The Legacy of Watergate

JOHN W. DEAN AND JAMES ROBENALT

John W. Dean is a lawyer, author, and former White House Counsel to President Richard Nixon.

James Robenalt is a partner at Thompson Hine LLP, Cleveland.

Dean and Robenalt jointly teach a CLE program based on Watergate.

The Watergate break-in marked its 40th anniversary on June 17, 2012. One by one, most of the major post-Watergate reforms have fallen by the wayside. The centerpiece—the special prosecutor law—had been sufficiently gored both major political parties that it was allowed to expire under its sunset provisions. Campaign finance regulation, especially for corporations, has been upended by *Citizen's United*. The Presidential Papers Act has been eroded over time. Even hard-hitting investigative journalism has succumbed to the economies of diminishing budgets at newspapers and major networks, and the rise of online, unedited news.

One Watergate reform endures and, in fact, has been strengthened: The legal profession's emphasis on ethics has grown and expanded since Watergate. Initially, the ABA required law schools to teach ethics in order to be accredited. Then states started mandating special ethics portions to the bar examination. Continuing legal education requirements almost always carry an ethics and professionalism part. The Kutak Commission's reforms, especially with respect to the representation of an organization as a client, now have been enacted in most states.

This is a lasting legacy from Watergate. In this sense, Watergate is not just a subject of history. Rather, it is the scandal that helped bring about stronger ethical standards and rules for the profession and for our society.

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It is Tuesday, June 26, 1973. The ornate Senate hearing room is packed, the television lights blinding.

"Now, will you look at Exhibit 43 that you inserted in your testimony yesterday?" Senator Herman Talmadge (D-GA) asks in his soft Georgia accent while theatrically slipping on horn-rimmed reading glasses so that he might inspect the document to which he has directed the witness's attention.

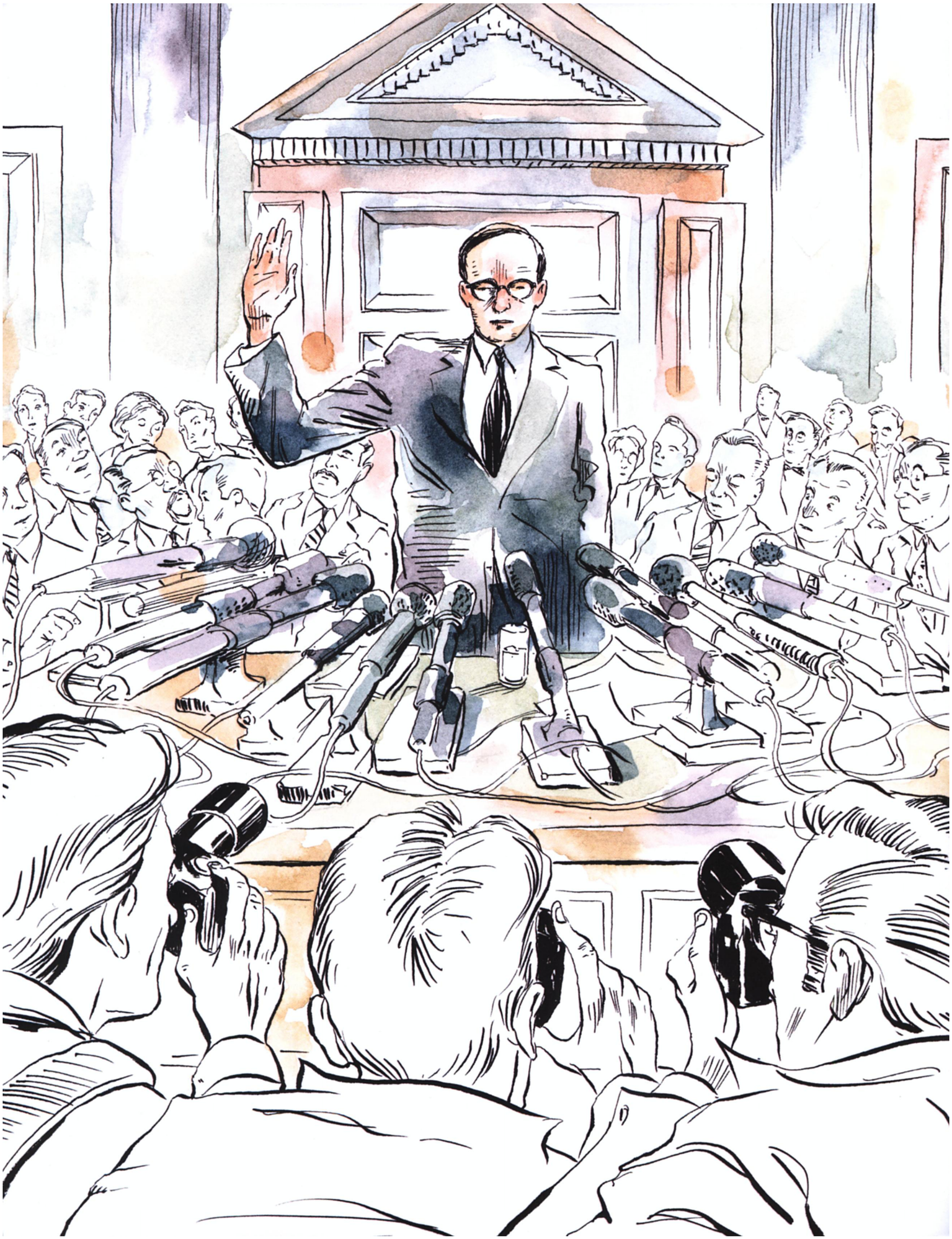
Talmadge is questioning me, John Dean, former White House counsel. It is my second day of testimony before the Senate Watergate Committee.

A shuffling of papers ensues as my lead lawyer, former Department of Justice attorney Charles Shaffer, stands up from behind me and approaches to make sure that I have the right document before him.

Next to Shaffer, and strategically just behind me, sits my wife, whose beauty and serene outward appearance captivate the country. Though skeptics abound, her stoic and unruffled presence seems to vouch for my veracity.

Shaffer, meticulously dressed with slicked-back, prematurely graying hair, does not sit next to me whispering into my ear at the witness table, as defense attorney Brendan Sullivan will do decades later during Oliver North's testimony as part of the Iran-Contra hearings.

Rather, we decided I'd do this on my own, flying solo in front



of this Senate Select Committee and one of the largest television audiences in history. By some reports, 85 percent of American households are tuned in. All three major networks simultaneously carry my entire week of testimony live, gavel to gavel.

Those who cannot watch during the day tune in to an obscure new network named PBS to watch full replays at night. PBS comes into its own because of its coverage of Watergate, especially during this week of testimony.

Few people miss the grand unfolding of this national spectacle. Watching the hearings becomes a nationwide addiction.

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High Stakes for Democracy

[Robenalt:] It is impossible now—40 years later—to explain how deeply felt everything was about the Watergate scandal. Those not around to witness and feel it firsthand cannot possibly comprehend how this "third-rate burglary," as Nixon press secretary Ron Ziegler had dubbed it, created one of the greatest constitutional crises in our nation's history and eventually brought down a sitting president.

But even that startling fact—the only resignation of a U.S. president—does not begin to evoke the strength of emotion that poured out during the course of the investigation. Everyone was invested.

At stake sometimes seemed to be the very existence of our democratic form of government, perhaps never more so than on the evening of the "Saturday Night Massacre," the night of October 20, 1973, when Nixon precipitated the resignations of his attorney general (Elliot L. Richardson) and deputy attorney general (William D. Ruckelshaus) in his efforts to find a lawyer willing to fire Independent Special Prosecutor Archibald Cox.

That willing lawyer was the solicitor general and future star-crossed Supreme Court candidate Robert H. Bork.

It was the Civil War without the military war, although much of the heat that drove the intensity of the inquiry was generated by an ill-fated and disastrous war in Vietnam, which was tearing the country apart, mainly across generational lines.

And television brought the matter directly to the people, as if we all were jurors in a mesmerizing "who done it" court case involving the president "and all his men." We Americans sat in the jury box in our living rooms and kitchens across the country and directly weighed the evidence, sifted through the facts, and judged the credibility of witnesses placed under oath by a grandfatherly, Bible-quoting, and Constitution-carrying legislator named Sam Ervin (D-NC), the senior senator from North Carolina.

Though we listened and read with passion, we did not need to form our opinions based on what commentators said or what newspapers or magazines printed. We watched it all for ourselves, and we made up our own minds.

The figures who appeared on our television screens—Haldeman, Ehrlichman, Mitchell, Liddy, Hunt—came into our lives like neighbors in trouble or family members gone astray. We came to know them in some strangely direct and personal way.

If there was one figure who ignited more passion than any other, it was Dean. On four occasions, his image appeared on the cover of *Time* magazine. Indeed, he was the only person ever to be on the cover of *Time* in back-to-back weeks.

John Lennon and Yoko Ono came to Washington to witness firsthand Dean's testimony; at the time, Lennon was fighting deportation proceedings brought by the Nixon administration. Elizabeth Taylor sent an admiring telegram to the Senate Watergate Committee and asked that her message of support be transmitted to Dean.

A hero to Nixon haters, Dean was despised by Nixon supporters. There was no in-between, no neutral feelings. Dean was either a disloyal rat seeking immunity from prosecution or a courageous young man willing to stand up to the most powerful person in the world and finally expose the truth.

In a sense, Dean was both saint and sinner. His 1976 best-selling book, *Blind Ambition*, is a confessional, showing how the allure of power caused his judgment to become distorted and flawed. In many instances, he had refused to support some of the more rank abuses in the Nixon White House. Others, he stopped—the best example being his intervention to interrupt and then abort a plan to firebomb the Brookings Institution, where Nixon believed a copy of the Pentagon Papers was being illegally held in a safe.

But Dean also followed orders and wrote memos encouraging retribution against political enemies, and he helped set up and facilitate the payment of hush money to the men who had been arrested for the Watergate break-in.

And, despite it all, when it became clear that the cover-up was going to threaten the president himself, Dean tried to warn Nixon, most famously during a March 21, 1973, meeting with the president in the Oval Office, in which Dean struggled to break through and grab the president's attention with a metaphor that he hoped would shock the president into the recognition that all the money payments and the perjury needed to end immediately.

"There is a cancer growing on the presidency," Dean said. By then, Nixon was too far in, too much involved.

When Nixon proposed a continuation of the payments to E. Howard Hunt, Dean realized he needed to take action, even if it meant "blowing himself up" in the process.

Dean told his superiors—Haldeman, Ehrlichman, and even Nixon—that he was going to the prosecutors to cooperate. He

Illustration by Tim Bower

hired criminal defense lawyer Shaffer and began a wilderness journey that led to his moment in the national spotlight before the Ervin Committee a few months later in June 1973.

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[Dean:] The examination centers on Exhibit 43, a document that I had prepared for Shaffer, to identify for my White House colleagues the individuals who I believed had been involved in the Watergate crimes, both before and after the break-in.

I included myself in the list.

"That's also an interesting document," Talmadge begins. "As I recall your testimony as you presented it yesterday, it's a list of all of the people that you thought had violated the law and what the laws may be that they violated, is that correct?"

"That is correct," I respond, speaking in a deliberately emotionless, almost robotic, monotone. My flat-voice affect is purposeful. I know that the content of what I am saying carries enough of an explosive charge on its own. I want to avoid the appearance of sensationalism in my delivery.

"Let's start with the top of the list. Now, that's in your own handwriting, is it not?"

"That is correct."

"And this is a copy thereof?"

"That is correct."

"What is the significance of the letters at the top left-hand part of that sheet?"

I begin to explain the document, which had been blown up and printed on poster board so that those in the audience might follow along.

"The list is broken down into two parts, Senator," I respond. "One says 'Pre' and the other is 'Post.' And this is—"

Talmadge interrupts. "By 'Pre' you mean *prior* to the Watergate break-in?" (In his Georgia accent, the word "prior" came out sounding like "*priah*.")

"That is correct."

"The planning and execution of those events?"

"That is correct."

"And you list in that category Mr. Mitchell, Mr. Magruder, and Mr. Strachan, is that correct?"

"That is correct."

"Now, you have a star by Mr. Mitchell's name, no star by Mr. Magruder—"

I interrupt Talmadge, in the hope of shortcutting the need for further drawn-out questioning: "Well, let me understand—let me—maybe if I explain the whole list, it would save some questions for you."

"Sure," Talmadge readily accedes.

I proceed to march through the list of names of those involved, both before and after the break-in. "I have listed for 'Pre'—Mitchell, Magruder, Strachan. 'Post'—Haldeman, Ehrlichman, Dean, LaRue, Mardian, O'Brien, Parkinson, Colson, Bittman, Kalmbach, Tony—I have, that's the word, 'Source'—I'll explain that in a minute—[and] Stans."

Soon I get to the heart of Senator Talmadge's question—the meaning of the stars placed next to many of the names. "Now, beside several of the names, after I did the list, I said—my first reaction was, 'There certainly are an awful lot of lawyers involved here.' So I put an asterisk beside each lawyer, which was Mitchell, Strachan, Ehrlichman, Dean, Mardian, O'Brien, Parkinson, Colson, Bittman, and Kalmbach."

The crowd audibly reacts to this testimony with a gasp of astonishment mixed with an undercurrent of laughter. Virtually every name on the list belongs to someone who is a lawyer, although this list does not include President Nixon or G. Gordon Liddy, both lawyers, nor a dozen other lawyers by education and training who had a hand in some aspect of the scandal.

Talmadge asks me to reaffirm that significance of the stars: "They're all lawyers?"

I responds with a comment that will reverberate around the country: "That was just a reaction to myself to the fact that how in God's name did so many lawyers get involved in something like this?"

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My rhetorical question hit a nerve, but I had no idea of its impact until years later, when two lawyers—Robert Kutak and Ron Rotunda—would explain the significance of my interaction with Senator Talmadge.

Kutak was a public finance lawyer from Omaha, Nebraska. Born in Chicago in 1932 and graduated from the University of Chicago Law School in 1955, he clerked for an Omaha judge before following Senator Roman Hruska (R-NE) to Washington, DC.

With his Buddy Holly glasses, Kutak was a dynamo. I met him during his time as a Senate staffer in Washington. He would return to Omaha to found the Kutak, Rock law firm that many consider to be the first experiment in a national law firm, with offices in Omaha, Denver, Atlanta, and the District of Columbia.

His interests were many and his curiosity voracious. When he was asked by the American Bar Association to chair the ABA Commission on Evaluation of Professional Standards, he readily agreed. The commission would take his name and become known for creating the ABA Model Rules of Professional Conduct.

Ron Rotunda, a graduate of Harvard Law School, joined the Watergate investigation as assistant majority counsel for the Senate Watergate Committee. He used that experience as a springboard to take up the question of legal ethics and became one of the nation's leading authorities on lawyer ethics, writing, with Professor John S. Dzienkowksi, the go-to resource in this area, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, now in its 12th edition.

Currently at Chapman University School of Law, he spent

most of his career at the University of Illinois. His proximity to the ABA's headquarters in Chicago facilitated much interaction with the ABA, including his role in its ethics work.

I had graduated from Georgetown Law School in 1965 and worked on the Hill for the House Judiciary Committee, where I came to the attention of John Mitchell and others at the Department of Justice as a result of some work I had done drafting a new national criminal code.

I was offered the number 13 position at the Department of Justice, where I served Attorney General Mitchell and his second-in-command, Dick Kleindienst.

Neither of these men enjoyed doing press briefings, so I was sent over to the White House to do background briefings with the press, which is where I came into contact with most of the players in the White House.

When John Ehrlichman was promoted from his White House counsel position to become the president's chief domestic advisor, I was asked to take his place. It was July 1970, just two months after the Kent State shootings. I was 31 years of age.

Why so Many Lawyers Broke the Law

Later, following Watergate, Kutak asked me to come to Omaha to speak informally with a few members of his commission on the new Model Rules. He was most concerned that his reforms be practical and useful, so he wanted to hear from me directly why I thought so many lawyers had crossed the line in Watergate and what could be done about it.

We talked late into the night, and I later spent time with his group trying my best to explain why apparently smart and savvy men (they were all men), who did not enter office intending to violate the law, could so easily have become enmeshed in this great scandal.

I have thought much about this question over the years. On the occasion of the 25th anniversary of Watergate in April 2000, I agreed to be part of a symposium panel that took up this very topic, sharing billing with Ken Starr at the University of California, Hastings College of Law. My remarks that day have been published, 51 *Hastings L.J.* 609–59.

I today organize my thinking about this question of why lawyers broke the law into four categories:

- Arrogance toward the law
- Incompetence
- Unquestioning loyalty to the client
- Confusion about the identity of the client

A few during the Nixon administration truly held an arrogance toward the law. Certainly, Tom Huston, special counsel to the president before my time, who had proposed a plan of black-bag jobs, wiretaps, and other clearly illegal actions to deal with war protesters, was one of the leading candidates. Nixon approved the plan. Federal Bureau of Investigation Director J. Edgar Hoover, who by this time seemingly had had enough of these sordid tactics, was the person to kill the idea. Gordon Liddy was also a lawyer who viewed the world in Nietzschean terms, openly admiring, for example, Leni Riefenstahl's *Triumph of the Will*, a Nazi propaganda film that he played for colleagues at a party at his home. "Might makes right," as far as Liddy was concerned.

Liddy's open disdain for the law emerged when it came to the Watergate break-in and the break-in nine months earlier at the offices of Daniel Ellsberg's psychiatrist in Beverly Hills. Liddy and his plumber friend E. Howard Hunt were searching for dirt on Ellsberg in the operation. Ellsberg had released the so-called Pentagon Papers in the summer of 1971, top secret government documents on America's involvement in the Vietnam War, and had been arrested on espionage charges.

Nothing quite captures this arrogance toward the law better than David Frost's interview with Richard Nixon, so dramatically portrayed in director Ron Howard's film *Frost/Nixon*.

When Frost finally asked Nixon if, in hindsight, it wouldn't have been better to do legally that which Nixon chose to do illegally, Nixon hesitated for only a second. "Well," he replied, "when the president does it, that means that it is not illegal."

The incompetence factor is obvious, including my relative youth and lack of experience in the criminal law; little did I know that one needed to be a highly trained criminal lawyer to be White House counsel in the Nixon administration.

Unquestioning loyalty to the president also substantially clouded judgment. The inclination to protect the powerful from unpleasant facts, and to seek and obtain rewards for unwavering loyalty, is at the heart of many scandals.

But new to me in recent years has been the realization that confusion about "who is the client" contributed hugely, and it often wreaks havoc for any attorney representing an organization.

The True Identity of Clients

I thought I represented Richard Nixon—the person—not the Office of the President. The confusion was not mysterious. I was asked to play the role of intermediary in highly personal matters, like estate planning, sometimes even meeting with the First Lady to discuss details.

But the law as it has developed makes it clear that I represented the Office of the President, not the person in that office. My duties were to the organization. *See* Model Rule 1.13.

While this sounds simple, it really isn't. In every representation of an organization, there is a confusion that can develop about the true identity of the client.

Lawyers of corporations or partnerships or unions are hired by general counsel or some of the "constituents" who run the organization. A lawyer needs to take direction from these constituents.

There are personal relationships that exist or develop that account for the lawyer getting the work in the first place. But the Model Rules, as hashed out by Kutak, make it abundantly clear that the client is the organization, and not the people running the organization.

This contrasts with the imprecise language of the ABA Model Code of Professional Responsibility, which merely provided that one "owed his allegiance" to the entity—a vague and ambiguous concept.

My job in 1972 following the break-in, as it turns out, was not to represent or protect Nixon in his reelection effort. My job was to protect the Office of the President, in that instance to protect it from the very people running that office.

Had I viewed the world in those clear terms, I hope I might have acted differently.

But what about blowing the whistle on the client? Suppose I had possessed the knowledge, insight, and moral character to stand up and tell the people running the White House during the first weeks following the Watergate break-in not to engage in the payment of hush money to the burglars, Hunt, and Liddy.

What if they ignored my advice? What could I have done about it? What leverage did I have to make people sit up and take notice?

That question was answered by my friend Ron Rotunda, who drew for me a direct line from my Senate testimony and my exchange with Senator Talmadge to the current professional rules being adopted around the country.

The public reacted, Ron told me, to my rhetorical question, How could so many lawyers have crossed the line and become mixed up in the Watergate crimes?

Perhaps as troubling, how could ethical lawyers stand by passively while future crimes were being planned by their clients, or remain mute when the crimes of their clients were, inherently by their nature, continuing or had ongoing impacts and consequences?

Was it really the case that lawyers had to remain silent in accordance with the ethical duty of confidentiality to their clients? Was it true that, at most, all a lawyer could do when faced with a client's plan for future crime or fraud was to counsel against such acts but that, in the end, if the client persisted, the lawyer could only quietly resign?

Shouldn't there be exceptions, especially when crimes or fraud would have future impacts that could be avoided?

The public outcry reached into the upper echelons of the legal profession, especially within the American Bar Association. Although the new ethics regime, known as the Model Code of Professional Responsibility, had been only recently debated and just enacted (in 1969), some within the ABA thought, after Watergate, that the Code was already outdated and in need of reform, in part due to my testimony about the prevalence of lawyer misconduct.

Hence, the Kutak Commission. That group would take up the specific question, among others, of what a lawyer may reveal about client misconduct in the course of representing an organization.

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Most of the seeds of the cover-up were sown during the first week following the break-in.

The cover-up began in the days following the arrests at the Watergate and led to at least two major discussions between the president and his chief of staff, Bob Haldeman, on how the investigation might be blunted.

In the first discussion, on Wednesday, June 21, 1972, the president and Haldeman considered a plan to have Gordon Liddy confess and take full responsibility.

In the second, which took place at the end of the week, on Friday, June 23, 1972, the president and Haldeman discussed a plan to have the CIA intervene with the FBI to rein in the investigation, which Acting Director Patrick Gray had told Dean was "out of control." That discussion was recorded by the White House taping system, a voice-activated system tied to where the president was at all times; the system was known to only a few in the White House.

When the existence of the taping system became known—after my testimony in which I suggested my suspicion that a taping system might have existed—the White House tapes, including the June 23 conversation, were subpoenaed.

A year later, when the Supreme Court agreed that the tapes must be produced, the tape of the June 23 conversation became known as the "smoking gun" tape, as it gave the lie to Nixon's defense that he knew nothing about the cover-up until I had told him on March 21, 1973, a bogus firewall he invented.

Nixon's resignation followed on August 8, 1974.

Today's Rules

[*Dean and Robenalt:*] What would Dean have been able to do under today's rules that might have helped him address the criminal activity he uncovered?

This is not meant to be revisionist history. We are not suggesting that Dean would have acted any differently, even given clearer rules. Nor are we ignoring that the law at the time did have allowances for disclosing client crime, albeit rules that weren't followed with any sense of regularity.

Confusion and threats of sanctions for revealing client confidences made it more likely than not that a lawyer would not think to disclose even future crime, especially when the lawyer's services were not being used to further the crime or fraud.

And we know that it was also the norm that if a lawyer disagreed with a client's course of conduct, as a practical matter, quiet withdrawal was really the only recourse.

What did Dean face after learning of the arrests? He had been in the Philippines giving a speech when the burglars were discovered at 2:00 a.m. on Saturday, June 17, 1972. He returned to Washington late Sunday night and went to his office in the Old Executive Office Building, the ornate French Second Empire–style building adjacent to the White House, which once housed the State, War, and Navy Departments.

On Monday, June 19, Dean met with about a dozen key figures in the Watergate matter: Jack Caulfield, Jeb Magruder, John Ehrlichman, Chuck Colson, Gordon Liddy, Hugh Sloan, Gordon Strachan, John Mitchell, and others.

All made it clear that the White House knew who the men were who were in jail and that the break-in had been conducted by the Committee to Re-elect the President (CRP).

Although a false press release had been issued the day before by John Mitchell—essentially calling the operation a frolic by misguided people, activity that the campaign would not condone—in fact, the White House knew that Gordon Liddy and E. Howard Hunt, both working for the CRP, had orchestrated the break-in.

And it was a second break-in—the first had failed, as the bugs that were installed were defective and were placed on the wrong phones.

Moreover, it quickly was learned that some of the same men who carried out the Watergate break-in had participated in the break-in at Dr. Lewis Fielding's office in Beverly Hills in 1971, looking for dirt on one of Fielding's patients, Daniel Ellsberg.

These same men therefore needed money for bail, for attorneys, and for their families, as they had been promised by Liddy, who made "commitments" in the event they were arrested.

Thus, Dean encountered past crime committed for an entity not his client (the CRP and the Watergate break-ins), past crime committed for the entity he did represent (the White House plumbers' crimes such as the break-in at Ellsberg's psychiatrist's office), and future crime planned for both entities (the payment of hush money to keep the arrested men from talking).

Under today's rules, had Dean been so inclined, he could have taken that information and reported it to his superiors, Haldeman and Ehrlichman.

If not satisfied with their response, he could have used his leverage to get to "the highest authority," Nixon; and, if he were frustrated in his attempts to get to Nixon, in concept he could have threatened to go outside the White House to disclose what he knew, as his "exhaustion of internal remedies" would have been blocked, triggering his ability to go public.

Once with Nixon, Dean could insist that the future-crime plan to pay hush money be abandoned, again under threat of going public.

This is not entirely an academic exercise. During that first week, on the evening of Tuesday, June 20, 1972, Nixon discussed with Haldeman the idea of Cuban Americans forming an open and obvious committee in Miami to create a "defense fund" for the jailed burglars, knowing as he did the animus of the Miami Cubans to the antiwar McGovern Democrats.

If such a fund had been opened and not directed by the White House, payments to the burglars might not have amounted to hush money. As it was, the White House was in charge of payments made by leaving paper bags for pick-up on park benches or in airport lockers.

In history, by the time Dean warned Nixon that there was a cancer growing on his presidency, it was too late. That famous talk took place nine months later, on March 21, 1973.

By then, Nixon was in too deep, and hundreds of thousands of dollars had already been paid in hush money.

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Across time, our legal profession has struggled with the astonishing tension between the sacred duty of confidentiality and the public good in reporting incipient fraud or crime.

Although the standards of legal ethics have allowed, and seemingly required, lawyers to report a client's intention to commit a future crime or fraud, the reality is that the profession has frequently defaulted to a nearly absolute protection of client confidentiality.

The privilege, as broadly interpreted to include not just the attorney-client privilege but also anything "embarrassing" to the client, has, in the eyes of the profession, time and again trumped the need to report crime or fraud that is about to happen or that has happened but has continuing impacts.

That is at the heart of this critical change. And the true genesis of the change can be traced back to Watergate and to Dean's testimony before the Ervin Committee in 1973 about how so many lawyers crossed the line in Watergate and participated in crime or its cover-up, including the president of the United States, Richard M. Nixon, Duke University School of Law, Class of 1937. ■