Santayana Warned Us, But We Weren’t Paying Attention

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I. INTRODUCTION

When preparing for a symposium entitled “Watergate: Consideration of the Constitutional Crisis and Lessons Learned,” one almost immediately turns to a comparison between the events surrounding the Watergate scandal—the pleas and trials of the “Plumbers” and their White House masters, the definitive event that confirmed the connection of the break-in to the Oval Office, the “Saturday Night Massacre,” the trials of administration officials, the Senate hearings that led to the resignation of President Richard M. Nixon—and the events that followed the 2020 presidential election and the January 6, 2021, insurrection. In doing so, one recalls the often-misquoted aphorism of the philosopher George Santayana, who wrote that “[t]hose who cannot remember the past are condemned to repeat it.” Surveying the past half-century, a cynic might conclude that both those who learn history and those who don’t are doomed to repeat it.

But what have we learned during these events, and are we repeating them? I start by taking issue with the idea that a “constitutional crisis” sprung

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1 See, e.g., Stephan Landsman, Those Who Remember the Past May Not be Condemned to Repeat It, 100 Mich. L. Rev. 1564, 1581 (2002).
from Watergate\(^2\), or that, as the Supreme Court suggested, its ultimate resolution was predicated upon the “interdependence” of the political branches of government.\(^3\) Indeed, throughout the panoply of events related to Watergate, it was the independence, not interdependence, of both political branches as well as the judiciary, aided by a vigorous and independent press, that resolved Watergate in a manner that the Framers of the Constitution would have approved.

In sum, there was no “crisis,” Watergate never seriously threatened the Republic’s existence and vitality. Crimes of national importance had been committed by a president and senior Executive Branch officials, and through various means, justice was delivered to each of them in ways entirely consistent with the anti-authoritarian views of the Framers.

Unfortunately, though, there were several lessons that Watergate taught, and a host of policy and legislative reforms that were enacted in its wake,\(^4\) the effect of these things has been dampened by current national divisions and toxic partisanship.\(^5\) We can examine two specific use cases that illustrate this. The first relates to political interference with what should be the independent prosecutorial function. The second relates to the political independence of Congress. Congress’s political independence defined the ultimate outcome of Watergate—the resignation of President Richard Nixon. But that independence is almost entirely absent from today’s Congress which, often consciously in cahoots with a reckless Executive, has allowed the erosion of its Article I autonomy. This Article will first trace the History of Watergate and the ensuing investigations. Part III then examines Post-Watergate Reforms. Finally, Part IV analyses former President Trump’s attack on those reforms before concluding.

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\(^5\) See, e.g., Wehle & Garrity, *supra* note 4, at 71 (“More than any other president in contemporary history, Trump articulated a conception of potentially unlimited presidential power. In the aftermath, Congress must step in to act again.”).
Il History

First, a little history. John Mitchell, a preeminent bond attorney and Nixon’s former law partner, was appointed attorney general following Nixon’s election in 1968. Having functioned as the nation’s leading law enforcement officer and as Nixon’s consiglieri, Mitchell resigned as Attorney General in January 1972 and assumed the leadership of Nixon’s Committee to Re-elect the President (“CREEP”).

G. Gordon Liddy and Jeb Stuart Magruder approached Mitchell with the so-called “Gemstone” plan, an ambitious proposal to steal and exploit the political strategies and other sensitive information of the Democratic opposition. Mitchell scaled back the proposal but authorized a cheaper, less extensive operation that included breaking into the Democratic National Committee Headquarters in the Watergate Hotel complex. Early in the morning of June 17, 1972, a Watergate guard named Frank Willis discovered a suspiciously taped-open door while conducting his rounds. Willis summoned law enforcement officers and five people were arrested, including James McCord, a former intelligence operative and the head of security for the CREEP. Those five men, along with Liddy and McCord, were indicted three months later on charges of conspiracy, burglary, and unlawful wiretapping.

An administration cover-up began almost immediately. Two days after the arrest of the “Plumbers,” Washington Post news stories were issued suggesting that John Mitchell, as head of the Nixon campaign, was directly involved in the matter. Meanwhile, White House officials—including White House Counsel John Dean and John Ehrlichman and Chief of Staff H.R. Haldeman—took steps to distance the administration from the investigation, simultaneously issuing denials while also attempting to get the FBI to stop its investigation. None of this, of course, was successful, and we later learned about the White House

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7 Ken Rudin, On This Day in 1972: John Mitchell Quits as Nixon’s Campaign Manager, NAT’L. PUB. RADIO (July 1, 2009, 5:31 AM).
9 Id.
10 See In re Liddy, 506 F.2d 1293, 1295 (D.C. Cir. 1974) (describing Liddy’s eight count indictment and subsequent trial).
Tapes and other matters that later became the ammunition that sunk the Nixon administration.

Things had begun to go south on August 1, 1972, when Bob Woodward and Carl Bernstein reported in the Washington Post that a $25,000 cashier's check that had been earmarked for the Nixon campaign wound up in the bank account of a Watergate burglar.\(^{12}\) This marked the time when I played a bit part in the matter.

Upon the arrest of the burglars, the office of the United States Attorney for the District of Columbia, in which I was an Assistant U.S. Attorney not long out of military service, undertook the prosecution of the case. Earl Silbert headed the prosecution. At the time of his recent death, and following a long and distinguished public and private career, Silbert deservedly had become legendary among present and former federal prosecutors. Earl's team also included Seymour Glanzer, the Office's fraud branch chief, and Don Campbell, who had expertise in organized crime prosecutions.

Not long after the Post reported the $25,000 check and related news concerning Maurice Stans,\(^{13}\) Nixon's former Secretary of Commerce and CREEP finance chairman, having served as a conduit for hundreds of thousands of dollars in questionable contributions, many originating from the fugitive financier, Robert Vesco. Richard Gerstein, the District Attorney of Dade County, Florida, through which the check had traveled, sought Stans's extradition to Florida under the Uniform Law to Secure the Attendance of Witnesses.\(^{14}\) The Statute is enforceable at the state level, and the analog to a state court in the District of Columbia is its Superior Court.

I received an urgent call from Earl Silbert informing me of the Florida matter and its probable interference with his team's investigation and projected interviews of Stans. Silbert instructed me to read into the case and get myself to an emergency hearing in the local court that afternoon. Wading my way through a sea of reporters in the first case that I ever was involved in that drew national interest and press coverage, I succeeded in convincing Judge Paul McArdle to keep


\(^{14}\) FLA. STAT. § 942.03.
Far more important events, none of them involving me, soon followed. Under the direction of the Silbert team, and the ultimate reluctant acquiescence of the acting director of the FBI, the Bureau had compiled substantial evidence that the Watergate break-in was the product of a massive campaign of political spying and sabotage conducted on behalf of the Nixon reelection campaign. The Washington Post reported this fact on October 10, 1972\(^\text{16}\), but that did not prevent Nixon from achieving a landslide reelection victory only a month later.

A. **Watergate on Trial**

The news might not have deflected Nixon, but it did not deflect Silbert, Glanzer, and Campbell either. On January 30, 1973, former Nixon aides Gordon Liddy and James McCord were convicted in Federal District Court of conspiracy, burglary, and wiretapping, the other five Plumbers indicted in the case having pleaded guilty.\(^\text{17}\) These convictions set the stage for what I suggest was an inspired stratagem and the single-most consequential event among all of the judicial proceedings related to Watergate, and one that bears on an analysis of current events as well. None of this reflected interdependence. Indeed, the Silbert team not only acted with independence, but it did so essentially as an adversary to its own cabinet department and the Chief Executive. And it did so without reference to the legislature, which had yet to act.

Judge John Sirica, before whom I frequently appeared, was—with good reason—known around the courthouse as "Maximum John." I once listened to an overwhelmed criminal defendant respond to the imposition of a severe prison sentence by saying to Judge Sirica: "Your Honor, I don't think I can pull that much time." The judge replied, "Well, pull as much as you can, and push the rest." Well aware of Judge Sirica's record, and reflecting upon the evidence against him, McCord recognized that he likely faced a stiff sentence.

Several days before his sentencing, McCord spoke with the probation officer, who had written his presentence report and verified McCord's fears. He then submitted a letter to the Court in which he


\(^\text{17}\) See, e.g., *In re Liddy*, 506 F.2d 1293, 1295 (D.C. Cir. 1974) (describing Liddy's indictment, trial, and conviction as a matter of background to the proceedings at bar).
confessed to having violated the law and that White House officials were involved in a cover-up.

Both Judge Sirica and Silbert knew of a federal statute that allowed for the imposition of provisional maximum sentences—in McCord's case, decades—but subject to reduction following “research” of additional information that might be needed for final sentencing. The possibility of provisional maximum sentences was an obvious means to pressure the defendants into revealing more information about the burglary.

Thus, on March 23, 1973, Judge Sirica read McCord's letter aloud in the courtroom, quoting him as stating: “There was political pressure applied to the defendants to plead guilty and remain silent . . . Perjury occurred during the trial.” McCord's sentencing was postponed until November, but the bombshell had exploded. Haldeman and Ehrlichman resigned in late April, along with Attorney General Richard Kleindienst, who had become involved in vainly trying to deflect the prosecution. John Dean was fired, and both Dean and Jeb Magruder quickly approached the Silbert team, looking to trade information for shorter sentences. Now, essentially armed to the teeth, the U.S. Attorney's office and Earl Silbert were ready to bring down bigger game. As is well known, they didn't get the chance, though they certainly set the table for their successors.

B. The Revelations of the Watergate Committee

On May 18, 1973, the Senate Watergate Committee, actually the “Select Committee on Presidential Campaign Activities,” under the chairmanship of Democratic Senator Sam Irvin of North Carolina, began its public hearings. The very next day, May 19th, Archibald Cox, who had been selected by the Attorney General designate, Elliot Richardson, became the Special Prosecutor. During Cox's tenure, John Dean revealed that he had spoken with President Nixon at least 35 times about the Watergate cover-up. Through Washington Post reporting,
we also learned of the White House taping system and Nixon’s order to disconnect it, as well as the planned burglary of Pentagon Papers defendant Daniel Ellsberg’s psychiatrist’s office.  

Both the Special Prosecutor and the Senate committee sought production of the White House tapes. This and subsequent disputes led, on October 20, 1973, to Nixon’s firing of Cox and abolishing the office of the special prosecutor.  

Attorney General Richardson and the Deputy Attorney General William D. Ruckelshaus resigned in what became known as the “Saturday Night Massacre,” and calls for Nixon’s impeachment began. The office of the special prosecutor was reinstated, and Leon Jaworski, a former President of the American Bar Association, assumed the position, serving until October 25, 1974, on the eve of the ultimate cover-up trial in which Mitchell, Haldeman, and Ehrlichman were convicted.

In the interim, maintaining the independence of the prosecutorial function, Special Prosecutor Jaworski’s staff moved forward, with the Supreme Court unanimously rejecting Nixon’s claim of executive privilege and ordering the release of 64 tape recordings of White House conversations concerning Watergate.  

The Senate Watergate committee also continued, and a large national audience heard Republican Tennessee Senator Howard Baker, who once had been a Nixon ally and had been a doubter about his involvement in Watergate, famously ask John Dean: What did the president know and when did he know it?  

On July 27, 1974, the House Judiciary Committee, under the leadership of New Jersey Congressman Peter Rodino, passed the first of three articles of impeachment, charging obstruction of justice.  

A week-and-a-half later, on August 7th, the leading Republican members of Congress, including Senator Barry Goldwater, House Minority Leader John Rhodes, and Senate Minority Leader Hugh Scott, informed

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24 The Watergate Files, supra note 20 (select “Battle for the Tapes” tab; then select “Timeline”).


President Nixon that he faced certain conviction following impeachment and removal from office.29

C. Post-hearing Aftermath

The next day, August 8, 1974, Richard Nixon became the first and only president to resign. Watergate was effectively over. Each branch of government had acted independently, but to a common end. The legislature impeached the president, fully prepared to convict him of “high crimes and misdemeanors.” The Executive Branch, its Department of Justice divorced from the president by public and congressional pressure, with its own prosecutors and their successors forcefully investigating and litigating, secured convictions and disclosures all the way to the top of the conspiratorial pyramid. And the judiciary, from the U.S. District Court’s sentencing strategy to the Supreme Court’s rejection of Nixon’s claims of privilege, also acted independently and definitively. Upon his inauguration, President Gerald Ford, having pardoned Nixon, opined that “our long national nightmare is over... Our Constitution works; our great Republic is a government of laws and not of men.”30

III. Post-Watergate Reforms: Reigning in Presidential Power

Ford was largely right. We have a government of laws, but as recent events show, that government of laws is administered by fallible and sometimes corrupt human beings. Thus, this conclusion begs two related questions. First, have we, in any effective and durable way, learned the lessons of Watergate to the extent that we won’t repeat them? Second, is the national interest served, save for survival issues such as war, when interdependent branches of government create government policy? I respectfully suggest that the answer to both questions is mostly negative. Let us examine these contentions in light of the many actions taken, among other things, to prevent successor administrations from conducting secret operations directed against political opponents using funds from unlawful and unidentified sources,


and from interfering with the independent prosecutorial function of the Department of Justice.

Beginning with the latter, Edward H. Levi was a hero. As Richard Kleindienst’s portrait was consigned to a secluded “wall of shame,” Ed Levi’s mere presence, to say nothing of his demonstrable personal integrity and intellectual abilities, reenergized the DOJ career staff and politically appointed division and branch leaders. During the time that I served leading the DOJ, Levi was my lodestar, and I know that he has similar influence on the current Attorney General. Levi’s personal example and the tone at the top mattered most, but it is also noteworthy that Levi implemented various reforms intended to promote transparency and restore both internal and public trust in government. Among these were various departmental guidelines, including several regulating the scope of FBI surveillance activities and creating two Offices of Professional Responsibility—one for the DOJ as a whole and the other for the FBI—to investigate misconduct by DOJ officials, agents, and other employees. Levi also began, and his successors amplified, steps to assure the severe limitation and monitoring of White House activity related to DOJ cases.

On the legislative front, Congress attempted to assure an ethical and transparent government by passing the 1974 amendments to the

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That, admittedly, is a large plate of reforms, most of them intended to be responses to Executive Branch abuses disclosed during the Watergate prosecutions and congressional hearings. Many reforms have been effective and beneficial, especially with regard to governmental transparency and restraint of surveillance. But have they prevented another Watergate, in the sense that an authoritarian President, aided by a do-little Congress, could subvert the constitutional order and the rule of law?

IV. TRUMP’S CHALLENGE TO WATERGATE’S REFORM

I begin this with the overriding fact that, irrespective of his offenses, or because he recognized them, Nixon resigned from office, having been advised by prominent members of his own party that his position was untenable. That fact represents an important lesson of Watergate—that there is no executive privilege for, or immunity from, criminal activity. Nixon ultimately, if not happily, recognized this. Contrast this with a recently defeated president who, against all evidence, falsely asserted that he had been denied reelection through


fraud and somehow should be returned to office. In doing so, publicly available evidence and recent criminal indictments lend credence to allegations that the defeated ex-president had sought corruptly to overturn the electoral counts against him and to substitute his agents for or otherwise subvert the properly chosen Electoral College electors.

No defeated candidate for the presidency, even one who litigated his electoral claims all the way to the Supreme Court, had, until recently, ever contradicted the American custom of peaceful transfer of power to an elected successor. And no defeated candidate had ever before encouraged and then actively participated in riotous activity intended to subvert the work of a coordinate branch of government. And, though earlier twice impeached, no one in his party’s leadership advised that person that he should step down. Nixon, his notable foreign policy successes aside, was a corrupt president. Whatever his self-image might have been, he recognized that the national interest was more important than his personal interest. Was that a lesson indelibly learned? One would suggest that recent events prove otherwise.

What of the suggestion that the actions of interdependent branches of government avoided a national calamity? I submit that the rehearsal of the events of the Watergate scandal set forth above amply demonstrates that the three branches of national government acted independently. Congress, especially, was both independent and adverse to the Executive Branch, with ultimate leadership coming from members of the president’s own political party. Would we see that kind of adversarial behavior today? Well, in the past few terms, we have seen a partisan and divided House of Representatives, often unable to act in several critical areas of national and international policy, and with notional “leaders” whose positions are tenuous because of party infighting. However, in the larger sense, congressional majorities have dissipated its fundamental constitutional power.

Let us turn to the two use cases that I mentioned earlier. An early chapter in the Watergate saga was marked by White House interference in the affairs of the Department of Justice and the U.S. Attorney’s Office for the District of Columbia intended to thwart criminal prosecutions and advance the cover-up of misconduct. There certainly was a lesson to be learned, and among the various administrative and legislative reforms that followed Nixon’s demise, Attorney General Ed Levi promulgated strong guidelines governing and limiting DOJ contacts with the White House concerning pending criminal investigations. Congress also legislated restrictions aimed at domestic surveillance by the FBI. These were sound responses to demonstrated abuses. But have they provided lessons learned that necessarily bound subsequent administrations?

Indeed, recent events suggest that, if remembered at all, they did not serve as useful restraints on subsequent administration conduct.

During the previous administration, the Attorney General vigorously mischaracterized the findings of Special Counsel Robert Mueller with respect to his findings regarding alleged misconduct by the president. Rather than concluding that there had been no violations

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of the law, Mueller actually had concluded that there was sufficient evidence that could have warranted proceeding on several issues.\textsuperscript{63} The Attorney General's public statements and those of the president evidenced clear coordination.

As the Trump administration's legal difficulties continued, more than 2,600 former prosecutors and DOJ lawyers issued a letter of protest concerning his Attorney General's decision to override, apparently without consulting them, the trial team's sentencing recommendation in the case of Roger Stone, a crony of the president convicted among other things of lying under oath and obstructing a witness.\textsuperscript{64} There had been a comparable intervention in the case of Michael Flynn, the president's former chief of staff.\textsuperscript{65} Subsequent actions, including the removal of the D.C. U.S. Attorney who had superintended these cases and the resignation of her Assistant U.S. Attorneys,\textsuperscript{66} the firing of the U.S. Attorney for the Southern District of New York who had been investigating allegations against the president,\textsuperscript{67} and the resignation of a Deputy Attorney General who had stood up to political pressure with respect to false allegations concerning outcome the 2020 presidential election\textsuperscript{68} and public statements by the Attorney General and the president himself indicated both White House coordination and political motivation with respect to two significant prosecutions.


\textsuperscript{66} See Kaitlan Collins, Decision to pull Liu's nomination directly linked to her oversight of Stone and McCabe cases, CNN (Feb. 12, 2020), https://www.cnn.com/2020/02/12/politics/jessie-liu-treasury-nomination-roger-stone/index.html.


DOJ’s Offices of Professional Responsibility and of Inspector General were created in response to Watergate abuses.\(^6\) When allegations arose during the Trump administration concerning questionable contacts between the Executive and corrupt agents of foreign governments, DOJ’s Inspector General issued a lengthy report concluding that there had been a lawful, independent source upon which a counter-intelligence investigation properly had been predicated.\(^7\) The Attorney General and President Trump vigorously rejected the conclusion of the Inspector General and appointed a Special Counsel whose much ballyhooed investigation produced virtually nothing that supported the Attorney General’s and president’s position of misconduct directed against them.\(^8\) What they did prove was that their intervention in what Ed Levi and the post-Watergate Congress clearly intended should not be allowed.

Immediately following Watergate, Congress passed several statutes aimed at limiting the accretion of Executive Branch power, most notably the constitutionally questionable War Powers Act, which has allowed its most fundamental power—the power of the purse—to erode.\(^9\) Almost simultaneously with its address of War Powers, Congress passed the National Emergencies Act,\(^10\) a loosely written statute, the tightening of which enjoys bipartisan support but has not been acted upon.\(^11\) As has been interpreted judicially, the Act has had consequences never foreseen by the post-Watergate Congress, and it has as allowed presidents of both parties to circumvent or supersede Congress in areas where the legislature was intended to have precedence.\(^12\) This

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\(^12\) See Arizona v. Mayorkas, 143 S. Ct. 1312, 1316 (2023).
diminution of Congress as a check on the Executive is hardly consistent with whatever lessons might have been learned from Watergate.

An illustrative example of this is President Trump’s reprogramming of monies appropriated by Congress to support the military and applying those funds to building a border wall along a large stretch of the U.S. border with Mexico.76 While some judicial limitations on this power play had been achieved, the ultimate result favored the president in that the National Emergencies Act, as currently written, was held to support his negation of Congress’s fundamental power of the purse.77 The current president, Joseph Biden, seems to have adopted a similar approach in dealing with a Congress that has been unable to enunciate, let alone legislate, a coherent policy of immigration reform and enforcement, which otherwise has allowed itself to become somnolent.78 The Framers’ desire for energy in the Executive did not mean that it intended for there to be torpor in the legislature. That is the core value exemplified by the term “checks and balances.” The Watergate Congress understood this. Those who control the current Congress view themselves less as legislators than supporters of a presidential candidate.

V. CONCLUSION

Watergate represented an important chapter in the history of the United States. However, various surveys suggest that most Americans, particularly high school and college students born decades after Nixon’s resignation, know little, if anything, about it.79 Watergate was not a national tragedy, though it could have been. It was not largely because of the energetic independence of the political branches, coupled with the integrity of the public servants who pursued and defeated wrong-doers, a judiciary dedicated to the truth, and an energetic press that published it. Watergate surely provided lessons that should have been learned. It is a sad fact that they have not been.

One hopes that the work of this symposium will help remedy that failure.

77 See Sierra Club v. Trump, 929 F.3d 670, 689–92 (9th Cir. 2019).  