enemies, and to conceal that persons working for the Nixon White House and Nixon re-election campaign were involved in these illegal intelligence gathering acts.

The problem with the chain conspiracy analysis is that this chain conspiracy was not the conspiracy alleged in the indictment. The conspiracy of which defendants Mitchell, Ehrlichman, Haldeman and Mardian were charged clearly did not cover the Ellsberg psychiatrist office burglary or the DNC Watergate burglary.[155] The first overt act of the conspiracy charged in the indictment was just after the arrest of the Watergate burglars on June 17, 1972.[156] Moreover, the prosecution introduced evidence of the Ellsberg psychiatrist and DNC burglaries only to establish motive for the conspiracy actually charged in the indictment.[157] More problematic is the evidence relating to events after Dean and others began cooperating with the prosecution. These events, especially the words of Nixon, Haldeman, and Ehrlichman caught on tape, were not aimed at hiding the identities of those responsible for the earlier burglaries, but rather to get others to take the blame for those burglaries, and thus protect the three men within the inner circle of the White House.[158] Therefore, although the Watergate conspiracy is better viewed as a chain conspiracy compared to a hub and spoke conspiracy, the chain conspiracy approach is not an accurate description of the conspiracy charged in the indictment.

154 *See* United States v. Haldeman, 559 F.2d 31, 55, 98 (D.C. Cir. 1976).

155 Indictment, *supra* note 145, at 109; *Brief Timeline of Events*, WATERGATE.INFO, http://watergate.info/chronology/brief.shtml (last visited Mar. 23, 2012).

156 Indictment, *supra* note 145, at 109.

157 *See Haldeman*, 559 F.2d at 88 ("Objection was made to the introduction of evidence of the Ellsberg break-in on the grounds that the prejudice engendered by the admission into evidence of such prior acts of criminal misconduct outweighed their legitimate probative value. Ehrlichman br. at 45-53a; Haldeman br. at 4. Rejecting this objection, the court admitted the evidence as being probative of motive.").

158 *See id*. at 58 ("Nixon, Dean, Mitchell, Haldeman, and Ehrlichman then took up a discussion that had begun the day before: the best strategy for dealing with the upcoming Senate hearings. Despite the previous day's plans, no one had the fortitude to suggest directly to Mitchell that he take the full blame and go to jail to save the Nixon presidency. Lacking that alternative, they all focused on a plan Nixon had discussed with Dean on March 17 indeed, it had been mentioned as an option for several months. Dean would make a report to the President. It would be quite general and would indicate that no one from the White House was involved.").

If we focus on the *agreement* among the conspirators to determine whether the Watergate conspiracy was a single conspiracy or multiple conspiracies, the multiple conspiracy conclusion appears more accurate. There were clearly four separate agreements: (1) an agreement to gather information on Ellsberg by illegally obtaining his mental health records in order to discredit him and hopefully discredit the Pentagon Papers; (2) an agreement to gather information about Democratic Party officials and candidates by illegally obtaining information in order to gain some political advantage (although the exact reason for the Watergate burglary is still subject to debate); (3) an agreement to conceal that persons who worked at CRP and the White House had authorized the break-in; and (4) an agreement to blame persons already identified to the prosecution by Dean as solely responsible for the Watergate burglary and subsequent cover-up, and to absolve Nixon, Haldeman, and Ehrlichman. It appears that none of the four defendants convicted at the Watergate conspiracy trial, except for perhaps Haldeman, were participants in all four agreements. The evidence seems to support that Mitchell was not part of any agreement to burglarize Ellsberg's psychiatrist office, and not part of any agreement for him to take the blame for the Watergate burglary.[159] Ehrlichman was not part of any agreement to burglarize the DNC offices.[160] Most significantly, Robert Mardian was clearly not a party to any agreement involving Ellsberg, the actual Watergate break-in, or an agreement to protect White House personnel and to place blame on those outside the White House, including himself.[161] Application of the "agreement" approach to multiple conspiracies seems to provide the strongest support for the conclusion that the evidence at the Watergate trial established multiple conspiracies contrary to the single conspiracy charged in the indictment.

Whether the "common goal or purpose" approach leads to a multiple conspiracy conclusion depends on how broadly we define the goal and purpose of the conspirators. On the one hand, the purpose of all the criminal conduct introduced at the Watergate trial could be viewed as supporting and protecting the presidency of Richard Nixon. The conspirator's goal was to help Nixon exercise power, be re-elected, and avoid impeachment. Although the precise goals may have shifted during the full conspiratorial period, and not every conspirator was involved in all

159 *See id*. at 89.

160 Indictment, *supra* note 145, at 104 ("On or about September 15, 1972, in connection with the said investigation, the Grand Jury returned an indictment in Criminal Case No. 1827-72 in the United States District Court for the District of Columbia charging Bernard L. Barker, Virgilio R. Gonzalez, E. Howard Hunt, Jr., G. Gordon Liddy, Eugenio R. Martinez, James W. McCord, Jr., and Frank L. Sturgis with conspiracy, burglary and unlawful endeavor to intercept wire communications.").

161 *See Haldeman*, 559 F.2d at 53 ("[I]n an apparent effort to avoid the appearance of any link between CRP and the burglars, Mitchell, Mardian, LaRue, and Magruder met and decided to contact the new Attorney General, Richard Kleindienst, urging him to have McCord released from jail before the police penetrated his alias. . . . Aware that McCord's true identity would come to light, Mardian, Magruder, and LaRue the next day worked on a press release that would deny any CRP tie to the break-in.").

phases of the conspiracy, it could be argued that there was a common goal of all the conspirators, and thus a single conspiracy. On the other hand, this goal may be too broad. All of the overt acts set forth in the indictment concerned only the goal of preventing disclosure that CRP and White House personnel had planned and organized the DNC burglary. This goal was thoroughly defeated in April 1973 when Dean and others began cooperating with the prosecution.[162] The goal of the next conspiracy, as stated by chief special prosecutor James Neal, was to "put it all on Mr. Mitchell, Mr. Magruder, and it also ropes in Mardian, LaRue, attorneys O'Brien, Parkinson and so forth . . . . In other words, everybody except that tight circle now within the wagons."[163] Additionally, the goal of the Ellsberg psychiatrist burglary was limited to discrediting Ellsberg, not gathering information for Nixon's re-election campaign. The common goal or purpose approach to conspiracies, like the agreement approach, seems to lend more support to the view that the evidence at the Watergate trial proved multiple conspiracies, although a broad application of the common goal or purpose approach could lead to a single conspiracy conclusion.

IV. PREJUDICE

The possible conclusion that the evidence at the Watergate trial proved multiple conspiracies as opposed to the single conspiracy charged in the indictment does not mean that any defendant's conviction should have been reversed. The case law is very clear that proof of multiple conspiracies is harmless error unless prejudice can be proven.[164] Substantial prejudice from multiple conspiracies can be proven in several ways. For example, if proof at trial differed so greatly from the indictment, prejudice can be based on unfair surprise and inability to prepare an adequate defense.[165] A more typical prejudice claim is based on spillover. Evidence of multiple conspiracies can confuse jurors who may transfer proof of one of the conspiracies to a defendant involved in a different conspiracy.[166] Although some courts have stated that the risk of spillover prejudice is less likely the fewer the defendants,[167] courts have found prejudicial spillover even when there were only three defendants.[168] Another factor in evaluating spillover prejudice is the disparity in evidence against different defendants. The greater the disparity, the more likely spillover is prejudicial.[169]

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162 *Haldeman*, 559 F.2d at 58.

163 Mardian's Brief, *supra* note 69, at 63–64; Transcript at 9823.

164 Kotteakos v. United States, 328 U.S. 750, 757 (1946); Berger v. United States, 295 U.S. 78, 82 (1935); United States v. Portela, 167 F.3d 687, 706 (1st Cir.), *cert. denied*, 528 U.S. 917 (1999).

165 United States v. Richardson, 532 F.3d 1279, 1287 (11th Cir. 2008), *cert. denied*, 555 U.S. 1120 (2009).

166 United States v. Kemp, 500 F.3d 257, 291 (3d Cir. 2007), *cert. denied*, 552 U.S. 1223 (2008).

167 *See, e.g.*, United States v. Mathis, 216 F.3d 18, 25 (D.C. Cir.), *cert. denied*, 531 U.S. 972 (2000).

168 *See, e.g.*, United States v. McDermott, 245 F.3d 133, 139 (2d Cir. 2001).

169 *Id.*

Additionally, courts have emphasized that prejudice exists if the jury transfers guilt from one defendant to another.[170] Although courts have recognized that proper jury instructions can diminish the likelihood of prejudice, there are cases where the prejudicial spillover was so overwhelming, limiting instructions were not adequate to eliminate prejudice.[171] Perhaps the most significant prejudice argument involves the improper admission of hearsay statements under the co-conspirator exception. If all defendants are co-conspirators in a single conspiracy, the hearsay statements of any one defendant are admissible against every other defendant.[172] In a multiple conspiracy situation, the statements of members of one conspiracy would not be properly admitted against defendants who were members of a separate conspiracy.[173] On the other hand, even if the trial evidence established multiple conspiracies when the indictment alleged a single conspiracy, no prejudice exists if a defendant participated in the separate conspiracies.[174] Moreover, proof of multiple conspiracies is not prejudicial when the evidence of conspiracies not charged in the indictment pertains to a chain of events explaining the context, motive, or set-up of the conspiracy charged.[175] It is not prejudicial to admit evidence of other conspiracies linked in time and circumstances to the charged conspiracy.[176] Nor is it prejudicial to present to the jury evidence of other conspiracies that are an "integral and a natural part" of the charged conspiracy, or necessary to "complete the story" of the charged conspiracy.[177]

It would seem that the only defendant convicted at the Watergate conspiracy trial who might have been prejudiced by the proof of multiple conspiracies was Robert Mardian. It is very doubtful that there was substantial prejudice to Mitchell, Haldeman, or Ehrlichman.

First, Mardian was the only convicted defendant who was not a member of more than one of the multiple conspiracies. As discussed earlier in this article, Ehrlichman was a member of the Ellsberg Conspiracy, the Cover-Up Conspiracy, and the White House Conspiracy.[178] Mitchell was a member of the Break-In Conspiracy and the Cover-Up Conspiracy. Haldeman, at the least, was a member of the Cover-Up Conspiracy and White House Conspiracy, and possibly the Ellsberg Conspiracy and Break-In Conspiracy. Therefore, the evidence pertaining to the Ellsberg Conspiracy and Break-In Conspiracy could easily be viewed

170 *Richardson*, 532 F.3d at 1279; *Kemp*, 500 F.3d at 291; *Portela*, 167 F.3d at 700.

171 *See*, *e.g.*, *McDermott*, 245 F.3d at 139–40.

172 *Portela*, 167 F.3d at 702.

173 Kotteakos v. United States, 328 U.S. 750, 757 (1946).

174 United States v. Mangual-Santiago, 562 F.3d 411, 423 (1st Cir.), *cert. denied*, 130 S. Ct. 293 (2009).

175 *Richardson*, 532 F.3d at 1287.

176 *Id.*

177 *Id.*

178 *See supra* Part II(A)–(C).

as providing the motive, context, and background for the participation of Ehrlichman, Haldeman, and Mitchell in the Cover-Up Conspiracy charged in the indictment. Mardian, however, was not part of any conspiracy other than the Cover-Up Conspiracy.

Secondly, there was a large disparity in the evidence against Mardian compared to the other three convicted defendants. In over 1600 pages of transcript of the direct and redirect testimony of government witnesses (excluding discussions with the court or between counsel), and 670 pages of White House tapes transcript, Mardian's name appeared on 106 pages, less than five percent of the transcript pages.[179] The evidence against Ehrlichman, Haldeman, and Mitchell was overwhelming and greatly exceeded the evidence against Mardian. This disparity in evidence lends support that Mardian was prejudiced by the evidence of multiple conspiracies.

Most significant to Mardian's prejudice argument is the introduction of the White House tapes into evidence at the Watergate Conspiracy trial. These tapes were admitted under the co-conspirator exception to hearsay.[180] If, however, the taped statements were made as part of a conspiracy different than the one with which Mardian was a member, these taped statements would be inadmissible against Mardian. This would also be viewed as establishing prejudice from the proof of multiple conspiracies.

The White House tapes played for the jury at the Watergate conspiracy trial included five references to Mardian.[181] All five references occurred during conversations on April 14 and 15, 1973, in which Ehrlichman was reporting to Nixon what he had learned about Watergate during his interviews with several persons during the previous ten days.[182] This was the time period of the "White House Conspiracy" during which Nixon, Haldeman, and Ehrlichman were conspiring to place all the blame on Dean and CRP officials such as Mitchell, Magruder, Mardian, and LaRue—everybody except that "tight circle now within the wagons."[183] These tapes of White House conversations were admitted against Mardian based on the prosecution's position that statements among Ehrlichman, Nixon, and Haldeman were in furtherance of the single conspiracy in the indictment of which all four defendants were charged.[184] To the extent that the White House Conspiracy, however, was a different conspiracy than the one alleged in the indictment, statements as part of and in furtherance of the White House Conspiracy would not be part of or in furtherance of the conspiracy of which Mardian was charged.

179 Mardian's Brief, *supra* note 69, at 102.
180 United States v. Haldeman, 559 F.2d 31, 110 (D.C. Cir. 1976).
181 United States v. Mardian, 546 F.2d 973, 978 (D.C. Cir. 1976).
182 Mardian's Brief, *supra* note 69, at 63.
183 *Id*. at 63–64; Transcript at 9823.
184 *Mardian*, 546 F.2d at 978.

The prejudice to Mardian by the statements on the White House tapes is clear. In a conversation on April 14, 1973, Ehrlichman told Nixon and Haldeman that he had a "bit of incidental intelligence" that Mardian had developed an "elaborate cover story which he fed to *The New York Times*, which lay it all back in the White House."[185] In a conversation later that same day, Ehrlichman told Nixon that he had heard that the "U.S. Attorney is hot after" Colson, Mitchell, Mardian, and Magruder.[186] In another April 14, 1973 conversation, Ehrlichman, in discussing Dean's involvement, told Nixon and Haldeman that "Mardian and LaRue would say to Mitchell, 'Mitch, you've got to do something about this,' and Mitchell's stock answer was to turn to John Dean."[187] On April 15, 1973, Ehrlichman told Nixon that "there was a cover story which Mardian and others cooked up."[188] Another White House tape had Nixon telling Ehrlichman that Mardian, LaRue, Kalmbach, and Dean "gotta have a straight damn line that, of course we raised money. Be very honest about it. But, uh, we raised money for a purpose we thought was perfectly proper."[189]

Mardian had never spoken with Nixon, Haldeman, or Ehrlichman about any Watergate-related matter.[190] These taped conversations were made after McCord had sent his letter to Judge Sirica, after Dean and others had begun cooperating with the prosecution, and nine months after Mardian had ceased being involved in any Watergate-related activities. These White House taped conversations therefore could properly be viewed as not during the course of or in furtherance of the Watergate Cover-up Conspiracy alleged in the indictment of which Mardian was charged. Mardian therefore would seem to have been prejudiced by the evidence of multiple conspiracies.

CONCLUSION

On appeal of his Watergate conspiracy conviction, Mardian raised several issues, including arguments dealing with multiple conspiracies and with the White House tapes.[191] The Court of Appeals for the District of Columbia sitting en banc unanimously reversed Mardian's conviction

185 Audio Tape: Transcript of a Recording of a Meeting Among The President, H.R. Haldeman and John Erlichman in the Executive Office Building (Apr. 14, 1973, at 8:55 to 11:31 A.M.) [hereinafter Recording in the Executive Office Building], *available at* http://www.nixonlibrary.gov/forresearches/find/tapes/watergate/trial/exhibit_18.pdf.

186 Audio Tape: Transcript of a Recording of a Meeting Among the President, H.R. Haldeman, and John Erlichman, the EOB (Apr.14, 1973, at 5:15 to 6:45 P.M.) *available at* http://www.nixonlibrary.gov/forresearches/find/tapes/watergate/trial/exhibit_20.pdf.

187 Recording in the Executive Office Building.

188 Audio Tape: Transcript of a Recording of a Meeting Between the President and John Erlichman, (April 15, 1973, at 10:35 to 11:15 A.M.), *available at* http://www.nixonlibrary.gov/forresearches/find/tapes/watergate/trial/exhibit_23.pdf.

189 Audio Tape: Transcript of a Recording of a Telephone Conversation Between the President and John Erlichman, (Apr. 14, 1973, at 11:22 to 11:53 P.M.), *available at* http://nixon.archives.gov/forresearchers/find/tapes/watergate/trial/transcripts.php.

190 United States v. Mardian, 546 F.2d 973, 978 (D.C. Cir. 1976).

191 *Id*. at 977–78.

based on severance.[192] The court's opinion was most influenced by the fact that two weeks after the trial had started, Mardian's lead counsel, David Bress, had become very ill and was forced to leave the trial.[193] A motion for severance was filed, but denied by Judge Sirica.[194] The Court of Appeals held that "Mardian's interest in being represented by counsel of his own choice, combined with the disproportion of the evidence to his potential prejudice, necessitated severance. On this ground, we reverse and remand for a new trial."[195] The Court did not directly address the admissibility of the White House Tapes.[196] It did note,

> Moreover, tape recordings of conversations between conspirators played an undeniably important role in the prosecution's case. Twenty-four of the 30 tapes the prosecution played presented conversations that occurred during March and April of 1973, further underscoring the significance of that time period. Mardian was not a participant in any of the 30 taped conversations. His name was mentioned five times on the tapes played to the jury. He challenged in timely fashion each of the references as inadmissible and moved to have them deleted, supporting his motion with a lengthy memorandum of points and authorities. The court did delete a few references, but the five challenged here remained.[197]

The court continued in a footnote:

> In light of our disposition of the case, we need not determine the admissibility of these references since the question, if it arises on retrial, will appear in a vastly different setting. Even if some references are technically admissible under various exceptions to the hearsay rule, the court is still called upon to exclude evidence "'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" Rule 403, Fed. R. Evid. When Mardian is retried singly, the major focus will be on the period of June and July of 1972. Without the need to introduce evidence against other defendants, the balance between relevance and prejudice of statements made in March and April of 1973 may be substantially altered.[198]

The court's opinion did not address the multiple conspiracy argument.[199] A few months after Mardian's conviction was reversed, a decision was made by special prosecutor Charles Ruff to drop all charges against Mardian.[200]

192 *Id*. at 981.
193 *Id*. at 979.
194 *Id*.
195 *Id*. at 981.
196 *See id*. at 979–80.
197 *Id*. at 978.
198 *Id*. at 978 n.6.
199 *See generally id*.
200 Joyce Jensen, *Mardian Charges Dropped*, N.Y. TIMES, Jan. 23, 1977, at E5.

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

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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 themself [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.").

millions of dollars flowing through his campaign committees.[10] Historians now know that much of this money flowing through those committees came from illegal sources – the result of quid pro quo corruption.[11]

In current policy debates over campaign finance reforms, quid pro quo corruption is treated as if it were as rare as a blue moon or even something mythical, like a mermaid or a unicorn.[12] But, the facts that were revealed by the multiple Watergate investigations demonstrated that exchanging campaign contributions for public acts occurred at an alarming frequency.[13]

Admittedly, catching an elected official selling public acts for campaign cash on the record is exceedingly rare. Direct evidence, such as the federal wiretap in Democrat Rod Blagojevich's case, which revealed an elected Governor (himself) discussing the sale of a public act, is extraordinarily hard to come by.[14] Usually, tape recorders are not running when corruption occurs. But as every 1L knows, in the Nixon White

10 John Aloysius Farrell, *Nixon to Grand Jury: $100,000 Cash Contributions and Rewarding Donors with Ambassadorships*, THE CENTER FOR PUB. INTEGRITY (Nov. 10, 2011, 5:44 PM), http://www.iwatchnews.org/2011/11/10/7382/nixon-grand-jury-100000-cash-contributions-and-rewarding-donors-ambassadorships ("[Nixon's] closest friends and aides discussed, solicited and collected secret $100,000 contributions from leaders of industry like the mysterious billionaire Howard Hughes, and Dwayne Andreas, the head of the giant agribusiness, Archer Daniels Midland.").

11 STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 434–35 (1990).

12 *See* Mitch McConnell, *Corruption is Not an Issue in American Politics*, *in* INSIDE THE CAMPAIGN FINANCE BATTLE COURT TESTIMONY ON THE NEW REFORMS 329 (Anthony Corrado, Thomas E. Mann & Trevor Potter eds., 2003) ("During my eighteen years in the U.S. Senate, I have never witnessed any colleague who changed his vote or took any official action as a result of either a federal contribution or a nonfederal donation to a political party at the national, state, or local levels."); Roger Pilon & John Samples, *Campaign Finance, Corruption, and the Oath of Office*, *in* CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS 99 (Edward Crane & David Boaz eds., 2003), *available at* http://www.cato.org/pubs/handbook/hb108/index.html ("[O]ur legal system has found rather less corruption in politics than the reformers would have us believe exists. Social scientists also report scant evidence of corruption of the legislature . . . . Thus, the basic premise of the campaign finance reform movement—that money corrupts and more money corrupts even more—comes up short on the evidence."); Susan Chamberlain, *House Hearing on the Constitutionality of Campaign Finance Reform*, The Federalist Society, Free Speech & Election Law Practice Group Newsletter – Vol. 3, Issue 1 (Spring 1999), http://www.fed-soc.org/publications/detail/house-hearing-on-the-constitutionality-of-campaign-finance-reform (stating "[t]he House hearing also highlighted an evidentiary hole in the case made by the those advocating further restrictions on political speech. None of the 'reform' panelists could establish that issue advocacy causes *quid pro quo* corruption or even its appearance.").

13 S. REP. NO. 93-981, at XXIV, (1974), *available at* http://www.maryferrell.org/mffweb/archive/viewer/showDoc.do?mode=searchResult&absPageId=1477617. [hereinafter SENATE SELECT REPORT] ("The Watergate affair reflects an alarming indifference displayed by some in high public office or position to concepts of morality and public responsibility and trust. Indeed, the conduct of many Watergate participants seems grounded on the belief that the ends justified the means, that the laws could be flaunted to maintain the present [Nixon] administration in office.").

14 Second Superseding Indictment, U. S. v. Blagojevich, No. 08 CR 888 (N.D. Ill. Feb. 2, 2010), *available at* http://www.justice.gov/usao/iln/hot.html; *see also* Trial Exhibit 281 at 3–4, U.S. v. Blagojevich, No. 08 CR 888 (N.D. Ill. May 10, 2011), *available at* http://www.justice.gov/usao/iln/hot/us_v_blagojevich/2011_05_10/2008-11-05_0281_ceh2_redactions_out.pdf (Blagojevich saying on the wiretap, "I told my nephew Alex, . . . it's just too bad you're not four years older 'cause I could a given you a U.S. Senate seat for your birthday . . . I mean I, I've got this thing and it's fucking [ ] golden. . . . And I, I'm just not giving it up for fucking nothing.").

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]

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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 1977[24] 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 1 (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).

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 Committee[62] 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 BRETHREN: 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

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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 five[83] 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]

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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.

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

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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]

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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 Spater[99] 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

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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 disfavors, 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 $100,000[146] and pleaded guilty of violating the federal election laws[147] 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.pdfhttp://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 Act[166]

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:

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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:

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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 contribution[209] 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.").

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 FEC[219] 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]

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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.hvjlaw.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 now[255] 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]

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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.

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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/indexp.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 . . . .").

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.

Post-Watergate: The Legal Profession and Respect for the Interests of Third Parties

*Laurel A. Rigertas**

INTRODUCTION

As a result of Watergate, disciplinary proceedings were brought against at least twenty-nine lawyers, which resulted in disciplinary action against at least eighteen of them.[1] Their misconduct included aiding and abetting burglary, obstruction of justice, perjury, violation of campaign laws and conspiracy to violate citizens' constitutional rights, among other charges.[2] As a result of lawyers' involvement in Watergate, the American Bar Association (ABA) worked to improve ethical standards for lawyers to rehabilitate the profession's tarnished reputation. The ABA's reform efforts included the enactment of the Model Rules of Professional Conduct ("Model Rules") in 1983 and the adoption of a requirement that all ABA accredited law schools provide legal ethics education.[3] Subsequent events involving lawyers, however, should cause the legal profession to question whether these reforms adequately help lawyers navigate their often competing roles while maintaining the trust and respect of the public that is necessary to sustain our legal system.

There are many lenses through which one can view the events of Watergate.[4] This article, however, suggests that much of the conduct of the

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1 *N.O.B.C. Reports on Results of Watergate-Related Charges against Twenty-Nine Lawyers*, 62 A.B.A. J. 1337 (Oct. 1976).

2 *Infra* Part I.B.

3 *Infra* Part II.D.

4 *See, e.g.*, Arnold Rochvarg, *Enron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 61 (2003) (looking at Watergate as concerning the role of an attorney for an organization when the attorney learns of misconduct by those acting for the organization); Fred D. Thompson, *One Lawyer's Perspective on Watergate*, 27 OKLA. L. REV. 226, 226 (1974) (viewing the events of Watergate as generating precedents that will govern the future relationship of the executive and legislative branches); Richard D. Schwartz, *After Watergate*, 8 LAW & SOC'Y REV. 3, 4 (1973) (seeing the events of Watergate as illustrating "the danger that governmental use of information control can threaten freedom of choice in the political process"); John Blake, *Forgetting a Key Lesson from Watergate?*, CNN.com (Feb. 4, 2012), http://www.cnn.com/2012/02/04/politics/watergate-reform/index.html?iref=allsearch (viewing Watergate as a campaign finance scandal).

lawyers who were disciplined as a result of Watergate violated the interests of third parties, which included both individuals[5] and the broader community.[6] If the lawyers had been trained and sensitized to assess the impact of their conduct on the interests of third parties, perhaps some of them would have paused and considered their choices more carefully. Instead, many of them seemed to have pursued the interests of their client or superior zealously and without any consideration of the impact on third parties.[7] Viewing the conduct of the lawyers through this lens may help inform our understanding of subsequent events where the public has felt betrayed by lawyers' conduct. The conduct of lawyers frequently has serious and foreseeable consequences on third parties that are a byproduct of zealous advocacy. This outcome is frequently proper in our adversarial system, but sometimes it is not. The public's disdain for the legal profession is particularly acute in these circumstances.[8]

Thus, forty years after Watergate, the legal profession should question whether it adequately inculcates in lawyers not only respect for the rule of law but also, specifically, respect for the interests of third parties. This is not to suggest that a lawyer will, or should, frequently allow consideration of a third party's interests to trump the lawyer's duty of loyalty to his or her client. Indeed, the proper execution of a lawyer's duties will often demand the lawyer put his or her client's interests first, even when it harms the interests of others.

That conclusion, however, should not preclude a lawyer, who is an agent of justice in addition to being an advocate, from routinely assessing the consequences of his or her conduct on the interests of third parties. Perhaps through that viewpoint some misconduct could be averted. Furthermore, even when a lawyer concludes that the law properly demands action of him or her that will harm the interests of third parties, this reflection may allow the lawyer to discuss with the client not just what the law allows, but the moral implications of taking a legally permissible course of action; in other words, to advise the client on the right thing to do. These moments of reflection may also allow for important consideration of whether the law as written has struck the right balance between loyalty to one's client and the interests in justice, or whether reform is necessary. Lastly, if the public viewed lawyers as a group that is

5 *See infra* notes 93, 96 and accompanying text.

6 *See, e.g.*, In the Matter of Wild, 361 A.2d 182, 184 (D.C. Cir. 1976) (suspending attorney Claude Wild from the practice of law for one year following his conviction for violating campaign finance laws and quoting the sentencing judge who noted that the crime may be one worse than a crime of violence because it "is corrupting our government").

7 *Infra* Part I.B.

8 *See* John E. Montgomery, *Incorporating Emotional Intelligence Concepts Into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 333 (2008) (lack of civility and overly aggressive tactics may not necessarily be ethical violations but the public frequently views them harshly and with distaste).

constantly mindful of how its conduct affects other people, that perspective may aid in improving the public's opinion of the legal profession.

No single reform can likely instill in lawyers a routine practice of assessing how their actions impact third parties and how to include the interests of third parties in the framework they use to assess difficult ethical situations. Instead, a variety of reforms would probably be required to create such a cultural shift. This article suggests two areas of reform for consideration: the Model Rules and legal education.

The Model Rules and its predecessors, the 1908 Canons of Professional Ethics and the 1969 Model Code of Professional Responsibility, articulate a need for lawyers to comply with the rule of law during their representation of clients, as well as in their personal affairs.[9] Each of these guidelines clearly prohibited the violation of the criminal laws that many of the lawyers involved in Watergate committed.[10] The Model Rules and its predecessors also all contain provisions that expressly or implicitly are concerned with the rights of third parties in some specific situations, such as a lawyer's duty not to make false statements of material fact to third parties.[11] However, neither the Model Rules nor its predecessors contain a broad principle that a lawyer's ethical decision-making framework should be informed, at least in part, by the impact of the lawyer's conduct on the interests of third parties. Such a principle could be included in the Model Rules, probably not as a standard for disciplinary enforcement, but as a general guiding principle such as those set forth in the Preamble.

Next, legal education can help future lawyers develop an analytical framework to consider ethical dilemmas, in part, through the perspective of third parties. Increasingly, legal ethics education has used a problem-based pedagogy to put ethical dilemmas in context and to give students the opportunity to assess problems from different roles, such as lawyer, client, third-party neutral and judge.[12] Such roles could also include third parties impacted by lawyers' conduct, which could broaden the perspective through which ethical problems are viewed and analyzed. Additionally, legal ethics education may benefit from the growing dialogue about developing the emotional intelligence of law students and lawyers. Emotional intelligence includes developing empathy for others and an understanding of their perspective, which could be valuable to legal ethics education.[13]

Legal education can also help train lawyers to do a better job of educating their clients about the role of lawyers and the limits on their role.

9 *Infra* Part II.B–D.
10 *Infra* Part II.B–D.
11 *Infra* Part II.B–D.
12 *Infra* Part IV.B.
13 *Infra* Part IV.B.

The conduct of the actors involved in Watergate has, in many instances, been explained by the context in which the actors were placed—specifically the White House and all of its power and prestige.[14] There is undoubtedly some truth to that explanation, but it would be an overstatement to say that the motivations of the actors were unique to that powerful setting. In today's competitive business world, private attorneys must compete vigorously to retain their clients' business or risk losing income and frequently job security. This can create incredible pressure to satisfy the demands of clients, who are not bound by the professional rules of ethics and frequently are not even interested in hearing about them.[15] Thus, lawyers need to do a better job of communicating with their clients about the limits of their role. No matter which lawyer a client sees, that client should hear a clear and consistent message that the lawyer is not there to win at all costs, but to advocate for the client within the parameters of the facts and the law, while treating third parties with dignity and respect.

Part I of this article gives a brief overview of Watergate and focuses on the specific conduct of some of the lawyers who were disciplined. Part II of this article gives an overview of the history the American Bar Association's efforts to codify ethical rules including the promulgation of the 1983 Model Rules of Professional Conduct. Part III will discuss post-Watergate events involving lawyers that have impaired the public's trust of the profession, which suggest there is still room for improvement. Lastly, Part IV will discuss possible reforms to the Model Rules and legal education that could help instill in lawyers a principle of evaluating the impact of their conduct on third parties as a routine part of legal practice and ethical decision-making.

I. WATERGATE

A. A General Overview

While the events that comprise what is now referred to collectively as "Watergate" are extensive, this article will only briefly outline some of the events to provide context for a more detailed exploration of the actions of some of the individual lawyers involved in Watergate. The epicenter of Watergate occurred on June 17, 1972, when five men were arrested at the Democratic National Committee (DNC) offices located in the Watergate Hotel.[16] This break-in was part of a broader campaign strategy devised by Nixon and his aides aimed at attacking Nixon's Democratic opponent in the

14 *Infra* Part III.

15 *Infra* Part III.

16 Tad Szulc, *Democratic Raid Tied to Realtor*, N.Y. TIMES, June 19, 1972, at 1; SAM J. ERVIN, JR., THE WHOLE TRUTH: THE WATERGATE CONSPIRACY 7 (1980).

1972 campaign.[17] This strategy included bugging the offices of the DNC in order to obtain political intelligence.[18]

The men arrested on June 17, 1992, were James McCord, who was working for the Committee to Re-elect the President (CRP)[19] and four Cubans.[20] Those involved in planning and authorizing the break-in included Gordon Liddy (a lawyer), Jeb Magruder, and John Mitchell, the former U.S. Attorney General who had left that post to work for CRP and take over the management of Nixon's re-election campaign.[21] The break-in occurred just months before Nixon won the 1972 election by a landslide for a second term.[22] The events that collectively comprise "Watergate," however, span the years before and after the break-in.

In many ways, the story of Watergate began in 1971, when The *New York Times* began publishing the Pentagon Papers, a top-secret study regarding the Vietnam War, which Daniel Ellsberg had leaked to the press.[23] Responding to this leak, the White House formed the "Plumbers," a group tasked with plugging information leaks.[24] Members of the "Plumbers" included Egil "Bud" Krogh (a lawyer), G. Gordon Liddy (a lawyer) and Howard Hunt, a former employee of the Central Intelligence Agency.[25]

The "Plumbers" sought to discredit Daniel Ellsberg's character and mental stability, which was the motivation behind a burglary of the offices of Dr. Fielding, Ellsberg's psychiatrist.[26] Members of the "Plumbers," including Krogh authorized the burglary, which was carried out by a team that included Liddy, Hunt and four Cubans.[27] It was these same four Cubans who, along with James McCord, (McCord was working for CRP), subsequently broke into the DNC offices at Watergate.[28] This fact, in large part, appears to have motivated Nixon and the White House's cover-up of the Watergate break-in.[29] While direct ties between CRP's Watergate break-in and the White House were weak, the ties between the White House and the break-in of Dr. Fielding's office were stronger; this made

17 ERVIN, *supra* note 16, at 3–4.

18 *Id*. at 5.

19 Rochvarg, *supra* note 4, at 61–62.

20 ERVIN, *supra* note 16, at 7–8.

21 *Id*. at 4, 40.

22 *Id*. at 10 ("President Nixon was returned to the White House over his Democratic opponent, Senator George S. McGovern, by a landslide victory in which he received 520 of the nation's 538 electoral votes and 60.8 percent of its popular votes.").

23 *Id*. at 120.

24 *Id*.

25 *Id*. at 105–06, 120.

26 *Id*. at 106.

27 JOHN W. DEAN, BLIND AMBITION: THE END OF THE STORY 506–10 (2009); *see N.O.B.C. Reports*, *supra* note 1, at 1337 (listing lawyers who were involved in Watergate-related activities).

28 DEAN, *supra* note 27, at 101–02; ERVIN, *supra* note 16, at 10.

29 *See infra* note 31.

the President vulnerable to being implicated in wrongdoing.[30] Because four of the men involved in the break-in of Dr. Fielding's office were taken into custody and faced criminal charges for the Watergate break-in, the President's administration apparently perceived a threat that those men would disclose information about the break-in of Dr. Fielding's office and the role of the White House, as part of a plea bargain.[31] And thus, the Watergate cover-up began.

Concerns about additional leaks also caused Nixon to want to obtain Morton Halperin's papers from the Brookings Institute because there were reports that those papers would extend the Pentagon Papers into the time frame of Nixon's administration.[32] Breaking in and stealing the papers was not feasible because they were believed to be in a very secure vault inside the building.[33] Nixon's Special Counsel, Chuck Colson (a lawyer),[34] proposed a plan to firebomb the Brookings Institute to create chaos and provide an opportunity to gain access to the facility.[35] This plan was abandoned after White House Counsel John Dean raised an objection to it.[36] While Dean's intervention stopped this plan, instead of viewing Dean's objections as wise counsel, some of the President's inner circle viewed him as having some "little old lady" in him.[37] In other words, those in power seemed to send a message that the people ready and willing to do the President's bidding should not feel constrained by the law.

The combination of the Ellsberg and Watergate break-ins set the stage for the events after the Watergate break-in, when the White House and many individuals associated with it engaged in cover-up activities[38] that would result in a multitude of criminal charges.[39] These events, and others, arose in an environment in which the White House and the presidency were

30 Nixon never admitted to knowing about the Ellsberg break-in prior to March 1973—eighteen months after the break-in occurred. FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON 210 (1994). However his close aides were apparently never sure of this, and were concerned that he could be implicated. *See* DEAN, *supra* note 27, at 240–41, 314–16.

31 DEAN, *supra* note 27, at 101–06.

32 *Id*. at 43. "Although the Pentagon Papers did not deal directly with the Nixon administration, the president believed that publishing the papers would undermine his efforts to control Vietnam policy." MICHAEL A. GENOVESE, THE WATERGATE CRISIS 15 (1999).

33 DEAN, *supra* note 27, at 43.

34 *See infra* notes 66, 67 and accompanying text.

35 DEAN, *supra* note 27, at 43.

36 *Id*. at 43–46.

37 *Id*. at 46.

38 *Id*. at 532–36. John Dean wrote:

> Bud Krogh's explanation as to why the cover-up occurred—that the Ellsberg-related burglary was at the core of the cover-up—is correct, at least as far as the White House was concerned. This fact was well understood by all who were involved in the cover-up, although it has been left to only Bud and myself to acknowledge it, since Haldeman, Ehrlichman, and Mitchell went to their graves either pretending they did not understand why the cover-up occurred or denied that anything untoward had, in fact, happened.

Id. at 529.

39 Lyman M. Tondel, Jr., *Watergate: The Public Lawyer and The Bar as seen from the Perspective of the ABA Ethics Committee*, 30 BUS. LAW. 295, 296 (1975).

in many instances viewed as infallible and above the law.[40] There seems to have been a general attitude that began with Nixon that the ends sought by the White House justified any means. For example, with respect to the documents Nixon wanted from the Brookings Institute, tapes of Nixon reveal demands from him such as, "Goddamnit, get in [the Brookings Institute] and get those files. Blow the safe and get it," and "You're to break into the place, rifle the files, and bring them in."[41] In 1975 Dean Weckstein wrote about this attitude among the Watergate actors:

> There is a difference in application, but not in underlying principle, between those who would state that it is a lawyer's duty to use any means (legal or illegal; honest or dishonest) to get his client off or otherwise achieve a victory and those who would break into a psychiatrist's office or engage in illegal wiretapping in the name of national security or to get their candidate elected and save the world from George McGovern.[42]

B. Lawyers' Crimes and Discipline

The criminal offenses of some of the lawyers involved in Watergate included "ordering, acquiescing in, participating in, or helping to cover up burglaries and thefts; illegal wiretapping; obstruction of justice; perjury; violations of campaign contribution laws; [and] giving and accepting bribes."[43] Most of these lawyers were not acting in their capacity as a lawyer when they engaged in misconduct.[44] This did not, however, prevent them from being subject to discipline by the states and courts in which they were admitted to practice.[45] Nor did that fact prevent damage to the reputation of lawyers and their role in the administration of justice.[46]

John Dean, former White House Counsel, famously testified before the Senate Watergate Committee in 1973 about a list he had made of all the people that he thought had violated the law.[47] He had put an asterisk next to ten of the names on the list, each of whom was a lawyer.[48] Senator Talmadge questioned Dean about the significance of the marks and Dean responded, "[T]hat was just a reaction to myself, the fact that how in God's name could so many lawyers get involved in something like this?"[49] Dean's list turned out to be modest.

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40 *See infra* note 166 and accompanying text.

41 DEAN, *supra* note 27, at 32–33; STANLEY I. KUTLER, ABUSE OF POWER: THE NEW NIXON TAPES 3, 6 (1997).

42 Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 270 (1975). He also wrote, "We must encourage our law students to accept the priority of process over results and means over ends . . . ." *Id*.

43 Tondel, *supra* note 39, at 296.

44 *See* Stuart E. Hertzberg, *Watergate: Has the Image of the Lawyer Been Diminished?*, 79 COMM. L.J. 73, 74 (1974).

45 *See* Clark, *infra* note 50.

46 *See*, *e.g*., Weckstein, *supra* note 42, at 271; Hertzberg, *supra* note 44, at 74.

47 John W. Dean, III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 611 (2000).

48 *Id*.

49 *Id*.

The National Organization of Bar Counsel created a Special Committee on the Co-ordination of Watergate Discipline in 1973.[50] The committee issued its final report in 1976 and reported that disciplinary proceedings had been initiated against twenty-nine lawyers in connection with Watergate-related matters.[51] The report disclosed that seven of the lawyers involved had been disbarred (President Nixon among them), public disciplinary action had been taken against another eleven other lawyers, and as of 1976 no public disciplinary action had been reported against the remaining eleven lawyers.[52]

While many of the actions of the disciplined lawyers involved violations of the law that were more injurious to society as a whole, many of the violations of the law also directly infringed on the rights and interests of individuals. For example, in the opinion that disbarred Nixon from the New York Bar, the Court's description of Nixon's misconduct included conduct that directly violated the rights of Dr. Fielding, who had his office broken into, and Daniel Ellsberg, whose personal legal defense was obstructed:

> Mr. Nixon improperly . . . attempted to obstruct an investigation by the United States Department of Justice of an unlawful entry into the offices of Dr. Lewis Fielding, a psychiatrist who had treated Daniel Ellsberg; improperly concealed and encouraged others to conceal evidence relating to unlawful activities of members of his staff and of the Committee to Re-elect the President; and improperly engaged in conduct which he knew or should have known would interfere with the legal defense of Daniel Ellsberg.[53]

Egil "Bud" Krogh, the Deputy Assistant for Domestic Affairs to the President of the United States and later Undersecretary of Transportation, was also disbarred.[54] Krogh recalled a meeting where President Nixon's Chief of Staff, Bob Haldeman, and Chief Domestic Advisor, John Ehrlichman, told Krogh, "[Y]ou have one client. And that client is Richard Nixon."[55] Krogh has since reflected, "The choice of words was deliberate. Our client was a person, not the President or the presidency. And we were to serve his wishes as zealously as we could."[56]

As a member of the White House "Plumbers," Krogh was instructed that the President wanted him to investigate the leak of the Pentagon Papers with the "utmost zeal," and to utilize whatever means the government had at its disposal to stop leaks of information that the President considered a matter of national security.[57] This led to Krogh's involvement in adopting

50 *N.O.B.C. Reports*, *supra* note 1, at 1337; *see also* Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 678–79 (2000).

51 *N.O.B.C. Report*s, *supra* note 1, at 1337.

52 *Id*.; *see also* Clark, *supra* note 50, at 678–79.

53 In re Nixon, 53 A.D.2d 178, 179–80 (N.Y. App. 1976).

54 In re Krogh, 536 P.2d 578, 589–90 (Wash. 1975).

55 Lynne Reaves, *Ethics in Action: Two Recall Watergate Lessons*, 70 A.B.A. J. 35, 35 (1984).

56 *Id*.

57 *In re Krogh*, 536 P.2d at 579–80.

a plan whereby Howard Hunt, another member of the "Plumbers," would break into the office of Dr. Fielding, Daniel Ellsberg's psychiatrist, in an effort to steal records that could depict Ellsberg as someone who was unreliable and untrustworthy.[58]

The Supreme Court of Washington's opinion that disbarred Krogh focused on his guilty plea to a violation of 18 U.S.C. § 241 (conspiracy against the rights of citizens), which was a felony.[59] The charges against Krogh included specific violations of Dr. Fielding's rights:

> [T]hat while the respondent was an officer and employee of the United States Government, [he] . . . unlawfully, willfully and knowingly did combine, conspire, confederate and agree with his co-conspirators to injure, oppress, threaten and intimidate Dr. Lewis J. Fielding, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, and to conceal such activities. It further charged that the co-conspirators did, without legal process, probable cause, search warrant or other lawful authority, enter the offices of Dr. Fielding in Los Angeles County, California, with the intent to search for, examine and photograph documents and records containing confidential information concerning Daniel Ellsberg, and thereby injure, oppress, threaten and intimidate Dr. Fielding in the free exercise and enjoyment of the right and privilege secured to him by the Fourth Amendment to the Constitution of the United States, to be secure in his person, house, papers and effects against unreasonable searches and seizures . . . . To all of these allegations, the respondent had pleaded guilty.[60]

As otherwise stated by the court, Krogh not only flagrantly disregarded the laws of the United States, but also the fundamental rights of citizens.[61]

The court's opinion indicated that perhaps the environment in which Krogh was functioning helped lead him astray:

> [Krogh] indicated that he had been blinded, perhaps, by the power of the Presidency or what he conceived to be its power. A number of men who submitted letters attesting to his good character expressed the concern that they in the same circumstances might have behaved in much the same manner.[62]

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58 *Id*. at 580.

59 *Id*. at 578.

60 *Id*. at 579. The opinion states that Krogh became distressed when he learned that the burglars had left evidence of their break-in "not, it appears, because of concern of Dr. Fielding's property but rather because of the fear that an investigation of the burglary might lead to a discovery of the identity of the perpetrators." *Id*. at 580.

61 *Id*. at 584.

62 *Id*. at 583; *see also* D.C. Bar v. Kleindienst, 345 A.2d 146, 149 (D.C. Cir. 1975) (order suspending former Attorney General of the United States Richard Kleindienst from the practice of law for thirty days and stating "that respondent is a man of high professional stature, with correspondingly high obligations, who was caught up in a 'highly charged political atmosphere . . . when pressed by political opponents'."); In the Matter of Wild, 361 A.2d 182, 185 (D.C. Cir. 1976) (order suspending attorney Claude Wild from the practice of law for one year acknowledged that Wild had been pressured by the Nixon administration to make illegal campaign contributions on behalf of his employer, Gulf Oil, and that he feared reprisals to his employer if he did not make the donation). Sam Dash, the chief counsel to the Senate Watergate Committee also wrote about the tension between a lawyer's obligation

Krogh seems to have given little thought to the impact of his conduct on others at the time of his actions; he was focused on his and his superior's interests.[63]

Krogh's reasoning for pleading guilty to the criminal charges suggests a later-developed appreciation of his violations of the rights of third parties. Krogh explained:

> I had a chance to sit back and sort of look at where I was. I was under indictment in both California and Washington and yet I was a person that was at large, free to travel, free to associate with whomever I wished. I could say what I wanted to and if I said it to certain individuals it would get reported. I could attend any church of my choice. There were a number of things I was enjoying as a defendant, potential defendant in a criminal trial and yet here I was defending conduct when I was a government servant which had stripped another individual of his Fourth Amendment rights to be secure from an illegal search, and I suppose it was that I felt that if I had continued to defend that, I would in a sense be attacking the very rights which I was enjoying at that time as a potential defendant.[64]

Charles Colson, White House Aide and Special Counsel to President Nixon, was also disbarred following his conviction for obstruction of justice.[65] The charges to which Colson pled guilty included impeding and obstructing justice in connection with the criminal trial of Daniel Ellsberg by "devising and implementing a scheme to defame and destroy the public image and credibility of Daniel Ellsberg and those engaged in the legal defense of Daniel Ellsberg, with the intent to influence, obstruct and impede the conduct and outcome of the criminal prosecution . . . ."[66] These activities were done at the behest of President Nixon who was angered by the release of the Pentagon Papers and had instructed Colson to stop the leaks of sensitive information "no matter what the cost," including disseminating material to the news media that would "expose" Ellsberg and his motives.[67] There is, of course, a societal interest in the integrity of criminal proceedings; but in addition, Daniel Ellsberg and his counsel also had an individual interest that was infringed by this conduct—namely the

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to do the right thing and a client's expectations of a lawyer. With respect to teaching legal ethics he wrote:

> It's nice to talk about these things theoretically in law school. But in the real world the choice a lawyer sometimes has to make is to stand up to a client who wants to do something wrong and say no. And by standing up to him you may lose your job.

Reaves, *supra* note 55, at 35.

63 The opinion disbarring Krogh states that he became distressed when he learned that the burglars had left evidence of their break-in "not, it appears, because of concern of Dr. Fielding's property but rather because of the fear that an investigation of the burglary might lead to a discovery of the identity of the perpetrators." *In re Krogh*, 536 P.2d at 580.

64 *Id*. at 581.

65 In re Colson, 412 A.2d 1160, 1161–62 (D.C. Cir. 1979).

66 *Id*. at 1162–63. Some of the specific acts included releasing defamatory allegations about one of Ellsberg's attorneys and attempting to obtain and release derogatory information about Daniel Ellsberg, including his psychiatric files. *Id*. at 1163.

67 *Id*.

right to be free from lawyers falsely attacking their public image and reputation through illicit means.

Another actor in Watergate, attorney Donald Segretti, was hired by two members of Nixon's staff, Dwight Chapin and Gordon Strachan, to pull pranks on Democratic presidential aspirants in order to cause internal divisions and prevent the party from uniting around one candidate.[68] In short, "[Segretti] repeatedly committed acts of deceit designed to subvert the free electoral process."[69] As a result of these activities, Donald Segretti was convicted of violating campaign laws.[70] He was subsequently suspended from the practice of law for two years as a result of those convictions.[71]

Segretti's "pranks" certainly subverted society's interest in an honest election process, but his activities also invaded the interests of specific individuals. For example, Segretti wrote and distributed a letter on the Citizens for Muskie Committee letterhead, without its consent, which falsely accused Senators Humphrey and Jackson (both candidates for the Democratic nomination for President) of sexual improprieties.[72] Both Senators Humphrey and Jackson had the individual right not to have a lawyer knowingly publicize false accusations about them. Segretti also wrote another letter on Senator Humphrey's stationery, without his consent, falsely alleging that Representative Shirley Chisholm, also a Democratic candidate, had been committed to a mental institution and was still under psychiatric care.[73] Senator Humphrey had the right not to have his identity misappropriated, and Representative Chisholm had the right not to have false accusations knowingly made about her mental capacities. Perhaps Segretti recognized this when he testified before the Senate Watergate Committee, "To the extent the activities have harmed other persons and the political process, I have the deepest regret."[74]

The California Supreme Court not only suspended Segretti from the practice of law, it also ordered that he (and all future suspended members of the bar) pass the then newly instituted Professional Responsibility Examination as a condition of reinstatement.[75] The court wrote, "In short,

68 In re Segretti, 544 P.2d 929, 930 (Cal. 1976).

69 *Id*. at 934.

70 *Id*. at 930. Specifically, Segretti was convicted of violating federal law prohibiting the publication or distribution of statements relating to presidential candidates without disclosing the names of the persons or organizations responsible for the publication or distribution, as well as conspiracy to commit such acts. *Id*.

71 *Id*. at 936.

72 *Id*. at 931.

73 *Id*.

74 *Id*. at 934 n.5. Other disciplinary actions included the disbarment of John Mitchell, former Attorney General of the United States, after his conviction for conspiracy, perjury and obstruction of justice, In re Mitchell, 351 N.E.2d 743, 744–45 (N.Y. 1976), and the disbarment of Gordon Liddy following his conviction for several crimes, including burglary in the second degree. In re Liddy, 343 N.Y.S.2d 710, 711 (N.Y. App. Div. 1973).

75 *In re Segretti*, 544 P.2d at 936–37.

although we cannot insure that any attorney will in fact behave ethically, we can at least be certain that he is fully aware of what his ethical duties are."[76]

In the early to mid-1970s, as the events of Watergate were still unfolding, some members of the legal profession made comments that expressed concern about the Watergate participants' disregard for the rights and dignity of third parties. For example, in 1973 ABA President Robert Meserve spoke to the ABA about Watergate and quoted the late John Lord O'Brian who wrote, "The whole American way of life, to say nothing of the confidence of the citizens in the government, is based, as we all know, upon a belief in the dignity of the individual accompanied by a pervasive sense of intelligent toleration and respect for the rights of the others."[77]

Meserve observed that perhaps "the belief in individual dignity and the deliberate promotion of mutual respect and tolerance" had suffered the most damage from Watergate.[78]

Attorney Elliot L. Richardson, who gave an address at the ABA's 1974 annual convention, had some similar reflections on the cause of Watergate and the continued presence of the cause:

> The problem is that the forces underlying Watergate morality persist. And very important among these forces, although not sufficiently appreciated as such, is the *decline of a sense of community* . . . . Those who lack a sense of community become prone to a rootless kind of amorality that makes them easily influenced by the institutional value systems to which they happen for the time being to belong.[79]

Richardson went on to state that such rootlessness may lead to the "sustained pursuit of self-interest," and that such "[e]xcessive absorption in self-interest leads, in turn, to individualism unconstrained by respect for other individuals."[80] Richardson further stated, "Indeed, where there is true respect for other people—the awareness that each is a unique, sacrosanct individual equal in dignity to every other human being—there is awareness of obligation which is higher and more sensitive than any requirement of the law."[81]

Richardson's address is somewhat reminiscent of Justice Brandeis' comments in a 1933 speech where he opined that the reason that lawyers do not hold a high position with the people is not because of a lack of opportunity, but because "[i]nstead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of

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76 *Id*. at 936.

77 Robert W. Meserve, *The Legal Profession and Watergate*, 59 A.B.A. J. 985, 986 (1973).

78 *Id*.

79 Elliot L. Richardson, *The Watergate Morality*, 24 BUFF. L. REV. 267, 269 (1974–75) (emphasis added).

80 *Id*.

81 *Id*. at 271.

either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people."[82]

II. POST-WATERGATE LEGAL REFORMS

At the time of Watergate, the ABA's 1969 Model Code of Professional Responsibility ("Code") was the national model of ethical rules that influenced the codes of conduct adopted by the various states. The ABA revisited the Code in 1977, when it formed the Commission on the Evaluation of Professional standards, known as the Kutak Commission, to recommend changes to the Code.[83] The result was the ABA's adoption of the 1983 Rules of Professional Conduct ("Rules"), which remains the predominant guide for the states today. However, in order to examine the evolution of ethical rules and their perception of the role of the lawyer in society, it will be helpful to start our review of ethical guidelines in the mid-1800s. The perception of the lawyer's role has slightly shifted over time from one who is a member of the community, charged with maintaining independence and keeping an eye on justice, to one who is more of a partisan advocate who has less independence from the directives of his or her client.[84] This shift may underlie part of the cause of Watergate, and it still persists today.

A. Ethics before the ABA's Involvement

Before the ABA drafted the Canons of Professional Ethics in 1908, there were several early statements of ethics that influenced the development of the ABA's 1908 Canons. First, David Hoffman's 1846 book A Course of Legal Study contains one of the earliest American statements of lawyers' ethics in a section titled "Fifty Resolutions in regard to Professional Development" ("Resolutions").[85] The Resolutions contemplated the lawyer's role as a moral agent of justice as being paramount to the lawyer's role as a zealous advocate under the law. Otherwise stated, Hoffman believed that moral law, which he understood to have a religious foundation, took priority over positive law.[86] For example, the Resolutions provided the following with respect to the representation of a defendant who the lawyer knows has committed a crime:

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82 LOUIS D. BRANDEIS, BUSINESS—A PROFESSION 337 (1933).

83 ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES v (1987) [hereinafter ABA, THE MODEL RULES AND THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES].

84 Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 220–22 (2002).

85 DAVID HOFFMAN, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 752–75 (1846). Hoffman drafted this book to be the curriculum at his planned law school at the University of Maryland. James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2422 (2003).

86 Altman, *supra* note 85, at 2423. Hoffman's resolutions included: "What is morally wrong, cannot be professionally right . . . ." HOFFMAN, *supra* note 85, at 765.

> Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honourable profession; and, indeed, to no intervention beyond securing them a fair and dispassionate investigation of the *facts* of their cause, and the due application of the law: all that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive, which sets a higher value on professional display and success, than on truth and justice, and the substantial interests of the community.[87]

Other Resolutions regarding civil matters contained similar principles. For example, the Resolutions admonished a lawyer never to plead the statute of limitations if that was the only defense available and the client was conscious of owing a debt.[88] Similarly, the Resolutions stated that lawyers "will never plead, or otherwise avail of the bar of *Infancy*, against an honest demand" if the client has the ability to pay and has no other defense.[89] They also stated that even if the law provided for such a defense, the lawyer should independently judge whether its use was proper under the circumstances.[90] One writer described Hoffman's moral philosophy as follows, "He maintains that attorneys must independently consult their consciences when conducting their cases and should not press claims that would make bad law. Hoffman's moral system, then, is explicitly premised on the assumption that men's consciences will accurately reflect shared community norms."[91]

The next influential statement of lawyers' ethical duties was George Sharswood's "An Essay on Professional Ethics," which was published in 1884 and then reprinted in 1907.[92] Sharswood also emphasized the importance of a lawyer's conscience in the course of his professional work, but his approach has been described as more nuanced than Hoffman's.[93] With respect to defendants, Sharswood believed that the value of lawyers in the adversary system provided sufficient justification for a lawyer to represent a client who the lawyer believed had committed a wrong.[94] However, his view was more akin to Hoffman's when it came to representing a plaintiff in a civil case. In that situation, Sharswood wrote

87 HOFFMAN, *supra* note 85, at 756.

88 *Id*. at 754.

89 *Id*. at 754–55.

90 *Id*.

91 Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 494 (1998) (footnotes omitted).

92 GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1993).

93 Altman, *supra* note 85, at 2427–29.

> Because Sharswood emphasizes, much more than Hoffman, the importance of the adversary process to the administration of justice and acknowledges, to a much greater extent, that the lawyer's professional role is shaped by that process, Sharswood's view of the lawyer's duty 'when the legal demands or interests of his client conflict with his own sense of what is just and right' is much more nuanced than Hoffman's.

Id. at 2427.

94 *Id*. at 2428–29.

that a lawyer has "an undoubted right, and [is] in duty bound, to refuse to be concerned for a plaintiff in the pursuit of a demand, which offends his sense of what is just and right."[95] Sharswood also wrote that, other than the ministry, there was no profession other than the law where a "high-toned morality" was imperative; indeed "[h]igh moral principle is [the lawyer's] only safe guide; the only torch to light his way amidst darkness and obstruction."[96]

Lastly, the first code of ethics formally adopted in the country was the Alabama State Bar Association's Code ("Alabama Code"), adopted in 1887.[97] The Alabama Code also contemplated that a lawyer's role as an advocate would be subordinate to his own moral views and to his obligations to third parties:

> [A]ccording to the Alabama Code, the lawyer's duty of zealous representation is subject to the lawyer's greater obligations to (i) the legal system, i.e. 'obedience to law'; (ii) *third parties; i.e. 'the obligation to his neighbor';* and (iii) his own moral view of right and wrong or, in other words, what was just and unjust in the eyes of his God; i.e. 'accountability to the Creator.'[98]

The Alabama Code heavily influenced the ABA's Canons of Professional Ethics, with some provisions of the Canons being derived primarily from the language in the Alabama Code.[99]

B. The Evolution of the ABA's Model Rules of Professional Conduct

Since its formation, the American Bar Association has adopted three major iterations of ethical guidelines for lawyers in the United States—the 1908 Canons of Professional Ethics, the 1969 Model Code of Professional Responsibility, and the 1983 Model Rules of Professional Conduct. Each document gives some consideration of the role of morality in lawyering, although the emphasis on the lawyer's role as a moral actor arguably decreases with each version. Each document has also contained language regarding the need for lawyers to operate within the bounds of the law in order to uphold the public's respect for the law and the legal profession, which are important rationales. None of these documents, however, explicitly state that upholding the rule of law frequently serves another broad purpose—it prevents a lawyer from becoming an instrument in the violation of the rights of third parties.

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95 *Id*.

96 SHARSWOOD, *supra* note 92, at 55. Sharswood also wrote, "The client has no right to require [the lawyer] to be illiberal—and he should throw up his brief sooner than do what revolts against his own sense of what is demanded by honor and propriety." *Id*. at 74–75. Sharswood also acknowledges that there are not necessarily easy answers when the legal demands and interests of the client conflict with the lawyer's own sense of what is just and right. *Id*. at 81.

97 Altman, *supra* note 85, at 2437.

98 *Id*. at 2448 (emphasis added).

99 *Id*. at 2453.

While all of the documents contain some sections that give parameters about lawyers' treatment of third parties in certain circumstances, none of them specifically set out third parties as an important beneficiary of adherence to the rule of law or as a specific consideration that should inform a lawyer's ethical decision-making regarding his or her actions. This is not to suggest that a lawyer's loyalty to his or her client is not going to trump consideration of a third party's rights at times; indeed, sometimes the proper role of a lawyer will demand that outcome. That reality, however, should not preclude a lawyer from thinking through the implications of his or her conduct regarding the rights of third parties and, perhaps through that lens, some misconduct could be averted. Furthermore, even when a lawyer concludes that the law properly demands action of him or her that will harm the interests of third parties, this reflection may allow the lawyer to discuss with the client not just what the law allows, but the moral implications of taking a legally permissible course of action. At other times, the lawyer may conclude that the law demands action of him or her that will harm the rights of the third parties, but these moments may allow for important reflection on whether the law as written has struck the right balance between advocacy and interests in justice.[100] Working to reform and improve the law is also within the proper role of all lawyers.[101]

C. The ABA Canons of Professional Ethics

In 1908 the ABA promulgated the Canons of Professional Ethics ("Canons").[102] The Canons are believed to be, at least in part, a response to President Theodore Roosevelt's criticism of the legal profession, particularly corporate lawyers.[103] In 1905 President Roosevelt gave a speech at Harvard where he made the following statements about the legal profession:

> Every man of great wealth who runs his business with cynical contempt for those prohibitions of the law which by hired cunning he can escape or evade is a menace to our community; and the community is not to be excused if it does not develop a spirit which actively frowns on and discountenances him. The great profession of the law should be that profession whose members ought to take the lead in the creation of just such a spirit. We all know that, as things actually are, many of the most influential and most highly remunerated members of the bar in every centre of wealth make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade

100 *See infra* Part IV.A.

101 MODEL RULES OF PROF'L CONDUCT Preamble 6 (2009) ("As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.").

102 CANONS OF PROF'L ETHICS (1908).

103 Altman, *supra* note 85, at 2403.

> the laws which are made to regulate in the interest of the public the use of great wealth.[104]

Hoffman's Resolutions, Sharswood's essay on ethics, and the Alabama State Bar Association's 1887 Code all had some influence on the drafters of the Canons.[105] There is also support for the view that, by the late 1800s, lawyers were viewing their responsibilities to their clients as their primary, and perhaps exclusive, moral obligation and the Canons were drafted to try to counter that trend.[106] While heavily influenced by the Alabama Code, one writer has argued that the Canons "express a more robust vision of conscientious lawyering that enlarges the authority of, and gives greater support to, the lawyer's moral autonomy in the relationship."[107] The Canons "prescribed a vision of conscientious lawyering" where "a special obligation for achieving moral and legal justice" limited zealous advocacy.[108]

The Preamble to the Canons underscored the need for the public's faith in the legal profession: "The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so 85 maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men."[109] Believing that no set of rules could be codified to govern the behavior of lawyers, the Canons adopted broad ethical principles to provide general guidelines.[110]

The Canons contained principles that cautioned lawyers to limit their zealous advocacy by adherence to the rule of law. For example, the Canons expressly stated that the rule of law constrained a lawyer's obligation to zealously advocate for his client and recognized the damage to the profession's reputation when the public viewed lawyers as not being bound by the law:

> Nothing operates more certainly to create or foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause . . . . *The office of attorney does not permit,*

104 President Theodore Roosevelt, Speech at Harvard University (June 28, 1905), *available at* http://www.theodore-roosevelt.com/images/research/txtspeeches/143.txt. One scholar has suggested that the ABA's formation of the 1908 Code of Professional Ethics stemmed from this speech. Altman, *supra* note 85, at 2409.

105 Altman, *supra* note 85, at 2400; *see also* David O. Burbank & Robert S. Duboff, *Were the Watergate Lawyers an Exception?*, 3 B. LEADER 17, 17 (1978).

106 Altman, *supra* note 85, at 2447.

107 *Id*. at 2441.

108 *Id*. at 2401.

109 CANONS OF PROF'L ETHICS Preamble (1908), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf.

110 *Id*.

> *much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client*.[111]

Canons 32 further advised that the lawyer

> advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance *with the strictest principles of moral law*. He must also observe and advise his client to observe the statute law . . . .[112]

This drafting appears to place primary consideration on moral law and secondary consideration on positive law. It may also have been the drafter's most direct response to President Roosevelt's concerns.[113] Many of the drafters shared his concerns about the increased commercialization of the legal profession "as a general threat to the moral autonomy of the lawyer in the attorney-client relationship."[114]

The Canons did recognize that in performing his duties, the lawyer's treatment of third parties had some specific limits. For example, the Canons made clear that clients, not lawyers, are the litigants and that clients' animosity towards each other should not influence a lawyer's treatment of opposing counsel or parties.[115] Canon 18 stated,

> A lawyer should always treat adverse witnesses and suitors with fairness and due consideration . . . . The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities.[116]

Similarly, Canon 30 admonished a lawyer to "decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong."[117]

The Canons also acknowledged one particular circumstance where the rights of third parties would trump a lawyer's fidelity to his or her client. Canon 37 provided that "The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened," although he is not

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111 CANONS OF PROF'L ETHICS Canon 15 (1908) (emphasis added). In this same spirit, the Canons also stated that no client was entitled to receive "any service or advice involving disloyalty to the law . . . ." CANONS OF PROF'L ETHICS Canon 32 (1908).

112 CANONS OF PROF'L ETHICS Canon 32 (1908) (emphasis added).

113 Altman, *supra* note 85, at 2461.

114 *Id*. at 2475. Altman's article concludes, "[T]o lawyers in the twenty-first century, for whom norms of lawyer conduct have become 'legalized,' [the Canons] may seem overly ambitious. But to members of the Canons Committee, a normative statement regarding lawyer conduct implied something imbued with morality and, in at least some members' minds, religion as well." *Id*. at 2499.

115 CANONS OF PROF'L ETHICS Canon 17 (1908) ("Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the cause. All personalities between lawyers should be scrupulously avoided.").

116 CANONS OF PROF'L ETHICS Canon 18 (1908).

117 CANONS OF PROF'L ETHICS Canon 30 (1908).

compelled to do so.[118] Implicit in this Canon is an acknowledgment that there are times when the rights of a third party may trump a lawyer's duty to his or her client.

While the Canons articulated specific limits on advocacy that take into consideration the rights of third parties, the Canons did not explicitly set out the rights of third parties as an important corollary to respect for the rule of law or as an important broad framework through which a lawyer should consider the consequences of his or her actions when acting on behalf of a client. In fact, the drafters of the Canons rejected a proposal to include language similar to that found in the Alabama Code regarding "limitations upon a lawyer's zealous representation of his client in terms of 'man's accountability to his Creator, . . . the duty of obedience to law *and the obligation to his neighbor*."[119]

C. The ABA Model Code of Professional Responsibility

In 1969 the ABA adopted the Model Code of Professional Responsibility ("Code"), which supplanted the Canons.[120] The structure of the Code differed from the Canons. Whereas the Canons consisted of only ethical guidelines, the Code articulated nine general Canons each of which was followed by ethical considerations and specific disciplinary rules.[121] The Code explained that the Canons were statements of axiomatic norms, the Ethical Considerations were aspirational in character, and the Disciplinary Rules were mandatory in nature and were to form the standards for disciplinary action as enforced by the various states.[122] Like the Canons, the Code contained principles regarding the rule of law's limits on a lawyer's zealous advocacy, as well as some specific principles regarding lawyers' respect for the rights of third parties.

The Preamble to the Code starts with some recognition of the relationship between the rule of law and the rights of individuals, although it does not specifically put these ideas in the context of a lawyer's conduct:

> The continued existence of a free and democratic society depends upon recognition of *the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual* and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only

118 CANONS OF PROF'L ETHICS Canon 37 (1908).

119 Altman, *supra* note 85, at 2453 (alteration in original) (emphasis added).

120 MODEL CODE OF PROF'L RESPONSIBILITY Preface (1980). The Code was amended in 1970 and every year between 1974–1980. A copy of the Code with its amendments is *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf.

121 MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1980). The Preface to the Code described some of the deficiencies with the Canons as follows, "The previous Canons were not an effective teaching instrument and failed to give guidance to young lawyers beyond the language of the Canons themselves . . . . They were not cast in language designed for disciplinary enforcement and many abounded with quaint expressions of the past." *Id*. at Preface.

122 MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1980); *see also* Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251 (1991).

> through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.[123]

The need for lawyers to respect the rule of law is also found throughout the Code. For example, Ethical Consideration 1-5 states, "Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude."[124] Respect for the rule of law is also the central theme in Canon 7 of the Code, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."[125] Similarly, Ethical Consideration 7-19 states, "The duty of a lawyer to his client and his duty to the legal system are the same; to represent his client zealously within the bounds of the law."[126]

The Code also permits a lawyer, as did the Canons, to inform a client about the moral consequences of a course of action, although this consideration is not expressed with the same primacy as it was in the Canons.[127] Instead, the Code provides:

> Advice of a lawyer to his client need not be confined to purely legal considerations . . . . In assisting his client to reach a proper decision, *it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible*. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.[128]

Although, as one writer concluded, "In the last analysis, the Code is not a guide to moral action. The Code, with its emphasis on the rules, presents as the ultimate question to be answered, 'How do I stay out of trouble?' rather than 'How do I make the moral choice?'"[129]

Like the Canons, the Code does not contain any broad statement that advocacy should be constrained by the interests of third parties, but it did include specific provisions that related to a lawyer's obligation to respect the rights of third parties in some instances. For example, Ethical Consideration 2-30 warns lawyers not to accept employment when "the

123 MODEL CODE OF PROF'L RESPONSIBILITY Preamble (1980) (emphasis added).
124 MODEL CODE OF PROF'L RESPONSIBILITY EC 1-5 (1980).
125 MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).
126 MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19 (1980).
127 *See* CANONS, *supra* note 109.
128 MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1980) (emphasis added).
129 Thomas G. Bost, *The Lawyer as Truth-Teller: Lessons from Enron*, 32 PEPP. L. REV. 505, 514 (2004); *see also* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 79 (1994) (describing the "amazing shrinking concept of the lawyer as an independent counselor").

person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another."[130] Also, Disciplinary Rule 4-101 permitted, but like the Canons did not require, a lawyer to reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime," which would in many instances impact the rights of third parties.[131] The ethical considerations in the Code further provided:

> In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.[132]

One can infer that at times an action may be unjust because of its impact on third parties, although the Code did not explicitly state this.

D. The ABA Model Rules of Professional Conduct

While the ABA Model Rules of Professional Conduct ("Rules") were not adopted until 1983[133]—over a decade after Watergate—the events of Watergate were in many ways responsible for spurring the legal profession to revisit the Code of Professional Responsibility.[134] A group of lawyers headed by Robert Kutak, known as the Kutak Commission, worked for six years to draft the Model Rules.[135] Watergate also prompted the ABA to adopt a law school accreditation requirement that compels accredited law schools to provide students with legal ethics instruction.[136]

The structure of the Rules differed from the Code. The Code contained canons, ethical considerations and disciplinary rules.[137] The Rules, however, abandoned this tripartite structure for a structure that contained black letter rules followed by explanatory comments for each rule.[138] Preceding the black letter rules is a Preamble that sets out broad

130 MODEL CODE OF PROF'L RESPONSIBILITY EC 2-30 (1980); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-109 (1980); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(1) (1980).

131 MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (1980); *compare with* CANONS OF PROF'L ETHICS Canon 37 (1908).

132 MODEL CODE OF PROF'L RESPONSIBILITY EC 7-9 (1980).

133 While the Rules were first adopted in 1983 they have been amended numerous times. MODEL RULES OF PROF'L CONDUCT (2009).

134 *See, e.g.*, Rochvarg, *supra* note 4, at 67–68 (discussing the impact of Watergate on reforms in the legal profession); Robert W. Meserve, *Action 1972–73—American Bar Association*, 59 A.B.A. J. 986, 990 (1973) ("[T]he involvement of prominent lawyers in the Watergate affair has heightened professional concerns about discipline.").

135 Rochvarg, *supra* note 4, at 68.

136 *See, e.g.*, Ronald D. Rotunda, *Teaching Legal Ethics a Quarter of a Century After Watergate*, 51 HASTINGS L.J. 661, 661 (2000); Clark, *supra* note 50, at 673. The Committee that drafted the ABA's 1908 Canons of Ethics had actually recommended in its 1907 report that ethics be taught in all law schools and that applicants to the bar be examined on that topic. Altman, *supra* note 85, at 2420–21.

137 *See* Preface, *supra*, note 120.

138 ABA, THE MODEL RULES AND THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES, *supra* note 83, at 3–4 (discussing the change in the format and the rationale for the change).

guidelines regarding the lawyer's role and responsibilities. To the extent that the Rules set out aspirational principles as found in the ethical considerations of the Code, those principles are found in the Preamble and in the comments to the Rules.[139] A predominate goal of the Rules, however, was to legalize the regulation of the legal profession by adopting enforceable rules and moving away from ethical standards that contained unenforceable aspirations.[140]

While the structure differed, the Rules, like the Canons and the Code, continued to emphasize the lawyer's respect for and adherence to the rule of law. The Preamble to the Rules states "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs . . . . A lawyer should demonstrate respect for the legal system and for those who serve it . . . ."[141]

The Rules acknowledge that at times a lawyer's job will create conflicts "between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."[142] While "remaining an ethical person" may be read to encompass a concern about the rights of third parties, the Rules do not explicitly articulate that consideration as part of the web of conflicts which a lawyer must sometimes confront.[143] This section states that sometimes the Rules will provide a direct answer to the conflict, but sometimes they will not, and the lawyer must be guided by the basic principles underlying the Rules.[144] The Rules further state that "[t]hese principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."[145] While third parties certainly have an interest in courteous and civil treatment, a clear principle affirming respect for the rights of third parties would include a broader articulation of their interests.

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139 *Id*. at 10 ("Professor Geoffrey C. Hazard, Jr., Reporter of the Commission, noted that the Preamble was intended to set forth balanced and realistic statements about a lawyer's role and responsibilities.") Such aspirational principles can also be found in some of the comments to the rules, which at times discuss what a lawyer "should" do. *Id*. at 15. *See also* David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 56–57 (1995) (finding ethical aspirations in some of the permissive rules).

140 *See* William H. Simon, *Conceptions of Legality*, 51 HASTINGS L.J. 669, 670–71 (2000); Luban & Millemann, *supra* note 139, at 46–51; Hazard, *supra* note 122, at 1241–42, 1253–55.

141 MODEL RULES OF PROF'L CONDUCT Preamble 5 (2009).

142 MODEL RULES OF PROF'L CONDUCT Preamble 9 (2009).

143 *Id*.

144 *Id*.

145 *Id*. Respect for the rule of law is also embodied in other provisions of the Rules that are analogous to provisions in the Canons and the Code. For example, Rule 1.2(d) prohibits a lawyer from counseling a client to engage, or assisting a client in conduct that is criminal or fraudulent. *Id*. at R. 1.2(d).

Like the Code, the Rules continue to contemplate that a lawyer's advice may include moral factors, although the moral independence of the attorney is not stressed as it was in the Canons.[146] Rule 2.1 states that: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, which may be relevant to the client's situation."[147] The comments to Rule 2.1 suggest that moral factors could include the impact on third parties:

> *Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant*. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.[148]

Other provisions of the Rules also have an underlying concern for some rights of third parties. For example, Rule 3.4 prohibits a variety of activities that are deemed to be unfair to opposing parties and their counsel, such as unlawfully obstructing their access to evidence or falsifying evidence.[149] Rule 3.8 compels prosecutors to ensure that the accused have been advised of their right to obtain counsel and to be given the opportunity to do so.[150] Also, Rule 4.1 prohibits lawyers from making a false statement of material fact to any third parties during the course of their representation of clients.[151]

Significant changes in the Model Rules that resulted from Watergate included the confidentiality rules in Rule 1.6, which are implicitly driven by concern for the rights of third parties.[152] Rule 1.6 defined a lawyer's duty of confidentiality more broadly than did the Code.[153] As the Kutak Commission originally proposed, however, Rule 1.6 permitted a lawyer to

146 MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009).

147 *Id*.

148 MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 2 (2011) (emphasis added); *see also* Russell Pearce, *How Law Firms Can Do Good While Doing Well (And the Answer is not Pro Bono)*, 33 FORDHAM URB. L.J. 211, 216 (proposing a new Model Rule that would restore lawyers' morally accountability); Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85, 126–30 (2010) (arguing that Rule 2.1 has been fairly dormant and that states should make its practical application more robust).

149 MODEL RULES OF PROF'L CONDUCT R. 3.4 (2009).

150 MODEL RULES OF PROF'L CONDUCT R. 3.8(b) (2009).

151 MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2009).

152 *See, e.g.*, Rochvarg, *supra* note 4, at 68. Model Rule 1.13, which addressed a lawyer's duties when representing an organization, was another significant development post-Watergate. *Id*. The initial version of Rule 1.13 the ABA adopted was disappointing to many critics of the legal profession who had hoped for more radical reform after Watergate. *Id*. at 70. After Enron, those rules were revisited and amended again. *Id*. at 85.

153 ABA, THE MODEL RULES AND THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES *supra* note 83, at 48; *see also* Rochvarg, *supra* note 4, at 71.

reveal a client's confidences in several situations that would benefit third parties, including

> to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another; [and] to rectify the consequences of a client's criminal or fraudulent act in furtherance of which the lawyer's services had been used.[154]

These exceptions in initial drafts, however, immediately became a subject of debate and amendment. "The debate focused on the problem of balancing the sometimes conflicting interests of lawyer, client and the public."[155] Proponents argued that the proposed rule struck the right balance between a client's right to have confidences protected and the public's right to be protected from criminal acts.[156] Opponents, however, argued successfully that the exceptions were too broad and inhibited lawyer-client communication.[157] Thus, Rule 1.6, as adopted, contained limited exceptions that permitted a lawyer to reveal confidential information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[158] This was a narrower exception than the one in the Code, which permitted a lawyer to reveal the "intention of his client to commit a crime and the information necessary to prevent the crime."[159]

Rule 1.6, as adopted in 1983, was a disappointment to many lawyers who had hoped for more radical reform after Watergate.[160] The majority of states declined to adopt the rule as adopted by the House of Delegates.[161] There were two subsequent efforts to amend Rule 1.6 to contain provisions similar to those proposed by the Kutak Commission, but both of them failed.[162] It was not until 2003 that Rule 1.6 was amended to allow a lawyer to reveal confidences in situations originally contemplated by the

154 ABA, THE MODEL RULES AND THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES *supra* note 83, at 48. There was also an exception when a lawyer needed to disclose confidences to establish a claim or defense in a controversy arising out of the legal representation. *Id*.

155 *Id*.

156 *Id*. at 48–49.

157 *Id*.

158 *Id*. at 51. There also remained an exception when a lawyer needed to disclose confidences to establish a claim or defense in a controversy arising out of the legal representation. *Id*. See id. at 51 for a red-lined version of the proposed rule as amended.

159 MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(C)(3) (1969); *see also* Rochvarg, *supra* note 4, at 71–72. The ABA also rejected the Code's prior rule that required a lawyer to disclose a client's fraud to try to rectify that fraud and, instead, prohibited such disclosures. *Id*.

160 Rochvarg, *supra* note 4, at 70.

161 *Id*. at 73.

162 ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982–2005, at 115, 117 (2006) [hereinafter ABA, A LEGISLATIVE HISTORY]. Unsuccessful efforts to amend Model Rule 1.6 were first made in 1991. *Id*. at 115. Another round of unsuccessful efforts occurred in 2001. *Id*. at 117–32. *See also* Rochvarg, *supra* note 4, at 73.

Kutak Commission.[163] Since that amendment, Rule 1.6 now provides, in part:

> b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.[164]

It is not a coincidence that these amendments finally occurred in the wake of Enron, a financial scandal that also impacted the reputation of the legal profession.[165]

III. THE LEGAL PROFESSION POST-WATERGATE

Many lawyers have correctly pointed out that the Code, which was the national model for a code of ethics at the time of Watergate, left no ambiguity about the impropriety of acts such as breaking, entering, perjury and obstruction of justice.[166] Many lawyers, however, were involved in these activities despite clear ethical guidance not to break the law.[167] In 1973, ABA President Robert W. Meserve wrote the following about Watergate:

> This is much more than an ethical problem. No one needs a course in ethics to know that burglary or perjury is illegal or immoral. What is needed is an acceptance of a reasonable respect for law and a recognition that no one—however high or low his rank—is above it.[168]

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163 ABA, A LEGISLATIVE HISTORY, *supra* note 162, at 133–41.

164 MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2009). This amendment to Model Rule 1.6 was adopted at the ABA's Annual Meeting in 2003. ABA, A LEGISLATIVE HISTORY, *supra* note 162, at 133–34.

165 *See* Rochvarg, *supra* note 4, at 85–86.

166 *See, e.g.*, Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 34–35 (2002) ("Most observers found it ludicrous to suppose that the massive misconduct among Nixon appointees and campaign contributors stemmed from their lack of familiarity with bar codes of conduct."); Interview with Chesterfield Smith, President, ABA, in S.F., Cal. (Feb. 25, 1974) *The Bar and Watergate: Conversation with Chesterfield Smith*, 1 HASTINGS CONST. L.Q. 31, 34 (1974) [hereinafter *Interview*] (disregarding suggestions that the Code needed to be revised in response to Watergate because "[b]reaking and entering, lying, obstructing justice, or perjuring oneself is a violation under any standard I've ever heard of"); Robert W. Meserve, *Our Profession & Watergate*, 2 STUDENT LAW. 9, 11, 60 (1973–74) ("Surely, it does not require a close reading of the Code of Professional Responsibility to support the proposition that breaking and entering is wrong, that perjury is wrong, or that bribery is wrong.").

167 *See supra* Part I.

168 Robert W. Meserve, *Watergate: Lessons and Challenges for the Legal Profession*, 59 A.B.A. J. 681, 681 (1973).

Thus, many lawyers suggested that revising the Code would not prevent future situations like Watergate.[169] Indeed, since the adoption of the Model Rules, there have been subsequent events involving lawyers that have once again damaged the reputation of the legal profession to varying degrees.[170]

A small number of lawyers engaging in misconduct are inevitable.[171] As Chesterfield Smith, the President of the ABA in 1974 said, "I would hope that someday [lawyers] could get to be lily-white, but realistically I don't believe that's possible."[172] Humans are not infallible and a minority of lawyers will always fall from grace regardless of the cultural and legal limits society imposes. Furthermore, attorney discipline, civil lawsuits and criminal lawsuits give society tools to hold such wrongdoers accountable for their actions, and to send a deterrent message to others. The legal profession should, however, continue to examine whether it can further improve itself through the rules it has adopted and the culture that it creates within the profession.[173] Even though it is a small number of lawyers who engage in conduct that diminishes the reputation of the legal profession, that small number has a profound impact on the public's perception of the profession.[174] Any reduction in that small number should be of significant benefit to the public and the legal profession.

If the law plainly prohibited the conduct of many of the actors in Watergate, then what motivated their decisions? The conduct of the actors involved in Watergate has, in many instances, been explained by the context in which the actors were placed—government offices—and specifically the White House, with all of its power and prestige.[175] There is undoubtedly some truth to that, but the motivation to please a powerful client can arise in many other contexts than the White House. In today's competitive business world, private attorneys must fight to retain the business of their clients or risk losing income and frequently jobs.[176] This

169 *See supra* text accompanying note 166.

170 *See infra* text accompanying note 179.

171 Rotunda, *supra* note 136, at 661, 663–65 (listing some malpractice claims based on ethical violations).

172 *See Interview*, *supra* note 166, at 31.

173 *See* Marianne M. Jennings, *The Disconnect Between and Among Legal Ethics, Business Ethics, Law, and Virtue: Learning Not to Make Ethics so Complex*, 1 U. ST. THOMAS L.J. 995, 997–98 (2004) (arguing that at the point that a client's fraud begins "the codified ethical standards and legal prohibitions are inapplicable. Virtue is required and courage of convictions demanded.").

174 *See* Sandra Day O'Connor, *Foreword* to RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS vii (2008) ("It takes only a few betrayals, however, to seriously damage the reputation of lawyers, both individual and collective. If the legal profession is to prevent breaches of trust, it needs to understand how and why they occur.").

175 *See*, *e.g.*, Richardson, *supra* note 79, at 268 ("To a staff associate, even a highly placed one, the prestige of the Presidential office can be awe-inspiring. In this context, it takes heroic effort for the subordinate to recognize that a President's whims are not necessarily made of cast iron.").

176 *See* ABEL, *supra* note 174, at 58–59 ("[M]any lawyers feel pressure from clients to facilitate illegal activity. And 38 percent of Americans believe that 'most lawyers would engage in unethical or illegal activities to help a client in an important case.'") (footnotes omitted); Rhode & Paton, *supra* note 166, at 26 ("The challenges of maintaining independent judgment are compounded in a competitive

can create incredible pressure to satisfy the demands of clients who are not bound by our professional rules of ethics or frequently even interested in hearing about them. There continues to be a danger that lawyers' self-interests create pressure to serve the demands of powerful clients and that this can at times compromise their judgment and ethics.[177] The Carnegie Foundation noted this danger in its 2007 report on legal education: "In many professional settings [the] lofty ideals of public spirit and service to clients can seem far removed from reality. The press of business demands . . . frequently focuses thoughts elsewhere than on the public purposes of the profession."[178]

A brief overview of a couple of more recent stories involving lawyers will follow to explore, albeit briefly and anecdotally, other contexts where the lawyers' self-interest in serving clients lead to problematic conduct. Such conduct frequently has an adverse effect on third parties and, concomitantly, on the legal profession.

One of the more notorious recent events was the collapse of Enron.[179] While no lawyers were subject to any criminal charges or disciplinary action as a result of Enron,[180] many people raised questions about the role lawyers played in its demise.[181] Enron's failure had a grave impact on the interests of third parties as "more than 4000 employees lost their jobs [and] thousands of investors also lost their life savings, as '$70 billon in wealth vanished.'"[182] Enron's collapse mainly involved corporate officials, accountants and bankers, but lawyers were in the picture, too.[183] Enron had in-house and outside counsel, both of whom were advising it on the structuring of financial transactions and financial disclosure requirements.[184] Enron's accounting firm, Andersen, also had in-house

market where powerful clients can shop for expedient rather than for ethical advice.").

177 Jerold S. Auerbach, *The Legal Profession After Watergate*, 22 WAYNE L. REV. 1287, 1288 (1976) (arguing that "Watergate demonstrated the attitude, all too prevalent in the modern history of the legal profession, that law should serve power"); *see also* Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1322–25 (2006) (discussing the impact of self-interest and group-thinking on ethical reasoning); Susan D. Carle, *Power as a Factor in the Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 118–20 (2006) (arguing for a model of ethical decision-making that considers the power of one's client in light of other interests at stake in litigation).

178 CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 126–27 (2007).

179 For an overview of the key facts relating to the collapse of Enron, *see* Rhode & Paton, *supra* note 166, at 13–17.

180 *See* Lawrence J. Fox, *Can Confidentiality Survive Enron, Arthur Anderson, and the ABA?*, 34 STETSON L. REV. 147, 152 (2004) ("Nobody had found that there was a single lawyer who was aware of things that should have been reported up the corporate ladder and had failed to do so.").

181 *See, e.g.*, Richard Acello, *Enron Lawyers in the Hot Seat: Bankruptcy Examination Outlines Possible Causes of Action*, 90 A.B.A. J. 22, 22–24 (2004); Bernard S. Carrey, *Enron—Where Were the Lawyers?*, 27 VT. L. REV. 871, 871–72 (2003); Susan P. Koniak, *Who Gave Lawyers a Pass?*, Forbes.com (Aug. 12, 2002), http://www.forbes.com/forbes/2002/0812/058_print.html.

182 Rhode & Paton, *supra* note 166, at 9–10; *see also* Rochvarg, *supra* note 4, at 74.

183 Rochvarg, *supra* note 4, at 74–75.

184 Rhode & Paton, *supra* note 166, at 17, 19.

counsel who became the center of a controversy regarding the timing of Andersen's destruction of documents.[185]

Some legal commentators have argued that the lawyers should have disclosed their client's misconduct to the Securities & Exchange Commission.[186] Many have viewed this event through the lens of an attorney's obligations when representing an organization, as well as an attorney's duty of confidentiality.[187] Others have viewed the events through the lens of conflicts of interest.[188] For example, Enron's outside counsel relied on Enron's business for more than seven percent of its revenues—Enron was the firm's largest client.[189] "Over the years V&E [Vinson & Elkins, Enron's outside counsel] had represented Enron in a wide range of matters, with Enron paying the firm legal fees of over $162 million in the five years ending with 2001."[190] The desire to keep that client satisfied must have been tremendous.

These are certainly valid perspectives from which to view the Enron scandal. But it is also worth thinking about whether the lawyers sufficiently considered the impact of their client's conduct on third parties when they were advising their clients. Did they consider the impact on all of the retirees who would be left with no income because of their client's fraud? Did they consider all of the jobs that would be lost when Enron collapsed? Certainly the interests of third parties may be legitimately injured during the course of economic competition and events such as mergers, downsizing, etc. But when the rights of third parties are injured because of fraud, the need for the lawyer to consider third parties' interests becomes particularly heightened. "As many legal ethics experts note, in cases of client misconduct, lawyers' professional norms of client loyalty often conflict with personal norms of honesty and integrity. To reduce the cognitive dissonance, lawyers will often unconsciously dismiss or discount evidence of misconduct *and its impact on third parties*."[191]

The federal government's response to Enron—Sarbanes Oxley—embodies the idea that "every attorney owes an obligation to the public separate from an attorney's obligation to his client."[192] This position received strong opposition from the legal profession.[193] The legal profession, however, has been more accepting of the lawyer's obligation to the public when the lawyer is a prosecutor. Model Rule 3.8 articulates special duties for prosecutors, and the comments to that Rule explain that

185 *Id*. at 21–24; *see also* Koniak, *supra* note 181.
186 Rochvarg, *supra* note 4, at 75.
187 *Id*.
188 Rhode & Paton, *supra* note 166, at 25.
189 *Id*.
190 Bost, *supra* note 129, at 506.
191 Rhode & Paton, *supra* note 166, at 32 (emphasis added).
192 Rochvarg, *supra* note 4, at 82.
193 *Id*. at 82–83.

"[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[194]

The case that came to be known as the Duke Lacrosse rape case is a recent notorious example of a prosecutor who did not act as a minister of justice. Prosecutor Michael Nifong was the district attorney for Durham County, North Carolina when he filed rape charges against three lacrosse players at Duke University—all of whom were eventually declared innocent.[195] Nifong's overzealous prosecution of the case appears to have been motivated by a desire to please his "client," i.e. the people of Durham County who were soon going to choose whether or not to reelect him.[196] The Disciplinary Hearing Commission of the North Carolina State Bar found that prosecutor Nifong violated many rules in the Duke Lacrosse rape case, including Rule 3.8.[197] The Chairman of the Disciplinary Hearing Commission made several comments about Nifong's apparent motivation for his conduct:

> [W]hat we have here, it seems, is that we had a prosecutor who was faced with a very unusual situation in which the confluence of his self-interest collided with a very volatile mix of race, sex and class . . . . But we can make no other conclusion that those initial statements that he made were to forward his political ambitions . . . . It's an illustration of the fact that character—good character—is not a constant. Character is dependent upon the situation. Probably any one of us could be faced with a situation at some point that would test our good character and we would prove wanting. And that has happened for Mike Nifong.[198]

The Chairman also specifically discussed the victims of Nifong's misconduct, who were "the three young men to start with, their families, the entire lacrosse team and their coach, Duke University, the justice system in North Carolina and elsewhere."[199] The subsequent order that disbarred Nifong also discussed how his conduct harmed third parties:

> Nifong's misconduct resulted in significant actual harm to Reade Seligman, Collin Finnerty, and David Evans and their families . . . . As a result of Nifong's misconduct, these young men experienced heightened public scorn and loss of privacy while facing very serious criminal charges of which the Attorney General of North Carolina ultimately concluded they were innocent.[200]

Watergate and the two examples discussed above do not suggest that the lawyers acted with a desire or motivation to harm the interests of third

194 MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009).

195 N.C. State Bar v. Nifong, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law and Order of Discipline, at 2 (July 24, 2007) [hereinafter Nifong Order], *available at* http://www.ncbar.gov/Nifong%20Final%20Order.pdf.

196 *Id*. *See also* Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice",* 76 FORDHAM L. REV. 1337, 1354–57 (2007).

197 Nifong Order, *supra* note 195, at 20–21.

198 *Comments of Disciplinary Panel's Chairman*, N.Y. TIMES, June 17, 2007, http://www.nytimes.com/2007/06/17/us/17duke-text.html?pagewanted=all.

199 *Id*.

200 Nifong Order, *supra* note 195, at 23.

parties. Their motives differed in each situation, although to some extent they were all pursing their self-interests by serving the real or perceived demands of their clients. The outcome of their conduct in each situation was similar—they all adversely impacted the interests of third parties and, concomitantly, the reputation of the legal profession. Perhaps encouraging lawyers to view their decision-making process through the lens of the impact on third parties, at least in part, could help improve lawyer decision-making and judgment.

IV. PROPOSED REFORMS TO THE MODEL RULES AND LEGAL EDUCATION

A. Reforms to the Model Rules

Reforms to the Model Rules alone are unlikely to change the culture of the legal profession, but they can be an important component.[201] As this article has suggested, the Rules should inculcate in lawyers not just a respect for the rule of law, which is paramount to a government based on laws, but a more humanistic respect for the interests of third parties. Viewing conduct through this lens could provide three possible benefits. First, it could give a lawyer a perspective to view his or her conduct that could deter misconduct. Second, even if the conduct that will harm the interests of a third party is permissible, thinking about these implications may give lawyers a more tangible perspective to consider when they are advising their clients about the "right thing to do." Third, again, even if the conduct that will harm the interests of a third party is permissible, thinking about such implications may cause lawyers to reflect on whether the current rules have struck the right balance between the interests of clients and the interests of third parties, or whether legal reform is appropriate.[202]

Scholars have written about the increase in lawyer regulation and the decrease in the demoralization of legal ethics over time.[203] Whether or not a lawyer *should* be a moral advisor and/or independent moral actor has been a topic of debate in legal scholarship.[204] Even if one did agree that a

201 Rhode & Paton, *supra* note 166, at 31 ("Of course, reforming professional rules will not of itself transform professional culture . . . . Regulation is no substitute for internalized norms, but it can foster their development and reinforce their exercise.").

202 For example, the recent case of Alton Logan, who two lawyers knew had been wrongfully convicted for twenty-six years because their client had confessed he was the real killer, has raised anew the debate over a lawyers' duty of confidentiality to his or her client. *See*, *e.g.*, James E. Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another?*, 38 HASTINGS CONST. L.Q. 811, 816–20 (2011); Harold J. Winston, *Learning from Alton Logan*, 2 DEPAUL J. SOC. JUST. 173, 173 (2009).

203 *See, e.g.*, Altman, *supra* note 85, at 2398–99; Luban & Millemann, *supra* note 139, at 41–42.

204 *See, e.g.*, Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1317–19 (2006). This debate is also sometimes framed as a debate between a client-centered and a justice-centered approach to lawyers' ethical obligations. Carle, *supra* note 177, at 116–17. The Model Rules do state that when giving legal advice, a lawyer may refer to other considerations such as moral factors. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009).

lawyer should be a moral advisor, in today's world of moral plurality, there may not be agreed upon norms explaining what it means to be "moral," which could meaningfully guide the actions of lawyers. "Morality" in early codes was strongly tied to Christianity, which is not of much assistance in today's world of religious diversity in lawyers' personal lives and secularism in the law. Thus, returning to broad notions of the lawyer as an autonomous moral actor may not provide much meaningful guidance. Instead of focusing on "morality," as a guiding principle for lawyers, it may be more helpful if the Model Rules articulated more specific principles that elaborate on what it means to be a "moral" advisor or actor.

The Model Rules specifically guide lawyers to assess their conduct in light of compliance with the rule of law, compliance with their duties to their clients, and compliance with their duties to the administration of justice as an officer of the court.[205] The Model Rules, however, are fairly scant in their focus on assessing the impact of a lawyer's conduct on third parties.[206] Thus, it may be beneficial if the Model Rules specifically advised a lawyer to consider the effects of his or her conduct on the rights of third parties as part of their ethical decision-making framework. "When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective."[207]

The Model Rules and its predecessor, the Code, have served two main functions. One is to set out specific standards that can be enforced in disciplinary proceedings. The other is to set out the values and the moral or philosophical framework from which lawyers should approach ethical decisions.[208] In this regard, perhaps the ABA's decision to eliminate the Canons' aspirational ethical considerations from the Model Rules was a loss. The Model Rules focused on setting out the black letter law regarding the conduct of lawyers in greater detail, but perhaps at the expense of the more nuanced and complex considerations of the role of the lawyer that were in the ethical considerations of the Code. Professor William H. Simon critiqued the Model Rules as follows:

> The way we now tend to teach our students legal ethics in the courses that have been mandated in the wake of Watergate tends to emphasize relatively mechanical, unreflective rule-following at the expense of relatively complex contextual judgment . . . . The Model Rules were explicitly drafted for the purpose of creating black letter rules (that is the term that the drafters used) that obviate complex judgment. The predecessor code of the ABA actually had a series of norms that were designed to inspire complex judgment—the so-called

205 *Supra* Part III.

206 The Model Rules do provide guidance about the treatment of third parties in specific situations. *See supra* Part III.

207 Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958).

208 *Supra* Part II.

> 'ethical considerations'—aspirational norms that were eliminated by the Model Rules precisely to reduce legal ethics to a matter of black letter rule following.[209]

The idea of inculcating concerns for the interests of third parties as part of the ethical framework through which lawyers view their decisions and their advice to their clients would work better as an ethical aspiration that can inform a lawyer's approach to ethical decisions than as a rule that could be a basis for disciplinary enforcement.[210] This idea could be included by reintroducing something akin to the Code's ethical considerations or by incorporating it into the current Preamble to the Model Rules, which does set out the broad framework regarding a lawyer's role.[211] For example, the Preamble could be revised to include this concept in Paragraphs 2 and 9 of the Preamble. The proposed additional language is in italics:

> [2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others. [*As an officer of the legal system, a lawyer shall be loyal to the client. This should not, however preclude a lawyer from considering, as part of the lawyer's ethical decision-making, the rights and interests of third parties that may be adversely affected by either the lawyer's conduct or the client's conduct*.][212]
>
> ****
>
> [9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward

209 Simon, *supra* note 140, at 670–71.

210 *See* Tondel, *supra* note 39, at 296 (concluding that "[n]o Code amendment could give practical expression to that revulsion" caused by the crimes committed by lawyers involved in Watergate); Susan D. Carle, *Power as a Factor in the Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 137 (2006) (discussing the discretion frequently exercised in lawyers' ethical decision-making and the inability of the positive law to determine what a lawyer should or should not do in every instance).

211 The Scope of the Rules states that the Rules do not "however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." MODEL RULES OF PROF'L CONDUCT Scope 16 (2009).

212 MODEL RULES OF PROF'L CONDUCT Preamble 2 (2009).

> all persons involved in the legal system. [*These principles also include the lawyer's obligation as an officer of the legal system. While a lawyer's duty of loyalty to the client is usually paramount, the lawyer should consider whether a course of conduct taken by a client or on behalf of a client would adversely impact the interests of third parties. There are many times when this outcome is legitimate, but sometimes it can be a sign of illegal conduct by a client or misconduct by a lawyer. Even if the law allows for an outcome that adversely impacts the interests of third parties, a lawyer should still discuss with his or her client whether such an outcome is the right thing to do*.][213]

B. Reforms to Legal Education

In addition to considering revisions to the Model Rules, legal education would be an important component in training lawyers to consider the impact of their conduct on the interests of third parties as part of their ethical decision-making. In the wake of Watergate there have been differing views about the importance that law schools have historically placed on educating and training students in the matter of ethics.[214] Legal education continues to receive some criticism about how it teaches professionalism, which includes education about the law of lawyering, in addition to matters of morality and character.[215] Some legal commentators have criticized legal education, particularly the area of legal ethics, as being too morally neutral.[216] One law student commented, "[W]e don't focus on what is right, we just talk about what is legally feasible."[217]

One commentator suggested that part of the circumstances leading to Watergate included legal education's agenda of banishing emotionality from lawyers' work.[218] The Carnegie Foundation's 2007 report on legal education concluded that "[t]he kind of personal maturity that graduates need in order to practice law with integrity and a sense of purpose requires not only skills, but qualities such as compassion, respectfulness and commitment."[219]

Legal ethics pedagogy may benefit from the growing dialogue about teaching law students emotional intelligence. Emotional intelligence has been defined as "a set of emotional competencies involving self-awareness of emotions, empathetic awareness of the emotions of others, and the

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213 MODEL RULES OF PROF'L CONDUCT Preamble 9 (2009).

214 *See, e.g.*, Burbank & Duboff, *supra* note 105, at 17 (commenting on the "apparent dearth of interest in and emphasis upon ethics exhibited by the fountainhead of legal training and conditioning, the law schools themselves"); *compare with* Weckstein, *supra* note 42, at 264 (countering allegations that legal education does not focus on ethics and asserting that "law schools do teach ethics, probably more and better than ever in history").

215 *See* CARNEGIE, *supra* note 178, at 136; *see also* Luban & Millemann, *supra* note 139, at 37–38.

216 *See* CARNEGIE, *supra* note 178, at 149.

217 *Id*. at 152.

218 Andrew S. Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 J. LEGAL EDUC. 441, 443–44 (1974).

219 *See* CARNEGIE, *supra* note 178, at 146.

ability to use this awareness to influence the behavior of others."[220] For purposes of this discussion, the concept of empathy is the most important and the following is a helpful definition:

"Empathy encompasses several related phenomena: (1) feeling the emotions of another; (2) understanding another's situation or experience; and (3) taking actions based on another's situation. Empathy involves ways of knowing and understanding and can serve as a catalyst for either action or restraint."[221] In this broader view, empathy is an essential element of the concept of emotional intelligence. "Empathy, when it primarily involves sympathy, leads to helping behaviors and even altruism . . . . So viewed, that aspect of empathy has little role in actual adversarial proceedings."[222]

Research supports the proposition that lawyers with high levels of emotional competencies are more successful persuaders, communicators, and influencers and should be "more likely to give high priority to other interests, such as improving the justice system."[223] This is important because lawyers have the daily opportunity in their practice "to set by their example, and even induce by their persuasion, standards of truth and right in our society at large[.]"[224]

Much work has been done on teaching legal ethics in context by using problems that give students an opportunity to address ethical issues through different roles.[225] Problem-based teaching has also been identified as an important tool for teaching emotional intelligence.[226] While current scholarship focuses largely on emotional intelligence regarding a lawyer's understanding of his or her emotions and the client's emotions,[227] one way to foster the expansion of legal morality is to include, in legal ethics education, problems that focus on recognizing and empathizing with the interests of third parties. "To a large extent people behave as they are expected to behave, and their expectations arise less from what they are told than from the examples they observe."[228]

220 Montgomery, *supra* note 8, at 326.

221 *Id*. at 337.

222 *Id*.

223 *Id*. at 347.

224 Tondel, *supra* note 39, at 298. For this reason, how law firms teach young lawyers about ethics and values is also an important component of a lawyer's education. *See* Ronald D. Rotunda, *Why Lawyers are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 703–07 (2011).

225 *See, e.g.*, Clark, *supra* note 50, at 675 (discussing teaching legal ethics in context); Reaves, *supra* note 55, at 35 (discussing Professor Sam Dash's approach to teaching legal ethics post-Watergate, where the materials should "constantly place the student in situations requiring role definitions . . . . [R]ole-playing is essential.").

226 *See* Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173, 1198–1200 (1999).

227 *See, e.g.*, Jan Salisbury M.S., *Emotional Intelligence in Law Practice*, 53 ADVOCATE 38 (2010); Silver, *supra* note 226, at 1202–03.

228 Weckstein, *supra* note 42, at 278.

CONCLUSION

There is no one explanation that can account for lawyers' improper involvement in Watergate or for other events that have involved lawyers, harmed third parties, and tarnished the reputation of the legal profession. ABA President Robert Meserve suggested that "[t]he first lesson of Watergate for *us* then may be that we must constantly preserve our professional independence and detachment — not only from the overzealous *client* who seeks what is improper, but from the urgings of our *own* ambition and self-interest."[229] As this article has argued, one way to do this may be to steer lawyers back to being morally accountable actors, but in a way that provides specific guidance about what it means to be "moral." Considering the impact of a course of action on the interests of third parties is one aspect of being a moral lawyer. The profession could start to inculcate the consideration of the interests of third parties as a component of a lawyer's decision-making process by reforms to the Model Rules and to legal education. In doing so, lawyers may be better enabled to fulfill one commentator's reflections about the role of the lawyer post-Watergate:

> We are not the keeper of our clients' consciences, but neither are we mere technicians whose sole function is to assure that legal limitations are narrowly observed. . . . We fulfill the finest standards of our profession when our informed legal opinion is supplemented by judicious counsel. Without undertaking to preach to our clients, we can encourage them to ask us not just "is it legal?" but "is it right?"[230]

229 Robert Meserve, *Our Profession and Watergate*, 2 STUDENT LAW. 9, 60 (1973).
230 Richardson, *supra* note 79, at 271.

Learning the Right Lesson from Watergate: The Special Prosecutor and the Independent Counsel

Jonathan L. Entin[*]

The Saturday Night Massacre, in which Watergate Special Prosecutor Archibald Cox was dismissed on orders of President Richard Nixon, provided the impetus for the creation of the independent counsel as part of the Ethics in Government Act of 1978.[1] The gravity of the situation was reflected in the resignations on principle of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus, both of whom refused direct orders to fire Special Prosecutor Cox.[2] Supporters of the independent counsel law contended that we needed to avoid another opportunity for the executive branch to squelch sensitive criminal investigations.[3]

The Supreme Court upheld the constitutionality of the independent counsel provisions in *Morrison v. Olson*,[4] but the law had a meandering life. Congress periodically amended and renewed the measure until 1992, when Republican opposition to various investigations of GOP officials led to its expiration.[5] The independent counsel law was renewed in 1994 as a response to the Whitewater investigation.[6] This in turn led to the appointment of Kenneth Starr, but the controversy over Starr's investigation of President Clinton led to the expiration of the law in 1999.[7]

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1 Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867–75 (1978) (amended 1983, 1987, and 1994; expired 1999).

2 STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 407 (1990); *see also* ELIZABETH DREW, WASHINGTON JOURNAL: THE EVENTS OF 1973–1974, at 52, 54 (1975) (noting initial uncertainty over whether Ruckelshaus had resigned or been fired).

3 *See*, *e.g.*, S. REP. NO. 95-273, at 2–3 (1977) (summarizing congressional proposals responding to the dismissal of Archibald Cox as Watergate Special Prosecutor); S. REP. NO. 95-170, at 2–7 (1977) (summarizing immediate and subsequent congressional responses to the Saturday Night Massacre).

4 487 U.S. 654 (1988).

5 KEN GORMLEY, THE DEATH OF AMERICAN VIRTUE: CLINTON VS. STARR 95–96 (2010); KATY J. HARRIGER, THE SPECIAL PROSECUTOR IN AMERICAN POLITICS 7 (2d ed. 2000).

6 *See* Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732.

7 GORMLEY, *supra* note 5, at 655–56.

Many of Starr's critics thought that his efforts vindicated Justice Scalia's denunciation of the independent counsel law in his *Morrison* dissent.[8]

This paper will examine the debate over the independent counsel law in light of its origins in the Watergate scandal. It will suggest that both sides of the independent counsel debate have missed important points. Proponents of the independent counsel overlooked the real lesson of the Saturday Night Massacre because they focused on what happened to Cox rather than on what happened to Nixon.

Critics, on the other hand, have conflated arguments about the constitutionality of the statute with concerns about its wisdom as a matter of policy. Perhaps most notably, Justice Scalia, dissenting in *Morrison*, invoked the political process that led to the appointment of the Watergate special prosecutor as more acceptable than the statutory provisions in the Ethics in Government Act.[9] Yet it is far from clear that the ground rules under which the Watergate special prosecutor operated were constitutionally preferable to those provided in the independent counsel law.

There is a defensible, if not airtight, argument for the constitutionality of the independent counsel law that draws heavily on the Watergate experience. But even if the arrangement is consistent with the Constitution, it is entirely possible to conclude that the independent counsel law was a well-intentioned reform that went awry. The questions posed by the Watergate special prosecutor, however, underscore the inherent difficulty of crafting sound institutional responses to problems of high-level political corruption.

I

Let us begin with those who believe that the Saturday Night Massacre demonstrated the need for some sort of standing institutional mechanism to investigate executive wrongdoing. Adherents to this view emphasize what happened to Special Prosecutor Cox. Of course, being dismissed in such a public way was unfortunate for him, but this was hardly a career-ending event. After all, Cox had taken a leave of absence from his faculty position at Harvard Law School to become special prosecutor, and he took up a prestigious visiting professorship at the University of Cambridge.[10] After that he returned to Harvard as a University Professor, one of the highest honors available to a member of the faculty of the nation's oldest university.[11]

8 *See, e.g.*, David Broder, *Fool's Law*, WASH. POST, Sept. 12, 1999, at B7; Jeffrey Rosen, *Steele Trap*, NEW REPUBLIC, Apr. 26, 1999, at 44.

9 *See Morrison*, 487 U.S. at 711.

10 KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 393 (1997).

11 *Id*. at 396.

The situation looks very different if we focus instead on what happened to President Nixon. Faced with what his own aides described as a "firestorm" of criticism that badly undermined his credibility following the Saturday Night Massacre,[12] the chief executive had to acquiesce in the appointment of Leon Jaworski as the new special prosecutor.[13] Jaworski's persistence led to the Supreme Court's ruling in *United States v. Nixon*,[14] which resulted in the release of the so-called "smoking gun" tape of June 23, 1972, which in turn led to Nixon's forced resignation.[15]

II

Congress eventually responded to the Saturday Night Massacre by enacting the independent counsel law.[16] Its provisions required the Attorney General to conduct a preliminary investigation of information suggesting that high-level executive officials had violated federal criminal laws.[17] That investigation could last no more than 90 days.[18] If, at the end of this period, the Attorney General found no reasonable grounds to believe that a crime had been committed, the matter ended.[19] Otherwise, the Attorney General was required to refer the matter to a special court that would appoint an independent counsel who could be removed only by the Attorney General and only for good cause.[20]

Critics, perhaps most notably Justice Scalia dissenting in *Morrison v. Olson*, argue that the law was unconstitutional because it allowed judges, rather than the President, to appoint an independent counsel and not only barred the chief executive from removing such an official, but also limited the grounds on which the Attorney General could dismiss an independent counsel.[21] Indeed, Justice Scalia lamented the demise of what he called "our former constitutional system"[22] in attacking the ruling upholding the independent counsel law, and specifically invoked the Watergate special prosecutor to illustrate what he viewed as an acceptable political response to allegations of executive wrongdoing.[23] A closer look at the institutional

12 DREW, *supra* note 2, at 66; KUTLER, *supra* note 2, at 411.

13 DREW, *supra* note 2, at 91; KUTLER, *supra* note 2, at 426.

14 418 U.S. 683 (1974).

15 *See generally* DREW, *supra* note 2, at 332–413; KUTLER, *supra* note 2, at 513–50.

16 Ethics in Government Act of 1978, Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867–75 (amended 1983, 1987, and 1994; expired 1999). Because the statute has expired, the following summary of the independent counsel law is taken from *Morrison v. Olson*, 487 U.S. 654, 660–64 (1988). The various versions of the independent counsel law differed in certain particulars, but not in any way that detracts from the summary provided in text.

17 Morrison v. Olson, 487 U.S. 654, 660 (1988).

18 *Id*. at 660–61.

19 *Id*. at 661.

20 *Id*. at 661–63. The requirement of a referral to the special court applied both when the Attorney General concluded that there were reasonable grounds to believe that a crime had been committed and when the Attorney General could not determine whether such grounds existed. *Id*. at 661 n.4.

21 *Id*. at 705–09 (Scalia, J., dissenting).

22 *Id*. at 715 (Scalia, J., dissenting).

23 *Id*. at 711 (Scalia, J., dissenting).

arrangements relating to the second Watergate special prosecutor, Leon Jaworski, suggests that Justice Scalia's invocation of those arrangements as preferable to those in the independent counsel law might have been misguided.

Both the Watergate special prosecutor and the independent counsel were effectively insulated from the day-to-day supervision of the Attorney General. That was, of course, the point of both arrangements. Let us consider the provisions for removing these officials. As noted above, an independent counsel could be removed only by the Attorney General—not by the President—and only for cause. The Watergate special prosecutor, on the other hand, could be removed by the President—but only for "extraordinary improprieties" and, even then, only after the chief executive had "first consult[ed] the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertain[ed] that their consensus [was] in accord with [the President's] proposed action."[24] The Supreme Court quoted this regulation in a footnote in the Watergate tapes case but attached no substantive significance to the removal mechanism.[25] Perhaps this provision was overlooked because President Nixon's lawyers did not attack the requirement of congressional approval of the removal of the special prosecutor. Whatever the explanation, this arrangement raised significant separation of powers concerns under the law as it existed in 1974 and as it exists today.

The 1926 decision in *Myers v. United States*[26] remains the leading case on the removal power. In *Myers*, the Supreme Court, in an opinion by Chief Justice Taft, ruled unconstitutional a statute that required the Senate to give its consent to the removal of a local postmaster before the expiration of the postmaster's four-year term of office.[27] Although subsequent cases have addressed different aspects of the removal power and suggest that Congress may limit the grounds for removal of certain officers,[28] the Supreme Court has made clear that the legislative branch may not reserve for itself any formal role in the actual process of removing federal officials beyond the constitutionally authorized impeachment mechanism.[29]

It is not as though Nixon's lawyers ignored *Myers*. Their brief on the merits invoked that precedent as exemplifying the centrality of separation

24 Office of Watergate Special Prosecution Force, 28 C.F.R. § 0.38 app. (1974).

25 *See* United States v. Nixon, 418 U.S. 683, 695 n.8 (1974).

26 272 U.S. 52 (1926).

27 *Id*. at 107, 176.

28 *See, e.g*., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (dual for-cause limitation on removal of interior officers); Wiener v. United States, 357 U.S. 349 (1958) (implied for-cause requirement for removing members of the War Claims Commission); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (for-cause requirement for removing members of the Federal Trade Commission).

29 *See* Bowsher v. Synar, 478 U.S. 714, 726–27 (1986); *Myers*, 272 U.S. at 172–73.

of powers and supporting the notion that the President is immune from compulsory process.[30] The brief went on to mention, almost in passing, that "the specific holding of the *Myers* case was narrowed to some extent" in a subsequent case, although "*that narrowing was on a point that does not bear on the present issue*."[31]

From a contemporary perspective, this seems like a legal gaffe. After all, *Myers* held that requiring Senate consent for the removal of a postmaster unconstitutionally impinged on presidential power.[32] The subsequent case to which Nixon's brief referred, *Humphrey's Executor v. United States*,[33] upheld a statutory provision requiring that the President have cause to remove a member of the Federal Trade Commission.[34] But the regulation requiring the President to consult with and obtain consensus approval from the leadership of both houses of Congress before discharging the Watergate special prosecutor goes well beyond the cause requirement upheld in *Humphrey's Executor*, and that arrangement might pose even greater constitutional problems than the postmaster provision that *Myers* rejected. In *Myers* the full Senate had to act, whereas the Watergate regulation empowered a handful of influential senators and representatives to prevent the President from discharging the special prosecutor.[35]

Before dismissing Nixon's failure to invoke *Myers* as a basis for challenging the removal restrictions in the special prosecutor regulation, we should put matters into historical and intellectual context. Although *Myers* suggests that the President has unfettered power to remove all appointed officials who exercise any part of the executive power, the notion that the removal power provides the basis for an expansive theory of the unitary executive is a more recent phenomenon.[36] Whatever this might suggest about the actual importance of the removal power, at the least it implies that President Nixon and his lawyers did not believe that attacking the requirement of congressional consent to the dismissal of the Watergate special prosecutor was a promising line of argument.[37]

30 Brief for Respondent and Cross-Petitioner Richard M. Nixon, President of the United States at 73, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834).

31 *Id*. at 74 (citing *Humphrey's Ex'r*, 295 U.S. 602) (emphasis added).

32 *Myers*, 272 U.S. at 176.

33 295 U.S. 602 (1925).

34 *Id*. at 620, 632.

35 *Compare Myers*, 272 U.S. at 107, *with* Office of Watergate Special Prosecution Force, 28 C.F.R. § 0.38 app. (1974).

36 *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 723–27 (1987) (Scalia, J., dissenting); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

37 Even if the Supreme Court invalidated this aspect of the regulation, it is not at all clear that the Court would have ruled in Nixon's favor. Perhaps the Court would have excised the objectionable portion of the removal section of the regulation on the theory that this provision was severable and left the remaining aspects of the regulation intact. *Cf*. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161–62 (2010) (severing the objectionable dual-cause provision and allowing the agency to exercise its statutory functions). Whether and to what extent the severability doctrine might

Regardless of the explanation for ignoring the removal procedures applicable to the Watergate special prosecutor, the larger point remains valid. Under contemporary doctrine, as well as the precedents in place during the Watergate litigation, the constitutional propriety of the removal provisions was questionable at best. For this reason, it is not clear that the arrangements relating to the Watergate special prosecutor were in fact less problematic than the independent counsel law that has come under such harsh constitutional criticism.

Justice Scalia attacked the independent counsel law starting from first principles: the Constitution divides and separates federal power such that any incursion on presidential authority was presumptively impermissible.[38] Chief Justice Rehnquist's opinion for the Court in *Morrison v. Olson* never really joined issue with Justice Scalia, but there is another first principle under which the independent counsel law might have been supported: the checks and balances view that the executive branch could not be trusted to investigate itself and therefore a carefully structured institutional mechanism such as the independent counsel might serve important constitutional values.[39]

From a checks and balances perspective, the independent counsel law gave the executive branch complete control over the initiation of proceedings involving covered officials, who were either high-level executive officers or close political allies of the President.[40] Moreover, the major features of the statute kept the appointment and removal of an independent counsel out of congressional hands.[41] If the Attorney General concluded, after a preliminary investigation, that there were no reasonable grounds to believe that a targeted person had committed a federal crime, the matter was closed and that decision was not subject to judicial review.[42] If the Attorney General could not close the matter at that point (either because there were reasonable grounds to believe that a federal crime had occurred or because it was not clear whether such grounds existed), the matter went to a special court that was authorized to appoint an independent counsel.[43] The independent counsel took on all of the investigative and prosecutorial authority of the Attorney General, who

apply to regulations of the sort at issue in *United States v. Nixon* as opposed to statutory provisions is beyond the scope of this essay. For criticism of the severability doctrine, see generally Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495 (2011).

38 *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident . . . . But this wolf comes as a wolf.").

39 This was the approach taken by the dissenting opinion in the lower court in *Morrison*. *See In re* Sealed Case, 838 F.2d 476, 518 (D.C. Cir. 1988) (Ginsburg, J., dissenting), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

40 *See Morrison*, 487 U.S. at 660–61.

41 *See id*. at 660–64.

42 *Id*. at 660–61.

43 *Id*.

could remove the counsel only for cause.[44] In other words, an executive official determined whether an independent counsel would be appointed and whether an independent counsel could be removed. The cause requirement, of course, limited executive power, but the limitation was for the purpose of checking abuses of executive discretion in situations where the executive branch has a conflict of interest and therefore might need to face some kind of institutional check. Indeed, the Solicitor General in *Myers* conceded that Congress might permissibly require cause for removal of executive officials.[45]

Perhaps the most challenging aspect of this argument is characterizing the independent counsel as an inferior officer, as the *Morrison* Court did,[46] in light of more recent rulings suggesting that inferior officers must report to a superior official.[47] Nevertheless, those decisions do not purport to undermine the continuing vitality of *Morrison*.

Justice Scalia added one more structural objection to the independent counsel law: the measure was unfair to the object of the investigation because the independent counsel has a single target and operates free from many of the practical and political constraints that limit the ability of ordinary prosecutors to rein in their efforts.[48] Whatever the validity of these concerns, Justice Scalia did not explain how the arrangements under which the Watergate special prosecutor operated alleviated them. To be sure, the regulations under which both Archibald Cox and Leon Jaworski functioned gave them "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice,"[49] whereas an independent counsel had "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[50] At least in theory, then, the special prosecutor was more accountable to the Attorney General than an independent counsel.

Nevertheless, the response to the Saturday Night Massacre suggests that the distinction was more apparent than real. The special prosecutor, like an independent counsel, focused on a limited number of targets in

44 *Id*. at 662–63.

45 *See* Myers v. United States, 272 U.S. 52, 90, 96 (1926) (oral argument for the United States); Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 744–45 (1987).

46 *Morrison*, 487 U.S. at 671.

47 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162 (2010); Edmond v. United States, 520 U.S. 651, 662–64 (1997).

48 *Morrison*, 487 U.S. at 727–32 (Scalia, J., dissenting).

49 Office of Watergate Special Prosecution Force, 38 Fed Reg. 14688, 14688 (June 4, 1973) (Cox); Office of Watergate Special Prosecution Force, 38 Fed. Reg. 30738, 30739 (Nov. 7, 1973) (Jaworski).

50 *Morrison*, 487 U.S. at 662.

connection with a defined series of events. The special prosecutor, like an independent counsel, had no need to consider how much priority to attach to a particular investigation relative to other criminal matters or how aggressively to pursue one or a few potential targets compared with others in unrelated matters because the special prosecutor, like an independent counsel, had no other unrelated targets or matters to address. These similarities have less to do with the mechanisms by which the Watergate special prosecutor and the independent counsels were appointed and removed than they do with the peculiar characteristics of sensitive investigations of high-level executive officials. In this sense, the problem is more institutional than constitutional. We should not pretend otherwise.

III

The Saturday Night Massacre led to the enactment of the independent counsel law. Although that measure seemed like a necessary prophylactic measure, today there seems to be bipartisan consensus that the independent counsel law did not work out very well. But whatever its defects, the disillusionment that many people of diverse political outlooks share does not make the law unconstitutional. We should not conflate wisdom with constitutionality. Just because some arrangement turns out to be of dubious wisdom does not make it unconstitutional.[51]

The Watergate special prosecutor was a political response to a political crisis.[52] President Nixon was forced to accept the appointment of Archibald Cox as the first special prosecutor and, when he concluded that Cox had to go, had to acquiesce in the appointment of Leon Jaworski. The largely unnoticed but constitutionally dubious requirement that the congressional leadership in both houses approve of any dismissal of Jaworski reflected the widespread dismay over Cox's sacking.[53] Because President Nixon had lost the confidence of important segments of the polity, the addition of the congressional leadership seemed to be a necessary element for allowing the investigation to proceed.

The independent counsel law sought to avoid the necessity for improvisation that characterized the Watergate situation. It did so by establishing a limited number of high-level executive officials and close

51 *See* Jonathan L. Entin, *Congress, the President, and the Separation of Powers: Rethinking the Value of Litigation*, 43 ADMIN. L. REV. 31, 56 (1991).

52 So was the appointment of special prosecutors to investigate the Teapot Dome scandal. *See* S.J. Res. 54, ch. 16, 68th Cong., 43 Stat. 5 (1924); *see generally* BURT NOGGLE, TEAPOT DOME: OIL AND POLITICS IN THE 1920's 91–115 (1962). Justice Scalia also cited this example approvingly in his *Morrison* dissent. *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting). Unlike either the Watergate special prosecutor or the independent counsel, the President appointed the Teapot Dome prosecutors with the advice and consent of the Senate. S.J. Res. 54, 43 Stat. at 6; NOGGLE, *supra*, at 114–15.

53 The regulation that initially created Cox's position as special prosecutor provided that he could be removed only "for extraordinary improprieties on his part." Office of Watergate Special Prosecution Force, 38 Fed. Reg. 14688, 14688 (June 4, 1973). A court later determined that Cox's dismissal violated this regulation. *See* Nader v. Bork, 366 F. Supp. 104, 108 (D.D.C. 1973).

political advisors to the President whose suspected involvement in serious federal crimes might create too many conflicts of interest for the normal investigative procedures of the Department of Justice to engender public confidence. As a result, partisans on both sides of the political aisle and many other Americans concluded that the independent counsel law did more harm than good. It seems highly unlikely that such a measure could be adopted in the foreseeable future.

Perhaps it is difficult to reconcile some of the specific details of both the Watergate special prosecutor and the independent counsel with both a strictly formal reading of the Constitution and some ideal political theory. Institutional design is a formidable challenge even when political comity is in greater supply than it has seemed to be in recent times. Beyond that, however, the difficulties inherent in both the Watergate special prosecutor arrangements and the independent counsel law suggest that reliance on purely legal responses to problems that are fundamentally political inevitably will lead to frustration.[54]

54 *See* HARRIGER, *supra* note 5, at 215–32.

Politics, Prosecutors, and the Presidency in the Shadows of Watergate

By J. Richard Broughton[*]

INTRODUCTION

Perhaps there are no real lessons that are unique to Watergate. Political scandal and corruption, after all, were hardly new to American politics as of 1972. Still, perhaps there is something about Watergate that, if not different, at least amplifies our understanding of the institutional forces at work when government officials seek to extend their authority, or engage in scandalous, or even criminal, behavior.

We know and we see when trouble occurs, or is coming. After all, presidents and other political leaders now have to be presidents and leaders on television. And that reality has been exacerbated, post-Watergate, by the twenty-four-hour news cycle and the ubiquity of the Internet and social media. It has been said that Watergate ushered in an era of great skepticism about the competence of government, generally, and, when combined with the Vietnam War, about the uses of executive power in particular.[1] That skepticism about executive power arose despite a Constitution that needed, and that supplies, an energetic executive[2] (indeed, from the ashes of Watergate emerged an important tool for presidential energy, the executive privilege).[3] And that skepticism seems unlikely to fade in an era of persistent political news coverage and commentary that is capable of reaching the masses instantaneously.

With respect to the presidency specifically, though, perhaps what Watergate accomplished was not merely to make the public skeptical of it but, rather, to affirmatively weaken it, to diminish it, to demystify it (and hence further weaken it).[4] Since Watergate, presidents and presidential candidates have consistently narrowed their distance from the governed and

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1 *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 415–18 (1973).

2 *See* THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* TERRY EASTLAND, ENERGY IN THE EXECUTIVE 9–14 (1992) (discussing Hamilton's energetic executive and placing it in the context of contemporary conservative presidencies).

3 *See generally* United States v. Nixon, 418 U.S. 683 (1974).

4 *See* SCHLESINGER, *supra* note 1, at 417–18. For an excellent treatment of the modern presidency, *see* ROGER BARRUS, ET AL., THE DECONSTITUTIONALIZATION OF AMERICA 105–09 (2007).

embraced a kind of populism that is designed to show empathy with voters and assure the electorate that the candidate can be trusted with power, an assurance made all the more necessary in the shadows of Watergate.[5]

But a contradiction emerges. For as the modern presidency has become more populist—and more Wilsonian, that is, less constitutional and driven to a greater degree by popular opinion[6]—the President's power to persuade the American people to support his political agenda has been emboldened.[7] Presidents now regularly appeal to the masses and to the public mood, and in doing so they have assumed an ever greater role in swallowing up legislative power and dictating the content of national legislation.[8] Presidential campaigns seem rarely to focus on the formal constitutional powers of the office, but instead seem devoted to an explanation of a candidate's proposed political and legislative agenda.[9] Popular leadership, through political rhetoric, has displaced concerns about formal powers and institutional arrangements.[10] Moreover, public approval of Congress has reached record lows: even unpopular presidents remain more popular than Congress.[11] In a strange sense, then, the post-Watergate presidency is in many ways bolder and more pervasive, though often in ways that seem at odds with constitutional forms. The presidency is at once stronger *and* weaker.

5 *See* Roger M. Barrus, *Politics as Theater: The Presidential Debates*, *in* AMERICA THROUGH THE LOOKING GLASS 19–21 (Roger M. Barrus & John Eastby eds. 1994) (describing how empathy became an issue at the 1992 Richmond presidential debate, and suggesting that this "fellow feeling" was replacing prudence, wisdom, and judgment as the chief qualification for ruling).

6 *See* BARRUS, ET AL., *supra* note 4, at 105-09 (discussing the constitutional views of Woodrow Wilson, who rejected the arrangements of the original Constitution and who wanted a presidency grounded in efforts to shape public opinion in order to secure realization of the President's public agenda).

7 The "persuasive" power of the presidency was described by Richard Neustadt as the core of modern presidential authority. *See* RICHARD NEUSTADT, PRESIDENTIAL POWER 32–60 (1960).

8 *See* J. Richard Broughton, *The Inaugural Address as Constitutional Statesmanship*, 28 QUINNIPIAC L. REV. 265, 270–71 (2010) [hereinafter Broughton, *The Inaugural Address*]. I also previously argued that presidents have used the veto power to achieve this result. *See* J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS 91, 118 (2005).

9 *See* Broughton, *The Inaugural Address*, *supra* note 8, at 265–66.

10 *See generally* JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (1987).

11 Recent public opinion polling, for whatever it is worth on its face, demonstrates consistently lower public approval of Congress (understood, presumably, as it is constitutionally: the House *and* the Senate). According to one website that collects and posts data from various national polls, Congress' approval at the start of 2012 averages somewhere in the low teens. *See Congressional Job Approval*, REAL CLEAR POLITICS, http://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html (last visited Feb. 20, 2012). According to the widely-respected polling of Gallup, the two-year approval rating of Congress averaged 25% in 2009–10, and 23% in 2007–08. *See* Lydia Saad, *111th Congress Averaged 25% Approval, Among Recent Lowest*, GALLUP POLITICS, (Jan. 5, 2011), http://www.gallup.com/poll/145460/111th-Congress-Averaged-Approval-Among-Recent-Lowest.aspx. By contrast, as of the first week of February 2012, President Obama's approval rating was 47%. Throughout most of his presidency, his approval numbers have remained low; his lowest was 38% in October 2011. The average for his term is 49%, as of February 2012. *See Obama Job Approval*, GALLUP, http://www.gallup.com/poll/124922/Presidential-Job-Approval-Center.aspx (last visited Feb. 20, 2012).

My focus is on those constitutional arrangements and the kinds of politics that accompany them. I consider them here in the context of one particular aspect of executive power that arises in the shadows of Watergate and the fears of executive power and an Imperial Presidency that followed: the scope of federal prosecutorial power and discretion.[12] The Constitution, I argue, embraces a strong criminal justice presidency. But these are formal powers that presidents and presidential candidates hardly discuss these days.[13]

Generally speaking, prosecutorial power is, and has been recognized by the judiciary as, a core executive power.[14] But the scope of the current federal prosecutorial regime is not the product of presidential aggrandizement.[15] Congress, particularly since Watergate, has continued to expand the scope of the federal criminal law.[16] In doing so, Congress has created an ever-growing menu of charging options for the federal prosecutor, enabling federal prosecutors to leverage more guilty pleas and, as thoughtful scholars have observed, exert tremendous ability to both control the scope of substantive federal criminal law[17] and act as *de facto* final adjudicator of criminal prosecutions.[18] Moreover, courts have not

12 *See infra* pp. 8–12.

13 *See infra* pp. 12–14.

14 *See* United States v. Armstrong, 517 U.S. 456, 467 (1996); Morrison v. Olson, 487 U.S. 654, 691 (1988); United States v. Nixon, 418 U.S. 683, 693 (1974). The Court's most vocal adherent to this proposition is Justice Scalia. *See Morrison*, 487 U.S. at 706 (Scalia, J., dissenting) (asserting that "Governmental investigation and prosecution of crime is a quintessentially executive function."). Note also Justice Scalia's observation that prosecuting a crime is *not* part of "the judicial power" under Article III. *See* Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 816–17 (1987) (Scalia, J., concurring).

15 *See* Katy J. Harringer, *Executive Power and Prosecution: Lessons from the Libby Trial and the U.S. Attorney Firings*, 38 PRESIDENTIAL STUD. Q. 491, 492–94 (2008).

16 Numerous scholars have described the ever-increasing "federalization of crime." *See generally* John S. Baker, *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 548–54 (2005); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 610 (2005); Gerald Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 801–04 (1996); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 CASE W. RES. L. REV. 801, 868 (1996); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 505 (1995); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 Annals Am. Acad. Pol. & Soc. Sci. 157, 158 (1967). I relied upon this literature in another recent piece, as well. *See* J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. Rich. L. Rev. 457, 458–66 (2012). *But see* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 Cornell J.L. & Pub. Pol'y 247, 249–52 (1997) (arguing that commentators complaining of overfederalization overlook the federal government's steady decline in criminal law enforcement, as well as substantive areas that ought to command a greater federal enforcement role); Susan Riva Klein & Ingrid B. Grobey, *De-Bunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050081 (disputing the connection between the growth of federal criminal law and the exercise of federal prosecutorial discretion).

17 *See* William J. Stuntz, *Plea Bargaining and the Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549–50 (2004); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001) [hereinafter Stuntz, *Pathological Politics*].

18 *See* Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from the Administrative State*, 61 STAN. L. REV. 869, 878 (2009); *see also* Angela Davis, *The American*

offered any meaningful limits on prosecutorial discretion.[19] The result is a body of about 4,500 federal criminal laws,[20] many of which are written too broadly, often without meaningful *mens rea* elements,[21] and often for activities that cause either minimal social harms or that are more properly, and constitutionally, regulated by state law.[22] This massive body of law has given rise to, in Rachel Barkow's words, "the Prosecutor as Leviathan."[23] The executive power of prosecuting crimes has appeared to metastasize into substantive lawmaking and adjudicative power, as well.

How can this happen in a post-Watergate world that was supposed to be so solicitous of limits on executive power?

One response is to suggest that, at least for some crimes, broad prosecutorial authority is desirable as a method of combating the kinds of social harms and public corruption that Watergate involved.[24] However, another response is to say that Watergate was concerned not so much about executive power writ large, but about *presidential* power in particular.[25] The key to this distinction is to view the federal prosecutor as politically independent, an executive actor perhaps but not one who acts at the direction of the President. Indeed, making the Justice Department "de-politicized," politically independent, and free of political control has been a constant theme in the post-Watergate era.[26] In light of the Saturday Night Massacre of October 20, 1973, the theme inspired the Ethics in Government Act of 1978[27] and the independent counsel provisions that were so controversial but upheld in *Morrison v. Olson*.[28] The theme also

Prosecutor: Independence, Power, and the Threat of Tyranny, 86 IOWA L. REV. 393, 408 (2001) (describing the power of modern prosecutors and advocating prosecutor review boards as a check).

19 *See* United States v. Armstrong, 517 U.S. 456, 464 (1996); Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

20 *See* Memorandum from John S. Baker, Jr. of Heritage's Center for Legal and Judicial Studies (June 16, 2008).

21 *See generally* BRIAN W. WALSH & TIFFANY M. JOSLYN, THE HERITAGE FOUND. & NAT'L ASS'N. OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN CRIMINAL LAW (2010).

22 *Id*. at 24–29.

23 Barkow, *supra* note 18, at 874.

24 *See* Harringer, *supra* note 15, at 492-93.

25 *See* Archibald Cox, *Watergate and the Constitution of the United States*, 26 U. TORONTO L.J. 125, 126–27 (1976); Ruth P. Morgan, *Nixon, Watergate, and the Study of the Presidency*, 26 PRESIDENTIAL STUD. Q. 217, 229 n.1 (1996).

26 *See, e.g., Raising the Standards at Justice*, CHI. TRIB., July 14, 1988, at 20 (praising President Reagan's appointment of Dick Thornburgh to replace Ed Meese as Attorney General, despite Thornburgh's partisan political background, and claiming that the Justice Department is "in shambles" after Meese's tenure); James Vicini, *Gonzales Seen as Politicizing Justice Dept*, REUTERS, Aug. 19, 2007, *available at* http://www.reuters.com (citing sources claiming DOJ politicization under Attorney General Alberto Gonzales).

27 *See* Ethics of Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591– 599).

28 Morrison v. Olson, 487 U.S. 654, 696 (1988). Notably, by contrast, John Manning argued that the removal provisions of the independent counsel law actually permitted presidential removal in the event that the independent counsel acted in defiance of a presidential order. *See* John F. Manning, *The Independent Counsel Statute: Read "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1288 (1999).

inspired other (unsuccessful) proposals to make the Justice Department and federal prosecutors politically independent.[29] We saw this political independence theme again in the wake of the 2007 United States Attorneys firings scandal in the Bush Justice Department,[30] and more recently in criticism of the Obama Justice Department,[31] both of which drew the attention of the political opposition in Congress.[32] Indeed, current House Judiciary Committee Chairman Lamar Smith of Texas recently issued a report describing the Obama Justice Department as "more partisan than ever."[33] It seems that "politicization" of the Justice Department has been a regular complaint in official Washington for years.

The theme is sensible as far as it goes. *Of course* we do not want politically motivated criminal prosecutions. That is, we do not want prosecutors to exercise discretion based simply on whether the criminal suspect is a Republican or Democrat, or a political rival of the prosecutors or the administration. Nor do we want federal prosecutors to decline legitimate prosecution of an administration official merely because he fears

29 *See, e.g., Removing Politics from the Administration of Justice, Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers, Senate Comm. on the Judiciary*, 93d Cong. 1-3 (1974) [hereinafter *Removing Politics*] (statement of Sen. Ervin) (concerning Senator Ervin's proposal for making the Justice Department an independent agency); *Watergate Reorganization and Reform Act of 1975, Hearings Before the Senate Comm. on Gov't Operations,* 94th Cong. 4 (1976) (concerning proposal for temporary special prosecutor recommended by the Attorney General); s*ee also* CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 236 (1992) (arguing that the Justice Department has become "the primary and most effective weapon in the quest to aggrandize presidential power" and this is reason for reconsidering the proposal to make the Department politically independent).

30 *See* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 371 (2009); David M. Dreisen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 709 (2008); Marisa Taylor, *New Attorney General Has Rebuilding Ahead; Depoliticizing Office Seen as Priority*, LEXINGTON (KY) HERALD-LEADER, Sept. 2, 2007, at A7; Editorial, *New Attorney General: Mukasey Should Chart Independent Course for Justice Department*, COLUMBUS DISPATCH, Nov. 15, 2007, at 16A.

31 *See* Hans A. von Spakovsky, *A Politicized Justice Department Strikes Again*, NATIONAL REVIEW ONLINE (Aug. 17, 2011), http://www.nationalreview.com/blogs/print/274805 (stating "it should come as no surprise that this politicized Justice Department is willing to abuse federal law to suppress anti-abortion views"); Hans A. von Spakovsky, *Politicizing the Law*, NAT'L. REV. ONLINE, Jan. 12, 2010, http://www.nationalreview.com/blogs/print/228943 (criticizing Civil Rights Division for using enforcement powers to benefit ideological goals of Democrats). In an interview with television and radio host Sean Hannity, former Justice Department lawyer J. Christian Adams discussed a book he recently authored and asserted that what was occurring in the Obama Justice Department was "not just politicization. It's radicalization . . . ." *See Hannity*, Fox News Channel, Transcript of Interview with J. Christian Adams, *available at* http://www.foxnews.com/on-air/hannity/2011/10/05/radicalization-obama-justice-department (October 4, 2011).

32 *See, e.g., Preserving Prosecutorial Independence: Is the Justice Dept. Politicizing the Hiring and Firing of U.S. Attorneys?, Hearing Before the Senate Comm. on the Judiciary,* 110th Cong. (2007); *Oversight of the U.S. Department of Justice, Civil Rights Division, Hearing Before the Subcomm. on the Const., House Comm. on the Judiciary*, 112th Cong. (June 1, 2011).

33 THE OBAMA ADMINISTRATION'S DISREGARD OF THE CONSTITUTION AND THE RULE OF LAW, REPORT OF THE CHAIRMAN, HOUSE COMMITTEE ON THE JUDICIARY, 112th Cong. (Apr. 30, 2012), *available at* http://judiciary.house.gov/issues/Reports/AG%20Report%20Final-Final%204%2028%2012.pdf. [hereinafter CHAIRMAN'S REPORT OF APRIL 30, 2012].

retribution by the President or the President's political appointees, or because he does not want to create a political problem for the otherwise prosecutable individual. The Public Integrity Section of a Justice Department in a Republican presidential administration should not seek indictment of a Democratic governor *merely* because that governor is a political opponent; a United States Attorney appointed by, and with close ties to, a Democratic President should not pursue charges of corporate criminality against a company merely because it was a major Republican campaign contributor. And, presidents and prosecutors should be sensitive to public perception that they are engaged in rank partisanship.

But beyond this, our vision of an apolitical federal criminal enforcement regime is clouded, for there are many ways in which politics and legitimate political considerations affect the role, scope, and duty of the federal prosecutor.[34] Properly distinguishing *partisanship* and *politics*, Dahlia Lithwick and Jack Goldsmith have rightly argued that politics is "inevitable in the enforcement of the law" and that this may be beneficial, at least in the sense of promoting accountability.[35] Moreover—and I would say *inevitably* in Washington politics—some allegations of using the Justice Department as a partisan weapon will naturally flow from the President's political opposition no matter how legitimate the Department's actions.[36] After all, these kinds of allegations tend to come with the hope of partisan gain for the political rivals who lodge them. So just as the Department should be sensitive to claims of partisanship, the Department also should not avoid a legitimate prosecution or other relevant action merely because the President's opponents find some way to accuse him of politicization. We often hear about the "criminalization of politics,"[37] a phenomenon worth sober consideration. But we should also take an interest in the politics of criminalization, or to be more precise, the politics of criminal lawmaking *and* prosecution.

Perhaps the ultimate question is about *who* really controls the exercise of prosecutorial power. One would have thought that a post-Watergate America would have definitively answered this question by now. And yet, the question remains open, and scholars—particularly after *Morrison v. Olson*—vigorously debated this question. I need not resolve that question in this brief project. I simply suggest —as I have in other contexts[38]—that in the context of the federal prosecutorial regime we need not necessarily choose between a strong President and a weak Congress, or a weak

34 *See* Dahlia Lithwick & Jack Goldsmith, *Politics as Usual*, SLATE, Mar. 14, 2007, *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2007/03/politics_as_usual.html.

35 *Id.*

36 *See id.*

37 *See Edwin M. Yoder, The Presidency and the Criminalization of Politics*, 43 ST. LOUIS U. L.J. 749, 749 (citing then-recent examples of the phrase's use).

38 *See* J. Richard Broughton, *Judicializing Federative Power*, 11 TEX. REV. L. & POL. 283, 314–15 (2007); Broughton, *The Inaugural Address*, *supra* note 8, at 287.

President and a strong Congress. We can, and should, have appropriate (which is to say constitutionally-proscribed) strength in both political branches. The formal powers of *both* political branches inform the role of the federal prosecutor at the level of constitutional *and* ordinary politics. This essay therefore uses federal prosecutorial authority after Watergate as a case study in the embrace (though they remain distinct) between the legal and the political.

I. THE POLITICS OF PROSECUTORIAL CONTROLS IN THE CRIMINAL JUSTICE PRESIDENCY

In a post-Watergate world, as we have witnessed, the suggestion of involving the President in the exercise of prosecutorial discretion may be thought to roam too far in politicizing the Justice Department and the notion of impartial criminal justice.[39] But the constitutional presidency leaves quite a bit of room for presidential influence over the enforcement of criminal law, often in ways that will intersect with political considerations. So beyond the formal arrangements that support the case for presidential control over the federal prosecutorial regime, ordinary politics also inform the criminal justice presidency, even as presidents carry out their constitutional functions. Presidents, after all, are not immune from the "tough on crime/soft on crime" dichotomy, however meaningless that dichotomy may be in enforcing and administering criminal law.

To be sure, some scholars have argued compellingly against the notion of broad or exclusive presidential control over federal prosecutors as a matter of our constitutional history.[40] But perhaps the most comprehensive response to this account comes from Saikrishna Prakash, who persuasively uses both text and early constitutional history to argue that the Constitution favors presidential control.[41] Starting from a historical context in which the Crown had control over prosecutors, he notes that early presidents consistently assumed direct control over the work of local federal prosecutors.[42] Moreover, Prakash argues that the text and structure of the Constitution favor presidential control.[43] Indeed, the textual and structural

39 *See supra* text accompanying notes 27–31.

40 *See generally* Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989).

41 Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 521 (2005). For another excellent historical account of presidential perspectives and practices related to control over law enforcement, see generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE (2008).

42 Prakash, supra note 41, at 527; *see also* John Yoo, *George Washington and the Executive Power*, 5 U. ST. THOMAS J. L. & PUB. POL'Y 1, 12 (2010) (describing Washington's view of executive control over law enforcement and explaining that Washington thought his authority as Chief Executive, combined with the Take Care Clause, "gave him the power and responsibility to carry out federal law. This included directing anyone, regardless of his position, who might participate in enforcing the law.").

43 Prakash, *supra* note 41, at 537–46.

aspects of Prakash's Chief Prosecutor Thesis form a substantial part of the legal basis for the criminal justice presidency that I describe here (though in my view the criminal justice presidency is more than merely the sum of the constitutional parts, and includes the political components of a President's influence over the federal prosecutorial regime).

The very notion of "executive power," all of which is vested in a single President,[44] offers support for broad presidential control of federal prosecution. The intellectual history of executive power—of which there is no better scholar than Harvey Mansfield—suggests that the term was used throughout political philosophy to mean, in substantial part, executing the law, which included the punishment of criminals.[45] Of course, our constitutional separation of powers owes more to Locke and Montesquieu than to perhaps any other political thinkers, adding the power of judging to the taxonomy.[46] In our system of separated powers, judges and juries adjudicate criminal cases and impose sentences.[47] But, though Mansfield explains that Montesquieu's judicial branch may have softened preceding understandings of executive power by separating the power of judging and making it explicitly independent of political power (thus separating politics from criminal punishment),[48] neither Montesquieu nor other expositors of executive power displaced the authoritative power of the executive to decide when and whether to identify criminal wrongdoers and place them into a system overseen by independent judges. So while judges in our system may ultimately decide and impose criminal sentences, the decision of whether to employ the coercive power of the state against a wrongdoer remains where it was in the earlier taxonomies: with the executive.[49]

The "executive power" that is vested in the President thus includes significant criminal justice responsibilities, which are the core components of the executive power, though not its sum total.[50] Presidents often carry out these responsibilities based on political values that may differ from other presidents. Notably, the President is specifically commanded to "take care that the laws be faithfully executed."[51] But let us consider Take Care Clause politics. After all, the President performs this duty, in significant part, through a system of lawyers at the Justice Department, among them federal prosecutors.[52] Presidents appoint the enforcers of the criminal law: the Attorney General, United States Attorneys, and the Assistant Attorneys General who head the relevant divisions of the Justice Department, including the Criminal Division and other divisions that have a hand in

44 U.S. CONST. art. II, § 1, cl. 1; *see also* CALABRESI & YOO, *supra* note 41, at 430–31.
45 *See* HARVEY C. MANSFIELD JR., TAMING THE PRINCE 102-07, 130-35 (1993).
46 *Id.* at 290.
47 U.S. C.ONST art. III, § 1.
48 MANSFIELD, *supra* note 45, at 216.
49 S*ee* Prakash, *supra* note 41, at 539.
50 *Id.* at 540.
51 *See* U.S. CONST. art. II, § 3; *see also* Prakash, *Chief Prosecutor*, *supra* note 41, at 539–40.
52 *See* Prakash, *supra* note 41, at 539–40.

criminal prosecution. Those appointments may well reflect the enforcement preferences of the President: for example, a United States Attorney who shares the President's desire for rigorous drug enforcement, or an Attorney General who is committed to prosecuting political corruption or corporate criminality or criminal offenses related to civil rights. To highlight this point with just one historical example, President Reagan "consistently named to key positions in the department individuals committed to his *political* objectives."[53] These appointees then "effected important changes in the status quo that illustrate how an administrative presidency is effectively pursued through a particular department."[54]

In addition, other contemporary practices within the Justice Department reveal that the exercise of prosecutorial discretion is affected by a President's political preferences.[55] Enforcement priorities may shift depending upon the political viewpoint of the President.[56] One President may be an advocate for greater attention and resources devoted to violent crimes and terrorism, while the next President may prefer that greater prosecutorial resources be shifted to environmental crimes, financial crimes, or public corruption. Examples are numerous, but a few will suffice here. For one, as Eastland again explains of the Reagan Justice Department, obscenity prosecutions were rare until Reagan's second term, when prosecutions increased substantially.[57] The increase "was a policy change, reflecting the President's concerns," resulting in the creation of a new litigating unit in the Criminal Division to handle obscenity offenses.[58] President Obama recently offered another high-profile example when, in the course of his January 2012 State of the Union address, he indicated that he was requesting that the Attorney General form a special unit of federal prosecutors to investigate and prosecute criminal law violations arising from the mortgage lending scandal.[59] These political preferences also become manifest in the legislative and policy choices that the Department makes, such as when the Department's Office of Legal Policy advocates new legislation, including criminal legislation, that is often a product of the President's political agenda in relevant areas of enforcement.[60] Even when

53 *See* EASTLAND, *supra* note 2, at 155 (emphasis added).

54 *Id.*

55 *See id.* at 155–56 (explaining the issue of segregation in school presented "an opportunity for the Justice Department to replace an inherited law enforcement practice with one reflecting the new President's views").

56 *See id.*

57 *Id.* at 157–58.

58 *Id.* at 158. The unit is now known as the Child Exploitation and Obscenity Section (CEOS). *See* The United States Department of Justice, *Exploitation & Obscenity Section*, *available at* http://www.justice.gov/criminal/ceos/.

59 *See* Barack H. Obama, President of the U.S., Remarks by the President in State of the Union Address (Jan. 24, 2012), http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address.

60 *See* 28 C.F.R. § 0.23 (2011) (detailing duties of the OLP, one of which is to work to "secure enactment" of legislative and policy goals of the Department and Administration); *see also* Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO.

enforcing the Principles of Federal Prosecution found in the *United States Attorneys' Manual*,[61] the Justice Department's enforcement priorities inform prosecutorial decision-making, and again, those priorities often may reflect the political preferences of the White House.[62] As the commentary to the provisions for "substantial federal interest" indicate, the federal prosecutor should consider national investigative and enforcement priorities when exercising his or her discretion about whether to bring a charge.[63] Faithfully executing the law within the arena of prosecutorial discretion thus includes what Jack Goldsmith and John Manning have called the President's "completion power," because the exercise of prosecutorial discretion includes "policy determinations about how best to implement"—to complete—a statutory program of criminal law.[64]

Moreover, it is important to remember that prosecutorial discretion is as much *a check* itself as it is *something to be* checked. The power to decide whether and what charges to bring can just as well function as a way of counteracting a Congress that has drafted criminal legislation poorly, unconstitutionally, or overzealously.[65] Prosecutorial discretion can thus serve as a check on the politics that can produce problematic criminal laws.[66] This kind of decision-making inheres in the obligation to preserve, protect, and defend the Constitution, to faithfully execute the Office of the President, *and* take care that the laws are faithfully executed—complementary powers that not only belong constitutionally to the *President* but that coalesce in the world of controlling prosecutorial discretion.[67] Faithful execution, after all, requires the President to take some measure of the validity of a law he is being compelled to execute, including the power—again when combined with his obligation to the Constitution and to his office—to deliberate upon the constitutionality of the laws and refuse to execute those that contravene the Constitution.[68] For

IMMIGR. L.J. 271, 293 n.121 (2002) (noting that OLP "is the focal point for developing Justice Department initiatives that advance the President's agenda").

61 *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-27.001 (1997).

62 *See* Mary Kreiner Ramirez, *Prioritizing Justice: Combating Corporate Crime From Task Force to Top Priority*, 93 MARQ. L. REV. 971, 982 (2010) (explaining that "[t]he U.S. Attorneys are appointed by and serve at the discretion of the President of the United States"); *see also* Brian A. Cromer, *Prosecutorial Indiscretion and the United States Congress: Expanding the Jurisdiction of the Independent Counsel*, 77 KY. L.J. 923, 941 (1989) (explaining that "federal prosecutors cannot be depended upon to maintain an attitude of independence in contravention of the President's wishes.").

63 U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-27.230.

64 Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2293 (2006).

65 The decision not to prosecute has not been subject to particularly rigorous examination in the criminal justice scholarship. But for an excellent recent discussion of discretion not to prosecute, *see* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243 (2011). *See generally* Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221 (2003) (empirically examining decisions not to prosecute).

66 *See infra* Part B.

67 *See* Saikrishna Bangladore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO L.J. 1613, 1616 (2008).

68 *See* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199,

example, suppose Congress passed, and a prior President signed into law, legislation making X a crime, even though that legislation is clearly unconstitutional. Can Congress demand that it be enforced anyway? Could Congress enact a provision demanding that prosecutors seek indictments pursuant to the legislation? My point here is that it would make little sense to invest a President with power to evaluate the constitutionality of the laws if he cannot authoritatively order his executive branch subordinates not to enforce those laws that he deems to be unconstitutional.[69]

Constitutionally, the President also has the sole power to grant pardons and reprieves, a key ingredient of the criminal justice presidency and one so broad that it is constitutionally limited only in two minor ways: presidents can employ it only for offenses against the United States and not in cases of impeachment.[70] While the breadth of the power means that it may be subject to political abuses,[71] it can also be used to further a President's legitimate political goals or to reflect a President's moral values expressed politically.[72] The President can grant clemency to persons convicted of crimes that the President views as unjust or unconstitutional, or whose sentences are inconsistent with a President's view of just and fair sentencing policy.[73] This, too, represents a meaningful control over the work of federal prosecutors by affirmatively undoing the legal consequences of the conviction or punishment for which the prosecutor's office had fought and invested considerable resources. Of course, as is often the case, the President will exercise his judgment as to the pardon or reprieve in favor of an individual who was prosecuted under a previous administration, thus allowing the President to give conclusive effect to his political differences with his predecessor.

200 (2004); Prakash, *supra* note 67, at 1616–17; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1280 (1996).

69 Sai Prakash has argued that this is actually *required*. *See* Prakash, *supra* note 67, at 1616–17.

70 *See* U.S. CONST. art. II, § 2, cl. 1; *see also* THE FEDERALIST NO. 74, at 447–48 (Alexander Hamilton) (explaining that "without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel" and that this power is best placed in the hands of a single man, "a more eligible dispenser of the mercy of the government than a body of men").

71 *See* Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 285 (1993); *see also* Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1666–69 (2001) (describing controversies surrounding pardons granted by President Clinton during his final days in office); Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185 (2003) (examining the Clinton pardons from a process-based perspective).

72 *See* Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 280 (2010) (explaining that "the founding generation understood the Pardon Clause to mean that when an offense properly falls within its terms, the decision whether to grant clemency would be subject largely to the constraints of the political process and the President's own personal sense of moral integrity.").

73 *See* Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1169 (2010). Moore, *supra* note 71, at 286–88.

Finally, the politics of federal prosecution can emerge in the context of presidential rhetoric.[74] Of course, recent presidential campaigns have rarely focused upon issues of crime and punishment. With a recent decline in crime rates,[75] and national politics focused on either economic conditions or international terrorism, recent sitting presidents also have not made criminal justice policy a regular talking point. This has been true despite the criminal justice presidency I have described here, in which criminal law enforcement and administration are among the chief duties of the head of the executive branch. But as the presidency has become increasingly rhetorical,[76] and as presidents make their case for political preferences to an ever-growing swath of the rhetoric-consuming public (not simply in person, but now electronically in more diverse ways than ever before), presidents can benefit politically from talking more about criminal justice matters. It is preferable that political rhetoric about prosecutorial preferences occur in the context of the President's formal institutional responsibilities, such as in an address to Congress, in signing or vetoing criminal legislation, or in formally recommending criminal legislation.[77] But regardless of the political or institutional context in which the rhetoric is voiced, the expression of such views in the context of political rallies, campaigns, or other public speeches can produce and inform the kinds of policies that prosecutors will be asked to pursue on behalf of the President.

A strong case thus exists for a criminal justice presidency that inheres in the constitutional presidency and that, in practice, functions not simply as a political control over federal prosecutors but also as a way to view the impact of ordinary politics upon the everyday work of prosecutors. Even if prosecutors and other criminal justice professionals in the Government do not view themselves as carrying out partisan objectives, they should nevertheless understand that the nature of their work is determined in substantial part by the political sensibilities of the President under whom they serve.[78] This arrangement surely seems inconsistent with the political independence theme that emerged after Watergate and that arises from time to time in modern politics. Yet it is one that the constitutional system embraces.

74 *See* Obama, *supra* note 59 (illustrating President Obama's discussion of prosecution in his State of the Union Address); *see also* JEFFREY K. TULIS, REVISING THE RHETORICAL PRESIDENCY, *IN* BEYOND THE RHETORICAL PRESIDENCY 3 (Martin J. Medhurst ed., 1996).

75 Preliminary Semiannual Uniform Crime Report, Jan.-June 2011, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/preliminary-annual-ucr-jan-jun-2011 (last visited Mar. 31, 2011); *see also Falling Crime Rates Challenge Long-Held Beliefs*, NPR (Jan. 3, 2012), http://www.npr.org/2010/01/03/144627627/falling-crime-rates-challenge-long-held-beliefs.

76 *See* TULIS, *supra* note 10, at 4.

77 *Id*. at 13.

78 *See* Cromer, *supra* note 62; *see generally* Prakash, *supra* note 41.

II. CONSTITUTIONAL AND CRIMINAL JUSTICE POLITICS IN THE CONGRESS

Even as there are persuasive arguments that existing constitutional formalities provide for strong presidential controls over the federal prosecutorial regime, this does not make Congress impotent as to that regime. It would be unwise to overlook the controls on the work of prosecutors and on the criminal justice presidency that derive from Congress' institutional powers—and that also can be deeply political. Congress usually empowers the criminal justice presidency and the prosecutorial regime that resides in it.[79] But Congress need not always do so, and there is evidence that greater constraints are worth pursuing in light of the scope of federal criminal law and the vast authority of modern federal prosecutors.

The very creation of criminal law by legislation is a political act.[80] The motivations for creating and defining crime may not be, indeed hardly ever are, distinctly *partisan*.[81] But criminal legislation, as much as any other kind of legislation, is motivated by preferences about good social order, justice, and moral desert–preferences that are often subject to dispute among reasonable people.[82] Beyond a small core of federal crimes, there are very few crimes that Congress has created which are universally accepted as legitimate.[83] Consequently, choosing whether to make something a crime means that the lawmaker must take sides on these disputes about preferences, and this creates the likelihood that he will, at least in some measure, consider his own potential political gain.[84] In modern parlance, "tough on crime" beats "soft on crime",[85] and *that* political factor, as much as anything, helps to explain the current size of federal criminal law.[86] And as federal criminal law demonstrates, this political act of crime-creation has substantial consequences for the exercise of prosecutorial discretion.[87]

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79 *See* Krent, *supra* note 40, at 282–85; *see also* Jack M. Beerman, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 158 (2006) (explaining that "Congress is intimately involved in the execution of the law, both formally through legislative and other controls on the executive branch and informally through oversight, investigations, direct contacts, and other political methods").

80 *See generally* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006).

81 *Id.*

82 For thoughts on the factors related to the aims of the criminal law that influence legislative decision-making, see generally Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

83 *See id.* at 475.

84 *See* Stuntz, *supra* note 80, at 850.

85 *See* Broughton, *supra* note 16, at 470–71.

86 *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn From the States*, 109 MICH. L. REV. 519, 523–24 (2011).

87 Although he does not deal exclusively with federal prosecutors or federal legislative politics, Bill Stuntz offers a keen analysis of the relationship between politics constitutional law, and criminal law enforcement. Among other insights, Stuntz argued that the constitutional law of criminal procedure had the effect of making political discourse, and the resulting substantive criminal law, "too punitive, racially divisive, and insufficiently attentive to the liberty and autonomy interests that constitutional law allegedly protects." Stuntz, *supra* note 80, at 850. In his other writing, however, Stuntz also explains

As we have seen, after all, the story of contemporary federal criminal law is a story of continued expansion.[88] More criminal laws means more potential prosecutions, which means more federal resources devoted to the exercise of prosecutorial power. It means greater overlap with state crimes, so that federal prosecutors are challenged more often to decide whether, consistent with the Department's *Petite* Policy, to prosecute a federal crime after a completed or contemplated state prosecution arising out of the same acts or transactions.[89] This results in greater pressure on the Justice Department, when enforcing internal policies, to determine which interests are both "substantial" and "federal," and whether they are worth pursuing through criminal prosecution.[90] And as the menu expands, (and with the elements in the Government's favor), with the Government pursuing more prosecutions, historical practice demonstrates that an overwhelming number of cases will result in guilty pleas.[91] Ever harsher punishments then aggrandize the phenomenon. That is, in many cases, even though judges hand down the ultimate sentences, prosecutors can persuasively recommend punishments that are harsh, and the *availability* of such harsh sentences only enhances the power to leverage pleas.[92] Prosecutorial discretion thus metastasizes along with the increased scope of the criminal law. Although the judiciary occasionally steps in to police procedural misconduct by prosecutors,[93] or to either strike down or narrow the reach of a substantive criminal law,[94] courts generally do not police prosecutorial discretion.[95] The separation of powers provides ample reason not to do so. But as a result, this arrangement inevitably exerts pressure on political actors—members of Congress, who are the creators—to exert *some* control

why there are particular kinds of political pressures that apply to federal lawmakers. *See* Stuntz, *Pathological Politics*, *supra* note 17, at 545–49.

88 *See* Stuntz, *Pathological Politics*, *supra* note 17, at 508.

89 *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-2.031 (2007).

90 *Id.*

91 *See* Barkow, *supra* note 18, at 879; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 56 (1997).

92 *See* Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717–18 (2006).

93 See, for example, the district court's order in the corruption prosecution of former Senator Ted Stevens. United States v. Stevens, 715 F.Supp. 2d 1 (D.D.C. 2009); *In re* Special Proceedings, 2011 WL 5828550 (D.D.C. 2011), as well as the district court's order requiring the government to pay $600,000 in defense legal expenses as a result of prosecutorial misconduct in the Southern District of Florida. United States v. Shaygan, 661 F. Supp. 2d 1289, 1293 (S.D. Fla. 2009).

94 *See, e.g.,* United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (striking down on First Amendment grounds federal criminal law punishing depictions of animal cruelty); Carr v. United States, 130 S. Ct. 2229, 2232–33 (2010) (holding that 18 U.S.C. § 2250(a) (2006) applies only to present or future travel in interstate commerce, not to travel that pre-dated the law's enactment); Abuelhawa v. United States, 129 S. Ct. 2102, 2107–08 (2009) (holding that Congress did not intend 21 U.S.C. § 843(b) (2006), which makes it a felony to use a communication facility to facilitate certain federal drug crimes, to apply to a person who uses a cell phone to obtain possession of a controlled substance in an amount that would only constitute a misdemeanor); United States v. Lopez, 514 U.S. 549, 551 (1995) (holding Gun Free School Zones Act unconstitutional as violation of Commerce Clause).

95 *See* Barkow, *supra* note 18, at 869.

over the law and the process, not simply to empower prosecutors but also to combat prosecutorial overreaching.

The problem, however, is that Congress rarely does so.[96] Of course, the conventional—and I think largely accurate—explanation for this is, in fact, a political one. Legislators see no political upside to reducing the scope of the criminal law or in advocating reduced punishments for convicted criminals.[97] Again, the "tough on crime" label trumps all else.

Examples abound, but political crimes offer a useful model for considering the matter. Most of the attention scholars have given over the past two decades to the Ethics in Government Act of 1978 deals with the independent counsel.[98] But that law also added new criminal provisions related to lobbying and financial disclosure by public officials and federal employees.[99] Many prosecutions though, do not even rely on criminal laws specific to *political* corruption.[100] Some of the most popular items on the prosecution's menu for fighting public corruption include the Racketeer Influenced and Corrupt Organizations Act (RICO);[101] the Hobbs Act;[102] mail and wire fraud,[103] and honest services fraud;[104] and finally—what is perhaps the new "darling" of the federal prosecutor[105]—the false statements statute.[106]

Yet along with this expanded menu has come the enhanced danger of prosecutorial overreaching.[107] And this danger arises whenever the Congress enacts poorly-crafted legislation, such as legislation that is vague or ambiguous or unclear as to the mental element that the government must prove. In fact, to provide just one recent example, the proclivity for

96 *Id.; see also* Richman & Stuntz, *supra* note 16, at 610–11 (describing the increased demand for federal criminal jurisdiction among agencies and observing that "Congress has been all too happy to meet that demand, especially in the past generation"). Professor Krent also argues that the modern Congress has, as a matter of practice, simply acquiesced in the executive's efforts to control law enforcement, and that this practice "masks the historical conflicts [between Congress and the executive] that have taken place." Krent, *supra* note 40, at 311.

97 Barkow, *supra* note 18, at 869; Richman & Stuntz, *supra* note 16, at 610; Broughton, *supra* note 16, at 470–72.

98 The literature on the independent counsel provisions is extensive. For thoughtful examples, see Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 463-65 (1996); *see also* Christopher H. Schroeder, *Putting Law and Politics in the Right Places – Reforming the Independent Counsel Statute*, 62 LAW & CONTEMP. PROBS. 163, 169 (1999).

99 *See, e.g.*, 18 U.S.C. § 207(c) (2006) (criminalizing certain communications between former government employees and the offices that employed them).

100 *See generally* 18 U.S.C. § 1961 (2006); 18 U.S.C. § 1951 (2006); 18 U.S.C. § 1341 (2006); 18 U.S.C. § 1343 (2006); 18 U.S.C. § 1346 (2006).

101 18 U.S.C. § 1961 (2006).

102 18 U.S.C. § 1951 (2006) (criminalizing robbery or extortion, including extortion under color of official right, that in any degree obstructs, delays, or affects commerce).

103 18 U.S.C. §§ 1341–1343 (2006).

104 18 U.S.C. § 346 (2006).

105 *See* Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) (stating that conspiracy is "that darling of the modern prosecutor's nursery").

106 18 U.S.C.A. § 1001 (West 2006).

107 *See* Barkow, *supra* note 18, at 874, 876–77.

overreaching had become so strong among federal prosecutors in honest services cases that the Supreme Court had to step in to narrow that statute's application in cases of public corruption.[108] In light of the (too) often poorly crafted menu that Congress has created and expanded, and in light of the otherwise anemic limits on discretion, it appears as though the most effective way to restrict the use of discretion without implicating the separation of powers would be to simply remove an item from the menu altogether.

The very political arrangements that produce criminal sanctions, then, are also the same ones that produce the risks and realities of oversized prosecutorial power. But just as Congress has used its institutional tools to (usually) empower the prosecutor's office, Congress also has the institutional tools to constrain it, even outside of the context of repeal or code reform.[109]

As I have argued elsewhere, Congress could use its investigative and oversight powers more aggressively,[110] to examine, for example, presidential enforcement priorities and their consistency with congressional priorities, or the exercise of discretion in specific cases that have been adjudicated. In 2009 and 2010, a House Judiciary subcommittee held hearings on over-criminalization and over-federalization, at which members expressed their concerns about the state of federal criminal law.[111] In addition, following criticisms that arose at the 2009 and 2010 hearings concerning the current scope of federal criminal law, the House is currently considering legislation—H.R. 1823—that would consolidate all federal crimes into Title 18 and eliminate overlapping and duplicative crimes.[112] And both the House and Senate have conducted oversight hearings on the application of the federal death penalty to examine the factors that drive the Justice Department's review, and the Attorney General's decision-making, in potential capital prosecutions.[113] These moves presumably reflect considered political judgments about the scope of federal criminal justice power and the uses and functions of the criminal law.

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108 *See* Skilling v. United States, 130 S. Ct. 2896, 2931–32 (2010) (holding that the honest services fraud statute covers only bribery and kickback schemes, not mere undisclosed self-dealing).

109 *See infra* notes 115, 117 (citing statutes constraining prosecutorial discretion).

110 *See* Broughton, *supra* note 16, at 479–99.

111 *See Over-Criminalization of Conduct/Over-Federalization of Criminal Law, Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary*, 111th Cong. (2009); *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions, Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary*, 111th Cong. (2010). For a fuller description of these hearings, see Broughton, *supra* note 16, at 473–79.

112 *See* Criminal Code Modernization and Simplification Act of 2011, H.R. 1823, 112th Cong. (2012).

113 *See, e.g., Oversight of the Federal Death Penalty, Hearing Before the Senate Subcomm. on the Constitution, Senate Comm. on the Judiciary*, 110th Cong., June 27, 2007; *Death Penalty Reform Act of 2006, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary*, 109th Cong. (2006). I note, in the interest of disclosure, that I assisted Justice Department leaders in preparing for each of these hearings during my time at the Justice Department.

Also, in a few instances, Congress has attempted to use the substantive statutory criminal law to constrain the exercise of prosecutorial discretion.[114] For example, the contempt of Congress statute requires the United States Attorney to convene a grand jury once the relevant chamber has approved the contempt citation.[115] In a more recent example, when Congress passed the new hate crimes legislation in 2009,[116] it included a provision which prohibits a federal prosecutor from bringing a prosecution pursuant to the new law unless the Attorney General has certified that the State lacks jurisdiction; the State has requested that the United States assume jurisdiction; the verdict or sentence in State court has left the federal interest in bias-motivated violence "demonstrably unvindicated;" or a federal prosecution is "in the public interest and necessary to secure substantial justice."[117] This provision is essentially an effort to codify the Justice Department's internal policies on prosecuting cases where there is the potential for a dual state prosecution, but now (at least as to hate crimes cases under this new law) those policies have the force of a congressional command, rather than internal policy that the Department could change at any time without congressional approval.

Congress has also successfully asserted its prerogatives to protect itself under the Speech or Debate Clause,[118] which, although limited to acts that are part of the "due functioning" of the legislative branch,[119] is an explicit method of limiting prosecutorial power. It favors Congress in a conflict between the legislative institution and the prosecutorial apparatus of the executive, which may be politically hostile to an individual member or to Congress more broadly.[120] Most recently, in *United States v. Rayburn House Office Building*, the United States Court of Appeals for the District of Columbia Circuit found that the FBI violated the legislative privilege when it searched Representative William Jefferson's Capitol Hill office and seized materials that were considered "legislative" for purposes of the Speech or Debate Clause.[121] This had the effect of preventing prosecutors from both accessing and using the protected materials, though the prosecution of Representative Jefferson was ultimately successful anyway on the strength of other, independent evidence.[122] Note that by protecting the "legislative" acts of speech or debate, which the Court has construed

114 *See infra* notes 115, 117 (citing statutes that limit or mandate prosecutorial action).

115 2 U.S.C.A. §§ 192, 194 (West 2005).

116 *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, *codified at* 18 U.S.C.A. § 249 (West 2009).

117 18 U.S.C.A. § 249(b)(1)(A–D) (West 2005).

118 *See* U.S. CONST. art I, § 6, cl. 1.

119 United States v. Brewster, 408 U.S. 501, 513 (1972); *see also* Eastland v. U.S. Serviceman's Fund, 421 U.S. 491, 503 (1975) (reaffirming that the Clause extends to members and their aides acting within the "legitimate legislative sphere").

120 *See* United States v. Johnson, 383 U.S. 169, 179 (1966).

121 U.S. v. Rayburn House Office Bldg., 497 F.3d 654, 654 (D.C. Cir. 2007).

122 David Stout, *Ex-Rep. Jefferson Convicted in Bribery Scheme*, N.Y. TIMES, Aug. 6, 2009, at A14.

broadly to effectuate its purpose,[123] and by protecting not only Representatives and Senators but also their aides,[124] the Clause has the practical effect of favoring politics (as practiced within certain institutional boundaries) by placing a fair amount of ordinary politics beyond prosecutorial reach.

And finally, the House and Senate retain the power of impeachment and conviction, respectively.[125] One of the important lessons of Watergate was that the existing constitutional scheme actually provided a political mechanism—impeachment—for dealing with the abuses of the Nixon White House. Similarly, if Congress determines that the President is politicizing criminal prosecution in ways that obstruct or threaten the integrity of the American criminal justice system, it always has the mechanism of impeachment.[126] And this mechanism is as much a political act as it is a legal one.[127]

Of course, these kinds of institutional controls on the Justice Department will often raise separation of powers concerns. For example, even when Congress attempts to use its investigative and oversight powers against the Justice Department, it is not uncommon for the Department officials to assert some privilege that would protect executive branch information from disclosure.[128] And it is debatable whether Congress can use the contempt statute to prosecute a high-ranking White House aide for refusing to answer questions before a congressional committee, even where that committee is investigating possible corruption of the federal prosecutorial regime.[129] Moreover, if criminal prosecution is a core executive function subject to exclusive control by the President, then although Congress can define the criminal law and oversee the executive's program of enforcement, any effort to direct the exercise of prosecutorial discretion would violate the separation of powers. This theory would raise some constitutional doubt regarding the charging directives in, for example, the new hate crimes law. But the formal arrangements that supply these various powers contemplate conflict; and conflict between the political

123 *See* Doe v. McMillan, 412 U.S. 306 (1973). *But see* Hutchison v. Proxmire, 443 U.S. 111 (1979) (holding that publication of allegedly defamatory material in Senator's press release and newsletters was not protected by Speech or Debate Clause).

124 *See* Gravel v. United States, 408 U.S. 606, 616–17 (1972) (holding that the day-to-day work of congressional aides "is so critical to the Members' performance that they must be treated as the latter's alter egos").

125 *See* U.S. CONST. art. I, §§ 2 cl. 5, 3 cl. 6.

126 U.S. CONST. art. I, § 2, cl. 5; *cf.* CALABRESI & YOO, *supra* note 41, at 414 (stating that a "President or an attorney general who uses his or her power of prosecution for political ends has committed a high crime and misdemeanor").

127 *See* JEFFREY K. TULIS, *Impeachment in the Constitutional Order*, *in* THE CONSTITUTIONAL PRESIDENCY 229–46 (Joseph M. Bessette & Jeffrey K. Tulis eds., 2009).

128 *See* Broughton, *supra* note 16, at 489. For additional examples, see LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE (2004).

129 *See* Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 564–65 (1991).

branches is good.[130] And often these conflicts—like those involving executive privilege, for example, or application of the contempt statute to White House officials—are resolved not by legal doctrine or court intervention, but by the forces of political muscle and political accommodation.[131]

CONCLUSION

This short essay has, of course, only skimmed the surface of some important issues of constitutional and ordinary politics related to the control of the federal prosecutorial regime at a time when the federal criminal law appears, often intolerably, super-sized. But the essay demonstrates that the regime is one that both of the political branches have an interest in controlling and that existing institutional arrangements are adequate for doing so, even when—in fact, particularly when—those arrangements may often place political forces and preferences at loggerheads.

Of course, one response to this suggestion is—and has been—to give ultimate control neither to Congress nor to the President but to affirmatively make the Justice Department independent of each.[132] We have seen numerous proposals of this kind since Watergate, from Senator Sam Ervin's initial proposal to make the Justice Department an independent agency,[133] to Garrett Epps' more recent argument for making the Attorney General an independent elected official.[134] Yet those proposals have not gained wide public acceptance or even wide congressional support.[135] As Nancy Baker has argued, a close relationship between the President and the leadership at the Justice Department may be essential for developing sound legal policy and for ensuring political accountability.[136] And as Lithwick and Goldsmith explain, these proposals present their own set of dangers, which we could avoid by allowing

130 *See* Broughton, *supra* note 16, at 496–98.

131 *See, e.g.*, FISHER, *supra* note 130, at 258; Todd D. Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 77 (2011); Dawn Johnsen, *Executive Privilege Since* United States v. Nixon: *Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1127 (1999); Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 719 (1993); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 462 (1987).

132 *See generally Removing Politics*, *supra* note 29, at 1.

133 *Id.* at 3; *see also* CLAYTON, *supra* note 29, at 236 (arguing that the Justice Department has become "the primary and most effective weapon in the quest to aggrandize presidential power" and this is reason for reconsidering the proposal to make the Department politically independent).

134 *See* Garrett Epps, *Why We Should Make Attorney General an Elective Office*, SALON.COM, Mar. 9, 2007, http://www.salon.com/2007/03/09/attorney_general.

135 It is notable, however, that following the 2007 United States Attorneys firings scandal, President Bush signed into law new legislation to change the procedures by which interim United States Attorneys are appointed and serve. *See* Preserving United States Attorney Independence Act of 2007, Pub. L. No. 110-34, § 2, 121 Stat. 224.

136 NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE 170–78 (1992).

"Congress, the press, and the people to be the check here. . . . If politics turns out to be the illness here, politics will also prove the cure."[137] I have attempted to follow these sensible critiques of a politics-free prosecutorial regime with some elaboration: existing constitutional arrangements—including a criminal justice presidency and a Congress that serves as the starting point for federal criminal law—contemplate healthy politics in this regime, and those same arrangements can adequately oversee, and combat excesses and improprieties in, prosecutorial decision-making. These arrangements function best, however, when the political branches take seriously the assertion of their own prerogatives, not on behalf of party but of institution.

None of this is to say that criminal law enforcement should be politicized, in the sense of permitting party affiliation or private political gain to animate prosecutorial decision-making. The Justice Department, the Attorney General, and the Bush Administration more broadly were surely sullied by the United States Attorney firings scandal, just as the Obama Justice Department may well suffer from the ongoing criticism that it has permitted partisanship to trump evenhanded law enforcement.[138] There remains much to be said for preserving both public confidence in the politically impartial administration of criminal justice *and* the reputation of federal prosecutors as devotees of the rule of law.[139] But the effort to divorce criminal law and its enforcement entirely from politics is a fool's errand, and unwise. And perhaps this is as it should be. The Constitution establishes a workable system in which political actors influence the structure and functioning of criminal law enforcement.[140] While it does so by creating a cooperative arrangement whereby executive actors enforce the law that legislators pass, it also does so through institutional arrangements that pit political forces against one another.[141] And that, if anything, is the real legal legacy of Watergate: institutions with separate constitutional functions and constitutional identities robustly asserting their respective prerogatives to prevent encroachments and ensure political accountability. This, I suggest, is a legacy worth embracing, as it embodies the American rule of law.

137 Lithwick & Goldsmith, *supra* note 34.

138 *See* CHAIRMAN'S REPORT OF APRIL 30, 2012, *supra* note 33, at 1, 15.

139 *See, e.g.*, OFFICE OF INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, 325–26 (2008) (finding that partisan politics were an important factor in the firings).

140 *See* U.S. CONST. art. I, § 2, cl. 5.

141 *See e.g.*, *Removing Politics*, *supra* note 29, at 1.

Skirting the Ethical Line: The Quandary of Online Legal Forms

Lindzey Schindler[*]

"*Yes, the law allows you to prepare your own Will. The law also allows you to perform surgery on yourself. However, neither process is recommended*."[1]

INTRODUCTION

Technology is advancing and its progress has not left the legal profession unaffected.[2] Websites are one of the most effective means of reaching the public at large, so much so that it is more common for a law firm to have a website than not to have one—firms without a website are at an incredible marketing disadvantage as compared to those firms that have one.[3] In recent years, however, lawyers' use of websites has gone beyond making a firm's presence known—their websites now allow the public to generate their own legal documents by simply filling out a standardized form online, resulting in saved expenses, but also creating the potential for future trouble.[4]

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1 *See* Roberts & Roberts, LLP, *Last Will and Testament*, http://www.robertslegalfirm.com/estwills.html (last viewed June 16, 2012).

2 Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPIAC PROB. L.J. 376, 376–77 (2011) (observing that software developers have started to offer online services, referred to as "Digital Estate Planning," to assist people in their post-mortem needs by offering such varied services as notifying the deceased's online contacts of the person's passing and providing an online location for grieving, and offering an online storage location for the deceased's information including passwords, account information, pictures, music and documents to better enable designated recipients of that information to effectively close out and disseminate the deceased's online assets).

3 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (discussing the "ethical obligations that lawyers should address in considering the content and features of their websites").

4 Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27, 27 (2011).

One of the best-publicized websites that allows consumers the option to create their own legal documents at "affordable" rates is LegalZoom.com ("LegalZoom").[5] Co-founded in 2001 by Robert Shapiro,[6] LegalZoom provides online services to all fifty states and guarantees 100% satisfaction on all of its trial-tested forms, which range from business incorporations and copyrights to divorces and wills and trusts, with much more in between.[7] Despite the satisfaction guarantee and comprehensive legal disclaimer,[8] LegalZoom has been named in class action lawsuits initiated by private attorneys who contend that LegalZoom's website provides services amounting to the unauthorized practice of law.[9]

In 1999, a federal district court in Texas similarly dealt with an issue of potential unauthorized practice of law in regard to Parsons Technology, Inc.'s Quicken Family Lawyer software—software that contained over one hundred legal forms for at-home use.[10] The court held that the software constituted the unauthorized practice of law despite its caution that the information provided was not individualized, and that personal judgment should be utilized in deciding whether to consult a lawyer.[11] However, the Texas Legislature soon overturned the court's decision when it passed a statute declaring that as long as a website, book, or software program "clearly and conspicuously" stated that it was not a substitute for the advice of a lawyer, the product would not be included within the meaning of the "practice of law;"[12] therefore, neither its production, distribution, nor use could be said to be an unauthorized practice of law.[13] Following this legislative enactment, the Fifth Circuit Court of Appeals vacated the district court's injunction on the Quicken Family Lawyer software.[14]

Not all states agree with Texas on the definition of the practice of law,[15] which is one reason LegalZoom remains susceptible to the class

5 *See LegalZoom About Us*, LEGALZOOM.COM, http://www.legalzoom.com/about-us (last visited June 16, 2012).

6 Robert Shapiro is an internationally renowned litigator with more than thirty years of criminal litigation practice, in which he has represented such clients as Occidental Petroleum, Wynn Resorts, and, most famously, O.J. Simpson. *See Robert Shapiro Biography*, GLASERWEIL.COM, http://www.glaserweil.com/pdf/bio.php?url=robert-shapiro-attorney-lawyer-law-los-angeles-california (last visited June 16, 2012).

7 *See* LEGALZOOM.COM, http://www.legalzoom.com (last visited June 16, 2012). This Comment will analyze only the wills and trusts services provided by LegalZoom.

8 *See LegalZoom Disclaimer*, LEGALZOOM.COM, http://www.legalzoom.com/disclaimer.html (last visited June 16, 2012).

9 Richard Acello, *We the Pauper*, A.B.A. J., May 1, 2010, *available at* http://www.abajournal.com/magazine/article/we_the_pauper/.

10 Unauthorized Practice of Law Comm. v. Parsons Tech., 1999 WL 47235 *1–3 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

11 *Id*. at *1, *6.

12 TEX. GOV'T CODE ANN. § 81.101 (2011).

13 *Id*.

14 Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999).

15 See Press Release, Washington Attorney General, DIY Legal Forms Aren't a Substitute for an Attorney (Sept. 16, 2010), www.atg.wa.gov/

action lawsuits it currently faces.[16] It is also possible that lawyers have tried to challenge LegalZoom based on a desire to protect the public from potentially damaging legal products. [17] But, perhaps more realistically, attorneys with specialized practices—such as estate planning—may want to protect their practices against more affordable competitors, namely purveyors of online legal forms.[18] This Comment addresses whether online, do-it-yourself legal services comply with today's ethical guidelines, or if today's ethical rules even have an answer to this quasi-practice of law.

Part I of this Comment summarizes the practices of online, do-it-yourself legal products—which are available to the general public—and discusses in particular the wills and trusts services offered by LegalZoom. Part II considers the recent ABA Formal Opinion 10-457 regarding the ethical use of websites, and the relevant Model Rules, as they apply to these types of online do-it-yourself legal services. Part III proposes legislation to deal with the discrepancies between the online practice of law and the concerns of laypeople and lawyers alike.

I. DO-IT-YOURSELF LEGAL DOCUMENTS: THE DEVIL IS IN THE DISCLAIMER

Despite the materialistic world we live in, when a person dies, none of their physical possessions go with them (save those with which they may be buried). In the first half of the twenty-first century alone, it is estimated that somewhere in the range of $10–41 trillion will be inherited in the United States; thus, it is not surprising that societies ranging from ancient times to the present have developed rules and regulations for such

pressrelease.aspx?&id=26466 [hereinafter Press Release]. The Washington State Attorney General investigated LegalZoom regarding the unauthorized practice of law, but to avoid trial, LegalZoom entered into an "Assurance of Discontinuance" with the state which, while not a finding of fact or admission to violation or commission of any act, constitutes prima facie evidence of a violation should the Discontinuance be breached. The agreement prohibits the company from:

> 1. Comparing the costs of its 'self help' products . . . with those provided by an attorney without clearly disclosing to consumers that LegalZoom is not a law firm. 2. Misrepresenting the costs, complexity and time required to complete a probate in Washington. 3. Misrepresenting the benefits or disadvantages of any estate planning document as compared to any estate distribution document in Washington. 4. Engaging in the unauthorized practice of law. 5. Failing to offer estate planning forms that conform to Washington law. 6. Failing to have a Washington licensed attorney review all self-help estate planning forms offered to Washington consumers. 7. Failing to clearly and conspicuously disclose that communications between the company and consumers are not protected by the attorney-client privilege.

Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27, 31–32 (2011).

16 LegalZoom is currently facing complaints from North Carolina, Alabama, and Missouri. Bill Draper, *Missouri Lawyers Challenge LegalZoom's Service*, ASSOCIATED PRESS, July 31, 2011, *available at* http://www.newstribune.com/news/2011/jul/31/missouri-lawyers-challenge-legalzooms-service/.

17 David C. Vladeck, *Hard Choices: Thoughts for New Lawyers*, 10 KAN. J.L. & PUB. POL'Y 351, 356 (2000).

18 *Id*.

succession purposes.[19] Furthermore, it has been estimated that as many as fifty percent of Americans die intestate—meaning without a will—thus subjecting the decedent's estate to probate and state intestacy laws.[20] Some people die without a will because they wanted to avoid thoughts regarding their own mortality or they did not want to invest in something from which they would not personally benefit.[21] Many people, however, likely find that creating a will in consultation with an attorney is cost-prohibitive, as estate planning lawyers charge hundreds or thousands of dollars per estate, depending on the complexity of the estate.[22] For young families just starting out, or families with little cash to spare, having a do-it-yourself will is better than having no will at all.[23]

Since there is such a strong feeling amongst those in the estate-planning community that all people should create a will and make provisions for incompetency and death, it is not surprising that self-help legal techniques have emerged to assist people through the process.[24] Many bookstores and libraries carry self-help books that educate a non-attorney audience on how to create their own wills,[25] but scholars have

19 LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 4, 7 (2009); *see also* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. PROB. & TR. J. 27, 32–33 (2008) (providing a history of the prominence and legitimacy of holographic wills—a will that is handwritten and unwitnessed—that dates back to Julius Caesar and the barbarian kingdoms of seventh century Italy and Spain, through fifteenth and sixteenth century France and England, to the colonies of the New World).

20 MetLife Consumer Education Center, *Estate Planning: Understanding Distributions of Assets and Estate Taxes* 1 (2011), *available at* https://eforms.metlife.com/wcm8/PDFFiles/15294.pdf; *see also* Clowney, *supra* note 19, at 28 (observing that only 30% of Americans create a will).

21 Deborah L. Jacobs, *The Case Against Do-It-Yourself Wills*, FORBES (Sep. 7, 2010, 9:50 AM), http://www.forbes.com/2010/09/07/do-it-yourself-will-mishaps-personal-finances-estate-lawyers-overcharge.html.

22 *Id*.; *see also* Gerry W. Beyer, *Statutory Will Methodologies—Incorporated Forms vs. Fill-In Forms: Rivalry or Peaceful Coexistence?*, 94 DICK. L. REV. 231, 235–38 (1990) [hereinafter Beyer, *Statutory Will Methodologies*] (discussing reasons individuals fail to prepare wills, including unawareness of the importance of preparing a will, indifference toward creating a will, apprehension toward the cost of preparing a will, aversion to the perceived time and effort it takes to create a will, discouragement from the complexity of a will, lack of property, and desire to deny or distance oneself from thoughts of personal mortality); Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 842 (1993) [hereinafter Beyer, *Statutory Fill-in Will Forms*] (reporting from an empirical study on how individuals regarded statutory will forms and providing more reasons people say they do not have wills, including that they never thought about it, procrastinated on the matter, believed they were too young to have a will, were indifferent to how property was distributed at death, were unaware of the importance of dying with a will, or felt they lacked the knowledge required to write a will).

23 Janet Novak, *The Case For Do-It-Yourself Wills*, FORBES (Sep. 7, 2010, 1:21PM), http://www.forbes.com/sites/janetnovack/2010/09/07/the-case-for-do-it-yourself-wills/.

24 Beyer, *Statutory Fill-in Will Forms*, *supra* note 22, at 828.

25 *See generally* DEBORAH L. HERMAN & ROBIN L. BODIFORD, A SIMPLIFIED GUIDE TO CREATING A PERSONAL WILL: HOW TO WRITE A WILL, TRUSTS AND LIFE ESTATES, ESTATE TAXES, HOW TO APPOINT AN EXECUTOR *passim* (2003); EDWARD A. HAMAN, HOW TO WRITE YOUR OWN LIVING WILL *passim* (3d ed. 2002); IRA DISTENFIED & LINDA DISTENFIELD, WE THE PEOPLE'S GUIDE TO ESTATE PLANNING: A DO-IT-YOURSELF PLAN FOR CREATING A WILL AND LIVING TRUST *passim* (2005); LIZA WEIMAN, THE BUSY FAMILY'S GUIDE TO ESTATE PLANNING: 10 STEPS TO PEACE OF

called the validity and effect of these products into question.[26] Similarly, critics have raised concerns that these books are not written with a particular state's laws in mind, and that the motivating factor behind publishing these tools is profit rather than concern for the public.[27] But as bookstores have begun to close their doors,[28] and as the Internet plays a more prevalent role in the lives of Americans,[29] it is only natural that do-it-yourself legal services would evolve and become web-based products.

Enter online legal document services. For more than a decade, websites such as LegalZoom.com, Nolo.com,[30] and LawDepot.com,[31] to name only a few, have been offering inexpensive alternatives to paying for the experience, expertise, or assistance of an attorney when creating a will or trust.[32] LegalZoom allows a consumer to create their own living will for as little as $40 per person, and a living trust for roughly $250, which is a far cry from the thousands of dollars a lawyer might charge. However, these low prices come with strings attached.

LegalZoom has a ten-paragraph disclaimer that, among other things, states that LegalZoom is not a law firm, its services are not to be substituted for the advice of an attorney, and that it does not act as the consumer's attorney.[33] The disclaimer further asserts that the website does not provide legal advice, but only self-help services at the consumer's specific direction, and that it cannot engage in the practice of law.[34] The disclaimer also states that while it provides general information on common legal issues, no attorney-client[35] relationship is established by use of the site.[36] However, the service does include a review of the customer's

MIND *passim* (2007) (accompanying CD-ROM included with the book); ROBERT J. LYNN & GRAYSON M.P. MCCOUCH, INTRODUCTION TO ESTATE PLANNING IN A NUTSHELL *passim* (5th ed. 2004); JOAN M. BURDA, ESTATE PLANNING FOR SAME-SEX COUPLES *passim* (2004); ZOE M. HICKS, THE WOMEN'S ESTATE PLANNING GUIDE: TECHNIQUES FOR PROTECTING YOURSELF AND YOUR FAMILY *passim* (1998); N. BRIAN CAVERLY & JORDAN S. SIMON, ESTATE PLANNING FOR DUMMIES *passim* (2003).

26 Beyer, *Statutory Fill-in Will Forms*, *supra* note 22, at 782.

27 *Id*. at 781–82.

28 David Magee, *Borders Closing: Why the Bookstore Chain Failed*, INT'L BUS. TIMES, July 19, 2011, *available at* http://www.ibtimes.com/articles/182815/20110719/borders-closing-why.htm.

29 In the month of September 2009, the average American spent sixty-eight hours online, or more than 2.25 hours of internet use per day, seven days per week. *Top U.S. Web Brands and Parent Companies for September 2009*, NIELSEN WIRE (Oct. 14, 2009), http://blog.nielsen.com/nielsenwire/online_mobile/top-u-s-web-brands-and-parent-companies-for-september-2009/.

30 *See* NOLO.COM, http://www.nolo.com/ (last visited June 16, 2012); *Disclaimer*, NOLO.COM, http://www.nolo.com/disclaimer.html (last visited June 16, 2012).

31 *See* LAWDEPOT.COM, http://www.lawdepot.com/ (last visited June 16, 2012); *Disclaimer*, LAWDEPOT.COM, http://www.lawdepot.com/disclaimer.php (last visited June 16, 2012).

32 TopTenReviews, an online service that compares products for the convenience of consumers, offers a comparison of online legal form services for 2011 in which LegalZoom is ranked in the top five. *Online Legal Forms Review*, TOPTENREVIEWS, http://online-legal-forms-review.toptenreviews.com/ (last visited June 16, 2012).

33 *See LegalZoom Disclaimer*, *supra* note 8.

34 *Id*.

35 This Comment uses the terms "attorney-client" and "client-lawyer" interchangeably.

36 *See LegalZoom Disclaimer*, *supra* note 8.

answers for completeness, spelling and grammar, as well as internal consistency of names, addresses and the like.[37] The disclaimer makes clear that the law changes frequently, and that while efforts are made to keep the forms on the website up-to-date, they are not guaranteed to be current, or even accurate, in every jurisdiction.[38] Lastly, the disclaimer states that LegalZoom should be used at the consumer's risk, as "LegalZoom is not responsible for any loss, injury, claim, liability, or damage related to [the] use of [the] site."[39] Furthermore, before receiving their legal documents, the consumer must acknowledge that LegalZoom did not supply the consumer with any advice, explanation or representation about any legal rights.[40] However, even these attached strings do not keep consumers away, as LegalZoom's homepage boasts of over one million satisfied customers.[41]

Despite the impressively detailed disclaimer to which the user must agree before any sort of product is completed for the consumer by LegalZoom, some might argue that any sort of will that denotes the deceased's intent is better than no will at all.[42] Even holographic wills—un-witnessed wills that are handwritten by the testator[43]—are permitted in twenty-seven states despite the lack of legal guidance needed to create one.[44] However, states that do not recognize the validity of holographic wills, such as Washington,[45] Alabama,[46] and Missouri,[47] would probably

37 *Id*.

38 *Id*. Under the "Common Questions" section of the Last Will & Testament page, however, LegalZoom replies that they have designed their Last Wills to the specific laws and requirements of each state. *LegalZoom Last Will & Testament*, LEGALZOOM.COM, http://www.legalzoom.com/legal-wills/wills-overview.html (last visited June 16, 2012) [hereinafter *Last Will & Testament*].

39 *See LegalZoom Disclaimer*, *supra* note 8.

40 *See* Fred Bernstein, *Being of Sound Mind and a $55 Consultation*, N.Y. TIMES, May 16, 2002, at G1, *available at* http://www.nytimes.com/2002/05/16/technology/being-of-sound-mind-and-a-55-consultation.html?pagewanted=all&src=pm.

41 *See* LEGALZOOM.COM, *supra* note 7.

42 For those who die without a will state intestacy statutes control the allocation of their assets. Typically, property passes to those most closely related to the decedent by blood and marriage in an attempt to distribute the decedent's possessions based on the presumed intent of the average person. As a result, the actual desires of any individual decedent are apt to be unaccounted. Clowney, *supra* note 19, at 53.

43 BLACK'S LAW DICTIONARY 1735–36 (9th ed. 2009).

44 *See* ALASKA STAT § 13.12.502 (2010); ARIZ. REV. STAT. ANN. § 14-2503 (2005 & Supp. 2007); ARK CODE ANN. § 28-25-104 (2012); CAL. PROB. CODE § 6111 (West 2009); COLO. REV. STAT. § 15-11-503 (2006); HAW. REV. STAT. ANN. § 560:2-502 (LexisNexis 2005); IDAHO CODE ANN. § 15-2-503 (2009); KY. REV. STAT. ANN. § 394-040 (West 2006); LA. CIV. CODE ANN. art. 1575 (2000 & Supp. 2012); ME. REV. STAT. ANN. tit. 18-A, § 2-503 (2012); MICH. COMP. LAWS § 700.2502 (2002 & Supp. 2007); MISS. CODE ANN. § 91-5-1 (1999); MONT. CODE ANN. § 72-2-522 (2011); NEB. REV. STAT. § 30-2328 (1995); NEV. REV. STAT. ANN. § 133.090 (LexisNexis 2009); N.J. REV. STAT. ANN. § 3B:3-3 (West 2007); N.C. GEN. STAT. § 31-3.4 (2007); N.D. CENT. CODE § 30.1-08-02 (1996); OKLA. STAT. ANN. tit. 84, § 54 (West 1990 & Supp. 2008); 20 PA. CONS. STAT. ANN. § 2502 (West 2005); S.D. CODIFIED LAWS § 29A-2-502 (2004); TENN. CODE ANN. § 32-1-105 (2007); TEX. PROB. CODE ANN. § 60 (West 2003); UTAH CODE ANN. § 75-2-503 (1993 & Supp. 2011); VA. CODE ANN. § 64.1-49 (2007); W. VA. CODE § 41-1-3 (2004 & Supp. 2007); WYO. STAT. ANN. § 2-6-113 (2011).

45 *See* In re Brown's Estate, 172 P. 247, 247 (1918) ("[T]he Legislature has defined wills and how they shall be executed and by whom, and no provision is made for holographic wills."); Press Release, *supra* note 15.

not argue that any will is better than no will at all, and in fact have tried to curtail LegalZoom's presence in their states. Moreover, even North Carolina, a state that permits holographic wills, has issued a cease-and-desist letter to LegalZoom.[48]

For example, in 2009, plaintiffs Todd Janson, Gerald T. Ardrey, Chad M. Ferrell, and C & J Remodeling LLC sued LegalZoom in Missouri.[49] They alleged that LegalZoom engaged in the unauthorized practice of law, that LegalZoom's charging of fees for alleged assistance in the preparation of legal documents violated the Missouri Merchandising Practices Act (MPA), section 407.010, et seq., of the Revised Statutes of Missouri, and they asserted a claim for money had and received with respect to fees paid to LegalZoom.[50] Furthermore, the court granted plaintiff's Motion to Certify as a Class.[51] On August 2, 2011, the court denied LegalZoom's Motion for Summary Judgment (arguing that, as a matter of law, it did not engage in the unauthorized practice of law in Missouri).[52] The court found it problematic that LegalZoom sold not only a good, but also a service, when LegalZoom said in its advertisements, "[j]ust answer a few simple online questions and LegalZoom takes over. You get a quality legal document filed for you by really helpful people."[53] On August 12, 2011, the parties informed the court via teleconference that they had agreed to settle the matter.[54] On September 28, 2011 a Motion for order Approving Class Action Settlement was filed on behalf of all plaintiffs,[55] as well as suggestions in support of the Motion filed on behalf of LegalZoom.[56]

46 *See* ALA. CODE § 43-8-131 (2011) ("[E]very will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will."); Black v. Seals, 474 So. 2d 696, 698 (Ala. 1985) ("The rule in Alabama is that an instrument must be subscribed by at least two witnesses to be valid as a will.").

47 *See* MO. REV. STAT. § 474.320 (2011). The Dekalb County Bar of Alabama is suing to bar LegalZoom from selling its legal documents there. Draper, *supra* note 16.

48 Interestingly, North Carolina does recognize holographic wills as valid in their state, but the North Carolina State Bar has nonetheless sent a cease-and-desist letter to LegalZoom. *Id*.

49 Janson v. LegalZoom.com, Inc., 271 F.R.D. 506, 506 (W.D. Mo. 2010).

50 *Id*. at 508.

51 *Id*. at 509, 513. Plaintiffs defined the Class as "All persons and other entities resident within the State of Missouri who were charged and paid fees to LegalZoom for the preparation of legal documents from December 17, 2004 to the present." *Id*. at 509.

52 Order, Janson v. LegalZoom.com, Inc., 2:10-CV-04018-NKL at 17, 31 (W.D. Mo. Aug. 2, 2011) (order denying summary judgment), *available at* http://www.scribd.com/doc/61564347/Janson-v-LegalZoom.

53 *Id*. at 18.

54 Minute Sheet, Janson v. LegalZoom.com, Inc., 2:10-CV-04018-NKL (W.D. Mo. Aug. 12, 2011), *available at* http://docs.justia.com/cases/federal/district-courts/missouri/mowdce/2:2010cv04018/93510/193/.

55 Joint Motion for Preliminary Approval of Class Action Settlement Agreement, Janson v. LegalZoom.com, Inc., 2:10-CV-04018-NKL (W.D. Mo. Sept. 28, 2011), *available at* http://docs.justia.com/cases/federal/district-courts/missouri/mowdce/2:2010cv04018/93510/197/.

56 Janson v. LegalZoom.com, Inc., 2:10-CV-04018-NKL (W.D. Mo. Sept. 28, 2011) (Defendant LegalZoom.com, Inc.'s Suggestions in Support of Joint Motion for Preliminary Approval of Class

While the settlement is not finalized at the time of this Comment, if the plaintiffs' suggestions are any indication of joint work toward settlement on behalf of both parties, it appears that LegalZoom has agreed to pay the class members six million dollars, and make substantial changes in its future practice within Missouri, including a free consultation with a Missouri licensed attorney for each future purchaser of a LegalZoom product.[57] But while Missouri has seemingly neared the end of its quandary with LegalZoom,[58] other states have yet to determine whether they too feel the company is engaging in an unauthorized practice of the law.

II. "WITHOUT 'ETHICAL CULTURE' THERE IS NO SALVATION FOR HUMANITY"[59]

Despite claiming at least one million success stories and offering a 100% satisfaction guarantee, LegalZoom probably has not provided every user of the company's services with a product best suited for their individual needs.[60] David Hiersekorn, an estate planning lawyer at Red Hill Law Group, PC in Santa Ana, California, took it upon himself to log onto LegalZoom.com as a customer to ascertain what sort of results he would get if he used the services offered by the company to create his will.[61] He described his life as fairly basic; at the time he used the product he was a 39-year-old married man with a home, a Subchapter "S" corporation, and an individual retirement account.[62] His wife had a 401(k) through her work, and together they had two children and a dog, as well as one son from his prior marriage.[63] Hiersekorn's end product was less than satisfactory for his needs—he was told he did not have the option to place his S-Corp stock in a living trust, (which he explained was incorrect), he was told he could put his and his wife's retirement accounts into a trust and name the trust as a beneficiary of the retirement account, (which he explained was true but that the tax consequences were severe if not done properly), and the trust had the effect of virtually guaranteeing that his son

Action Settlement), *available at* http://docs.justia.com/cases/federal/district-courts/missouri/mowdce/2:2010cv04018/93510/199/.

57 Plaintiff's Suggestions in Support of Preliminary Approval of Class Action Settlement Agreement, Janson v. LegalZoom.com, Inc., 2:10-CV-04018-NKL at 2–3, 5 (W.D. Mo. Sept. 28, 2011), *available at* http://docs.justia.com/cases/federal/district-courts/missouri/mowdce/2:2010cv04018/93510/198/.

58 Preliminary Approval Order, Janson v. LegalZoom.com, Inc., 2:10-CV-04018-NKL at 1, 3 (W.D. Mo. Nov. 14, 2011) (The Court preliminarily approved the settlement as proposed and set a final hearing for the proposed settlement for April 13, 2012), *available at* http://docs.justia.com/cases/federal/district-courts/missouri/mowdce/2:2010cv04018/93510/200/.

59 ALBERT EINSTEIN, IDEAS AND OPINIONS 54 (1982).

60 *See* LEGALZOOM.COM, *supra* note 7.

61 David A. Hiersekorn, *So, What's So Bad About LegalZoom, Anyway?*, *available at* http://www.kctrustlaw.com/files/Download/Legalzoom.pdf.

62 *Id*. at 3.

63 *Id*.

from his previous marriage would be disinherited should he die before his wife (an undesired outcome), amongst other issues.[64] Hiersekorn determined that using LegalZoom would have cost him "tens of thousands in probate fees and potentially hundreds of thousands in taxes."[65] The question remains if under current ethical rules, a service with the potential for such missteps and mishaps is, or should be, allowed to continue selling its services.

To answer the question of whether it is ethical for an organization like LegalZoom to provide services that can have such potentially harmful results as demonstrated in the Hiersekorn example above, one should first evaluate the ethical rules and principles that govern lawyers' actions.[66] In order to assist those practicing or, perhaps controversially, *not practicing* in the field of law, the American Bar Association (ABA) has adopted the Model Rules of Professional Conduct ("Rules") to guide lawyers as it strives to define ethical conduct to protect the public.[67] Forty-nine of the fifty states have adopted the Rules,[68] while California is the only state to adopt its own rules of professional conduct.[69] The Preamble to the 2011 Rules established that, as lawyers play an essential role in the preservation of society, every lawyer is responsible for observing the rules, the rules do not exhaust the morals and ethics a lawyer should consider in their work, and failure to comply with the rules gives basis for discipline.[70] It also established that a lawyer's conduct should conform to the requirements of the law, and that a lawyer should be competent, diligent, and maintain relevant communication with clients in regard to the matter of representation.[71] The ABA's Standing Committee on Ethics and Professional Responsibility also issues formal written opinions to construe the Model Rules of Professional Responsibility, which, while not binding on any court, are considered to be highly persuasive authority on ethical matters that arise in the legal profession.[72]

64 *Id*. at 3–4.

65 *Id*. at 4.

66 *See Preface to* MODEL RULES OF PROF'L CONDUCT, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface.html (last visited June 16, 2012) (providing a brief history of the American Bar Association's role in legal ethics beginning with the adoption of the original Canons of Professional Ethics in 1908).

67 *See* J. MICHAEL GOODSON LAW LIBRARY, DUKE UNIV. SCH. OF LAW, RESEARCH GUIDES: LEGAL ETHICS 1 (2011), *available at* http://www.law.duke.edu/lib/researchguides/pdf/legalethics.pdf.

68 *Alphabetical List of States Adopting Model Rules*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited June 16, 2012).

69 *Rules of Professional Conduct*, THE STATE BAR OF CAL., http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct.aspx (last visited June 16, 2012).

70 THOMAS D. MORGAN & RONALD D. ROTUNDA, 2011 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY: INCLUDING CALIFORNIA AND NEW YORK RULES 3–5 (2011).

71 *Id*. at 3.

72 Source Information: ABA Formal Ethics Opinions, LEXISNEXIS, *available at* http://w3.nexis.com/sources/scripts/info.pl?138582; *see also* Phila. Eth. Op. 00-10, 2000 WL 33173001

The Rules govern the ethical considerations of the practice of law when dealing with clients, for the protection of clients.[73] But in LegalZoom's disclaimer, the company states that it does not practice law, but rather provides information, and that it does not form client relationships with the consumers who use its services.[74] It is uncertain whether any law-related service can or should be allowed to disclaim such accountability, but a closer look into ABA Formal Opinion 10-457, sections of the Rules, and the Restatement of the Law Governing Lawyers should help to provide a clearer answer that the services currently offered by LegalZoom are not entirely ethical under lawyer standards of ethics.

A. Has an Attorney-Client Relationship Formed?

Attorneys owe certain ethical duties to their clients, which are set forth in the Rules, and it is therefore imperative to establish whether LegalZoom has formed an attorney-client relationship with the users of its website in order to determine whether the company should be held to the ethical guidelines established in the Rules.[75] To determine whether LegalZoom *has* created an attorney-client relationship with those using its services, it is important to review Model Rule 1.18—the rule governing a lawyer's duties to prospective clients—with a narrow scope of interpretation, while still acknowledging its broad policy purpose.[76] Comment 2 of the rule explains that "[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning" of the rule.[77] However, a lawyer cannot avoid the obligations of Rule 1.18 simply by making a blanket statement that there is no lawyer-client relationship until both the lawyer and the client consent to create such an agreement.[78] Despite engaging in what could arguably be labeled as more of a bilateral than a unilateral exchange of

(2000) (explaining that the ABA Committee's Formal Opinion is not binding on the Supreme Court of Pennsylvania, or any other court); Cal. Eth. Op. 1983-71, 1983 WL 31672 (1983) (elucidating that the ABA's Model Code of Professional Responsibility has no direct effect on California lawyers practicing in California courts, but that while not binding, can be looked to as a collateral source to California rules and statutes).

73 MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011) (describing the requirements of competence in representing a client as being knowledge of the law, skill, and preparation for the required representation).

74 *See LegalZoom Disclaimer*, *supra* note 8.

75 MODEL RULES OF PROF'L CONDUCT R. 1.18 (2011).

76 *Id*.

77 MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. 2 (2011); *see also* DeVaux v. Am. Home Assur. Co., 444 N.E.2d 355 (1983) (holding that a jury might reasonably find that the client had reasonably believed that the firm had formed an attorney-client relationship with a client who had only ever spoken to the firm's secretary, when the secretary answered the client's call, told the client to write a letter to the firm requesting legal services, arranged a medical examination for the client, but then misfiled the client's letter requesting services so that no lawyer in the firm ever saw it until after the statute of limitations had run).

78 JOHN DZIENKOWSKI & RONALD ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 640 (2007–2008 ed.).

information (because document assistants at LegalZoom review the user's submitted information for spelling, grammar, and consistency before providing the finished product), users of LegalZoom do not likely form a reasonable expectation that an attorney-client relationship exists with the company, because the disclaimer that such a relationship will not exist must be agreed upon by the user before the requested document can be purchased.[79] Still, Comment 9 of Rule 1.18 tells lawyers that the duty of competency applies when assistance is given to a prospective client on the merits of a matter, set forth in Model Rule 1.1.[80] As the very first substantive rule of the Model Rules of Professional Conduct, Rule 1.1 directs a lawyer to provide competent representation to a client, which requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation at hand.[81] A person could reasonably believe that LegalZoom is assisting them on the merits of their needs, since it provides necessary forms, checks the forms for consistency, and provides future assistance on those same forms should the need arise, thus necessitating at least the required competency set forth in Rule 1.1.

Furthermore, the Restatement of the Law Governing Lawyers lends additional support to the idea that an attorney-client relationship has been formed between LegalZoom and its users based on the user's reasonable belief of the nature of the services provided. Section 14 of the Restatement provides that a relationship of client and lawyer arises when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person and . . . the lawyer manifests to the person consent to do so,"[82] an arrangement that LegalZoom could be said to be engaged in (i.e. offering documents that hold up in courts of law at the request of paying clients). While Section 19 of the Restatement imparts that "a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances,"[83] it could be argued that the terms of limitation are not entirely reasonable in the circumstance of people looking for affordable solutions for their legal needs since they are giving up their complete right to file a malpractice suit against the company.[84] Model Rule 1.2, Comment 7 clarifies that while this limitation on duties is allowed—provided the requisite reasonableness and consent exist—the agreement for limited representation does not exempt a lawyer from the duty to provide competent representation.[85] As

79 Bernstein, *supra* note 40; *see also* DZIENKOWSKI & ROTUNDA, *supra* note 78, at 639 (explaining that a website that encourages prospective clients to contact the law firm may change expectations of whether a prospective client could reasonably expect the formation of an attorney-client relationship, particularly if the website gives no cautionary instruction).

80 MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. 9 (2011).

81 MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).

82 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

83 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 (2000).

84 *See LegalZoom Disclaimer*, *supra* note 8.

85 MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2011).

demonstrated in David Hiersekorn's trial run of the service offered by LegalZoom for his own needs, it is clear that at least in *his* case, competent service would not have been provided.[86]

B. Lawyer Websites Can Create Attorney-Client Relationships

LegalZoom's website seems to offer more than just legal information, but rather legal advice; that fine line which, when crossed, establishes an attorney-client relationship.[87] The ABA Formal Opinion 10-457 on Lawyer Websites is the Standing Committee on Ethics and Professional Responsibility's most recent view on "some of the ethical obligations that lawyers should address in considering the content and features of their websites."[88] The opinion speaks about lawyers using their websites to give information about the law, it addresses when website visitors inquire about legal advice or representation, and it discusses when lawyers disclaim obligations to website visitors.[89] Formal Opinion 10-457 can be read to show that despite the disclaimer agreed to by the user of LegalZoom, an attorney-client relationship has been formed between the company and the user based on the interactive relationship the company engages in with its users.

The opinion acknowledges that lawyer websites are an incredibly useful tool to assist the public in understanding matters of law and to inform the public on how to obtain legal counsel for various issues in their lives.[90] However, the opinion warns that no precise line distinguishes legal information from legal advice.[91] For instance, a lawyer "who answers fact-specific legal questions may be characterized as offering personal legal advice," but "[a] lawyer who poses and answers hypothetical questions usually will not be characterized as offering legal advice."[92] In order to avoid misunderstanding, the opinion advises that it would be prudent for lawyers to warn visitors not to rely on the legal information provided as legal advice, but rather that the advice is general in nature.[93]

In its next section, the opinion explains that "inquiries from a website visitor about legal advice or representation may raise an issue concerning the application of Rule 1.18 (Duties to Prospective Clients)."[94] Rule 1.18(a) defines a prospective client as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect

86 *See supra* notes 61–65 and accompanying text.

87 *See infra* note 107 and accompanying text.

88 ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 10-457 (2010).

89 *Id*.

90 *Id*.; *see also* MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2011) (acknowledging the "public's need to know about legal services [which] can be fulfilled in part through advertising").

91 ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 10-457 (2010).

92 *Id*.

93 *Id*.

94 *Id*.

to a matter."[95] Either the lawyer or the potential prospective client can initiate this initial communication.[96] Without any cautionary language, a lawyer's website that provides an electronic form encouraging visitors to submit a personal inquiry about a proposed representation invites submission of confidential information, and might indicate that a lawyer has agreed to discuss a possible attorney-client relationship.[97]

In its last section, the opinion discusses warnings or cautionary statements intended to limit, condition, or disclaim a lawyer's duties to its website visitors.[98] It states that limitations, conditions, or disclaimers of lawyer obligations will be effective only if reasonably understandable, properly placed, and not misleading.[99] Furthermore, these warnings may be used to avoid a misunderstanding by the website visitor that an attorney-client relationship has been formed, that the visitor's information will be kept confidential, or that legal advice has been given.[100] The information must be conspicuously placed to assure that the visitor is likely to see it before proceeding.[101] However, the Committee boldly makes its final declaration in the last line of the opinion by stating that a limitation, condition, waiver, or disclaimer may be undercut if the lawyer acts or communicates contrary to the warning on its website.[102]

This opinion is consistent with the Model Rules' policy to protect lawyers from unwittingly forming relationships with prospective clients, but more importantly, to protect the public from unethical legal practices.[103] With this policy in mind, it can be argued that an attorney-client relationship has been created between those who use the services offered by LegalZoom's website and the company itself, despite the disclaimer that is prominently featured on the website in various locations (and to which the user must agree before completion of the legal document transaction).[104] After a website visitor has filled out the legal questionnaire for the service of their choice, LegalZoom's document assistants review the answers for spelling, grammar, and consistency before compiling the final

95 MODEL RULES OF PROF'L CONDUCT R. 1.18 (2011).

96 ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 10-457 (2010).

97 *Id*.

98 *Id*.

99 *Id*.

100 *Id*.

101 *Id*.

102 *Id*.

103 A lawyer should aid the legal profession in pursuing the objectives of seeking to improve the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession, and should help the bar regulate itself in the public interest. Neglect of the responsibilities to assure its regulations are conceived in the public interest and not in furtherance of self-interested concerns of the bar compromise the independence of the profession and the public interest that it serves. THOMAS D. MORGAN & RONALD D. ROTUNDA, 2011 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY: INCLUDING CALIFORNIA AND NEW YORK RULES 4–5 (2011).

104 *See Creating LegalZoom Living Trusts in 3 Simple Steps*, LEGALZOOM.COM, http://www.legalzoom.com/living-trusts/living-trusts-3-step-process.html (last visited June 16, 2012).

document.[105] Furthermore, with the optional purchase of "Legal Advantage Plus," the LegalZoom website visitor receives the added features of attorney support, annual legal checkup with an attorney, unlimited revisions to the trust through LegalZoom, secure storage and delivery of the trust, and 25% savings on additional attorney services.[106] Whether narrowly reading into the definition of "advice" to mean giving information, or broadly defining the term to mean taking care of a person's legal needs, it appears that LegalZoom does more than simply provide information to those who purchase and reasonably rely on the services it provides.[107]

C. Law-Related Services Are Subject to Ethical Guidelines

Model Rule 5.7 should also be examined in determining whether an attorney-client relationship has been established between LegalZoom and its users, as the rule describes a lawyer's ethical responsibilities regarding law-related services—an area that LegalZoom seems to be dabbling in.[108] Paragraph (a) of the rule states that a "lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services . . . if the law-related services provided" display either of two characteristics.[109] The Rules will apply: (1) if the law-related services are

105 *See Living Trust Documents Pricing*, LEGALZOOM.COM, http://www.legalzoom.com/living-trusts/living-trusts-pricing.html (last visited June 16, 2012).

106 *See id*. The Legal Advantage Plus package comes with its own thirteen page legal disclaimer that, among other things, states:

> Please note that LegalZoom does not provide legal services. Attorneys made available through Legal Plans are third-party independent contractors who agree to provide legal services directly to you, not through LegalZoom, via a separate retention agreement between you and the attorney. Their contact information is provided as advertising. The attorneys have agreed to provide complimentary, thirty-minute consultations related to subject matters about which they represent that they are qualified in jurisdictions where they are admitted to practice. A conflict check will apply. They may require you to meet at their office or another location convenient to them or may require a telephonic consultation. LegalZoom will not select an attorney for you. LegalZoom makes no guarantees as to the substance of the attorney's advice.

Legal Plan Contract, LEGALZOOM.COM, http://www.legalzoom.com/legal-plans-contract.html (last visited June 16, 2012).

107 If a lawyer gives legal advice or provides legal services to a person seeking advice or services from a lawyer, that person may become a client. LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 267 (2d ed. 2008); *see* Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 693 (Minn. 1980) (holding that in a legal malpractice action, evidence was sufficient to establish existence of attorney-client relationship arising when the alleged client went to an attorney for legal advice, was told there was not a case against husband's doctor for medical malpractice, and relied upon advice in failing to pursue claim for medical malpractice, and the attorney allegedly did not qualify legal opinion by urging client to seek advice from another attorney and did not inform alleged client that he lacked expertise in medical malpractice area).

108 MODEL RULES OF PROF'L CONDUCT R. 5.7 (2011).

109 *Id*. Law-related services are services that are reasonably performed in conjunction with, and are related to, legal services, but these services would not constitute the unauthorized practice of law if a nonlawyer performed them. DZIENKOWSKI & ROTUNDA, *supra* note 78, at 992–93. Comment 9 to Rule 5.7 defines law-related services to include "title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax return preparation, and patent, medical or environmental consulting." MODEL RULES OF

provided "by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients," or (2) if the law-related services are provided in "other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist."[110]

Once again, it appears LegalZoom has instituted measures to properly disclaim that its services create an attorney-client relationship. However, a closer reading of the Rules' comments and tangential rules makes it clear that LegalZoom has ethical obligations to its users under either section (a)(1) or (a)(2) of Rule 5.7. First, under paragraph (a)(1) of the rule, it could be argued that since LegalZoom claims that it only offers the website's users information rather than advice, it is engaging in a law-related practice not distinct from the lawyer's provision of legal services to its clients who are not purchasing products through its website.[111] If true, LegalZoom should therefore be subject to the Rules of Professional Conduct because the users of LegalZoom would necessarily be receiving legal services not distinct from the legal services the company's owners offer to their non-website clients.[112] Second, Rule 5.7, Comment 8 elucidates that the requirement of disclosure imposed by section (a)(2) of Rule 5.7 sometimes cannot be met when legal and law-related services are closely entwined.[113] In such a case, "a lawyer will be responsible for assuring that both the lawyer's conduct and . . . that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct."[114] Since LegalZoom offers services that minimally can be described as law-related, LegalZoom should be responsible for making sure that its employees and company policies comply with the Rules, including, but certainly not limited to, Rule

PROF'L CONDUCT R. 5.7 cmt. 9 (2011).

110 MODEL RULES OF PROF'L CONDUCT R. 5.7 (2011).

111 The Co-Founders, Senior Management Team, and Directors at LegalZoom.com includes top attorneys such as General Counsel Chas Rampenthal, a graduate of the University of Southern California, a founding partner of Belanger and Rampenthal LLC, an associate at Testa, Hurwitz & Thibeault, LLP of Boston, Massachusetts and at the Los Angeles office of Thelen Reid & Priest LLP; Chairman and Co-Founder Brian Liu, a graduate of UCLA School of Law and a former corporate attorney with Sullivan & Cromwell; Chief Strategy Officer and President, Attorney Services Eddie Hartman, a member of the California Bar; Co-Founder Robert Shapiro, currently a partner of Glaser, Weil, Fink, Jacobs, Howard & Shapiro, LLP, a full-service law firm with approximately 120 attorneys (no relationship with LegalZoom); and Co-Founder Brian S. Lee, a graduate of UCLA School of Law and a former attorney with Skadden, Arps, Slate, Meagher & Flom, LLP and a former Manager at Deloitte & Touche, LLP. *Management Team*, *About Us*, LEGALZOOM.COM, http://www.legalzoom.com/about-us/management-team (last visited June 16, 2012). Any of these lawyers could be said to be engaging in a law-related practice not distinct from their provision of legal services to their previous or current clients not purchasing products through LegalZoom's website.

112 MODEL RULES OF PROF'L CONDUCT R. 5.7 (2011).

113 MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 8 (2011).

114 *Id*.

1.8(h)(1).[115] Rule 1.8(h)(1) states, "A lawyer shall not: make an agreement limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."[116] Despite the company stating in its disclaimer that LegalZoom "is not responsible for any loss, injury, claim, liability, or damage related to [the users] use of this site," it does not require, or even advise users to obtain independent representation before agreeing to the terms in the disclaimer as is required in Rule 1.8(h)(1).[117] This violation of Rule 1.8(h) should not be taken lightly because, as stated above, the rules are in place to protect clients. Therefore, LegalZoom, with its law-related services, should not be exempt from the requirements of the Rules.[118]

D. What Constitutes the Practice of Law?

Assuming that LegalZoom has established an attorney-client relationship with its website users,[119] and considering LegalZoom has been named in class action lawsuits initiated by private attorneys who contend that the website provides services amounting to the unauthorized practice of law, it would be prudent to discuss where the boundaries of the practice of law lie to determine whether LegalZoom should be allowed to continue offering its services.[120] Legally, only licensed professionals can practice law in the United States, and what constitutes the unauthorized practice of law is a matter of state law.[121] Model Rule 5.5 incorporates the definitions provided by the various states and in paragraph (b) notes that "a lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law" or otherwise represent that the lawyer is admitted to practice law.[122]

115 MODEL RULES OF PROF'L CONDUCT R. 1.8 (2011).

116 *Id*.

117 *See LegalZoom Disclaimer*, *supra* note 8.

118 *See supra* note 75.

119 *See supra* Part II.A–C.

120 Acello, *supra* note 9, at 24.

121 DZIENKOWSKI & ROTUNDA, *supra* note 78, at 950–51. A 1994 ABA survey found that thirteen jurisdictions had adopted no definition of "the practice of law," eight jurisdictions reported that their enforcement mechanism was inactive or non-existent, and of the thirty-five jurisdictions that reported they had a definition, only twenty-eight could support it with case law. *Id*. at 951–52.

122 MODEL RULES OF PROF'L CONDUCT R. 5.5 (2011); *see also* Letter from Federal Trade Commission to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002), *available at* http://www.justice.gov/atr/public/comments/200604.htm (discussing the ABA Task Force on the Model Definition of the Practice of Law, Draft Definition (Sept. 18, 2002), which, if adopted, would have included "[s]electing, drafting, or completing legal documents or agreements that affect the legal rights of a person" within the definition of the practice of law). Instead, the ABA House of Delegates adopted the Report and Recommendation of the Task Force on the Model Definition of the Practice of Law in 2003. *Task Force on the Model Definition of the Practice of Law*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html (last visited June 16, 2012).

> The Guidelines for the Adoption of a Definition of the Practice of Law recommend that every jurisdiction and territory adopt a definition of the practice of law that includes the basic premise that the practice of law is the application of legal principles and judgment to

Furthermore, the Model Code of Professional Responsibility, Ethical Considerations 3-5 states that the

> essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment,[123]

once again emphasizing the important policy goal of protecting clients' interests in matters of law.[124]

Regardless of the aforementioned policy considerations, publishers have a First Amendment right to create and sell do-it-yourself legal kits, but they can only do so if they are not engaging in the unauthorized practice of law, which is accomplished by refraining from personal contact with customers regarding the use of the kits.[125] However LegalZoom, with its practice of reviewing documents for spelling, grammar, and consistency, arguably creates sufficient personal contact to prevent it from relying upon

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> the circumstances or objectives of another person or entity and that each state and territory should determine who may engage in the practice of law and under what circumstances, based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability.

AMERICAN BAR ASSOCIATION TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW STANDING COMMITTEE ON CLIENT PROTECTION WASHINGTON STATE BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION (Aug. 11, 2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.authcheckdam.pdf. The adoption of state definitions was recommended in order to protect the public from unqualified service providers and provide certainty for those providing services in law-related areas. *A History of the Client Protection Rules*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/history.html (last visited June 16, 2012); *see* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2582–85 (1999) (providing a detailed account of the history of the regulation regarding the unauthorized practice of law in the United States).

123 MODEL CODE OF PROF'L RESPONSIBILITY Canon 3-5 (1980).

124 While it is true that the law allows people to act *pro se*, or represent themselves in court, the unauthorized practice of law rules are still important because the practice involves a person helping another with legal matters. THOMAS D. MORGAN, RONALD D. ROTUNDA, & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 634 (11th ed. 2011). "The condemnation of the unauthorized practice of law is designed to protect the public from legal services by persons unskilled in the law. The prohibition of lay intermediaries is intended to insure the loyalty of the lawyer to the client unimpaired by intervening and possibly conflicting interests." Elliott E. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438, 439 (1965); *see also* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581–94 (1999) (discussing the Ethical Considerations' dominant justifications for prohibiting the unauthorized practice of law and restricting the practice of law to members of the bar. Reasons include:

> (1) protecting the public against harmful incompetence and unscrupulous conduct; (2) protecting the administration of justice from incompetent or unscrupulous nonlawyers; (3) supplying a system of discipline to regulate lawyers; and (4) rewarding lawyers with an economic advantage over their potential and actual competitors in exchange for their submitting to regulation.

125 *Id*. at 2591 (citing *In re* Thompson, 574 S.W.2d 365, 369 (Mo. 1978); New York County Lawyers' Ass'n. v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967); Or. State Bar v. Gilchrist, 538 P.2d 913, 919 (Or. 1975)).

a First Amendment shield for publishers.[126] LegalZoom's services are unlike self-help books, do-it-yourself kits, and self-help legal software, because unlike the one-time purchase of such products, LegalZoom reviews and edits its users' documents and more aptly engages in an interactive transaction with its customers.[127] When there is just a one-time purchase of a do-it-yourself legal kit, it is not hard to imagine that the buyer has accepted responsibility for the consequences of the personal use of that kit. But when a do-it-yourself kit allows the user interaction with the selling company beyond the one-time purchase of the product, it is reasonable for the user to place greater responsibility for the final outcome of the product on the provider of the kit.

Operating under the assumption that LegalZoom does not violate prohibitions of the unauthorized practice of law, since as of yet there is no definitive authoritative position on the matter, there are consequent Model Rules, including Rules 1.1, 1.4, and 5.3, by which LegalZoom and all those legally practicing law must abide.[128] Model Rule 1.1 establishes the duty of competency that a lawyer must provide to represented clients, including competent legal knowledge, skill, thoroughness, and preparation reasonably necessary for the requisite representation.[129] A lawyer and client may agree to limit the scope of representation for which the lawyer is responsible, but the duty to provide competent representation may not be limited.[130] The case *In re Sledge* demonstrates this rule well.[131] Sledge, a high-volume solo practitioner, ran his office by largely leaving his cases in the hands of his clerks and other nonlawyers, who were left to put the lawyer's name on pleadings, discovery responses, and correspondences using a rubber stamp.[132] Sometimes Sledge was not present in the office for months as he attended religious retreats and wrote a novel, leaving his staff of nonlawyers to sign-up clients, write letters and pleadings, and negotiate settlements.[133] The Louisiana Supreme Court held that disbarment was the appropriate sanction for Sledge for the neglect of his

126 *See supra* note 124.

127 *See* Steve French, Note, *When Public Policies Collide . . . Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 101–02 (2001) (discussing that most courts opine that mere information and forms enabling individuals to self-prepare legal forms and documents do not violate prohibitions of the unauthorized practice of law because no personal relationship exists between the provider and the recipient, while a minority of courts hold that kits containing legal forms and instructions as to their completion do constitute an unauthorized practice of law since personal contact is not a prerequisite to finding that an activity or product constitutes the practice of law).

128 *See* Draper, *supra* note 16; *see also* MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2011) ("This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.").

129 MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).

130 MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2011); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2011); MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2011).

131 *In re* Sledge, 859 So.2d 671 (La. 2003).

132 *Id*. at 674.

133 *Id*. at 674–75.

law practice and failure to supervise his nonlawyer assistants.[134] Even though LegalZoom's main disclaimer states that at no time does the company review users' answers for legal sufficiency, draw legal conclusions, or provide legal advice or apply the law to particular user situations,[135] the site does proclaim to users that they will get a "personalized legal document" with specific language for their state and "peace of mind" knowing their family is protected, implying that a user can safely rely on the legal document created for them by LegalZoom.[136] It is hard to imagine that a user would get a legal document sufficient to protect their families if the document they received was not checked for legal sufficiency, and without someone to be liable, or accountable, for potential insufficiency down the road.

Similarly, Model Rule 1.4 states that a lawyer shall keep the client reasonably informed about the status of their legal matter,[137] and Rule 1.3 requires a lawyer to act with reasonable diligence and promptness when representing a client.[138] LegalZoom's disclaimer makes clear that the law changes frequently, and that while efforts are made to keep the forms on the website up-to-date, they are not guaranteed to be current, or even accurate, in every jurisdiction.[139] It is hard to reconcile this part of the disclaimer with the requirements of the Rules on this count, because as Rule 1.3, Comment 4 makes clear, unless the attorney-client relationship is terminated, a lawyer should carry through to conclusion all matters undertaken for a client.[140] When a client retains an attorney to draw up a will, the attorney-client relationship is not terminated upon the lawyer's completion and delivery of the will. The attorney has the responsibility to keep the client up-to-date on any changes in the law that might affect that client's will and is liable for malpractice to beneficiaries should the will be drafted in a way that the client did not request.[141]

Lastly, Rule 5.3 sets forth a lawyer's responsibilities regarding nonlawyer assistants.[142] The rule states that,

> With respect to a nonlawyer employed or retained by or associated with a lawyer . . . (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of

134 *Id*. at 686.

135 *See LegalZoom Disclaimer*, *supra* note 8.

136 *See Last Will & Testament*, *supra* note 38.

137 MODEL RULES OF PROF'L CONDUCT R. 1.4 (2011).

138 MODEL RULES OF PROF'L CONDUCT R. 1.3 (2011).

139 *See LegalZoom Disclaimer*, *supra* note 8; *Last Will & Testament*, *supra* note 38. Under the "Common Questions" section of the Last Will & Testament page, however, LegalZoom replies that they have designed their Last Wills to the specific laws and requirements of each state. *See id*.

140 MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 4 (2011).

141 *See* Leavenworth v. Mathes, 661 A.2d 632, 634–35 (Conn. App. Ct. 1995).

142 MODEL RULES OF PROF'L CONDUCT R. 5.3 (2011).

> Professional Conduct if engaged in by a lawyer if (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.[143]

There is at least one instance per document where LegalZoom retains nonlawyer assistants to aide in the completion of the documents prior to releasing them to the purchaser. The "peace-of-mind review" is included in all LegalZoom wills, trusts, and power of attorney documents.[144] The peace-of-mind review is described as follows:

> Unlike simple do-it-yourself forms, LegalZoom services include a personal review of your work after you create your document through the LegalZip® system. Along with hundreds of automated checks, our document scriveners review the answers you provide for the following:
>
> > Complete information. We'll contact you by phone and email regarding any missing information.
> >
> > Spelling, grammar and punctuation. We do not rely solely on software spell checkers.
> >
> > Correct capitalization and lowercasing where required.
> >
> > Proper pagination and blank space elimination.
> >
> > Complete words. We spell out abbreviations or symbols in English.
> >
> > Correct residency information. Indicating the proper state is critical to ensure the document conforms to your state's requirements.
> >
> > Full names. We verify that full names are given (first and last) and that all names appear consistently throughout the document.
> >
> > Correct shipping addresses and email addresses to ensure timely delivery.[145]

The document scriveners retained by LegalZoom who provide the useful and beneficial checks listed above should be subject to the Model Rules since, should they do their job incorrectly, they would violate the Model Rule requiring competency, thus seemingly exposing the lawyer who hired the document scrivener and authorized their work to liability for the mistake.[146]

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143 *Id*.

144 *See Last Will & Testament*, *supra* note 38; *LegalZoom Living Trusts*, LEGALZOOM.COM, http://www.legalzoom.com/living-trusts/living-trusts-pricing.html (last visited June 16, 2012); *LegalZoom Living Wills*, LEGALZOOM.COM, http://www.legalzoom.com/living-wills/living-wills-overview.html (last visited June 16, 2012); *Pricing*, *LegalZoom Powers of Attorney*, LEGALZOOM.COM, http://www.legalzoom.com/power-of-attorney/power-of-attorney-pricing.html (last visited June 16, 2012).

145 *See Pricing*, *LegalZoom Last Will and Testament*, LEGALZOOM.COM, http://www.legalzoom.com/legal-wills/wills-pricing.html, (follow "Peace-of-mind review"); *LegalZoom Living Trusts*, *supra* note 144 (follow "Piece-of-mind review"); *Living Wills*, *supra* note 144 (follow "Peace-of-mind review"); *LegalZoom Powers of Attorney*, *supra* note 144 (follow "Peace-of-mind review").

146 *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).

III. IF IT AIN'T BROKE, YOU STILL MIGHT WANT TO FIX IT

LegalZoom does an excellent job of giving notice that it has disclaimed liability from its users.[147] While every user may not actually read the ten and thirteen page disclaimers and terms of use documents that they "click" and thereby acknowledge they have read and agreed to, they at least have notice that terms and conditions apply to the legal document they create with LegalZoom. Then again, in other areas of life, providing a disclaimer is not always enough to disclaim liability—New York and Ohio both have statutes that void liability disclaimers for parking garages whose employees act negligently in handling patrons' cars.[148] While valuable, cars are likely less valuable than the sum of the estate a person leaves in their will, the handling of which deserves care above a level of potential negligence. At least three possible actions can be taken—either by LegalZoom, the states, or the ABA—to ensure that people who have little money to spend on a will or trust receive the protections their legal documents should provide, while still holding someone accountable should something go wrong down the road.

147 *See* discussion *supra* Part I.

148 N.Y. GEN. OBLIG. LAW § 5-325 (McKinney 2001); 51 OHIO JUR. 3d *Garages, Etc*. § 23 (West 2011); *see also* Cal. State Auto. Ass'n. Inter-Ins. Bureau v. Barrett Garages, Inc., 64 Cal. Rptr. 699, 704 (1967) ("hold[ing] that the delivery of a claim check to the respective bailors . . . did not create a contract embodying the matter printed thereon as a [m]atter of law"); Cascade Auto Co. v. Petter, 212 P. 823, 824 (Colo. 1923) (holding that posting a sign in a parking garage, limiting liability for theft, cannot actually limit the garage keeper's liability for theft); Malone v. Santora, 64 A.2d 51, 53–54 (Conn. 1949) (stating that the operator's failure to exercise reasonable care in the bailment of the plaintiff's car was not relieved simply because the operator had given the plaintiff a claim ticket and stating he assumed no responsibility for damages or theft of the car); Davidson v. Ramsby, 210 S.E.2d 245, 247 (Ga. Ct. App. 1974) (holding that "a mere disclaimer of responsibility on a receipt is insufficient to absolve one of responsibility where negligence is alleged in the handling of [bailor's] automobile while defendants had it in their possession so as to allow the keys to be used in removing it"); U.S. Fid. & Guar. Co. v. Dixie Parking Serv., Inc., 262 So.2d 365, 365–67 (La. 1972) (holding that a man who delivered his car with personal belongings in it, and who specifically asked the parking attendant if the personal belongings would be safe in the car, was entitled to believe that the personal belongings would be safe despite a sign stating the garage denied responsibility for personal items); Sandler v. Commonwealth Station Co., 30 N.E.2d 389, 391 (Mass. 1940) (stating that it could be a "reasonable assumption by the plaintiff that the stub that was given him was a receipt for his automobile, or a means of identifying him when he should return to get his automobile, rather than a contract freeing an apparent bailee from all responsibility"); Miller's Mut. Fire Ins. Ass'n. of Alton, Ill. v. Parker, 65 S.E.2d 341, 344 (N.C. 1951) (holding that it would go against public interest to exculpate the defendant parking lot owner from his own negligence, despite the defendant erecting signs and telling the parking lot user that he would not be responsible for loss by fire or theft); Wendt v. Sley Sys. Garages, 188 A. 624, 625 (Pa. 1936) (holding that "the bailee was relieved of liability as an insurer, but not for loss due to its negligence"); Savoy Hotel Corp. v. Sparks, 421 S.W.2d 98, 104 (Tenn. Ct. App. 1967) (denying that "the exculpatory language printed upon the claim check delivered to plaintiff formed a part of the contract of bailment"); Allright, Inc. v. Schroeder, 551 S.W.2d 745, 747 (Tex. Civ. App. 1977) (stating that "[t]he fact that the closing time of the lot was posted on signs and was printed on the claim ticket does not exempt the operator of the lot from the exercise of ordinary care with respect to the safety of the property"); Althoff v. System Garages, Inc., 371 P.2d 48, 50 (Wash. 1963) (adopting the rule that "a professional bailee cannot contract away responsibility for his own negligence or fraud").

One option is to make the "Legal Advantage Plus" package a required item of purchase for all legal products sold through LegalZoom.[149] The package gives the user the added features of attorney support, annual legal checkup with an attorney, unlimited revisions to the trust through LegalZoom, and secure storage and delivery of the trust.[150] These added measures of review would likely have the effect of increasing the accuracy of the document created for the user.

A second option is for all states to enter into Assurance of Discontinuance agreements with LegalZoom, much like the one the state of Washington has entered into with the company.[151] Provisions stating that LegalZoom cannot misrepresent the benefits or disadvantages of any estate-planning document as compared to any estate distribution document in the state, or fail to offer estate-planning forms that conform to the state's law, would help assure that users of LegalZoom receive a product that better protects and satisfies the user's needs.[152] Furthermore, the provision should state that LegalZoom cannot fail to have a state licensed attorney review all self-help estate-planning forms offered to the state's consumers, or fail to clearly and conspicuously disclose that communications between the company and consumers are not protected by the attorney-client privilege, which would further assure protection and satisfaction of the user's needs.[153]

A third option is the creation and adoption of a new Model Rule that makes it unethical for a provider of legal forms, who has an interactive relationship with the user of those forms, to disclaim complete liability from harm that may come from using those forms. By disallowing the disclaimers, users would have no doubt of their right to sue the provider for malpractice should a form end up being harmful to, or misrepresent, the user's needs.[154]

CONCLUSION

No one is likely to argue that preparing a will is an unwise decision, and, in fact, having a will is highly recommended.[155] LegalZoom was created with noble intentions: it sought to allow people to create essential legal documents without encountering inconvenience or high fees.[156] But disclaiming all liability to users of legal services, whether online or not—

149 *See Legal Plan Contract*, *supra* note 106.

150 *Id*.

151 *See* Press Release, *supra* note 15.

152 *Id*.

153 *Id*.

154 "In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest of others." RESTATEMENT (SECOND) OF TORTS § 282 (1965).

155 *See* discussion *supra* Part I.

156 *Legal Zoom About Us*, *supra* note 5.

especially without the users conferring with a separate attorney—skirts a line of ethical responsibility that should not be allowed in light of the underlying policy of protecting the public from potentially harmful legal practices.

The National Popular Vote Compact: Horizontal Federalism and the Proper Role of Congress Under the Compact Clause

Heather Green[*]

INTRODUCTION

On August 8, 2011, California became the ninth United States jurisdiction to pass the "Agreement Among the States to Elect the President by National Popular Vote" (NPV agreement).[1] Once the NPV agreement receives the equivalent of at least 270 electoral votes,[2] the traditional Electoral College will be overhauled in favor of a national popular vote for the President of the United States.[3] Specifically, member states like California will be bound to abandon the widely used practice of selecting electors based on the outcome of the statewide vote.[4] Instead, state electors will be chosen in favor of the candidate winning the most votes nationally.[5] Until August of 2011, the NPV agreement had obtained less than thirty percent of the 270 vote total.[6] With the addition of California's fifty-five electors, the agreement now has nearly fifty percent of the votes required to become effective.[7]

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1 *See* 2011 Cal. Legis. Serv. Ch. 188 (West); *see also* Ben Boychuk & Pia Lopez, *Head to Head: Has the Time Come for the States to Help Fix the Electoral College?*, SACRAMENTO BEE, Aug. 10, 2011, http://www.sacbee.com/2011/08/10/3827460/head-to-head-has-the-time-come.html (reporting that California joined "seven other states and the District of Columbia in the National Popular Vote compact").

2 *See infra* text accompanying note 33 (discussing when the NPV becomes effective).

3 *See* JOHN R. KOZA ET AL., EVERY VOTE EQUAL: ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 248 (2011) (indicating that Article III of the NPV agreement requires that the election official from each member state "shall certify the appointment in that official's own state of the elector slate nominated in that state in association with the national popular vote winner").

4 *See infra* text accompanying note 160.

5 *See* KOZA ET AL., *supra* note 3, at 248 (explaining that under Article III of the NPV agreement, member states must base their choice of electors on the "national popular vote total" determined by the "number of votes for each presidential slate in each State of the United States and in the District of Columbia").

6 *See* David Siders, *Jerry Brown Signs Popular Vote Bill*, SACRAMENTO BEE, Aug. 8, 2011, http://blogs.sacbee.com/capitolalertlatest/2011/08/jerry-brown-signs-popular-vote.html (reporting that before California passed the NPV agreement, the seven other states and the District of Columbia, which had already passed NPV legislation, committed seventy-four of the 270 total electoral votes needed).

7 *See id.* (explaining that California added fifty-five electoral votes to the NPV agreement when

Although all past attempts to implement popular or direct presidential elections have failed to obtain the support needed for a successful constitutional amendment,[8] the NPV agreement presents an alternative means of achieving electoral reform. Relying on the power given to the states under Article II of the Constitution,[9] the NPV agreement avoids the amendment requirements by regulating the selection of electors at the state level.[10] Proponents believe that the NPV agreement will make every vote in every state equally important,[11] increasing the significance of uncompetitive states like California that are largely ignored in presidential elections.[12] The creators also intended that the NPV agreement would avoid situations in which presidential candidates win the presidential election without winning the popular vote.[13] However, the NPV agreement will also radically alter both the traditional method for electing the President and the distribution of voting power among the states.[14]

This comment focuses on the validity of the NPV agreement under the Compact Clause.[15] The text of the Clause requires that, in order to be valid, interstate agreements and compacts must obtain the consent of Congress.[16] The Supreme Court's interpretation has narrowed the Clause,

it passed the NPV legislation in August 2011).

8 *See* NEAL R. PEIRCE, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE 151 (1968) (noting that there have been over 500 attempts in Congress to amend the constitutional provision for the Electoral College); Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of the President*, 73 AM. HIST. 35, 35 (1986) ("Close to seven hundred proposals to amend the Electoral College scheme have been introduced into Congress since the Constitution was inaugurated in 1789."); L. PAIGE WHITAKER & THOMAS H. NEALE, CONG. RESEARCH SERV., RL 30804, THE ELECTORAL COLLEGE: AN OVERVIEW AND ANALYSIS OF REFORM PROPOSALS 17 (2004) (indicating that most of the proposed amendments "had minimal legislative activity," but some failed due to "insufficient legislative support"); *see, also*, Lodge-Gossett Amendment, S.J. Res. 200, 80th Cong. (1948) (proposing proportional allocation of electoral votes based on the number of votes cast in each state, but failing to pass the House). A successful constitutional amendment requires the support of two-thirds of both the House and the Senate. *See* U.S. CONST. art. V.

9 *See* U.S. CONST. art. II, § 1, cl. 2 (allowing state legislatures to appoint electors in any way they may choose).

10 *See infra* Part I.

11 *See* KOZA ET AL., *supra* note 3, at 245 (indicating that a national popular vote is the only electoral approach that achieves equality in voting).

12 Siders, *supra* note 6 (reporting that "proponents say the agreement would make California more relevant in presidential elections"); Ralph Z. Hallow, *GOP Factions Unite Against Presidential Popular Vote Push*, WASHINGTON TIMES, Aug. 2, 2011, http://www.washingtontimes.com/news/2011/aug/2/gop-factions-unite-against-president-popular-vote/?page=all (indicating that supporters believe that the NPV agreement "would 'guarantee that every vote matters'").

13 *See California: Brown Signs Electoral College Revision*, N.Y. TIMES, Aug. 8, 2011, *available at* http://www.nytimes.com/2011/08/09/us/09brfsBROWNSIGNSELBRF.html?r=1&ref=electoralcollege (reporting that the "National Popular Vote[] seeks to prevent a repeat of 2000, when Al Gore won the popular vote[,] but George W. Bush won the electoral vote"); KOZA ET AL, *supra* note 3, at 245 (positing that the NPV agreement would "ensure the election to the Presidency of the candidate with the most popular votes nationwide").

14 *See infra* Part II.C.

15 *See* U.S. CONST. art I, § 10, cl. 3 (defining the Compact Clause).

16 *Id.*

requiring congressional approval only when an interstate compact encroaches on the power of the federal government.[17] However, the question of whether the NPV agreement requires congressional consent is unclear. While it does not involve federal encroachment, it does interfere with the voting power of nonmember states, an issue which has never been squarely decided by the Supreme Court.[18] In addition, the power given to states under Article II of the United States Constitution to determine the method by which electors are selected is not subject to congressional interference.[19] Thus, a conflict between the two constitutional provisions leaves the legitimacy of the NPV agreement open to debate.

In Part I, this comment explores the provisions of the NPV agreement, its history, and the rationale behind it.[20] Part II addresses the need for congressional consent under the text of the Compact Clause, the Supreme Court's narrower interpretation of the Clause, and the absence of a conclusive decision from the Court regarding encroachment on nonmember states.[21] Part III then investigates the conflict between Article II and the Compact Clause regarding the proper role of Congress in determining the validity of the NPV agreement.[22] Part III concludes that the NPV agreement is subject to congressional approval. The NPV agreement not only increases the voting power of signatory states while encroaching upon the power of nonmember states, but also falls within the plain meaning of the Compact Clause.[23]

I. THE NATIONAL POPULAR VOTE AGREEMENT

The NPV agreement is unique in its state level approach. Instead of abolishing the Electoral College, it avoids the difficulties in passing an amendment by enacting popular vote legislation to individual state legislatures, and regulates the state's Article II power to determine how electors are selected.[24] Section A examines the provisions of the NPV legislation introduced, and in some cases, passed by state legislatures. Section B investigates the origins of the NPV agreement and its adoption in a number of states. In Section C, the rationale behind the NPV agreement and why it has been embraced in particular states is discussed.

17 *See infra* Part II.B.
18 *See infra* Part II.C.
19 U.S. CONST. art. II, § 1, cl. 2.
20 *See infra* Part I.
21 *See infra* Part II.
22 *See infra* Part III.
23 *See infra* Part III.B.
24 *See* Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218, 218 (2008) (indicating that the NPV agreement relies on state power over selection of electors to establish a "state-by-state path to a National Popular Vote").

A. The Mechanics of the NPV Agreement

The NPV does not eliminate the Electoral College, but it does significantly change how the electors are chosen.[25] The Constitution grants the states the power to determine the method by which electors are chosen,[26] and traditionally, states have chosen to select electors based on the outcome of a statewide popular vote.[27] The NPV agreement, on the other hand, lays out a number of provisions requiring that signatory states select presidential electors based on the outcome of the popular vote at the national level.[28]

These provisions would require that each state conduct a statewide popular vote similar to that under the current Electoral College system.[29] Then the votes from the individual states would be counted and combined by election officials in each member state to produce an official national popular vote total.[30] Each of those states that have adopted the NPV agreement would be bound to choose electors based on this total.[31] In the event of a tie in the national vote, each signatory state would revert to choosing its electors based on the winner of the statewide popular vote.[32]

The NPV agreement does not immediately bind the choices of the signatory states, however. Instead, it will become effective only after enough states approve it to make up at least 270 electoral votes, or a majority of the Electoral College.[33] In addition, an important limitation is

25 *See* KOZA ET AL., *supra* note 3, at 247 (explaining that while "[t]he Electoral College would remain intact under the proposed compact," it would change it to "a body that reflects the voters' nationwide choice").

26 U.S. CONST. art. II, § 1, cl 2.

27 *See infra* text accompanying note 53 (defining this method as the unit rule); *see also* note 160 (describing the use of the unit rule by nearly every state and the District of Columbia).

28 *See* KOZA ET AL., s*upra* note 3, at 248 (indicating that Article III of the NPV agreement requires that the election official from each member state shall certify the appointment in that official's own state of the elector slate nominated in that state in association with the national popular vote winner).

29 *See id.* at 250 (requiring that "[e]ach member state shall conduct a statewide popular election for the President and Vice President of the United States.").

30 *See id.* at 252–53 ("[T]he chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a 'national popular vote total' for each presidential slate.").

31 *See id.* at 250 (describing states as the members to the "Agreement Among the States to Elect the President by National Popular Vote" which "mandates a popular election for President and Vice President").

32 *See id.* at 248.

33 *See id.* at 249 (reporting that under Article IV of the agreement, the agreement "shall take effect when states cumulatively possessing a majority of the electoral votes have enacted [the] [a]greement in substantially the same form"); Press Release, John Buchanan, Congressman, Prepared Remarks for Initial Press Conference of National Popular Vote at National Press Club in Washington (Feb 23, 2006) (on file with National Popular Vote) (indicating that the laws will only "come to life" once "identical laws have been enacted by states collectively possessing a majority of the electoral votes"); Hendrik Hertzberg, *Count 'Em*, THE NEW YORKER, Mar. 6, 2006, http://www.newyorker.com/archive/2006/03/06/060306talkhertzberg ("The compact would take effect only when enough states had joined it to elect a President . . . .").

placed upon each signatory state's ability to repeal the NPV agreement. In an effort to prevent states from freely withdrawing solely to select electors in a way "better suited [to] their political preferences,"[34] the NPV agreement creates a "blackout" period.[35] Any withdrawal from the NPV agreement taking place within the six months before the end of a President's term is not effective until after the election for the next presidential term has concluded.[36] Thus, if a state wishes to vote for a candidate who better represents its interests but is likely to lose in the national popular vote, it must repeal the NPV legislation before July 20 of an election year.[37] If it misses this deadline, that state may not repeal the NPV legislation until after inauguration day.[38]

B. The History and State Approval of the NPV Agreement

Law professor Robert W. Bennett introduced the proposal for a state-implemented shift from the electoral system to a national popular vote without the burdens of a constitutional amendment in the wake of the highly controversial 2000 presidential election.[39] In 2005, entrepreneur John R. Koza founded the National Popular Vote Movement to advocate for the legislative adoption of Bennett's proposal.[40] By 2008, the NPV agreement was introduced in forty-seven state legislatures.[41] Maryland was

34 *Question Concerning Withdrawal from the National Popular Vote Compact*, NATIONAL POPULAR VOTE (Mar. 13, 2010) http://www.nationalpopularvote.com/resources/Withdrawal-V6-2010-3-13.pdf; *see also* KOZA ET AL., *supra* note 3, at 266 (indicating that the purpose of the withdrawal provision is to prevent states from withdrawing in the middle of a campaign for possibly partisan purposes).

35 *See* KOZA ET AL., *supra* note 3, at 265 (explaining that the NPV agreement "permits a state to withdraw from the compact but provides for a 'blackout' period (of approximately six months) restricting withdrawals").

36 *See id.* at 266 (describing the purpose of the withdrawal limitation as an attempt to prevent withdrawal for "partisan political purposes"); *see also id.* at 249 (indicating that Article IV of the agreement prevents withdrawal "occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term"); Paul Casey, *Is It Time For Electoral Reform?*, WICKED LOCAL STONEHAM (Sept. 24, 2007, 3:35 PM) http://www.wickedlocal.com/stoneham/opinion/x775330870#axzz1cww2X6WA ("[S]tates could withdraw from the agreement at any time except during a six-month window between July 20 of an election year and inauguration day.").

37 *See* KOZA ET AL., *supra* note 3, at 266 ("The blackout period starts July 20 of a presidential election year . . . .").

38 *See id.* (explaining that the blackout period "would normally end on January 20 of the following year (the scheduled inauguration date)").

39 *See* Robert W. Bennett, *Popular Election of the President without a Constitutional Amendment*, 4 GREEN BAG 2d 241, 241 (2001).

40 *See* Andrew Ferguson, *The Head Counter: John Koza has an Ingenious Plan to Put the Electoral College Out of Business*, FORTUNE, July 21, 2008, at 119, *available at* http://money.cnn.com/magazines/fortune/fortunearchive/2008/07/21; Rick Lyman, *Innovator Devises End Run Around Electoral College*, N.Y. TIMES, Sept. 22, 2006, http://www.nytimes.com/2006/09/22/us/politics/22electoral.html; Stevenson Swanson, *Turning Election into Popularity Race*, CHI. TRIB., July 21, 2008, at A18, *available at* http://articles.chicagotribune.com/2008-07-21/news.

41 *Maryland Sidesteps Electoral College*, MSNBC (Apr. 10, 2007, 11:17 AM) http://www.msnbc.msn.com/id/18053715/ns/politics/t/maryland-sidesteps-electoral-college/#.TwfNHzXVujY.

the first state to formally adopt the NPV agreement in 2007,[42] followed by New Jersey,[43] Illinois,[44] and Hawaii in 2008,[45] Washington in 2009,[46] Massachusetts[47] and the District of Columbia in 2010,[48] and Vermont[49] and California in 2011.[50] With the addition of California's fifty-five electoral votes, the agreement has successfully obtained 132 of the 270 electoral votes needed for the agreement to become effective.[51]

C. Rationale Behind the Agreement and State Approval

The advocates for the NPV agreement cite three main reasons for national popular vote election as opposed to traditional election by the Electoral College.[52] First, they believe that under the unit rule system,[53] individual votes are virtually worthless unless the voter lives in a highly contested state where an individual vote could tip the scale toward one candidate or another.[54] Second, the unit rule has been seen as the cause of candidates spending a disproportionate amount of time and resources in competitive states while the remaining states are largely ignored.[55] Finally, national popular vote advocates often cite the ability of the traditional

42 *See* MD. CODE ANN., ELEC. LAW § 8-5A-01 (LexisNexis 2007).

43 *See*.N.J. STAT. ANN. § 19:36-4 (West 2008).

44 *See* 10 ILL. COMP. STAT. ANN. 20/1 (West 2009).

45 *See* HAW. REV. STAT. ANN. § 14D-1 (LexisNexis 2008).

46 *See* WASH. REV. CODE ANN. § 29A.56.300 (West 2009).

47 *See* 2010 Mass. Acts 229.

48 *See* D.C. CODE § 1-1051.01 (LexisNexis 2010).

49 *See* VT. STAT. ANN. tit. 17, § 2751 (2011).

50 *See* CAL. ELEC. CODE § 6921 (West 2011).

51 *See* Nate Silver, *Pa. Electoral College Plan Could Backfire on G.O.P.*, N.Y. TIMES, (Sept. 15, 2011, 11:56 PM), http://fivethirtyeight.blogs.nytimes.com/2011/09/15/pennsylvania-electoral-college-plan-could-backfire-on-g-o-p.

52 The creators of the NPV agreement identify "accuracy," "competitiveness," and "equality" as the three criteria by which they analyze both the Electoral College and the NPV agreement. *See* KOZA ET AL., *supra* note 3, at 245. "Accuracy" is defined as the ability to "ensure the election to the Presidency of the candidate with the most popular votes nationwide." *Id.* "Competitiveness" is the ability of the electoral method to "improve upon the current situation in which voters in two-thirds of the states are ignored because they live in presidentially non-competitive states." *Id.* "Equality" is defined as the ability of the method to make "every vote . . . equal." *Id.* The creators argue that the NPV agreement is the only method that meets all three criteria. *Id.*

53 The unit rule describes the state initiated practice of "aggregating a state's electoral votes as a unit" on a general ticket. *See* Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2124 (2001) (describing the origination of the unit rule in the presidential election of 1800); *see also infra* text accompanying note 160 (explaining the nearly universal use of the unit rule by states today).

54 KOZA ET AL., *supra* note 3, at 243.

55 *See* Jack N. Rakove, *Presidential Selection: Electoral Fallacies*, 119 POL. SCI. Q. 21, 23 (2004) (noting that under the current electoral system, candidates are able to focus their scarce resources on a "relatively small number of electoral units that are in serious contention"); Brenden J. Doherty, *Elections: The Politics of the Permanent Campaign: Presidential Travel and the Electoral College, 1977–2004*, 37 PRESIDENTIAL STUDIES Q. 749, 750 (2007) (recognizing the assumption made by some that candidates, specifically incumbents, are "single-minded seekers of reelection" who will inherently spend more time in the states with the most political value); Daron R. Shaw, *The Methods behind the Madness: Presidential Electoral College Strategies, 1988–1996*, 61 J. POL. 893, 911 (1999) (positing that candidates allocate resources based on systematic planning and strategy under the electoral college).

Electoral College system to elect a President who failed to win the nationwide popular vote, as inconsistent with democratic ideology.[56]

State legislatures have recognized similar rationale. Those that have passed the NPV legislation have especially emphasized campaign attention and the power of individual voters as justification for enactment of the NPV agreement.[57] Indeed, the importance of these factors is supported by an examination of the states that have passed the NPV legislation.[58] So far, none of the signatory states are currently considered "battleground" states thought to receive the most resources and voting power.[59] Instead, many of them are thought to be "spectator" states receiving the least amount of campaign attention and where the statewide vote is typically not competitive.[60]

II. THE NPV AGREEMENT AND CONGRESSIONAL APPROVAL

The NPV agreement has been challenged and extensively analyzed by critics on various grounds including the Voting Rights Act[61] and the Guaranty Clause.[62] This comment focuses on the most serious constitutional objection facing the NPV agreement: whether it requires

56 *See* Keena Lipsitz, *The Consequences of Battleground and "Spectator" State Residency for Political Participation*, 31 POL. BEHAV. 187, 187–88 (2008) (noting that "George W. Bush's ability to win the 2000 presidential election without winning the popular vote reinvigorated calls for abolishing the Electoral College" and that those dissatisfied with the Electoral College have begun to support a national popular vote); *see also* Randall E. Adkins & Kent A. Kirwan, *What Role Does the "Federalism Bonus" Play in Presidential Selection?*, 32 PUBLIUS: J. OF FEDERALISM 71, 71 (2002) (observing that after close election in 2000, politicians began advocating elimination or revision of the Electoral College); Bonnie J. Johnson, *Identities of Competitive States in U.S. Presidential Elections: Electoral College Bias or Candidate-Centered Politics?*, 35 PUBLIUS: J. OF FEDERALISM 337, 337–38 (2005) (indicating that both the 2000 election of George W. Bush and the very narrow 1888 election of Benjamin Harrison triggered questions about the validity of the Electoral College and that under a national democracy, the President should be elected by popular vote).

57 *See* H.R. REP. NO. 111-5599, at 1 (2009) (identifying the fact that "[t]he current system forces candidates to focus only on a few states" and the supporters' belief that the agreement "will involve more citizens in presidential campaigns"); MD. DEPT. OF LEGIS. SERVS., *Md. Fiscal and Policy Note*, H.R. 148, 2007 Sess., at 1 (2007) (discussing the "concentration of campaigning in a minority of closely divided states and the ability of a candidate to win the presidency without winning the national popular vote"); ASSEMB. APPROPRIATIONS COMM., NEW JERSEY ASSEMBLY COMMITTEE STATEMENT, Leg., 212, A.B. 4225 (2007) ("This agreement ensures that all states are competitive in presidential elections, makes all votes important and equal . . . .").

58 *See supra* text accompanying notes 42–50 (listing the states that have successfully passed the NPV agreement).

59 *See* Johnson *supra* note 56, at 337 (defining competitive states as those with "margins of victory of less than [five] percentage points"); *see also Election Results 2008*, N.Y. TIMES (Dec. 9, 2008), http://elections.nytimes.com/2008/results/president/map.html (reporting that the margins of victory for the eight states and the District of Columbia, which approved the agreement, ranged from a low of fifteen to a high of ninety-four percentage points).

60 *See* Doherty, *supra* note 55, at 766 (concluding that closer voting margins are among the factors that contribute to the number of campaign events in a given state, with closer margins leading, on average, to more events).

61 *See* David Gringer, *Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College*, 108 COLUM. L. REV. 182, 183 (2008).

62 *See* Kristin Feeley, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427, 1434 (2009).

congressional approval under the Compact Clause. Unlike other possible constitutional challenges, a Compact Clause challenge to the NPV agreement highlights a tension between the Article II power of states on one hand to select presidential electors and the power of Congress on the other hand to approve interstate compacts.[63]

The text of the Compact Clause states that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."[64] This clause applies, on its face, to all compacts or agreements made between states, but the Supreme Court has held that the Clause only applies to agreements found to encroach upon federal power.[65] The Supreme Court recognized that interstate agreements can be helpful or even necessary to solve interstate problems, and to require congressional consent for all such compacts would be unwise.[66] The Court has not, however, squarely considered the need for congressional consent when interstate compacts horizontally encroach or interfere with the power of other nonmember states.[67] This Part explores the NPV agreement under the original meaning of the Compact Clause and the Court's interpretation, and examines the possible need for congressional consent due to the agreement's effects on non-signatory states. Section A addresses whether the NPV agreement qualifies as a compact or agreement within the meaning of the Compact Clause. Section B then examines the need for congressional consent under the accepted federal encroachment test. Finally, Section C considers a possible horizontal encroachment test.

A. The NPV Agreement is a Compact

Before the Compact Clause may be applied, it must first be determined whether the NPV agreement qualifies as a compact or agreement within the meaning of the Clause. The Constitution does not clearly define these terms.[68] For instance, there was no discussion at the

63 *See infra* Part III.

64 U.S. CONST. art. I, § 10, cl. 3.

65 *See* New Hampshire v. Maine, 426 U.S. 363, 369 (1976) ("The application of the Compact Clause is limited to agreements that are '[d]irected to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.'" (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893))).

66 *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 470 (1978) (finding that the Constitution "is not to be construed to limit the variety of arrangements which are not possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution" (quoting New York v. O'Neill, 359 U.S. 1, 6 (1959))).

67 *See infra* Part II.B.

68 *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 694 (1925) ("The records of the Constitutional Convention furnish no light as to the source and scope of this compact provision of Article I, Section 10. Nor does the Federalist help."). Because the Clause largely mirrors that used under the Articles of Confederation, the Court has found that the purpose of the Clause is to protect the federal government from competing state political power. *See infra* Part II.B. This argument is bolstered by the text of the Clause which places the same limitations on interstate compacts as "keep[ing] Troops" and "engag[ing] in War," powers specifically granted as enumerated powers of the federal government. U.S. CONST. art I, § 10 (describing the state's limited ability to enter into interstate compacts); U.S. CONST. art. I, § 8

Constitutional Convention of the use of the phrase "agreement or compact" rather than the "treaty, confederation, or alliance" phrase used in the Articles of Confederation to describe interstate agreements allowed with congressional consent.[69] James Madison declared that the purpose of the inclusion of the Clause was so obvious that it required no discussion.[70] Therefore, the best indication of the original meaning of these terms may be found in the earliest edition of the Webster's Dictionary.[71] It defines a compact as "an agreement [or] a contract between parties; a word that may be applied, in a general sense, to any covenant or contract between individuals, but it is more generally applied to agreements between nations and states, as treaties and confederacies."[72] It defines agreement as a "[u]nion of minds in regard to a transfer of interest; bargain; compact; contract; stipulation."[73] Under these definitions, to qualify as an agreement or compact, the NPV agreement must be a kind of contract between individual states.[74]

To be a valid and enforceable contract, an agreement must involve a "bargain in which there is a manifestation of mutual assent to the exchange and a consideration."[75] Mutual assent requires that the parties to an agreement either "make a promise or begin or render a performance."[76] Finally, to satisfy the consideration requirement, parties to a contract must give "performance or return promise [that] is bargained for."[77] In applying contract law to interstate compacts, courts have found that presentation of

(describing the enumerated powers of Congress including the ability to "declare War," "raise and support Armies" and "provide and maintain a Navy").

69 *See* Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 761 (2010) (explaining that "agreement or compact" was introduced in a draft of the Constitution and then continued to be used without any discussion).

70 *See* THE FEDERALIST NO. 44, at 783 (James Madison) (explaining that with the exception of the limitations upon state power over imports and exports, "the remaining particulars of [Article I, Section 10] . . . are either so obvious, or have been so fully developed, that they may be passed over without remark").

71 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1828).

72 *See id*.

73 *See id*.

74 Courts have also recognized compacts as contracts between signatory states. *See* Tex. v. N.M., 482 U.S. 124, 128 (1987) ("[A] Compact is, after all, a contract." (quoting Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 285 (1959))); Doe v. Pa. Bd. of Prob. & Parole, 513 F.3d 95, 105 (3d Cir. 2008) (finding that "[i]nterstate compacts are formal agreements between states, and hence, are contracts subject to the principles of contract law."); Spence-Parker v. Del. River & Bay Auth., 616 F. Supp. 2d 509, 515 (D.N.J. 2009) (finding that "[t]he terms of a state's surrender of a portion of its sovereignty to a compact clause entity are found in the compact agreement itself, which is a 'contract[ ] subject to the principles of contract law.'" (quoting *Doe*, 513 F.3d at 105)); Aveline v. Pa. Bd. of Prob. & Parole, 729 A.2d 1254, 1257 (Pa. Commw. Ct. 1999) (finding that "[b]ecause interstate compacts are agreements enacted into state law, they function simultaneously as contracts between states and as statutes within those states."). In applying contract law to interstate compacts, it has been found that the presentation of reciprocal legislation represents an offer, approval by the state legislature represents acceptance, and "the settlement of a dispute or the creation of a regulatory scheme" satisfies consideration. *Doe*, 513 F.3d at 105.

75 RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981).

76 *Id.* § 18.

77 *Id.* § 71(2).

reciprocal legislation is an offer, approval by the state legislature represents acceptance, and the regulation or settlement of a dispute by the states satisfies consideration.[78]

By considering and formally enacting the NPV legislation, state legislatures meet the requirement for manifestation of mutual assent.[79] Also, when enough states enact the legislation, each state promises not only to abide by the terms of the agreement in selecting state electors based on the outcome of a national popular vote, but also to sacrifice its ability to withdraw from the agreement during the six months preceding the inauguration of the President, establishing consideration for the agreement.[80] Therefore, the NPV agreement qualifies as a compact within the meaning of the Compact Clause under contract law and the original meaning of the term.

The Supreme Court has used a set of factors to determine if an interstate agreement comes within the meaning of the Compact Clause. The Court has looked to (1) mandated reciprocity or regional limitation, (2) whether state legislation depends upon the actions of another state, or (3) whether a state's representatives or officials cooperate with those of other signatory states.[81]

The NPV agreement satisfies the test for a compact within the meaning of the Clause. As far as reciprocity or regional limitation, the NPV agreement is national rather than regional in nature,[82] and each state's NPV legislation depends on the actions of other states as it becomes effective only after a specific number of states have enacted similar legislation.[83] Finally, as far as cooperation among state officials, the NPV agreement requires that the "chief election official[s]" of each state are to "communicate an official statement of [the number of votes cast in the state

78 *See Doe*, 513 F.3d at 105.

79 *See id*.

80 *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (indicating that consideration is a "performance or return promise [that] is bargained for" which includes "a forbearance").

81 *See* Ne. Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 175 (1985) (expressing doubt as to whether an interstate agreement that allowed regional banking amounted to a compact under the factor test). A set of "classic indicia" was also used by the Court in recent cases in evaluating whether an agreement amounted to a compact under the Clause. *See id.* The same indicia were introduced in earlier cases in applying the federal encroachment test because the Court defined a compact as an agreement encroaching on federal power, effectively collapsing compact analysis and the federal encroachment test into this single set of factors. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472–73 (1978) (indicating that to determine whether an agreement was a compact to which the Compact Clause would apply is based on "whether the Compact enhances state power *quoad* the National Government"); New Hampshire v. Maine, 426 U.S. 363, 369 (1976) (disagreeing with the contention that a marine boundary agreement was an "Agreement or Compact" under the Compact Clause due to its failure to meet the federal encroachment test).

82 *See* KOZA ET AL., *supra* note 3, at 248 (stating that the text of the NPV agreement provides that "any State in the United States and the District of Columbia may become a member of [the NPV] agreement by enacting [the NPV] agreement"). The states that adopted the legislation are not confined to any particular region of the country. *See supra* text accompanying notes 42–50.

83 *See supra* text accompanying note 33.

for each presidential slate] . . . to the chief election official of each other member state."[84] Because the NPV agreement meets all of the factors, the NPV agreement would likely be found to be an interstate compact within the meaning of the Compact Clause.

B. The Vertical Federal Encroachment Test

Although the language of the Compact Clause seems to require broad application,[85] the Supreme Court has held that not every interstate compact requires congressional consent.[86] Instead, the Court has determined the need for congressional consent using a test first introduced in *Virginia v. Tennessee*.[87] The Court considered a compact used to settle a state boundary dispute and found that the compact did not violate the Compact Clause because congressional consent could be implied from subsequent recognition of the boundary.[88] More importantly, Justice Field posited that because "[t]here are many matters upon which different States may agree that can in no respect concern the United States," congressional approval should only be required for "the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[89] Thus, interstate compacts only require congressional consent if they encroach upon the power of the federal government.[90]

84 *See id.*; KOZA ET AL., *supra* note 3, at 248 (describing the terms of the agreement).

85 *See* U.S. CONST. art. I, § 10, cl. 3 (requiring congressional approval for "any" interstate compact or agreement); Virginia v. Tennessee, 148 U.S. 503, 517–18 (1893) (acknowledging that "[t]he terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects.").

86 *See* Wharton v. Wise, 153 U.S. 155, 169 (1894) (holding that "the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained." (quoting *Virginia*, 148 U.S. at 518)); *U.S. Steel*, 434 U.S. at 469 (holding that "not all agreements between States are subject to the strictures of the Compact Clause."). The Supreme Court found that a literal reading of the Compact Clause could not have been intended because it provided no benefit to the federal government. *See* Union Branch R.R. Co. v. E. Tenn. & Ga. R.R. Co., 14 Ga. 327, 340 (1853) (explaining that if the court was required to follow the exact language of the Compact Clause, it "must hold that a State, without the consent of Congress, can make no sort of contract, whatever, with another State," but concluded that it was not meant to apply to every agreement between states because there is "no advantage to be gained by, or benefit in such a provision").

87 148 U.S. 503 (1893).

88 *See id.* at 522 (finding that "[t]he line established was treated by [Congress] as the true boundary between the States" for elections, federal appointments, and judicial and revenue purposes).

89 *See id.* at 518–19; *see also Ne. Bancorp, Inc.*, 472 U.S. at 175–76 (citing Justice Field's test when deciding the status of a regional banking agreement under the Compact Clause); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471(1978) (finding that the federal supremacy test proposed in *Va. v. Tenn.* "states the proper balance between federal and state power with respect to compacts and agreements among States"); N.H. v. Me., 426 U.S. 363, 369–70 (1976) (applying the test to evaluate a compact regarding the marine boundary between the two states); Stearns v. Minn., 179 U.S. 223, 246–47 (1900) (referring to the *Virginia v. Tennessee* rule in reviewing the validity of an agreement between states regarding railroad taxation); La. v. Tex., 176 U.S. 1, 17 (1900) (citing the test in evaluating an interstate railroad agreement).

90 *See N.H.*, 426 U.S. at 369–70 (finding that whether a state boundary dispute fell under the congressional approval requirement of the Compact Clause depended upon whether it "encroach[ed] . . . upon the full and free exercise of Federal authority" (quoting *Va. v. Tenn.*, 148 U.S. at 520)).

The Court has developed a factor test for determining federal encroachment by an interstate compact. It looks to (1) whether the agreement gives states power they would not otherwise have, (2) whether the agreement delegates state power to an outside body, (3) the ability of each participating state to withdraw at will, or (4) whether the statute is "conditioned on action by the other state[s]."[91] Under these factors, the NPV agreement does not involve federal encroachment. Article II gives the federal government no power to determine the manner by which the states choose electors.[92] Instead, it leaves that choice to the states.[93] Therefore, an interstate agreement concerning the selection of electors does not give states any power they would not have otherwise and does not encroach upon the power of the federal government. The power to use reciprocal legislation to choose electors is not included in the language of Article II, but collective action alone is not enough to prove federal encroachment.[94] In addition, the NPV agreement does not give regulating power to any outside body or commission.[95] Instead, an election official from each participating state is given the duty to tally the popular votes within the state for each candidate, report the vote totals to all other participating states, and select electors for the state based on the final outcome of the national popular vote.[96]

Although the last two factors weigh against the NPV agreement, they are unlikely to prove conclusive in finding federal encroachment. First, because repeal of the NPV agreement by participating states is prevented during the six-month blackout period, states are not free to withdraw at any time.[97] Second, the fact that it becomes effective only after acquiring 270 electoral votes establishes that the NPV legislation in each state is conditioned upon legislation in other states.[98] However, these factors seem

91 *See U.S. Steel*, 434 U.S. at 473 (identifying the factors as the "test [to analyze] whether the Compact enhances state power *quoad* the National Government"). These factors have also been used in more recent decisions to determine whether an agreement amounts to a compact. *See also* cases cited *supra* note 74.

92 *See* McPherson v. Blacker, 146 U.S. 1, 27 (1892) (noting that the Constitution "recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the [appointment of electors]").

93 *See id.*; U.S. CONST. art. II, § 1, cl. 2 (granting state legislatures the power to select presidential electors in any way they choose).

94 *See* N.Y. v. O'Neill, 359 U.S. 1, 11 (1959) (indicating that not all interstate compacts necessarily encroach on federal power because "[t]he Constitution of the United States does not preclude resourcefulness of relationships between States on matters as to which there is no grant of power to Congress and as to which the range of authority restricted within an individual State is inadequate").

95 *See* KOZA ET AL., *supra* note 3, at 247 ("The proposed compact does not change a state's internal procedures for operating a presidential election. After the [fifty] states and the District of Columbia certify their popular vote counts for President in the usual way, a grand total of popular votes would be calculated by adding up the popular vote count from all 51 jurisdictions.").

96 *See id.* at 248 (indicating that the mechanics of the agreement are the duty of the chief election official in each participating state).

97 *See supra* Part I.A.

98 *See id.*

to only address the NPV agreement's status as a compact rather than whether it encroaches on the power of the federal government. The fact that the states are not given any additional power beyond that already retained under Article II and in no way "interfere with [the federal government's] rightful management of particular subjects placed under their entire control" decisively forecloses the need for congressional approval under the federal encroachment test.[99]

C. Horizontal Encroachment and the Compact Clause

The NPV agreement presents an issue separate from federal encroachment: whether congressional consent is required for interstate compacts that encroach on state power. NPV advocates believe that under the traditional unit rule system, voters in a majority of states are disregarded during presidential elections in favor of the more influential competitive states.[100] The NPV agreement seeks to remedy this problem by replacing unit voting with a national popular vote.[101] Under this system, voting power is expected to shift in favor of those states believed to be ignored in current presidential elections.[102] Indeed, many of the states that have enacted the NPV legislation cited its ability to increase campaign attention within those states in future elections.[103] Thus, rather than affecting the vertical distribution of power between the states and the federal government, the NPV agreement affects the horizontal distribution of power, benefitting safe states at the expense of the competitive, non-signatory states that benefit from traditional presidential elections.

To analyze the voting power of the states, researchers have looked to the amount of campaign time and resources spent in each state during a presidential election.[104] This method takes into account the basic

99 *See* Va. v. Tenn., 148 U.S. 503, 517–18 (1893).

100 *See* KOZA ET AL., *supra* note 3, at xxiv (arguing that "[w]ith the number of battleground states steadily shrinking, we see candidates and their campaigns focused on fewer and fewer states" and that the candidates in the 2004 election "completely ignored three-quarters of the states").

101 *See supra* Part I.A.

102 *See* 125 Cong. Rec. 309 (1979) (statement of Sen. Robert E. Dole) (postulating that if the country switched to the direct election of the President, each vote would "carr[y] equal importance" and "would give candidates incentive to campaign in States that are perceived to be single party States").

103 *See* MD. DEP'T OF LEGIS. SERVICES, *Md. Fiscal and Policy Note*, S.B. 634, 2007 Sess., at 3 (2007) (reporting that the NPV agreement is "aimed at changing [certain] aspects of the current system of electing the President, including the concentration of campaigning in a minority of closely divided states"); N.J. ASSEMB. COMM. STATEMENT, A.B. 4225 (2007) ("This agreement ensures that all states are competitive in presidential elections, [and] makes all votes important and equal."); SB 5599, 2009 Leg. (Wash. 2009) (stating that "two-thirds of the campaign spending and visits in the last election were focused only on five 'swing' states" and that "[t]his bill will allow *all* voters to count in a presidential election").

104 *See* Steven J. Brams & Morton D. Davis, *The 3/2's Rule in Presidential Campaigning*, 68 AM. POL. SCI. REV. 113, 113 (1974) (analyzing how the Electoral College "induces candidates to allocate campaign resources" so as to "create[] a peculiar bias in presidential campaigns that makes the largest states the most attractive campaign targets to the candidates, even out of proportion to their size" while a popular vote "would tend to relieve the candidates of the necessity of making some of the manipulative strategic calculations that are endemic to the present system"); Shaw, *supra* note 55, at

assumption that a candidate's time and resources are limited.[105] Consequently, they are expected to invest the most in the states likely to yield the greatest vote return.[106] The states in which candidates invest the most are assumed to be the states with the most voting power.[107]

Under the unit rule system, candidates have been found to focus mainly on large, competitive states that are more likely to be pivotal in any given presidential election.[108] Because the number of electors given to each state depends upon the number of seats that state has in Congress,[109] large states possess more electoral votes, increasing their chance of casting the decisive vote.[110] If a large state is also competitive, it becomes even more powerful under the unit rule because it is more likely to tip the electoral vote scale toward one candidate or another.[111] At the other end of the spectrum, the less populous, noncompetitive states are the least likely to receive campaign time and resources. These states benefit from the

894 (describing how "electoral college strategies . . . can lead to discrepancies in the allocation of campaign resources even among the battleground states"); John R. Wright, *Pivotal states in the Electoral College, 1880 to 2004*, 139 PUB. CHOICE 21, 22 (2009) (finding that a state's "pivot position" was a "significant predictor of presidential candidates' media buys and travel decisions in the last two presidential elections"); Doherty, *supra* note 55, at 753 (hypothesizing that presidents' "patterns of travel should favor populous, electorally competitive states"); Lipsitz, *supra* note 56, at 188 (examining whether the allocation of campaign resources in presidential campaigns affects political participation of voters within competitive and noncompetitive states).

105 *See* Darshan J. Goux & David A. Hopkins, *The Empirical Implications of Electoral College Reform*, 36 AM. POL. RES. 857, 869 (2008) (finding that "[r]esources, principally time and money, would remain limited" even under a direct vote); Doherty, *supra* note 55, at 754 (positing that where the President decides to campaign is revealing because "time is perhaps his scarcest resource").

106 *See* Bernard Grofman & Scott L. Feld, *Thinking About the Political Impacts of the Electoral College*, 123 PUB. CHOICE 1, 8 (2005) (assuming that "campaigners invest resources in influencing voters so as to equalize the expected marginal gain in the probability of their winning the Electoral College"); Wright, *supra* note 104, at 33 (arguing that "[s]ince candidates must win the pivotal state" to win the election, his or her resources "will probably be distributed around the pivotal state").

107 *See* Brams & Davis, *supra* note 104, at 117 (examining the amount of campaign time spent in each state in relation to the population size of that state and finding that candidates target and favor the states which will "maximiz[e] [his or her] expected electoral vote").

108 *See* Wright, *supra* note 104, at 35 ("[B]oth size and competitiveness exert indirect effects via pivot position on candidates' decisions about where to campaign."); Brams & Davis, *supra* note 104, at 131 ("Insofar as polls indicate the largest states to be the toss-up states, candidates who act on this information and concentrate almost all of their resources in these states will magnify even the large-state bias . . . .").

109 *See* U.S. CONST. art. II, § 1, cl. 2 (instructing that the number of electors in each state should be equal to "the whole Number of Senators and Representatives to which the State may be entitled in the Congress").

110 *See* John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304, 313 (1968) (finding that "[t]he present Electoral College system, in conjunction with state imposed unit-vote ("winner take all") laws . . . greatly favors the citizens of the most populous states and deprives citizens of the less populous states of an equal chance to affect the election of the President."); Brams & Davis, *supra* note 104, at 122 ("[W]hile an individual voter has a reduced chance of influencing the outcome in a large state because of the greater number of people voting, this reduction is more than offset by the larger number of electoral votes he can potentially influence.").

111 *See* Brams & Davis, *supra* note 104, at 123 (finding that "greater potential voting power of voters in large states . . . makes them more attractive as campaign targets to the candidates" because the state's larger number of electoral votes provide a higher likelihood that it will affect the outcome of a presidential election).

"federalism bonus" which provides at least two electors to each state regardless of its population.[112] Nevertheless, they have relatively few electoral votes and are less likely to play a significant role in the outcome of the election.[113] Moreover, if the state is uncompetitive, candidates may also be hesitant to give it any appreciable campaign attention because it is unlikely to provide additional votes.[114]

Although some researchers believe that a direct vote, like that proposed in the NPV agreement, will eliminate power disparities between individual voters and states,[115] candidates' limited resources will likely continue to encourage uneven resource allocation.[116] Candidates would have to alter their campaign strategies to obtain the largest number of individual votes on a national scale.[117] The focus of campaign resources would be adjusted from politically competitive states to both competitive and uncompetitive states with areas of high population.[118] Thus, spectator states are more likely to pass the NPV agreement because they may gain power under a national popular vote.

On the other hand, this implies that smaller competitive states would likely lose power under the national popular vote. Candidates would not expect as great of a return on their investment of resources in sparsely populated regions and would likely reduce the amount of campaign attention afforded to them.[119] These states would be harmed by a national

112 The "federalism bonus" is the grant of two electors assigned to each state based not on population, but on the number of Senate seats held by each state. *See* Adkins & Kirwan, *supra* note 56, at 72–73. The idea was carried over to the Electoral College from the Great Compromise regarding the composition of the Congress during the Constitutional Convention and reflects the founder's effort to balance political power between large and small states. *Id.* at 74–75; *see also* Lawrence D. Longley & James D. Dana, Jr., *The Biases of the Electoral College in the 1990s*, 25 POLITY 123, 133 (1992) (recognizing the increased voting power of residents of small states which "stems from the two electoral votes that are not based on population").

113 *See* Banzhaf, *supra* note 110, at 313 ("Citizens of the small and medium-sized states are severely deprived of voting power in comparison with the residents of the few very populous states . . . .").

114 *See* Doherty, *supra* note 55, at 766 (finding that during campaign years, a closer margin of victory in the previous election is a "statistically significant predictor[]" of more "presidential events").

115 *See* Longley & Dana, *supra* note 112, at 137 (finding that because under a direct vote "each citizen's voting power is, by definition, equal," it would be less biased than the "present electoral college"); Banzhaf, *supra* note 110, at 321–22 (arguing that because "no distinction whatever is made between votes cast by residents of different states," the votes in each state would be of equal weight under a direct vote).

116 *See* Goux & Hopkins, *supra* note 105, at 869 (arguing that "[c]andidates cannot realistically compete everywhere or engage every voter; inevitably, each campaign would decide, just as now, to direct resources toward some identifiable populations and not others.").

117 *See id.* (suggesting that "[u]nder a system of direct popular election, candidates no longer have reason to acknowledge state boundaries").

118 *See* Eric M. Uslaner, *Spatial Models of the Electoral College: Distribution Assumptions and Biases of the System*, 3 POL. METHODOLOGY 355, 361 (1976) ("The larger states would be favored under direct election simply because they have more voters than smaller states.").

119 *See* Goux & Hopkins, *supra* note 105, at 870 (examining the cost of campaign advertising and finding that "[e]vidence indicates that [candidates under a popular vote] would follow much the same strategy as they do today: attempt to maximize the number of persuadable, or swing, voters targeted per dollar of advertising cost").

popular vote and would be the least likely to approve NPV legislation. Further, if the NPV agreement reaches 270 electoral votes, the signatory states alone will have enough electoral votes to successfully elect the President regardless of the remaining states.[120] While candidates would still be concerned with obtaining the votes of individuals within these nonmember states, voters in these states would effectively lose the protections of the Electoral College including the federalism bonus.[121] Therefore, by both altering strategy incentives and eliminating protections for voting power under the Electoral College, the NPV agreement horizontally encroaches on the power of non-signatory states while increasing the voting power of member states.

The Supreme Court has never squarely decided Congress's role when compacts involve horizontal encroachment on the power of non-signatory states.[122] In *U.S. Steel Corp. v. Multistate Tax Commission*,[123] a compact between states that regulated the taxing of multistate taxpayers was challenged on constitutional grounds.[124] The appellants sought injunctive relief, arguing that the compact failed to receive congressional approval and was thus invalid.[125] Appellants also asserted that the compact "impair[ed] the . . . rights of nonmember States" by "exert[ing] undue pressure to join" the compact.[126] The Court found insufficient support for encroachment on nonmember states.[127] Further, it held that the compact did not require congressional consent because, based on *Virginia v. Tennessee*,[128] the compact did not "threaten[] federal supremacy."[129]

Similarly, in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,[130] the Court considered the constitutionality of an interstate compact that would lift the federal ban on interstate acquisitions

120 *See supra* Part I.A; *see also supra* text accompanying note 30 (describing the provision that requires a majority of electoral votes before the agreement becomes effective).

121 *See* Adkins & Kirwan, *supra* note 56, at 84 (noting that due to the federalism bonus, "the smaller states are well represented in the electoral college" and would likely oppose a shift to a direct form of election).

122 Horizontal encroachment occurs when an interstate compact or agreement negatively affects the power of states that are not parties to the agreement or compact. Under the *Virginia v. Tennessee* test, the potential effect of compacts on nonmember states is ignored. *See* Va. v. Tenn., 148 U.S. 503, 519–20 (1893).

123 434 U.S. 452 (1978).

124 *See id.* at 456, 458 (indicating that the appellants brought claims under both the Compact Clause and Commerce Clause).

125 *Id.* at 458.

126 *Id.* at 477.

127 *Id.* at 477–78 ("It has not been shown that any unfair taxation of multistate business resulting from the disparate use of combination and other methods will redound to the benefit of any particular group of States or to the harm of others. . . . Each member State is free to adopt the auditing procedures it thinks best, just as it could if the Compact did not exist.").

128 *Va.*, 148 U.S. at 503.

129 *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 476 (1978) (holding that "[a]ppellees make no showing that increased effectiveness in the administration of state tax laws, promoted by [the compact], threatens federal supremacy.").

130 Ne. Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 159 (1985).

of banks.[131] Petitioners claimed that the compact was invalid for a lack of congressional approval,[132] and that it "impermissibly offend[ed] the sovereignty of sister States."[133] The Court held that the compact was incapable of interfering with federal power because any state law conflicting with the federal ban would be preempted regardless of its standing under the Compact Clause.[134] The Court also found that the petitioners failed to show encroachment upon the power of other states.[135]

There have been justices on the Court, though, that have supported the need for congressional consent when a compact interferes with the power of nonmember states. Justice White argued in his dissenting opinion in *U.S. Steel*, "[a] proper understanding of what would encroach upon federal authority . . . must also incorporate encroachments on the authority and power of non-Compact States."[136] The opinion relied on pre-*Virginia v. Tennessee*[137] reasoning for inclusion of horizontal encroachment under the Compact Clause,[138] and the belief that "[a]s the constitutional arbiter of political differences between States, the Congress is the proper body to evaluate the extent of harm being imposed on non-Compact States . . . ."[139] It is possible, then, that if faced with an interstate compact which alters the distribution of power among states as the NPV agreement does, the Court may be persuaded to require congressional approval in cases of horizontal encroachment.

III. CHOOSING A THEORY OF ENCROACHMENT

In determining whether the NPV agreement should require congressional consent, a constitutional conflict arises between Article II and the Compact Clause. On the one hand, Article II gives Congress no power to oversee the method by which states choose electors.[140] On the other hand, the Compact Clause requires congressional consent for all interstate compacts.[141] Because the NPV agreement involves both the

131 *See id.* at 163–64 (explaining that several New England states passed reciprocal legislation within their region allowing interstate bank acquisitions).

132 *Id.* at 175 (reporting that the petitioners argued that the compact "violate[d] the Compact Clause . . . because Congress has not specifically approved it").

133 *Id.* at 176.

134 *See id.*

135 *See id.* ("We do not see how the statutes in question either enhance the *political* power of the . . . States at the expense of other States or have an 'impact on our federal structure.'" (quoting U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 (1978))).

136 *U.S. Steel*, 434 U.S. at 494 (White, J., dissenting).

137 Va. v. Tenn., 148 U.S. 503, 503 (1893).

138 *See U.S. Steel*, 434 U.S. at 494 ("[T]his Court held that the purpose of requiring the submission to Congress of a compact . . . between two States was 'to guard against the derangement of their federal relations with the other states of the Union, and the federal government . . . .'" (quoting R.I. v. Mass., 12 Pet. 657, 726 (1838))).

139 *See id.* at 496.

140 *See* U.S. CONST. art. II, § 1 (giving Congress the power to decide the day and time for the selection of electors in each state, but giving the power to determine the method of selecting the electors to the states alone).

141 *See* U.S. CONST. art. I, § 10, cl. 3 (prohibiting states, "without the Consent of Congress," from

selection of electors and an interstate compact, the proper role of Congress is uncertain. This Part explores this conflict and ultimately proposes a resolution. Section A below discusses the argument in favor of maintaining the exclusive Article II power of the states. Then Section B explores the counter argument for requiring congressional approval under the Compact Clause. In the end, because the NPV agreement involves both meaningful encroachment on the power of nonmember states and fits under the broad language of the Compact Clause, it should require congressional approval before becoming a valid and enforceable interstate compact.

A. State Power Under Article II

Article II provides that state legislatures may appoint state electors in any manner that they may choose.[142] Proponents of the NPV agreement argue that this provision allows individual states to constitutionally select electors through an interstate compact without congressional consent.[143] An examination of both the intent of the Framers and judicial interpretation reveal that Article II does grant states broad power to select their electors, subject only to time and qualification limitations.

The election of the executive was among the most contentious issues facing the Framers in constructing the United States Constitution.[144] With regard to federal legislative power, compromise was reached between large and small states by the creation of a bicameral legislature designed to protect smaller states from being overwhelmed by the more populous states.[145] A similar issue arose with regard to the election of the executive.[146] Unlike the bicameral legislature, there was no clear way to balance the interests of large and small states when electing a single person charged with representing all citizens.[147] Three methods were proposed

entering into any agreement or compact with another state).

142 *See* U.S. CONST. art. II, § 1, cl. 2.

143 *See* KOZA ET AL., *supra* note 3, at 285; Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 521 (2009) ("The NPV's proponents emphasize that Congressional consent is not required for the compact to be found valid by the courts.").

144 *See* LEONARD W. LEVY & DENNIS J. MAHONEY, THE FRAMING AND RATIFICATION OF THE CONSTITUTION 129 (1987) ("[T]he Committee of Unfinished Business (or on Postponed Parts) untangled the convention's last remaining snarls, the knottiest of which was certainly the long-debated question of a sound executive."); *see also* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 114 (2010) (noting that when asked, James Wilson, a representative from Pennsylvania, indicated that the issue of election of the President was the most difficult for the Framers to resolve).

145 *See* LEVY & MAHONEY, *supra* note 144, at 129. ("[Large and small states] each secured supremacy in one house of the Congress.").

146 *See* Slonim, *supra* note 8, at 37 (explaining that "at the very outset of the convention, the large and small states were at loggerheads over the method of selecting the executive no less than they were over the composition of the legislature" because both plans called for election of the executive by the legislature).

147 *See* LEVY & MAHONEY, *supra* note 144, at 129 (indicating that "both the small and the large states had proved determined not to give the other a predominant advantage in selecting the chief magistrate" and "fear of an elective monarchy and strong objections to election either by the people or

and considered by the Framers: election by the national legislature; popular vote; and election by state electors.[148]

First, election by the legislature was proposed as a national reflection of the common practice in the states permitting the state legislatures to elect individuals for public office and because it allowed the most knowledgeable citizens to choose the executive.[149] It was rejected, however, due to concerns for separation of powers and presidential independence.[150] The members of the Convention favored election by the people.[151] Nonetheless, the popular vote was ultimately dismissed because, as Virginia delegate George Mason explained, "[t]he extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates."[152]

The Electoral College was ultimately selected, though not without controversy.[153] The plan had the benefit of preserving the independence of

the states had brought the meeting to an impasse").

148 *See* JACK. N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 259 (1997); KOZA ET AL., *supra* note 3, at 38 ("The Constitutional Convention considered a variety of methods for electing the President and Vice President . . . .").

149 *See* Slonim, *supra* note 8, at 37 (discussing the fact that both the New Jersey Plan and the Virginia Plan proposed election by the legislature, "as was the practice in all but three of the states"); RAKOVE, *supra* note 148, at 259 (describing election by the legislature as "[t]he most obvious alternative" for the Framers because it "plac[ed] the decision in the nation's most knowledgeable leaders"); SAUL K. PADOVER, TO SECURE THESE BLESSINGS: THE GREAT DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1787 349 (1962) ("[T]he sense of the nation would be better expressed by the legislature than by the people at large.").

150 FORREST MCDONALD, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 28 (1986) ("Having Congress elect the president would be a convenient way, but that would make the executive branch dependent upon the legislative."). The Framers feared that this plan would result in the President becoming a mere puppet of the legislature. RAKOVE, *supra* note 148, at 259 (acknowledging that one of the fundamental concerns of the Framers was to "enable the executive to resist legislative encroachments," and election by the national legislature would "produce a pliable official"). The President's re-eligibility for office was also of concern to many of the Framers under the legislative option. LEVY & MAHONEY, *supra* note 144, at 129 ("[T]he desire to make it possible for the executive to succeed himself, had seriously discredited appointment by the Congress."); Slonim, *supra* note 8, at 37–38 (explaining that the issue of reelection of the President was one of three concerns regarding election of the executive that "formed a sort of tripod where an imbalance on one side disrupted the balance of the whole").

151 PADOVER, *supra* note 149, at 346–47 (noting that Wilson, the first to voice his opinion on the matter of electing the President, supported election by the people); RAKOVE, *supra* note 148, at 259 ("Morris, Wilson, and Madison boldly endorsed [election by the people] on principle.").

152 *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 31 (Max Ferrand ed., 1911). The Framers also feared that the people would "naturally prefer citizens from their own states," preventing a popular vote from ever producing the requisite majority. RAKOVE, *supra* note 148, at 259; *see also* PADOVER, *supra* note 149, at 349. In addition, direct election by the people had the potential to create instability in the national government and would necessarily favor the North as there would be far more eligible voters from the North than from the South. LEVY & MAHONEY, *supra* note 144, at 128–29 ("The vigor and stability demanded by the Pennsylvanians seemed incompatible to some with popular election . . . ."); *see also* WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 188–89 (2007) (discussing James Madison's belief that the electoral system gave southern states more weight because slaves would be counted to determine the number of state electors while a direct election by the people would include only white voters, leaving southern states without this extra weight).

153 Some of the Framers feared that a meeting of the electors would be impractical. *See* RAKOVE, *supra* note 148, at 260 (indicating that the Framers "questioned the inconvenience and expense of

the presidency from the Legislature, alleviating concerns over separation of powers.[154] The Framers were also able to preserve the balance of power between large and small states by incorporating the benefits of the Great Compromise.[155] Like the election of Senators and Representatives,[156] the selection of electors was left to the states.[157] The Electoral College was unique, however, in that the method for electing the electors was left to each state.[158] It has been argued that the Framers expected that states would select electors on a district-wide basis.[159] Today, all but two states choose electors under a winner-take-all unit rule based on the outcome of a

gathering electors from distant states"). Others argued that selection by the Senate, as was originally contemplated in the event of a tie in the Electoral College, favored small states at the expense of larger states. *See* LEVY & MAHONEY, *supra* note 144, at 130 (noting that the larger states proposed that the power of the Senate to choose the President should be limited due to the disproportionate power given to the small states under the proposed plan). Still others worried that the plan would produce separation of powers issues between the executive and the legislative branches if the Senate were allowed to choose the President in the event of a tie. *See id.* (noting that because the Senate and executive shared the power to enter into treaties and make appointments, allowing the Senate to determine the outcome of the election might "encourage these two branches to combine against the lower house").

154 *See* THE FEDERALIST NO. 68, at 375 (Alexander Hamilton) (noting that the Framers desired that "the Executive should be independent for his continuance in office, on all, but the people themselves" and that this would be accomplished by "making his re-election to depend on a special body of Representatives, deputed by the society for the single purpose of making the important choice"); *see also* LEVY & MAHONEY, *supra* note 144, at 129–30 (discussing the Framers' belief that "[r]eliance on electors . . . would 'get rid of the ineligibility' for reelection, which had seemed inseparable from an election by Congress"); Kevin J. Coleman et al., *The Election Process in the United States*, *in* THE ELECTION PROCESS IN THE UNITED STATES 1, 41 (Albert Nicosia ed., 2003) (noting that preventing Congress from interfering in elections "was intended to preserve the independence of the Presidency"); RAKOVE, *supra* note 148, at 259–60 (positing that some Framers favored this plan due to "the support it gave to those who thought that eligibility for reelection would give the executive an important incentive to maintain his independence" and due to the plan's prevention of the executive becoming "toady" to Congress' demands).

155 *See* U.S. CONST. art. II, § 1, cl. 2 (instructing that the number of electors appointed by each state be "equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"); THE FEDERALIST NO. 68, at 375 (Alexander Hamilton) ("[E]ach state shall choose a number of persons as electors, equal to the number of Senators and Representatives of such State in the National Government, who shall assemble within the State, and vote for some fit person as President."). The Great Compromise sought to balance legislative power between the large and small states by combining two plans proposed at the Constitutional Convention. The Virginia Plan benefitted large states through proportional representation in the legislature, while the New Jersey Plan protected the interests of small states by providing only one vote per state for equal representation. *See* Slonim, *supra* note 8, at 37. In the end, the Framers adopted a bicameral legislature in which the members of the lower house would be chosen through proportional representation and each state would be given an equal vote in the upper house. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 29 (Max Ferrand, ed., 1966).

156 *See* U.S. CONST. art. I, § 2, cl. 1 (requiring that members of the House of Representatives be "chosen every second Year by the People of the several States); U.S. CONST. art. XVII (commanding that Senators be elected by the people from each state).

157 *See* U.S. CONST. art. II, § 1, cl. 2 (indicating that "each State shall appoint" the electors allotted to it).

158 *See* U.S. CONST. art. II, § 1, cl. 2 (allowing each state to select its electors in "such Manner as [it] may direct").

159 *See* Letter from James Madison to George Hay (Aug. 23, 1823), *in* THE FOUNDERS' CONSTITUTION 556, 557 (Phillip B. Kurland & Ralph Lerner eds., 1986) (indicating that "[t]he district mode was mostly, if not exclusively in view when the Constitution was framed and adopted; & was exchanged for the general ticket & the legislative election, as the only expedient for baffling the policy of the particular States which had set the example.").

statewide vote.[160] The Framers also expected that the electors would act independently once selected to vote for the candidates they found to be the most qualified.[161] However, electors generally choose candidates based solely on party loyalty.[162]

Courts have interpreted Article II to give states the power to select electors free from congressional oversight.[163] In *McPherson v. Blacker*,[164] presidential nominees challenged a Michigan law regarding selection of electors to the Electoral College.[165] The law provided that each congressional district would elect one elector and one alternate elector.[166] The two remaining electors allotted to the state and their alternates were to be chosen by the electors elected from the congressional districts making up the eastern and western Electoral Districts.[167] The Court held that the legislation was valid because "Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes . . . but otherwise the power and jurisdiction of the State is exclusive."[168] The Court also held that this power did not cease to exist simply because the mode adopted had not followed the original expectations of the Framers.[169]

Nevertheless, in more recent decisions, the Court has consistently held that the broad powers granted under Article II are limited by the other

160 *See* Festa, *supra* note 53, at 2126 (noting that currently, "forty-eight states plus the District of Columbia use the unit rule"). Maine and Nebraska use a district system in which voters in each of the state's congressional districts vote for one elector, with the remaining electors chosen based on the statewide plurality winner. *See* Jennifer S. Hendricks, *Popular Election of the President: Using or Abusing the Electoral College?*, 7 ELECTION L.J. 218, 222 (2009) (finding that the unit-rule voting system is used in every state except Maine and Nebraska, which use district voting); ME. REV. STAT. ANN. tit. 21-A, § 802 (1964); NEB. REV. STAT. ANN. § 32-1038 (LexisNexis 1994).

161 *See* THE FEDERALIST NO. 64 (Alexander Hamilton) (postulating that because electors "will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtues"); *see also* KOZA ET AL., *supra* note 3, at 43 (indicating that the Framers believed the electors would "exercise independent and detached judgment" in choosing a President and Vice President).

162 *See* KOZA ET AL., *supra* note 3, at 44 (reporting that from the very first contested presidential election, electors have been chosen "to register the will of the appointing power" (quoting McPherson v. Blacker, 146 U.S. 1, 36 (1892))).

163 *See supra* text accompanying note 92.

164 *McPherson*, 146 U.S. at 1.

165 *See id.* at 2–4 (identifying the plaintiffs as presidential nominees seeking to nullify the state legislation outlining the method for selecting Michigan electors).

166 *See id.* at 5 (indicating that each district would elect one "district elector" and one "alternate district elector" (quoting 1891 Mich. Pub. Acts 50)).

167 *See id.* at 4 ("There shall be elected by the electors of the districts hereinafter defined one elector of President and Vice President of the United States in each district . . . there shall also be elected in like manner two alternate electors of President and Vice President . . . ." (quoting 1891 Mich. Pub. Acts 50)).

168 *Id.* at 35.

169 *See id.* at 36 ("[W]e can perceive no reason for holding that the power confided to the States by the Constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created.").

provisions of the Constitution.[170] In *Williams v. Rhodes*, the Court considered an Ohio law requiring new parties to obtain petitions from enough supporters to equal fifteen percent of the voters in the previous gubernatorial election.[171] The Ohio American Independent Party and the Socialist Labor Party claimed that the law denied the parties and their supporters the equal protection of the laws by effectively preventing new parties from appearing on the ballot.[172] The Court held that although Article II "grant[s] extensive power to the States to pass laws regulating the selection of electors . . . these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."[173] Thus, the power of the states to choose electors is not unlimited.

Based on the text of Article II and the Framer's intent, the NPV agreement seems to be a valid exercise of state power free from congressional interference. The Framers specifically rejected legislative selection of the President, wishing to preserve separation of powers between the executive and legislative branches.[174] Instead, the Constitutional Convention approved the exclusive state power embodied in Article II, due, in large part, to its ability to preserve the independence of the President from Congress.[175] It is clear, then, that were signatory states to select electors based on a national popular vote of their own, Congress would have no power to oversee that decision under Article II.[176] The NPV

170 *See* Williams v. Rhodes, 393 U.S. 23, 29 (1968) (holding that the power of the states to select electors could not "be exercised in such a way as to violate express constitutional commands"). Specifically, the Court has limited the power of states to choose electors in a manner that denies its residents equal protection of the laws. *See* Bush v. Gore, 531 U.S. 98, 104–05 (2000) (reasoning that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another" (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966))); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (using a balancing test that weighs the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against state interests which "make it necessary to burden the plaintiff's rights"); Bullock v. Carter, 405 U.S. 134, 141 (1972) (applying the rule that the state's power over elections "must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment" (citing *Rhodes*, 393 U.S. at 89)); Hitson v. Baggett, 446 F. Supp. 674, 676 (M.D. Ala. 1978) (holding that "a state is free, under the Constitution, to conduct elections on a statewide or at-large basis so long as the electoral system it establishes does not 'operate to minimize or cancel out the voting strength of [minority voters].'" (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965))).

171 *See* Rhodes, 393 U.S. at 24–25 (describing the requirements for parties to join the presidential race under § 3517.01 of the Ohio Revised Code).

172 *See id.* at 25 (finding that the Ohio law made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties").

173 *Id.* at 29.

174 *See supra* text accompanying notes 168–169.

175 *See supra* text accompanying note 173.

176 *See* U.S. CONST. art II, § 1, cl. 2 (granting state legislatures the power to choose electors "in such Manner as [they] . . . may direct"); McPherson v. Blacker, 146 U.S. 1, 35 (1892) (describing the power of the states to choose electors as exclusive and "so framed [in the Constitution] that Congressional and Federal influence might be excluded"); *see also infra* text accompanying notes 186–187 (describing the states' power over the mode for selecting electors as plenary).

agreement, proponents argue, is only an exercise of states' Article II powers.[177]

Under *Williams*, however, the NPV agreement must not violate any other constitutional provisions.[178] Therefore, the broad power given to states by Article II does not preclude application of the Compact Clause to the selection of electors under the NPV agreement.

B. The Compact Clause and Limitations on State Power

The Compact Clause, in contrast to Article II, gives Congress the power to oversee states' ability to enter into enforceable agreements or compacts.[179] Whether the NPV agreement requires congressional approval is an open question. The historical context of the Clause suggests that compacts with no appreciable effect on nonparties should be accepted.[180] But when a compact involves meaningful encroachment, the text of the Clause may require the consent of Congress.

Interstate compacts have been subject to government regulation since colonial times.[181] Under British rule, colonies could enter into agreements with one another with the approval of the Crown.[182] If an agreement could not be reached, the colonies could litigate the matter before a Royal Commission appointed by the Crown.[183] The framers of the Articles of Confederation were also suspicious of interstate agreements, fearing they might create entities destructive or capable of competing with the Confederation.[184] Therefore, states could not "enter into any treaty,

177 *See* KOZA ET AL., *supra* note 3, at 284–85 (arguing that because the Constitution gives "each state the power to select the manner of appointing its presidential electors . . . the subject matter of the [NPV agreement] is a state power and an appropriate subject for an interstate compact").

178 *See infra* text accompanying note 192.

179 *See* U.S. CONST. art. I, § 10, cl. 3 (requiring congressional approval for any interstate compact or agreement).

180 *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 688 (1925) (indicating that compacts are useful in resolving disputes that "transcend State lines," are "beyond the power of Congress and where . . . diversity of treatment is an interstate evil"); Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 739 (2007) (indicating that an interstate agreement has not been invalidated by courts for lack of congressional consent in over 100 years because they have not been found to be "within the ambit of the Compact Clause").

181 *See* Frankfurter & Landis, *supra* note 180, at 692 ("[T]he Compact Clause has its roots deep in colonial history. It is part and parcel of the long and familiar story of colonial boundary controversies."); *see also* Hollis, *supra* note 69, at 760 (explaining that colonies resolved boundary disputes through intercolonial agreements "more than one hundred years before the American Revolution").

182 *See* Frankfurter & Landis, *supra* note 180, at 692–93 n.29 (indicating that the Massachusetts officials were required to submit an agreement with New York to the King for approval); Hollis, *supra* note 69, at 760 (indicating that intercolonial agreements required the Crown's approval).

183 *See* Frankfurter & Landis, *supra* note 180, at 692–93 ("If negotiations failed . . . [there] was an appeal to the Crown, followed normally by a reference of the controversy to a Royal Commission. In effect such a controversy before a Royal Commission bore the characteristics of a litigation.").

184 *See id.* at 693–94 (indicating that the interstate compact provision in the Articles of Confederation limited the power of the states to "protect the new Union of States").

confederation or alliance whatever between them, without the consent of the United States in congress assembled."[185]

The Constitution is unique from its predecessors in that it differentiates between a "treaty, confederations or alliance" and an "agreement or compact."[186] The former are completely forbidden to states under the Constitution.[187] The latter, however, mirror the British model. Rather than requiring approval of the Crown, agreements and compacts between states require congressional approval, and like the Royal Commissions, disputes that cannot be resolved may be heard by the Supreme Court.[188] However, since the ratification of the Constitution, many interstate compacts have been accepted despite a lack of congressional approval.[189] Until 1921, Congress had approved only thirty-six compacts,[190] and those that were approved, often involved disputes similar in kind to those which were accepted despite a lack of consent.[191] In addition, since the Supreme Court's 1893 decision in *Virginia v. Tennessee*, no interstate compact has been successfully challenged for lack of congressional consent.[192]

There are strong arguments for accepting interstate compacts that can have no meaningful effect on nonmember states.[193] In a 1925 study of the rising use of interstate compacts, Frankfurter and Landis argued that compacts have been useful in resolving interstate disputes that are difficult or impossible to litigate.[194] For example, on-going interstate conflicts like

185 *See* ARTICLES OF CONFEDERATION of 1781, art. VI, para. 2 ("No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue.").

186 *See* Schleifer, *supra* note 180, at 729 (indicating that the Constitution creates a dichotomy between "treaties, alliances, and federations" and "agreements and compacts"); s*ee also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1397 (1st ed. 1833) (speculating that the Framers, through the two sets of terms, sought to distinguish political treaties from agreements that are "mere private rights of sovereignty").

187 *See* U.S. CONST. art. I, § 10, cl. 1 ("No state shall enter into any Treaty, Alliance, or Confederation . . . ."); Hollis, *supra* note 69, at 761 (indicating that treaties, confederation or alliance between states are "prohibit[ed] entirely" under the Constitution).

188 *See* U.S. CONST. art. I, § 10, cl. 3 (discussing the congressional approval requirement for interstate agreements or compacts); U.S. CONST art. III, § 2 (granting original jurisdiction to the Supreme Court in resolving any dispute in which a state is a party); *see also* Frankfurter & Landis, *supra* note 180, at 694 ("Historically the consent of Congress, as a prerequisite to the validity of agreements by States, appears as the republican transformation of the needed approval by the Crown.").

189 *See* Frankfurter & Landis, *supra* note 180, at 749–55 (describing eleven interstate compacts between 1803 and 1909 which never received the consent of Congress, but were accepted as valid).

190 *See* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 288 (2003).

191 *See* Frankfurter & Landis, *supra* note 180, at 735–55 (summarizing both compacts receiving congressional consent and those that were accepted without consent prior to 1925).

192 *See* Greve, *supra* note 190, at 289.

193 *See, e.g.*, Frankfurter & Landis, *supra* note 180, at 729 ("The imaginative adaptation of the compact idea should add considerably to resources available to statesmen in the solution of problems presented by the growing interdependence, social and economic, of groups of States forming distinct regions.").

194 *See id.* at 704–05 (identifying two areas in which compacts have proven useful: when the

waste disposal and boundary disputes require a kind of "[c]ontinuous and creative administration" which the courts are unable to provide.[195] Frankfurter and Landis also acknowledged the fact that states can use compacts to deal with regional issues.[196] Because these conflicts involve a specific group of states, resolution would require action by more than a single state.[197] Alternatively, federal legislation would be burdensome and excessive because it would require only regional enforcement.[198] These findings suggest that if they affect only member states, interstate compacts may present an efficient and often necessary alternative method of state regulation and should not require congressional interference.

However, compacts affecting the power of nonmember states should require congressional consent. While the necessity of consent in instances of horizontal encroachment is unclear from Supreme Court precedent, such compacts harm the balance of power between states, posing a risk to the entire federal system.[199] In these cases, congressional approval can be used to protect the interests of both the federal government and the nation as a whole.[200] The NPV agreement represents this kind of compact.[201] Under the NPV agreement, candidates will be forced to reduce the attention given to sparsely populated states and increase the amount of time and resources spent in areas of high population.[202] In addition, competitive states previously favored in traditional presidential campaigns will lose voting power as candidates will have greater incentive to broaden their campaigns in order to reach a larger number of individual voters.[203] Thus, congressional consent is required to preserve the balance of state power in presidential elections.

"range, the intricacy, [or] the technicality of the facts [ ] make a court a very ill-adapted instrument for settlement," and when the dispute is "wholly beyond the process of adjudication").

195 *See id.* at 707.

196 *See id.* (arguing that "most questions of interstate concern are beyond the jurisdiction of the Supreme Court" because "regions, like the Southwest clustering about the Colorado River, or the States dependent upon the Delaware for water," are "less than the nation and are greater than any one State").

197 *See id.* (finding that a solution to regional issues must "be greater than that at the disposal of a single State").

198 *See id.* at 708 (noting that while national action may be an alternative to action by a single state, the "regional interests, regional cultures and regional interdependencies . . . produce regional problems calling for regional solutions" and "a gratuitous burden would thereby be cast upon Congress and the national administration" in an effort to control the issue).

199 *See* FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 23 (1976) (noting that although they could find no examples, "compacts which might be said to have a discriminatory effect upon nonparty states could be described as affecting the political balance of the federal system"); *see also* Frankfurter & Landis, *supra* note 180, at 695 (arguing that interstate agreements or compacts "may affect the interests of States other than those parties to the agreement," thus "national, and not merely regional, interest may be involved").

200 *See* Frankfurter & Landis, *supra* note 180, at 695 (arguing that in the case of horizontal encroachment, "Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions").

201 *See supra* Part II.C.

202 *See id.*

203 *See id.*

CONCLUSION

There is no doubt that Article II grants state legislatures broad control over the selection of presidential electors largely free from federal intervention. It is equally clear from the text of the Compact Clause that any agreement or compact between states must receive the consent of Congress. The NPV agreement involves both provisions, highlighting a constitutional conflict that leaves the proper role of Congress and the validity of the agreement in question. This issue is further complicated by the lack of guidance from the Supreme Court regarding the necessity of congressional consent when a compact like the NPV agreement horizontally encroaches upon the power of nonmember states. While these questions remain open, this article has argued that because it will upset the balance of voting power between the states and thus threaten the federal structure designed by the Framers, the NPV agreement must receive congressional approval before becoming effective.

In Tribute: M. Katherine B. Darmer

The editors of the *Chapman Law Review* respectfully dedicate this issue to Professor M. Katherine B. Darmer.

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Tom Campbell
Dean and Donald P. Kennedy Chair in Law and Professor of Economics
Chapman University School of Law

It was my privilege to know Katherine Darmer, but it was not given to me to know her for as long as those whose tributes are included in this edition of our *Law Review*. So, let me say simply for myself that I lost a friend who showed devotion to the rule of law, to the concept of fairness, and to teaching our students so they could help others. As we read the tributes in this piece, and reflect on all that has been said about her in the months since her passing, we should focus on the blessing it was to know her; and take from her life a renewed devotion in our own lives to use our legal training, as well as our compassion, honestly and selflessly.

The School of Law of Chapman University mourns the loss of our friend, mentor, and colleague. Rest in peace, Katherine. We shall see you again.

* * * * *

Erwin Chemerinsky
Dean and Distinguished Professor of Law
University of California, Irvine School of Law

Katherine Darmer was a powerful voice for social justice; for using the law to make society and the world better. Her eloquent voice is here and will be for years to come to inform us, to guide us, and to inspire us. It is here through her writings, through the students she taught, and through the institutions she created through her tireless advocacy.

Katherine was a prolific scholar. She wrote not just to get promotion and tenure, though of course she did, and not just for academics. Her writings were forceful arguments to advance her vision of justice. For

example, she wrote important articles criticizing the abuses of power that have occurred in the context of the war on terror. She and Justice Richard Fybel did a terrific recent book on national security, civil liberties, and the war on terror. Her writings hopefully will influence law professors, lawyers, judges, and the public for years to come.

Long before I ever met Katherine, I heard about her from her students. The two words they used most often to describe her were "amazing" and "inspiring." She cared deeply about teaching and her students, and they knew it and reciprocated by adoring her. She played a special role for the students who felt alienated—especially the progressive students and the gay and lesbian students. She made them feel less alone and she let them see how they could use law for social justice. Her voice continues through these students and will echo into the future through those they influence.

I knew Katherine best through her advocacy. She was tireless in her work against Proposition 8. For her, marriage equality was a matter of basic fairness and human decency. She was instrumental in creating new organizations—the Orange County Equality Coalition and the Lavender Bar Association of Orange County. These institutions are the fruits of her efforts and her voice continues through them.

If I had to pick two words to describe Katherine Darmer, they would be "passionate voice." That voice remains for us to hear and to heed. As we honor her in this tribute, let us resolve to listen to her voice more carefully and to let her passionate voice and the example of her life be an inspiration to us.

* * * * *

Bobby L. Dexter
Professor of Law
Chapman University School of Law

Although Katherine passed several months ago, I still, from time to time, experience searing moments of grief. She was such a complex and intriguing mix of energy, confidence, passion, power, and drive that it is simply difficult to comprehend the enormity and finality of her absence. The Chapman community has, indeed, lost one of its crown jewels.

To the best of my recollection, I met Katherine for the first time several years ago at the AALS Faculty Recruitment Conference. I, like hundreds of other aspiring law professors, had tossed my hat into the ring with the hope of landing a healthy slate of initial interviews with various schools. Even strong candidates, however, know not to start the process with unshakable expectations, because different schools have different curricular needs and interests, and they often recruit largely with those

matters in mind. Yet and still, I did what others did. I polished off my resume, joined the faculty recruitment fray, sent up a prayer, and resigned myself to letting the chips fall where they may.

And then, a hero came along. Katherine was serving on Chapman's Appointments Committee that year, and as I understand it, she designated me as a person she specifically wanted the committee to interview. Years later, she would jokingly pat herself on the back at some casual get-together or celebration, crowing that bringing me to the faculty was one of the best things she did for Chapman. The clear and overwhelming truth, of course, is that the best thing Katherine did for Chapman was to come here herself. I said repeatedly during the faculty recruitment process that I wanted, above all else, to join a good group of colleagues, and I will forever be happy knowing that I was able to tell her (directly) that she was one of my favorites.

I treasure Katherine because she was an outstanding colleague and friend, and I admire her passionate sense of devotion, whether she was arguing and protesting to advance the interests of gays and lesbians or railing against the horror of torture. In fact, Katherine reminds me of the Freedom Riders, individuals who would ride buses into the Deep South in the 1960s to defy the enforcement of Jim Crow laws, even if it meant putting themselves in harm's way. I'm proud to say that the Katherine I knew was made of that stuff! I am fortunate in having known her, even if only briefly. She is now and always will be one of my heroes.

Sleep on, Katherine. Sleep on. And I'll see you when I get to the other side of that river.

* * * * *

Katherine Franke
Sulzbacher Professor of Law Director, Center for Gender & Sexuality Law
Columbia Law School

MORAL ADAMANCE: A TRIBUTE TO PROFESSOR KATHERINE DARMER

I had the great pleasure to get to know Katherine Darmer when she visited Columbia Law School, in the fall of 2009, as a Senior Fellow in our Center for Gender & Sexuality Law. Of course this was something of a homecoming for her, as she had been a member of Columbia Law School's class of 1989 when she distinguished herself as a Harlan Fiske Stone Scholar, an exceptional moot court competitor, and an editor of the *Journal of Environmental Law*.

While a visitor at Columbia in 2009, Professor Darmer began work on an article challenging the role of immutability in constitutional Equal Protection doctrine, particularly as applied to sexual orientation-based

discrimination. She took the view that it is inherently stigmatizing to ask whether a person's sexual orientation can be "changed." She sought to illuminate the ways in which the very posing of the question of immutability or choice derived from heteronormative assumptions that presumed the normative priority of heterosexuality. "The attitude that an unchosen sexual orientation should not be criminalized or penalized, while perhaps preferable to a society that terrorizes members of the LGBT community, is still not an embracing theory that is truly accepting of the legitimacy of being LGBT," she wrote in the published version of this work as part of a LatCrit Symposium.[1]

It was particularly fitting that Professor Darmer's last published work amounted to a full-throated defense of the humanity and equality of lesbians and gay men. In this work she brought to bear her searing intellect, her true-north moral compass, and her passion to engage what she regarded as one of the most pressing forms of social and legal injustice of our time. Rather than trying to untangle the puzzle of tiered scrutiny by shoe-horning sexual orientation into already flawed doctrine, she wrote that "any requirement for 'immutability' is deeply problematic in the development of equal protection doctrine with regard to the LGBT community. An immutability inquiry is inherently stigmatizing and loaded with heteronormative assumptions."[2]

Her focus on the problem of immutability was not merely a smart legal argument, though it was that to be sure. More than that, it reflected a fundamental part of who Professor Darmer was as a scholar, a teacher, an activist, and a person. In writing, as in the rest of her life, she led with her values and a strong commitment to respect, and defended the dignity and humanity of those around her. Her experience as a prosecutor drew her to defend the rights of criminal defendants and to question overreaching by the government in the name of protecting national security. Her strong commitment to social justice led her to play a fundamental role in defending the right to marriage equality for same-sex couples in California.

When I visited Chapman University School of Law in January of 2011 upon the invitation of Professor Darmer, I saw up close the role she played at Chapman as a mentor to students and as a committed colleague to the law faculty. Quite clearly, the values that animated her writing also formed the basis of her day-to-day interactions at work.

With Professor Darmer's passing, we all lost a colleague whose work as a lawyer, scholar, and political activist served to remind us of the importance of moral adamance. She left us a legacy to which we all should pay heed: an unyielding insistence that the good and the right are one and the same.

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1 M. Katherine Baird Darmer, *"Immutability" and Stigma: Towards A More Progressive Equal Protection Rights Discourse*, 18 AM. U. J. GENDER SOC. POL'Y & L. 439, 451 (2010).

2 *Id.* at 453.

Mark Osler
Professor of Law
University of St. Thomas School of Law

THE LOSS OF A PROPHETIC VOICE

In my office, on a shelf near to my hand, I keep a line of old, well-read books. I reach for them often. One of them, at the end of the row, I keep there only because it contains a piece written by Katherine Darmer's father, who is a beloved philosophy professor at Baylor.[3] Actually, I keep it there not even for the entire article, but for one sentence fragment in that article, in which he describes his ambition for Baylor itself: "A confident engagement with God's diverse world."[4]

What Robert Baird wrote, perhaps unknowingly, is the perfect description of his own daughter. Katherine Baird Darmer lived her too-short life in confident engagement with God's diverse world.

Professor Darmer and I lived in the same world; in fact, our lives were parallel up until the point when she died. We graduated from law school about the same time, then clerked for federal judges, then worked for big firms for three years, became federal prosecutors at the same time, and even made the transition to teaching in unison (though we did not know one another until we were both in the academy).

We both made the tricky transition (in tandem) from being a prosecutor to a teacher. It was a challenging change, because we were shifting from having power to having influence. As a prosecutor, we had power: to choose a charge, to start or continue an investigation, to direct the forces of the federal government against harm and danger. As a professor, there is not that form of power; instead, we had influence. We taught the law as a vocation, urged principled action, and wrote about what mattered. Katherine Darmer entered that realm of influence with grace, resolve, and hope.

In that world, the world of law professors, everyone is smart and well-educated, and most went to the kinds of places that Katherine Darmer went (Princeton and Columbia Law School). Yet, she was different.

First, as many of her students know, she *listened*. If you caught her in the kitchen, after a meal, and told her about an idea as she leaned against the counter, she would be quiet and still. She did not interrupt to show you how much she knew, or what she had read, or what important person she knew. Sometimes she would nod and her hair would bounce as it framed her face, and only when you were done would she begin to move. Her hand

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3 Robert M. Baird, *An Alternative Vision for Baylor, in* THE BAPTIST AND CHRISTIAN CHARACTER OF BAYLOR 99 (Donald D. Schmeltekopf and Dianna M. Vitanza, eds., 2003).

4 *Id.* at 107.

would come out, palm forward, and she would bring that fierce intelligence to bear on what you had said, and make your idea better. There is a selflessness, a patience, in that kind of listening that is far too rare.

Second, she knew how to talk to people on all sides. Although she went to school in New York and ultimately lived in Newport Beach, she grew up in Waco, Texas, surrounded by conservative Baptists. I know the church she grew up in, which is full of smart people of good faith. Katherine Darmer never lost that ability to understand what mattered to conservatives and progressives alike, and she used her intellect to challenge both.

Finally, and perhaps most importantly, she was bold and unfussy in a field that too often is mucky and opaque. She spoke with a clear-eyed passion and conviction that rose from a heart for justice. It was with this heart and voice that she challenged those who would tell gay men and lesbians that there was no love for them, on earth or in heaven. When our nation took up torture as a method of investigation, she sent me the draft of an essay which, in her style, began with a simple clear truth: " . . . waterboarding is torture, and torture is illegal and wrong."

That moral clarity—to say that all are loved, that torture is wrong—is too rare in my world, and rarer still now that Professor Darmer is gone. The hole she leaves is large and sad, and profoundly different than the mark of others.

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Marisa S. Cianciarulo
Professor and Director, Family Violence Clinic
Chapman University School of Law

IN MEMORY OF MY FRIEND AND MENTOR, KATHERINE DARMER

Katherine Darmer was my friend and my mentor for the six years that we were colleagues at Chapman Law School. I still immediately think of her when an issue arises that could benefit from her counsel. I still catch myself glancing towards her door when I am on her side of the hallway. I know that such instinctive reactions will fade, but what will never fade is my memory of her.

Katherine was the most energetic and driven person I knew. In between teaching classes, writing law review articles, co-authoring a book, and attending or organizing law school events, she was accompanying her two young children all over Southern California and cheering them on in their various activities, founding the Orange County Equality Coalition, hosting fundraisers, leading marches, and advocating for sexual orientation

equality. And all of this that she did, she did with passion and vigor and love.

Katherine was a leader and a doer, and I happily followed where she led. Galvanized by the injustice of 2008's Proposition 8 anti-marriage-equality ballot initiative and the aftermath of its success, Katherine helped found the Orange County Equality Coalition and became its most vocal and active member. At Chapman, she founded the Global Project for LGBTQ Rights, graciously giving me the title of "co-director" even though she was the true force behind it. As a leader of these organizations and a speaker at various pro-equality events, she was always motivated, fiercely dedicated, and brilliantly articulate.

Katherine was also a good friend. Despite the many commitments that filled her life, she still had time to chat, offer counsel, and take time out for lunch or happy hour. She even found the time to throw me an engagement party, where she voiced her concern that my feminist sentiments might be offended by the spice carousel she bought for me. I assured her that it was indeed exactly what I wanted and an item for which I had registered without any feminist qualms. As I await the arrival of my first child, I miss her on yet another level. She loved being a parent and was eager for me to experience the joys of having a child.

The magnitude of losing Katherine is difficult to put into words. I miss my brilliant, serious, fun, loyal friend; I miss her counsel, her laughter and her infectious zeal. Chapman has lost a much-needed voice and an incomparable colleague. The communities and values she supported have lost a powerful ally. Her family—those most deeply and irrevocably affected by her death—has lost the center of their world.

But even though we are left with a tremendous, gaping loss, that is not all that we are left with. Katherine was a special and uniquely gifted person. In her short life, she inspired us through her friendship and her leadership. Her life was a daily challenge to all of us to put our strengths and talents to the best use, to take action even when the opposition is powerful, and to take risks in support of justice. Katherine's memory is as powerful as the heart and mind that guided her in life, and it is imprinted upon each of us who knew and loved her.

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James L. Doti, Ph.D.
President
Chapman University

A woman of courage and conviction, Katherine Darmer was one of Chapman University School of Law's foremost legal scholars, who wrote

and spoke and advocated at the forefront of marriage equality issues. As I reflected upon her life and career while writing this tribute, an image leaped to mind—one of those archetypes that tend to linger in the human psyche through the ages and the generations. Katherine, in many ways, reminds me of a warrior goddess, fierce and fearless, clear-eyed and honest, standing at the front line of battle—Athena, perhaps, or some similar figure from our collective memory. For Katherine, the ongoing war in which she took up sword and shield was equality for all people—in life, in love and in legal standing.

Her loss has been especially devastating because I believe we stand on the cusp of widespread acceptance of marriage equality, and it is poignant to realize that Katherine is not here, with us, to witness it. As I have written publicly in past op-eds and articles, I strongly believe that denying a same-sex couple the cultural and legal status of marriage is not only discriminatory, but also degrading, because it denies them a basic human right. Religions may determine their own values and creeds, but they must not impose those creeds upon individuals' civil rights.

Katherine and I certainly stood on the same side of the fence on this issue, but she expressed these views far more eloquently—and, of course, with far more legal acuity—than I ever could. And that is just a part of why we cherished her both as a colleague and a friend: her virtuosic ability to cut to the heart of tangled matters, of arguments that seemed thorny and vast and circuitous, to tease out the threads, and to state truths and propose solutions that were humane, brilliant, and sound.

A teacher as well as a formidable scholar, Katherine Darmer was beloved by her students, many of whom cite her as their inspiration in life as well as in their career paths. A wife and mother, she meant the world to her family, especially her husband Roman and children Lia and Locke.

In the days following her passing, I watched with great sadness, along with the rest of our Chapman community, as the tributes poured in, as the candlelight vigil was held on the steps of our School of Law, and as Katherine was remembered on a web page created by the *Orange County Register* that encouraged online reminiscences from the Chapman and legal communities and the public. "A hero," many called her. A "deeply committed activist." "A terrific human being." "She inspired us to open our minds in new ways, and to evolve." "Beacon of light," "courageous advocate and leader," "friend to all."

* * * * *

Justice Richard D. Fybel
California Court of Appeal

A FOND REMEMBRANCE OF M. KATHERINE B. DARMER

All of us who knew Professor Katherine Darmer were, and are, devastated by her loss. She inspired us and earned our respect and admiration. I am grateful for the opportunity to honor Katherine's memory in the *Chapman Law Review*, and commend the editors and the Law School for the decision to remember her in an important, lasting manner.

I was extraordinarily fortunate to have collaborated with Katherine in our two-year project of co-editing a book published in Summer 2011, entitled *National Security, Civil Liberties, and the War on Terror*. Katherine and I knew each other through our participation in the Ferguson American Inn of Court, based at Chapman Law School.

Our book was Katherine's idea, and we had common goals for its content. We wanted to edit and publish a balanced book with important viewpoints from diverse and knowledgeable perspectives. Katherine worked especially hard in an effort to gather and present opposing viewpoints by distinguished authors. I believe we succeeded in soliciting and selecting pieces demonstrating differing points of view on controversial subjects involving national security and civil liberties. Katherine authored significant chapters, wrote a powerful introduction, edited wisely, and encouraged me to publish my own chapter.

I am proud of our achievement in publishing our book, but the publication itself is not the lasting memory of my experience with Professor Darmer. Allow me to discuss with you qualities I learned about Katherine as a scholar, person, and colleague with whom I worked so closely.

Katherine was extraordinarily smart, and a gifted writer. Beyond her professional talent, Katherine's ethics, integrity, and moral compass were engrained in her character and revealed by her acts. She was held in esteem by all of us as an intellectual giant and force of nature who also was blessed with compassion and kindness. Her energy, enthusiasm, and work ethic were remarkable.

We edited and discussed literally every sentence and paragraph from the book's contributors. We resolved any possible problem with respect, and found common ground. Working with Katherine was a joy and profoundly easy.

No description of working with Katherine would be complete without a tribute to her personal and professional courage. In editing our book and in championing important causes, Katherine faced political challenges. Katherine took the high road and never gave up her goals of fairness,

equality, and justice. She achieved these goals with her strength of character, intellectual honesty, commanding knowledge, and compassion.

I conclude as I started: we all miss Katherine, and are devastated by her loss. We lost a treasure. May Katherine's memory be a blessing to her family, her students, and all of us who so respected, admired, and liked her.

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Kirsten E. Gillibrand
United States Senator
State of New York

Kathy Darmer was many things to many people: a loving wife, a devoted mother, a beloved daughter, a passionate advocate, a brilliant teacher . . . the list goes on and on. To me, she was a treasured friend, an advisor, and an inspiration.

During the early 1990's, Kathy and I practiced law together as associates at Davis Polk & Wardwell and we trained for the New York City marathon together. During the hours in conference rooms and the miles in Central Park and on New York City streets, we talked about the big stuff and the small stuff: our hopes and plans, our work, our families, our friends, what books we were reading, and where to get the best sushi. After a few years, we both left private practice for public service. When Kathy joined the United States Attorney's office in the Southern District of New York, and I moved to Washington D.C. to work at the United States Department for Housing and Urban Development, our friendship continued through phone calls, visits and emails.

During Kathy's time as a prosecutor she argued many cases before the U.S. Court of Appeals for the Second Circuit. She was always a wonderful public speaker and advocate: eloquent and persuasive, with just the faintest hint in her voice of her Texas upbringing. She joined the faculty of Chapman Law School and was a prolific and elegant writer and a brilliant teacher.

Last year, after I was elected to the Senate, Kathy brought her young son, Locke, to see me at an event in Los Angeles. I know that Kathy wanted to instill both of her children—Lia and Locke—with a love for public service. Her love for her children and her pride in them was evident in every conversation we had.

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Tiffany Chang
Former Student
Chapman University School of Law '10

I met Katherine when I was a student at Chapman University School of Law in 2008. After expressing interest in starting an LGBTQ law student group, I was tipped off that Katherine would be an interested faculty advisor. Little did I know that I would soon be swept up in the wave of impassioned accomplishment that accompanied Katherine. She left many legacies behind—the most important being her two beautiful children. Although she left behind a litany of work addressing various human rights violations, I knew her best for her tireless and heroic efforts for LGBTQ marriage and full equality.

The night Proposition 8 passed in California, the injustice facing LGBTQ people flipped a switch in Katherine. Despite severe push back, hate mail, and malicious acts against her, her righteous conviction plus sharp intelligence made her unstoppable. In a short three and a half years, Katherine was involved in founding Chapman OutLaw, the Orange County Equality Coalition ("OCEC"), the Orange County Lavender Bar Association and the Global Project for LGBTQ Rights and Feminism at Chapman. She served as a senior fellow in the Gender and Sexuality Law Program at Columbia Law School. She was the legal confidant to "Don't Ask, Don't Tell's" iconic Lt. Dan Choi, as well as the victims of gender and sexual orientation harassment and the *Rent* production controversy at Corona del Mar High School. She spoke at almost every rally, festival, protest, church sanctuary, community meeting, and law school event. She was a symbol of the LGBTQ movement, and now that she is gone, what I will treasure most is what made her Katherine, an extraordinary person and a beloved friend.

For a long time, I figured she was superhuman and her artful oratory skills just poured out like magic. Whether she was speaking to three people on a restaurant's back patio or in a packed lecture hall seated next to Dean Erwin Chemerinsky, Katherine always spoke flawlessly and never seemed to sweat it. But over time, I caught on to her tells and found she was often nervous. She would distance herself from the crowd and look down at notes or take her seat on stage early trying to seem busy. Regardless of the nerves she might have been concealing, once the curtain lifted, Katherine empowered her audience with her unwavering poise. Katherine listened as well as she spoke. She listened more intensely than anyone I have ever known. No matter who was speaking in any setting, she would lean in with her body and neck as if she were straining to hear every syllable. Her eyes would be trained on the speaker and you could see her processing every sentence. Her mind was constantly analyzing. When she met an unfamiliar person or was in an unfamiliar conversation, she was so focused that her eyes would flit just slightly as if she were decoding an encrypted message.

Katherine would put any perfectionist to shame. Emails from her at 3:00 A.M. sharing one edited paragraph on what should have been a finished article, or that maybe those OCEC event tickets should be $60 versus $75, were not uncommon. One early afternoon I met Katherine in the offices of Crowell and Moring to help put the final touches on an amicus brief she submitted to the California Supreme Court in support of the petitioners in *Perry v. Schwarzenegger*. As the clock pushed past midnight, I sat with Katherine in the empty office building as she insisted on reviewing the brief "just once more." Of course, the brief was accepted; all of her articles were perfect, and every event was fully attended. Katherine knew her quirks and could laugh at herself. I once drove her home after her car broke down. While at the mechanic, I witnessed a paralyzed Katherine overwhelmed with indecision about whether to leave the car there or to call about the warranty first, and what to do next. I was a little surprised by this woman who was so meticulous and who moved mountains daily, but mostly, I was just thrilled to finally have a chance to help her. On the way to her house, she turned to me with a nervous laugh and said, "I don't do well with daily life crises." Katherine also often joked about her sense of style. However, at each rally, protest and event she attended, she added another civil rights button or ribbon to her sweater. A reassuring sight to see walking toward you was Katherine in her A-frame skirt, sandals and short sweater, heavy laden with her convictions.

Off the battlegrounds, Katherine was warm and fun. She always had homemade pasta waiting for attendees of the various organization meetings held in her family room. She often held cocktail parties bringing together her lesbian activist circle and her Newport Beach female neighbors. Katherine suggested it was a good break from the fight and that it might change some hearts and minds, but I believe the amusement resulting from two worlds colliding was undoubtedly motivating. When she heard that most of my family was not going to make it to my law school graduation, she threw a party for me at her house and together we took a shot of tequila in celebration. She chased her shot with Arrowhead Sparkling Water, her constant companion. It replays in my head the common scene of her whipping her head around, hair flipping over her shoulder, and smile widening as she says "Hey guys!" with the distinct mix of a faint Texan drawl, hint of Southern California valley girl and New York directness.

While we all saw her as a champion of our cause, the LGBTQ struggle was very personal to Katherine. I know that we inspired her, just as she inspired us. She felt that the LGBTQ community, her friends, were taking so much abuse that there was no way she could stop fighting until equality was won. She invested blood, sweat and tears into being perfect when it counted; and the dignity of the LGBTQ community counted to her. She was a force of nature, yet exceedingly human. Through all of this, she took me with her and I am forever changed and grateful. She was my mentor

and a kindred spirit. Her absence is unspeakable, but may she rest peacefully knowing she is loved unconditionally by many.