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Volcano of Change

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Public Corruption Panel

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transcribed remarks of
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First, allow me to say what a privilege and an honor it is to be here. It is great to see old friends and make new friends, and it is just a privilege to be here with all of you this morning.

My major thesis is that Watergate created a volcano of change in the world of public corruption, in virtually every area of the field. For example, a significant aftermath of Watergate has been a dramatic shift in the policies and laws that govern federal prosecution of judges, congressmen, members of the Executive Branch, state and local officials, and prosecutors. Some of the changes have been for the better, some for the worse. But it is clear that Watergate had and will continue to have a profound effect on the way in which public officials in this country are held legally and ethically accountable for their conduct.

Looking first at the judiciary, during the first two hundred years of the union it was almost unheard of for the Executive Branch to investigate, much less to prosecute, federal judges. It just did not happen, due to a recognition of the independence of the federal judiciary. After Watergate, however, there was a spate of investigations, prosecutions, and even convictions of federal judges which created an enormous amount of turmoil, an enormous amount

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of interesting law, and an enormous amount of change. There were also interesting constitutional questions, the fundamental question being "can a federal judge be prosecuted, or must he first be impeached?" Obviously, because federal judges have gone to prison, the Supreme Court recognized that federal judges can be prosecuted.

The dynamic of the Justice Department of the United States going into a district and investigating sometimes even a chief judge brought about enormous changes, but the fundamental principle that was established was that even a chief judge was not above the law. This had a profound impact on our system. It turns out that there were about four prosecutions of federal judges in the 1980s, and, happily, we haven't had one since. But if we speak honestly about the subject, there is conduct among a handful of federal judges, present company obviously excluded, that is not criminal but is worthy of review. After Watergate, the question became "what do we do about that?" What do we do about the judge who, for a variety of reasons, simply refuses to give your client a fair trial?

Since Watergate, there has been set up in all of the judicial circuits an administrative apparatus that is very difficult to administer, very controversial, and worthy of review even to this day. And what we are talking about is a vital subject that continues to have significance and continues to change even today.

Turning to the legislative branch, prior to Watergate, there were a few successful prosecutions of congressmen by the Justice Department. After Watergate, there has been a dramatic increase in the number of these investigations. The primary reason for the increase in the number of investigations, of course, is that the Justice Department now focuses on this area. The Public Integrity Section of the Criminal Division was born right after Watergate. It started out as a very small section of the Criminal Division, and it now has about thirty lawyers. Furthermore, the FBI is a primary investigative arm of the Justice Department, and now designates an enormous number of agents to work with public corruption prosecutors in the Public Integrity Section and out in the field. Each U.S. Attorney also often has a public corruption unit.

When it comes to congressmen, a number of very interesting issues arise. You may be surprised to know that there is something in our Constitution called the Speech or Debate Clause which prevents prosecutors from asking, challenging, or questioning congressmen about their activities on the Hill in any form whatsoever. The Speech or Debate Clause goes back to 17th century England. What this produces are interesting results. For example, if a congressman is paid $50,000 on videotape, with the FBI cameras rolling, to introduce an immigration bill on Capitol Hill, and he does in fact do this, the prosecutor is able to introduce the $50,000 payment into evidence.

However, the Speech or Debate Clause prohibits the introduction into evidence of the casting of the ballot, or the congressman's voting on the introduction of the bill.

A great deal of law has been developed since Watergate that provides congressmen with significant protection to maintain their independence, but allows the Justice Department to successfully prosecute them. If you are a student of this area, there is very interesting reading ahead. The separation of powers question is at the center of every one of these prosecutions. I was the lead prosecutor in the prosecution of Congressman George Hansen of Idaho. We charged him with filing false financial disclosure statements. One of the real important results of Watergate was the Ethics in Government Act, which requires every public official in all three branches to make financial disclosures. Every person in the country who has ever had to fill out these forms hates them, but everybody has to do it. And I believe that the real beginning of the invasion in the personal lives of our public officials came with the financial disclosure form, because you have to "lay it all out." We alleged that George Hansen didn't lay it all out, and he was indicted for it. The day after the indictment, 275 members of Congress amended their forms. We thought that this was a very good thing, but 325 members of Congress later signed an amicus saying that the Justice Department had no right to go after a congressman for filing false financial disclosure statements, because the ethics committees on the Hill would take care of the problem. It was an interesting collision of the branches of government. Congressman Hansen went to prison—obviously we won.

That leads to another interesting development in Washington D.C., namely, how different groups take care of their own on Capitol Hill. In the years since Watergate, there have been many interesting dramas played out on the Hill, including Newt Gingrich's travail before the Ethics Committee, and Jim Wright's travail before the Ethics Committee. There have been similar battles on the Senate side. These efforts are interesting to watch—they are politically dynamic, and it is just a continuation of the tension between the different branches. Congress says "we can take care of our own. Stay out of our business." Perhaps the clearest case came in the Rostenkowski prosecution. He was essentially indicted for violating House rules, and doing strange things with House accounts and House employees. Had he not pled guilty, I think there would have been an interesting development of this whole subject in the Supreme Court.

I have covered the Executive Branch's efforts to discipline criminally members of the judiciary, and we have touched upon the Legislative Branch. Obviously, the greatest number of prosecutions

are on the Executive Branch side. Let's just talk briefly about the Independent Counsel Statute and that history. I consider myself to be in a unique position. I served as an independent counsel, I prosecuted General Secord, and I worked for Judge Walsh. I also was in the Public Integrity Section, the section that passed judgment on whether or not cases should be assigned to an independent counsel, and I have fought against independent counsels throughout the past ten years. In my view, the bottom line is that there are a few cases, almost always involving the President, the Vice-President, or the Attorney General where simply because of appearance issues the cases are not appropriately handled by the Justice Department. It is also my view, having been in the Public Integrity Section for ten years, that virtually any allegation against any public official can be handled competently by the professional prosecutors of the Public Integrity Section. It is also my view that cases handled by independent counsel are different. They are handled differently than cases handled by professional prosecutors in the Department of Justice. When you are sitting there with unlimited resources and one target, you act differently than if you are sitting there with fifty cases and a bunch of cases set for trial. There can be mischief that occurs, not because independent counsels have bad intentions, or they want to be President, or they want to get on the front page of the Washington Post, but because the pressures attendant to that kind of situation create distortions. It is also my view that down the road, there will be another act; the Independent Counsel Statute is not dead and gone. There will be an allegation against someone in this administration, right on the eve of the election, and because there is the opposite party controlling Congress, there will be a spate of allegations that things are not being handled properly in Jim Robinson's Criminal Division, and there will be a call for a new statute. I think as the sun rises in the east, we will have another statute.

The meat and potatoes of public corruption since Watergate have been cases against state and local officials. I don't know what the numbers are, but I bet that close to 90% of the successful prosecutions in this area since Watergate have involved the "feds" going after state and local officials. To do that, the federal government has distorted statutes. They have taken a labor racketeering statute from the 1930s, namely the Hobbs Act, and they have taken the mail fraud statute, and they have bent them completely out of shape in order to go after corrupt state and local officials. And the justification for it is that if the feds don't do it, nobody will. And the federal courts have bought it, and the result of this is, again, that you have entire communities that have been turned upside down, with very sophisticated and very effective federal law

enforcement efforts reaching into local communities.

I believe a very interesting development in this area is how the Justice Department goes after corrupt law enforcement officials and Justice Department officials.[1] I grew up at Judge D. Lowell Jensen's knee in this area. Perhaps one of the most sensitive issues I ever handled involved an Assistant U.S. Attorney from the southern district of Texas who went bad. He offered the bad guys who had killed informants the name of another informant for a quarter of a million dollars. One of the ironic things about this case was that the bad guys concluded that the price was too low, that the information was worth at least ten million dollars, so they brought it to the Justice Department. They started taping conversations with this dirty prosecutor.

I believe that there is a crisis here. Because we all know there is no remedy for things like Brady violations in court. There are essentially no more remedies for prosecutors who misbehave in court, so the remedies must be found in the Justice Department administratively, and right now all the Justice Department has is the Inspector General, and the office of professional responsibility. I believe that they try hard, but the feeling out there in the vineyards is that a complaint against a federal prosecutor for doing things like withholding Brady materials until a defense attorney can't use it effectively either falls on deaf ears, gets lost, or takes so long that there is no effective remedy. I think this is a crisis.

Again, to demonstrate what a vibrant field this is, the issue de jour is how we finance our elections. Probably the scandal in Washington that continues to have the most light is the allegations that there was gross criminal activity in the financing of the 1996 elections. As we all know, there is a Federal Election Campaign Act that has been amended many times. Right now, most observers believe that it is the influx of soft money that makes all of these election laws dated. The federal government is not satisfied with the statutes that the Federal Election Commission administers, because the crimes that are laid out are all misdemeanors. However, the "feds" continue to distort the clear language of the act, and attempt to charge felonies in all of these cases. There are a number of trials that are going on now, and will go on in the next few months. Meanwhile, on Capitol Hill, we have Congress investigating this entire area, and refusing to outlaw soft money.

The point of all of this is that public corruption is a vital area of the law that continues to change, and is interesting to keep on top of. My view of all this is that in this area of law there is an intersection of

1. *See* D. Lowell Jensen, *"The Local Mindset,"* 51 HASTINGS L.J. 723 (2000).

journalism, politics, ethics, and the law. It is my belief that since Watergate many of our most public decisions have been made at this intersection.