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Partisanship and the Attorney General of the United States: Timely Lessons from Edward Levi and Griffin Bell about Repairing a Politicized Department of Justice

Patrick E. Longan
Mercer University School of Law, LONGAN_P@law.mercer.edu

James P. Fleissner
Mercer University School of Law, fleissner_jp@law.mercer.edu

Partisanship and the Attorney General of the United States: Timely Lessons from Edward Levi and Griffin Bell about Repairing a Politicized Department of Justice

by Patrick E. Longan*

and James P. Fleissner**

I. INTRODUCTION

The proper role of the Attorney General of the United States has been much in the news in recent years. William Barr received scathing criticism for how he handled the Mueller Report regarding Russian interference in the 2016 election; the sentencing of President Trump's associate, Roger Stone; the charges against President Trump's first national security adviser, Michael Flynn; and numerous other matters.[1]

* William Augustus Bootle Chair in Ethics and Professionalism in the Practice of Law, Mercer University School of Law. A.B., Washington University, M.A., University of Sussex, J.D., University of Chicago. Professor Longan acknowledges the financial assistance of the Gerald R. Ford Foundation, which provided a travel grant that enabled him to spend several weeks at the Gerald R. Ford Presidential Library in Ann Arbor, Michigan, conducting research for this project. Professor Longan also expresses his thanks for the assistance of the staff of the Ford Library and of the Special Collections Research Center at the University of Chicago, where Edward Levi's papers are held. Professor Longan thanks Mercer University for the sabbatical leave granted for the purpose of conducting the research that led to this article. Finally, the authors gratefully acknowledge the intrepid research assistance of Jameson Fisher, Mercer Law Class of 2021, as well as the editorial assistance of Dr. Mary Wilder and Gretchen Longan.

** Professor of Law, Mercer University School of Law. B.A., Marquette University, J.D., University of Chicago.

[1] One United States District Judge who compared Attorney General Barr's statements about the Mueller Report and the report itself wrote in an opinion:

Mr. Barr's critics accused him of perverting his office from one that served the rule of law in a nonpartisan fashion into one that catered to President Trump's personal and political desires.[2] Many of these critiques condemned Barr's flouting of the traditional norms of the Department of Justice that exist to guard against its politicization.[3]

Mr. Barr was not the first Attorney General to be accused of allowing the Department of Justice to be politicized. Woodrow Wilson's Attorney General allegedly conducted a series of unconstitutional "raids" on political dissidents for the purpose of furthering his political ambitions.[4] Several presidents appointed Attorneys General who had

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> [T]he Court cannot reconcile certain public representations made by Attorney General Barr with the findings in the Mueller Report. The inconsistencies between Attorney General Barr's statements, made at a time when the public did not have access to the redacted version of the Mueller Report to assess the veracity of his statements, and portions of the redacted version of the Mueller Report that conflict with those statements cause the Court to seriously question whether Attorney General Barr made a calculated attempt to influence public discourse about the Mueller Report in favor of President Trump despite certain findings in the redacted version of the Mueller Report to the contrary.

Electronic Privacy Information Center v. United States Department of Justice, 442 F. Supp. 3d 37, 50–51 (D.D.C. 2020). For a more general critique of Attorney General Barr's conduct as Attorney General, including a description of him as a "lickspittle" to President Trump, *see* Ruth Marcus, *Barr failed at his job. His bootlicking resignation letter made that clear*, WASH. POST (Dec. 14, 2020, 9:14 AM), https://www.washingtonpost.com/opinions/2020/12/14/barr-failed-his-job-his-bootlicking-resignation-letter-made-that-clear/.

[2] *See*, *e.g.*, Editorial Board, *William Barr's Perversion of Justice*, N.Y. TIMES (May 9, 2020), https://www.nytimes.com/2020/05/09/opinion/sunday/michael-flynn-william-barr-justice-department.html ("The attorney general is turning the Justice department into a political weapon for the president").

[3] *See*, *e.g.*, Editorial Board, *The degradation of William Barr's Justice Department is nearly complete*, WASH. POST (Feb. 12, 2020, 4:02 PM), https://www.washingtonpost.com/opinions/the-roger-stone-fiasco-further-diminishes-the-justice-department/2020/02/12/d90ce0be-4dcd-11ea-9b5c-eac5b16dafaa_story.html ("Mr. Barr should have ensured that Mr. Stone's case was handled with strict professionalism, as the career prosecutors sought to do, and shielded them from White House pressure, direct or indirect. To all appearances, he did the opposite"). For a comprehensive and highly critical review of Barr's service as Trump's Attorney General, *see Report on the Department of Justice and the Rule of Law Under the Tenure of Attorney General William Barr*, Center for Ethics and the Rule of Law Ad Hoc Working Group, University of Pennsylvania, Oct. 12, 2020 (available at https://www.law.upenn.edu/live/files/10900-report-on-the-doj-and-the-rule-of-law).

[4] *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on the Separation of Powers of the Committee on the Judiciary United States Senate,* 93d Cong. 142 (1974).

held senior positions in their presidential campaigns.[5] George W. Bush's Justice Department engineered the firing of numerous U.S. Attorneys, allegedly for political reasons, and produced legal opinions that justified the administration's use of torture.[6] Eric Holder, President Obama's first Attorney General, described himself as the President's "wing-man."[7] Obama's second Attorney General, Loretta Lynch, suffered withering criticism for meeting with former President Bill Clinton while Hillary Clinton was under investigation by the FBI.[8] Claims that the Department of Justice and the Office of Attorney General have been politicized have been common throughout our history and, in all likelihood, will continue to be so.

In recent times, the most egregious politicization of the Office of Attorney General, at least until Barr came along, occurred during the Nixon Administration.[9] President Nixon's first Attorney General, John Mitchell, was the President's close personal friend, former law partner, and campaign manager.[10] He went to prison for his role in the

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[5] DANIEL JOHN MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE (1980).

[6] *Editorial: A rescue plan for the Justice Department*, 92 JUDICATURE 4, 144 (2009); DAVID IGLESIAS, IN JUSTICE: INSIDE THE SCANDAL THAT ROCKED THE BUSH ADMINISTRATION (2008).

[7] Josh Gerstein, *Eric Holder: 'I'm still the President's wingman,'* POLITICO44 BLOG (Apr. 4, 2013, 12:31 PM), https://www.politico.com/blogs/politico44/2013/04/eric-holder-im-still-the-presidents-wingman-160861 (when Holder was asked if he intended to stay on as attorney general in President Obama's second term, he said, "I'm still the President's wing-man, so I'm there with my boy. So we'll see[.]").

[8] *See*, *e.g.*, Mark Landler, *Meeting Between Bill Clinton and Loretta Lynch Provokes Political Furor*, N.Y. TIMES (June 30, 2016), https://www.nytimes.com/2016/07/01/us/politics/meeting-between-bill-clinton-and-loretta-lynch-provokes-political-furor.html.

[9] Senator Adlai Stevenson of Illinois summed the situation up this way at the confirmation hearings of Edward Levi as Attorney General in January 1975:

> It is a sad fact that the Department of Justice was a principal victim of the Watergate era. In past years the Department's carefully built reputation for evenhandedness and professionalism was abused by those who took it over. The office of Attorney General became, for a time, a headquarters for political dealing[.]

Nomination of Edward H. Levi to be Attorney General: Hearings before the Senate Committee on the Judiciary, 94th Cong. 1, 4 (Jan. 27, 1975, 10:40 AM).

[10] For a description of Nixon's relationship with Mitchell, *see* FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON 10 (1994).

Watergate scandal.[11] Mitchell's successor, Richard Kleindienst, pled guilty to lying to Congress about President Nixon's attempted interference with an antitrust case.[12] When events related to Watergate forced Kleindienst's resignation, the President appointed Elliot Richardson, who chose to resign several months later when the President ordered him to fire Archibald Cox, the Watergate Special Prosecutor.[13] Throughout the Watergate investigation, Henry Petersen, the Assistant Attorney General in charge of the Criminal Division during the Nixon Administration, served as an "open conduit" of information about the investigation to the President and his aides as the Watergate cover-up proceeded.[14] Petersen felt the need at one point to tell the press, "I'm not a whore,"[15] but he later reflected, "If I had to say what the greatest crime of the Nixon administration was, I'd have to say it was the public's loss of confidence in the government, in the Justice Department. It's a lot harder to regain confidence than to lose it."[16]

In the aftermath of the Nixon Administration, both President Ford and President Carter made commitments to depoliticize the Department of Justice and to try to heal the scars left by Watergate.[17]

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[11] Lesley Oelsner, *Mitchell, Haldeman, Ehrlichman are Sentenced to 2 ½ to 8 Years, Mardian to 10 Months to 3 Years*, N.Y. TIMES (Feb. 22, 1975), https://www.nytimes.com/1975/02/22/archives/mitchell-haldeman-ehrlichman-are-sentenced-to-2-to-8-years-mardian.html.

[12] Anthony Ripley, *Kleindienst Admits Misdemeanor Guilt*, N.Y. TIMES (May 17, 1974), https://www.nytimes.com/1974/05/17/archives/kleindienst-admits-misdemeanor-guilt-accused-of-keeping-data-from.html.

[13] For an excellent and succinct description of the so-called "Saturday Night Massacre," *see* KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 1, 338–58 (1997).

[14] *Id.* at 56. John Dean, Nixon's White House Counsel and the coordinator of the Watergate cover-up, is the one who described Petersen as a "open conduit" and also said of Petersen: "He told me everything I needed to know. And then some." *Id.*

[15] Peter Osnos & Richard M. Cohen, *Key Petersen Role in Probe Shown,* WASH. POST (May 3, 1974) *reprinted in Removing Politics, supra* note 4, at 505–08.

[16] Mitchell C. Lynch, *Rebuilding Morale at Justice*, WALL ST. J. (Feb. 24, 1975).

[17] At Levi's memorial service in 2000, President Ford reflected on that commitment: "Within months of taking office I found myself looking for a new Attorney General. No more critical decision would cross my desk. The situation demanded someone of towering intellect and spotless integrity. No campaign managers need apply, nor members of the family, official or political." *Gerald R. Ford's Remarks at the Memorial Service for Ed Levi, April 6, 2000* (photocopy from Gerald R. Ford Library, on file with authors). Griffin Bell described his and President Carter's approach to the alleged partisanship of the Department of Justice in this way:

> I happen to understand, with Governor Carter, that, if I am to be the Attorney General, we want to professionalize the Department of Justice. We want to depoliticize it to the extent possible. Otherwise, I would not care to be the

President Ford chose Edward H. Levi, a legal scholar and President of the University of Chicago, to serve as Attorney General. President Carter turned to Griffin Bell, a Georgia lawyer who had served for almost fifteen years on the United States Court of Appeals for the Fifth Circuit.

On a personal level, Levi and Bell were remarkably different. Levi was a bow-tied academic who spent most of his working life at the University of Chicago.[18] He had an earned reputation for being "prickly."[19] In contrast, Judge Bell was a gregarious raconteur who, it was said, "could light up any room with his personal warmth and entertain all with his stories drawn from a life of incredible depth and breadth."[20] These two very different men were asked by the presidents who appointed them to do the same thing: to restore the credibility and morale of the Department of Justice in the wake of Watergate.[21]

The historical judgment is that they succeeded. In the 1970s, Congressman Pete McCloskey opined that President Ford's "greatest contribution to the Nation may perhaps turn out to be his appointment of the nonpolitician, Edward Levi, as Attorney General—and the preserving of the Attorney General's independence from presidential influence in matters of political concern . . . ."[22] McCloskey stated that with the appointment of Bell, President Carter "continued the tradition of independence . . . ."[23] In 2018, a columnist in the New York Times wrote: "[F]or all their differences, Levi and Bell came to share a

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> Attorney General; he would not care for me to be the Attorney General, either. His ideas and mine are the same on that.

The Prospective Nomination of Griffin B. Bell, of Georgia, to be Attorney General, Hearings before the Committee on the Judiciary United States Senate, 95th Cong. 1, 20 (1977).

[18] *See* Victor S. Navasky, *The Attorney General as scholar, not enforcer*, N.Y. TIMES (Sept. 7, 1975).

[19] This was one of the comments of George Schultz about Levi relayed by President Ford's Chief of Staff, Donald Rumsfeld, to Ford's White House counsel, Philip Buchen, when Buchen was vetting the suggestion of nominating Levi as Attorney General. Notes on individuals being considered for attorney general, Dec. 1974, folder: Justice–Personnel–Attorney General (1), box 24, Philip Buchen Papers, Gerald R. Ford Library.

[20] John C. Bell, Jr., *President's Foreword*, 18 J.S. LEGAL HIST. viii (2010).

[21] The authors note that each knew both Levi and Bell, although not well. Levi taught both authors at the University of Chicago Law School, and the authors came to know Judge Bell when they joined the faculty of Bell's alma mater, Mercer University School of Law.

[22] H.R. 96-280, 96th Cong. 1, 28 (1979).

[23] *Id.*

mission. Together they created the modern Department of Justice and, more important, the modern American idea of the rule of law . . . ."[24] More recently, at the press conference at which President Biden introduced Merrick Garland as his nominee for Attorney General, Judge Garland noted that when he took his first job at the Justice Department in the late 1970s, "Ed Levi and Griffin Bell, the first attorneys general appointed after Watergate, had enunciated the norms that would ensure the department's adherence to the rule of law."[25]

The deeper question is how Levi and Bell accomplished that task. They did not do so by sitting in their offices and exuding integrity. Levi had to deal with the issues of the day, including Watergate prosecutions, busing, gun control, intelligence gathering, an appointment to the Supreme Court of the United States, criminal justice reform, and the Presidential campaign of 1976. Levi once described the job as "one damn thing after another."[26]

The same was true for Bell. He had to make decisions whether to investigate and prosecute powerful Congressmen and high officials of the FBI and CIA. He helped formulate the government's position in politically explosive cases involving affirmative action, civil rights, and the handover of the Panama Canal.[27] The lessons of how Levi and Bell restored the Department of Justice and the Office of Attorney General

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[24] David Leonhardt, *The Sense of Justice We're Losing*, N. Y. TIMES (Apr. 29, 2018), https://www.nytimes.com/2018/04/29/opinion/the-sense-of-justice-that-were-losing.html.

[25] *Biden introduces Merrick Garland as nominee for attorney general,* YOUTUBE, (Jan. 7, 2021), (23:45), https://www.youtube.com/watch?v=gtJOJ2jayPw.

[26] Katherine Graham, *In Memoriam: Edward H. Levi (1912–2000)*, 67 U. CHI. L. REV. 979, 980 (2000). This was no exaggeration. Just weeks after Levi was sworn in, James Lynn, the Director of the Office of Management and Budget, sent the president a memorandum with suggested topics for the president's upcoming meeting with Levi. The memo listed rising crime, the need for more data about the cost of crime, coordination of federal law enforcement activities, antitrust enforcement, and the need to improve the FBI, the Immigration and Naturalization Service, the Law Enforcement Assistance Administration, and the Drug Enforcement Administration. Memorandum, Lynn to Ford, Feb. 27, 1975, folder: Justice, Edward H. Levi, box 2, James E. Connor Papers, Gerald R. Ford Library. The list for Merrick Garland is, if anything, longer and more daunting. Jennifer Rubin, *Opinion: What Merrick Garland should tell us*, WASH. POST (Jan. 17, 2021, 10:00 AM), https://www.washingtonpost.com/opinions/2021/01/17/what-merrick-garland-should-tell-us/.

[27] For general background of Bell's time as Attorney General, *see* GRIFFIN B. BELL WITH RONALD J. OSTROW, TAKING CARE OF THE LAW (1982). For discussion of some selected events, *see* REG MURPHY, UNCOMMON SENSE 1, 189–248 (1999). A more contemporaneous survey of issues he faced when he took office appears in Richard E. Cohen, *Griffin Bell—The Georgia 'Outsider' Finds Some Problems 'Inside,'* THE NATIONAL JOURNAL (Sept. 24, 1977).

are not abstract. The lessons are instead embedded in the way Levi and Bell conducted themselves in office.

Those lessons, whatever they may be, are not just of academic interest. Levi presciently noted that the day might come when another Attorney General would have to build the Department of Justice back up after a period of politicization. In his farewell address to Department employees on January 17, 1977, as he was about to hand over the leadership of the Department to Bell, Levi said, "We have shown that the administration of justice can be fair, can be effective, can be non-partisan. These are goals that can never be won for all time. They must always be won anew."[28] Senator Abourzek gave the same warning in a more colorful way during the confirmation hearings for Griffin Bell: "There might be a future Richard Nixon, God forbid."[29] An understanding of how Ed Levi and Griffin Bell led the Department of Justice back from the wreckage of Watergate will be useful whenever the time comes to "win anew" the goal of a nonpartisan, depoliticized Department of Justice.

In the eyes of many observers, we have now entered one of those times. William Barr's conduct as Attorney General led thousands of former officials to call for his resignation, first for his handling of the Roger Stone case,[30] and later for his actions in connection with the Michael Flynn case.[31] There were calls for Barr to be impeached.[32] Some of Barr's own prosecutors resigned from positions, cases, and even from government service rather than support some of his actions.[33] Barr left

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[28] Edward H. Levi, Attorney General of the United States, *Farewell Remarks of the Honorable Edward H. Levi Before the Employees of the U.S. Department of Justice* 2 (Jan. 17, 1977, 3:30 PM), transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/01-17-1977.pdf.

[29] *The Prospective Nomination of Griffin B. Bell supra* note 17, at 114 (statement of Sen. James Abourzek).

[30] Katie Benner, *Former Justice Dept. Lawyers Press for Barr to Step Down*, N.Y. TIMES (Feb. 16, 2020), https://www.nytimes.com/2020/02/16/us/politics/barr-trump-justice-department.html.

[31] Alexandra Sternlicht, *2,000 Former FBI and DOJ Officials Call On Barr To Resign*, FORBES (May 11, 2020, 3:23 PM), https://www.forbes.com/sites/alexandrasternlicht/2020/05/11/2000-former-fbi-and-doj-officials-call-on-barr-to-resign/?sh=57f1a909171e.

[32] *See, e.g.,* Mark Hosenball, *U.S. ethics groups say Barr uses DOJ as political tool, call for his impeachment*, REUTERS (Oct. 12, 2020, 7:18 PM), https://www.reuters.com/article/us-usa-justice-barr/u-s-ethics-groups-say-barr-uses-doj-as-political-tool-call-for-his-impeachment-idUSKBN26X2RS.

[33] *See, e.g.,* Matt Zapotosky, Devlin Barrett, Ann E. Marimow, and Spencer S. Hsu, *Prosecutors quit amid escalating Justice Dept. fight over Roger Stone's prison term*, WASH.

the credibility and morale of the Department of Justice in tatters.[34] When it emerged that then-President-elect Joe Biden intended to nominate Judge Merrick Garland to serve as Attorney General, it was reported that "Garland's selection also echoed the decision in 1975 by President Gerald Ford to tap Edward H. Levi, a legal scholar and president of the University of Chicago, to restore credibility to the department in the post-Watergate era."[35] This is a time when the lessons of Levi's and of Bell's service will prove useful.

The purpose of this Article is to start the process of discerning those lessons for use now and any future time when an Attorney General takes office in the aftermath of a period of politicization of the Department of Justice. Part II provides background about the Office of the Attorney General and describes the distinction between an Attorney General's roles in "politics" as policy and "politics" as partisanship. Part III discusses the specific circumstances of the Watergate scandal and how it affected the Department of Justice. In Parts IV and V, we examine one episode from Levi's time as Attorney General and one from Bell's tenure, as examples from which future Attorneys General might learn. There is not enough room in one article to examine all of the issues they faced, but we hope that the two episodes we have chosen are instructive.

Professor Daniel Meador, who served in the Department of Justice in the Carter Administration, once wrote that the successive

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POST (Feb. 11, 2020, 8:44 PM), https://www.washingtonpost.com/national-security/justice-dept-to-reduce-sentencing-recommendation-for-trump-associate-roger-stone-official-says-after-president-calls-it-unfair/2020/02/11/ad81fd36-4cf0-11ea-bf44-f5043eb3918a_story.html; *see also* Katie Benner and Michael S. Schmidt, *Barr Hands Prosecutors the Authority to Investigate Voter Fraud Claims,* N. Y. TIMES (Nov. 9, 2020), https://www.nytimes.com/2020/11/09/us/politics/barr-elections.html.

[34] TIME magazine summed up the problem this way:

> That partial damage to the public perception of the Justice Department, former officials say, leaves a tricky dynamic waiting for Biden and his Attorney General next year. "When you have a reputation for integrity, if you lose it, it's very hard to get it back," says John Bies, a former Justice Department official under President Obama who is now chief counsel at American Oversight. "The same is true for the Justice Department. Once it loses that reputation, restoring it is actually a very hard task."

Tessa Berenson, *How Joe Biden and His New Attorney General Can Repair the Justice Department's Reputation*, TIME (Dec. 21, 2020, 12:53 AM), https://time.com/5921187/joe-biden-attorney-general-justice-department-challenges/.

[35] Matt Zapotosky, Devlin Barrett, and Ann E. Marimow, *Biden plans to nominate Merrick Garland as his attorney general*, WASH. POST (Jan. 6, 2021, 5:50 PM), https://www.washingtonpost.com/national-security/merrick-garland-biden-attorney-general/2021/01/06/071053ce-2dd4-11eb-bae0-50bb17126614_story.html.

appointments of Levi and Bell gave rise to the hope that thereafter Attorney Generals would "be in that mold . . . ."[36] That hope proved forlorn, but the service of Levi and Bell may at least provide a template for when an Attorney General takes office in the wake of a predecessor whose service was not in the independent tradition that Levi and Bell exemplified.

II. POLITICS AND THE ATTORNEY GENERAL

Before we take a look at what went wrong in Watergate and how Levi and Bell acted to bring the Department of Justice back on track, we need to put the Attorney General's job in some context. That requires an understanding of the difference between an Attorney General who acts properly as a politically appointed member of a President's administration and an Attorney General who abuses the office for partisan political purposes. It is also important to appreciate why such abuses are possible and so dangerous, and to examine what it takes to prevent them.[37]

A. Politics as Policy vs. Politics as Partisanship

No one defends the "politicization" of the Department of Justice. That term, however, requires some examination. Sometimes it is suggested that the Attorney General should be "apolitical" or that the Department of Justice should be independent of presidential control.[38] These suggestions miss the mark because the job of the Attorney General inevitably and rightly involves issues of public policy, and decisions about how those issues are handled should be in the hands ultimately of

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[36] Daniel J. Meador, *Griffin Bell at the Intersection of Law and Politics: The Department of Justice, 1977–1979*, 18 J.S. LEGAL HIST. 291, 302–03 (2010).

[37] For general background on the Office of the Attorney General and the Department of Justice, *see* CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY (2015); CORNELL W. CLAYTON, GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS (1995); NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789–1990 (1992); MEADOR, *supra* note 5. A number of former Attorney Generals met and discussed the complexities of the job at a 1992 conference at the Hastings Law School. THE OFFICE OF THE ATTORNEY GENERAL, https://c-span.org/video/?35169-1/office-attorney-general (discussion of the scope of the job occurs in the first ten minutes of the program).

[38] The Subcommittee on Separation of Powers of the Senate Judiciary Committee held several days of hearings in 1974 about making the Department of Justice independent of the president. *Removing Politics*, *supra* note 4.

people who are elected and responsible to the voters.[39] Much of a President's policy agenda might relate to the work of the Department of Justice. Decisions about antitrust enforcement relate to economic policy. Choices about how and when to enforce immigration laws can be important to foreign affairs, civil rights, and the composition of the work force. Whether to concentrate resources on the reform of policing practices or on combatting a rising crime rate will reflect policy judgments upon which a president may have campaigned. As a member of the President's cabinet and as a political appointee, the Attorney General inevitably plays a role in the formulation and execution of the president's approach to governing.[40] There is nothing insidious about that.

There is a difference, however, between being engaged in politics-as-policy and politics-as-partisanship.[41] The former is about the exercise of power duly granted to the President, and delegated to the Attorney General, as a result of democratic elections. The latter is about the use of the powers of the Office of the Attorney General for improper purposes such as to enhance or harm the political prospects of friends or foes or to administer the laws differently for people or institutions that are favored or disfavored by the President, the Attorney General, or others who are in power. The use of the powers of office for such

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[39] *Id.* at 119:

> It seems right, not wrong, to me that an administration give policy direction on such matters as busing, employment quotas, school district consolidations, and private discrimination in places of public accommodations. . . . It seems to me that under our political system Presidential candidates are entitled to run, and—more important—the nation's voters are entitled to vote for candidates on such issues.

Prepared Statement of Burke Marshall, former Assistant Attorney General for the Civil Rights Division.

[40] William Rehnquist, who later served as Associate Justice of the Supreme Court and then as Chief Justice of the United States, expressed the need for the Attorney General to be part of the public policy team of the President (at the time Rehnquist was an Assistant Attorney General):

> The plain fact of the matter is that any President, and any Attorney General, wants his immediate underlings to be not only competent attorneys, but to be politically and philosophically attuned to the policies of the administration. This is not peculiar to the Department of Justice, it is a common feature in staffing of virtually all of the Cabinet departments in the executive branch of Government.

Id. at 41 (quoted in testimony of Mitchell Rogovin, General Counsel of Common Cause).

[41] For an excellent general discussion of this distinction, and the difficulty in making it sometimes, *see* GOVERNMENT LAWYERS, *supra* note 37, at 16–21.

partisan or personal purposes is what it means for the Department of Justice to be "politicized." Such activities are abuses of power.

B. Why Politicization is Possible and Why it is Dangerous

It is important to understand how the Department can become politicized and how dangerous it is. First, recognize that the leaders of the Department of Justice have enormous discretionary power. An Attorney General or U.S. Attorney, for example, has broad prosecutorial discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas.[42] The Attorney General or the Director of the Federal Bureau of Investigation (FBI) (part of the Justice Department) might choose to make announcements about the existence or results of pending investigations, or not to do so.[43] On behalf of (or at least with the agreement of) the President, an Attorney General can dismiss a U.S. Attorney without cause.[44] Through the Solicitor General, the Department of Justice may file an amicus brief in the Supreme Court without leave of the Court, but there is nothing that requires it to do so.[45] Justice Department attorneys have discretion in how they handle information they learn in the course of an investigation (other than grand jury information) and, for the most part, to decide what witnesses will be brought before a grand jury.[46] The exercise of such discretion is, for all intents and purposes, unreviewable.

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[42] U.S. Dep't of Just., Just. Manual § 9-27.110 (2018).

[43] Perhaps the most famous examples are the decisions of James Comey as Director of the FBI to go public (twice) about the investigation into the handling of Hillary Clinton's emails when she was Secretary of State, in contrast to the FBI's silence about Russian interference in the 2016 presidential election. *See* JAMES COMEY, A HIGHER LOYALTY, 1, 164 (2018) ("In October 2016, there was no good reason for the FBI to speak about the Russians and the election . . . . But 'avoid action' was not an option when the Clinton email investigation came back to my office in October in a powerful and unexpected way . . . .").

[44] 28 U.S.C. § 541(c) ("Each United States Attorney is subject to removal by the President").

[45] U.S. Sup. Ct. R. 37 ("No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General.").

[46] When Henry Petersen testified before the Senate Select Committee on Presidential Campaign Activities (commonly known as the Senate Watergate Committee), he stated that the decision about sharing information with others in the executive branch, such as members of the White House staff, was not as a matter of legalities but rather was a matter of "prudence." *Hearings Before the Select Committee on Presidential Campaign Activities of the United States Senate,* 93d Cong. 3615 (1973) (transcript available at https://catalog.hathitrust.org/Record/003212943). Prudence is another word for discretion.

Because so many of the powers of the Attorney General are matters of unreviewable discretion, there are few enforceable guardrails against their abuse. For example, the Justice Manual of the Department of Justice has guidelines for charging decisions and numerous other discretionary decisions that prosecutors make, but the Justice Manual is an internal document that does not carry the force of law.[47] Similarly, the Department for a long time has had written policies about not revealing information that might help or hurt a candidate in the ninety days before an election, but there is no formal sanction for violating them.[48] If an Attorney General or other Department of Justice official were tempted to use their discretion for improper purposes, to a large extent they are free to do so without formal constraints.

Such power is dangerous if it is misused. At an individual level, use of the powers of the Department of Justice can have grave consequences. Anyone who is subjected to prosecution may suffer in ways that are ruinous to reputation and solvency even if they are acquitted.[49] A U.S. Attorney who is fired for not targeting members of the opposing party, or for too vigorously investigating the President,

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[47] The Justice Manual recognizes that the guidelines will only be effective if Department of Justice lawyers choose to follow its guidelines: "Important though these principles are to the proper operation of our prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the federal criminal justice process." Just. Manual § 9-27.110, *supra* note 42.

[48] For background on the so-called 90-day rule, particularly in the context of FBI Director James Comey's violation of it in 2016, *see* Eric Holder, *James Comey Is A Good Man, But He Made A Serious Mistake*, WASH. POST (Oct. 30, 2016), https://www.washingtonpost.com/opinions/eric-holder-james-comey-is-a-good-man-but-he-made-a-serious-mistake/2016/10/30/08e7208e-9f07-11e6-8832-23a007c77bb4_story.html; Jamie Gorelick and Larry Thompson, *James Comey is Damaging Our Democracy*, WASH. POST (Oct. 29, 2016), https://www.washingtonpost.com/opinions/james-comey-is-damaging-our-democracy/2016/10/29/894d0f5e-9e49-11e6-a0ed-ab0774c1eaa5_story.html; Jane Chong, *Pre-Election Disclosures: How Does, and Should, DOJ Analyze Edge Cases*, LAWFARE BLOG (Nov. 8, 2016, 9:10 AM), https://www.lawfareblog.com/pre-election-disclosures-how- does-and-should-doj-analyze-edge-cases.

[49] *See, e.g.,* Herb Jackson, *Justice Department moves to drop corruption case against New Jersey Sen. Bob Menendez*, USA TODAY (Jan. 31, 2018, 4:49 PM) https://www.usatoday.com/story/news/politics/2018/01/31/justice-department-asks-drop-menendez-indictment-ending-case-launched-2015/1083038001/ ("Though he has been cleared, the charges and 11-week trial have taken their toll on the 64-year-old Democrat. Menedez is currently one of the least popular senators in the country . . . ."); John Kennedy, *Once-Mighty Politician Back to Help Chiles*, ORLANDO SENTINEL (July 16, 1995), https://www.orlandosentinel.com/news/os-xpm-1995-07-16-9507160104-story.html (reporting on story of Mallory Horne, a Florida politician who was acquitted of money laundering but "left the courthouse personally and financially ruined").

will face a career disruption if not a derailment.[50] Having the weight of the federal government brought into a civil case could change the result for the disfavored party.[51] And making public the results of an investigation might sway an election.[52]

There are also more general types of harm that can flow from the decisions of a politicized Attorney General. The first is the undermining of the legitimacy of the rule of law itself. If the public perceives that the law means one thing for a supporter of the President and another for an opponent, people lose faith in the rule of law.[53] Law is supposed to be neutral, and that is one reason why it works: people voluntarily comply with the law when it is perceived to be legitimate.[54] But once its legitimacy is undermined, the law becomes just another partisan weapon to be deployed.[55]

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[50] *See* IGLESIAS, *supra* note 6.

[51] One example of this may be Regents of the University of California v. Bakke, 438 U.S. 265 (1978). One scholar described how the Justice Department changed its position in the process of writing its amicus brief, and "[t]he Justice Department's brief no doubt influenced the Court's plurality decision, which not surprisingly adopted the same position." GOVERNMENT LAWYERS, *supra* note 37, at 19.

[52] There has been much speculation that FBI Director James Comey's revelations about the investigation into Hillary Clinton led to Donald Trump's victory in the 2016 presential election. *See, e.g.*, Andrew Buncombe, *Bill Clinton: FBI Director James Comey 'cost' Hillary the presidential election*, THE INDEPENDENT (Dec. 19, 2016, 3:27 PM), https://www.independent.co.uk/news/world/americas/us-politics/bill-clinton-fbi-director-james-comey-cost-hillary-clinton-presidential-election-donald-trump-a7484636.html. Comey stands by his decision. COMEY, *supra* note 43, at 178 ("The 2016 presidential election was like no other for the FBI, and even knowing what I know now, I wouldn't have done it differently, but I can imagine good and principled people in my shoes making different choices about some things").

[53] Levi recognized the importance of perception. On May 21, 1976, he gave an address to the American Law Institute in which he said:

> One concern, which I believe is of general importance, is the image of the department of Justice. It is well enough to say that in the long run it is the reality and not the image which counts, but because of past events and because of the ways of our present society, the reality can become lost in the constant stream of images which may be quite false.

Remarks, Levi, May 21, 1976, folder: Law Enforcement—Remarks by Edward Levi, box 4, A. James Reichley Papers, Gerald R. Ford Library. Senator Alan Cranston, quoting Senator Sam Ervin, put the point this way: "A cornerstone of our system of justice is the faith of the American people in that system and their belief in its fairness." *Removing Politics*, *supra* note 4, at 9.

[54] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 1, 62 (1990); *see also Removing Politics*, *supra* note 4, at 9, 151.

[55] Ed Levi once criticized the notion that the "struggle for power is what is truly and only genuine" by saying that such a claim "diminishes reason, disparages the ideal of the

Furthermore, misuse of power by one Attorney General may beget abuse by the next, as when a new Attorney General is urged to engage in payback for the misdeeds of the last.[56] Perhaps more subtly, abuse of power by the Attorney General undermines the morale and therefore the effectiveness of the career personnel in the Department of Justice, most of whom serve during multiple presidential administrations of both parties. They serve best when they have faith that the Attorney General is supporting them in their mission: the application of the law equally to everyone, without fear or favor. When they see their judgments reversed or ignored, or see years of effort thrown away, for partisan reasons, it is demoralizing.[57] The effective and fair administration of the law depends upon the day-to-day efforts of these career professionals, and abuses at the highest levels take a toll.

C. The Primacy of Character

Because the potential for abuse of the Attorney General's broad discretionary power is largely unconstrained by law or other

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common or public good, and adds legitimacy to the notion that law is only one more instrument among many to be manipulated." Edward H. Levi, In the Service of the Republic: A Speech to the Fellows of the American Bar Foundation, *in* RESTORING JUSTICE: THE SPEECHES OF ATTORNEY GENERAL EDWARD H. LEVI, 45 (Jack Fuller, ed.) (2013).

[56] This issue is sure to receive much attention, regardless of whether the Biden Justice Department decides to prosecute Donald Trump or other members of the Trump Administration for crimes allegedly committed while Trump was President. For a glimpse at the debate, *see* Spencer Bokat-Lindell, *Opinion: Should Trump Be Prosecuted?,* N.Y. TIMES (Dec. 3, 2020), https://www.nytimes.com/2020/12/03/opinion/trump-biden-prosecute.html.

[57] The effect of politicization on morale at the Department of Justice is a consistent refrain whenever it appears that partisanship is motivating decisions. *See* Richard E. Cohen, *Justice Report—Richardson Moves to Assert His Control of Watergate-Shaken Justice Department*, NATIONAL JOURNAL (July 14, 1973) (reprinted in *Removing Politics*, *supra* note 4, at 487–95) (listing reasons for low morale at the Department of Justice in 1973). For a sample of such comments relating to William Barr, *see* Matt Zapotosky and Karoun Demirjian, *Analysts say William Barr is eroding Justice Department independence–without facing any real personal consequence*, WASH. POST (June 24, 2020, 6:51 PM), https://www.washingtonpost.com/national-security/analysts-say-barr-is-eroding-justice-department-independence--without-facing-any-real-personal-consequence/2020/06/24/459778ca-b647-11ea-a8da-693df3d7674a_story.html ("[m]orale inside the Justice Department has plummeted, according to several Justice Department employees who spoke on the condition of anonymity to discuss the matter frankly"); Robert Storace, *Morale Low at Department of Justice Under William Barr's Leadership, Ex-Staffers Say*, LAW.COM (Feb. 19, 2020, 5:32 PM), https://www.law.com/ctlawtribune/2020/02/19/morale-low-at-department-of-justice-under-william-barrs-leadership-ex-staffers-say/?slreturn=20210020141917.

formalities, and because such abuses are so destructive, it is crucial that the Attorney General be a person with a particular character. When there are so few guardrails, character counts. It matters who holds the job.

Previous holders of the office recognized the importance of character at the Department of Justice. Harlan Fiske Stone took over as Attorney General in the aftermath of the controversial actions of his predecessor, Harry Daughtery.[58] Stone's biographer noted that Stone emphasized the need for character.[59] Daughtery "showed that an 'impassable gap' lay between law 'as a mere statement of rules of conduct and the effective translation of those rules and the actual control of human action . . . .'"[60] To Stone, Daughtery's tenure in office proved that the most important step in law enforcement was "improvement in the training, character, and morale of those to whom its administration is primarily committed."[61] Levi agreed. At his confirmation hearings, Levi testified, "I suppose the primary basis for insulating personnel from improper conduct has to be their own moral conscience and the collective morality of the Department of Justice."[62] Similarly, Griffin Bell referred to character in response to a question during his confirmation hearings about whether there ought to be a rebuttable or a conclusive presumption against the confirmation of an Attorney General who has been active in politics:

> If it is conclusive, I might better go back to Atlanta. If it is rebuttable, then I think you will have to consider my record. You will have to decide if I am independent enough and have sufficient integrity to do what Governor Carter agreed I should do. That is to depoliticize the Justice Department, and to professionalize it and run it as an independent law department of the Nation. If you think I can do that, then I think you will have decided that such presumption as you raise has been rebutted. Otherwise, you ought to vote against me.[63]

Character clearly is key to doing the job right.

From time to time, there has been serious consideration of structural changes to the Attorney General's job rather than relying on

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[58] ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 141–44 (1956).

[59] *Id.* at 149.

[60] *Id.*

[61] *Id.*

[62] *Nomination of Edward H. Levi*, *supra* note 9, at 21.

[63] *The Prospective Nomination of Griffin B. Bell*, *supra* note 17, at 136.

the appointment of people with the right character. But when Senator Sam Ervin held several days of hearings, in the midst of the Watergate scandal, about the possibility of making the Department of Justice independent of the President to prevent future episodes of politicization of the Department, almost all the witnesses repeated the same theme: the problem was the lack of character of those who had politicized the Department, and the solution was to find people of integrity to serve.[64] In 1980, the University of Virginia convened a conference and considered a proposal to split the Department of Justice into two departments as another way of using structural reform to guard against partisanship.[65] In the paper he prepared for the conference, Professor Meador wrote:

> Whether or not institutional rearrangements are undertaken to elevate the Attorney General to the position of chief lawyer free of other responsibilities, the single most important element in the fair and lawful administration of federal justice is the person who occupies that office. Whatever the structure, the best assurance that the role of the Attorney General is carried out as it should be lies in the selection of highly competent lawyers of integrity and appropriate professional independence.[66]

Again, the refrain is that the most important thing about avoiding the abuse of the discretionary power of the Department of Justice is the character of the person who serves as Attorney General.

D. The Indispensable Component of Character for an Attorney General: Independence

When former Attorneys General and others speak about the necessary "character" of an Attorney General, they are essentially all talking about one thing: independence. For an Attorney General to be willing and able to put aside partisan considerations, he or she must act independently in the sense that personal or political interests, especially those of the President, are subordinated to proper considerations. This much is clear. What requires more analysis is the

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[64] *Removing Politics*, *supra* note 4 at 16, 25 (statements of Theodore Sorensen), 74 (statement of Richard Kleindienst), 136, 138, 143 (statements of Charles Goodell), 204, 209 (statements of Archibald Cox).

[65] MEADOR, *supra* note 5.

[66] *Id.* at 68.

set of conditions necessary for an Attorney General to act with such independence.

To a great extent, this sense of independence is a function of how the President views the role of the Attorney General. When Biden introduced Merrick Garland as his Attorney General nominee and his nominees for other senior positions in the Department of Justice, Biden said, "You won't work for me. You are not the president's or the vice president's lawyer. Your loyalty is not to me. It's to the law, the Constitution, the people of this nation."[67] President Ford made clear that he wanted Levi to be apolitical and that the Department of Justice would be independent with respect to legal decisions.[68] Jimmy Carter told Griffin Bell and the public that the Justice Department must be a "neutral zone" free of partisan politics.[69] In contrast, Donald Trump constantly insisted on "loyalty" from his Attorneys General (and everyone else) and bitterly complained when he did not get it.[70] A supportive president makes independence easier.

Independence also relates to the extent to which the Attorney General values other things, such as reputation, personal honor, or legacy, more than the power and prestige of the office. When Ed Levi was asked about whether he would consider resigning if the President asked him to follow a policy with which Levi disagreed, Levi responded that, if it is something he could not in good conscience support, he would resign. He said, "I assume that the President has asked me to take this job because he is interested in impartial administration of justice . . . there is a proper loyalty we all recognize as lawyers to the idea of law itself."[71] Senator Kennedy asked Levi how he would respond to pressure from the White House or from a member of Congress.[72] Levi responded that he would call things as he saw them because "ultimately

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[67] *Biden introduces Merrick Garland as nominee for attorney general*, *supra* note 25.

[68] Notes of interview of Levi by Reichley 1, Jan. 24, 1991, folder: Domestic Policy Levi, Edward, box 2, James Reichley Papers, Gerald R. Ford Library.

[69] Interview by James S. Young with Griffin Bell (Mar. 23, 1988) (transcript available at https://millercenter.org/the-presidency/presidential-oral-histories/griffin-bell-oral-history) ("I never had any trouble with President Carter about anything. He was very supportive of the Justice Department. He wanted to have it as a neutral department. He had a high respect for the law").

[70] *See*, *e.g.*, Philip Bump, *Trump Wanted an attorney general who'd be loyal to him. He got one.*, WASH. POST (Sept. 9, 2020, 10:20 AM), https://www.washingtonpost.com/politics/2020/09/09/trump-wanted-an-attorney-general-whod-be-loyal-him-he-got-one/.

[71] *Nomination of Edward H. Levi*, *supra* note 9, at 39.

[72] *Id.* at 23.

I do not feel any reason to give into pressure of any kind. I really have to ask myself, why should I?"[73] Griffin Bell also testified that he would rather resign than take any improper actions, in part because "I have my own reputation to worry about. As a good lawyer and a good person . . . ."[74] Elliott Richardson resigned rather than follow President Nixon's order to fire the Watergate Special Prosecutor because Richardson had given his word in his confirmation hearings that he would not do so absent extraordinary impropriety.[75] William Barr, on the other hand, has professed not to care what others think. He expressed indifference to the question of how history would judge his decisions by saying that "history is written by the winners."[76]

Attorneys General who do not cling too tightly to the power and prestige of the office are also more likely to be independent. Ed Levi's response to President Ford's offer of the job was that he needed it "like a hole in the head."[77] He frankly looked on the attorney generalship as a demotion from his position as President of the University of Chicago.[78] Similarly, when Griffin Bell took office, he had recently relinquished the power and prestige of the office of a U.S. Circuit Judge for something he decided he valued more: the chance to practice law again in Atlanta with King & Spalding.[79] In his confirmation hearings, he emphasized his independence and his willingness to leave office if necessary: "If Governor Carter—I think he knows I'm independent. He has made a mistake if he doesn't know I'm independent . . . . He knows I would be glad to leave."[80]

Even with a President's support, a value system that supports non-partisanship, and a loose grip on the perquisites of office, acting

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[73] *Id.*

[74] *The Prospective Nomination of Griffin B. Bell, supra* note 17, at 137.

[75] Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST (Oct. 21, 1973), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm.

[76] Mairead Mcardle, *Barr Defends DOJ Dropping Case against Michael Flynn: "It Upheld the Rule of Law,"* NATIONAL REVIEW (May 11, 2020, 9:36 AM), https://www.nationalreview.com/news/barr-defends-doj-dropping-case-against-michael-flynn-history-is-written-by-the-winners/ ("'Well, history is written by the winners,' Barr responded. 'So it largely depends on who's writing the history'").

[77] Navasky, *supra* note 18, at 9.

[78] *Id.* at 1. When White House staff suggested that Levi make the customary courtesy calls on senators as part of the confirmation process, Levi initially resisted. He said that he "didn't really think that the president of the University of Chicago should go around looking for a job." *Id.* at 2.

[79] *See* MURPHY, *supra* note 27, at 137–43.

[80] *The Prospective Nomination of Griffin B. Bell, supra* note 17, at 137.

independently will sometimes require an attorney general to deploy personal virtues. First, it takes wisdom to discern the line between an action that is political but legitimate as a tool of policy from one that is illegitimate as partisan.[81] These things do not come labeled. Even with that discernment, it takes courage to act in ways that others, especially others in powerful positions, will dislike and perhaps publicly criticize. It is also important to acknowledge that not every judgment will be right, and sometimes even correct judgments are implemented poorly. Maintaining independence over time requires humility to learn from mistakes and the resilience to come back to fight another day. Acting independently, like other moral actions, requires the deployment of the virtues necessary to the particular situation.[82]

In sum, for an attorney general to do the job right, and resist pressure to use the powers of the office for partisan advantage, the attorney general must be a person who has the values and virtues necessary to be independent. We believe Ed Levi and Griffin Bell are excellent examples of such independence and that they demonstrated that capacity as they repaired the damage done to the Justice Department under President Nixon. To set the scene for Levi's and Bell's service as Attorneys General, we now turn to the events of the Nixon years that made such restoration necessary.

III. PARTISANSHIP AND THE NIXON DEPARTMENT OF JUSTICE

The need for Levi and Bell to restore the credibility and morale of the Department of Justice arose from the politicization of the Department during the Nixon Administration. For our purposes, we need not set forth an exhaustive history of what happened in the Department between 1969 and 1974. There are numerous excellent comprehensive resources on the subject.[83] Rather, we will focus on some of the specific choices that the Department of Justice officials made that

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[81] MEADOR, *supra* note 5, at 79–80 (the interrelationships of the attorney general and the president are questions of "wisdom and appropriateness" rather than legalities) (comments of John Shenefield). *See also Removing Politics*, *supra* note 4, at 21 ("[T]he greatest stress we ever meet is when we have to choose between conflicting loyalties") (statement of Senator Ervin).

[82] For an excellent exploration of using practical wisdom to choose a course of action when multiple values are relevant to a particular situation, *see* BARRY SCHWARTZ AND KENNETH SHARPE, PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING (2010).

[83] *See*, *e.g.*, JOHN W. DEAN, THE NIXON DEFENSE: WHAT HE KNEW AND WHEN HE KNEW IT (2014); EMERY, *supra* note 10; *FINAL REPORT OF THE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES UNITED STATES SENATE*, S. Rep. No. 93-981 (1973).

left the Department with such low credibility and morale when Levi took over in February 1975.

John Mitchell served as Nixon's first Attorney General for just over thirty-six months, from January 21, 1969 to March 1, 1972. At his confirmation hearings, he reassured the Judiciary Committee that his close political and personal relationship with President Nixon would not interfere with the proper discharge of his duties:

> Senator Ervin: Mr. Mitchell, until comparatively recent years it has been customary for Presidents to appoint the Postmaster General his chief political adviser and agitator. Unfortunately, during recent years this role has been largely taken away from the Postmaster General and given to and exercised by the Attorney General. To my mind there is something incompatible with marrying the function of the chief political adviser and chief agitator with that of prosecutor of crimes against the Government. Now, I would just like to know whether you think that the primary function and objective of the Attorney General should be giving political advice or doing political agitating before congressional committees or enforcing Federal law and acting as an adviser to the President in his Cabinet in legal matters rather than political.
>
> Mr. Mitchell: Senator, I would hope that my activities in a political nature and of a political nature have ended with the campaign. I might say that this was my first entry into a political campaign, and I trust it will be my last. From the termination of the campaign and henceforward my duties and functions will be related to the Justice Department, and as the legal and not the political adviser of the President.[84]

Mitchell's hope that his political activities ended with the 1968 campaign was not to be fulfilled. The President prevailed upon Mitchell to step down as Attorney General effective on March 1, 1972, in order to take charge of the re-election campaign. As a result of actions Mitchell took while he was Attorney General and thereafter in connection with the Watergate affair, Mitchell eventually spent nineteen months in prison, after he was convicted of conspiracy and obstruction of justice.

The series of events that led John Mitchell from the fifth floor of the Department of Justice to a prison cell began because President Nixon

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[84] *Removing Politics*, *supra* note 4, at 38 (citing *Hearings Before the Committee on the Judiciary on John N. Mitchell, Attorney General-Designate*, 91st Cong., 1st Sess. (Jan. 14, 1969)).

had an "insatiable need" for political intelligence.[85] In early 1972, the Committee to Reelect the President (CREEP) hired G. Gordon Liddy as its new General Counsel.[86] Liddy's experience for the job included illegal and clandestine work for the White House. He was involved in the burglary of the office of Dr. Lewis Fielding, the psychiatrist of Daniel Ellsburg, a former Pentagon official who had leaked the "Pentagon Papers" (an internal Department of Defense study that was critical of the Vietnam War) to the New York Times.[87] One of Liddy's jobs for CREEP was to organize an intelligence operation, and he developed some grandiose plans.

On January 27, 1972, about six weeks before Mitchell was to step down as Attorney General to lead the re-election campaign, Liddy went to Mitchell's office at the Department of Justice and presented his plans and a proposed budget for "Operation Gemstone." The plans included the use of "high-end" prostitutes to entrap prominent Democrats, the kidnapping of the leaders of any demonstrators at the Republican national convention, and electronic surveillance.[88] Liddy was asking for approval and a million dollars in funding, in the office of the Attorney General of the United States, for an elaborate set of criminal activities. Mitchell merely puffed his pipe and told Liddy that his plan was "not quite what he had in mind."[89] Mitchell later testified that he "should have thrown him out the window,"[90] but instead his instructions were to come back with something not quite so elaborate and expensive.[91]

Eight days later, on February 4, 1972, Liddy made another presentation to Mitchell, again in Mitchell's office at the Department of Justice.[92] Although the plans presented at this meeting were not as elaborate as the original "Operation Gemstone," they still included kidnapping and electronic surveillance.[93] John Dean, then-counsel to the President and a former Deputy Associate Attorney General, arrived late to this meeting. When he saw the kinds of things that Liddy was

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[85] EMERY, *supra* note 10 at, 4.

[86] JOHN W. DEAN, BLIND AMBITION: THE WHITEHOUSE YEARS 76 (1976).

[87] Robert D. McFadden, *G. Gordon Liddy, Mastermind Behind Watergate Burglary, Dies at 90*, N. Y. TIMES (Mar. 30, 2021), https://www.nytimes.com/2021/03/30/us/g-gordon-liddy-.dead.html?action=click&module=Well&pgtype=Homepage&section=Obituaries.

[88] EMERY, *supra* note 10, at 89–91.

[89] *Id.* at 91.

[90] *Hearings Before the Select Committee on Presidential Campaign Activities*, *supra* note 46, at 1610.

[91] EMERY, *supra* note 10, at 91.

[92] *Id.* at 92–93.

[93] *Id.* at 93.

proposing, Dean suggested that perhaps such discussions should not occur in the office of the Attorney General, and the meeting soon adjourned.[94]

There was a third meeting about Gemstone in March, after Mitchell had left the Department of Justice.[95] Part of Operation Gemstone, even in its reduced form, was the bugging of the Democratic National Committee Headquarters at the Watergate complex in Washington, D.C.[96] John Mitchell always publicly denied that he approved the Watergate break-in, but the evidence that he approved it is very strong.[97] According to Dean, Mitchell privately admitted that he had approved the plan.[98] With the approval and budget he needed, Liddy got to work. He enlisted the assistance of E. Howard Hunt, a former CIA official who had been part of the Dr. Fielding break-in[99] and who had been employed by the White House working for Charles Olson, Counselor to the President.[100] Hunt recruited four men to conduct the burglary.[101] Liddy hired James McCord, who was in charge of security for CREEP, to provide the "bugging expertise" to the entry team.[102] The decision to use Hunt, who had ties to the White House, and McCord, with his connection to CREEP, were dreadful mistakes for Liddy. The ties between Hunt and McCord to the White House and CREEP respectively were easily traceable.

When the Watergate burglars were discovered in the offices of the Democratic National Committee in the early morning hours of June 17, 1972, they were apprehended by D.C. police.[103] McCord's connection to CREEP was discovered quickly.[104] Hunt's involvement also surfaced

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[94] DEAN, *supra* note 86, at 85–86 .

[95] EMERY, *supra* note 10, at 101.

[96] *Id.* at 103.

[97] *Id.*

[98] DEAN, *supra* note 86, at 224.

[99] Tim Weiner, *E. Howard Hunt, Agent Who Organized Botched Watergate Break-in, Dies at 88*, N.Y. TIMES (Jan. 24, 2007), https://www.nytimes.com/2007/01/24/obituaries/24hunt.html.

[100] DEAN, supra note 86, at 94.

[101] Howard Hunt, Watergate Conspirator, Dies, 88, https://watergate.info/2007/01/23/howard-hunt-watergate-conspirator-dies-88.html (last visited May 24, 2021).

[102] EMERY, *supra* note 10, at 112.

[103] *Id.* at 135.

[104] By Monday, June 19, the Washington Post was reporting on McCord's connection to CREEP. Bob Woodward and Carl Bernstein, *GOP Aide Among Five Arrested in Bugging Affair*, WASH. POST (June 19, 1972), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/061972-1.htm.

almost immediately. One of the burglars carried an address book with Hunt's White House phone number in it.[105] Inexplicably, Hunt left an envelope in the room from which he and Liddy were observing the burglary. The envelope was addressed to his country club and enclosed his personal check for his dues.[106] Hunt and Liddy left behind other evidence that could be easily traced.[107]

Because of the politically sensitive nature of the location of the arrests, D.C. Police alerted the Justice Department, and word quickly reached Henry Petersen, the Assistant Attorney General in charge of the Criminal Division.[108] Petersen had been at the Department of Justice for twenty-five years, steadily working his way up the career ladder.[109] He had become the first career Department of Justice prosecutor to be directly appointed to head the Criminal Division.[110] In that capacity, Petersen reported directly to Mitchell's successor as Attorney General, Richard Kleindienst. Petersen realized that there could be "immense political repercussions" from the Watergate burglary, and he immediately called Kleindienst and reported the Watergate arrests.[111]

Kleindienst had been a politically active lawyer in Arizona before being appointed as Deputy Attorney General by Nixon in 1969.[112] When the Watergate burglars were arrested, Kleindienst had just emerged from a bruising confirmation process that focused in part on allegations that President Nixon had pressured Kleindienst, when Kleindienst was Deputy Attorney General, to drop an antitrust case against the International Telephone and Telegraph Corporation ("ITT") for political reasons.[113] Kleindienst testified falsely during his confirmation hearings that there had been no such pressure, and that testimony

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[105] Howard Hunt, Agent Who Organized Botched Watergate Break-in, Dies at 88, *supra* note 101.

[106] CARL BERNSTEIN AND BOB WOODWARD, ALL THE PRESIDENT'S MEN 23 (1974).

[107] EMERY, *supra* note 10, at 136.

[108] *Hearings Before the Select Committee on Presidential Campaign Activities, supra* note 46, at 3611.

[109] *Id.*

[110] Henry E. Petersen (1972–1974), https://www.justice.gov/criminal/history/assistant-attorneys-general/henry-e-peterson (last visited May 24, 2021).

[111] *Hearings Before the Select Committee on Presidential Campaign Activities, supra* note 46, at 3611.

[112] RICHARD G. KLEINDIENST, JUSTICE: THE MEMOIRS OF ATTORNEY GENERAL RICHARD KLEINDIENST 13–38 (1985).

[113] David Kurlander, *The DOJ Time Machine: The Levi Confirmation, Part* II, https://cafe.com/article/the-doj-time-machine-the-levi-confirmation-pt-ii/ (last visited May 24, 2021).

would come back to haunt him later.[114] As of June 17, 1972, when the Watergate burglars were arrested, Kleindienst had been Attorney General for five days.[115]

That day, Kleindienst was having lunch after a round of golf at the Burning Tree Club in Bethesda, Maryland.[116] To his surprise, he looked up and noticed Gordon Liddy standing near the entrance to the locker room and motioning that he needed to talk. Kleindienst knew Liddy slightly and did not have a high opinion of him. Kleindienst could not imagine why Liddy was trying so hard to get his attention at his country club. Liddy informed Kleindienst that some of the men who had been arrested the night before at the offices of the Democratic National Committee might be employees of the White House or CREEP and that John Mitchell wanted Kleindienst to get them out of jail at once.[117] To his credit, Kleindienst emphatically (indeed, profanely) refused Liddy's request.[118]

It took little time for President Nixon and his senior aides to appreciate the political danger that the Watergate arrests could present in an election year.[119] The risks were both direct and indirect. The Watergate operation was a crime perpetrated by employees of CREEP (Liddy and McCord), and it included a former White House employee (Hunt). But the President's advisers had more to worry about than just the burglary. There were also realistic fears that a thorough investigation would uncover other illicit activities, including the burglary of Dr. Fielding's office and a set of so-called campaign "dirty tricks" that might constitute violations of statutes regulating campaign conduct. Many of these "dirty tricks" had been carried out under the direction of Donald Segretti, who had connections to members of the White House staff.[120]

Because of these risks, the cover-up began, with the intent to contain the damage and protect the President's reelection. John Dean

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[114] *Id.*

[115] EMERY, *supra* note 10, at 146.

[116] Kleindienst described this event in his testimony before the Senate Watergate Committee. *Hearings Before the Select Committee on Presidential Campaign Activities*, *supra* note 46, at 3560–62.

[117] KLEINDIENST, *supra* note 112, at 146; EMERY, *supra* note 10, at 146–47.

[118] EMERY, *supra* note 10, at 146–47.

[119] Nixon met with his chief of staff, Bob Haldeman, and discussed the implications of the Watergate arrests no later than June 20, 1972, although the recording of that conversation was later found to have an unexplained eighteen-and-a-half-minute gap. *Id.* at 174–75.

[120] *Id.* at 96.

became the de facto coordinator of the cover-up—the self-described "ringmaster."[121] One of his first acts was to meet with Petersen and Kleindienst in the Attorney General's office. When Kleindienst stepped out of the meeting, Dean told Petersen, "I don't believe the White House can stand a wide-open investigation."[122] Dean explained that the investigation should be limited to the break-in to ensure that the FBI did not "stumble into" other matters, including the Fielding burglary and campaign act violations.[123] Petersen's response was to tell Dean that there would be "no fishing expedition as far as White House activities in this investigation."[124] Petersen instructed the prosecutors in charge of the case, Earl Silbert and Seymour Glanzer, that they were investigating a break-in and that they were not to wander off into other things.[125] Dean reported back to the White House that he and Petersen had a deal.[126]

Another of Dean's early steps was to take possession of the contents of Hunt's White House safe.[127] There was evidence in the safe that was sufficiently "politically sensitive" that John Ehrlichman, one of President Nixon's two most senior advisors (the other was Bob Haldeman), instructed Dean to shred the documents and "deep-six" a briefcase that was found there.[128] The evidence included documents that could lead to discovery of Hunt's involvement in the Ellsburg break-in and forged State Department cables that purported to show that President Kennedy had ordered the assassination of the President of South Vietnam.[129] Dean delivered at least most of the contents of the safe to the Acting Director of the FBI, L. Patrick Gray, and eventually shredded some of the documents himself.[130] Months later, Gray secretly destroyed everything that Dean had given him.[131]

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[121] DEAN, *supra* note 86, at 185.

[122] Don Fulsome, *Nixon's Watergate Mole,* Crime Magazine (July 30, 2012), http://www.crimemagazine.com/nixon's-watergate-mole.

[123] GORMLEY, *supra* note 13 at 259.

[124] *Hearings Before the Select Committee on Presidential Campaign Activities*, *supra* note 46, at 3614.

[125] Fulsome, *supra* note 122.

[126] GORMLEY, *supra* note 13, at 259.

[127] DEAN, *supra* note 86, at 114–15.

[128] *Hearings Before the Select Committee on Presidential Campaign Activities*, *supra* note 46, at 1416.

[129] DEAN, *supra* note 86, at 115.

[130] EMERY, *supra* note 10, at 232.

[131] *Id.*

As the investigation and prosecution of the Watergate cases proceeded, Petersen engaged in numerous other activities that demonstrated that the Department of Justice was not handling these cases the same way it would have treated cases that were of no concern to the President. Petersen kept Dean "totally aware of the activities of the federal prosecutors,"[132] and Dean reported back to Haldeman and Ehrlichman.[133] Silbert and Glanzer did not know that Petersen was reporting to Dean.[134] Dean was allowed to sit in on the FBI interviews of White House personnel and received investigative reports.[135] Petersen allowed several high-ranking officials to testify in his Department of Justice conference room rather than to the grand jury directly.[136] When John Mitchell testified, Petersen let Dean know what questions Mitchell should expect.[137] When Segretti testified before the grand jury, Petersen instructed Silbert not to ask about "dirty tricks" or about who at the White House had hired Segretti.[138] In a conversation that Nixon taped, Dean reported that because of Petersen he (Dean) "was totally aware of what the grand jury was doing. I knew what witnesses were going to be called. I knew what they were asked, and I had to."[139] Archibald Cox later said to the same effect that "the White House knew what the grand jury testimony was going to be on any day before the grand jury knew it."[140]

For this and his activities later in the process, Petersen was described as being "pathetically compliant with the wishes of a criminal President" and of having engaged in "toadyism."[141] Archibald Cox would later say that Petersen "was sort of overimpressed by what the

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[132] Osnos & Cohen, *supra* note 15, at 505.

[133] GORMLEY, *supra* note 13, at 259.

[134] Osnos & Cohen, *supra* note 15, at 506.

[135] *Hearings Before the Select Committee on Presidential Campaign Activities, supra* note 46, at 1760.

[136] *Id.* at 3580–81, 3636; GORMLEY, *supra* note 13, at 259.

[137] GORMLEY, *supra* note 13, at 259.

[138] *Id.*

[139] Fulsome, *supra* note 122.

[140] GORMLEY, *supra* note 13, at 257; *see also Removing Politics*, *supra* note 4, at 134–35, 145–46 (critique of Petersen reporting to White House and of Petersen's decision to allow Maurice Stans, CREEP's finance director, to testify at the Department of Justice rather than in front of the grand jury). Ervin described the preferential treatment that Petersen gave to Stans as "one of the saddest revelations made during the course of the Watergate hearings." *Id.* at 145.

[141] Anthony Lewis, *Proving that Good Law Can Be Good Politics: An Agenda for Edward Levi*, The New Republic (Feb. 8, 1975).

president wants . . . and the obligation to do it."[142] Reporters in 1974 described the situation this way: "He was sort of awed by Nixon in the Oval Office . . . the consummate bureaucrat, a civil servant first and foremost whose deference toward the Presidency left him incapable of resisting orders that emanated from the White House."[143] Petersen defended himself but admitted that the Watergate cases put him in what he perceived to be an extremely difficult situation. He later asked rhetorically, "What was I supposed to do? Walk into the Oval Office, tell the President to put his hands up and lean face forward against the wall?"[144] Petersen also indignantly told a reporter, "I walked through a minefield and came out clean."[145]

The efforts to contain the political damage that might have come from the Watergate burglary succeeded at first. In September 1972, the grand jury returned indictments of only the five burglars, Hunt, and Liddy.[146] Despite the limits that Petersen had placed on the investigation and the assistance Petersen had given Dean, Kleindienst went on the Dick Cavett talk show and bragged about the extent and scope of the Watergate investigation.[147] The dam held. The President won a landslide re-election in November 1972.

The cover-up continued into 1973. Liddy and McCord were tried and convicted in the court of Judge John Sirica.[148] The other burglars and Hunt pled guilty.[149] But the cover-up began to unravel. Money for the burglars had been secretly distributed in the summer of 1972.[150] The demands for money had grown in early 1973 to the extent that on March 21, 1973, Dean took them directly to Nixon. Dean told the President that "we have a cancer within[—]close to the presidency, that's growing. It's growing daily. It's compounding."[151] When Dean told

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[142] GORMLEY, *supra* note 13, at 256.

[143] Osnos & Cohen, *supra* note 15, at 507.

[144] Lynch, *Rebuilding Morale at Justice*, *supra* note 16.

[145] Osnos & Cohen, *supra* note 15, at 506.

[146] The Watergate Files > Timeline, https://www.fordlibrarymuseum.gov/museum/exhibits/watergate_files/content.php?section=1&page=d (last visited May 24, 2021).

[147] *Dick Cavett's Watergate* at 8:25–10:50 (2014).

[148] Lawrence Meyer, *Last Two Guilty in Watergate Plot*, WASH. POST (Jan. 31, 1973), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/013173-2.htm.

[149] *Id.*

[150] EMERY, *supra* note 10, at 199–200.

[151] Cancer on the Presidency, https://millercenter.org/the-presidency/secret-white-house-tapes/cancer-on-the-presidency (last visited May 24, 2021).

Nixon in that same conversation that it might take a million dollars to buy silence, the President responded, ". . . you could get the money fairly easy. … What I mean is, you could get a million dollars. And you could get it in cash. I know where it could be gotten."[152]

Meanwhile, days before and unbeknownst to Dean and Nixon, James McCord had privately delivered a letter to Judge Sirica just before McCord was to be sentenced.[153] The letter stated, among other things, that there had been "political pressure applied to the defendants to plead guilty and remain silent" and that "[p]erjury occurred during the trial of matters highly material to the very structure, orientation, and impact of the government's case and to the motivation of an intent of the defendants."[154] McCord also told the judge that "[o]thers involved in the Watergate operation were not identified during the trial when they could have been by those testifying."[155] On March 23, Judge Sirica read McCord's letter in open court.[156]

Events picked up speed in April. Dean began to sense that he was to be made the scapegoat for the cover-up if it unraveled. He hired an attorney and began secret discussions with Silbert and Glanzer in an attempt to make a deal to save himself.[157] Dean of course knew that Petersen was feeding information about the case up the chain of command at the White House.[158] To keep the President from learning that Dean was cooperating, Dean's lawyer made a deal with Silbert and Glanzer that the prosecutors would not inform Petersen about their discussions with Dean.[159] Eventually, however, the information the prosecutors were learning became too hot for them to handle; Dean implicated Mitchell, Haldeman, and Ehrlichman in the planning and cover-up of the Watergate burglary.[160] Jeb Stuart Magruder, CREEP's former deputy director, had also begun cooperating .[161] The prosecutors told Dean's lawyer that they were going to have to break their agreement and inform Petersen of what Dean and Magruder were saying.[162] On April 14, 1973, they did so.[163]

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[152] *Id.*

[153] JOHN J. SIRICA, TO SET THE RECORD STRAIGHT 93 (1980).

[154] *Id.* at 96.

[155] *Id.*

[156] *Id.* at 107–08.

[157] DEAN, *supra* note 86, at 226–37.

[158] *Id.* at 260.

[159] *Id.* at 233.

[160] EMERY, *supra* note 10, at 318–19.

[161] *Id.* at 301.

[162] DEAN, *supra* note 86, at 255.

Petersen immediately arranged for Silbert to go with him to Kleindienst's home at 1 A.M.[164] For much of the night, Petersen and Silbert briefed Kleindienst on Dean's and Magruder's revelations. At the news of Mitchell's involvement, Kleindienst wept.[165] Kleindienst decided that he had to report what he knew directly to the President, and he did so on Sunday, April 15, 1973.[166] Because of Kleindienst's close connections to Mitchell, Kleindienst recused himself from further involvement in the Watergate investigation.[167] Within days, he decided that he should resign as Attorney General.[168]

Kleindienst's recusal and later resignation left Petersen in charge of the Watergate investigation as head of the Criminal Division.[169] Over the next few months, Petersen regularly communicated directly with Nixon about the progress of the investigation.[170] The President gave directions about the investigation, including one not to investigate the burglary of Dr. Fielding's office because that was a "national security matter. You stay out of that. Your mandate is to investigate Watergate."[171] Petersen complied.[172] Petersen at least twice responded to Nixon's questions about whether the prosecutors had information that implicated the President, and Petersen assured him that they did not.[173] During this time, Nixon floated the ideas of having Petersen

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[163] EMERY, *supra* note 10, at 318–19.

[164] *Id.* at 318.

[165] *Hearings Before the Select Committee on Presidential Campaign Activities*, *supra* note 46, at 3578.

[166] *Id.* at 3579.

[167] *Id.* at 3584.

[168] *Id.* at 3587.

[169] *Id.* at 3584.

[170] Jim Baker and Sarah Grant, *What the Watergate 'Road Map' Reveals about Improper Contact between the White House and the Justice Department*, lawfare blog (Nov. 19, 2018, 10:13 AM), https://www.lawfareblog.com/what-watergate-road-map-reveals-about-improper-contact-between-white-house-and-justice-department. *See also* GORMLEY, *supra* note 13, at 368–69. One of these conversations had fateful consequences. Nixon summoned Petersen to the President's office in the Old Executive Office Building and in an expletive-laden tirade complained that Petersen had offered Dean immunity despite the President's direct order not to do so. When Petersen said that the President must have misunderstood Dean, the President replied, "You can listen to the tape." When Petersen told this story to the newly appointed Watergate special prosecutors, it alerted them to the possibility, later confirmed, that Nixon taped his conversations. *Id.* at 255–56.

[171] *Hearings Before the Select Committee on Presidential Campaign Activities*, *supra* note 46, at 3631.

[172] Baker & Grant, *supra* note 170.

[173] *Id.*

become White House Counsel or maybe Director of the FBI.[174] Nixon told him, "You're the advisor to the President now."[175] Accusations about the impropriety of Petersen's actions, from his initial agreement with Dean to limit the scope of the Watergate investigation in 1972 through his almost daily conversations with the President in 1973, are what led Petersen to feel the need to claim, as we quoted before, that he was "not a whore."[176]

Nixon nominated Elliott Richardson to be his third Attorney General. As part of his confirmation process, Richardson agreed to appoint a Special Prosecutor for the Watergate investigation and not to discharge him except for extraordinary impropriety.[177] Such an appointment is in a sense the ultimate sign that a prosecution is, or is likely to be, so politicized that the Department of Justice cannot handle it in the normal course.[178] It is a demoralizing statement that the Department's prosecutors are incapable of discharging their responsibilities or at least that there is enough of an appearance of such an impairment that a special prosecutor is needed. Petersen deeply resented the appointment of the special prosecutor. In his testimony before the Senate Select Committee on Presidential Campaign Activities (commonly known as the Senate Watergate Committee), Petersen said:

> Now, one of the things, you will excuse me, I have to get something off my chest. I resent the appointment of a special prosecutor. Damn it, I think it is a reflection on me and the Department of Justice. We would have broken that case wide open, and we would have done it in the most difficult circumstances. And do you know what happened. That case was snatched out from under us when we had it 90-percent

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[174] *Id.*

[175] *Id.*

[176] Osnos & Cohen, *supra* note 15.

[177] For an interesting comparison between the assurances that Richardson gave and those given by William Barr with respect to the Mueller investigation, see Nick Akerman, Trump Nominee William Barr's hearing evokes the standard set by Nixon AG Elliot Richardson during Watergate, https://www.nbcnews.com/think/opinion/trump-nominee-william-barr-s-hearing-evokes-standard-set-nixon-ncna959156 (last visited May 24, 2021).

[178] Levi said years later that in general the appointment of a Special Prosecutor is "ruinous for the idealism that the department has to have" and that such an appointment essentially is a message that the lawyers in the department cannot be trusted. The Office of the Attorney General, *supra* note 37, at 31:50.

> complete with a recognition of the Senate of the United States that we can't trust those guys down there.[179]

Nevertheless, Richardson had committed the Department to the appointment of a Special Prosecutor for Watergate.

Archibald Cox became the Watergate Special Prosecutor on May 25, 1973.[180] On July 16, 1973, presidential aide Alexander Butterfield revealed to the Senate Watergate Committee that President Nixon had regularly recorded conversations in the Oval Office and elsewhere.[181] Cox sought a number of tapes of particular conversations that he believed were relevant to the Watergate investigation.[182] Nixon resisted. When Cox refused to back down, Nixon ordered Richardson to fire Cox. Richardson refused and resigned instead. Richardson's Deputy Attorney General, William Ruckelshaus, also refused to fire Cox and resigned. Robert Bork, who was next-in-line at the Department of Justice as Solicitor General, ultimately agreed to fire Cox. These were the events of the so-called "Saturday Night Massacre."[183] FBI agents were dispatched to secure the offices of the Special Prosecutor. The plan was to disband the Special Prosecutor's Office and bring its work back under the direction of Henry Petersen.[184]

The public backlash from the Saturday Night Massacre was so great that within weeks Nixon had to agree to the appointment of another Special Prosecutor, Leon Jaworski.[185] The investigation and prosecution of crimes related to Watergate then continued. Meanwhile, Nixon had nominated Senator William Saxbe as his fourth Attorney General, to

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[179] *Hearings Before the Select Committee on Presidential Campaign Activities*, *supra* note 46, at 3639.

[180] GORMLEY, *supra* note 13, at 235. Petersen reacted to the suggestion of Cox as Special Prosecutor with the comment: "[w]ould not recommend." This came at a time when "the Criminal Division . . . had recently come under attack for its lack of objectivity and collusion with the White House . . . ." *Id.*

[181] Bob Woodard describes that fateful day in his biography of Butterfield. BOB WOODWARD, THE LAST OF THE PRESIDENT'S MEN 165–70 (2015).

[182] GORMLEY, *supra* note 13, at 290–317.

[183] For a detailed recitation of the events of the Saturday Night Massacre, *see id.* at 338–77.

[184] *Id.* at 368.

[185] Jaworski describes being recruited to take the job by Alexander Haig on October 30, 1974, just ten days after the Saturday Night Massacre. LEON JAWORSKI, THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE 1–7 (1976).

replace Richardson, and Saxbe was confirmed and took office on January 19, 1974.[186]

However, the troubles for the President and his Attorneys General continued. On March 1, 1974, Mitchell was indicted (along with Haldeman, Ehrlichman, Colson, and others) for conspiracy, obstruction of justice, and perjury in connection with the Watergate cover-up.[187] The grand jury named Nixon as an unindicted co-conspirator.[188]

Kleindienst had troubles of his own and cut a deal with the Special Prosecutor. In 1973, Kleindienst had approached Cox's team and offered to provide information about the President and ITT.[189] As part of these discussions, Kleindienst revealed that President Nixon had called him and ordered him to drop the government's appeal in the ITT antitrust case.[190] Nixon also ordered Kleindienst to fire the Assistant Attorney General for the Antitrust Division.[191] To his credit, Kleindienst did not follow the orders of the President—an instance in which the Nixon Justice Department resisted politicization of its work. But Kleindienst testified falsely to Congress about these events during his confirmation hearing to become Attorney General. He denied that anyone from the White House had made any suggestions about what the Justice Department should do in the ITT case.[192] Kleindienst and Jaworski reached a deal under which Kleindienst tearfully pled guilty on May 16, 1974 to one misdemeanor count of lying to Congress.[193] Kleindienst was fined but did not serve time in prison.[194]

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[186] Lesley Oelsner, *Senate, 75 to 10, Votes to Confirm Saxbe as Attorney General*, N.Y. TIMES (Dec. 18, 1973), https://www.nytimes.com/1973/12/18/archives/senate-75-to-10-votes-to-confirm-saxbe-as-attorney-general.html.

[187] Anthony Ripley, *Federal Grand Jury Indicts 7 Nixon Aides on Charges of Conspiracy on Watergate; Haldeman, Ehrlichman, Mitchell on List*, N.Y. TIMES (Mar. 2, 1974), https://www.nytimes.com/1974/03/02/archives/federal-grand-jury-indicts-7-nixon-aides-on-charges-of-conspiracy.html.

[188] Anthony Ripley, *Jury Named Nixon a Co-Conspirator But Didn't Indict*, N.Y. TIMES (June 7, 1974), https://www.nytimes.com/1974/06/07/archives/jury-named-nixon-a-coconspirator-but-didnt-indict-st-clair-confirms.html.

[189] Leon Jaworski describes the circumstances of Kleindienst's plea deal in his memoir. JAWORSKI, *supra* note 189, at 149–57 (1976).

[190] *Id.* at 151.

[191] KLEINDIENST, *supra* note 112, at 90–93.

[192] For Kleindienst's version of these events, *see id.* at 90–105.

[193] Ripley, *supra* note 12.

[194] Bart Barnes, *Richard Kleindienst, Attorney General During Watergate, Dies*, WASH. POST (Feb. 4, 2000), https://www.washingtonpost.com/archive/local/2000/02/04/richard-kleindienst-attorney-general-during-watergate-dies/3fd8559d-4eff-41b8-8302-6404ff8d449f/.

As the months proceeded, pressure from the various Watergate investigations continued to build. The Judiciary Committee of the House of Representatives approved three articles of impeachment in July.[195] A vote in the House on impeachment and then a trial in the Senate would have been the next steps on Capitol Hill. Nixon clung to the hope that he could survive the impeachment process.

In the summer of 1974, the Supreme Court ruled against Nixon's attempt to protect his incriminating tapes on the basis of executive privilege.[196] When the recordings were turned over, they showed Nixon's involvement in the cover-up within days of the Watergate burglary.[197] Nixon's political support collapsed, and he resigned on August 9, 1974.[198] Gerald Ford took the oath of office as President that day.[199]

Ford inherited a deeply wounded Justice Department. Mitchell was under indictment and would be convicted of numerous crimes a few months later. Kleindienst had pled guilty to lying to Congress. The Watergate cases had been removed from the Department amid concerns that the Department had been allowing political considerations to affect its work. In fact, Petersen had limited the scope of the investigation and then regularly reported to Nixon and Dean on its progress. Richardson had resigned along with his deputy because Nixon had ordered them to fire the Special Prosecutor. No wonder that Ford wrote in his memoirs that "nowhere did Watergate leave more lasting scars than at the Department of Justice.[200]

Saxbe was not the answer. He had his own troubles as Attorney General. After Levi's nomination, Saxbe would be described as an

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[195] Richard Lyons & William Chapman, *Judiciary Committee Approves Article to Impeach President Nixon, 27 to 11*, WASH. POST (July 28, 1974), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072874-1.htm.

[196] United States v. Nixon, 418 U.S. 683 (1974).

[197] The so-called "smoking gun" recording was of the President's June 23, 1972 conversation with his chief of staff, Bob Haldeman. The Smoking Gun Tape, https://watergate.info/1972/06/23/the-smoking-gun-tape.html.

[198] Carroll Kilpatrick, *Nixon Resigns*, WASH. POST (Aug. 9, 1974), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm.

[199] Photographs and video of the swearing-in ceremony in the East Room of the White House are available on the web site of the Gerald R. Ford Foundation. Oath of Office and Swearing In Remarks https://geraldrfordfoundation.org/centennial/media/oath-office-swearing-remarks/ (last visited May 24, 2021).

[200] GERALD R. FORD, A TIME TO HEAL 235 (1979).

amiable primitive.[201] Saxbe had a well-deserved reputation for bluntness.[202] This tendency did not serve him well as Attorney General. Early in his tenure, the heiress Patricia Hearst was arrested because of her participation in crimes committed with members of the Symbionese Liberation Army. Before Hearst could even be charged, Saxbe caused a furor by describing her as a "common criminal."[203] After that experience, he found that he had to resist his natural tendency to be frank. He nevertheless liked being Attorney General and intended to remain as long as the President would have him. As late as November 17, 1974, Saxbe told a national television audience that he had no intention of quitting his job as Attorney General, that he intended to "stick with it."[204]

Ford had other plans, and he seized an opportunity to replace Saxbe without appearing to fire him. Daniel Patrick Moynihan was serving as the Ambassador to India, but he needed to return to Harvard by February 1975 to retain his tenure.[205] Saxbe had traveled numerous times to India and was known to be interested in that country.[206] Although Ford told the story slightly differently in his memoirs—he made it sound as if the decision was up to Saxbe[207]—the President used the opening to clear the way for a new Attorney General. Saxbe would be nominated to replace Moynihan in India, and that would open up the Attorney General's position in the cabinet.[208] As of December 1974, Saxbe, the last of Nixon's Attorneys General, was on his way out.[209]

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[201] Lewis, *supra* note 141, at 15.

[202] Saxbe once said on Face the Nation that the people in the Nixon Administration were so inept that they ought to be wearing clown suits. Transcript at 14, Oct. 6, 1974, folder: Face the Nation—Oct. 6, 1974, box 63, Ronald H. Nessen Papers, Gerald Ford Library.

[203] Newspaper clipping from Ann Arbor News (*Saxbe to Get Ambassadorship, Reports Say*), Dec. 12, 1974, folder: vertical file, William Saxbe Papers, Gerald R. Ford Library.

[204] Transcript, Nov. 17, 1974, folder: Meet the Press Nov. 17, 1974, box 69, Ronald H. Nessen Papers, Gerald R. Ford Library.

[205] Newspaper clipping from Ann Arbor News (*Everybody Happy with Saxbe Xhange*), Dec. 14, 1974, folder: Vertical File, William Saxbe Papers, Gerald R. Ford Library.

[206] Newspaper clipping from Detroit Free Press (*Senate Unanimous in OK of Saxbe*) Dec. 20, 1974, folder: Vertical File, William Saxbe Papers, Gerald R. Ford Library.

[207] FORD, *supra* note 200, at 235–36.

[208] *Id.* at 236.

[209] *Id.* at 240.

IV. THE APPOINTMENT OF EDWARD LEVI AND THE BOSTON BUSING CASE

A. The Appointment of Ed Levi as Attorney General

Ford wanted his new Attorney General to be non-political and to possess a superior intellect.[210] Levi's name was suggested to the White House by Donald Rumsfeld, then-Chief of Staff to the President.[211] Philip Buchen, President Ford's White House Counsel, undertook to make some telephone calls about Levi.[212] Once those checks had been made, and the positive comments of those Buchen spoke with had been noted, Rumsfeld called Levi in early December and asked Levi to come to the White House.[213] Levi came on December 5, before the President had spoken to Saxbe about leaving the Department of Justice.[214] Rumsfeld took Levi to meet with the President, and, in response to a question from the President, Levi told the President that next Attorney General should be non-political.[215] That was exactly what the President had said he was looking for. The President, who had never met Levi but who had been thoroughly briefed about him, "sprang [his] trap" and offered the Attorney General's job to Levi on the spot.[216] Levi resisted at first because he was in a major fund drive for the University.[217] This is the point at which Levi felt that he needed the job as Attorney General like he needed "a hole in the head."[218] According to the President, however, Levi agreed to serve after Ford appealed to his patriotism.[219]

Levi's confirmation process got off to a rocky start, in part because the White House neglected to consult several powerful senators before making the announcement.[220] But President Ford overcame that

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[210] *Id.* at 236.

[211] *Id.*

[212] Notes on individuals being considered for attorney general, *supra* note 19.

[213] Interview with Edward H. Levi (Document Title: 95-NLF-032), Nov. 1, 1989, folder: Kramer, Victor H., box 1, Composite Oral History Accessions, Gerald R. Ford Library.

[214] David Hess, *Saxbe Not Happy About Leaving Job*, DETROIT FREE PRESS (Dec. 14, 1974) (on file with authors).

[215] Gerald R. Ford, *In Memoriam: Edward H. Levi (1912–2000)*, 67 U. CHI. L. REV. 967, 976 (2000).

[216] *Id.*

[217] *Id.*

[218] JAMES CANNON, GERALD FORD: AN HONORABLE LIFE 308 (2013).

[219] Ford, *supra* note 200, at 976.

[220] Newspaper clipping (Rowland Evans and Robert Novak, *The Opposition Lines Up Against Levi*), Dec. 23, 1974, folder: Justice–Personnel–Attorney General (1), box 24, Philip Buchen Papers, Gerald R. Ford Library.

opposition,[221] and Levi's nomination hearing proceeded in late January 1975.[222] The Judiciary Committee approved the nomination, and the Senate confirmed Levi as Attorney General on February 5, 1975.[223] Levi took office with a promise from the President that the President would not interfere with Levi's decisions about particular cases.[224] Levi later said that he did not believe the President would keep this promise, but in fact the President never did interfere.[225] Levi, as we have noted, made a commitment to the Senate to be independent and to call them as he saw them. He promised at his swearing-in to lead a non-partisan Department of Justice.[226] The President's promise, and Levi's commitments, were sorely tested when the time came to decide whether the United States would inject itself into one of the most controversial issues of the day—school busing for purposes of desegregation—in cases involving the most volatile of locales—the city of Boston.

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[221] Newspaper clipping (Orr Kelly, *Opposition to Levi Fades*), Jan. 19, 1975, folder: Justice–Personnel–Attorney General (1), box 24, Philip Buchen Papers, Gerald R. Ford Library.

[222] In preparing to testify, Levi was assisted by a young Justice Department lawyer from Kentucky named Mitch McConnell. Memorandum, McConnell to Levi, Jan. 22, 1975, folder: Levi, Edward (2), box 9, William T. Kendall Papers, Gerald R. Ford Library.

[223] Gerald R. Ford, *Attorney General Edward H. Levi*, 52 U. CHI. L. REV. 284, 285 (1985).

[224] The Office of the Attorney General, *supra* note 37, at 51:50.

[225] *Id.* The President's position was not merely a private promise made to Levi. At Levi's swearing in, Ford's prepared remarks included this paragraph:

> In looking for a new Attorney General, I determined that a traditional political appointment would not do. Recent events had raised widespread doubt about our justice system in general and our Department of Justice in particular. The Department of Justice has been and must remain a strong arm of the executive branch. The Justice Department must participate in the development of administration policies. But it must not be involved in partisan politics.

Remarks at 4, Feb. 7, 1975, folder: Feb. 7, 1975 Remarks for Swearing-In Ceremony of Edward Levi, Attorney-General, box 5, Reading Copies of Presidential Speeches and Statements, Gerald R. Ford Library.

[226] At the ceremony, Levi said:

> We have lived in a time of change and corrosive skepticism and cynicism concerning the administration of justice. Nothing can more weaken the quality of life or imperil the realization of those goals we all hold dear than our failures to make clear by word and deed that our law is not an instrument of partisan purpose, and it is not an instrument to be used in ways which are careless of the higher values which are within all of us.

Exchange of Remarks, Feb. 7, 1975, folder: FG 17/a 8/9/74–2/10/75, box 88, White House Central Files Subject File, Gerald R. Ford Library.

B. The Boston Busing Case

The example we have chosen to illustrate Edward Levi's non-political approach to his job as Attorney General is the decision he made on Saturday, May 29, 1976, not to have the Department of Justice file a memorandum with the Supreme Court about what had become known as the "Boston Busing" case. Levi awoke early that day, and he had not yet decided whether the Department of Justice should get involved, essentially on the side of the parties who were opposed to a district judge's order to bus school children to promote desegregation of public schools.[227] The Department of Justice memorandum was drafted and ready to go, and Levi had two press releases in his briefcase, one announcing that the Department of Justice would be filing the memorandum and another announcing that it would not.[228] Sometime between 5 A.M. and 8 A.M. on that Saturday morning, Levi made his decision.[229]

To understand why this decision was complex and controversial, and why it raised issues of partisan influences on the Department of Justice, we have to look back at the political environment in which Levi was operating. Twenty years had passed since the first decision in Brown v. Board of Education,[230] and school desegregation was still one of the hottest political issues of the day.[231] In particular, the use of what opponents called "forced busing" as a remedy for discrimination was a highly sensitive issue. All over the country—in Michigan, Delaware, Texas, California, and many other places—there was controversy and unrest where black students were bused across town to attend formerly all-white schools, and where white students were bused across town to attend formerly all-black schools.

Nowhere was the issue more volatile than in Boston.[232] Based upon a history of deliberate segregation of the Boston city schools, United

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[227] Notes of interview of Levi by Reichley, *supra* note 68, at 3.

[228] Draft press releases and draft memorandum, folder 2: Boston School Busing cases (1975), notes, 1991, box 124, May, 1976, Edward H. Levi Papers, University of Chicago Library, Department of Special Collections.

[229] *Id.*

[230] 347 U.S. 483 (1954).

[231] For general background on the history of busing for the purpose of desegregating public schools, *see* MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION (2016).

[232] For a retrospective look at busing in Boston, see the two-part series produced by WBUR. The first part: Bruce Gellerman, *'It Was Like a War Zone': Busing in Boston*, wbur (Sep. 5, 2014, 8:35 AM) (available at https://www.wbur.org/news/2014/09/05/boston-

States District Judge Arthur Garrity in 1974 ordered the busing of white students from South Boston to Roxbury, Massachusetts, and the busing of black students from Roxbury to South Boston.[233] The order led to violence and prompted numerous demonstrations.[234] One photo of an anti-busing rally shows a sea of white faces and a demonstrator holding a placard that read, "WHITES HAVE RIGHTS."[235] A woman in the foreground of the picture is wearing a button that says, "NO WE WON'T GO."[236] Many of the protests were organized by an anti-busing organization, Restore Our Alienated Rights—known by its initials as "ROAR"—led by Louise Day Hicks.[237] The logo for ROAR was a drawing of a lion mid-roar with its front paws resting on a school bus.[238] Supporters of the judge's order also demonstrated. One march was led by a banner that read: "DESEGREGATE BOSTON SCHOOLS NOW" and "KEEP THE BUSES ROLLING."[239]

President Ford became President less than two months after Judge Garrity issued his initial busing order. On principle, Ford opposed busing.[240] In a move that was unprecedented at the time, the President commented directly on his disagreement with Judge Garrity's decision at a press conference on October 9, 1974. Ford said, "the court decision

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busing-anniversary). The second part: Bruce Gellerman, *Busing Left Deep Scars on Boston, Its Students*, wbur (Sep. 5, 2014, 10:05 AM) (available at https://www.wbur.org/news/2014/09/05/boston-busing-effects).

[233] Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom.* Morgan v. Kerrigan, 530 F.2d 431 (1st Cir. 1976), *cert. denied sub nom.* White v. Morgan, 426 U.S. 935 (1976).

[234] In one incident, hundreds of white students walked out of school the day after the stabbing of a white student by a black student had led a crowd of about 1,000 white students to trap 131 black students inside a school building for four hours. John Kifner, *4 Boston High Schools Hit by Walkouts*, N. Y. TIMES, Dec. 13, 1974, https://timesmachine.nytimes.com/timesmachine/1974/12/13/79883650.pdf?pdf_redirect=true&ip=0.

[235] The photo is reprinted in Nikole Hannah-Jones, *It Was Never About Busing*, N. Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/opinion/sunday/it-was-never-about-busing.html.

[236] *Id.*

[237] For general background on ROAR, *see* Rachel Sherman, ROAR: The Anti-Busing Group with the Loudest Voice, https://bosdesca.omeka.net/exhibits/show/roar-anti-busing-group (last visited May 24, 2021).

[238] *Id.*

[239] The photograph is reproduced in Desegregation Busing, Encyclopedia of Boston, https://bostonresearchcenter.org/projects_files/eob/single-entry-busing.html (last visited May 24, 2021).

[240] Interview by James Reichley of Philip Buchen 3–4, Sept. 1, 1977, folder: Ford White House, box 1, A. James Reichley Interview Transcripts, Gerald R. Ford Library.

in that case, in my judgment, was not the best solution to quality education in Boston."[241] It should be noted that Ford also called for calm.[242]

The Boston busing case began to make its way through the court system, as did the busing cases in other parts of the country. Over a year later, on November 20, 1975, the President met with Levi to discuss busing. President Ford's Press Secretary, Ron Nessen, later described the meeting: "The President asked the Attorney General to look for an appropriate and proper case to ask the Court to re-examine busing as a remedy, and to explore alternative solutions that would be less destructive[] of the fabric of our community life."[243] It was, Nessen said, "a policy directive" from the President.[244] Levi agreed with the policy.[245] Both Ford and Levi understood that the decision would belong to Levi and that the President would not be getting involved in Levi's decisions about individual cases.[246]

By early 1976, the United States Court of Appeals for the First Circuit had approved Judge Garrity's orders in the Boston case. Several petitions for certiorari were on their way to the Supreme Court as interested parties sought to have the court end or limit busing in Boston.

Meanwhile, President Ford was locked in a battle with Ronald Reagan for the Republican nomination for President. This was a bitterly contested and close contest.[247] It would have been to the President's political advantage to be seen as acting forcefully in opposition to busing. A report of Reagan's assertions about busing in a speech in Sacramento illustrates how Reagan treated the issue during the campaign. Reagan said that if he were elected he would call on

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[241] Anthony Ripley, *Violence is Deplored*, N. Y. TIMES (Oct. 10, 1974), https://www.nytimes.com/1974/10/10/archives/violence-is-deplored.html.

[242] *Id.*

[243] Lesley Oelsner, *President Seeks Case for Review of Busing Issue*, N. Y. TIMES (May 19, 1976), https://www.nytimes.com/1976/05/19/archives/president-seeks-case-for-review-of-busing-issue-nessen-says-ford.html.

[244] *Id.*

[245] Interview by James Reichley of Philip Buchen, *supra* note 240.

[246] Interview by James Reichley with Gerald Ford, Mar. 3, 1978, folder: Ford White House, Ford, Gerald, box 1, A. James Reichley Interview Transcripts, Gerald R. Ford Library.

[247] President Ford devoted a lengthy chapter in his memoir to Reagan's "[c]hallenge from the [r]ight." FORD, *supra* note 200, at 333–407.

Congress to outlaw "forced busing."[248] Reagan claimed that "[f]ederal intervention in the classroom was responsible for much of the nation's educational deficiencies and he promised that if elected President, he would issue instructions to Federal departments 'to get off the back' of local school boards."[249] Reagan also "called busing for purposes of desegregation a 'pernicious' instrument of the Federal courts."[250]

Even before the possibility of having the Department of Justice get involved in the Boston case came up, Levi was being criticized for being a political liability for President Ford in the race for the Republican nomination for President. Levi's nuanced pronouncements on crime control did not dovetail with the President's much more forceful statements on the campaign trail. The Wall Street Journal reported, "Polls show that crime could be one of the [most] explosive political issues of the campaign year, and Mr. Levi is neither explosive nor political."[251]

Then Levi received a call about the pending petitions for certiorari in the Boston case from Robert Bork, his former student and now the Solicitor General of the United States.[252] Bork said, "I want you to know that I am thinking about whether or not we should file a Memorandum in support of at least one of the petitions; Do you want to discuss it?"[253] Levi later said that the politics of the matter immediately went through his head and that he thought he could have avoided the issue if he chose to do so.[254]

Levi was not naïve. If he decided to go ahead, he would be accused of using the Department to further the political position of the President. If he didn't, he could be seen as hurting the President politically with respect to a subject about which the President felt strongly, about which he had rightfully set his broad policy goals, and about which the

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[248] John Nordhelmer, *Reagan Criticizes U.S. School Role*, N. Y. TIMES (June 3, 1976), https://www.nytimes.com/1976/06/03/archives/reagan-criticizes-us-school-role-makes-campaign-vow-to-get-federal.html.

[249] *Id.*

[250] *Id.* The Ford campaign was closely monitoring Reagan's comments. A report about the Sacramento speech appears in the papers of Ron Nessen, Ford's Press Secretary. Memorandum, June 1976, folder: Reagan Issues Busing, box 39, Ronald Nessen Papers, Gerald R. Ford Library.

[251] Mitchell C. Lynch, *Levi Takes Politics Out of Justice Agency, But Is He a Ford Asset?*, WALL ST. J. (Mar. 4, 1976) (on file with authors).

[252] Press Conference of The Honorable Edward H. Levi Attorney General of the United States with Members of the Press 5 (June 16, 1976, 10:00 A.M.) at 5 (on file with authors) (photocopy from Gerald R. Ford Library).

[253] *Id.*

[254] *Id.* at 13.

President would be subject to criticism from Reagan. Levi thought that his relationship with Bork was such that he could have said, "Bob, forget it. Why are you going to cause trouble?"[255]

But Levi did not succumb to that understandable temptation to stay away from such a hot political issue. He later said, "[b]ut I really made the rather immediate judgment—and I think it was the right one—that I have responsibilities, official responsibilities, and I don't think they can be put in the icebox because this is a political year."[256] Levi told Bork that he thought they should review the possibility of Department of Justice involvement in the Boston case, and he got Bork together with the Assistant Attorney General for Civil Rights, Stanley Pottinger, to discuss the matter.[257] The result of those discussions was that Levi thought the best way to proceed was to draft the memorandum and see what it looked like.[258] He said, "the only way . . . that you find out whether something can be written is that you try to write it and after you write it you see where there are holes in it and whether it doesn't work."[259] The lawyers in the Department went through this process and eventually created six different drafts as they learned more and more about what was in the voluminous record developed in the trial court.[260] Levi had not made a decision, but obviously he was seriously considering filing a memorandum with the Supreme Court in support of one or more of the petitions for certiorari. At this point, no one at the Department of Justice told the President or White House counsel what was going on.

Then all hell broke loose.

Someone made the Department of Justice deliberations public, and the New York Times published the story on May 14, 1976.[261] The Times story noted right away the possible connection to "President Ford's struggle to win the Republican Presidential nomination over the conservative challenge of former Gov. Ronald Reagan of California."[262] The story later mentioned the "connection that many persons might

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[255] *Id.* at 5–6.

[256] *Id.* at 13–14.

[257] *Id.* at 6.

[258] *Id.*

[259] *Id.* at 6–7.

[260] *Id.* at 8.

[261] Lesley Oelsner, *Levi Weighs Asking High Court to Upset Boston Busing Ruling*, N.Y. TIMES (May 14, 1976), https://www.nytimes.com/1976/05/15/archives/new-jersey-pages-levi-weighs-asking-high-court-to-upset-boston.html.

[262] *Id.*

draw between the filing of the brief and the Presidential race."[263] The story also noted that the timing of the Department's potential filing was highly suspicious. Bork had urged that the Department file the brief on May 14, just before the Republican primary on May 18 in Michigan, which had had its own severe busing problems.[264] Levi professed not to know or care who was the source of the leak, but he was very disappointed because, he said with understatement, "the political aspects became more pronounced."[265]

Now that the Department's deliberations were public, interested parties wanted to lobby Levi. On May 18, four days after the New York Times published its first article on the matter, Levi started his day with a phone call with Philip Buchen, White House Counsel, about the Boston busing situation.[266] Then Levi met at the Justice Department with Louise Hicks, the founder of ROAR—the group organized to resist the Boston busing order.[267] Ms. Hicks, of course, wanted the Department of Justice to get involved to try to overturn Judge Garrity's orders. An hour later, Levi met with Roy Wilkins, the Executive Director of the NAACP, and Clarence Mitchell, the chief lobbyist for the NAACP.[268] They brought with them the lead lawyers in the Boston case and tried to persuade Levi to stay out of the Boston case.[269] Levi rather laconically described it this way: "we had the added point that a lot of people wanted to talk to us. Now, that had a certain value, I think. In any event, various groups came in and we heard them out, and I was told a great deal about the situation in Boston."[270] The New York Times described Levi's apparent approach to the meetings: "Mr. Levi, according to persons who attended each meeting, said very little to either group and sought to convey the impression that he wanted to hear both sides before making his final decision."[271]

May 18 was not the only day of lobbying. Over the next eleven days, Levi met or talked with (among others) Senators Brooke, Roth, Biden,

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[263] *Id.*

[264] *Id.*

[265] Press Conference of The Honorable Edward H. Levi, *supra* note 252, at 14.

[266] Attorney General's Log, May 18, 1976, folder 7, box 110, Edward H. Levi Papers, University of Chicago Library, Department of Special Collections.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] Press Conference of The Honorable Edward H. Levi, *supra* note 252, at 9.

[271] Oelsner, *supra* note 261.

and the Congressional Black Caucus.[272] Levi had several passionate exchanges with the Secretary of Transportation, William Coleman, the only black member of President Ford's Cabinet, who urged Levi to stay out of the Boston case.[273] Levi also had several phone calls with Buchen about the Boston case, and Levi met twice at the White House with President Ford about busing. They met for about an hour each time, on May 21 and again on Friday, May 28—the day before Levi made his decision.[274] Levi reported that he and the President had "excellent discussions" about the factors that Levi was considering.[275]

These meetings and phone calls, and the attendant publicity, now added new political dimensions to the decision. All Levi wanted to do was decide whether the Boston case was a good case to help the Supreme Court develop the precise contours of the law, to narrow the circumstances under which busing would be the appropriate remedy. Now, however, if the Department of Justice filed, it would appear to be siding with ROAR and other opponents of the judge's order. If the Department did not file, it would be seen as caving in to the pressure of Senator Brooke, the NAACP, and other proponents of busing. Levi had a political hot potato in his hands. Levi was understandably concerned "that if he decided not to intervene in the Boston case, it might seem that he was reacting to public pressure."[276]

So that takes us back to 5 A.M. on Saturday morning, May 29. Levi decided that the Department would not file a memorandum in the Boston case, spoke with White House Counsel Buchen, and instructed

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[272] These various meetings and phone calls appear on the Attorney General's logs for May 19, May 20, May 24, May 25, May 27, and May 28, 1976, folder 7, box 110, Edward H. Levi Papers, University of Chicago Library, Department of Special Collections.

[273] Eight days before Levi made his decision in the Boston case, Secretary Coleman delivered remarks to the American Law Institute that included this:

> I don't always agree with everything Ed Levi does. Indeed, and I report this publicly because it is already public knowledge, I have been urging him during these last several days not to add to our inventory of disagreements by taking a position in the Boston school litigation which in my respectful view would be ill-timed and unsound in law.

Memorandum, Buchen to Lynn and Gergen, May 25, 1976, file: Justice-General (6), box 23, Philip Buchen Papers, Gerald R. Ford Library.

[274] These calls and meetings appear on the Attorney General's logs for May 21 and May 28, 1976, folder 7, box 110, Edward H. Levi Papers, University of Chicago Library, Department of Special Collections.

[275] Press Conference of The Honorable Edward H. Levi, *supra* note 252, at 10.

[276] Lesley Oelsner, *Levi, In Reversal, Won't Use Boston as Test on Busing*, N.Y. TIMES (May 30, 1976), https://www.nytimes.com/1976/05/30/archives/levi-in-reversal-wont-use-boston-as-test-on-busing-decision-not-to.html.

the Public Information Office to issue a press release at 12:15 P.M.[277] Levi called Buchen to tell him the decision, and the President learned of the decision from Buchen.[278] Levi went home and left it to Robert Bork to answer questions from the press.[279] The Supreme Court denied certiorari in the Boston cases several weeks later.[280]

Levi described his decision as a matter of judgment. Political considerations had no role.[281] His legal judgment was that Boston was not the right case in which to try to influence the development of the law in the direction that Levi and the President agreed was the right direction. Levi's comments on the decision included these:

> So that on Saturday morning I decided that on balance, using the best judgment I could—and I have no desire to try to second-guess myself any more on that subject—that we should not go in . . . What was involved was basically a question of law, but that oversimplifies it; because the evolution of opinions and the kind of cases one brings to the court inevitably involve what you think the facts of the case really are and as they will be seen by the court, whether it is a case for the kind of theory which we think and have thought for some time is correct; but we also of course had to be concerned, as I think the Department of Justice always has to be, about the—you can't be indifferent to the effect on the particular community.
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> [O]ur concern with respect to Boston was, how much difference that would make in that particular situation? So that we had to make a judgment whether it was the right case to bring it out . . . . [W]e didn't think it was the right case.[282]

Levi said later that he had not taken any political considerations into account when he made the decision, but he knew it was a no-win situation: "I did my best to remove any other kinds of influences upon me. I always knew that whatever decision I made would be the wrong one; that it is the kind of decision which you do not win on."[283]

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[277] Attorney General's Log, May 29, 1976, folder 7, box 110, Edward H. Levi Papers, University of Chicago Library, Department of Special Collections.

[278] Notes of interview of Levi by Reichley, *supra* note 68, at 3.

[279] Memorandum to file, Mar. 7, 1991, folder 2: Boston School Busing Cases (1975), notes 1991, box 124, Edward H. Levi Papers, University of Chicago Library, Department of Special Collections.

[280] *White*, 426 U.S. 935.

[281] Notes of interview of Levi by Reichley, *supra* note 68, at 2.

[282] Press Conference of The Honorable Edward H. Levi, *supra* note 252, at 10–11, 26.

[283] *Id.* at 11.

Some reactions to the decision were critical. The New York Times speculated about appearances of possible political motivations: "[a]pparently, however, the Attorney General in making his decision weighed several factors, both strictly legal ones and others that in a broad sense at least could be considered political."[284] Columnists Rowland Evans and Robert Novak criticized Levi's handling of the Boston case as "'hopelessly amateurish.'"[285] Levi's response to that was that the decision "might [have] . . . seemed bad because it was not politically shrewd—indeed it was not political," and so "in that sense was hopelessly amateurish."[286]

Despite the lost political opportunity, the President kept his word to leave the decision to Levi, and Ford publicly supported Levi's decision. On Face the Nation a week later, the President said:

> Within the last [two] weeks the Attorney General has decided not to intervene in the Boston case for good reasons that he, as Attorney General, decided, and I support him. On the other hand the Attorney General is seeking a particular case where we can get a clarification or a modification of some of the previous Supreme Court decisions in this very complex area.[287]

The ongoing search for the right case was not the only way in which Levi continued to serve the President's policy against busing while preserving his independence with respect to particular cases. Over the next few weeks, Levi met with the President numerous times to work on trying to further the President's anti-busing policy in other ways, including through the passage of legislation.[288]

The Boston busing case is an excellent example of an Attorney General doing things the right way. Edward Levi had political reasons to duck the issue entirely. He thought about them—he recognized them—and then he ignored them. He and other lawyers at the Department proceeded to analyze the case in order to decide whether it presented an appropriate opportunity to try to influence the direction of

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[284] Oelsner, *supra* note 276.

[285] Address, Edward H. Levi Before the Annual Dinner Meeting of the Chicago Bar Association 5, June 24, 1976, Levi Bound Vol. 3, Gerald R. Ford Library.

[286] *Id.*

[287] Interview on CBS News' "Face the Nation,"

https://www.presidency.ucsb.edu/documents/interview-cbs-news-face-the-nation (last visited May 24, 2021).

[288] *See*, *e.g.*, Memorandum from Jim Cannon regarding meeting on school desegregation, June 2, 1976, folder: Justice, Edward H. Levi, box 2, James E. Connor Papers, Gerald R. Ford Library.

the law, consistent with the broad policy preferences of the President. They did so without regard to the politics of the moment. Then, through no fault of Levi's, the matter became public in the midst of deliberations about what to do. That brought forth even more political pressure, from both sides of a highly volatile issue, in the midst of presidential primary season. Here, again, Levi could have allowed the politics of the situation to influence him. He did not. Levi set partisan politics aside and used his best legal judgment in connection with a highly charged decision. His conduct in this case is a good lesson for future Attorneys General.

V. THE APPOINTMENT OF GRIFFIN BELL AND THE MARSTON AFFAIR

A. The Appointment of Griffin Bell as Attorney General

When Jimmy Carter defeated Gerald Ford in the Presidential Election of 1976, it became clear that there would be a new Attorney General in a few months. Carter and Bell had known each other since their boyhoods in Sumter County, Georgia, but they were not close personally.[289] Even before he was elected, Carter asked Bell to be thinking about who should be appointed as Attorney General.[290] Bell drew up a list, but ultimately, Carter asked Bell to take the job.[291] Bell's assumption was that Carter wanted someone he knew to be the Attorney General because of the need for the President to have absolute confidence in a cabinet official with so much power.[292]

Bell's nomination was controversial, and his confirmation hearings were strident at times. Bell had served as a sort of informal part-time Chief of Staff to Georgia Governor Ernest Vandiver in the late 1950s, during a time of great turmoil over the desegregation of Georgia schools.[293] Vandiver had been elected on a slogan of "no, not one," and Bell's involvement with Vandiver's policies on segregation concerned a number of Senators and witnesses.[294] Those concerns were exacerbated when it became known that Judge Bell belonged to several private clubs

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[289] Interview by James W. Ceasar et. al. with Griffin Bell 4 (Mar. 23, 1988) (final edited transcript *reprinted in* Griffin Bell Oral History, University of Virginia Miller Center, https://millercenter.org/the-presidency/presidential-oral-histories/griffin-bell-oral-history).

[290] *Id.* at 5.

[291] *Id.*

[292] *Id.* at 12–13.

[293] *The Prospective Nomination of Griffin B. Bell, supra* note 17, at 93–97.

[294] *Id.* at 92.

that had only white members.[295] Bell chose to resign those memberships.[296] Despite the controversies, Bell ultimately was confirmed by the Senate and took office on January 26, 1977.

Griffin Bell had never met Edward Levi until after Bell was nominated to serve as Carter's Attorney General.[297] After Levi called Bell and offered to brief him on the issues that awaited Bell, they spent two days together at the Department of Justice in early January 1977.[298] Bell understood that his mission was restoring the independence of the Department of Justice. He knew that the legacy of Watergate had "given rise to an understandable public concern that some decisions at Justice may be the products of favor, or pressure, or politics."[299] He appreciated that his mission involved not only working to restore the reality of the Department's independence, but also the public's perception of the Department's independence. Restoring the reality of independence required putting in place procedures that would allow the Department's lawyers the freedom to exercise their professional judgment absent political influence. Just as important, the public must have confidence that the Department is independent.[300] Griffin Bell's mantra as Attorney General was that the Department of Justice be a "neutral zone" in the government, and he was keenly aware "[i]t follows necessarily that the Department must be recognized by all citizens as a neutral zone, in which neither favor nor pressure nor politics is permitted to influence the administration of the law."[301]

The episode we have chosen from Griffin Bell's tenure as Attorney General squarely raises the issue of restoring both the reality and perception of the Department's independence and non-partisanship. The incident we highlight involved a major controversy that erupted over what would usually be a routine event: the replacement of a hold-over Republican United States Attorney by an incoming Democratic presidential administration. It is initially a tale of missteps and miscalculations by an Attorney General that damaged the

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[295] *Id.* at 119–121.

[296] *Id.* at 121.

[297] Interview of Griffin Bell by Patrick Longan, June 4, 2003 (notes on file with authors).

[298] *Id.*

[299] Griffin B. Bell, Attorney General of the United States, An Address by the Honorable Griffin B. Bell at the Great Hall, U.S. Department of Justice 3 (Sept. 6, 1978, 11 AM), transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf.

[300] *Id.* at 5–6.

[301] *Id.* at 13.

perception of the Department's independence, but ultimately a story of lessons learned, responsibility taken, and positive leadership during the sort of adversity and crisis that marks the tenure of every Attorney General.

B. The Marston Affair

The episode, commonly referred to as the Marston affair,[302] was a fiasco for Bell and the Department. Looking back, Bell said, "We made grave mistakes from start to finish in handling the matter."[303] Bell viewed the episode as a serious setback that cost him precious months in his mission to restore the Department.[304] It was not only embarrassing to Bell himself, but as we shall see, it proved to be personally embarrassing to President Carter to such a degree that Bell seriously considered resigning.[305] These were Bell's "darkest days as attorney general."[306] It is sometimes said that adversity may not build character, but it does reveal it, and so it was with Bell and the Marston affair. He took ownership of the problem, forthrightly admitted errors, and declined to shift blame. His special assistant at the Department of Justice, Terry Adamson, said that the Marston affair was "a watershed positive event for Judge Bell during his tenure, earning him critical credibility for his humility, as well as candor with the press and public."[307]

Every Attorney General faces a constant tension between the mission of faithfully executing the laws in a neutral manner and the reality that the Attorney General is a political appointee of a partisan president.[308] Some Attorneys General succumb to the temptations of partisan loyalty. The rest, including Bell, inevitably face situations where mistakes create the appearance of possible partisanship that is hyped by the administration's political foes and by the press. Some Attorneys General are unable to meet these challenging situations. Others, including Bell, are able to summon the character and judgment not only

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[302] William Safire, *The Philadelphia Story*, N.Y. TIMES, Feb. 19, 1978, at 10, *reprinted in Nomination of Benjamin R. Civiletti to be Deputy Attorney General*, Hearing before the Committee on the Judiciary, United States Senate, 95th Cong., 2d Sess., Part 2 539, 541 (1978) (embracing the "The Marston Affair" as the episode's appropriate title).

[303] BELL WITH OSTROW, *supra* note 27, at 208.

[304] *Id.* at 209.

[305] *Id.* at 208.

[306] *Id.*

[307] Terry Adamson, *Hardworking Bell Leaves a Legacy To Be Appreciated*, 18 J. S. LEGAL HIST. 307, 314 (2010).

[308] Meador, *supra* note 36, at 299.

to weather such political firestorms but to restore the perception of independence and neutrality. The Marston affair illustrates Bell's ability to do this.[309]

The narrative of the Marston affair begins by introducing its protagonist, David W. Marston, who graduated from law school in 1967 at age twenty-five. He began his legal career with a firm in Philadelphia. Marston had political ambitions but was unsuccessful in two campaigns for seats in the state legislature. Marston came to the attention of Republican United States Senator, Richard Schweiker, who asked Marston to join his staff in 1973.[310]

In 1976, with the presidential election a few months off, Marston was appointed United States Attorney for the Eastern District of Pennsylvania by President Ford.[311] It is unusual for U.S. Attorneys, who require vetting by the Senate Judiciary Committee and confirmation by the full Senate, to be nominated and approved so close to an election, but with the backing of Senator Schweiker, David Marston found himself as the presidentially-appointed head of the U.S. Attorney's Office in Philadelphia.[312] Marston took office in June 1976, at age thirty-five and less than ten years after graduating from law school.[313] He had served about five months when Carter defeated President Ford.[314]

Having introduced David Marston, there are two other points of background to set the stage for the Marston affair. First, it is important to have a sense of the traditional process for handling the appointment of United States Attorneys when a presidential election results in a change to a President of a different political party. In 1976, Republican Gerald R. Ford lost to Jimmy Carter, so the incoming Democratic Administration would have to make decisions about who would run the U.S. Attorney's Offices in the ninety-four federal judicial districts around the country.

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[309] *Id.*

[310] BELL WITH OSTROW, *supra* note 27, at 209.

[311] *Id.* at 208.

[312] *Id.* at 209.

[313] *Id.* It is an interesting political twist that in July 1976, shortly after Marston became U.S. Attorney, his political sponsor Senator Schweiker was named by Republican presidential candidate Ronald Reagan as his intended choice for Vice-President in Reagan's unsuccessful insurgent campaign against President Ford for the Republican nomination. *See* JULES WITCOVER, MARATHON: THE PURSUIT OF THE PRESIDENCY 1972–1976 456–63 (New York, 1977).

[314] BELL WITH OSTROW, *supra* note 27, at 209.

The process has varied from one presidential transition to another. Some of the outgoing party's U.S. Attorneys will resign of their own accord during the transition, with an Assistant U.S. Attorney running the office on an interim basis. After the inauguration, some incoming administrations will require all incumbent U.S. Attorneys to leave office, with interim U.S. Attorneys taking over. Other transitions take a hybrid approach with most U.S. Attorneys asked to leave office, but some incumbents asked to stay on at least for the time being. The decision to retain a U.S. Attorney appointed by the opposite party, at least on a temporary basis, might be based on the perceived merit of the incumbent or perhaps concern about disrupting the continuity of one or more sensitive pending investigations or prosecutions.

Every transition is marked by a somewhat chaotic process that involves ninety-four office-by-office decisions and varying timelines for selections; vetting (including full field FBI background investigations); and Senate Judiciary Committee hearings and Senate confirmation that can extend many months into the new administration. Politics makes a significant contribution to the chaos. Because the appointments require Senate confirmation, it is traditional that the senior Senator of the President's party will have a role in selecting the U.S. Attorneys to serve in the federal districts in the state. If there are two Senators of the President's party in a state, sometimes—but not always—the senators will share power. Sometimes—but not always—the Senator or Senators will set up an advisory committee to make recommendations. If there is no Senator of the President's party, then the members of the House Delegation of the President's party will expect input on the nominations, adding to the number of decision makers and the level of chaos. So, the process for a new presidential administration deciding how to fill U.S. Attorney positions and actually filling those positions is, at best, untidy, cumbersome, and time consuming—completely unlike the snappy precision and efficiency of the changing of the palace guard.

The second piece of background to set the stage for the Marston affair concerns Jimmy Carter's campaign for President. In campaigning to restore morality to the government after Watergate, candidate Carter espoused the highest standards of integrity and honesty in government. For example, candidate Carter said this: "If I ever tell a lie, if I ever mislead you, if I ever betray a trust or confidence, I want you to come and take me out of the White House."[315] Such an absolute

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[315] *That Mishandled Marston Affair: Broken promises and misstatements put Carter on the Spot*, TIME, Feb. 6, 1978, at 20.

standard of moral purity may have been appealing to voters in the wake of the corruption of Watergate, but once in office, it invites the press and public to use it as the day-to-day measure of the administration's probity, and the ease of committing perceived lapses of such a high standard may set up the administration for failure, or at least put the administration in a constant posture of defensiveness. The Carter campaign thus set standards of behavior in office that invited close scrutiny.

The Carter campaign also made declarations concerning how a Carter Administration would select federal prosecutors. The story of Watergate included significant elements of the compromise of independent prosecutorial decision-making and politicization of the Department of Justice. Candidate Carter said this: "All federal judges and prosecutors should be appointed strictly on the basis of merit without any consideration of political aspects or influence."[316] Such a sweeping proposal flew in the face of the traditional political process by which judges and U.S. Attorneys were selected. No one advocated appointing unqualified judges and U.S. Attorneys, but the system of political patronage was entrenched. That is simply the way the system worked: the party in control of the Executive Branch exercised the appointment power to favor party loyalists.

This reality was brought home to President-elect Carter and Attorney General-designate Bell by Senator James Eastland, the Chairman of the Senate Judiciary Committee.[317] Senator Eastland made clear that while some form of non-political merit selection might be possible for federal appellate judges, politicians of the President's party would continue to have a role in selecting district judges and U.S. Attorneys for federal districts in their states.[318] The campaign promise of merit selection without any political considerations was a non-starter. A Democratic Administration would mean Democratic appointees would be selected with input from the Democratic political establishment. Exceptions would be few and far between. That was the way the system would continue to work.

With that background, we now focus on the Carter administration's process of selecting the U.S. Attorneys following the inauguration in January 1977. During 1977, the new Administration had named about seventy U.S. Attorneys, all Democrats, and about twenty Republican U.S. Attorneys were allowed to remain in office at least temporarily.

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[316] *Id.* at 20.

[317] BELL WITH OSTROW, *supra* note 27, at 208–09.

[318] *Id.*

One of those allowed to stay on was David Marston in Philadelphia.[319] Attorney General Bell had criteria that had been applied to the incumbent U.S. Attorneys thus far evaluated. Under those criteria, David Marston was unlikely to be retained. Marston was relatively inexperienced as a lawyer, and very inexperienced as a prosecutor and trial lawyer. Not only was Marston a Republican political appointee, but he was a very *political* political appointee, having come directly from a Senator's office with two previous attempts at elective office and likely having designs on future attempts based on a resume and reputation burnished by service as the U.S. Attorney.[320]

Nonetheless, Marston was not immediately replaced. Two of Bell's advisors, one of whom had connections to Pennsylvania politics, recommended that Marston not be removed right away and that he should be considered for retention. These advisors pointed to the fact that the U.S. Attorney's Office in Philadelphia had several important investigations and prosecutions involving prominent Democratic politicians and an investigation into abuses by the Philadelphia Police Department. Removing Marston, who had been effective at portraying himself in the local media as a corruption-fighting white knight, might be viewed as interfering with those ongoing cases and might cause a backlash by the media in Philadelphia. Despite some misgivings, Bell agreed not to remove Marston immediately.[321]

Bell may have avoided short-term media backlash, but he encountered backlash from another quarter. Because Pennsylvania did not have a Democratic Senator, the Democrats representing Pennsylvania in the House of Representatives not only wanted their voices heard—they insisted that their demands be met. Although the Democratic Congressmen could not agree on who should be U.S. Attorney in Philadelphia, they agreed on who it shouldn't be. They demanded that Marston be removed from office. One of those Democratic Congressmen was Joshua Eilberg of Philadelphia, who happened to hold an important position on the House Judiciary Committee. In meetings and phone calls with Bell, Congressman Eilberg repeatedly demanded that Marston be removed. The message having been received, Bell avoided taking Eilberg's calls.[322]

After an unsuccessful attempt to recruit a replacement for Marston and further warnings that removing Marston might be perceived as an

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[319] *Id.* at 208.

[320] *Id.* at 209. *See also* Meador, *supra* note 36, at 298.

[321] BELL WITH OSTROW, *supra* note 27, at 209–10.

[322] *Id.* at 210–11.

attempt to undermine cases he was handling, Attorney General Bell decided to keep Marston for the balance of 1977 while a search for his replacement was conducted.[323] For his part, Marston was hoping to keep his job for the rest of President Carter's four-year term. Marston remembered candidate Carter's commitment to merit selection and intended to make the case that he deserved retention on that basis.[324] As U.S. Attorney, Marston presided over some impressive corruption prosecutions in 1977 and bolstered his case. Of course, Marston inherited investigations and cases being worked by talented prosecutors and an excellent contingent of FBI agents, but he was the leader and the human face of the U.S. Attorney's Office and received substantial credit with the media and the public.[325] During that first year of the Carter Administration, Marston was pleased to receive some signals from Bell's advisors that he had a chance to hold on to his job.[326]

Meanwhile, Congressman Eilberg's frustration grew because Marston remained in office, his demands were unmet, and Bell would not return his calls. Then, on November 4, 1977, perhaps the most significant event in the Marston affair transpired. As part of his campaign to remove Marston, Congressman Eilberg tried to arrange a phone call with President Carter himself. Perhaps for the purpose of improving the chances that Congressman Eilberg would assist the Administration to get several pieces of high priority legislation through the Judiciary Committee, President Carter called the Congressman. During the call, Congressman Eilberg complained about Marston remaining in office and grumbled that all Marston did was prosecute Democrats.[327]

President Carter promptly called his Attorney General to inquire about the status of the U.S. Attorney in Philadelphia. Bell had a detailed recollection of the call. The Attorney General was being driven to a Brooks Brothers store to shop for a suit. The President called on the car phone, and Bell called the President back on the more secure phone in the manager's office at Brooks Brothers. The President asked about the U.S. Attorney in Philadelphia, and Bell replied that he planned to replace the U.S. Attorney in early 1978. Carter told Bell to hurry up, because Congressman Eilberg was complaining about the

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[323] *Id.* at 210.

[324] Safire, *supra* note 302, at 544.

[325] *Id.* at 542, 544; BELL WITH OSTROW, *supra* note 27, at 210.

[326] Safire, *supra* note 302, at 542.

[327] BELL WITH OSTROW, *supra* note 27, at 210–11.

Attorney General, the slow process, and the U.S. Attorney who "doesn't do anything but prosecute Democrats." Bell promised to hurry.[328]

What neither Carter nor Bell knew during that early November call was that Congressman Eilberg was under investigation by federal authorities, including U.S. Attorney David Marston, for corruption relating to the construction of a hospital in Philadelphia.[329] So, the President had personally spoken to a Congressman under investigation and asked the Attorney General to carry out the Congressman's request that the prosecutor on the case be removed. The seriousness of the potential appearance of impropriety is difficult to overstate. Although neither the President nor the Attorney General knew of the investigation, the circumstantial evidence strongly indicated that Congressman Eilberg did know about the investigation; it appeared that the President may have been an unwitting participant in the Congressman's attempt to derail the investigation.[330] When Bell told his subordinates that the President wanted Marston's removal expedited, he too, appeared to be an unwitting participant.

When Marston spoke with a Department of Justice official in mid-November to check on his status, Marston was told that he would likely be removed because Eilberg had called the President and there was "pressure from on high."[331] That Department official was not in the Criminal Division and was unaware that Eilberg might be under investigation. Marston immediately contacted a Department official in the Criminal Division, one who was in the chain of command of the investigation involving Eilberg, and shared his concern that politics might be behind the attempt to remove him.[332] Somehow, the information that Congressman Eilberg was under investigation by Marston's office did not get to Bell until much later, and there were conflicts in the accounts of Department officials about who knew what and when.[333]

About two months later, in early January 1978, the media in Philadelphia reported that the Attorney General was trying to remove Marston at the urging of Congressman Eilberg, who was under investigation by Marston's office. There was a firestorm of reporting that raised the specter that the Carter Administration was improperly

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[328] Safire, *supra* note 302, at 539; BELL WITH OSTROW, *supra* note 27, at 210–11.

[329] BELL WITH OSTROW, *supra* note 27, at 211.

[330] Safire, *supra* note 302, at 542–44.

[331] *Id.* at 544; BELL WITH OSTROW, *supra* note 27, at 212.

[332] Safire, *supra* note 302, at 545.

[333] BELL WITH OSTROW, *supra* note 27, at 212; *see* Safire, *supra* note 302, at 545–46.

politicizing the appointment process, or worse. The problem was compounded when the President, at a press conference, first insisted that he had "not interfered at all," with the Marston matter nor discussed it with Bell, but then conceded that Congressman Eilberg had asked that Marston be removed and that he had called the Attorney General.[334]

The proximate cause of this disastrous situation was that information concerning a Congressman being under investigation was not shared with the Attorney General in a timely manner. When Bell finally learned that Congressman Eilberg was under investigation, the news shook him, and "the whole ball game changed."[335] This was a serious breakdown, but while accounts conflicted concerning which subordinate officials knew and when they knew, the Department's internal investigation concluded that the Attorney General did not know until after the above-described damage was done.[336] One consequence of the Marston affair was that Bell instituted Department procedures requiring that the Attorney General be notified whenever a public figure becomes the subject of an investigation. But in the case at hand, the information came to Bell too late.[337]

Having learned that there was, in fact, a serious criminal investigation involving Marston's office that implicated Congressman Eilberg and others, the question remained: should Marston be removed as U.S. Attorney? Bell sent a team of Department lawyers to Philadelphia to do an assessment of whether replacing Marston would compromise the investigation. That assessment determined that there would be no long-term disruption if Marston were replaced.[338] Bell, who regretted not removing Marston a year earlier and suspected that Marston was manipulating the situation to preserve his job, resolved to remove Marston as U.S. Attorney.

That set the stage for a final dramatic scene in the Marston affair. Rather than sending an intermediary to inform Marston of his removal, Bell asked Marston to come to Washington for a meeting. Bell regretted handling the dismissal in this way, especially when the meeting became the subject of intense press coverage. Anticipation escalated when the

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[334] BELL WITH OSTROW, *supra* note 27, at 212; *see* Safire, *supra* note 302, at 547–48.

[335] Safire, *supra* note 302, at 547.

[336] Memorandum on Replacement of David Marston as United States Attorney from Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility, to Wade H. McCree, Jr., Solicitor General (Jan. 23, 1978) *reprinted in Nomination of Benjamin R. Civiletti to be Deputy Attorney General*, *supra* note 302, at 558–59.

[337] BELL WITH OSTROW, *supra* note 27, at 212.

[338] *Id.*

gathered press contingent waited several hours while Marston was delayed by travel conditions caused by poor weather. When the meeting finally occurred, it was short and to-the-point. Bell told Marston that he could stay on the job until his replacement was appointed. Marston said that he would stay on the job only if he could serve the entire balance of President Carter's term. Marston's position must have confirmed Bell's suspicion that Marston was trying to engineer the outcome he wanted, and the Attorney General could not abide that.

When the meeting was over, Marston stepped out of the Attorney General's office to meet the throng of press. Marston told them he had been "fired."[339] Bell not only regretted staging the confrontation with Marston, but having done so, he further regretted that he "abandoned the field" by not immediately responding to Marston's statement.[340] By the time the Department attempted to counter Marston's narrative, the public relations damage was done. The press had a field day. There was "a firestorm of charges that political influence had corrupted the administration of justice."[341] The perception was created that the Administration had interfered with an investigation for political purposes. Marston was portrayed as a martyr. The Marston affair had been a debacle. Bell confided to a Department colleague that "a man from the South had not taken such a whippin' in Pennsylvania since Gettysburg."[342]

There are two brief postscripts worth mentioning.[343] One is that Congressman Eilberg eventually lost re-election and later pleaded guilty to corruption charges that were prosecuted by the U.S. Attorney appointed by President Carter. The other is that Marston used his newfound fame to re-enter politics but was unsuccessful. He first lost a bid for Governor of Pennsylvania and later lost a campaign for Mayor of Philadelphia.[344]

The Marston affair graphically illustrates some of the greatest challenges of being Attorney General. In the hierarchy of decision making in the Department of Justice, few matters reach the Attorney General's desk for personal decision that do not involve thorny problems requiring tough calls where any choice will engender controversy and criticism. Despite the fact that, by Bell's own account,

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[339] *Id.* at 213.

[340] *Id.*

[341] Meador, *supra* note 36, at 299.

[342] John Dowd, *Memories of Judge Griffin B. Bell*, 18 J. S. LEGAL HIST. 59, 60 (2010).

[343] BELL WITH OSTROW, *supra* note 27, at 214.

[344] *Id.* at 208, 214.

he made serious mistakes in handling the Marston affair, we believe that the episode yields several important lessons for future Attorneys General. First of all, Bell took responsibility for the errors made on his watch. He forthrightly acknowledged the missteps. He didn't try to shift the blame. He took ownership. He told his colleagues that he felt he had let the President down. He even considered resignation.[345] And in doing all this amidst a firestorm of controversy, he gained credibility as a leader among his colleagues at the Department of Justice.

Second, an Attorney General must be aware of the bureaucratic problems that are inherent in running an enormous organization. During the Marston affair, there was a glaring failure to communicate critical information needed by decision makers at the top of the chain of command. Had the Attorney General known from the outset that Congressman Eilberg was under serious scrutiny by the U.S. Attorney in Philadelphia, most of the regrettable aspects of the Marston affair, including the President communicating with Eilberg and acting on the request to ask Bell to remove Marston, would have been avoided. To address the serious bureaucratic lapse that occurred, Bell instituted new procedures requiring notice up the chain of command of all sensitive investigations involving public figures.[346]

Third, and most importantly, the Marston affair illustrates that perceptions inadvertently created can overwhelm reality. The Attorney General must be acutely aware of the media environment and the risk that misimpressions can be accepted as truth. In the Marston affair, this happened in a disastrous way, especially because the misimpressions created—including that the President and Attorney General were removing a U.S. Attorney to protect a corrupt political crony—were directly at odds with the Attorney General's core mission of restoring the Department after Watergate and the President's campaign pledges of clean government.

Part of the Attorney General's job on this score is preventative. For example, inviting David Marston to Washington for a confrontation covered by the press surely reinforced the misimpression that the Attorney General was acting in a heavy-handed political manner. The other part of the Attorney General's job is curative. To use the same example, when David Marston emerged from the meeting and announced his "firing," the Attorney General should have countered Marston's statement with a forthright explanation of why the personnel change was made.

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[345] *Id.*

[346] BELL WITH OSTROW, *supra* note 27, at 212; Meador, *supra* note 36, at 299.

Although Bell regretted not immediately answering Marston, Bell did take curative public relations actions during the Marston affair. One notable example was that after the Marston affair had become a public controversy, several journalists, including William Safire of the New York Times, began investigating and preparing hard-hitting articles about the matter. Bell spoke to Safire on the record, knowing it was almost certain that Safire's article would not be positive in tone. In fact, the article did not have a positive tone, but Bell's detailed, on-the-record contributions balanced some the negative information and created the impression that the Attorney General was not afraid of the story. And despite the overall negative tone of Safire's lengthy piece, Safire felt compelled to make clear to the reader that Griffin Bell was "a good and honest public official."[347] Even amidst controversy and criticism, the Attorney General should honestly state the facts, including inconvenient ones.

The Marston affair was a setback for Bell, the kind of setback that plagues every Attorney General. The episode struck at Bell's central mission of restoring the independence and reputation of the Department of Justice after Watergate. Bell not only weathered the firestorm, but demonstrated strength of character, acknowledged errors, and exercised leadership informed by hard-learned lessons, enabling him to go on to take a place, alongside Edward Levi, as a champion and restorer of the Department of Justice.

VI. CONCLUSION

It has been said that history does not repeat itself, but it rhymes.[348] That aphorism is appropriate when it comes to the periodic politicization of the United States Department of Justice and the Office of Attorney General of the United States. Throughout our history, from time-to-time Attorneys General and senior Department of Justice officials have abused their power and engaged in partisan political activities.

The fact that politicization is predictable does not make it any less dangerous. It is incumbent upon those who care about the independence of the Department to try to minimize the danger. We believe that the lessons of history need to play a big role in this endeavor. In particular, the service of Edward Levi and Griffin Bell in the aftermath of the

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[347] Safire, *supra* note 302, at 550.

[348] History does not repeat itself, but it rhymes, https://quoteinvestigator.com/2014/01/12/history-rhymes/ (last visited My 24, 2021) (this quotation is often attributed to Mark Twain, but its origins are unclear).

Nixon Administration's highly-politicized Justice Department tells us much about what it takes to restore and then preserve the proper role of the Department. It is largely a matter of character, and the character trait that is most in need is independence. The need for independence will always be in tension with the need for the Attorney General to be a team player when it comes to politics-as-policy, but the Attorney General (and, for that matter, every other senior Justice Department official) must be someone who has the professional stature and strength of character to resist the temptation or an instruction to use the Department of Justice for partisan purposes. It is our hope that future Presidents choose Attorney General nominees with this in mind and that the Senate considers every nominee's ability and disposition to serve with this kind of independence.

Both Levi and Bell made valedictory speeches to the lawyers of the Department of Justice in the days before they left office. The themes of these two events were, unsurprisingly, similar. They looked back with pride at what they had accomplished and acknowledged that the job is never done. Levi said, "[W]e have shown a willingness to confront problems directly, to deal with them as openly as possible, to have placed the administration of justice on a foundation of fairness and not upon favor."[349] In the same breath he conceded, "Of course problems remain—that is the life of the law."[350]

Bell expressed pride in what the Department had become and optimism that it would resist future temptations towards partisanship: "The Department must be recognized by all citizens as a neutral zone, in which neither favor nor pressure nor politics is permitted to influence the administration of the law. This Department is such a neutral zone now, and with the help of all of you, it will remain so."[351] As long as people care about the independence of the Department of Justice, the examples of Edward Levi and Griffin Bell should resonate—even rhyme, if need be—as future Attorneys General face inevitable pressures to politicize their powerful office.

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[349] Levi, *supra* note 28, at 3.

[350] *Id.*

[351] Bell, *supra* note 299, at 13.