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Stanley I. Kutler*

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In The Shadow of Watergate: Legal, Political, and Cultural Implications

Stanley I. Kutler*

Sometimes Watergate seems doomed to be trivialized or, at best, only memorialized on “significant” anniversaries. Richard Nixon has sought desperately to induce national amnesia, but being Richard Nixon he can succeed only in part. Indeed, his very presence has the perverse effect of eventually reminding us of what he did.

Richard Nixon eventually will leave us, and then what do we do to commemorate and learn from Watergate? For nearly two decades, the record has been dismal. In 1992, the media was awash in an orgy of recapitulation, speculation, and inevitable inaccuracy, as it marked the twentieth anniversary of the burglary. Convicted felon G. Gordon Liddy, who has made a career implicating the criminality and involvement of others, seems to be a required presence in any of these memorializations—illustrating once again that the media does not recognize what is anything but a fine line between news and entertainment. The usual suspects appear—Colson, Ehrlichman, and Haldeman, for example—to put their special twist on past events. Never mind that they use such occasions to backstab one another (carrying on a fine old Nixon White House tradition), but they also manage periodically to make new allegations, much of it grist for publishing proposals. Did Nixon have advance knowledge of the break-in? The writings and public comments of the late H. R. Haldeman will give you a wide array of answers. Yes, Nixon knew; no, he did not—whatever it takes to sell. After all, Haldeman made his fortune in advertising (while being the heir to a plumbing fortune).

If the media is to be believed, Watergate’s most enduring impact seems to be the legacy of a suffix. References to Nixon’s deeds and the Watergate controversy soon became a shorthand for amorality, abuse of power, and official criminality. “Watergate” provided a ready suffix for a range of public scandals. And thus: Koreagate, Irangate, Iraqgate, Debategate, and even more recently, Nannygate and Whitewatergate. The language became global when the Japanese used “Recruitgate” to describe a government scandal in the late 1980s. Watergate encouraged a routinized response to official breaches of public law and confidence. I am disappointed, but not

* Stanley I. Kutler is the E. Gordon Fox Professor of American Institutions and Law at the University of Wisconsin-Madison. Part of this essay is adapted from his book, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1992).

surprised, by the media's incessant trivialization of an event of such transcendent importance.

Watergate, in fact, served as a prescription to alter the political and legal landscape (not always successfully, of course) in the United States, and it became a standard for analyzing political behavior. It did not halt or decisively reverse the long-term trend toward greater executive power and responsibility. Eight years after Nixon's resignation, the Supreme Court upheld presidential immunity in civil cases, and warned against the "dangers of intrusion" on presidential authority and functions. But the perceived abuses of power during the Nixon presidency led to various "reforms," ranging from attempts to institutionalize the special prosecutor, to curbs on presidential manipulation of executive agencies for personal political gain, to new campaign-financing laws. Watergate had a substantial influence on the political parties and political ideology. It also profoundly affected the foreign policy of the Nixon Administration, with consequences for the future as well.

As symbol and memory, Watergate shaped public discourse even when distorted or exaggerated. In 1980, Ronald Reagan attacked a federal court ruling against abortion restrictions as "an abuse of power" as bad as Watergate. Senator Edward Kennedy criticized President Reagan in 1987 for reaching into the "muck of Watergate" to nominate Judge Robert H. Bork to the Supreme Court. Bork was never able to shake his image as a bloody accomplice, however innocent, to the events of October 1973; he had, Kennedy charged, executed "the unconscionable assignment" of firing Archibald Cox, "one of the darkest chapters for the rule of law in American history." In 1986, Richard Nixon, serenely confident that he had been "rehabilitated," suddenly found Watergate alive and well, hauntingly compared to the Iran-Contra affair that erupted that fall. Watergate proved to be more than the "dim and distant curiosity" that one historian described.¹

We have an abiding interest in the "lessons" of history. In this case, that would center on whether Watergate provided any enduring changes or reforms. The verdict at best is mixed. Perhaps, then, it is best to focus on how Watergate touched American society, and what it meant, in an immediate sense.

Watergate's impact involved a sweeping range of so-called reform legislation. But Watergate is, as I said, an event of transcendent importance;

1. *Watergate is Already a Dim and Distant Curiosity*, U.S. NEWS & WORLD REP., Aug. 13, 1984, at 59; N.Y. TIMES, Feb. 22, 1980, at 1; *see also* Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982); 133 CONG. RECS. 9188-89 (daily ed. Jul. 1, 1987) (statement of Sen. Kennedy).

it consumed the nation's attention for nearly two years. Inevitably, the events of Watergate affected the nation's institutions, politics, and perceptions of itself in a variety of areas, foreign as well as domestic.

Watergate profoundly shaped struggles for leadership and ideological control in the major political parties. Richard Nixon's fall from grace strengthened the claims of Republican conservative ideologues, who had captured the party in 1964 only to find their goals frustrated by the rise of the "pragmatic" Nixon. At the same time, Watergate spurred the elections of Democrats bent on a reform agenda for the political process, yet who had virtually no cohesive program for national policies. Perceived at first as a Democratic triumph and a Republican debacle, Watergate, in reality, facilitated the conservative takeover that reinvigorated the Republican Party, and although the Democrats temporarily profited, they left unattended the fissures in their old coalition and ignored the need for fashioning programs that would reverse the corrosion of that coalition.

Barry Goldwater's 1964 defeat left the Republican conservatives no alternative but Nixon in 1968. Yet, when President Nixon reached out for rapprochement with China and as his domestic programs mounted deficits and produced inflation, conservatives found themselves politically estranged. For conservatives, Watergate discredited Nixon personally; it also dealt a blow to the "middle ground" in the Republican Party that Nixon had preempted in the 1960s between the liberal Rockefeller forces and the Goldwater Right. With Nixon's departure and Ford's defeat in 1976, the conservative movement captured the field against the relatively feeble challenges from its intra-party foes.

Except for the brief Ashbrook insurrection in the 1972 primaries, conservatives had muted their criticism of Nixon, confining it to occasional attacks on isolated policies. But with Nixon's resignation, conservatives launched an ideological assault on his overall policies, and excoriated Ford for maintaining them. William Buckley assailed Nixon for the "humiliating defeat" in Vietnam, for a budget deficit "larger than any Democrat ever dared to endorse," and for the "baptism of détente" with its attendant talk of the "peace-loving intentions of the Communist superpowers." Other conservatives blamed Nixon for passing strategic superiority to the Soviets, for sowing the seeds of economic destruction because of his inability to make difficult choices, for dismantling the American Navy, and for expanding the Great Society contrary to his campaign promises. Foolishly, according to such sources, Nixon believed that if he appeased the Left on policy matters, he would have a respite from his Watergate difficulties.

As President Ford continued the same policies, conservatives disdained party loyalty and spurned an incumbent they had once admired. In May

1975, Ronald Reagan condemned Ford for a projected fifty-one million dollar budget deficit. *Conservative Digest* reported a poll in June of 1975 claiming that seventy-one percent of its readers thought Ford was doing a "poor" job, and ninety-one percent opposed his nomination for the 1976 election.²

The conservative fury nearly resulted in denying the 1976 Republican nomination to Ford, an event that would have been unprecedented in the twentieth century. Senators James Buckley and Pat Buchanan called for an "open convention." The conservatives massed behind a Reagan candidacy and failed to carry it through only by a scant margin; many believed that a second ballot would have given the nod to the former California Governor. When Reagan spoke to the 1975 Conservative Political Action Conference, he invoked the sacred appeal of the "Mandate of 1972," a mandate that conservatives believed had been given to them to implement their political and social agenda, and not to be used by Nixon personally. The election, they claimed, had emphatically repudiated the ideology of "radicalism" and "social permissiveness" that had captured the Democratic Party. "The mandate of 1972 still exists," Reagan proclaimed. "The people of America have been confused and disturbed by events since that election, but they hold an unchanged philosophy." Reagan and his advisers held to that faith. In the 1980 campaign, they used the conservative indictment against Nixon and Ford to telling effect against a Democratic President. Ironically, as President Reagan concluded his second term in 1988, conservative spokesmen, such as Buchanan, once more assailed the nation's continued "leftward drift."³

Richard Nixon's Republican opponents finally enjoyed a measure of revenge. Periodically, he invoked conservative slogans and labels, but he remained a distrusted and embarrassing figure, even to his own party. The former President had the unique distinction of not being invited to the four Republican presidential nominating conventions that followed his leaving the White House. When President Clinton invited Nixon to the White House in March 1993, the press was given no access.

Watergate swelled the ranks of congressional Democrats in the 1974

2. William F. Buckley, Jr., *Reagan for Challenger*, NAT'L REV., Sept. 12, 1975, at 1008; HUMAN EVENTS, Dec. 7, 1974, at 14; CONSERVATIVE DIG., May 1975, at 3, June 1975, at 39; Interview with Howard Phillips (Aug. 23, 1985); Interview with Barber Conable (May 28, 1985).

3. Patrick Buchanan, *A Long March Unfulfilled*, WASH. TIMES, Apr. 4, 1988, at 18; HUMAN EVENTS, June 21, 1975, at 4, July 19, 1975, at 7, Nov. 24, 1974, at 3, Mar. 1, 1975, at 5; Interview with David Keene (Aug. 14, 1985).

and 1976 elections. In 1974, at the height of interest in the scandal, the Democrats added seventy-five new members to the House, most of whom promised electoral reform. In the meantime, however, the attention given to procedural reforms ignored the growing schisms in the Democratic Party, schisms that reflected changing social and economic concerns among the electorate. The 1972 election pointed to the growing strains within the party; Watergate, however, obscured, then postponed, any real understanding or reckoning of the party's dilemmas. "The Real Majority," political analysts warned, no longer consisted of the "have-nots" who had formed the basis for Democratic coalitions for more than forty years. The "haves" had new concerns, which made the Democratic Party's "politics of inclusion" paradoxical, even contradictory.⁴

Many of the new Democrats represented marginal districts, often suburban, middle-class, and domesticated to the politics of affluence. The programmatic concerns of the AFL-CIO, minority coalitions, and women's groups had limited appeal in such districts. The reform-minded new representatives struck a Faustian bargain: the Democratic leadership gave them their "reform" proposals but demanded that they toe the line on policy concerns originating in the party's traditional constituencies. The newcomers' support for the leadership's desired social and economic policies only aroused organized opposition in their local districts from pro-business organizations, as well as from ideological groups demanding a reduced welfare state and support for anti-abortion measures.

Jimmy Carter rode to victory in 1976 on promises of greater morality and efficiency in government. "We were responsible for Jimmy Carter," Richard Nixon admitted in 1977.⁵ The historical accident of Watergate produced President Carter, but unlike the Great Depression, Watergate by itself was not an issue that could sustain power. Carter seemed to offer little in the way of a program that would broadly appeal to the nation; his seeming aimlessness reflecting the Democrats' lack of cohesiveness and purpose. Altogether, the situation was a prescription for disaster, particularly as inflation corroded the earning power of the Democrats' electoral base. Meanwhile, the Republicans united behind Ronald Reagan, a candidate who attractively expressed the conservative ideology which had been dominant

4. RICHARD SCAMMON & BENJAMIN J. WATTENBERG, *THE REAL MAJORITY* (1970); KEVIN P. PHILLIPS, *POST-CONSERVATIVE AMERICA* (1982); JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM* (1983), and especially, THOMAS B. EDSALL, *THE NEW POLITICS OF EQUALITY* (1984), offer useful insights into the dilemmas of the Democrats.

5. DAVID FROST, "I GAVE THEM A SWORD": BEHIND THE SCENES OF THE NIXON INTERVIEWS 62 (1978).

in the party since 1964 but which had always lacked a charismatic leader. Reagan led his party to two presidential triumphs and a six-year control of the Senate, and he successfully transferred his aura and image to George Bush in 1988. Three consecutive presidential defeats left the Democrats floundering in search of their identity as a party. Watergate diverted the party from that quest and left it in disarray for nearly two decades.

Watergate spurred demands for "reform" to prevent future abuses of power, as scandals inevitably do; paradoxically, however, the affair also produced assertions that "the system worked." In the spring of 1974, a distinguished academic panel headed by Yale Law School professors Alexander Bickel and Ralph Winter warned that Watergate was a "poor vehicle" for addressing major reforms. The panel's report contended that both existing law and legal institutions had responded adequately to the crisis. The Watergate scandal had been that of an individual and not of the political-legal system itself. Yet the panelists warned that reducing presidential power required Congress to reform itself and to accept its proper responsibilities for shared governance, rather than damaging the institution of the presidency. Watergate, they concluded, might result in "history less in danger of being ignored than misunderstood."⁶

Still, the temptation to rectify lawbreaking with more law was irresistible. Ethical standards, guidelines for institutional behavior, restraints on power, and the enforcement of the new rules flowed from Congress in the aftermath of Watergate. The results produced years of bickering over the meaning of the reforms and the willingness to follow them. Samuel Johnson once characterized patriotism as the last refuge of a scoundrel. Roscoe Conkling, a scandal-plagued nineteenth-century Senator, added that Johnson had "underestimated the potential of reform."

In the years since Watergate, Congress has flirted with reform legislation essentially focusing on ethical considerations or on the nature of the political process. For the latter, it seems nothing has been as futile as campaign financing legislation, ironically, the original subject of the Senate Watergate investigation.⁷ The 1992 elections ended the partisan division

6. RALPH WINTER, JR., *WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER* 1-4, 83-85 (1974).

7. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *Public Financing of Federal Elections: Hearings Before the Subcomm. on Privileges and Elections of the Comm. on Rules and Administration*, 93d Cong., 1st Sess. 23, 33, 35 (1973); *Congress Clears Campaign Finance Reform*, CONG. Q. ALMANAC 611-33 (1974); HERBERT E. ALEXANDER, *FINANCING THE 1972 ELECTION* (1976); GILLIAN PEELE, *REVIVAL AND REACTION: THE RIGHT IN*

between the Executive and Legislative branches, offering some prospect that the two-decade long gridlock on this subject might be broken.

The institutionalization of the Independent Counsel, formerly known as the Special Prosecutor, probably is the most visible and controversial remnant of Watergate. The reality of divided government in 1973 forced Richard Nixon to accept the idea of a Special Prosecutor, who was to be independent of the Justice Department, free to carry on his own investigations. After the President summarily dismissed Archibald Cox, Congress and Leon Jaworski pushed for firmer guarantees of independence for the Special Prosecutor. When the Nixon Administration raised substantial constitutional objections centering on separation-of-powers doctrine, the move to some observers seemed to be merely a ploy to limit the authority of the Special Prosecutor.⁸

One year after the House Judiciary Committee had voted to impeach Nixon, Congress first considered institutionalizing the Office of Special Prosecutor and codifying ethical standards. In 1978 Congress passed the Ethics in Government Act, a law that perhaps more than any other symbolized the lingering concerns of Watergate. When Congress first considered the bill in 1975, Senator Abraham Ribicoff (D-CT) declared that Congress had the responsibility to prevent future Watergates. In a subsequent hearing, a Justice Department official acknowledged, "in the shadow of Watergate . . . the appearance of justice is almost as important as justice itself."

The 1978 ethics law required financial disclosures by executive and judicial branch officials, although not by members of Congress. The law restrained the "revolving door" through which public officials readily moved into the private sector and immediately used knowledge and contacts gained in their previous positions for private gain. The act established the Office of Government Ethics to monitor its financial disclosure and conflict-of-interest provisions.

Demands for such reforms antedated Watergate. But Watergate specifically inspired the creation of mechanisms for judicial appointment of

CONTEMPORARY AMERICA 60 (1984); Gregg Easterbrook, *What's Wrong with Congress?* THE ATLANTIC, Dec. 1984, at 57; see also Paul Huston, *Fat Cat Contributions in the 1988 Campaign*, L.A. TIMES, Dec. 9, 1988. The disclosure requirements of the 1974 legislation have remained largely intact and have provided useful information as to the source of campaign funds.

8. ROBERT NISBET, *THE PRESENT AGE: PROGRESS AND ANARCHY IN MODERN AMERICA* 105-06 (1988); Leon Jaworski, *Oral History Memoir*, in THE TEXAS COLLECTION, 5 BAYLOR UNIV. 764-65.

a special prosecutor to investigate allegations of wrongdoing by officials of the Executive branch. The 1978 law required the Attorney General to investigate such allegations and then to report to a three-judge panel within ninety days on whether the charges were unfounded or whether the judges should appoint a special prosecutor. The judges defined the prosecutor's jurisdiction. Once selected, the prosecutor had authority to perform the investigative and prosecutorial functions of Justice Department officials. Finally, the prosecutor could not be removed, except by impeachment, conviction of a crime, physical incapacity, or by the Attorney General in the event of extraordinary impropriety. The Attorney General must justify such action to the Senate Judiciary Committee; moreover, the prosecutor might appeal to the courts for review. The Ethics Act institutionalized the memory of the Saturday Night Massacre.

The measure passed both houses overwhelmingly. Congressman Charles Wiggins, however, sounding what some viewed as irrelevant sour notes from the past, led a corporals' guard of resistance in the House. He was joined, interestingly enough, by Robert McClory and Caldwell Butler, both of whom had voted to impeach Nixon. The minority contended that the government's prosecutorial machinery had not broken down, that Watergate was exceptional and did not justify the creation of a new mechanism. "If an attorney general cannot be trusted to enforce the law against the executive," the minority contended, "the remedy is impeachment and not the cloning of an additional attorney general to do the job of the first." The responsibility, in short, rested with Congress. Henry Petersen, who regretted his "slowness" in recognizing the necessity for a special prosecutor in 1973, nevertheless opposed the bill as well, believing that "political safety" too often would result in narrowing prosecutorial discretion, with unfair consequences to the accused.⁹

Two Carter Administration officials became the first targets of the Ethics in Government Act, as a result of allegations of drug use and conflicts of interest. The lengthy, predictably sensational investigations resulted in no charges. Doubtless, their ordeals impaired the reputations and undermined the effectiveness of both men. When Congress reviewed the operation of the law in 1981, disenchantment was apparent, particularly marked by complaints that the special prosecutor provisions were too easily

9. *Watergate Reorganization and Reform Act of 1975: Hearings Before the Comm. on Government Operations*, 94th Cong., 1st Sess. (1975); *Public Officials Integrity Act of 1977: Hearings Before the Comm. on Government Affairs*, 95th Cong., 1st Sess. (1977); *Carter Signs Government-Wide Ethics Bill*, CONG. Q. ALMANAC 835-45 (1978); Interview with Henry Petersen (August 23, 1975).

triggered. Former Attorney General Benjamin Civiletti, who had served under Carter, warned that “we have selected a weapon which must be used with greater care.” He argued that the Justice Department could have conducted the necessary investigations of Carter’s men and that applying the law against 480 Executive branch officials was simply too broad and expensive.

The Reagan Administration opposed the Ethics in Government Act as well, and focused on constitutional and cost objections. Judicial appointments of prosecutors, the Justice Department contended, involved executive functions but did not allow executive control, an unconstitutional arrangement. But the need for a special prosecutor to provide the “appearance of justice” still had a powerful appeal. The Reagan Administration eventually dropped its opposition, although it proposed a wider latitude for removal of the prosecutor. Interestingly, the Justice Department suggested adding the President’s friends and family as objects of attention of a special prosecutor. Two years of wrangling produced a series of amendments to the Ethics Act in 1983. The changes renamed the Special Prosecutor an “Independent Counsel” (a less “inflammatory” title, one Senator suggested). The changes gave the Attorney General more discretion in the decision to name a counsel, reduced the list of officials who might be investigated, provided for reimbursement of attorney’s fees for the subject of an investigation if no indictment was brought, and allowed the Attorney General to remove the counsel for “good cause.”¹⁰

Four years later, the legislation again had to be revised. By then more than half a dozen independent counsel investigations had been launched. Now the Reagan Administration openly opposed continuation of the office. Attorney General William French Smith assailed the independent counsel process as “probably unconstitutional.” He believed it negated the ends of justice and that it was “cruel and devastating in its application to individuals, falsely destroying reputations and requiring the incurring of great personal costs.” The investigations, he contended, resulted in media circuses and had yielded little at high cost to the taxpayers. Democratic senators accused the Administration of “re-interpreting” and weakening the law when it refused to apply the act on several occasions. For its part, the Administration

10. *Special Prosecutor Provisions of Ethics in Government Act of 1978: Hearings Before the Subcomm. on Oversight of Government Management of the Comm. on Governmental Affairs, 97th Cong., 1st Sess. (1981); Ethics in Government Act Amendments of 1982: Hearings Before the Subcomm. on Oversight of Government Management of the Comm. on Governmental Affairs, 97th Cong., 2nd Sess. (1982); Revision of Special Prosecutor Law Cleared, CONG. Q. ALMANAC 386-89 (1982).*

stressed the unconstitutionality of the system. But pending investigations only strengthened the opposition to changes. Meanwhile, the Administration offered regular Justice Department appointments to the then-acting independent counsels on a dual basis, pending the settlement of court challenges to the constitutionality of the position.

Watergate reverberated as Congress debated extending the Ethics Act in 1987. The bill's chief Senate sponsor, Carl Levin (D-MI), had no illusions about the Reagan Administration's real attitudes. The Reagan Justice Department, he complained, "would have us return to the days of Watergate and Nixon's 'Saturday Night Massacre' when public trust in our criminal justice system hung in the balance. We don't want to go to the brink again." On June 17th, the fifteenth anniversary of the Watergate break-in, the Justice Department reiterated its opinion that all prosecutors must be responsible to the President. During the Senate debate in October, Levin reminded his colleagues that Watergate had raised doubts about the integrity and independence of criminal investigations directed at the President and his entourage. Since then, the statutory arrangements for an independent counsel, Levin insisted, had won wide acceptance from the American people. The ready support for an independent counsel in the pending Iran-Contra affair contrasted sharply with the "public's consternation over the Watergate investigation," demonstrating that the arrangement had restored "public confidence in the integrity" of the criminal-justice system. "That is an invaluable achievement," Levin concluded.

The renewal measure passed overwhelmingly by a margin making it vetoproof and Reagan signed it on December 15, despite Justice Department opposition. Given four pending investigations of the President's actions as well as those of his advisers, the "appearance of justice" compelled him to sign the bill. Coincidentally, one day later, an Independent Counsel secured the first conviction under the Ethics Act when a jury found Michael Deaver guilty of perjury. Michael Deaver was a former White House aide who had close personal ties to President Reagan and his wife. After Deaver's conviction, Independent Counsel Whitney North Seymour complained that the Ethics in Government Act had too many loopholes and exemptions. Whatever its inadequacies, the law nevertheless remained imperative, he said, because there was "too much loose money and too little concern in Washington about ethics in government." Seymour assaulted the Reagan Administration's failure to instill an ethical sense throughout the government. Critics from another direction used the occasion to chastise Congress again for having immunized its members from outside investigations for

violations of ethical standards.¹¹

With the open support of the Reagan Administration, individuals under investigation pursued a constitutional challenge to the Office of Independent Counsel. Three former Attorneys General and the Solicitor General lent their considerable prestige to the campaign. The issue boiled down to differences over the power of the Executive branch to conduct all criminal prosecutions, on the one hand, and the significance of constitutional language authorizing Congress to vest in the Judiciary the appointment of “inferior officers,” on the other. Left largely unspoken in the formal briefs was any recognition of the importance of the “appearance of justice.”

In January, 1988 the Court of Appeals, divided two-to-one, invalidated the Independent Counsel provision as an unwarranted intrusion on Executive authority. Speaking for the majority, Judge Lawrence Silberman articulated a strict construction of separation of powers. The decision came down amid growing doubts whether the independent counsel statute was workable. Critics charged that the Counsels’ investigations had become at times outright harassment of public officials. Predictably, former Nixon aides assailed what one called an “orgy of investigation” and “prosecutorial politics.” But even former members of the Cox and Jaworski staffs noted that the independent counsel operations had become elephantine, given the large expenditures and resources required for investigations, maintenance, and security. Still, public support for the probe of the Iran-Contra affair remained strong. Meanwhile, independent counsels secured convictions of two more former Reagan aides, lending some weight to the idea that only a disinterested prosecutor could proceed against the Executive branch.

The Supreme Court put its imprimatur on the independent counsel statute in a surprisingly firm and broad decision.¹² Reversing the appellate court, Chief Justice William Rehnquist led the Court in rebuffing the Administration. The Justices found no violation of separation of powers doctrine. The Court held that the Ethics Act in no way inhibited the President from performing his constitutionally assigned duties.¹³ Unlike the lower court, Rehnquist rejected any notion that the law constituted

11. *Special Prosecutor Provisions of Ethics in Government Act of 1978: Hearings Before the Subcomm. on Oversight of Government Management of the Comm. on Governmental Affairs*, 97th Cong., 1st Sess. (1981); *Ethics in Government Act Amendments of 1982: Hearings Before the Subcomm. on Oversight of Government Management of the Comm. on Governmental Affairs*, 97th Cong., 2nd Sess. (1982); *Revision of Special Prosecutor Law Cleared*, CONG. Q. ALMANAC 386-89 (1982).

12. *Morrison v. Olson*, 487 U.S. 654 (1988).

13. *Id.* at 657.

“Congressional usurpation” of executive functions. In a lone dissent, Justice Antonin Scalia bitinglly referred to “our former constitutional system,” as he lamented the Court’s refusal to uphold what he believed to be a proper and absolute scheme of separation of powers.¹⁴

The Independent Counsel nevertheless remained the bane of both the Reagan and Bush Administrations which made no secret of their desire to abolish the office. Congressional Republicans kept up a steady drumfire of criticism, particularly scoring the alleged excesses of Lawrence Walsh, who headed the Iran-Contra investigation. Walsh was accused of lavishing excessive amounts of money and, in effect, pursuing a vendetta against President Bush and other figures. During the 1992 campaign, Walsh presented new charges against former Defense Secretary Caspar Weinberger, infuriating Bush and his party.

The Independent Counsel Law expired on December 15, 1992. Still, three Independent Counsels remained in office continuing their investigations. Besides Walsh, Arlin Adams headed an investigation of Reagan’s Department of Housing and Urban Development and Joseph diGenova, who was appointed just before the law expired, was exploring the State Department’s involvement in the search of President Clinton’s passport files during the election campaign. Subsequent disclosures of Clinton’s possible involvement in unethical business dealings prompted Republicans to demand (and receive) an independent counsel to investigate the matter, but at the same time, made it difficult for them to resist renewed pressures for the Independent Counsel Reauthorization Bill.

The charges that President Nixon had abused his office by improperly using such powerful executive agencies as the FBI, the CIA, and the IRS produced a sharp reaction in Congress and in the nation. Loosening presidential controls, however, conceivably could enlarge the independence of those same groups, a prospect that gave pause to those who had watched the practically unbridled power of the bureaucracies.

The Watergate years brought into sharp relief the practices and

14. *Id.* at 697; see also *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988); Leonard Garment, *Does America Really Need This Orgy of Investigation?* WASH. POST, May 10, 1987, at B1; Leonard Garment, *The Guns of Watergate*, COMMENTARY, Apr. 1987, at 20-23; L. Gordon Crovitz, *Independent Counsels: Quo Warranto?* WALL ST. J., Feb. 9, 1988, at 38. In one article, the authors criticized the lack of accountability and excesses of the Independent Counsel. See Andrew L. Frey & Kenneth S. Geller, *Better Than Independent Counsels*, WASH. POST, Feb. 14, 1988, at C7. One author responded to the criticism. See Lovida H. Coleman, Jr., *The Case for the Independent Counsel*, WASH. POST, Feb. 22, 1988, at A11.

behavior of almost sacrosanct institutions. Questions and challenges to authority invariably raised the issue of accountability. In the years following Nixon's resignation, Congress periodically wrestled with that problem, but it often backed away from fundamental reforms affecting the structure or the role of the FBI, CIA, and IRS. That reluctance reflected the prevailing views, either that the abuses discovered in the Watergate years were mere aberrations, or that later transgressions were so minor that reform might do more harm than good.

Clarence Kelley, who became FBI Director in 1973, thought that the Watergate "nightmare" had served "as a much needed cleansing agent for the Bureau," one that enabled him to initiate "long overdue reforms." Responding to criticisms of the FBI counterintelligence program of the late 1960s and early 1970s, as well as to other allegations of misconduct often sanctioned by J. Edgar Hoover, Kelley supposedly reduced the Bureau's role in domestic intelligence probes and instituted wide-ranging organizational changes. Kelley and the Carter Administration also sought a posthumous verdict against the practices of the previous era when they brought criminal indictments for unauthorized burglaries against two high ranking Hoover aides. The FBI officials were convicted and fined in December 1980, but they appealed the decision, and Reagan pardoned them. The President contended that the officials had acted in the belief that their actions were authorized at "the highest levels of government," and cited Carter's "unconditional pardon" of those who had violated the Selective Service laws during the Vietnam war.

Congress, in its fashion, sought to retaliate against Hoover when, in 1976, it established a ten-year term for future FBI directors. The impetus for the limitation came from congressional concern both over Hoover's excessive independence, developed over his nearly fifty-year reign, and over the cooperation which Acting Director L. Patrick Gray had given to Nixon's blatant political manipulation of the Bureau. The conflicting motives for imposing the limited term passed almost unnoticed.¹⁵

15. See ATHAN G. THEOHARIS, *SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN* (1978) (best account of FBI's abuses of power); CLARENCE KELLEY, *KELLEY: THE STORY OF AN FBI DIRECTOR* 152-53 (1987). Mark Felt, one of the indicted agents, bitterly assailed Kelley and the reformist spirit, in *THE FBI PYRAMID: FROM THE INSIDE* 345-51 (1979) ("The FBI wouldn't be in this predicament if Clarence Kelley were alive," was, according to Felt, a favorite observation among FBI personnel); see also Robert Pear, *President Reagan Pardons 2 Ex-F.B.I. Officials in 1970's Break-Ins*, N.Y. TIMES, Apr. 16, 1981, at A1; RICHARD G. POWER, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER* 487 (1987); *Watergate Revisited: A Legislative Legacy*, CONG. Q. ALMANAC 387 (1982).

Congressional investigations in 1975 had dramatically illustrated the extent of FBI abuses of power and had demonstrated Hoover's willingness to serve the political goals of different presidents, to ingratiate himself, and to augment his power. But Congress failed to develop a legislative charter defining proper FBI activities. Instead, in March 1976, Attorney General Edward Levi established a series of guidelines to restrain FBI domestic security investigations and prevent questionable activities.

Less than a decade later, the nation learned that the more things changed, the more they remained the same. Attorney General William French Smith announced that he had relaxed rules governing domestic spying by the Bureau and claimed that the changes had enabled the government to successfully combat domestic terrorism. A special American Bar Association committee, composed of lawyers who had served on various intelligence agencies, praised Smith's revisions of the Levi guidelines for their "healthy degree of balance" between First Amendment rights and the demands of domestic security. Yet it recommended some changes in Smith's rules to "ensure that while the security goals . . . are met, the civil liberties of all of our citizens are protected." In a pointed eulogy, the report praised Levi's work. Smith brushed off any implied criticism, claiming that the ABA report merely reflected "issues of policy and style rather than fundamental disagreements on matters of law." His assessment probably was correct. The American Civil Liberties Union, however, thought that the Administration's interpretation of the guidelines granted "overly broad authority" to the FBI.¹⁶

In December 1974, Seymour Hersh's *New York Times* articles accused the CIA of wholesale violations of its charter and of the law, as a result of its massive involvement in domestic political-intelligence activities. Hersh based his disclosures on the CIA's internal inquiry into some questionable operations, an inquiry ordered by Director James Schlesinger in 1973. Those activities, subsequently dubbed the "Family Jewels," included not only domestic intelligence activities, but also such questionable legal and moral policies as the assassination of foreign leaders.

The Hersh revelations were eagerly seized upon by the newly-elected members of the Ninety-fourth Congress, who felt committed to restoring an

16. The Levi Guidelines are reprinted in STAFF OF SENATE COMMITTEE ON THE JUDICIARY, 94TH CONG., 2D SESS. REPORT ON SURVEILLANCE TECHNOLOGY 383-402; ATHAN G. THEOHARIS & JOHN STUART COX, THE BOSS: J. EDGAR HOOVER AND THE GREAT AMERICAN INQUISITION 431-35 (1988); AP DISPATCH, IN WISCONSIN STATE JOURNAL, Oct. 14, 1984; Leslie M. Werner, *Lawyers' Panel Would Limit F.B.I.'s Inquiries into Groups*, N.Y. TIMES, Jan. 13, 1985, at A13.

ethical compass to governmental affairs in the wake of Watergate. Many of the new congressional members, as well as the veterans, had campaigned against abuses of official power and had promised a new direction. William Colby, Schlesinger's successor, perceived that the "radically altered nature of the Congress" gave focus to increasing demands to harness and control his agency. President Ford attempted to preempt Congress when he appointed a commission, chaired by Vice President Rockefeller, to investigate CIA activities. But three weeks later, the Senate and the House each authorized a select committee to conduct an investigation of CIA operations.

"The Year of Intelligence had begun," a Senate staffer wrote, and the long, cozy relationship between Congress and the CIA came to a halt. "All the tensions and suspicions and hostilities that had been building about the CIA since the Bay of Pigs, and had risen to a combustible level during the Vietnam and Watergate years, now exploded," Colby remarked.¹⁷

Years later, in seeming innocence, Nixon praised Richard Helms, the CIA Director he had so summarily sacked for, among other things, his failure to fully cooperate in the Watergate cover-up. Nixon deplored Helms' subsequent criminal conviction for lying to Congress—"great injustice," Nixon called it—for Helms, he said, simply had been carrying out a presidential assignment. Nixon went on to denounce the "attempt to castrate the CIA in the mid-seventies [as] a national tragedy." But Helms dismissed Nixon's hypocrisy, for the former Director had "no doubt that the whole Watergate business fueled" the CIA's difficulty with Congress. Nixon's attempt to entangle the CIA in Watergate, Helms contended, had been "the battering ram" for the subsequent congressional inquiry.¹⁸

The Rockefeller Commission, the Senate investigation headed by Senator Frank Church (D-ID), and the House inquiry chaired by Otis Pike (D-NY), highlighted the "black" side of CIA activities. But the image that most clearly emerged in the public eye was Howard Baker's depiction of the CIA as a "rogue elephant," an agency that had operated without authorization or audit, either by Congress or the President. Baker's characterization seemed innocent; yet to put all the blame on the Agency masked the reality that if neither Congress nor the President knew what the CIA was doing, it

17. Hersh's articles first appeared in the *New York Times* on December 22, 1974. The best account of the politics of the Senate hearings, and the Senate's findings, is in LOCH K. JOHNSON, *A SEASON OF INQUIRY: THE SENATE INTELLIGENCE INVESTIGATION 9-11* (1985); Interview with William Colby, Director (Oct. 9, 1987).

18. Interview with Richard Helms, Director of the C.I.A. (July 14, 1988 & Sept. 23, 1988).

was because neither wanted to know.

The resulting uproar over the revelations led to two results. First, the CIA itself now had an excuse to institute an internal housecleaning. Both Colby and his successor, Admiral Stansfield Turner, forced the resignation and retirement of bureaucratic barons who had built great power bases of their own, often independent of the Director. Second, Congress developed a greater interest in oversight and established the institutional means to that end.

Hersh's reports spurred Congress to pass the Hughes-Ryan Amendment at the end of 1975, requiring the President to approve and report all covert operations to Congress. Two years later the Senate formalized the procedure by establishing a standing committee for oversight of the intelligence agencies, and the House followed a year later. Executive orders by President Carter tightened the guidelines on domestic intelligence activities, including a requirement that the CIA obtain warrants from the Attorney General to carry on surveillance activities within the United States. In October 1978, Congress enacted the Foreign Intelligence Surveillance Law, which, among other things required that the CIA obtain court orders to wiretap. Two years later, the Intelligence Oversight Act provided new requirements that the CIA report to Congress on its covert activities.

Executive orders are subject to new executive orders, however; relations between the CIA and the Attorney General are subject to the compatibility of their interests; and congressional oversight is dependent, first, on what information the CIA or the President chooses to provide, and second, on the extent of Congress' own vigilance and interest. President Reagan's Executive Order 12333 of December 4, 1981, substantially weakened Carter's 1978 directives and restored a large measure of discretion to CIA activities. (That order also upset the Levi Guidelines on the FBI and, in general, "unleashed" the intelligence agencies, as the President noted.) The Iran-Contra affair in 1986-87 demonstrated that the CIA and the Administration had acted without congressional consultation and hence lacked that degree of consent that might have provided some cover of legitimacy to what clearly was a dubious enterprise. The result was predictable; renewed demands to force full CIA disclosure of its activities were followed by expressions of concern that the CIA not be inhibited or compromised in its activities.

When FBI Director William H. Webster moved to head the CIA in March 1987, he remarked wistfully that the "post-Watergate period . . . included some very searching and at times devastating inquiries that affected not only us [the FBI] but the other components of the intelligence community." Reagan's CIA Director, William Casey, undoubtedly agreed, and when

he proceeded to act on the premise that congressional oversight inquiries and their conclusions mattered not a whit, no one effectively challenged him. During his tenure, Casey readily secured presidential authorization for aggressive covert operations, and he consistently proved uncooperative with congressional oversight committees. Only the Iran-Contra fiasco and Casey's death emboldened critics to demand more effective control again.¹⁹

In an immediate sense, Watergate altered public perception of the presidency and the relationship between the executive and other institutions. How much of those changes has endured, however, is questionable. Watergate transformed and reshaped American attitudes toward government, and especially the presidency, more than any single event since the Great Depression of the 1930s, when Americans looked to the President as a Moses to lead them out of the economic wilderness. World War II and the Cold War, with their attendant dangers to the physical and ideological security of the nation, only exalted that faith. Professor Woodrow Wilson, who often expressed his low opinion of Congress, wrote in 1908 that the presidency "must always, henceforth, be one of the great powers of the world. . . . We have but begun to see the presidential office in this light; but it is the light which will more and more beat upon it" ²⁰

Intellectuals, liberal and conservative alike, celebrated Wilson's prophecy. "The President is not a Gulliver immobilized by ten thousand tiny cords nor even a Prometheus chained to a rock of frustration," political scientist Clinton Rossiter wrote in the late 1950s. "He is rather a kind of magnificent lion, who can roam widely and do great deeds, so long as he does not try to break loose from his broad reservation. . . . He will feel few checks upon his power if he uses that power as he should." John F. Kennedy's election in 1960 made that a canonical doctrine of the liberal faith. But by the end of the decade, such glorifications of the presidency seemed embarrassing (when they were not forgotten), and Rossiter's restraints, largely written in as an afterthought, became the new gospel.²¹

Watergate bestowed a new vulnerability on the presidency. Americans

19. JOHNSON, *supra* note 17, at 195-96, 252-56, 263; Stansfield Turner, *A Letter to William H. Webster*, N.Y. TIMES, Mar. 13, 1987, at A35; Ronald J. Ostrow, *Webster Chosen as C.I.A. Director; President Picks F.B.I. Chief to Head Agency Under Fire for Iran Role*, L.A. TIMES, Mar. 4, 1987, § 1, at 1; see generally STANSFIELD TURNER, *SECRECY AND DEMOCRACY* (1985).

20. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 78 (1908).

21. GODFREY HODGSON, *ALL THINGS TO ALL MEN: THE FALSE PROMISE OF THE MODERN AMERICAN PRESIDENCY* 71, 76 (1980).

alternately inflicted anger and derision on the office and the man. Ford's pardon of Nixon added an element of cynicism. Slander and malice toward presidents, of course, was not new. Washington suffered his share, as did Jefferson, Lincoln, and Franklin D. Roosevelt. But the invective now appeared on a massive scale. Once peerless and invincible, presidential majesty seemed diminished, and Nixon and his immediate successors served as easy prey for cruel, contemptuous humor. The media criticism of the presidency, and the preoccupation with presidential sins of omission or commission, had gathered such momentum in the Nixon years that it seemed impossible to turn off the spigot. Jimmy Carter fared no better; indeed, his self-avowed status as an outsider, his mannerisms, and his alternating shifts between doubt and assured faith provided tailor-made targets for equally biting humor and criticism. The Ford and Carter Administrations, especially, offered the spectacle of president as victim.

Clinton Rossiter notwithstanding, the President of the United States now appeared to be an immobilized Gulliver—or worse yet, a Lilliputian. “A feeble Executive implies a feeble execution of the government.” Hamilton wrote in *Federalist No. 70*. “A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.” By the end of the 1970s, the nation seemed to view its government as “feeble,” and hence “bad.”

Although Watergate gave rise to the criticism of the “imperial presidency,” the *leitmotif* in the early Reagan years was that the nation could ill afford a crippled Chief Executive. Ford spoke of an “imperiled Presidency.” Yet power and authority were not so much at issue during the Watergate years as were responsibility and accountability. Richard Nixon endlessly stressed the importance, the infallibility, and the uniqueness of the “Presidency”—reiteration designed, it seemed, to insulate the President from accountability. Nothing in the historical traditions of executive power, nothing in the Constitution, nothing even in the modern celebrations of executive authority justified Nixon's rationalizations. Indeed, had he acknowledged responsibility for Watergate, Nixon might have had a different fate. The President's foes—and the nation—needed more than he offered. Nixon had underestimated the historical tradition of skepticism toward unrestrained power.²²

22. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 12 (1985). PHILIPPA STRUM'S, *A Symbolic Attack Upon the Presidency*, in THOMAS CRONIN & REXFORD G. TUGWELL, *THE PRESIDENCY REAPPRAISED* 249-63 (1974), has many useful insights in qualifying the criticism of the “Imperial Presidency.”

In subsequent years, references to Nixon's deeds and the Watergate controversy became a shorthand for amorality, abuse of power, and official criminality. In turn, Watergate encouraged a routinized—some would argue a trivialized—response to official breaches of public law and confidence. A succession of congressional investigations, special prosecutors, and media pressures followed the various allegations, some well founded, some not.

Watergate established historical traces as standards for future political behavior. For those who thought the scandal a “dim and distant curiosity,” the Iran-Contra affair in 1986-87 offered a rude reminder. The Reagan Administration's secret shipment of weapons to Iran, clearly intended as ransom for American hostages held there, and the diversion of profits to the Contra rebels in Nicaragua vividly revived the memories, the lessons, and even the language of Watergate, sometimes inappropriately so. Almost instantaneously, the media raised the familiar Howard Baker question: “What did the President know, and when did he know it?”

Watergate veterans weighed in with experienced advice. Alexander Haig urged President Reagan to take responsibility for the scandal and immediately dismiss underlings suspected of violating the laws. The President, he continued, should refuse to appoint a special prosecutor, nor should he allow congressional hearings (as if it were in his power to bar them). Finally, Haig thought Reagan should tell the American people: “And if you don't like it, impeach me!” He later lamented that Reagan did not follow his advice and instead “went along with a six-month orgy” of independent-counsel investigations and congressional hearings. Richard Nixon told Reagan that the affair would not be “another Watergate, as long as you stay ahead of the curve.” More familiar language: Thirteen years earlier, he had told Assistant Attorney General Petersen that he wanted “to stay one step ahead of the curve.”²³

Reagan and his advisers had learned a great deal from the Watergate experience. The President appointed the Tower Commission to investigate the Iran-Contra affair. He generally cooperated, and more importantly, gave the appearance of cooperation (if not of truthfulness). He never asserted executive privilege; he instructed relevant agencies and individuals to cooperate with Congress and with the independent counsel he appointed (ignoring Haig), and even made available to the congressional committee

23. “1988, in Washington at least, was the year of the pig. Not since the Watergate scandal and its aftermath has concern with the ethics of public officials reached such a feverish pitch,” Terence Moran, *The New Breed of Ethics Scandal*, LEGAL TIMES, Dec. 19, 1988, WASH. POST, Jan. 30, 1988; NEWSWEEK, Dec. 22, 1986, at 17; Tape Transcript, the President and Petersen, Apr. 15, 1973, *United States v. Mitchell* materials, National Archives.

material held by his designated biographer as well as extracts from his personal diaries. One congressman, however, was unimpressed and thought the Reagan Administration had learned a different lesson from Watergate: "they learned to destroy as much evidence as possible and to appear cooperative." The next perpetrators of misdeeds, he thought, would do "even better" at covering their tracks.

The Iran-Contra affair may or may not have been a greater threat to the American constitutional order than had Watergate, yet its dénouement was not nearly as dramatic. Reagan undoubtedly suffered a loss of credibility, but unlike Nixon he retained a substantial measure of public trust. For some, nevertheless, there was a sinister aspect in what was perceived as the privatization of foreign policy by the White House and the adventurism of presidential subordinates. More than anything, perhaps, the affair revealed the shortcomings of Reagan's careless management style. But the congressional inquiry demonstrated that the constitutional arrangements for shared governance remained contested ground in the American system. And within those conflicts, as within that system, "trust," as Secretary of State George Shultz admitted, "is the coin of the realm."²⁴ Watergate sounded its haunting tones throughout the episode.

Watergate became a permanent part of the American political language after 1972, but its meaning could be easily forgotten. At a 1978 press conference, a reporter asked President Jimmy Carter if he would consider reducing or withholding federal revenue-sharing funds from those cities or states that did not follow his wage guidelines. "I think this would be illegal under the present law," the President said. The reporter, as if oblivious to Nixon's extra-legal policies, persisted and repeated the question. "No," Carter responded very firmly, "we could not do that under the present law." Yet for others, Watergate was more instructive. In 1983, revelations indicated that the Solicitor General's office had suppressed evidence that might have helped the cause of the Japanese-Americans when the Supreme Court heard arguments in 1944 regarding the constitutionality of their

24. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100, 100th Cong., 1st Sess. 33 (1987), S.R. REP. NO. 100, 100th Cong., 1st Sess. 216 (1987); Elizabeth Drew, *Letter from Washington*, THE NEW YORKER, Aug. 31, 1987, at 89; Theodore Draper's articles on the Iran-Contra affair in *The New York Review of Books*, October 8, 22, December 17, 1987, are especially insightful. The literature is growing on the Iran-Contra controversy. *Harper's*, February and April 1988, offered some interesting critiques and debates on the congressional report. A thoughtful analysis is Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

wartime internment. A Justice Department attorney, who later went on to a distinguished career as a civil libertarian, was asked some forty years later why he had not publicly exposed the alleged chicanery when he found himself tormented between conscience and loyalty to superiors in 1944. "Watergate," he responded, "hadn't happened yet."²⁵ With President Clinton embroiled in a controversy over his allegedly questionable private business dealings, the Republican House leader complained that the President's behavior was "Nixonish."

Watergate, on the whole, has lingered in public memory. The public traditionally has been disposed to expect the worst of legislators "and at the same time believe in the high virtues of the president and his entourage."²⁶ But for a while, at least, the situation has been reversed. When the expectation of executive virtue is disappointed, the weight of such disappointment almost inevitably produces a massive response which, however naively, attempts to ensure against any repetition of executive offenses. Some of the resulting measures succeed; some amount to little more than an exercise in futility or wrongheadedness. And so, the judgment of the effectiveness of post-Watergate reforms results is a mixed verdict.

Perhaps above all, however, Watergate revitalized and nourished the tradition of constitutional responsibility. It also elevated moral considerations in the judgment of public officers and in the conduct of public business. Whether involving limitations on campaign funds, ethical standards for elected and appointed officials, governmental intervention in the private sphere, or the conduct of foreign policy, a national consciousness of the need of checks on powerholders was sparked by Watergate. That concern has remained vital in the years since, prompting both legislation and criticism that reinforced some standards for the proper conduct of political leaders and governmental officials. However excessive, faulty, or even misguided the responses to Watergate may have been, they reflected an understanding that public officials must themselves adhere to the same rule of law they so piously demand that the governed obey. What is not acceptable is Nixon's 1977 rationalization that "when the President does it, that means that it is not illegal."²⁷ Richard Nixon's most ardent and passionate defenders must either agree, or defend the alien proposition that a president is above the law.

25. PUB. PAPERS: JIMMY CARTER 1978, at 2224 (December 12, 1978); PETER IRONS, JUSTICE AT WAR 351 (1983).

26. FISHER, *supra* note 22, at 333.

27. FROST, *supra* note 5, at 183.