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### The Legalization of the Presidency: A Twenty-Five Year Watergate Retrospective

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## THE LEGALIZATION OF THE PRESIDENCY: A TWENTY-FIVE YEAR WATERGATE RETROSPECTIVE

MICHAEL A. FITTS\*

Is history destiny? Are those who ignore it, as has often been prophesized, condemned to repeat it?

As Americans we benefit enormously from our exploration, even obsession, with the past. The rewards flowing from such retrospective searches are partly instrumental. Historical inquiry helps us better appreciate the potential upsides as well as pitfalls of our current choices. But even if the past is neither a replica of, nor a moral precedent for, the future, American history necessarily shapes our personal and collective understanding of the present. Our current debates are deeply effected by our retrospective understanding of the meaning of what preceded us.

The events surrounding Watergate poignantly serve both roles for separation of powers enthusiasts. Indeed, few, if any, episodes in our separation of powers history capture the public and academic imagination to the same degree. Watergate has also framed much of the subsequent debate over the proper role of the presidency, especially for longitudinally challenged baby boomers, who make up much of the current crop of legal academics. For us, this period was a defining moment in our understanding of the proper exercise and potential abuse of presidential authority. It also underscored the necessity for the rule of law in controlling that most individual, and personal, of institutions—the presidency.<sup>1</sup>

With this picture of executive abuse frozen in our collective mind, the Watergate lessons have since resulted in, or at least provide a theoretical rationalization for, much legislation subjecting the presidency to greater legal

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1. Indeed, the author spent an unsettling evening in a Harvard dorm during the so-called Saturday Night Massacre. The reason: the dorm Master, the Deputy Watergate Prosecutor, assumed the position of Acting Special Prosecutor that evening by virtue of Archibald Cox's involuntary departure. As the FBI surrounded the Special Prosecutor's offices in Washington, we all imagined, by virtue of the succession, that our dorm was next. In this sense, Watergate may have been the one time in our generational history when we actually imagined the possibility of armed conflict over the control of the United States government.

regulation. The Independent Counsel Statute,<sup>2</sup> the War Powers Resolution,<sup>3</sup> and the Congressional Budget and Impoundment Control Act of 1974,<sup>4</sup> were certainly the most famous legislative reactions to the events of Watergate. Each ensured greater participation of institutions outside the president's formal control in the execution of an important presidential function. Beyond these conspicuous innovations, the reform philosophy that grew out of Watergate served as a justification for a variety of other legal changes such as the passage of the Freedom of Information Act (FOIA),<sup>5</sup> the Government in the Sunshine Act (GSA),<sup>6</sup> and the Federal Advisory Committee Act (FACA),<sup>7</sup> as well as the reinvigoration of Congressional oversight.<sup>8</sup> Even to the present day, debates over structural reform, such as the scope of executive privilege and access to OMB and commission documents and deliberations,<sup>9</sup> are largely shaped by arguments originally advanced in favor of these earlier legislative reforms. Taken together, these legal changes have served to open up the operation of the presidency to greater public oversight, subjected the presidency to legal checks by other branches or institutions of government and, more generally, imposed rule of law principles to more and more types of presidential decision making.

Indeed, the impact of Watergate obviously extends beyond these additions to the United States Code. Viewed broadly, the consequences of this episode must be understood to encompass the transformation in expectations among elite actors, the public, and the media about how the president *should* operate.<sup>10</sup> Today, the public presumes that the Chief Executive and his staff should act openly, and that presidential policies should be achieved through greater consultation with coordinate institutions in government.<sup>11</sup>

2. Ethics in Government Act of 1978 codified as amended 28 U.S.C. §§ 591-98 (1994).

3. 50 U.S.C. §§ 1541-48 (1994).

4. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C. and 31 U.S.C.).

5. 5 U.S.C. §552 (1994).

6. 5 U.S.C. § 552b (1994).

7. 5 U.S.C. App 2, § 1 (1994).

8. Each change facilitates congressional participation in the decisions of the executive branch through control over information, rather than formal legal intervention. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984). These so-called "fire alarms" ensure that interested groups, the public, and Congress will be alerted to future Executive branch plans, and, as a matter of political necessity, will be consulted more often. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273 (1993).

9. See Susan Low Bloch, *Cleaning Up the Legal Debris Left in the Wake of Whitewater*, 43 ST. LOUIS U. L.J. 779 (1999).

10. See Norman J. Ornstein, *Doing Congress's Dirty Work*, 86 GEO. L.J. 2179, 2183 (1998).

11. In other words, whether or not the president has a legal right to engage in certain types of actions, in our post-Watergate world, he is often expected to do so openly, with consultation of

While sympathetic to many of these changes, this article seeks to place the received wisdom in context, showing how our collective vision of the presidency, crystallized in and by Watergate, may need to be modified, or at least updated. As the nature and functions of the presidency have evolved over the years, we have begun to better understand the problems and legal complexity of the modern presidency. Because of the peculiar role and vulnerability of the modern plebiscitary presidency, I argue, these restrictions and expectations can tend, in at least some cases, to disrupt the delicate moral authority presidents must draw on to do their job.

Needless to say, there is an intentionally provocative, perhaps even mischievous, quality to this claim. How can forcing the President to be open about his activities and subject to the rule of law undermine his authority, or at least undermine his *proper* authority? Obviously, in most cases, it does not. Let me, at the outset, state the obvious: most of these changes were beneficial and necessary. I am not calling for their repeal. Viewed systematically, however, their complicated and sometimes burdensome impact on the proper functions of the presidency needs to be recognized. In this sense, there is a connection between the legalization and openness of the modern presidency and at least some aspects of its political weakness. If, as Tom Wicker argued, Watergate made liberals understand the problems of the imperial presidency,<sup>12</sup> the reforms of Watergate have underscored for liberal and conservatives alike some of the problems of the modern presidency. Although I am not suggesting repeal of these restrictions, we need to appreciate the difficulties they raise for any inhabitant of the office *even if he is trying to perform his job properly*, and the peculiar abilities it demands of any modern president who must deal with them.

To accomplish this task, I will cover with a broad brush several legal topics that others in this symposium explore in far greater detail. The reason for this admittedly superficial treatment: the systemic quality of the project. While scholars usually focus on the legal implications of individual laws and individual administrations, I wish to explore the broader political question of how the presidency, over time, is able to pursue and implement appropriate national policy. Looking at individual legal doctrines and presidents may miss part of this dynamic effect. The generality of the analysis also has an added benefit; quite candidly, it avoids an extended discussion of individual presidents, which can cloud the broader structural debate as readers react positively or negatively to a discussion of their favorite president.

Part I of the article summarizes, in the context of general separation of powers jurisprudence, what are generally perceived to be the central lessons of

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the appropriate actors.

12. See generally Tom Wicker, *Is the Restoration of Public Confidence Possible in CRISIS IN CONFIDENCE: THE IMPACT OF WATERGATE* (Donald W. Harward ed., 1974).

Watergate and the legal responses to those experiences. Part II describes some of the changes in the nature of presidential power that have occurred since Watergate. Part III then explores how these changes might lead us to rethink our approach to, or at least attitude toward, the presidency and the performance of its inhabitants. The conclusion discusses some limitations of the analysis, as well as comments briefly on the Monica Lewinsky episode, which has unfolded since this article was first drafted.

### I. THE LESSONS OF WATERGATE

As numerous scholars have observed, the Framers established a complicated scheme of checks and balances in order to ensure that government initiatives were tested against the normative vision as well as political will of different groups in society.<sup>13</sup> This presumption against action ensured that government was unlikely ever to be seized by any one faction.<sup>14</sup> For, in this system, no one institution or branch of government spoke for the people; instead, the people were represented through the interplay of all the different branches, in pursuit of an elaborate form of deliberative democracy.<sup>15</sup>

The presidency, however, has long occupied an unusual place within this legal hierarchy. Under the formal structure of the Constitution, the presidency serves as merely one part of a constellation of representative institutions. By rejecting a parliamentary system, and making presidential election indirect, the framers envisioned the presidency as simply one part of the constitutional whole, certainly not as *the* representative of the people. Indeed, it was not supposed or expected to be the most powerful one at that. Many of the president's formal powers that legal academics explore, such as vetoing legislation, are reactive, a check on what was originally viewed as the most powerful and potentially dangerous institution, Congress.<sup>16</sup>

Not surprisingly, the traditional political science literature on the presidency reflected this picture of an elite office of limited powers. In the classic work of Richard Neustadt, the ultimate power of the president was simply his ability to cajole the dispersed elites in Washington to take action, that is, in Neustadt's now famous words, "the power to persuade."<sup>17</sup> Informal moral authority was necessarily an important, if not *the* important, ingredient of its influence.

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13. See, e.g., ALPHEUS THOMAS MASON & DONALD GRIER STEPHENSON, JR., *AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES* 95-97 (11<sup>th</sup> ed. 1996).

14. *Id.*

15. See JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON; DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994).

16. MASON & STEPHENSON, *supra* note 13, at 96.

17. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLICIES OF LEADERSHIP FROM FDR TO CARTER* 10 (1980).

Like many architect's original drawings, however, the subsequent operation of the Constitution revealed potential deficiencies in the original plan. Given the responsibilities of regulating a modern New Deal and post New Deal economy, and guiding a nation in the difficult waters of international affairs, the need for government leadership was increasingly apparent. The singularity and visibility of the Presidency naturally led the public and other actors in government to look to it to formulate government policy in a more coherent fashion than the separate pieces of government individually. As a result, during the Twentieth Century, presidents and an expanded White House office have increasingly overseen the government bureaucracy, initiated the passage of a full legislative program in Congress, and exercised greater leadership of U.S. policy abroad.<sup>18</sup>

These changes, which have ultimately depended on the president's claim to informal political support, have occurred with Democrats as well as Republicans at the helm, with the additional help of what can only be described as dynamic constitutional interpretation by the Court.<sup>19</sup> Ultimately, the process culminated in the development of what political scientists have described as "the modern presidency," which is said to have begun with Roosevelt and continued to the present day.<sup>20</sup> The normative vision of a modern presidency was originally championed by liberals, who saw this as the main source for innovation in the society, but later found support across the political spectrum.

Despite these benefits, the singularity and power of the presidency has always been a major source of concern, as the Framers originally feared. To the extent the president is the formulator as well as the executor of policies, ultimate authority is vested effectively in one person. In other words, without the division of legislative and executive functions, there is, in effect, no veil of ignorance imposed on the policy decision maker;<sup>21</sup> a president can make government decisions that clearly implicate his own personal and political interest with no external check. In extreme cases, as Montesquieu said, "when the legislative and executive powers are united in the same person, or in the same body of magistrates; there can be no liberty. . . ."<sup>22</sup>

Watergate revealed that this problem was more than just theoretical. The

18. MARTIN SHAPIRO & ROCCO J. TAESOLIWI, *AMERICAN CONSTITUTIONAL LAW*, 161-63 (5<sup>th</sup> ed. 1979).

19. See BRUCE ACKERMAN, *WE THE PEOPLE 1: FOUNDATIONS* (1991); Cass R. Sunstein, *Constitutionalism After The New Deal*, 101 *HARV. L. REV.* 421 (1987); Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 *ARK. L. REV.* 1 (1994).

20. See NEUSTADT, *supra* note 18; THOMAS E. CRONIN, *THE STATE OF THE PRESIDENCY* (2d ed. 1980); CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* (1956).

21. See Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 *MICH. L. REV.* 917 (1990).

22. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (Thomas Nugent trans., Hafner Press 1949).

executive abuses exposed by the scandal reflected a consistent disregard for the rule of law by Nixon and the White House staff. In other words, members of the Nixon administration systematically confused their personal and state interests.<sup>23</sup> As Arthur M. Schlesinger, Jr. summarized the received wisdom at the time, “presidential primacy, so indispensable to the political order, has turned into presidential supremacy. The constitutional presidency . . . has become the imperial presidency and threatens to become the revolutionary presidency.”<sup>24</sup> These perverse incentives were poignantly exposed in Nixon’s famous declaration on the president’s place in separation of powers confrontations: “When the President does it,” Nixon later remarked, “that means its not illegal.”<sup>25</sup>

With this image frozen into the American psyche, Watergate led to a series of legal reforms as well as changed expectations as to how the presidency should operate. By “led” I mean that these changes either occurred in the wake of Watergate, or the events of Watergate were offered as one of the rationales for the changes.

Under this loose standard of causation, two types of legal reforms can be said to have developed out of Watergate. The first were the substantive legal restrictions that ensured the president could not act without sharing decision making with other actors. This category includes, among others, the Impoundment Act,<sup>26</sup> the War Powers Resolution,<sup>27</sup> the appointments procedures contained in the Independent Counsel Act,<sup>28</sup> the political insulation of the FBI, Treasury, and Department of Justice; and campaign reforms and ethics restrictions included in the Ethics in Government Act.<sup>29</sup>

A second series of changes opened up the presidency and government to greater outside scrutiny: the Freedom of Information Act (FOIA);<sup>30</sup> the Government in the Sunshine Act (GSA);<sup>31</sup> the Federal Advisory Committee Act

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23. While the underlying event may have been a “two bit burglary,” the subsequent cover-up and the related executive abuses it revealed, reflected a systematic disregard for the rule of law by Nixon and his White House aids. To protect the illegal activities, the president and members of the White House improperly intervened into Department of Justice, Department of Treasury, and Central Intelligence investigations: thus manipulated government power to raise campaign contributions, asserted Executive privilege for documents and items with the sole purpose of hiding illegal conduct. *See generally* LEON FRIEDMAN & WILLIAM LEVANTROSSER, *WATERGATE AND AFTERWARD* (1992).

24. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 299 (1973).

25. *Nixon: A President May Violate the Law* U.S. NEWS & WORLD REP., May 30, 1977, at 65 (interview with David Frost).

26. *See supra* note 4.

27. *See supra* note 3.

28. *See supra* note 2.

29. *Id.*

30. *See supra* note 5.

31. *See supra* note 6.

(FACA);<sup>32</sup> Whistleblower protections;<sup>33</sup> judicial and political limitations on executive and attorney-client privilege;<sup>34</sup> creation of the Congressional Budget Office and expansion of congressional oversight,<sup>35</sup> and, of course, the independent counsel provisions in The Ethics in Government Act.<sup>36</sup> All of these changes, along with changed norms about how the president should operate, subjected the presidency to greater legal standards and oversight.

## II. POLITICAL CHANGES AFTER WATERGATE

While there are strong arguments to be made on behalf of each of these changes, the presidency has evolved since Watergate, lessening at least some of the concerns about presidential overreaching and the likelihood of another armageddon. In particular, four separate political developments have served to diminish the President's "natural" level of political support, while, at the same time, increasing his susceptibility to external political criticism and legal oversight.

First, and most importantly, the singularity of the presidency has turned out to be a source of weakness as well as informal political power. The assumption had always been that the presidency was a powerful position largely because all of its influence was focused in a single person. That gave it the ability to command the airwaves, control the bureaucratic and political agenda, and outmaneuver other institutions, especially Congress, as the rational choice literature is forever telling us.<sup>37</sup> That was a major source of fear regarding its overreaching.

On the other hand, in recent years, we have seen that the individuality and singularity of the presidency, that is, embodying an institution in a single person, can be a source of political weakness as well. As an individual, the president lacks some political advantages enjoyed by a multi-member institution such as Congress, which can avoid confronting issues because of its committee structure and change positions without serious political retribution over time; that is what democratic institutions are supposed to do. As an institution embodied in a single person, in contrast, the president is often expected to have a position on all issues, to personally resolve all conflicts, and not to change his position in response to political events, or else he is said to lack moral conviction.

32. See *supra* note 7.

33. Whistle Blower Act of 1989, 5 U.S.C. §§ 1211-22, 3352 (1994).

34. *United States v. Nixon*, 418 U.S. 683, 703-16 (1974).

35. 2 U.S.C. § 602 (1994).

36. See *supra* note 2.

37. See Terry Moe, *Presidents, Institutions, and Theory*, in RESEARCHING THE PRESIDENCY: VITAL QUESTIONS, NEW APPROACHES 337 (George C. Edwards, III et al. eds., 1993); Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, in RESEARCHING THE PRESIDENCY 289 (1992).



tions.<sup>38</sup> That is what political leaders are supposed to do. Needless to say, the public also tends to hold the President more responsible for most government outcomes, good or bad.

What are the political consequences of these expectations? As Stephen Hess has said, Americans “always have wanted their president to be something bigger than life.”<sup>39</sup> In other words, “it is not just an office of incredible power but a breeding ground of indestructible myth.”<sup>40</sup> In the modern world with instant visibility and substantial ideological division in the public, it can be difficult for one person to fulfill that role successfully.<sup>41</sup> The expectations are high, often too high. Political scientists have a term for this weakness: its called the personal presidency.<sup>42</sup>

A second unforeseen challenge modern presidents must confront has been the transformation of political parties.<sup>43</sup> In their purist form parties can be political organizations that enable leaders to effectively galvanize the public and garner support among government officials. As Justice Jackson stated in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>44</sup> political parties are “a significant extraconstitutional supplement to real executive power.”<sup>45</sup> Their much debated transformation in recent years has complicated the president’s role organizationally, since he lacks a standing party apparatus on which to rely. More importantly, the decline of reflexive party identification in the general public means that ideology, rather than party affiliation, is a more frequent source of popular evaluation in today’s political environment.<sup>46</sup> As a result the president is more likely to be subject to a population that continually asks what

38. Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827 (1996). See also THOMAS E. CRONIN & MICHAEL A. GENOVESE, *THE PARADOXES OF THE AMERICAN PRESIDENCY* (1998). This analysis reflects to some extent the comparative law insight that centralized regimes can be more unstable in a politically diverse and fractionalized society. See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (1977); Jonathan Zasloff, *The Tyranny of Madison*, 44 UCLA L. REV. 795 (1997).

39. Alison Mitchell, *Campaign Trail or Garden Path?* N.Y. TIMES, July, 2, 1995 at E5, (quoting Stephen Hess, Brookings Institution).

40. ROSSITER *supra*, note 20, at 81.

41. As Jeffrey Tulis has observed, if “power and authority are conferred directly by the people,” the “president[] must continually craft rhetoric that appeals to [his] popular audience.” Jeffrey K. Tulis, *The Two Constitutional Presidencies*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 113-14 (Michael Nelson ed. 5<sup>th</sup> ed. 1998). See also JEFFREY TULIS, *THE RHETORICAL PRESIDENCY* (1987).

42. THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* (1985).

43. See JOHN ALDRICH, *WHY PARTIES: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* (1995)(discussing evolution and change in modern political parties).

44. 343 U.S. 579 (1952).

45. *Id.* at 654.

46. See ALDRICH, *supra* note 43, at 13.

have you done for me lately.<sup>47</sup> As one political review recently observed, in the absence of traditional parties, presidents “lack[] a firm popular base . . . [and] are much more vulnerable than their predecessors were to political attack, especially media criticism.”<sup>48</sup> Presidents can galvanize support on ideological grounds on a given issue but it can be more difficult, all things being equal, for the president to achieve his policy objectives. Indeed, one recent study of the U.S. political system described this process as “revolving gridlock,”<sup>49</sup> as each branch of government is incapable of overcoming the supermajority hurdles established in our governmental system.

The third political change effecting the presidency is, paradoxically, the decline of communism, which has diminished the president’s international role. Traditionally, presidents have relied on a socially agreed on external enemy, namely communism, to rally domestic support and insulate themselves from some domestic criticism. Indeed, one prominent legal commentator titled a famous article, written before the fall of communism, “Why the President (Almost) Always Wins in Foreign Affairs.”<sup>50</sup> With the decline of communism, however, the President’s ability to invoke and trade on this political agenda has diminished. Presidents can always rally the country when soldiers are in harm’s way, but the natural level of agreement on external enemies has declined. Some observers even view foreign affairs today as simply an extension of internal domestic politics. This development led Clinton to comment quite candidly one day that he envied his predecessors because they “had an enemy,”<sup>51</sup> though, in light of recent events, it is important to note he presumably meant the right type of enemy. Its no coincidence, we can assume, that the day his grand jury testimony was released to the public, Clinton delivered a major speech proclaiming that the country was facing an international economic crisis the likes of which we had not seen in the last 50 years— the length of the cold war.<sup>52</sup>

Finally, the rise of a diverse and hypercritical media, which is a consequence of increased market competition as well as changed cultural norms af-

47. In law and economics vernacular, there can be a type of principal agency problem, where the agent is not given sufficient “slack” for optimal performance.

48. Benjamin Ginsberg et al., *The Presidency, Social Forces, and Interest Groups: Why Presidents Can No Longer Govern in THE PRESIDENCY AND THE POLITICAL SYSTEM* 358, 371 (Michael Nelson ed., 5<sup>th</sup> ed. 1998)

49. See David W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK* (1998)

50. Harold Hongju Koh, *Why the President (Almost) Always Win In Foreign Affairs*, 97 *YALE L.J.* 1255 (1988).

51. Richard Reeves, *Why Clinton Wishes He Were JFK*, *WASHINGTON MONTHLY*, September 27, 1995, at 16.

52. Jim Landers, *Clinton Urges U.S. Aid to Fight Currency Crisis*, *DALLAS MORNING NEWS*, Sept. 15, 1998, at A1.

ter Watergate, has impacted upon the presidency disproportionately.<sup>53</sup> In theory, the singularity of the modern presidency endows it with a unique ability to dominate the press and airwaves. Now days, the breadth and competitiveness of the press not only limits that influence, but also means that the president is the most likely institution to be the subject of press scrutiny and criticism. In an era where every institution and faction is trying to manage information about their activities and position,<sup>54</sup> wholesale exposure has a downside political cost.<sup>55</sup>

What are the consequence of all of these political and social developments? They have contributed to the difficulties modern presidents have in garnering informal political support as well as controlling the political agenda, which are important ingredients of their influence. In other words, on average, with emphasis on the word average, presidents tend to be politically weaker than we otherwise might have expected, at least after they have served as president for any length of time. “The decline in presidential popularity,” one study of modern presidents concluded, “is one of the most well documented trends in recent American politics.”<sup>56</sup> Indeed, there is a standard pattern for modern presidents; they have very low approval ratings after they have served as president for one or two years, with the average approval rating of presidents consistently declining since 1965.<sup>57</sup> One reason: the president’s exercise of power, articulation of public positions, and exposure to intense scrutiny in today’s environment can tend to undermine public support and confidence. As one study concluded, “active presidents are not supported in the polls; popular presidents win more but generally ask less.”<sup>58</sup>

Of course, these problems do not suggest the modern presidency is weak in comparison to Congress or on some absolute level. As the single most visible and powerful actor in Washington, with control over the bureaucracy and discretion in international affairs, the president has substantial legal, bureaucratic, and political resources at his command. The point is rather that political changes since Watergate have limited the presidents influence more than we might of originally expected. The fear of a tyrannical presidency, overreaching the republic and dictating the agenda, is less obvious than it was in 1973.

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53. For a discussion of the increasing impact of the press on political behavior. see JOSEPH CAPELLA & KATHLEEN JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* (1997); KATHLEEN HALL JAMIESON, *DIRTY POLITICS* (1992); THOMAS PATTERSON, *OUT OF ORDER* (1993). See also Mathew Baum and Samuel Kernell, *Has Cable Television Ended the Golden Era of Presidential Television*, 93 AM. POL. SCI. REV. 99 (1999).

54. TIMOTHY COOK, *GOVERNING WITH THE NEWS* (1998).

55. See Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267 (1998).

56. MARTIN P. WATTENBURG, *THE RISE OF CANDIDATE-CENTERED POLITICS* 66 (1991).

57. *Id.* at 66-91.

58. PAUL BRACE & BARBARA HINKLEY, *FOLLOW THE LEADER* 10 (1992).

### III. THE IMPACT OF THE WATERGATE REFORMS

This leads, of course, to the sixty-four thousand dollar question: in this changed environment, how do the Watergate reforms impact the presidency politically? Regardless of whether these changes are appropriate legally, do presidents and their staff have difficulty withstanding scrutiny even when they are trying, and have every incentive, to do their job properly. In other words, by making the president and his staff subject to many more substantive restrictions and increasing exponentially the political and legal scrutiny of their compliance, have we created systemic costs to the presidency? Whatever one's ultimate conclusion, there are several reasons, I think, to be raise questions.

First, the modern presidency is largely unitary. This means that the White House and cabinet make, oversee, or are simply thought by the public to oversee, a very high proportion of the decisions of government. As a result, the White House is going to be involved in, or held responsible for, more decisions that are subject to some type of legal regulation or ethical charge, even if the president may never have been actually involved. As anyone who has worked in the White House will tell you, they often make such decisions in a matter of minutes and only realize the potential legal issues or problems until after a charge has subsequently arisen. On other occasions, they are charged with responsibility for decisions which they did not themselves make but for which they had oversight responsibility. As a simple matter of mathematics, therefore, there are many more possibilities for legal error, violations of complicated conflict of interest standards, or simple suspicions of improper behavior, all of which may be subject to subsequent legal or press micro scrutiny.

Second, this effect is complicated by the incentive members of the White House sometimes have to shave it close to the legal line, especially if they are going to be politically successful. Watergate revealed the need to extend the rule of law to more decisions of our political system. Yet, there is an inherent tension between politics and law. The main reason is our inherently ambiguous view on what we consider appropriate political representation: we believe in Burkean representation as well as constituency service, but not in illegal bribes or selling government opportunities.<sup>59</sup> While Daniel Boorstin has called a certain level of moral ambiguity the "genius of American politics,"<sup>60</sup> it makes it difficult to be a successful politician in an open, highly contentious,

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59. Daniel Hayes Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985). See also David A. Strauss, *What is the Goal of Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 141; and Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111. For a recent judicial example of this ambiguity, see *United States v. Sun-Diamond Growers*, 67 U.S.L.W. 5265 (Apr. 27, 1999) (outlining legal requirements for establishing acceptance of an illegal gratuity under 18 U.S.C. §201(c)(1)(A)).

60. DANIEL J. BOORSTIN, *THE AMERICANS* 391-430 (1967).

legally regulated environment. The margins between conflict of interest and appropriate political representations, between quid pro quo bribes and political deals, between legitimate claims of secrecy and obstruction of justice, between soft and hard money, between issue ads and presidential ads, between down-playing uncomfortable details and lying to the public, are all quite narrow. Indeed, the distinctions may ultimately turn on the political perspective of the beholder. At some point, every successful president and his aids have an incentive to push this behavior close to the line. But in an environment where these lines are often defined by the criminal law, and where the public is unlikely to appreciate this moral ambiguity in the light of intense *ex post facto* press coverage and microscopic independent counsel investigations, the consequences can be substantial.<sup>61</sup>

This tension was brought home to this author years ago from comments made by career Justice Department lawyers about the difference between the Carter and Reagan White Houses. The Carter people, who were steeped in the lore of Watergate, sought a legal opinion before undertaking any initiative and, as a result, never did anything, according to my informants. The Reaganites, who were not well liked by my confidants because of their politics, were nevertheless generally praised for their willingness to exercise leadership, that is, take chances, and at least get something done.

Of course, the Reagan and Clinton White Houses paid a price—that is the point. Some recent examples from today's headlines: President Clinton and the First Lady's involvement in the travel office firings and file gate; improper campaign calls made by the Vice President and President from the White House; improper soft money expenditures on ads for the President; using government resources, such as the Lincoln bedroom, to raise money; Clinton's involvement in the claim of executive privilege for the secret service; White House calls to the Treasury about the Whitewater investigation; Hillary Clinton's involvement in the health reform commission; the list is endless. A modern White House's oversight of the bureaucracy while pursuing its political agenda is frequently going to get it into legal trouble and subject it to accusations of political impropriety or sleaziness. It is a consequence of its unitary structure and need to push projects to the limit, all the while being subject to intense outside scrutiny.<sup>62</sup>

The political problem is magnified, it should be emphasized, when the le-

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61. For a fuller discussion of the problems of presidents operating in a political environment of moral conflict and political ambiguity see Fitts, *supra* note 21. See also CRONIN & GENOVESE, *supra* note 38.

62. See David von Drehle, *Feat of Henry Clay*, WASHINGTON POST, June 20, 1993, at C1. ("Political commentators [continually] assert that President Clinton compromises are a sign of his complete lack of moral convictions."); Thomas L. Friedman, *Clinton's Gay Policy*, N.Y. TIMES, July 25, 1993 at A11 (criticizing Bush, in almost identical terms, "for changing his positions so many times nobody knows who he is.")

gal basis for scrutiny and/or substantive intervention is enforcement of the criminal law. Because of the severe moral element implicit in criminal sanction, and the difficulty in applying a nuanced normative judgement appropriate to the real political context, there can be very serious political effects when accusations of criminal impropriety are raised.<sup>63</sup> In a politically charged atmosphere of imperfect information, it can be the equivalent of a death sentence.<sup>64</sup>

This leads to the final and related reason why these changes may impact on the presidency: the nature and source of its strength, informal political support and control over the political agenda. As I noted, the public views the president as “above politics” and a unique source of “moral leadership.” As George Reedy observed, “the president affords the only means through which we can act as a nation.”<sup>65</sup> As a result, “public opinion polls show that the public most consistently expect the president to place the country’s interests above that of politics. Presidents must present themselves as representatives of the people and as moral, non-partisan, and religious leaders.”<sup>66</sup>

These expectations, however, cause problems for a modern president seeking to push the political envelope, engage in political compromise and deals, but who is subject to extraordinary micro legal and press scrutiny of his actions in the wake of Watergate. An actual criminal investigation exacerbates this tension; not only does the independent counsel have a structural incentive to uncover every detail, but the strategic behavior of litigation, as presidential lawyer David Kendall has recently learned, does not play well on the modern presidency stage. It is no accident that the public and press repeatedly charge modern presidents with “lacking moral conviction,” being “slick” or “tricky,” as “changing positions so many times nobody knows who [they are],” or as treating issues “compartmentally,” to quote just a few of the recent allegations. Unfortunately, these qualities, while not exactly sought after in a spouse or religious advisor, may be valuable to the exercise of leadership in this environment.<sup>67</sup>

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63. See generally Edwin M. Yoder, *The Presidency and the Criminalization of Politics*, 43 ST. LOUIS U. L.J. 749 (1999). See also John Griesbach, *Three Levels of Trouble: A Comment on Edwin Yoder’s “The Presidency and the Criminalization of Politics”*, 43 ST. LOUIS U. L.J. 761 (1999).

64. Of course, the increasing legalization of government is true at all levels. Government officials are necessarily involved in more activities and subject to more investigation and prosecution than ever before. See Ornstein, *supra* note 10.

65. GEORGE E. REEDY, *THE TWILIGHT OF THE PRESIDENCY* (1970)

66. LYN RAGSDALE, *VITAL STATISTICS ON THE PRESIDENCY* (1996).

67. Not surprisingly, several of the recent conspicuous exercises of leadership have occurred outside the public view. For example, Presidential commissions that act in privacy, such as the missile base closing commission and the social security commission, have tended to be more successful than open committees subject to FACA, such as the health care commission. The point is that politics sometimes means making deals and managing, or hiding, information and resolving conflict behind closed doors. One final observation: it is important to recognize that this loss of

## IV. CONCLUSION

Let me quickly offer some brief, but obvious, caveats to the above analysis.

First, despite the concerns outlined here, presidents have and will survive most scrutiny. Ronald Reagan, for example, inoculated himself from *some* of these problems simply by appearing, and being, uninvolved with many of the details of government—a non-unitary unitary president. He did lose control of the policy agenda in his second term, and several of his aids were prosecuted, but his *Presidency* ultimately survived the challenge.<sup>68</sup>

Clinton's political response to scandal represents a more complicated case, especially in light of the Monica Lewinsky episode. The type of personal transgressions found in the Lewinsky affair fall outside the current analysis, which focuses on the exercise of government powers. Nevertheless, Clinton has been more resilient politically than many originally predicted.<sup>69</sup> At the time this article went to press, despite impeachment by the House, Clinton still had extremely high job approval ratings. The type of *personal* scandal at issue in this episode, although different from the transgressions discussed in this article, seems not to have tainted this president's overall level of political support.

At the same time, whether his presidency stands as a prototype for future political leaders facing ethics investigations remains to be seen. Clinton's personal approval ratings, and control over the policy agenda, have evaporated during the scandal. He has also benefited from crime rates plummeting and an economy performing at historically unprecedented levels, a social and economic environment future presidents are unlikely to enjoy. In short, the experiences of Clinton, like those of Reagan and Bush, suggest there is a political cost, though the presidencies ultimately survive.

My second caveat: the analysis does not imply that we should repeal the laws and rely simply on political retribution to keep the president in check. While we may argue about how tight the scrutiny should be, Watergate revealed the need to hold presidents and their staffs subject to legal oversight. Indeed, a cutback in the Independent Counsel Law, which seems inevitable at this point, may solve many of the problems, so long as it is accompanied by

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support for the president can infect the entire branch. Because the executive branch is largely unitary, the president cannot recuse himself from decisions or be replaced if the heat gets too high. Indeed, even if he rides out the storm, the allegations can effect the entire institution. His public approval tends to vacillate, a variability over time that can itself undermine the institution, even if he is technically successful in defending against a specific charge.

68. Reagan also lost control of the policy agenda during his second term. See RAGSDALE, *supra* note 66, at 232-37.

69. See John R. Zaller, *Monica Lewinsky's Contribution To Political Science*, 31 POL. SCI. & POL. 182 (1998).

greater public and congressional recognition that we may have gone too far, in other words, a change in the post-Watergate norms of the presidency.

Finally, the generality of the argument is not intended to mask any political agenda for or against a particular president, but rather to avoid obsessing on a particular administration or legal device. The author was originally hired by the Carter administration, served in the Reagan administration, and has close friends who have worked in the Bush and Clinton administrations. From what I can tell as an outside observer, there has been illegal behavior in all of these administrations, as one would expect.

Despite these important limitations, we still need to appreciate the cost of this dynamic process. In the entire debate over the Independent Counsel law, executive privilege, and heightened oversight of the presidency, opponents have failed to address one simple question: why can't the president and his staff withstand the legal and political scrutiny if in fact they are doing their duties. While several scholars attribute the problem simply to a cultural obsession with scandal, there seems to be something peculiar to the office of the presidency that is important. Why is the politics of scandal seem to be so costly if we are simply ensuring there will not be corruption at the very highest level of our government, the presidency.

This article has sought to offer one explanation. Over the long run, micro scrutiny can expose the president's necessary but highly undignified political activities, obfuscation on issues, avoidance of political conflict, and proximity to conceivably illegal conduct, even if he is generally trying to do his job. By making one person the focus of branch and government power (that is, by furthering a unitary presidency), we create expectations of presidential performance and political resolution that can be practically (even at times logically) impossible. More importantly, illuminating with obsessive clarity the complicated tactics of a president attempting to operate in this environment can have an important political impact, even if there is no underlying illegal behavior. If this analysis is correct, therefore, at least some of our criticisms of current presidents may be a function of their operating in this environment, not simply their personal failings. Even Bob Woodward, a strong supporter of those changes, has conceded that conflicts in presidential role. He recently wrote:

The myth of the big-time president persists, the longing for someone with heroic energy, someone who can take the air out of a room, who can define an era worth living in. That is not only what Presidents hope to see in themselves, it is what the public wants and what the President holds up as the standard against which they will be judged. But the post-Watergate conditions have made the emergence of such a leader increasingly unlikely ...<sup>70</sup>

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70. BOB WOODWARD, *SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* 515 (1999).



This phenomenon can have two real consequences. On the one hand, if, as presidential scholars suggest, the presidency serves as the symbol of our country, we can expect to have intermittent national identity crises. We don't like some presidents, and if Freud is right, perhaps ourselves, in part because of the job they must do and the character traits it demands. This weakness is not preordained, but is more likely. At its extreme, this type of cynicism among elites in Washington and perhaps the public at large might even have an effect on a social and economic commodity, social trust, whose importance Robert Putnam and others have underscored.

But there may be a more fundamental structural issue. As a result of this process, Presidents may be weaker politically and less able to overcome the political gridlock created by our system of checks and balances and supermajority rules. Again, this outcome is not preordained, but is probably more likely.

Of course, if one concludes that the current level of friction has positive value, as the Framers believed, then this outcome is beneficial. But to the extent one views the presidency as a necessary engine for innovation and leadership, as the original supporters of the modern presidency did, there may be reason for more substantive concern. In the end, only history, informed by today's events in Washington and yet to be written, will give us a more definitive answer.