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FOREWORD

REFLECTIONS ON LAWYERS, LEGAL ETHICS AND THE CLINTON IMPEACHMENT

Robert F. Drinan, S.J.[*]

EVERY time I learn new things about the operation of the Office of Independent Counsel—as in this valuable symposium of the *Fordham Law Review*—I retrace the post-Watergate activities in the House and especially in the House Judiciary Committee, where I served from 1971 to 1981. The list of changes and reforms that the post-Nixon Congress enacted is long, and on the whole, well thought out and well accepted.

The secrecy and the abuses inherent in the 1972 presidential election campaign led to the reforms by which all contributions to a presidential campaign are regulated and recorded. Aside from the failure to block "soft money," the present regulation of money in presidential campaigns by the Federal Election Commission is a striking improvement over election laws prior to 1972.[1]

There are other reforms such as the creation of the Office of Government Ethics and the requirement that every major federal agency have an ethics advisor and an inspector general. Similarly, all high level federal officials, including judges, must annually report the levels of their income from all sources.[2]

Another reform unique to the Nixon administration required the impoundment of all Nixon's papers in a way different from any previous Chief Executive. The suspicions were deep in the Congress that

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1. In response to Watergate, the election campaign laws that were enacted in 1972, *see* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), were improved, in part, by the addition of the Federal Election Commission in 1974, *see* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 208-210, 88 Stat. 1263, 1279-89. The powers of the Federal Election Commission are currently found at 2 U.S.C. § 437d (1994).

2. *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 101-109, 201-211, 301-309, 92 Stat. 1824, 1824-61 (income reporting) (codified as amended at 5 U.S.C. app. § 101-111 (1994 & Supp. IV 1998)); *id.* § 209(10), at 1850 (designated agency ethics official) (codified as amended at 5 U.S.C. app. § 109(3) (1994)); Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (inspector general) (codified as amended at 5 U.S.C. app.).

there were crimes other than those revealed in the Watergate proceedings and that as a result the Congress should prevent the destruction of the evidence of these crimes. The measure, which was admittedly harsh on Nixon, was sustained by the United States Supreme Court.[3]

The clear rationale for these drastic measures was the desire and determination of the Congress to prevent another firing of an Attorney General like Elliot Richardson or a Special Prosecutor like Archibald Cox. The motivation for the reform seemed reasonable to the majority in the Congress. In addition, these reforms were good politics for those in charge of the Congress. Indeed, members who voted against the "reform" measures had a lot of explaining to do to the millions of voters who were appalled and saddened by the scandals of Watergate.

There were other reforms. Tighter procedures were created in the intelligence community by the establishment of an oversight committee on all intelligence functions in both houses of Congress.[4] Reforms to bring more "sunshine" to federal agencies were authorized and the Freedom of Information Act[5] was vastly improved—over the veto of President Ford.[6]

Although most of these reforms were applauded, the creation of the office of Special Prosecutor—later renamed the Office of Independent Counsel ("OIC")—was questioned from the beginning. The Congress itself was doubtful about the constitutionality of this measure and its usefulness. The legislation included a provision that it would be valid for only five years and would be sunsetted unless Congress re-enacted it and obtained the signature of the President.[7]

I helped to structure the bill that created the OIC and I voted for it. The discovery of the obscure phrase in the Constitution that relates to "inferior" officers being appointed by judges justified the novel approach of the bill by which a three-person panel appointed by the Chief Justice of the United States can appoint a special prosecutor. No standards were placed in the bill—one of the several mistakes of omission.

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3. *See* United States v. Nixon, 418 U.S. 683, 713-14 (1974).

4. *See* S. Res. 400, 94th Cong. (1976) (Senate Select Committee on Intelligence), *reprinted in* 122 Cong. Rec. 14,657, 14,673-75 (1976); H.R. Res. 658, 95th Cong. (1975) (House Permanent Select Committee on Intelligence), *reprinted in* 123 Cong. Rec. 22,932 22,932-49 (1977).

5. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1994)).

6. *See* Public L. No. 93-502, 88 Stat. 1561 (1974); *see also* 120 Cong. Rec. 36,633 (1974) (House veto override); 120 Cong. Rec. 36,882 (1974) (Senate veto override); Veto of Freedom of Information Act Amendments: The President's Message to the House of Representatives Returning H.R. 12471 Without His Approval, 10 Weekly Comp. Pres. Doc. 1318 (1974) (describing Ford's veto).

7. *See* 28 U.S.C. § 599 (1994) (expired 1999).

I sometimes wish that the United States Supreme Court had agreed with Justice Scalia's sole dissent in *Morrison v. Olson* and declared that the creation of the OIC violated the separation of powers.[8] Justice Scalia's reasoning was considered but rejected during the process of enacting the measure. But one has to wonder whether the Congress dominated by Democrats was unconsciously seeking to exploit the political advantage that came to the Democrats by the disgrace and departure of President Nixon.

If someone in the 1970s had suggested to me that the OIC would lead to the impeachment of a Democratic president I would have dismissed the prediction as far-fetched. But in retrospect one has to take the suggestion seriously. The machinery that was devised in the OIC was dangerous and fraught with unintended and unanticipated consequences. Its demise was welcome on almost all fronts.

Indeed, the history of the work of the OIC becomes more distressing as we now reflect on the excesses of many of its investigations. Careers were ruined, lives were altered, and the public deepened its fears of a ruthless and runaway prosecutor. It is possible that some of the good hoped for by the Congress was attained. But the OIC will always be identified with the work of Kenneth Starr. It will, therefore, be perceived as partisan, excessive, and abusive. Mr. Starr's one-sided presentation of his case to the House Judiciary Committee during the investigation of President Clinton will continue to be regarded by many observers as inappropriate. Even Mr. Starr's advisor on ethics, Professor Sam Dash, felt obliged to resign from that office after Starr, in Dash's judgment, exceeded the mandate he had received from the panel of judges.[9]

At the end of the Senate trial of President Clinton, observers in Washington and around the nation concluded that the impeachment proceedings in essence launched by Starr and his staff demeaned and degraded everyone—the White House, the Congress, and the press. The eventual political fallout cannot be known as this time. But the consequences could eventually be catastrophic for the Republicans or the Democrats. The whole spectacle of the President's being impeached on a strictly partisan vote is still very troubling to millions of citizens.

There are other questions. Will the impeachment of President Clinton, like the process against President Andrew Johnson in the 1860s, weaken the office of the Presidency as it did in the late 1800s? If some day Democrats retake the Senate and the House, will they now be more likely to seek the impeachment and removal of a Republican president? Would they be inclined to re-establish the OIC if

8. *See* Morrison v. Olson, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting).

9. *See* Susan Schmidt & Ruth Marcus, *Starr's Ethics Advisor Quits Over Testimony; Dash Charges Counsel Abused Office*, Wash. Post., Nov. 21, 1998, at A1.

this were perceived to further their political objectives?

The entire saga of the Starr investigations along with the proceedings against President Clinton left millions of Americans baffled and distraught. There were deep feelings against the personal conduct of the President but there was also widespread feeling that his misconduct was personal and not the kind of activity that reaches the constitutional norm of "Treason, Bribery, or other high Crimes and Misdemeanors."[10] But the distress that many Americans—especially parents—had at Clinton's conduct caused them to disregard the constitutional norms for impeachment and express their deep desire that somehow the President resign or be removed.

The process was not entirely rational or reasonable. Indeed, one has to ask whether the impeachment process can ever be substantially removed from partisan politics of some kind.

When the House Judiciary Committee was planning the process of impeaching President Clinton, I was invited by its chairman to testify because I was a member of the House Judiciary Committee under Chairman Peter Rodino in 1973 and 1974. It was clear that this Republican-controlled committee desired to "piggy-back" on the majesty and dignity of the Rodino committee. Photos of the Rodino committee were enlarged and shown to the packed hearing room of the House Judiciary Committee. Those in charge of the meeting used the photos in order to associate themselves with a believably non-partisan congressional committee that had been assigned the dreadful task of making an inquiry into whether a president, re-elected overwhelmingly in 1972 by the people of America, should be removed by the decisions of 535 members of the House and Senate.

In my testimony I related the deliberate process followed by the House Judiciary Committee during the impeachment inquiry in 1973 and 1974. I myself filed the first resolution of impeachment on July 30, 1973.[11] But it was not on Watergate but exclusively on the then recently disclosed fact that President Nixon had clandestinely bombed neutral Cambodia with some 3,800 sorties. I reasoned that the conduct carried out without the knowledge or consent of anyone in the Congress reached the constitutional requirement of "high Crimes and Misdemeanors."

I pointed out to the House Judiciary Committee in 1998 that while the conduct of President Clinton was objectionable, neither he nor anyone in his administration had abused their office in a way contemplated by the framers of the Constitution when they set forth the norms for impeachment.

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10. U.S. Const. art. II, § 4.

11. *See* House Comm. on the Judiciary, Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, at 217 (1974), *microformed on* CIS No. 74-H523-11 (Congressional Info. Serv.).

Giving testimony was painful because it was clear to everyone that the vote on impeachment would be strictly along party lines. When asked by a Republican member of the House Judiciary Committee about my view as to the motivation of his fellow Republicans I paused a bit and then said that in my view it was "vengeance." The questioner was taken aback but many felt that my spontaneous response spoke the truth.

But in the end, the several days of hearings could hardly be described as an objective assessment of the situation. The majority of the Committee and its chairman had early on agreed that they would call Mr. Starr to put the worst face on all of the facts and then vote for impeachment.

In 1974 the Democrats on the House Judiciary Committee were aware that Republican support for impeachment was essential if the impeachment were to be credible. The Democrats did not have to ask for support from their Republican colleagues. The support came as the awful truths were revealed and, in the end, the full deceit and deception of the White House became undeniable after President Nixon in July 1974 was unanimously required by the United States Supreme Court to reveal the incriminating tapes.[12]

History has been kind to the work of the Rodino Committee. It was clear in talking with the members of the Hyde Committee that they hoped to receive some of the accolades that the members of the House Judiciary Committee in 1974 received. Whether they will is not now predictable. But historians will have abundant material to coordinate when they try to make some final assessment of the dramatic events that occurred in the months when the Republicans in control of the Congress did everything they could do to remove a President of the opposite party.

Lawyers, of course, were on both sides at every stage of the proceedings against Clinton. Will there sometime be an investigation of the investigators? Will the ethical conduct of Mr. Starr and his colleagues be probed? Will the mountains of documents put together by the OIC and delivered dramatically to the House Judiciary Committee be open to the public? Will we know some day why the Democrats in both bodies had only a handful who worked against their President?

About the only clear victory for the traditional moral ideals of the legal profession is the Supreme Court decision in *Swidler & Berlin*, which sustained the rule that confidential material contained in a lawyer's notes remains privileged even after the death of the client, Mr. Vincent Foster.[13]

The guilt and the fate of the twenty-eight lawyers in the Nixon ad-

12. *See* United States v. Nixon, 418 U.S. 683, 713-14 (1974).
13. *See* Swidler & Berlin v. United States, 524 U.S. 399, 411 (1998).

ministration who were convicted of ethical wrongdoing are well known and documented. Lawyers for the Nixon administration were charged with obstruction of justice, lying to the Congress or the courts, and other offenses that bring disgrace to the legal profession.[14]

Can we expect that there will be charges brought against lawyers who were involved in the spectacle about President Clinton? At the moment there seems to be no appetite to go after the lawyers who were involved in the fiascoes revolving around Monica Lewinsky, Paula Jones, and others. The whole mood of the country and the legal profession is to hope that all of these tawdry tales disappear soon and forever.

After the Senate refused to remove President Clinton, Starr openly admitted that it was a "mistake" on his part to take on the case of Monica Lewinsky and tie it into the matter involving Paula Jones.[15] Mistakes are not ordinarily the basis for a suit for legal malpractice by a prosecutor. But is there some remedy available to the persons who were hurt in the proceedings which Mr. Starr now says were a "mistake"?

This special issue of the *Fordham Law Review* reminds us that we should not as lawyers and as citizens forget all of the things that we want to forget. Dreadful things occurred and lawyers were at the heart of them. Without lawyers few if any of the events would have happened. The non-lawyers in the country—some ninety-nine percent of the people—watched in pain and consternation. They can blame the impeachment on the politicians and the press, but deep down they know that members of the bar were the movers and shakers. As a result, lawyers should examine, investigate, and diagnose the legal and moral earthquakes that disturbed America during the months of the Starr inquiries and the action in Congress. It was the legal profession—up to the Chief Justice himself—that orchestrated this profound series of events in America.

The creative and constructive series of articles in this special issue of the *Fordham Law Review* will be read today and for many years in the next century. These articles are filled with insights which have been meaningful to this reader. It will help the generations to comprehend the forces that brought about the first impeachment in U.S. history of a directly-elected President.

For twenty-five years this writer has been involved in teaching, writing, and reflecting on the process of impeachment under the U.S. Constitution. Impeachment had been initiated against two U.S. Presidents in that period of twenty-five years. Both processes have

14. *See* Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 Geo. L.J. 2307, 2320 (1998).

15. *See CNN Larry King Live: Ken Starr Discusses His Term as Independent Counsel* (CNN television broadcast, Oct. 18, 1999), *available in* LEXIS, News Library, CNN File (transcript No. 99101800V22).

been unsettling. Both will almost certainly continue to have an impact on the way citizens view their President and their nation.

Being a fact-finder or a juror in the case of President Nixon and a witness in the case of President Clinton has made more clear to this writer the pitfalls, the agonies, and the partisanship that are almost inherent in the impeachment process. Both events produced libraries of commentary. But there is still no calm and clear consensus as to what really happened.

As a result, lawyers and all Americans must continue to research and reflect on these monumental events. One of the most important sources for that research and reflection will always be the December 1999 special issue of the *Fordham Law Review*.