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# ON THE STEADFASTNESS AND COURAGE OF GOVERNMENT LAWYERS

ROGER C. CRAMTON\*

Some years ago, during my relatively short period of service in the United States Department of Justice, a feeling of pride would overwhelm me as I passed before the inscription on its massive walls: "The United States wins its point whenever justice is done its citizens in the courts." Lawyers in general are partisans serving the often selfish desires of their clients. As one recent commentator strongly stated, "Lawyers don't give a damn about justice, [they just want to win for their clients]."<sup>1</sup> But I was part of an institution that had "justice" in its name; and the stream of lawyers who shaped its traditions and culture took that designation seriously.<sup>2</sup>

The culture of the Department, to be sure, included a body of traditional doctrines that tended to favor the United States over other parties in litigation. These doctrines placed the Department in a position of primacy in quarrels within the federal government between agencies and departments.<sup>3</sup> Sometimes the emphasis on these aspects of the Department's tradition led outsiders to argue for striking "justice" from its title in place of a more apt description, such as "the Department of Government Litigation." The Department represents the varied interests of many agencies and departments, mediates among them in situations of conflict, and seeks to provide a degree of coordination and consistency to the litigating positions of the United States. This posture of the Department gives its lawyers a breadth of perspective that led them to view the long-

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1. D. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL INQUIRY* 16 (1988).

2. For general discussion of the Department of Justice and its history, see H. CUMMINGS & C. MCFARLAND, *FEDERAL JUSTICE* (1937); J. EISENSTEIN, *COUNSEL FOR THE UNITED STATES* (1978); L. HUSTON, *THE DEPARTMENT OF JUSTICE* (1967); V. NAVASKY, *KENNEDY JUSTICE* (1971).

3. For discussion of the special law governing the United States as a party, see P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* ch. X (3d ed. 1988) (Federal Government Litigation); 14 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* §§ 3651-3660 (1985 & Supp. 1988).

term interests of the United States, and especially of the executive branch, as their guiding light.<sup>4</sup> The Department of Justice may well be the world's largest law firm. Its 5300 lawyers are found in a number of litigating divisions responsible for the enforcement of a distinct set of federal laws (including, *inter alia*, antitrust, criminal, land and natural resources) and in United States Attorneys' offices scattered around the country.<sup>5</sup> I was the Assistant Attorney General in charge of the Office of Legal Counsel, a small shop of lawyers' lawyers who furnish legal opinions for the other divisions as well as for the Executive branch. William Rehnquist preceded me by a year or so; Antonin Scalia followed me by a year or so. But here I am, still a law teacher!

The top levels of the Department are staffed with officers appointed by the President with the consent of the Senate. An additional group of deputy positions are political appointments. The vast bulk of lawyers in the Department's Washington offices, however, are able young lawyers hired through the Department's honors program or career lawyers who are devoting their professional lives to assist the Attorney General and the President in enforcing the laws of the land.

Enforcing the teeming multiplicity of federal laws is not an easy job—the factual and legal issues are difficult and complex, and Presidents and Attorneys General have a habit of coming and going. Not all of them bring to the office the same views concerning the interpretation and application of existing federal law, to say nothing about ways in which new regulations or statutes should shape and reform the law. Yet some things are constant. Whoever heard of an Attorney General who was not basically a “law and order” type

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4. The duties and responsibilities of government lawyers are shaped by statutory and constitutional law as well as by the rules applicable to lawyers generally. It is difficult to answer the question, “Who is the client?” without regard to a broad array of law and policy applicable to the particular issue involved. For example, the federal government lawyer's duty of confidentiality is shaped by the professional code adopted in the jurisdiction in which the lawyer is practicing. In addition, this duty of confidentiality is further shaped by special rules of federal law prohibiting the release of some information (e.g., individual tax returns) and permitting the release of other information (e.g., public records) and by law and policy emanating from separation-of-powers considerations (e.g., lawyer in federal agency required to disclose information concerning corrupt behavior of agency official to responsible law enforcement officers of the Department of Justice). See generally C. WOLFRAM, *MODERN LEGAL ETHICS* 753-58 (1986); Josephson & Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 *How. L.J.* 539 (1986) (government attorneys' different approaches to conflicts between government authorities); Lawry, *Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 *FED. B.J.* 61 (1978); Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 *U. CHI. L. REV.* 1293 (1986).

5. See *OFFICE OF FED. REG., THE UNITED STATES GOVERNMENT MANUAL* 370-79 (1988).

when it came to enforcement of federal criminal laws?<sup>6</sup> And who has ever encountered an Attorney General who, insofar as relevant legal precedent permitted, did not further his President's major policies?

In general, with only rare outbreaks of civil or uncivil disobedience, the Department's lawyers are professionals who realize that each administration is entitled to make its mark on federal law. If plausible legal arguments are available to support the directions in which the President wants to move, the Department's lawyers are vigorous and effective advocates of Executive branch policies.

That is not to say that there might not be a bit of grumbling and disputation in particular instances. The career lawyers usually urge an institutional view of the interests of the United States on their temporary political leaders. Existing precedent and practice are known and familiar; career lawyers may initially view proposals for a change of policy or approach with skepticism. Ultimately, however, the career lawyer's obligation is to the responsible officials who have been properly selected through our constitutional processes of election and appointment to define the interests of the United States.<sup>7</sup> As able and dedicated professionals, the Department's lawyers take this obligation seriously in their day-to-day work. If a political push finally came to a shove, their response would depend upon the plausibility of the legal position that Department officials assert. The career lawyers would attempt to persuade the responsible officials to adopt what they perceived as the correct or best approach. These career lawyers' knowledge, experience, and persuasive talent often overcome initial resistance. Short-sighted political winds of the moment rarely prevail. If, however, plausible legal arguments exist in support of the position that the political appointees advocate, and the career lawyers lose the argument for following current law or practice, they would do their best to support the position adopted. In very rare circumstances, their courage and steadfastness has led to instances of what has come close to civil disobedience—an individual or collective choice that a particular position was so lacking in merit that they refused to advance it. In short, Department lawyers usually exemplify the best traditions of the legal profession.

Expressions of direction and control from outside the Department, however, are extremely rare. Most of the day-to-day work of the Justice Department involves established positions that no new administration seeks to challenge or to change. Although the De-

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6. There are rare exceptions to this general proposition. For example, "Ramsey Clark as a matter of policy chose not to enforce the court-ordered electronic surveillance procedures of the 1968 Omnibus Crime Control Act . . . [while] John Mitchell chose to do so . . ." R. KLEINDIENST, *JUSTICE* 137 (1985).

7. See Miller, *supra* note 4.

partment's lawyering is important, both to the individuals affected and to the country as a whole, most of this lawyering does not involve the level of policy that reaches the attention of the White House.

This Article briefly explores several incidents that occurred during my tenure at the Department. In addition to their intrinsic interest, they illustrate some larger issues concerning the temptations of ambition, the dangers of unchecked power, and the need for independence, courage, and steadfastness on the part of lawyers.

## I

Richard Kleindienst was an intelligent, energetic, and personable lawyer who had been politically active in Arizona's burgeoning Republican party.<sup>8</sup> After effective participation in two unsuccessful presidential campaigns (Nixon in 1960 and Goldwater in 1964),<sup>9</sup> he was an early and major participant in Richard Nixon's successful run for the presidency in 1968.<sup>10</sup> John Mitchell, Nixon's friend, law partner, and campaign manager, chose Kleindienst as his deputy when Nixon selected Mitchell as his Attorney General.<sup>11</sup> Kleindienst admired Mitchell, and the two men worked well together.

It may come as a surprise to you to learn that Kleindienst brought to the Department a more populist view of the antitrust laws than had prevailed in the Department of Justice under Don Turner, who headed the antitrust division during most of the Johnson Administration.<sup>12</sup> In particular, Kleindienst and Richard McLaren, the Chicago antitrust lawyer who became head of the antitrust division, were eager to apply the antitrust laws to conglomerate mergers, which were fashionable and controversial in the late 1960s. I saw this coming as a member of the Nixon transition team that advised the President-elect on antitrust and regulatory policy matters. This advisory group, headed by the eminent economist, George Stigler, was aghast at the eagerness of Kleindienst and McLaren to enter this difficult area. It was no surprise to me, therefore, when the Department brought antitrust charges against International Telephone and Telegraph Corporation (ITT),

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8. See R. KLEINDIENST, *supra* note 6, at 13-38.

9. *Id.* at 25-38.

10. *Id.* at 39-57.

11. *Id.* at 61. Kleindienst accepted his new position with a certain amount of trepidation. As he remarked in his autobiography, "My concept of the Department of Justice in late November 1968 was, to say the least, sophomoric. . . . I knew I needed help, quickly." *Id.* at 62. Kleindienst got help from Warren Christopher, who was serving as Deputy Attorney General in the outgoing Johnson Administration. *Id.*

12. See L. SULLIVAN, *ANTITRUST* 751-52 (1977).

the world's largest conglomerate.<sup>13</sup> The division's lawyers responded with alacrity to the challenge of trying out new theories and, when lower courts rejected the Department's arguments, the Department decided to appeal one of the cases, *Grinnell*,<sup>14</sup> to the Supreme Court.

On Monday afternoon, April 19, 1971, Richard Kleindienst received what he later described as "the most fateful telephone call of my life."<sup>15</sup> President Nixon was on the line and in the bluntest and crudest language possible he ordered Kleindienst not to file the appeal and to fire McLaren. Nixon's order left no room for discussion, explanation, or persuasion. Because the time for appeal expired the following day, Kleindienst had little time to determine a course of action. Kleindienst made up his mind quickly—unless the President countermanded his order, he and McLaren would resign and a major political dust-up would result. Kleindienst then told Mitchell what had happened and sought his help.<sup>16</sup> In the meantime, Kleindienst asked Solicitor General Edwin Griswold (his former law teacher and dean) to obtain an extension of time from the Supreme Court in which to file the Government's brief. Subsequently, Mitchell called on President Nixon when he was in a calmer mood and persuaded him to let the appeal go forward. The Department of Justice later settled the ITT case under circumstances that led to charges of impropriety. The propriety of the ITT settlement resurfaced a year later during Kleindienst's confirmation hearing.<sup>17</sup>

What are we to make of all this? Kleindienst accurately described the underlying tension of Nixon's order in his autobiography:

Simply put, I could not have functioned effectively as deputy attorney general [if I had acceded to the President's request] . . . granted, the President heads the Department of Justice and we are to effect *his* policies. But how these policies are arrived at in the first place, and how they are therefore changed are essential matters. . . . If the attorney general's approach to antitrust enforcement was to be altered, that change should be the result only of thoughtful policy discussions at the highest level, not of impulse.<sup>18</sup>

I believe that Nixon, perhaps influenced by then Secretary of Labor, George Shultz, had the better view on the underlying merits

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13. See R. KLEINDIENST, *supra* note 6, at 94.

14. *United States v. International Tel. & Tel. Corp.*, 306 F. Supp. 766 (D. Conn. 1969), *appeal dismissed per stipulation*, 404 U.S. 801 (1971).

15. R. KLEINDIENST, *supra* note 6, at 90.

16. *Id.* at 92. Mitchell had disqualified himself from the case since his former law firm had represented an ITT subsidiary. *Id.* at 94.

17. See *infra* notes 21-25 and accompanying text.

18. R. KLEINDIENST, *supra* note 6, at 95 (emphasis in original).

of applying the antitrust law to conglomerate mergers.<sup>19</sup> What is the harm in the same company owning both hotels and rental cars provided there is competition in each of the separate industries? The subsequent economic difficulties of conglomerates in the face of market forces revealed that they were a fad, not a social danger. But the President or his advisors had not expressed that view on substantive policy during the three years in which the Department had prosecuted the case. Pulling out the rug by fiat at the last minute, without any opportunity for discussion, was inappropriate. Kleindienst's willingness to put his own position on the line to protect the Department from crude political interference in a pending adjudication—something quite different from executive direction on future enforcement policy—was a courageous one. The incident also illustrates the importance of having an Attorney General who has access to and the respect of the President. On many occasions during Nixon's first term, John Mitchell, who has been much maligned, was able to reverse directives that Nixon, acting on the advice of John Ehrlichman and H.R. Haldeman,<sup>20</sup> had given to the Department.

In the spring of 1972, the settlement of the ITT case became a central issue in the hearings on Nixon's nomination of Kleindienst as Attorney General.<sup>21</sup> Mitchell had resigned to head Nixon's reelection effort, and Nixon nominated Kleindienst to succeed Mitchell. The charges, initially made by Jack Anderson but then picked up by some Democratic senators, concerned Kleindienst's participation in the settlement, alleged improper influence by ITT, and other matters. The hearings developed a bit of smoke here and there (e.g., the Dita Beard memorandum), but nothing surfaced touching Kleindienst personally, and the Senate confirmed his nomination. During the hearings, however, Kleindienst responded to one question with an answer he later regretted. Senator Bayh asked Kleindienst whether he had "ever talk[ed] to anybody at the White House . . . on the ITT matter?"<sup>22</sup> Kleindienst obviously had not forgotten the telephone call from President Nixon—it was imprinted on his mind. But he chose to view the question the way lawyers often view an opponent's discovery request—as a narrow inquiry about the White House staff. He responded negatively even though the question was rephrased several times to ask about "anyone" at the White House. Although members of the Senate Judiciary Committee never explicitly asked Kleindienst whether the President had discussed the ITT matter with him, Kleindienst's responses created a misleading im-

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19. See generally L. SULLIVAN, *supra* note 12, at 653-57.

20. John Ehrlichman was Assistant to the President for Domestic Affairs. H.R. Haldeman was White House Chief of Staff.

21. R. KLEINDIENST, *supra* note 6, at 97-107.

22. *Id.* at 104-05.

pression. Kleindienst later stated the reasons for his lack of candor: "In the charged political environment that mesmerized my confirmation hearing, if that impulsive call from the President had been revealed, certain segments of the press would have exploded it into a 'scandal' that never in fact existed."<sup>23</sup>

Some two years later, in June 1974, as part of the fallout of the Watergate affair, Kleindienst pled guilty to the misdemeanor of refusing to answer fully the questions of a congressional committee.<sup>24</sup> He still maintains his innocence, claiming that he accepted the misdemeanor plea in order to avoid a felony prosecution before a District of Columbia jury at the height of the backlash to Watergate. You can judge his conduct for yourself. The conviction irreparably damaged Kleindienst's reputation and future career.

Kleindienst is surely neither the first nor the last high government official to have been less than fully candid in dealing with a congressional committee. One thinks, for example, of Richard Helms, Oliver North, and others. The next time you shade a response to an inquiry in order to conceal information that might damage your client's interests, remind yourself of the old adage, "there but for the grace of God go I." Kleindienst's involvement in the ITT matter provides a vivid example of how a good man—and I believe Kleindienst was and is a good man—can be tempted into error by ambition and loyalty.<sup>25</sup>

The ambition was to become Attorney General of the United States; full disclosure of Nixon's effort to sidetrack the government's case would have frustrated that ambition. The loyalty was that of a man who had devoted a number of years to serving Richard Nixon and who firmly believed that his reelection was important to the future of the nation.

The Nixon reelection campaign of 1972 provided the moment of crisis in which Richard Kleindienst had the opportunity to save Richard Nixon from the fateful consequences of Nixon's worst instincts. On Saturday, June 17, 1972, five days after Chief Justice Burger had sworn him in as Attorney General, Kleindienst was having lunch with a friend at the Burning Tree Club in suburban Washington, D.C. Shortly before his round of golf, Kleindienst learned from Henry Peterson, the head of the Department of Justice's crimi-

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23. *Id.* at 105.

24. See 2 U.S.C. § 192 (1982) (making it a misdemeanor for a person summoned to testify before Congress to refuse to answer any questions pertinent to the inquiry).

25. Judge Hart of the United States District Court for the District of Columbia expressed a similar view in sentencing Kleindienst: "While this was technically a violation of the law, it is not the type of violation that reflects a mind bent on deception; rather it reflects a heart that is too loyal and considerate of the feelings of others." R. KLEINDIENST, *supra* note 6, at 176.



nal division, of a break-in of the Democratic Party's national headquarters at the Watergate Hotel and the subsequent arrest of the burglars involved. During lunch at the club, Gordon Liddy, a lawyer who worked for the Treasury Department before joining Nixon's reelection campaign organization, sought Kleindienst's attention. When Kleindienst approached him, Liddy said he needed to talk to Kleindienst in private. In a corner of the locker room Liddy informed Kleindienst, in effect, that those arrested for the Watergate break-in were working for the reelection committee and that Mitchell wanted Kleindienst to get them out of jail at once.

Kleindienst was flabbergasted and refused to believe that the message came from Mitchell. He questioned Liddy's directive: "John Mitchell knows how to find me. I don't believe he gave you any such instructions."<sup>26</sup> Kleindienst then exploded in rage: "What the [expletive deleted] did you people think you were doing in there?"<sup>27</sup> Still livid, Kleindienst told Liddy to leave in no uncertain terms.<sup>28</sup>

In some respects Kleindienst's response was appropriate. He made it perfectly clear (to use an expression that is hard to avoid when one is dealing with the Nixon years) that improper political influence would not sidetrack or shackle the nascent criminal investigation. On the other hand, Kleindienst failed to seize the opportunity to get at the bottom of the Watergate affair and bring it to an early end. His failure to do so proved fateful for Richard Nixon's presidency as well as Kleindienst's reputation.

What should Kleindienst have done? Liddy, who Kleindienst knew was an employee of the Nixon reelection committee, had informed the chief law enforcement officer of the United States that the break-in was part of a committee operation. Moreover, Liddy claimed responsibility for the operation, and he surely implied, if he did not state, that Mitchell was also involved. With the calm hindsight of the Monday-morning quarterback, here is what I think Kleindienst should have said and done.

"Gordon, we can't talk about such a sensitive matter here. Come to my house later this afternoon and we'll review the whole situation." Then Kleindienst should have relayed the entire conversation to Henry Petersen and asked Petersen to have the FBI set up recording devices at Kleindienst's home. After Liddy's arrival, Kleindienst would encourage him as skillfully as possible to tell the whole story: what was going on; who had knowledge of the operation; who were the principal participants. With Liddy's revelations

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26. *Id.* at 146.

27. G. LIDDY, *WILL* 253 (1980).

28. R. KLEINDIENST, *supra* note 6, at 146.

in hand, the Department could obtain confirming evidence from other reelection committee staffers without difficulty. Within a few days the Department's criminal investigation would have a complete picture of those criminally responsible for the Watergate break-in. Kleindienst could then confront President Nixon with a *fait accompli*: a completed criminal investigation that the Department would have to pursue even if the investigation resulted in the indictments of Mitchell and a White House aide or two. In the face of a steadfast Attorney General, armed with the fruits of a solid criminal investigation, no President could prevent the process from going forward other than by use of the pardon power.

Why did Kleindienst not follow up Liddy's revelations, either personally or by passing the details along to those in charge of the Watergate criminal investigation? In retrospect, knowing what we know now, the magnitude of Kleindienst's failure to act is clear. At the time, Kleindienst believed that the Watergate break-in was an isolated and contained episode. As a result, his concern focused on the immediate political fallout and not the long-term risks. Again, Kleindienst's loyalty to those he admired and for whom he worked was a crucial factor. Mitchell was Kleindienst's mentor and friend; Nixon was not only his leader, but had the aura of invincibility and legitimacy that Americans seem to associate with the presidency. Kleindienst simply could not imagine that such a stupid criminal venture might involve Mitchell or that the aggressiveness and stupidity of subordinates might implicate Nixon.<sup>29</sup> Loyalty and trust overcame Kleindienst's lawyer instincts of caution and skepticism. Finally, there was the hubris of power that gradually grew during the Nixon Administration: somehow effective damage control could contain any scandal, counter it by effective public relations, and conceal dirty linen. "Power corrupts," Lord Acton said, "and absolute power corrupts absolutely."<sup>30</sup> Although this is an ancient lesson, every President apparently needs to relearn it at least once, especially if his administration lasts more than a single term.

The incident also illustrates the dangers of too close a political relationship between the President and the Attorney General. A close relationship provides access to and influence in the White House on matters that relate to the Department of Justice and the interests of justice. On the other hand, too close an association deprives the President of the independent advisor that a President needs in an Attorney General—someone who will say, when it needs to be said, "Mr. President, I understand that there are political

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29. See *supra* note 25 and accompanying text.

30. Letter from Lord Acton to Mandell Creighton (April 5, 1887), quoted in *LIFE AND LETTERS OF MANDELL CREIGHTON* (1904).

costs and dangers, but in this situation you have no option. Your constitutional duty is to see that laws are faithfully executed without fear or favor." Such an Attorney General must be willing to resign and publicly explain the circumstances that led to his resignation, armed with the information that supported his advice to the President.

## II

I joined the Department of Justice as head of the Office of Legal Counsel at about the time of the Watergate break-in. Needless to say, all I learned about it during my time at the Department came from the *Washington Post*.<sup>31</sup> Like other Americans, I fretted about the continuing disclosures of a cancer that ate away steadily at the legitimacy of the Nixon Administration. What I have reported thus far was only gradually revealed as a result of the Ervin committee hearings and the subsequent impeachment proceedings.

There was another matter, however, not totally unrelated, which engaged me almost from my first day on the job—the controversy between the President and Congress concerning the impoundment of appropriated funds.<sup>32</sup> President Nixon had been more aggressive than his predecessors in declining to spend monies that Congress had appropriated for authorized purposes. The President, supported by leading members of his administration, argued that in the absence of effective congressional control over the budget, impoundment was an essential weapon in the fight against inflation, deficit spending, and waste. Members of Congress protested that the administration was using impoundment to substitute its budget priorities for those enacted and funded by Congress. The argument between the President and Congress involved questions of executive power, separation of powers, and congressional prerogatives. The underlying problem—the inability of the federal government to control expenditures—remains with us today in the form of massive budget deficits despite extensive overhaul of the budget process and enactment of the Impoundment Control Act of 1974.<sup>33</sup>

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31. For discussion of the unfolding story in the press, especially the *Washington Post*, see B. WOODWARD & C. BERNSTEIN, *ALL THE PRESIDENT'S MEN* (1973); B. SUSSMAN, *THE GREAT COVERUP: NIXON AND THE SCANDAL OF WATERGATE* (1974).

32. For general discussions of impoundment and the spending power, see L. FISHER, *PRESIDENTIAL SPENDING POWER* (1975); Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191 (1974); Mikva & Hertz, *Impoundment of Funds - The Courts, The Congress and the President: A Constitutional Triangle*, 69 NW. U.L. REV. 335 (1974); Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636 (1973).

33. Pub. L. No. 93-344, §§ 1001-1017, 88 Stat. 297, 332-37 (codified as amended at 2 U.S.C. §§ 681-688 (1982)). See generally Fisher, *Congressional Budget Reform:*

Richard Nixon was not the first President to impound appropriated funds.<sup>34</sup> When the Louisiana Purchase eliminated the need for gunboats along the Mississippi River, Thomas Jefferson impounded \$50,000 that Congress had appropriated for gunboats.<sup>35</sup> From time to time thereafter, Presidents utilized impoundment to eliminate a few pork-barrel projects that they characterized as unduly wasteful. Franklin Roosevelt was the first President to make substantial use of impoundment, but most of his impoundments related to military expenditures, a field in which the President's authority as commander-in-chief may provide a special justification.<sup>36</sup> Only in the Johnson and Nixon Administrations was impoundment applied with some frequency to domestic spending programs. The frequency of impoundments grew, and the total funds involved soared (\$14-18 billion) in the Nixon Administration. The result was a major political controversy.

Increasingly over time many Americans have come to view Presidents as politically responsible for the health of the economy. It is not surprising that Presidents, knowing that voters will judge them by the health and stability of the economy, do everything they can to keep it healthy. The control of expenditures by impoundment of funds is a major weapon in this endeavor. Congress, especially if it is in the hands of the opposing political party, is more responsive to the interest groups that support various spending programs. My predecessors in the Office of Legal Counsel had addressed the legality of impoundment on a number of occasions. The Department's considered view, expressed by Ramsey Clark, Nicholas Katzenbach, William Rehnquist, and others, was that the President, in the absence of an explicit statutory mandate to spend appropriated funds during a specified period of time, has broad discretion to control the timing or amount of spending.<sup>37</sup> The Department based its legal opinion in part on the general congressional practice of using permissive language in appropriation bills (the executive "may" spend

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*The First Two Years*, 14 HARV. J. ON LEGIS. 413 (1977); Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693 (1984).

34. See generally Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549 (1974).

35. See 11 ANNALS OF CONG. 11, 14 (1803) (message to Congress by President Thomas Jefferson, October 17, 1803).

36. See U.S. CONST. art. II, § 2, cl. 1; Harner, *Presidential Power to Impound Appropriations for Defense and Foreign Relations*, 5 HARV. J.L. & PUBL. POL'Y 131 (1982).

37. See STAFF OF SENATE COMM. ON THE JUDICIARY, 93rd CONG., 1ST SESS., REPORT ON HEARINGS, IMPOUNDMENT OF APPROPRIATED FUNDS BY THE PRESIDENT: JOINT HEARINGS BEFORE THE AD HOC SUBCOMM. ON IMPOUNDMENT OF FUNDS OF THE COMM. ON GOV'T OPERATIONS AND THE SUBCOMM. ON SEPARATION OF POWERS OF THE SENATE COMM. ON THE JUDICIARY 390-95 (Comm. Print 1973) [hereinafter *Joint Hearings*] (Rehnquist memorandum).

an amount "not to exceed" a fixed sum for a particular purpose). In addition, the Department relied upon the long executive practice of exercising discretion as to expenditures, accompanied usually by congressional acquiescence. Another important factor was the existence of a growing body of other legislation that required the President to achieve objectives inconsistent with some expenditures. For example, statutory provisions prohibited the President from exceeding debt ceilings<sup>38</sup> and directed the President to avoid waste in government programs,<sup>39</sup> to prevent inflation, and to maintain full employment.<sup>40</sup>

In short, the Department, as the lawyer for the Executive branch, construed the available legal materials as supporting a large claim of presidential discretion to control expenditures. What if Congress, however, concerned about the exercise of this presidential discretion, mandated that the Executive branch spend a specified amount in a particular fiscal year? Concern with impoundments during the Johnson and Nixon years led Congress to enact a number of such statutes by mid-1972.<sup>41</sup> Faced with language that contemplated no presidential directions, what was the President's duty? The consistent view of my predecessors was that if Congress spoke clearly and unambiguously, and the expenditure did not fall within some special authority of the President as commander-in-chief, the President's duty was to execute the law as written.

Article II, which vests the executive power in the President, requires the President to "take Care that the Laws be faithfully executed . . . ."<sup>42</sup> Since the Constitution grants the lawmaking power to

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38. The debt ceiling is a limitation on the cumulative federal debt. See Mikva & Hertz, *supra* note 32, at 370-71.

39. See Anti-Deficiency Act of 1906, ch. 510, § 3679, 34 Stat. 27, 49. Congress passed the Anti-Deficiency Act to prevent various departments from using all of their funds before the end of the fiscal year. See Mikva & Hertz, *supra* note 32, at 367-70.

40. See Employment Act of 1946, ch. 33, 60 Stat. 23 (codified as amended at 15 U.S.C. §§ 1021-1025 (1982)).

41. In a number of cases decided in 1973 and 1974, the lower federal courts interpreted particular statutes as mandating spending. See, e.g., National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974) (executive required to grant pay raise to federal workers authorized by Congress); Maine v. Fri, 486 F.2d 713 (1st Cir. 1973) (preliminary injunction required allotment of funds pursuant to the Water Pollution Control Act Amendments of 1972); State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973) (no withholding of funds from programs pursuant to the Federal Highway Act); Pennsylvania v. Weinberger, 367 F. Supp. 1378 (D.D.C. 1973) (impoundment of funds appropriated for state educational purposes improper); Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973) (impoundment of funds under Library Services and Construction Act improper). Two factors led to judicial review of impoundment decisions for the first time in the early 1970s. First, the traditional barriers of standing, justiciability, and sovereign immunity that previously kept impoundment questions out of the courts decayed sharply. See Mikva & Hertz, *supra* note 32, at 349-62. Second, Congress began to include mandatory language in appropriation statutes.

42. U.S. CONST. art II, § 3.

Congress, the President may not substitute his own policy predilections and decline to spend funds that Congress has stated must be spent. The more specific language of a mandated appropriation overrides general directives concerning waste, inflation, and the like.

On several occasions during the summer and fall of 1972, I wrote opinions addressing the President's authority to impound funds included in particular appropriation bills. These opinions, written against the backdrop I have outlined, invariably turned on the language and legislative history of particular appropriation bills. In one instance, for example, where the bill did not contain an unambiguous expenditure mandate, I concluded that the funds were subject to impoundment. In another situation, the presence of an unambiguous mandate to spend led to the conclusion that the President lacked authority to impound. In yet another instance, the statutory language was inconclusive, and I concluded that the outcome was uncertain. The latter was the case with the Federal Water Pollution Control Act Amendments of 1972,<sup>43</sup> in which the contending forces in Congress were unable either to mandate expenditure of the enormous amounts appropriated or leave spending to presidential discretion. Instead, the statute contained language that pointed both ways, and the partisans of the opposing views salted the legislative history with conflicting versions of what they intended.<sup>44</sup>

My memorandum discussing the water treatment bill was in the context of President Nixon's consideration of whether or not to veto the bill. Did the language of the bill mandate spending? Would a reviewing court reach that conclusion? I concluded that the ambiguous language of the bill provided the basis for a plausible argument that presidential discretion was not precluded, but that there was a substantial risk that a reviewing court would reach a contrary conclusion. The President vetoed the bill, which Congress then enacted over his veto.<sup>45</sup>

My opinions on this subject, however, were too timid for some of the President's White House advisors, who were urging that the President attack congressional spending by claiming a broad inherent authority to impound funds even in the face of explicit statutory language requiring spending. President Nixon took this approach at a press conference in early 1973: "The constitutional right for the President of the United States to impound funds . . . when the

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43. Pub. L. No. 92-500, § 2, 86 Stat. 817, 834 (1972) (codified as amended at 33 U.S.C. § 1252 (1982 & Supp. III 1985)).

44. Brief for the Petitioner at 14-21, *Train v. City of New York*, 420 U.S. 35 (1975).

45. In his veto message, President Nixon stated that the bill's "laudable intent is outweighed by its unconscionable \$24 billion price tag." 118 CONG. REC. 518,534 (daily ed. Oct. 17, 1972).

spending of money would mean either increasing prices or increasing taxes . . . is absolutely clear."<sup>46</sup> Nixon's clarity about his authority, however, was not accompanied by any statement grounding this power in our Constitution, laws, or political traditions.

One theory of Nixon's advisors was that the President's authority as commander-in-chief applied not only to defense expenditures, but to domestic programs as well. Matters relating to domestic spending affect the economy which in turn affects military and foreign affairs, and therefore the commander-in-chief can act. Members of the White House staff urged me to support this and other similar theories. After giving them careful consideration, I concluded that there was no basis in the Constitution, laws, or in longstanding practice for this extraordinary claim of Presidential lawmaking authority. I did not agree with the claim that, in essence, the President could nullify any program that Congress had enacted into law and substitute his own policy preferences for those of Congress. My intransigence led to a request for my resignation shortly after Nixon's triumphal reelection in November 1972.

The story does not end there. President Nixon appointed a distinguished legal educator, Joseph Sneed, then dean of Duke University Law School, as Deputy Attorney General under Kleindienst in 1973. Sneed dutifully supported the President's argument of an inherent Presidential authority to impound funds even in the face of an unmistakable spending requirement. In testimony to the Ervin committee on separation of powers, Sneed stated:

[T]here is doubt whether Congress can legislate against impoundment even in the domestic area when to do so results in substantially increasing the rate of inflation. To admit the existence of such power deprives the President of a substantial portion of the 'executive power' vested in him by the Constitution. . . . I question whether Congress has the power to convert the Chief Executive into 'Chief Clerk,' a position which he has never held under our Constitution.<sup>47</sup>

Sneed's assertions were greeted with dismay by the career lawyers in the Department who were then defending a series of cases in the lower federal courts challenging particular impoundments. Although the President and some presidential appointees continued to assert a virtually unlimited presidential authority to impound funds, no lawyer in the Department of Justice proved willing to include these arguments in briefs filed in the pending cases. In each case the United States, speaking through the Department of Justice, asserted only that particular statutes were ambiguous, and that in the face of ambiguity the President had discretion to impound some of the ap-

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46. N.Y. Times, Feb. 1, 1973, at 20, col. 6.

47. *Joint Hearings*, *supra* note 37, at 363 (statement of Joseph T. Sneed).

propriated funds. The Department lawyers viewed the claim of inherent constitutional authority as so lacking in merit that to advance it before a court of law would violate their professional standards. The courage and steadfastness of professionalism triumphed over an unsupported Presidential claim of raw power.

The claims of the President and some of his appointees, however, did adversely affect the decisions in the impoundment cases, even though the Department lawyers did not include such claims in their arguments. The political controversy over impoundment roiled Congress and led to sharp media criticism of the President's pretensions of unchecked power. The courts decided the impoundment cases against the unfolding backdrop of Watergate, which suggested the threat to a democratic society of unchecked executive power. The result was that nearly all of the cases went against the government on statutory interpretation grounds.<sup>48</sup> I believe that in calmer times the government would have won most of them. The water treatment bill reached the Supreme Court in *Train v. City of New York*.<sup>49</sup> The Court interpreted the statute as requiring the expenditure of the full amount of appropriated funds. Neither the Department's brief nor the Court's opinion in *Train v. City of New York* contain a single suggestion of the President's constitutional claims; the Court simply took it for granted that the executive must "faithfully execute" the spending provisions of valid legislation.

There is more to tell about these and other incidents, especially some events in the Watergate affair that were closely related, that will have to await another day. The incidents themselves are less important than their underlying theme — the importance of courage, integrity, and steadfastness on the part of lawyers. Many lawyers in the Department of Justice displayed these qualities during the difficult times I have discussed, while a few on occasion did not. A true sense of professionalism can be informed by both the rare instances of failure and the more frequent ones of quiet heroism.

### III

Dramatic presentations of actual events usually end with a narration of the current whereabouts of the participants.

Richard Kleindienst practiced law in Washington, D.C. before returning to Arizona in the late 1970s. His standing at the bar in the District of Columbia was questioned on the basis of his misdemeanor conviction;<sup>50</sup> and the Arizona Supreme Court subsequently

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48. For a discussion of some of these cases, see *supra* note 41.

49. 420 U.S. 35 (1975).

50. See *District of Columbia Bar v. Kleindienst*, 345 A.2d 146 (D.C. 1975) *overruled*, *In Re Hutchinson*, 534 A.2d 919, 927 (D.C. 1987) (overruled to extent it dealt



suspended him from practice for a year because of an unrelated professional problem.<sup>51</sup> His autobiography, *Justice*, deals with these and other matters, and I highly recommend it.

Gordon Liddy is making money on the college lecture circuit after serving a lengthy sentence for his participation in the Watergate affair.

Joseph Sneed is now Judge Sneed. Shortly after his congressional testimony in support of an inherent Presidential power to impound funds, Nixon appointed Sneed to the United States Court of Appeals for the Ninth Circuit in San Francisco, where he sits today.

As for me, being fired by Nixon rehabilitated my credentials in the academic world, easing my return to law school teaching and university life. Would I do it over again? Yes, my short year with the Department of Justice was one which left scars of growth and learning. In part I learned what I had not fully understood until then: that being a lawyer in important matters is a difficult and demanding moral undertaking; that it requires courage and steadfastness; and that most of the things that I needed to rely on in difficult times I did not learn in law school but on my mother's knee. Robert Fulghum was right: all I really needed to know to handle moments of crisis I learned in kindergarten and before.<sup>52</sup>

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with appropriate sanctions for disciplinary violations). For a discussion of the circumstances leading to Kleindienst's misdemeanor conviction, see *supra* notes 22-24 and accompanying text.

51. See *In re Kleindienst*, 132 Ariz. 95, 644 P.2d 249 (1982).

52. R. FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN (1988).