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Symposium Summation

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transcribed remarks of
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That was a wonderful introduction, and I only now learned that being a dean is a safe job. Where is our dean? She'll be very pleased to know. But thank you, Rory, very much, and thanks for all that you did again to put this together.

I am very mindful that the hour is late. When Rory and I discussed this, we thought it would be useful to have a synthesizing of the wonderful things that have been put before us. I will try to keep that synthesis very short. He also asked me to comment editorially, and that I am woefully and sorely tempted to do. But I am going to try not to yield to that temptation, at least not overly much. So, I have my watch, which is at least a symbolic form of assurance to you that I am mindful of the time. Let's see whether I can do something about that.

What we have now concluded is what was appropriately dubbed at the outset this morning as "Symposium-gate." I am very pleased that you, David [Cannon], were so persistent with Professor Little in convincing him that this rich and sober topic still has currency for the entire legal community—not just the academic community. It continues to resonate in our history, as we saw today.

The day began with a suggestion that outcomes were manifestly unclear in 1973. What was clear was that there was shaping up to be an enormous constitutional confrontation. The events of that year gave rise, of course, to the unanimous Supreme Court opinion (which we have not focused on in these deliberations today, and to show some restraint I will refrain from noting further its remarkable effect in our constitutional law), the opinion of *United States v. Nixon.* But I hope you will permit me this: That decision ushered in a remarkable process of ad hoc balancing of very important constitutional principles in an effort to allow the Presidency to thrive, while remaining subject to the law. And that is the principle which came to

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be known as "executive privilege." Judges would simply view it as the principle of confidentiality of the deliberative process that is treated with complete respect.

Through the powerful observations of John Dean in his opening comments, we were also reminded today of "blind ambition." He illustrated the profound dangers to professional responsibility, personal ethics and morality that blind ambition poses through his description of his epiphany as a young lawyer—just five years out of law school—while reading through the United States Code: The realization that he was a criminal. That self-realization guided him eventually to the preparation of the list with asterisks. Why were there so many asterisks? Why were so many lawyers caught up in the crimes of Watergate?

His conclusion, based upon his continuing reflections and his discussions with others, pointed to three factors: *arrogance, incompetence,* and *loyalty*. He suggested, as a wonderful segue to our opening panel, that the study of ethics can help especially in raising lawyers' antennae. He also asked provocatively whether there can be an effective investigation of a President without a Deep Throat or an insider. He commented on the President's own observations about Deep Throat, and Deep Throat's own motivations. John Dean came up today with one name, Al Haig, who denies the suggestion. He has also concluded, based on his own study, that: First of all, Deep Throat had a lot of wrong information; and secondly, he knew very little. He closed by reminding us, drawing on the example of Whittaker Chambers, that every informant becomes a pariah. In this sense, he disagreed with the President as to the motivation of someone called as a witness, because, as Chambers said in his own book, "To be a witness means that a man has to be willing to destroy himself."

The Ethics Panel spent a good deal of time focusing on the origins of the study of ethics in the legal academy —that is, how it is done and the need for it to be done. Professor Rotunda shared a most intriguing empirical conclusion, suggesting that, whatever the shortcomings of ethics education in the academy, it is certainly good in light of what we know about the number of malpractice filings against those who have had such training versus those who have not.

Professor Simon lifted up two quite different concepts of law: A *respect for law* on the one hand—a system of mechanical compliance with known rules—and a *complex contextual compliance* on the other. He suggested that Watergate sounded in both—it was both a literal, mechanical violation of law, but also a violation of broader ethical norms and principles. He kindly suggested that his view was controversial—that the impeachment proceedings of the recent past (what I have dubbed as "the recent unpleasantness") represented an overemphasis on mechanical and non-reflective rules at the expense

of other fundamental values, including privacy.

Professor Clark expressed skepticism about the efficacy of the simple ethics course, at least when it comes to a G. Gordon Liddy. But perhaps even in such a case, there are benefits. At a minimum, we teach the law of lawyering. But what is hard to teach are the skills and the vocabulary that enable an intuitive moral sense, a sense that something is wrong, something is amiss. She lifted up a vision of contextual education through subject matter clinical activity, or pure clinical activity, that is practical and practice-based. "To talk," as the distinguished moderator, Professor Zitrin, put it. We have to talk in order to address the reality of the young lawyer asked to bill 2,400 hours each year in order to come into that golden bonus.

In the Public Corruption panel, Reid Weingarten suggested that Watergate had created a "volcano of change" in the entire arena of public integrity, including prosecutions of sitting federal judges, which was a rare event prior to Watergate. The dynamic was enormous and fundamental—no one is above the law.

He also raised questions about other aspects of judicial conduct. He noted, given his wide-ranging experience, the activity with respect to prosecution of members of Congress prior to Watergate. They were few in number. But Watergate gave birth, at least indirectly, to the Public Integrity Section itself. And that, in turn, has raised some enormously important questions under our Constitutional structure—namely, the Speech and Debate Clause and also Separation of Powers principles. But Reid also suggested that Congress seeks to do this itself, protecting its own independence and autonomy by declaring, "We're taking care of our own. Please stay out of our business." He does predict, to the sorrow of many, if not all, in the room, that there will be a new independent counsel statute as soon as we hit the next rough patch.

After we recovered from that prophecy, Professor Beale gave us a very enlightened overview—given her vast learning in the whole arena of federal criminal law—of the use of tools and what federal prosecutors do *vis-à-vis* public corruption. She quickly reminded us of the catalogue—and it is impressive—of federal criminal offenses that are addressed to federal officials: Sections 201, 203, 207, 208, 209. All of these in contrast with state corruption, covered by a lonely statute, 18 U.S.C. § 1666. And yet, the federal prosecutors have used two quite expanded tools, which she focused on in very helpful, quite illuminating detail: the Mail and Wire Fraud Statute, and the Hobbs Act. She also suggested provocatively that the 11th Circuit's upholding of the indictment in *Lopez Lucas*, a County Commissioner accused of failing to disclose a personal relationship, may have, at least for our academic purposes, implications for our reflections on impeachment.

Judge Jensen, who has served with distinction in both high state and federal offices as well as a judge, quickly reminded us that there is no direct effect on state prosecutions and state D.A.'s offices by Watergate, but there was a clear indirect effect. The culture of state prosecutions changed. He also indicated that the prosecutorial culture at the state level is such that the comfort level will be higher when going after the Watergate burglars than when going after the higher-ups. He noted that a simple lack of resources makes it difficult for a state prosecutor's office to commit resources to the kind of long, complex white collar crime/public integrity investigations that have become so well known to us at the federal level. He also indicated that the perceived institutional conflict in an investigation of an Executive Branch official really does not arise as an issue in some of our state systems—and certainly not in California, which has addressed this issue by giving certain powers of "supplantation," if I may coin that phrase, to the Attorney General's office.

We were treated by Assistant Attorney General Robinson to a very effective global overview of the Department's experience under the twenty-one-year-old statute. He was kind enough to suggest that the problem that the Department discerned was structural, not one of personalities or particular performances. But he said that we have learned painful lessons in domestic government, and he came over to the side of being opposed to the statute after suggesting that his initial tilt might have been that the statute was, in fact, appropriate.

He described the Act and its problems: The broad jurisdictional mandate; the lack of authority to control the independent counsel; the unlimited budget; the time and effort devoted by the senior officials of the Justice Department to the administration of the Act, imposing enormous burdens, and warping out of all proportions, in his words, "the handling of small and petty matters"; and his final critique was that the Act required the involvement of the entire chain of command at the Justice Department, including those at the most senior levels—time that could have been better addressed to, in his view, more important matters. Ultimately, the Act failed to achieve its goal of achieving greater public confidence in the administration of justice. It was crushingly expensive, and it tipped the balances of restraint.

The Department, in considering ways to correct the situation, considered various possibilities, including a thoughtful suggestion by Common Cause that would locate prosecutorial authority within the Criminal Division, answerable to the Assistant Attorney General. There was much to be said for this, and Professor Cox himself, universally praised throughout these proceedings today, endorsed it as well. But it did not have "legs," as Attorney General Robinson put it, because the proposal simply did not feature enough independence.

He described the various provisions of the regulations which, in

the Department's considered judgment, now reflect a balanced approach, including subjecting the Special Counsel, as the person is now called, to an established budget, and—relating back to a comment I made in my capacity as a panel participant—calling for a confidential report by the Special Counsel to the Attorney General, with Congress simply being informed of key decisions. This would allow us (if I may editorialize) to focus on privacy and human dignity to a much greater degree than interest.

The final panel treated us to the various perspectives from Watergate. Mr. Woods recalled, in a charming story, his boarding the plane with his Declaration of Independence and his Constitution, which came in very handy as he became involved in his studies of the meaning of High Crimes and Misdemeanors—a phrase he came to define as "grave abuse of office," as informed by historical materials both in England and in this country.

Mr. Ben-Veniste recalled for us his colloquy with Mr. Goodlatte of Virginia. Quoting from his own book *Stonewall*, he suggested that, in reflecting on that colloquy, there really are clear distinctions between Watergate and what we have recently seen in the "unpleasantness": That Watergate did start in what he viewed as a serious crime, and that it involved high-ranking officials—high-ranking officials seeking to obstruct the investigation through the misuse of various agencies of government, including the CIA, the use of secret money to witnesses, and the like. These were White House horrors. And it went to the top, in Mr. Ben-Veniste's view, as reflected by the March 21, 1973 rejection by President Nixon of Mr. Dean's advice. Mr. Ben-Veniste suggested that his presidential authority was waning in the wake of Watergate, that Congress exercised its oversight authority quite aggressively, as exemplified in recent years of the use, as he sees it, of overbroad opinions.

Mr. Ben-Veniste also had words to say—and they weren't terribly kind—about the Whitewater investigation and the press' coverage thereof. I look forward to a time of complete rebuttal when the entire record is before Mr. Ben-Veniste, particularly relating to his specific suggestions of improper conduct. Suffice it to say that, even my own beloved Sam Dash, who resigned on me, said that we conducted ourselves ethically and properly throughout; but he did agree with Mr. Ben-Veniste that I crossed the line in terms of becoming an advocate in favor of impeachment—a charge that I vigorously reject.

Our next speaker was Judge Trott. How can you improve on that? It was a fabulous, rollicking story. We are so glad that he kept playing golf, that he kept his perspective on Watergate West. Thank you for making it in from Boise, Judge Trott.

John Dean at his second appearance before us reflected on the

"financial thing." What were the financial arrangements for the 1972 Democratic National Convention in Miami? When, in 1972, the President was focusing not just on pandas and whether they will go to the Washington Zoo or elsewhere, but on a concern about the effort to cover-over or to submerge his historic visit to China. As Mr. Dean put it, a fuse had been lit in the White House and it exploded at the convention itself.

Former Congressman and now Judge Wiggins has a very different perspective. Some of the views expressed here today reminded him of the San Francisco twenty-somethings of yesteryear who did not know what they were talking about. He reminded us that he had known President Nixon for over a half-century, and you heard Judge Wiggins' opinion of the President's character expressed here. He made it clear that the discussions of the Judiciary Committee focused very carefully on the definition of an impeachable offense. You heard him state his view that it requires a criminal act on the part of the President. As to the issue of partisanship, perhaps he would suggest (my words, not his) that we are romanticizing the past—that, in his view, he was there, and as he saw it, the Democrats were quite partisan, as exemplified by their expansion of the inquiry by inviting the public to submit charges. It was partisan. I will now quote Judge Wiggins: "It was very, very partisan, with the press having a field day with respect to the charges."

Judge Wiggins then focused on the lengthy conversation of June 23, 1971 between Bob Haldeman and the President, and he gave a recounting of the conversations that Haldeman had in turn with Mitchell, and the President's fateful comment, "I am not going to second-guess John Mitchell." But two weeks later, as Judge Wiggins views the evidence, the President withdrew from the conspiracy.

Our next presenter was Mr. Miller, America's leading criminal defense lawyer. You heard it here at the podium just a moment ago, that, in light of all that has been said, including today, it is difficult even for a lawyer of his great skill (my words—I am not putting those in your mouth, Jack) to convince anyone that President Nixon did not actually participate in the conduct. It appeared to me that Mr. Miller—Jack, if I may, since I have known him for a long time—that Jack has a different take on this, including his opinion that the culpability belongs to others in the White House, including lawyers in the White House. And to truly get to the bottom of all of this would require listening to the tapes, if we are willing to fork over $9,000 of our good hard-earned money and, I take it, a good deal of our time. He commented about his being hired after the resignation and how he came to the view that it would have been impossible for the President to receive a fair trial, especially in Washington, D.C. He opined that the facts, if there are any doubters in our midst, can be

found in the dissenting opinion at the Court of Appeals in Washington. Faced with that situation, the course was clear: To secure a pardon if possible.

And so there were two things to do. For the law students, good practice tips: Go to the right persons to get the right result. From Phil Bucher, counsel to President Ford, and to Leon Jaworski. As he put it simply, "I went and talked to Leon Jaworski." Wouldn't you like to know what was said? Well, what we do know is that something was given either at the meeting or before, and you can get access to it right here (and you cannot have access to it on the Internet. You can only have it on hard copy. Yahoo!, eat your heart out. Amazon.com, keep losing money. You will need to buy your stock in Xerox.). On September 4, 1974, a letter to Mr. Jaworski (available only in hard copy) transmitted a memorandum that was prepared by the able lawyers of Miller Cassidy that obviously persuaded Mr. Jaworski that the correct course for the country was for the pardon to be granted.

But he had, as a lawyer, another front (lawyers worry about fronts just as generals do): He worried about the Watergate trial and the outstanding subpoena to President Nixon, and thus the pardon was all the more efficacious. President Ford, as Mr. Miller has put it today, did not want to wallow in the past, and it was his view that it was best for the country. It was his decision, and it was a courageous one, as Mr. Miller has described it, because President Ford knew the American people would exact a tribute—his job. Mr. Miller closed by saying that he knew it was difficult to listen to the catalog of possible offenses, but he is convinced that many things occurred without the President's knowledge.

My dear friend Professor Rotunda was the clean-up hitter. I have never tried to summarize what Ron Rotunda has said. *Res ipsa loquitur*!

Thank you very much.

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