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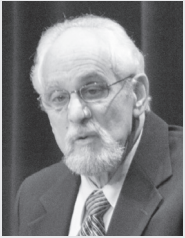
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## Politics by Other Means: The Use and Abuse of Scandal

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*The following is adapted from a speech delivered at Hillsdale College on September 11, 2018, during a conference on “American Political Scandals” sponsored by the College’s Center for Constructive Alternatives.*

**The great** difficulty of interpreting political scandals was summarized by a newspaper editor in the western film, *The Man Who Shot Liberty Valance*. Deciding not to publish the truth of an explosive political story, the editor justifies it by saying, “When the legend becomes fact, print the legend.” We have certainly had many legends regarding political scandals foisted on us, especially since Watergate.

Nearly every political administration has potential scandal lying just below the surface. There are always those in government who seek to profit privately from

public service, and there are always those who will abuse their power. All governments provide the occasion for scoundrels of both kinds. But the scandals they precipitate rarely erupt into full-blown crises of the political order. What differentiates the scandals that do?

**Scandal can provide a way for defenders of the status quo to undermine the legitimacy of those who have been elected on a platform of challenging the status quo.**

To understand a political scandal fully, one must take into account all of the interests of those involved. The problem is that these interests are rarely revealed—which is precisely why it is so tempting for partisans, particularly if they are at a political disadvantage, to resort to scandal to attack their opponents. Many great scandals arise not as a means of exposing corruption, but as a means of attacking political foes while obscuring the political differences that are at issue. This is especially likely to occur in the aftermath of elections that threaten the authority of an established order. In such circumstances, scandal provides a way for defenders of the status quo to undermine the legitimacy of those who have been elected on a platform of challenging the status quo—diluting, as a consequence, the authority of the electorate.

The key to understanding how this works is to see that most political scandals, sooner or later, are transformed into legal dramas. As legal

dramas, scandals become understood in non-partisan terms. The way in which they are resolved can have decisive political impacts, but those in charge of resolving them are the “neutral” prosecutors, judges, and bureaucrats who make up the permanent (and unelected) government, not the people’s elected representatives. To resort to scandal in this way is thus a tacit admission that the scandalmongers no longer believe they are able to win politically. To paraphrase Clausewitz, scandal provides the occasion for politics by other means.

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Richard Nixon won a landslide electoral victory in 1972 and was removed from office less than two years later. The Watergate scandal then became the model for subsequent political scandals, down to the current day. How and why did Watergate come about and what did it mean?

After the election of 1964, our two elected branches of government, each controlled by Democrats, worked together to expand power in Washington by centralizing administrative authority in the executive bureaucracy. This dramatic centralization of power created a political reaction in the electorate that began pushing back against the Great Society policies of the time. The Republican Party under Richard Nixon established itself as the partisan opponent of this centralized and powerful bureaucracy. Following his victory in 1968, Nixon’s first term

**Imprimis** (im-pri-mis),  
[Latin]: in the first place

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required political concessions that often *expanded* federal power—concessions aimed primarily at garnering support for the Vietnam War in a Democrat-controlled Congress. But Nixon’s second term was not going to be a continuation of the first. Even *The New York Times* noted that the transformation of government demanded by Nixon after his 1972 re-election—his stated intention was to rein in the executive bureaucracy—was as extreme as if an opposition party had won.

As we all know, Nixon’s intentions for his second term came to naught. American politics after Watergate were shaped by those who had engineered his downfall. As Henry Kissinger subsequently noted:

Nixon in the final analysis had provoked a revolution. He had been re-elected by a landslide in 1972 in a contest as close to being fought on ideological issues as is possible in America. . . . The American people for once had chosen on philosophical grounds, not on personality. . . . For reasons unrelated to the issues and unforeseeable by the people who voted for what Nixon represented, this choice was now being annulled—with as-yet unpredictable consequences.

I recall being struck at the time of Watergate by the fact that there was a tremendous mobilization of partisan opinion against Nixon, but very little partisan mobilization in Nixon’s defense. The reason for this, in retrospect, is that it is difficult—if not impossible—to mobilize partisan support once the contest is removed from the political arena and placed in the hands of prosecutors, grand juries, and judges. Nixon believed, correctly, that his partisan enemies were trying to destroy him. But even Republicans in Congress came to accept Watergate primarily in legal terms. The most remembered line from a Nixon defender was

that of Senator Howard Baker: “What did the President know, and when did he know it?” Nixon quickly became boxed in; he was limited to making a legal, rather than political, defense of his office.

Also surprising at the time was how little disagreement there was about how to interpret Watergate. The political and intellectual elites of both parties came quickly to agree that executive abuse of power under Nixon posed a threat to democracy, and that Nixon’s removal was required to meet that threat. Few noted the adverse effect on democratic or popular accountability: removing the elected chief executive further empowered the *unelected* executive bureaucracy, and further relegated Congress—which had created that bureaucracy—to serving as an executive oversight body rather than a legislative body.

Here is how the editors of the *Congressional Quarterly* summarized the situation at the time:

When the 93rd [Congress] first convened in January 1973, President Nixon’s sweeping assertions of executive authority posed a threat to the viability of the legislative branch. Even as Congress braced for confrontations with Nixon over spending, war powers, and other issues, its defiance was tempered by doubts as to whether it was indeed any match for the newly re-elected President. But by the time Congress adjourned [on] December 20, 1974, the balance of power had shifted dramatically. Both Nixon and . . . [Vice President] Agnew had been driven from office in disgrace—replaced by men whom Congress had a hand in selecting. Meanwhile, moving into a vacuum created by the disintegration of executive leadership, Congress had staked out a commanding role for itself.

The popular understanding of the Watergate scandal—that it was

somehow rooted in Nixon's flawed personal character, and that it was essentially a legal matter—remains unshaken after more than 40 years. But I was not convinced then, nor am I convinced today, that Watergate can be properly understood in either personal or legal terms. By promising to use his executive power to bring the executive bureaucracy under his control, Nixon posed a danger to the political establishment after his landslide re-election. In response, the establishment struck back.

It wasn't until many years after Watergate that we learned the identity of the source of the leaks that led to Nixon's removal. Deep Throat, the source for the reporting of Bob Woodward and Carl Bernstein at *The Washington Post*, turned out to be Mark Felt, a high-level FBI official who had access to all of the classified information pertaining to the investigation. Felt leaked that information selectively over the course of a year or more, helping to shape public opinion in ways the prosecution could not. Although Woodward and Bernstein were lauded as investigative reporters, they merely served as a conduit by which the bureaucracy undermined the authority of the elected chief executive. Geoff Shepard, a young member of Nixon's defense team who has continued investigating Watergate using the Freedom of Information Act, has recently established as well that the prosecutors and judges involved in Watergate violated the procedural requirements that ensure impartiality, acting instead as partisans opposed to Nixon.

Our country was divided at the time of Watergate, as it remains divided today, over how we should be governed, and thus over what constitutes a good and just regime. Is the modern administrative state—the progressive innovation that took shape in the New Deal and was greatly expanded in the Great Society—the just and proper way to govern? Or is it just and proper to govern through the political structures established by the Constitution? Does

the regulation of Americans' economic and social lives by a centralized bureaucracy establish the moral justification for government? Or does the underlying principle of American constitutionalism—the principle that the power of government must be limited and directed to the protection of its citizens' natural rights—remain valid?

Between these alternatives there can be no compromise. This division was not solely of Nixon's making, and it was the inability of the political parties and of the two elected branches of government to forge a consensus one way or the other that made the Watergate scandal possible, if not inevitable.

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The Ethics in Government Act, passed by Congress in 1978, established the Independent Counsel statute. This legislation was justified on the ground that executive discretion must be subordinate to law. But that masked its political purpose, which was to insulate the permanent, unelected government from political control. The Independent Counsel statute was devised to stand as a bulwark against any president or senior executive branch official who dared threaten the centralized executive bureaucracy put in place by the Democratic Party majorities of the 1960s and '70s. It weakened the president's political control of that sprawling bureaucracy and strengthened Congress's hand in managing it. Ultimately, it had the effect of transforming political and policy disputes—adjudicated by the elected branches of government, and thus by the people—into legal disputes in which the people have no part. As former prosecutor Cliff Nichols has written:

The [Department of Justice] is an institution vested with formidable resources, including its authority over the FBI. It is also often the beneficiary of a thinly veiled, yet presumed, allegiance with most

of the federal courts in which its attorneys operate. As a result, and given enough time, in most cases, the DOJ is empowered—via favorable rulings and otherwise—to access, manipulate, and maneuver the federal laws, rules, regulations, and procedures—not to mention witness testimony—in whatever ways it may deem necessary to ultimately bring most of those it targets to heel, perhaps even including a President.

For nearly two centuries of our nation's history, prior to passage of the Ethics in Government Act, there existed no legal mechanism of government outside the political and legal authority granted by the Constitution to the legislative, executive, and judicial branches. The Constitution established the separation of powers as the ground of adjudicating all political disputes. Members of the elected branches would defend their institutional interests, motivated by self-interest and by differing opinions regarding the public good. In the most serious political disputes, the legislature had the constitutional power to impeach the president—in which case both sides could make their case to the public and the people could decide.

Today, by contrast, the political branches, rather than defending their institutional interests, tend to accommodate the administrative state. The centralized executive bureaucracy has become the central feature of government, administrative rulemaking has replaced general lawmaking, and rule by bureaucrats has replaced rule by elected officials. Not only both political branches of government, but in some ways both parties, have accommodated themselves to this new way of governing. But given that this transformation of how we are governed was accomplished administratively, through the bureaucracy and the courts, rather than politically—with Congress passing

legislation supported by a majority of the American people—it is not clear that the American people are on board. Certainly there is no public consensus on the question.

Nationally organized interests were well equipped to adjust to this new way of governing, and they continue to have access to, and be well served by, the Washington establishment. Citizens who exist outside those organized interests, on the other hand, seem to sense that they have been disenfranchised and that government no longer operates on behalf of a public or a common good. This explains the deep social and cultural division underlying the 2016 election results that shocked and awed the Washington establishment.

**Ultimately, the Independent Counsel statute had the effect of transforming political disputes—adjudicated by the elected branches, and thus by the people—into legal disputes in which the people have no part.**

We see today, in the two-year Mueller investigation and its aftermath, yet another attempt to destroy an anti-establishment president using a legal rather than political process of adjudication. The most notable difference between this scandal and Watergate is that President Trump has so far succeeded—largely through his relentless characterization of most of those in the media as dishonest partisans rather than objective reporters—in preventing the scandals surrounding him from being defined, by his enemies, in legal rather than political terms.

The guardians of the status quo in the permanent government and the media have defined past political scandals so successfully that a full and proper understanding of Watergate, for instance, is likely impossible now. It remains to be seen whether, in the end, they will succeed again today—whether the legend will again become fact, and they will print the legend. ■