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The Legacy of Watergate for Legal Ethics Instruction

by
KATHLEEN CLARK*

I prepared a list of who was likely to be indicted as the investigation proceeded. . . . [M]y first reaction was there certainly are an awful lot of lawyers involved here. So I put a little asterisk beside each lawyer, which was Mitchell, Strachan, Ehrlichman, Dean, Mardian, O'Brien, Parkinson, Colson, Bittman, and Kalmbach. . . . [H]ow in God's name could so many lawyers get involved in something like this?

—John Dean¹

As the above statement by John Dean makes clear, the Watergate scandal made lawyers look quite bad. Lawyers who held high-level positions in the Nixon administration and in his re-election campaign were convicted of perjury, fraud, criminal violations of a citizen's constitutional rights, obstruction of justice, burglary, false statements, campaign law violations, and conspiracy.² The profession apparently felt that it had to do something to repair the image of lawyers, and in 1974 the ABA did indeed take action. What kind of reforms did the ABA adopt in order to prevent future Watergates? The ABA adopted an accreditation requirement that law schools ensure that each graduate receive instruction in legal ethics.

When I learned that this was the ABA's response to Watergate, my first reaction was somewhat cynical. Did the ABA really believe that if only G. Gordon Liddy had been given instruction in legal ethics, he never would have planned the break-in of the Democratic

* Professor of Law, Washington University. I am grateful to my colleagues, Ronald Levin and Susan Kaplan, for their comments on an earlier version of this essay.

1. *Watergate and Related Activities. Phase I: Watergate Investigation. S. Res. 60. Senate Select Committee on Presidential Campaign Activities, Presidential Campaign Activities of 1972*, Book 3 (June 25 & 26, 1973) pp. 1013, 1054, referring to Exhibit No. 34-47 at p. 1312. See also Exhibit A: *List from John Dean's Testimony at the Senate Select Committee on Presidential and Campaign Activities, infra*.

2. See accompanying table "Professional Discipline for Watergate-Related Criminal Conduct," *infra* pp. 678-82.

National Committee headquarters in the Watergate?³

My initial reaction was, I now think, a bit too cynical. A course in legal ethics would not have prevented G. Gordon Liddy or Richard Nixon from participating in or directing the crimes of Watergate.⁴ On the other hand, ethics instruction might have helped some of the other lawyers, such as Egil Krogh, develop the practical skills to deal with difficult professional situations where their client or supervisor wanted their assistance in illegal activity.

Krogh was a relatively inexperienced lawyer when he committed the crime that later resulted in his disbarment—conspiracy to violate constitutional rights.⁵ He graduated from law school in 1968, worked for several months at a Seattle law firm, and then accepted a job at the White House, where he became Deputy Assistant to the President for Domestic Affairs.⁶ In 1971, Krogh became a director of the White House “special intelligence unit,” also named the “plumbers,” for its role in dealing with leaks of national security information.⁷ He was told that President Nixon wanted the plumbers to respond to Daniel Ellsberg’s leak of the Pentagon Papers, and Krogh adopted a plan to break into the office of Dr. Fielding, Ellsberg’s psychiatrist, in order to obtain information that could discredit Ellsberg.

At the time, he apparently believed that this break-in was justified by concerns of national security. Krogh “was so overawed by the prestige and power of the Presidency that his conscience was lulled to rest during the time he served as director of the special investigative unit.”⁸ His “conscience . . . was not alert enough to refuse participation in the[se] unlawful activities involving Dr. Fielding and Daniel Ellsberg.”⁹ “[W]hen it was suggested that he violate not only the laws but the constitutional rights of his fellow citizens, he accepted the proposition without any misgivings as to its legality, accepting as a tenable proposition the notion that whatever was ordered by his superiors should be done.”¹⁰ Much later, after the Watergate conspiracy began to unravel and he was indicted, Krogh came to realize that this “national security” justification had been

3. See *In re Liddy*, 343 N.Y.S. 2d 710 (App. Div. 1973). Cf. Lynne Reaves, *Ethics in Action: Two Recall Watergate Lessons*, 70 A.B.A. J. 35 (Aug. 1984) (quoting Sam Dash saying, “As a matter of fact, John Dean, my principal witness in Watergate, liked to boast that he got the highest grade in ethics at Georgetown University”).

4. See *In re Nixon*, 385 N.Y.S. 2d 305 (App. Div. 1976).

5. See *In re Krogh*, 536 P.2d 578 (Wash. 1975).

6. See *id.* at 579.

7. See *id.* at 579-80, 583.

8. *Id.* at 586.

9. *Id.* at 583.

10. *Id.* at 585.

misguided, that he had indeed violated Dr. Fielding's constitutional rights, and that he needed to take responsibility for his past actions.¹¹

Since the Watergate-era accreditation standards require that all law students receive some instruction in legal ethics, the question is what type of instruction is optimal. All would agree that legal ethics instruction must include the substantive law of lawyering, including professional rules, civil malpractice standards, disciplinary procedures, and the common law principles, statutes and regulations that apply to lawyers. In many ways, this substantive component is similar to the substantive content of other courses. But in one important respect, it is different. In other law courses, law students learn about the law that will apply to their clients. In legal ethics courses, law students learn the law that will apply to their own conduct. In my experience, this means that students have a different attitude toward the material—an attitude that may be similar to the attitude that business school students may have toward a course on antitrust law, for example. Students resist acknowledging that the law will limit their freedom of action.

In addition to the substantive law of lawyering, I believe that there are two features that can significantly improve legal ethics instruction. First, it is important for ethics instruction to occur in context. In my experience, practicing lawyers have a very clear idea of the importance of ethics issues in their daily working lives. They realize this because they understand the context in which ethics issues regularly arise. Law students, on the other hand, by and large lack this context. Presenting ethics issues without context means engaging in a somewhat sterile philosophical enterprise. Such an enterprise may be of interest to a few philosophically-oriented students who are interested in role-differentiated morality, but leaves most students puzzled or bored. This means that ethics needs to be integrated into the entire law school curriculum. Ethics issues are most engaging when they occur in context, so we need to assist the teachers of other

11. *See id.* at 581. Krogh explained his change of heart this way:

I took a trip with my wife and children to Williamsburg for the Thanksgiving vacation I had been vigorously defending up until just a few days before we left However in Williamsburg . . . I had a chance to sit back and sort of look at where I was. I was under indictment . . . and yet I was a person that was at large, free to travel, free to associate with whomever I wished. I could say what I wanted to . . . I could attend any church of my choice. There were a number of things I was enjoying as a . . . potential defendant in a criminal trial and yet here I was defending conduct when I was a government servant which had stripped another individual of his Fourth Amendment rights to be secure from an illegal search, and I suppose it was that I felt that if I had continued to defend that, I would in a sense be attacking the very rights which I was enjoying at that time as a potential defendant.

substantive courses in finding ways to integrate ethics issues into their courses.¹²

Second, legal ethics instruction needs to assist students in developing the skills necessary to deal with the moral issues that they will face as professionals working on behalf of clients and within organizations. We need to help students develop a vocabulary that will help them analyze the difficult moral choices they will face in practice, and to develop the interpersonal and organizational skills to deal with difficult situations in the workplace. Students need practice in recognizing how they will feel about the moral challenges of their professional work, and what is the most appropriate way to deal with those challenges. In order to help students develop these skills, it makes sense to borrow the methods of clinical education. In developing such skills, a student needs to engage not just her intellect, as she might in puzzling out the intricacies of federal jurisdiction, but she must also engage her heart, to determine how she will feel in a professional situation she may face.

For example, suppose a supervising lawyer has instructed a subordinate lawyer to engage in conduct that the subordinate thinks may be illegal. On the level of substantive law, a legal ethics course would include coverage of the Model Rules dealing with supervisory and subordinate lawyers, which indicates that if the "supervisory lawyer [has made a] reasonable resolution of an arguable question of professional duty," the subordinate lawyer will be insulated from professional discipline if she followed the directions of her supervising lawyer, who could be disciplined for the subordinate's conduct.¹³ The course would also include discussion of whether a subordinate lawyer who was fired for failure to follow illegal orders could sue for retaliatory discharge.¹⁴

A purely substantive approach to this issue is, in my view, incomplete. Instead, when I teach these issues I attempt to put the students in role, so that they can experience what it would feel like to be in the position of the subordinate, and come up with creative strategies for dealing with that difficult position. I would ask: What options might be available to such an employee? Should she confront the supervisor? Would an indirect approach be preferable? Are there other people in the workplace whom the employee might be able to consult? This kind of approach relies in part on the

12. See, e.g., DEBORAH RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1997) (an ethics textbook with separate sections that can be used in substantive courses torts, civil procedure, criminal law, etc.).

13. ABA Model Rule 5.2(b).

14. See, e.g., *Balla v. Gembro*, 584 N.E. 2d 104 (Ill. 1991); *General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994).

substantive law, but goes beyond that level and also includes a more skills-oriented approach.

Probably no purely black-letter course on the law of lawyering could have prevented Egil Krogh from getting involved in Watergate. On the other hand, an ethics curriculum that showed how ethics issues arise in practice, and that engaged Krogh not just intellectually, but also emotionally and on the level of skills, might have enabled him to see more clearly the nature of the actions he was being asked to take.

Lawyers can do a great deal of harm in the world, and it is important that law schools not unleash on the world lawyers who are armed with legal knowledge, but lack the judgment to keep their skills and conduct in perspective. A legal ethics curriculum that is integrated into the substantive courses and that takes a skills-oriented approach, engaging not only students' minds but their ambitions and values, might make a difference.

**PROFESSIONAL DISCIPLINE FOR WATERGATE-RELATED CRIMINAL
CONDUCT**

Name Official Position	Discipline	Predicate Conduct for Discipline
Spiro T. Agnew Vice-President ¹	Disbarred by MD.	Pled <i>nolo contendere</i> to filing false income tax return (Did not list as income the kickbacks he received from state contractors while he was governor). ²
Charles Colson Special Counsel to the President	Disbarred by VA, MA, D.C., & D.C. federal district court.	Pled guilty to obstruction of justice (Impeded administration of justice re: criminal trial of Daniel Ellsberg by defaming Ellsberg and those defending him). ³
G. Bradford Cook SEC Chairman	Suspended for three years by NE.	Testified falsely before grand jury and Senate subcommittee. ⁴
John Dean Counsel to President	Disbarred by VA. ⁵	Pled guilty to obstruction of justice. ⁶
Frank DeMarco Nixon's tax lawyer		Indicted for making false statements to Congressional Committee and IRS, obstructing congressional investigation, & defrauding the government; court dismissed charges because of prosecutorial misconduct (Alleged to have lied regarding Nixon's 1969 tax return). ⁷
John Ehrlichman Assistant to President	Disbarred by CA & U.S. Supreme Court. ⁸	Convicted of conspiracy and perjury (Conspired to violate constitutional rights of Daniel Ellsberg's psychiatrist & lied to grand jury). ⁹
Herbert Kalmbach Nixon's Personal Lawyer	Suspended. ¹⁰	Pled guilty to breaking campaign-contribution laws. ¹¹
Richard Kleindienst Attorney General	Suspended for one month by D.C.; censured by AZ. ¹²	Pled guilty to willful refusal to answer congressional question (Lied to Senate committee at hearing on his confirmation as Attorney General re: White House's interference with antitrust litigation). ¹³

Name Official Position	Discipline	Predicate Conduct for Discipline
Egil Krogh Deputy Assistant to President ¹⁴	Disbarred by WA (reinstated five years later). ¹⁵	Pled guilty to conspiring to deprive citizen of civil rights (Headed White House "plumbers unit," which broke into office of Daniel Ellsberg's psychiatrist, searching for damaging information on Ellsberg). ¹⁶
G. Gordon Liddy CREEP General Counsel ¹⁷	Disbarred by NY. ¹⁸	Convicted of burglary (Planned break-in of the Democratic National Committee offices in the Watergate building). ¹⁹
Robert Mardian Assistant Attorney General for Internal Security	Suspended by CA, D.C. federal district court, & U.S. Supreme Court (later reinstated by CA & U.S. Supreme Court). ²⁰	Convicted of conspiracy; conviction was reversed on appeal for failure to sever from co-defendants. ²¹
John Mitchell Attorney General ²²	Disbarred by NY & U.S. Supreme Court. ²³	Convicted of obstructing justice, testifying falsely before grand jury and Senate Committee, and conspiracy. ²⁴
Edward Morgan White House Lawyer	Disbarred by D.C. federal district court & U.S. Supreme Court. ²⁵	Pled guilty to fraud (Helped to back-date documents so that Nixon could take tax deduction on donation of official papers). ²⁶
Richard Nixon President	Disbarred by NY. ²⁷	Obstructed justice (<i>inter alia</i> , obstructed investigation of Watergate burglary; attempted to obstruct investigation of break-in at Daniel Ellsberg's psychiatrist's office). ²⁸
Harry Sears State Senate Majority Leader ²⁹	Suspended for three years by NJ.	Attempted to influence improperly SEC investigation of his client, Robert Vesco; gave false testimony to grand jury. ³⁰
Donald Segretti CREEP staffer	Suspended for two years by CA. ³¹	Pled guilty to conspiracy and publication of political statements without attribution (Orchestrated dirty tricks against candidates for Democratic presidential nomination). ³²

1. Agnew was disbarred based on conduct that occurred in 1967 while he was Governor of Maryland, prior to his becoming Vice-President in 1969.

2. Agnew pleaded *nolo contendere* to violating § 7201 of the Internal Revenue Code, was sentenced to three years probation, was fined \$10,000, resigned as Vice-President, and was disbarred. See *Maryland State Bar Ass'n v. Agnew*, 318 A.2d 811 (Md. 1974).

3. Colson pled guilty to violating 18 U.S.C. § 1503, was sentenced to one-to-three years imprisonment, served 207 days in prison, was fined \$5,000, and was disbarred. See *In re Colson*, 412 A.2d 1160 (D.C. 1979); *Where Are They Now?: Some of the Main Watergate*

Scandal Figures Today, HOUS. CHRON., June 7, 1992, at A23.

4. Robert Cook had been Director of the SEC's Division of Market Regulation, and wanted to become SEC Chairman. He sought the assistance of Maurice Stans, who was in charge of raising funds for the Committee to Reelect the President (CREEP). At the time, the SEC was investigating Robert Vesco, who had secretly given \$250,000 to CREEP. Stans asked Cook to prevent the SEC from releasing information that would tie Vesco to CREEP, and Cook did so. Later Stans lied to a grand jury, testifying that he spoke with Cook about the Vesco investigation only after the SEC had already made public its complaint against Vesco. After Stans informed Cook of this testimony, Cook lied to a grand jury and a Senate subcommittee about the timing of his conversation with Stans. Federal prosecutors confronted Cook and accused him of lying to the grand jury. Cook then cooperated in the case against Stans, and was not prosecuted. He resigned as SEC Chairman. See *Nebraska State Bar Ass'n v. Cook*, 232 N.W. 2d 120 (Neb. 1975).

5. See N.Y. TIMES, Feb. 7, 1974, at 19.

6. See Ed Magnuson, *Aftermath of a Burglary: What Happened to the Cast of a Political Drama?*, TIME, June 14, 1982, at 30. Dean served 127 days in prison of a one-to-four year sentence. See *Where Are They Now?*, *supra* note 3, at A23.

7. See *United States v. DeMarco*, 550 F.2d 1224 (9th Cir. 1977).

8. See *Top Nixon Aides Sentenced*, FACTS ON FILE WORLD NEWS DIGEST, Mar 1, 1975, at 118B1; *In re Ehrlichman*, 421 U.S. 905 (1975).

9. Ehrlichman was convicted of one count of 18 U.S.C. § 241 (conspiracy) and two counts of 18 U.S.C. § 1623 (perjury), *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976), was sentenced to twenty months to eight years, *Ehrlichman Seeks a Pardon for Watergate Crimes*, N.Y. TIMES, Aug. 15, 1987, at A7, and spent 18 months in prison. See Bette Harrison, *Awash in Redemption: Twenty Years after Watergate, John Ehrlichman Has Come to Terms with the Past and Enjoys a Full Life in Atlanta*, ATLANTA CONST., Jan. 28, 1996.

10. Kalmbach regained his license to practice law in 1977. See Magnuson, *supra* note 6, at 30.

11. See *id.* Kalmbach served 191 days of a 6- to 18-month sentence for campaign finance law violations. See *Where Are They Now?*, *supra* note 3, at A23.

12. In addition, the federal district court in D.C. decided not to impose any discipline on Kleindienst. See *District of Columbia Bar v. Kleindienst*, 345 A.2d 146, 148 (D.C. 1975). In 1982, Arizona and the U.S. Supreme Court suspended him from practicing law for unrelated fraud charges. See Magnuson, *supra* note 6, at 30.

13. During Senate confirmation hearings on Kleindienst's nomination as Attorney General, he asserted that no one in the White House made any effort to influence the Justice Department's conduct in its antitrust litigation against ITT. "To the contrary, a tape-recorded telephone conversation between [Kleindienst] and then-President Nixon reveals that [Kleindienst] was ordered to 'stay . . . out of [the case] . . . Don't file the brief [in the Supreme Court] . . . [Drop] the thing.'" See *Kleindienst*, 345 A.2d at 147. The Watergate Special Prosecutor allowed Kleindienst to plead guilty to a misdemeanor. The sentencing judge suspended his sentence of one month imprisonment and \$100 fine, imposing one month's unsupervised probation. See *id.* at 149 n.5.

14. "Mr. Krogh was . . . one of the close and most intimate circle of personal advisors to the President of the United States. He certainly was not the chief architect of Watergate; however, he was certainly one of the principals of the so-called 'plumbers' unit in willfully, intentionally, and unlawfully planning, implementing, and carrying out the burglary of the private office of an individual citizen of the state of California and of the United States." *In re Krogh*, 536 P.2d 578, 590 (Wash. 1975) (Finley, J., concurring) (emphasis in original).

15. See *id.* at 578 (maj. opinion) (disbarment); *In re Krogh*, 610 P.2d 1319, 1321 (Wash.

1980) (reinstatement contingent on passing the bar exam).

16. Krogh pleaded guilty to violating 18 U.S.C. § 241, and was sentenced to six months in prison and two years unsupervised probation, with the remainder of his two to six year imprisonment suspended. *See Krogh*, 536 P.2d at 578.

17. CREEP (Committee to Re-Elect the President) was President Nixon's re-election campaign. *See Watergate 25 Years Later*, CIN. ENQUIRER, June 15, 1997, at A6.

18. *See In re Liddy*, 343 N.Y.S.2d 710 (App. Div. 1973).

19. Liddy served 52 months in prison of a six-to-twenty-year sentence. The sentence was later commuted to eight years by President Jimmy Carter. *See Donald M. Rothberg, Cynicism Haunts Nation 20 Years After Watergate*, RECORD (Bergen County, N.J.), June 7, 1992, at A37.

20. *See In re Mardian*, 430 U.S. 903 (1977); *In re Mardian*, 420 U.S. 1001 (1975); FACTS ON FILE, *supra* note 8, at 118B1.

21. Mardian was originally sentenced to 10-36 months of imprisonment, *United States v. Haldeman*, 559 F.2d 31, 51 n.6 (D.C. Cir. 1976), but his conviction was reversed on grounds of failure to sever from co-defendants, *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976), and he was not prosecuted after that, *Nixon v. Warner Comm.*, 435 U.S. 589, 593 n.2 (1978).

22. Mitchell had resigned as Attorney General and became Chairman of the Committee to Re-elect the President. *See Lawrence Meyer, John N. Mitchell, Principal in Watergate, Dies at 75*, WASH. POST, Nov. 10, 1988, at A1.

23. *See Mitchell v. Ass'n of the Bar of the City of New York*, 351 N.E.2d 743 (N.Y. 1976); *In re Mitchell*, 420 U.S. 1001 (1975).

24. Mitchell was convicted of violating 18 U.S.C. § 1503 (obstruction of justice), § 1623 (false statement to grand jury), § 1621 (false statement to Senate Select Committee on Presidential Campaign Activities) and § 371 (conspiracy). He was sentenced to 20-60 months imprisonment, *see In re Mitchell*, 370 N.Y.S.2d 99 (App. Div. 1975), and served 19 months. *See Magnuson, supra* note 6, at 30.

25. *See In re Morgan*, 422 U.S. 1004 (1975).

26. Morgan was sentenced to four months imprisonment. *See Holding the Bag?*, NEWSWEEK, Mar. 3, 1975, at 15.

27. *See In re Nixon*, 385 N.Y.S.2d 305 (App. Div. 1976); *In re Nixon*, 385 N.Y.S. 2d 373 (App. Div. 1976). Nixon attempted to submit his resignation from the bar in order to avoid disbarment, but the letter of resignation "did not contain the required admission of culpability." *In re Nixon*, 385 N.Y.S.2d at 307.

28. Nixon also authorized secret payment to E. Howard Hunt, one of the Watergate burglars, in order to prevent or delay Hunt from cooperating with law enforcement; improperly concealed evidence relating to unlawful activities of his staff and the Committee to Re-elect the President, and improperly interfered with the legal defense of Daniel Ellsberg. *See id.* at 306. One month after Nixon resigned the presidency, he was pardoned by his successor, Gerald Ford, and thus was never indicted.

29. During the period of Sears' involvement with Vesco, Sears resigned from the New Jersey State Senate. *See In re Sears*, 364 A.2d 777, 779 (N.J. 1976).

30. Sears received transactional immunity for his cooperation with federal prosecutors and was not charged with any crime. *See id.* at 782.

31. The California Supreme Court suspended Segretti for five years, stayed all but the first two years of that suspension, placed him on probation for the remaining three years, and required him to pass a professional responsibility exam. *See Segretti v. State Bar*, 544 P.2d 929 (Cal. 1976).

32. *Inter alia*, Segretti "wrote and caused to be distributed" a letter on Citizens for Muskie Committee "letterhead . . . accusing Senators [Hubert] Humphrey and [Henry] Jackson of sexual improprieties. The accusations were false, as Segretti then knew."

Segretti, 544 P.2d at 931. He pled guilty to violating 18 U.S.C. § 371 (conspiracy) and § 612 (publication of political statements without attribution). *See id.* at 930. He was sentenced to six months imprisonment, three years probation, with the remainder of his three-year sentence suspended. *See id.*