Nixon, Trump, and the Doom of Repeating History

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INTRODUCTION

As long as government has existed, those inside that machine have had to balance their personal lives with their representation of the people. From the Senators of the Roman Republic[1] to the members of the Virginia House of Burgesses,[2] public officials have had the sacred task of representing the people, while still maintaining their private lives.

More recently, members of the executive branch have come under tremendous scrutiny from Congress, the media, and the general public for the overlap of their private and representative activities.[3] Never before have so many officials in the President's inner circle had such varying backgrounds before their entrance into the public sector.[4] President Trump has, whether wisely or unwisely, surrounded himself with dozens of advisers and counselors who were previously executives of multi-million dollar enterprises.[5] As such, there has been constant criticism of the many conflicts of interest and ethical issues raised by his cabinet.[6]

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1. Susan Treggiari, *Home and Forum: Cicero Between "Public" and "Private,"* 128 TRANSACTIONS AM. PHILOLOGICAL ASS'N 1 (1998).

2. *See generally* LORRI GLOVER, FOUNDERS AS FATHERS: THE PRIVATE LIVES AND POLITICS OF THE AMERICAN REVOLUTIONARIES (Yale University Press 2014).

3. Gregg Re, *Trump Cabinet Officials in the Crosshairs as Dems Zero in on DeVos, Zinke, Others*, FOX NEWS (Nov. 30, 2018), https://www.foxnews.com/politics/trump-cabinet-officials-in-the-crosshairs-as-dems-zero-in-on-devos-zinke-others [https://perma.cc/6SPU-WJPB]; Z. Byron Wolf & Kevin Piptak, *Trump's Cabinet Turmoil*, CNN (Dec. 17, 2018), https://www.cnn.com/2018/12/07/politics/trumps-cabinet-shakeup/index.html [https://perma.cc/6BUC-H68F].

4. Martin Longman, *Trump Has Assembled the Worst Cabinet in History*, WASH. MONTHLY (May 17, 2019), https://washingtonmonthly.com/2019/05/17/trump-has-assembled-the-worst-cabinet-in-history/ [https://perma.cc/DE9T-TVY8]; Nancy Cook & Andrew Restuccia, *Meet Trump's Cabinet-in-Waiting: He's Expected to Reward the Band of Surrogates who Stood by Him*, POLITICO (November 9, 2019), https://www.politico.com/story/2016/11/who-is-in-president-trump-cabinet-231071 [https://perma.cc/T99E-7JUD]; Drew DeSilver, *Trump's Cabinet will be One of Most Business-Heavy in U.S. History*, PEW RES. CTR. (Jan. 19, 2017), https://www.pewresearch.org/fact-tank/2017/01/19/trumps-cabinet-will-be-one-of-most-business-heavy-in-u-s-history/ [https://perma.cc/JL8S-ASYL].

5. *See* Michela Tindera, *The Definitive Net Worth of Donald Trump's Cabinet*, FORBES (July 25, 2019), https://www.forbes.com/sites/michelatindera/2019/07/25/the-definitive-net-worth-of-donald-trumps-cabinet/#585c475a6a15 [https://perma.cc/X234-35MR].

6. *See* Tom Schenk & AMP Reports, *Ethics Be Damned: More than Half of Trump's 20-Person Cabinet Has Engaged in Questionable or Unethical Conduct*, MARKETPLACE (Feb. 16, 2018), https://www.marketplace.org/2018/02/16/ethics-be-damned-more-half-trumps-20-person-cabinet-has-engaged-questionable-or/

Because of the framework established between the executive branch and the legislative branch,[7] complications have arisen in which powerful individuals on the President's staff have become too far removed from Congressional oversight, and actions taken by these individuals threaten to undermine the balance of power between the branches. This Note will discuss one facet of this issue regarding one specific adviser to the president—the White House Counsel. Part I will give a brief historical overview of the framework of the executive branch, and how it interplays with the legislative branch. It will discuss the history of the cabinet-level positions; the history of the Executive Office of the President; and the levels of Congressional participation in executive officials' activities, both in the advice and consent role and in the oversight role. Part II will discuss the role of the White House Counsel, by examining both a previous administration's and the current administration's practices and the conflicts and ethical implications of these actions. Part III will discuss possible remedies, including legislative change or changes to the *Model Rules of Professional Responsibility*, that can help to mitigate these complications in the future.

I. A BRIEF HISTORY OF THE FRAMEWORK OF THE EXECUTIVE BRANCH

Throughout the history of the United States, the executive branch has perhaps been the most commonly misunderstood branch of our government.[8] While the sections of the Constitution dealing with legislative power are far lengthier and in depth than the sections dealing with executive power,[9] the power of the executive has a much further reach and potential than that of Congress.[10] First, while Congress can only act when both chambers are in agreement and the president signs the bill (absent a veto-proof majority),[11] the president has the ability to act unilaterally in many cases.[12] Second, the Founders intended the presidency to be less subject to political pressures and considerations.[13] Under the original constitutional system of presidential elections, the president was not elected directly by the people. The system under the Constitution is that of indirect elections, where

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[https://perma.cc/WQ6W-NFEW]; s*ee also Trump Team's Conflicts and Scandals: An Interactive Guide*, BLOOMBERG (updated March 14, 2019), https://www.bloomberg.com/graphics/trump-administration-conflicts/ [https://perma.cc/4EH8-4JBS].

7. *See infra* Parts I & II.

8. *See* Aaron David Miller, *Five Myths About the Presidency*, WASH. POST (Feb. 16, 2012), https://www.washingtonpost.com/opinions/five-myths-about-the-presidency/2012/02/02/gIQAxi0GIR_story.html [https://perma.cc/7672-WPFM].

9. *Compare* U.S. CONST. art. I, § 8–9 *with* U.S. CONST. art. II, § 1–2.

10. *See, e.g.*, Kevin J. Fandl, *How Far-reaching Are the President's Powers on DACA?*, WHYY (Oct. 17, 2017), https://whyy.org/articles/far-reaching-presidents-powers-daca/ [https://perma.cc/2T86-4SP3].

11. U.S. CONST. art. I, § 7.

12. *See, e.g.*, Jack Ryan, *When Do Presidents Exercise Unilateral Power?*, GEO. PUB. POL'Y REV. (Nov. 16, 2019), http://gppreview.com/2018/11/16/presidents-exercise-unilateral-power/ [https://perma.cc/Q8Y6-9HWP].

13. *See* THE FEDERALIST NO. 39 (James Madison).

the voters in each state select electors, who then vote for the president.[14] This system was perhaps intended to make the executive less submissive to the "mob-rule."[15] Alternatively, Congress has to answer to the people directly. Members of the House of Representatives are up for reelection every two years and are elected by a popular vote in their respective districts.[16] Senators were not originally elected directly. Instead, they were elected by their respective state legislatures who were in turn directly elected by the people of their districts.[17] Therefore, for both houses of Congress, the political considerations of their legislative actions and votes are almost always on their minds. The president, however, was intended to be more removed from such considerations.[18]

The executive branch itself is divided into two categories of officials, the cabinet and the Executive Office of the President. These two groups have different statutory obligations and operate in very different ways.

A. THE PRESIDENT'S CABINET

The Framers of the Constitution intended the power of the executive to be unitary and separate from the powers of Congress.[19] The Constitution commands the executive to "Take [c]are that the [l]aws be faithfully executed . . . ."[20] Not to pass the laws. Not to make new ones. But to execute the laws written and passed by the Congress. In this capacity, the Framers knew it would be necessary for the president to surround himself with departments and secretaries to efficiently fulfill his constitutional duties.[21] Therefore, almost immediately upon the ratification of the new Constitution, Congress passed laws creating several departments, such as the Departments of State (originally the Department of Foreign Affairs),[22] Treasury,[23] War (the precursor to the modern Department of Defense),[24] and Justice (headed by the Attorney General).[25] The purpose of these departments was to provide for the smooth and efficient implementation of foreign policy, currency and economic regulation, defense of the homeland, and the implementation of justice, respectively. The Framers understood that the executive could not

14. *See* U.S. CONT. art. II, § 1; *see also* U.S. CONST. amend. XII.
15. *See* THE FEDERALIST NO. 10 (James Madison).
16. U.S. CONST. art. I, § 2.
17. U.S. CONST. art. I, § 3. Subsequent to the passage of the 17th Amendment, Senators are now also directly elected by the people of their states at-large.
18. *See* THE FEDERALIST NO. 39 (James Madison).
19. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8 (1994).
20. U.S. CONST. art. II, § 3.
21. *See generally* THE FEDERALIST NO. 76 (Alexander Hamilton).
22. 1 Stat. 28 (1789).
23. 1 Stat. 65 (1789).
24. 1 Stat. 49 (1789).
25. Judiciary Act of 1789, sec. 35, 1 Stat. 73, 93 (1789).

possibly run the country on its own, and established parameters for Congress to create these departments.[26]

B. THE EXECUTIVE OFFICE OF THE PRESIDENT

While the cabinet-level departments, as they became known, are the primary tool through which the president fulfilled his "take care" duties, the operation of the executive branch and the Office of the President in particular (colloquially known as the West Wing) became a complex machine of advisers, counselors, and lawyers. While many of them not Senate-confirmed appointees, these positions have become even more important in some ways than the department secretaries.[27] As the government grew and the departments grew with it, it became more imperative for the president to delegate many of his duties and obligations to a series of staffers. Even common everyday communications with the departments became impractical. By the latter half of the twentieth century, most of the president's policy directives and orders to the departments were formulated and delivered through these staffers.[28] The Chief of Staff became a very powerful position, both for often having the president's ear, and for acting as the main intermediary through whom the president communicated his wishes to his staff, the executive departments, and the public at large. Additionally, through the creation of numerous informal positions in the West Wing, the number of personnel in the Executive Office of the President has grown into the thousands, a vast majority of whom do not require Senate confirmation.[29] The end result is that Congress has very little direct control of the happenings in West Wing appointments.[30] Other better-known and influential positions not requiring advice and consent of the Senate are the aforementioned Chief of Staff, the National Security Advisor, the White House Press Secretary, Senior Advisors to the President, and the White House Counsel.

C. CONGRESSIONAL PARTICIPATION IN THE EXECUTIVE BRANCH

While the "unitary executive" theory has gained mainstream support, even if there is no academic consensus as to how strong it is,[31] Congress still has two

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26. *See* U.S. CONST. art. II, § 3.

27. *See* Robert Longley, *What to Know About Presidential Appointments*, THOUGHTCO. (July 3, 2019), https://www.thoughtco.com/presidential-appointments-no-senate-required-3322124 [https://perma.cc/599H-8X4D].

28. *See* The Obama White House, https://obamawhitehouse.archives.gov/administration/eop [https://perma.cc/MD8W-VJMF].

29. *See* American President: An Online Reference Resource for U.S. Presidents – Administration of the White House, Miller Center of Public Affairs, University of Virginia, https://web.archive.org/web/20101117160520/http://millercenter.org/academic/americanpresident/policy/whitehouse [https://perma.cc/ZE57-XEF5]. President George W. Bush's budget request for FY 2005 included $341 Million for 1,850 personnel in the EOP.

30. *See infra* Part I.C for an overview of Congress's powers of appointment and oversight and how they relate to the actions and powers of the executive branch.

31. *See, e.g.*, Lessig & Sunstein, *supra* note 19, at 2.

significant ways it can participate and control the president in his leadership of the executive branch: The Appointments Clause and congressional oversight.

1. THE APPOINTMENTS CLAUSE

Implicit in the Constitution is one very clear way that the Senate specifically plays a role in the operation of the executive branch: advice and consent.[32] The Constitution tasks the Senate with the power to approve or disapprove of presidential appointees who are "Officers of the United States."[33] Additionally, the creation of the departments and their structures are entirely up to Congress, so it has the ultimate power to "veto" a presidential appointment by legislating a department in or out of existence.[34] While this is not direct congressional control of the executive branch's actions, they are still able to act as the "gate-keepers" that prevent undesirable appointees from assuming positions of power.[35]

2. CONGRESSIONAL OVERSIGHT

The second way Congress asserts control over the executive branch, while not explicitly stated in the Constitution, is through its power of congressional oversight, which is more powerful and far-reaching than the power of advice and consent. While the ratification history of the Constitution makes it clear that congressional oversight was an implicit power given to Congress,[36] the courts have both limited and expanded the scope of that power at different occasions.

In 1927, the Supreme Court reaffirmed this implicit power and explicitly gave Congress the power to enforce it.[37] In *McGrain*, the House Sergeant at Arms arrested respondent for contempt for refusing to answer to a Senate subpoena.[38] The Supreme Court upheld the respondent's arrest as a proper exercise of

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32. U.S. CONST. art. II, § 2.

33. *Id.*

34. Most recently, Congress created the Department of Homeland Security headed by the Secretary thereof, pursuant to legislation passed by both houses and signed by President George W. Bush in 2003. *See* Homeland Security Act of 2002, sec. 101, 116 Stat. 2135. Congress has also renamed, reorganized, and abolished cabinet-level positions, such as the Secretary of War being replaced by the Secretary of the Army and the Secretary of the Air Force in 1947, and being demoted to being subordinate to the Secretary of Defense, in 1949. *See* National Security Act of 1947, sec. 205-07, 61 Stat. 495 (1947).

35. With both executive branch appointees and judicial nominations, the intent was never that the Senate should "rubber stamp" the president's picks. While there is certainly deference given to the president's choices, senators and Senate committees have the responsibility to make sure nominees are qualified. *See* James Wallner & John Malcolm, *On Judicial Nominations, Senators Are Meant to Advise, Not Rubber-Stamp*, HERITAGE FOUND. (Nov. 17, 2016), https://www.heritage.org/political-process/commentary/judicial-nominations-senators-are-meant-advise-not-rubber-stamp [https://perma.cc/D6YD-7HJN].

36. WALTER J. OLESZEK ET AL., CONGRESSIONAL PROCEDURES & THE POLICY PROCESS 378 (10th ed. 2016) (citing ARTHUR M. SCHLESINGER, JR. & ROGER BURNS, EDS., CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792–1974, vol. 1, xix (1975)) ("It was not considered necessary to make an explicit grant of such authority[.] The power to make laws implied the power to see whether they were faithfully executed.").

37. McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

38. *Id.* at 154.

congressional power to compel testimony in front of a committee hearing.[39] The Court looked to the lengthy historical record of the early days of Congress to find that there was indeed precedent for congressional oversight power.[40] Important to the Court's opinion was its holding that the object of congressional oversight must be related to an area in which the Congress has power to legislate.[41] The Court (quoting from the 1792 congressional record) held that the Necessary and Proper Clause gives Congress the power to form committees to investigate the need for new or changed laws.[42] Congress in this instance was investigating the need to reform the Department of Justice, which is an area where Congress has the power to legislate.[43] The Court held that it was within the power of Congress to subpoena the witness as a part of its investigation.[44]

Since *McGrain*, the Court has both expanded and constricted the oversight power of Congress. In *Watkins v. United States*, the Court limited the power of Congress to expose the private affairs of individuals.[45] "But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress."[46] In *Watkins*, the petitioner was appealing a conviction for contempt of Congress for his refusal to name people he knew to be members of the Communist Party upon questioning by a member of the House of Representatives Committee on Un-American Activities.[47] The Court ruled the Committee could not show that the questions being asked were "pertinent to the question under inquiry," and therefore the witness could not be held in violation of federal law[48] for refusing to answer.[49] This ruling showed the Court was not willing to give Congress free rein over the lives of private citizens, and that their oversight role would be limited to assisting them in the proper fulfillment of their constitutional role.[50] In 1975, the Court released another ruling, this time greatly expanding the scope and power of Congress in its oversight role. In *Eastland v. United States Servicemen's Fund*, the Court ruled that oversight included broad power to issue

39. *Id.* at 158.
40. *Id.* at 161–64.
41. *Id.* at 160–61.
42. *Id.* at 164; *See* U.S. CONST. art. I Sec. 8.
43. *McGrain*, 273 U.S. at 177.
44. *Id.*
45. Watkins v. United States, 354 U.S. 178, 187 (1957).
46. *Id.*
47. *Id.* at 186. This committee was established in 1938, as a reorganization of several previous sub-committees established in the early 20th century to investigate pro-German and pro-Bolshevik sentiments during World War I and suspected Russian Communist sympathizers in the early 1930s. In 1945 the sub-committee was granted the status of a standing (permanent) committee. The subcommittee was abolished in 1975, with its functions being transferred to the Committee on the Judiciary.
48. 2 U.S.C. § 192 (2012).
49. *Watkins*, 354 U.S. at 214–15.
50. *Id.* at 215–16.

subpoenas for documents and testimony.[51] In *Eastland*, the Senate Subcommittee on Internal Security was investigating the actions of the respondent (USSF) that were potentially bad for the morale of American troops in Vietnam.[52] Pursuant to the investigation, the Committee issued subpoenas for documents related to USSF's activities.[53] The Supreme Court held that as long as the actions of the Committee fell within the sphere of "legitimate legislative activity," the subpoenas were valid.[54]

This line of cases cemented the oversight role of Congress as one of the most vital checks on the executive branch, as well as clearly marking the limits of that power. As detailed in subsections I.A and I.B of this Note,[55] there are a myriad of influential government officials with varying degrees of power who fall completely outside the Appointments Clause regime and oversight is the only way for Congress to ensure their faithful execution of existing legislation. This Note will show two examples of how congressional oversight is necessary to ensure that executive branch officials comply with their constitutional duties, and suggest possible remedies for cases where existing law may have fallen short of its goal.

II. THE WHITE HOUSE COUNSEL

Perhaps one of the most powerful and long overlooked offices in the executive branch is the Office of White House Counsel. Created in 1943, the Office's role was originally intended to advise the president on all legal aspects of policy questions and decisions, issues arising in connection with the president's reactions to legislation (whether to sign, veto, or abstain from action), ethical questions, financial disclosures, and conflicts of interest within the West Wing.[56] This mandate only covers counseling the president in his official capacity, and the White House Counsel does not have jurisdiction over any action the president or his family takes in their personal lives, nor over anything that happens before the president takes office.[57] However, there has long been confusion and misunderstanding between presidents, their advisers, the media, and the general public about where the responsibilities of the White House Counsel begin and end.[58]

While the legal and ethical shortcomings of the current administration are well-documented,[59] this Note will first provide background on these limitations

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51. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975).

52. *Id*. at 493–94.

53. *Id*. at 494–95.

54. *Id*. at 503.

55. *See supra* Parts I.A and I.B.

56. *See* Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 L. & CONTEMP. PROBS. 63, 66 n.14 (1993) [hereinafter *At the President's Side*].

57. *See* Rob Bauer, *Thoughts on the Proper Role of the White House Counsel*, LAWFARE (Feb. 21, 2017), https://www.lawfareblog.com/thoughts-proper-role-white-house-counsel [https://perma.cc/D5DE-FJJ8].

58. *Id*.

59. Interview with Richard Painter & Norman Eisen, ethics lawyers for Presidents George W. Bush and Barack Obama, respectively (Jan. 16, 2018), *transcript available at* https://www.npr.org/2018/01/16/578247224/report-trump-administrations-first-year-has-been-unethical [https://perma.cc/2V3Q-PFVN].

as they were thrust into the limelight during a prior administration: President Richard Nixon's White House Counsel John Dean and his activities before, during, and after the Watergate affair.

A. JOHN DEAN AND WATERGATE

John Dean was appointed White House Counsel by President Richard M. Nixon on July 27, 1970, approximately eighteen months after Nixon took office.[60] Originally a staff attorney at the Department of Justice, Dean later became an associate deputy in the office of the Attorney General before moving over to a White House position.[61]

On January 27, 1972, Dean participated in a meeting with United States Attorney General John Mitchell and two representatives for the Committee to Re-Elect the President ("CREEP")[62] to plan for intelligence gathering operations during the upcoming 1972 presidential campaign.[63] Over the next few weeks they eventually developed a plan to eavesdrop on the Democratic National Committee headquarters in the Watergate Hotel Complex.[64] On June 16, 1972, the men sent to plant the wiretaps were caught in the act.[65] Through a combination of outstanding journalism[66] and the FBI investigation into the break in, Congress investigated the cover-up and began to determine who in the administration was connected to the incident.[67]

After the arrest of the burglars, Dean took possession of evidence and money from E. Howard Hunt's White House safe.[68] Acting FBI Director L. Patrick Gray testified to Congress that the White House and Dean had possession of the FBI Watergate files and Dean was then directly linked to the cover-up.[69]

By April 1973, several of the Watergate conspirators, including Liddy and Hunt, were sentenced to prison terms and the Senate made it clear they were coming after administration officials next.[70] Dean then hired an attorney and began cooperating with Senate investigators, leading to his firing by Nixon on April 30, 1973.[71] The Senate committee voted to grant Dean immunity, and his testimony

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60. JOHN W. DEAN III, BLIND AMBITION 25 (1976).

61. *Id*. at 16.

62. Jeb Magruder (Deputy Director of CREEP) and G. Gordon Liddy (counsel for CREEP and a former FBI agent).

63. DEAN, *supra* note 60, at 78.

64. *Id*.

65. *Id*. at 89–90.

66. *See generally* CARL WOODWARD & BOB BERNSTEIN, ALL THE PRESIDENT'S MEN (1974).

67. United States Senate, Watergate Leaks Lead to Open Hearings (Mar. 28, 1973), *available at* https://www.senate.gov/artandhistory/history/minute/Watergate_Investigation.htm [https://perma.cc/SPR9-RYE3].

68. DEAN, *supra* note 60, at 121–22. Hunt, a former CIA Agent and political operative for President Nixon, was the primary go-between for the burglars, specifically as the bagman for the payments from CREEP to the burglars.

69. *Id*. at 183–84.

70. FRED EMERY, WATERGATE 271 (1994).

71. DEAN, *supra* note 60, at 226.

proved crucial to the progression of the Senate investigation.[72] This eventually led to indictments and prison terms for several administration officials[73] and the eventual resignation of Nixon on August 9, 1974.[74]

Underlying this drama was the issue of Dean's connection to Nixon's campaign activities. While it was his job to represent Nixon and the Office of the Presidency, the line between that mandate and the president's non-official affairs was blurry. From his presence at the first pre-Watergate planning meetings, it was clear he was participating in Nixon's campaign and the post-break-in obstructive acts. While he eventually agreed to participate with prosecutors and Congressional committees, this Note suggests that there needs to be stricter guidelines with regard to scope of representation, conflicts of interest, and client's interests. These issues were addressed by the American Bar Association ("ABA") after Watergate,[75] but subsequent administrations have fallen into the same trap.[76] The remedies need to be revisited and strengthened.[77]

B. DON MCGAHN AND ROBERT MUELLER

While the many legal, moral, and ethical shortcomings of the current administration are well known and documented within the introduction to this Note,[78] specific attention needs to be given to President Trump's use and actions with regard to his first White House Counsel Don McGahn, and how these actions show the dangers of Watergate are still alive and well.

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72. *Id*. at 313.

73. Including Former White House Chief of Staff H.R. Haldeman, Former White House Counsel John Ehrlichman, Former United States Attorney General John Mitchell, and Former White House Counsel Charles Colson.

74. During the intervening months between the break-in and Nixon's resignation there was a flurry of Congressional hearings and litigation related to the overarching scandal, the details of which are beyond the scope of this paper. To briefly summarize, the investigation was led by the Special Prosecutor for the Department of Justice Archibald Cox, who was appointed by then-Attorney General Elliott Richardson under a one-time regulation. Cox led his team on a relentless search for tape recordings of Nixon made using the Oval Office recording system. Cox was subsequently fired on October 20, 1973, in what became known as the Saturday Night Massacre. Leon Jaworski was then appointed Special Prosecutor in Cox's place, and succeeded in subpoenaing the tapes. It is also worth noting that the position of Special Prosecutor was subsequently passed into law under the Title VI of the Ethics in Government Act of 1978 (92 Stat. 1824). I encourage the reader to delve into the topic on his or her own; it is a universal staple in first year Constitutional Law classes. *See* Morrison v. Olsen, 487 U.S. 654 (1988) (declaring the special prosecutor provision of The Act is not in violation of the separation of powers or the appointments clause); *see also* Petition for Writ of Certiorari for Petitioner, Seila Law v. CFPB, June, 2019 (No. 19-7) (arguing the Court should grant certiorari in a case challenging the constitutionality of the Consumer Financial Protection Bureau, and arguing to overturn *Morrison*), *cert. granted*, 140 S. Ct. 427 (2019). This case was argued before the United States Supreme Court on March 3, 2020, with a decision expected in June 2020.

75. *See infra* Part III.A.2.

76. *See, e.g.*, *infra* Part II.B.

77. *See infra* Part III for a discussion of possible remedies.

78. *See supra* Introduction.

Don McGahn was appointed White House Counsel on January 20, 2017, immediately following the inauguration of President Donald Trump.[79] He was previously a member of the Trump campaign's legal team, and served as General Counsel of the Presidential Transition Team.[80] Through the early months of the new administration, McGahn dealt with the standard duties of his position, including making recommendations for judicial nominees.[81] However, his duties changed in May 2017 with the appointment of a Special Counsel to the Department of Justice, Robert Mueller.[82]

Even before the 2016 election there were allegations by members of Congress of the continuous attempts by foreign powers to interfere in that election.[83] Following Trump's victory, numerous allegations of election interference, specifically by the Russian Federation, surfaced.[84] The origin of what would become the Special Counsel investigation was the FBI's Operation Crossfire Hurricane, which focused on links between Trump campaign associates and Russian officials.[85] On May 9, 2017, Trump fired FBI Director James Comey, initially claiming the dismissal to be on recommendation from Attorney General Jeff Sessions and Deputy Attorney General Rod Rosenstein.[86] However, subsequent statements by Trump and others made it clear that Comey's investigation into Trump and the campaign contributed in large part to Trump's decision.[87] Comey's dismissal

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79. Michael C. Bender & Joe Palazolo, *Donald Trump Selects Donald McGahn as White House Counsel*, WALL ST. J. (updated Nov. 25, 2016), https://www.wsj.com/articles/donald-trump-selectsdonald-mcgahnas-white-house-counsel-1480103558 [https://perma.cc/B39F-NM7Y].

80. *Id.*

81. Peter Nicholas, *Trump's Fury at Don McGahn Is Misplaced*, ATLANTIC (May 22, 2019), https://www.theatlantic.com/politics/archive/2019/05/don-mcgahn-helped-trump-remake-federal-courts/589957/ [https://perma.cc/6Y4P-HFFJ].

82. Del Quentin Wilber & Aruna Viswanatha, *Former FBI Director Robert Mueller Named Special Counsel for Russia Probe*, WALL ST. J. (updated May 17, 2017), https://www.wsj.com/articles/former-fbi-director-robert-mueller-named-special-counsel-for-russia-probe-1495058494 [https://perma.cc/V3MF-W9VG].

83. *See* Press Release, Senator Dianne Feinstein (D-CA) and Representative Adam Schiff (D-CA28) Feinstein, Schiff Statement on Russian Hacking (Sept. 22, 2019) (available at https://www.feinstein.senate.gov/public/index.cfm/2016/9/feinstein-schiff-statement-on-russian-hacking [https://perma.cc/323B-87DS]); *see also* Greg Miller, *Key Lawmakers Accuse Russia of Campaign to Disrupt U.S. Election*, WASH. POST (Sept. 22, 2016), https://www.washingtonpost.com/world/national-security/key-lawmakers-accuse-russia-of-campaign-to-disrupt-us-election/2016/09/22/afc9fc80-810e-11e6-b002-307601806392_story.html [https://perma.cc/8V2F-67KJ].

84. *See* JOINT ANALYSIS REPORT, NATIONAL CYBERSECURITY & COMMUNICATIONS INTEGRATION CENTER AND FEDERAL BUREAU OF INVESTIGATION, GRIZZLY STEPPE – RUSSIAN MALICIOUS CYBER ACTIVITY, REF. NO. JAR-16-20296 (December 29, 2016), *available at* https://www.us-cert.gov/sites/default/files/publications/JAR_16-20296A_GRIZZLY%20STEPPE-2016-1229.pdf [https://perma.cc/N6EY-YGHD].

85. *See Key Quotes from Congress' Hearing on Russia and the U.S. Election*, REUTERS (Mar. 20, 2017), https://www.reuters.com/article/us-usa-trump-russia-factbox-idUSKBN16R229 [https://perma.cc/74KN-LT99].

86. *See* Michael S. Schmidt & Maggie Haberman, *Mueller Has Early Draft of Trump Letter Giving Reasons for Firing Comey*, N.Y. TIMES (Sept. 1, 2017) https://www.nytimes.com/2017/09/01/us/politics/trump-comey-firing-letter.html?mcubz=0&_r=0 [https://perma.cc/F92Z-KDL7].

87. Jacob Pramuk, *Trump to Russians in Oval Office: Firing 'Nut Job' Comey Eased Pressure, NYT Reports*, CNBC (May 19, 2017), https://www.cnbc.com/2017/05/19/trump-to-russians-in-oval-office-firing-nut-job-comey-eased-pressure-nyt.html [https://perma.cc/7L4W-UH5Q].

would later play a part in Mueller's report and the investigation into potential obstruction of justice by Trump.[88] With Comey fired and Sessions having recused himself from any Department of Justice activities related to the investigation,[89] Deputy Attorney General Rod Rosenstein appointed former FBI Director Mueller to take over the investigations into election meddling and possible collusion by the Trump campaign.[90]

In the subsequent twenty-two-month Special Counsel investigation, Trump expressed his displeasure at being at the center of the investigation, frequently lashing out at the investigation and at Mueller personally on Twitter and in press conferences.[91] However, several actions and statements Trump made to McGahn turned out to be more than just social media hyperbole, and had the potential to lead to legal and ethical ramifications for Trump and his advisers.

In the early months of his presidency, it was reported that Trump had given McGahn instructions to stop Sessions from recusing himself.[92] McGahn spoke to the Attorney General, but ultimately ceased any attempt to convince him to retract his recusal.[93] However, this would be the first of several instances in which McGahn represented Trump in his personal capacity as the potential target of a criminal investigation, and not in his official capacity as President of the United States.

Later in June 2017, Trump called McGahn at his home and instructed him to tell Rosenstein to fire Mueller.[94] McGahn refused and threatened to resign, after

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88. *See* DEPARTMENT OF JUSTICE, OFFICE OF THE SPECIAL COUNSEL, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, Vol. II.D.2 (p. 64–65) [hereinafter MUELLER REPORT].

89. Karoun Demirjian et al., *Attorney General Jeff Sessions Will Recuse Himself from any Probe Related to 2016 Presidential Campaign*, WASH. POST (March 2, 2017), https://www.washingtonpost.com/powerpost/top-gop-lawmaker-calls-on-sessions-to-recuse-himself-from-russia-investigation/2017/03/02/148c07ac-ff46-11e6-8ebe-6e0dbe4f2bca_story.html [https://perma.cc/R8KJ-LH6N].

90. UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, DOJ ORDER NO. 3915-2017, APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS (2017) (*available at* https://www.justice.gov/opa/press-release/file/967231/download).

91. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 11, 2018), https://twitter.com/realdonaldtrump/status/984053549742067712 [https://perma.cc/VL24-PELW], Donald J. Trump (@realDonaldTrump), TWITTER (June 18, 2018), https://twitter.com/realdonaldtrump/status/1008732992481710081 [https://perma.cc/9SRG-7ZKA], Donald J. Trump (@realDonaldTrump), TWITTER (June 28, 2018), https://twitter.com/realdonaldtrump/status/1012315534220808192 [https://perma.cc/S3YM-N95C], Donald J. Trump (@realDonaldTrump), TWITTER (July 23, 2018), https://twitter.com/realdonaldtrump/status/1021351630648815616 [https://perma.cc/8WEQ-J4T4]; Jack Holmes, *The President Held an Extremely Normal HeliPresser After Robert Mueller's Testimony*, ESQUIRE (July 25, 2019), https://www.esquire.com/news-politics/a28505329/donald-trump-robert-mueller-fake-news-wikileaks-hoax/ [https://perma.cc/HL4K-BMZQ].

92. *Trump Had White House Lawyer Urge Sessions Against Russia Recusal, Report Says*, FOX NEWS (January 4, 2018), https://www.foxnews.com/politics/trump-had-white-house-lawyer-urge-sessions-against-russia-recusal-report-says [https://perma.cc/4KBT-9EQG].

93. *Id.*

94. MUELLER REPORT, *supra* note 88, Vol. II.E (p. 84–85).

which Trump withdrew his request.[95] This is another example of Trump attempting to use the White House Counsel as his personal attorney in matters unrelated to official conduct. In early 2018, Trump attempted to convince McGahn to change his version of the events of June 2017, but McGahn refused.[96]

These two instances further show the danger of blurring the job of the president's personal attorney with the duties of the White House Counsel. While the job of the White House Counsel is certainly to advise the president in a wide variety of matters, there needs to be a firm line between matters of the *office* of the presidency and the president's private matters. The Special Counsel was never investigating the office of the president; the investigation was focused on the president himself, the campaign, and the possible contact with Russian assets and officials during the campaign. These activities occurred before Trump became president and were not at all related to his official capacity as president. As such, similar to the problem with Dean and Nixon, there is a lack of standards and guidelines in this area which should be addressed.

III. POSSIBLE REMEDIES AND SOLUTIONS

While it is easy to point out the issues with the current administration's use of the White House Counsel, finding a solution to the problem may be more difficult. As discussed,[97] the president requires neither the advice nor the consent of Congress in appointing the White House Counsel, who is appointed and serves at the pleasure of the president; it is virtually impossible for Congress to assert any check over the White House Counsel's appointment. The only way Congress can check the actions of the White House Counsel is for Congress to exercise its oversight power, and attempt to pass legislation to control his or her actions.

A. ETHICAL REMEDIES

One solution is an examination of the ABA *Model Rules of Professional Conduct* as currently promulgated, to determine whether there are gaps that led to the questionable actions previously discussed. [98]

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95. MUELLER REPORT, *supra* note 88, Vol. II.E (p. 85–87); *See also* Michael S. Schmidt & Maggie Haberman, *Trump Ordered Mueller Fired, but Backed Off When White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 25, 2018), https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html [https://perma.cc/9PXZ-ESKM].

96. MUELLER REPORT, *supra* note 88, Vol. II.I.2 (p. 114–18).

97. *See supra* Part I.

98. The *Model Rules* are a set of rules that prescribe baseline standards of legal ethics and professional responsibility for lawyers in the United States. They were promulgated by the ABA House of Delegates upon the recommendation of the Kutak Commission in 1983. The Rules are merely recommendations and are not themselves binding, but having a common set of rules facilitates a common discourse on legal ethics. As of 2015, forty-nine states and four territories have adopted the rules in whole or in part.

1. HISTORY OF THE *MODEL RULES*

The history of legal ethics goes back to the creation of the legal profession itself. As far back as ancient Greece and in first century Rome, records exist of legal advisers and advocates playing an active role in the court system.[99] However, with the fall of the Roman Empire and the start of the medieval age, any framework developed to regulate the legal profession fell to the wayside as courts fell under the control of the elite ruling class.[100] Legal ethics became mere theory with no practical application.[101]

With the introduction of courts into colonial America, legal ethics slowly began to reenter the picture.[102] Because legal representation was commonly discouraged and litigants more often than not represented themselves, rules of ethics became necessary to keep all parties "in check."[103] With American independence and the subsequent ratification of the Constitution, the substantive rules for courts were codified, both in Article III of the Constitution and in the Fifth, Sixth, and Seventh Amendments.[104]

With the end of the Civil War and the beginning of Reconstruction, southern state legislators found the need to rein in some of the questionable conduct by northern lawyers who had come to the south to participate in the legal matters of Reconstruction.[105] The first state to adopt a code of legal ethics was Alabama in 1887.[106] In 1878, the ABA was founded in New York, and by 1908 it had adopted the *1908 Canons of Professional Ethics*, which were intended to be model rules for the states to adopt on their own.[107] In the 1960s, the ABA decided to revamp the *1908 Canons* and in 1969 the *Model Code of Professional Responsibility* was adopted.[108] The *Model Code* was "extremely influential," and almost every state amended their legal ethics rules to comply with the new *Model Code*.[109]

However, the *Model Code* was not much better than the *1908 Canons*, especially in terms of the brevity with which it addressed the representation of organizations.[110] This issue was brought into the limelight as the ABA was forced to

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99. LAW LIBRARY – AMERICAN LAW AND LEGAL INFORMATION, *Professional Responsibility: History*, https://law.jrank.org/pages/9481/Professional-Responsibility-History.html [https://perma.cc/NA9C-LASJ].

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Arnold Rochvarg, *Enron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 66 (2003).

108. *Id.*

109. *Id.*

110. *Id.* The only provision of the *Model Code* which dealt with organizational clients was Ethical Consideration 5-18, which simply provided that an attorney for an entity owed his or her allegiance to the entity and not to any individuals employed by the entity. There was no framework for reporting questions of concerns.

face the harsh reality that much of the damage to the legal profession (and indeed to the country as a whole) caused by Watergate could have been prevented by clearer rules and a more enforceable framework.[111]

2. THE *MODEL RULES* AND HOW THEY ANSWERED THE CALL OF WATERGATE

After the events of Watergate, it became clear that the *Model Code* needed to be changed and updated. Many saw Watergate as "an opportunity for meaningful reform of legal profession."[112] The response of the legal profession to Watergate was twofold: First, the introduction of professional responsibility courses in law school; and second, a wholesale revision of the *Model Code*.[113]

a. The Introduction of Professional Responsibility to Law School Curricula

One of the major changes resulting from of Watergate was the introduction of professional responsibility courses in law schools across the country.[114] With the general culture in 1960s America being seen as getting less moral and a general declining faith in professional leaders, many colleges and universities introduced ethics courses into their standard curriculums.[115] Medical schools introduced courses on human values and medical ethics, and business schools began to teach courses on the social role of business.[116] Law schools followed suit, and by 1974 the ABA mandated that accredited law schools "[R]equire for all student[s] . . . instruction in the duties and responsibilities of the legal profession . . . ."[117] Despite opposition by law school administrations to impose curriculum changes, once the ABA adopted the guidelines, the changes at the school level were almost universally made.[118]

While the need for such a change was obvious,[119] many felt the introduction of legal ethics into standard legal education would do little if anything to solve the problem.[120] While the education setting would be the ideal place to indoctrinate young lawyers with these important rules and lessons, the rules themselves

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111. Rochvarg, *supra* note 107, at 67–68. Another related issue was that the District of Columbia (the relevant jurisdiction for most if the lawyers involved in Watergate) had not adopted part of the *Model Code*, specifically the provisions relating to the crime-fraud exception to attorney confidentiality.

112. Donald T. Weckstein, *Watergate and Law Schools*, 12 SAN DIEGO L. REV. 261, 263 (1975).

113. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 39 (1992).

114. *Id*.

115. *Id*. at 38–39.

116. *Id*. at 39–40.

117. *Id*. at 39 (quoting from ABA Standards for the Approval of Law Schools, Standard 302(a)(iii) (1974)).

118. *Id*. at 40.

119. On the rare occasion a Watergate witness was asked, they acknowledged that they were not taught any legal ethics in law school. *See* Rhode, *supra* note 113, at 39.

120. *Id*. at 39 n.40 (quoting John Dean's testimony responding to whether being taught professional responsibility would have made him act differently, "No, I don't think so . . . I knew that the things I was doing were wrong, and one learns the difference between right and wrong long before one enters law school. A course in legal ethics wouldn't have changed anything").

needed to be changed to fill in the gaps which led to such questionable conduct by the attorneys involved.[121]

b. Changes to the *Model Code*

A group of lawyers led by Robert Kutak worked for six years after Watergate, holding hearings and taking suggestions from all over the country as to make changes in the *Model Code*.[122] The Kutak Commission made substantive changes to the rules of legal ethics, and their work ended with the promulgation of the 1983 *Model Rules of Professional Conduct*.[123] The *Model Rules* became the framework for many state courts to enact their own ethics changes.[124]

One of the most significant changes to the *Model Code* came in the form of Rule 1.13 – Organization as Client.[125] Rule 1.13 states that a lawyer employed by an organization represents the organization, not the individuals who work for or represent the organization.[126] The comments to Rule 1.13 make it clear that the *entity* is the client, not its directors, officers, or employees.[127] Comment 9 states that the rule applies equally when a government agency organization is the client.[128] The comment does acknowledge that in such a scenario it may be difficult to ascertain who the client is, and the attorney must make a judgment call in those situations. The *Model Rules* concede that those judgments are beyond the scope of the *Model Rules*.[129]

Another important addition to the *Model Rules* that came out of Watergate is Rule 1.13(b), or the "report up and out" provision. [130] This provision states that if an organizational attorney knows that an officer or other person associated with the organization is engaged in matters that may be in violation of the law, the lawyer must report this to a higher authority in the organization.[131] If the circumstances warrant (for example, if the aforementioned higher authority is the one engaged in the questionable conduct), then the *Model Rules* provide for the attorney to report the information to the appropriate authority outside of the organization.[132] The Kutak Commission reasoned that such a provision would have provided CREEP lawyers with an opportunity to report the plans of the break-in to CREEP's director, John Mitchell. In the event the director himself was

121. Rochvarg, *supra* note 107, at 68.

122. Laurel A. Rigertas, *Post-Watergate: The Legal Profession and Respect for the Interests of Third Parties*, 16 CHAP. L. REV. 111, 133–34 (2012).

123. *Id.*

124. *Id.*

125. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (AM. BAR ASS'N 1983) [hereinafter MODEL RULES].

126. MODEL RULES R. 1.13(a).

127. MODEL RULES R. 1.13 cmt. 1.

128. MODEL RULES R. 1.13 cmt. 9.

129. MODEL RULES R. 1.13 cmt. 9.

130. Rochvarg, *supra* note 107, at 68–69.

131. MODEL RULES R. 1.13(b).

132. Rochvarg, *supra* note 107, at 68–69.

involved in the conspiracy (which was in fact the case), they could have gone outside the organization to the relevant authority.[133]

Underscoring all of this is the general duty to not allow a client to engage in illegal conduct, and the duty on an attorney to not engage in the illegal conduct him- or herself.[134] The adoption of a clearer version of this rule answers Dean's egregious actions in Watergate in two ways: First, he should have understood who he was representing in his role as White House Counsel, and second, he should never have agreed to take part in the illegal activities being planned by CREEP. While there is considerable debate in the exact mandate of the White House Counsel,[135] the consensus of the legal academic community is that the personal matters of the president, totally unrelated and removed from his capacity and duties as Commander in Chief and the unitary head of the executive branch, are excluded from the mandate.[136] The White House Counsel does not represent the president for his parking tickets, nor for anything else of such a personal nature.[137] The actions of CREEP, whether Nixon knew of them before the break-in or was only informed after the fact, are campaign matters and the White House Counsel should not have been involved with them at all.

B. LEGISLATIVE REMEDIES

While the aforementioned parts of the *Model Rules* certainly answered the "call" of Watergate, the actions by the current administration have shown that the rules need to be enforced more strongly in certain areas of government. Don McGahn certainly did the right thing in his response to Trump's attempts to use him as his personal attorney, but it should never have come to that point. While the ABA is mainly concerned with the actions of attorneys and not with the actions of clients, in the area of government and especially in the Office of the White House Counsel there needs to be a clearer picture of exactly what the attorney's job is and what he can do for the client. If it had been made clear to Trump from day one what McGahn's job was and what it was not, he perhaps would have known that he could not discuss firing Mueller with McGahn, and would have known to go straight to his personal attorney for this matter. However, the ABA has no enforcement authority on its own, and state bars could not possibly

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133. *Id*. The author of this note hypothesizes that perhaps future violations could be reported to the Federal Election Commission, or otherwise the Republican National Committee would have been appropriate avenues to report these instances of misconduct.

134. MODEL RULES R. 1.2(d).

135. *See, e.g*., Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 B.Y.U. L. REV. 17, 26–27 (articulating two views on the role of the White House Counsel: the view of former Bill Clinton White House Counsel Bernard Nussbaum that the role is to represent the president in his personal capacity as a politician (as supposed to his personal activities totally removed from the political sphere), and the view of former George H.W. Bush White House Counsel C. Boyden Gray that the role is to represent the "office of the presidency," and is unrelated to the "person" of the president).

136. *See* Bauer, *supra* note 57.

137. *See id*.

exert the kind of power needed over the West Wing to keep those lawyers in check. It is up to Congress to use their power and oversee the actions of the executive branch lawyers and keep them within the confines of the law. Such laws would also serve as fair and proper notice to the President and other officers of exactly what these government lawyers are permitted to do, and avoid a situation like the one McGahn was faced with.

This Note suggests a possible two-part remedy, of which both parts seem reasonable and within Congress's power to implement. The first remedy would be to pass legislation requiring the executive branch attorneys to comply with the ABA Rules, similar to the way states passed the Rules to be binding on local attorneys. The second remedy would be to empower the Office of Government Ethics with more enforcement authority to ensure compliance with the ABA Rules.

1. NEW LEGISLATION REQUIRED

Congress has already shown its ability and desire to pass legislation in response to questionable activities by executive branch officials. In the aftermath of Watergate, Congress passed the Ethics in Government Act of 1978.[138] The Act detailed new required disclosures by many executive branch officials, including but not limited to the president, vice president, cabinet-level nominees, and high-ranking officials in the Executive Office of the President.[139] The Act was passed in response to many of the ancillary facts that came out of the Watergate hearings, namely, the revelations of large amounts of money being moved between executive branch officials and CREEP, the Nixon campaign, and the Watergate burglars.[140] Congress recognized the need for legislation to ensure their ability to oversee the activities of executive branch officials.[141]

In light of the actions of the current administration, it appears that Congress needs to act once again. The ABA's actions in the aftermath of Watergate seem to be a good framework. Congress needs to pass legislation that codifies sections of the *Model Rules* and adopts them as mandatory for government lawyers, specifically in the executive branch. Given the potential slippery slope which can come from lack of knowledge of Rule 1.13 and what it obligates lawyers to do in certain circumstances, a way to ensure that the White House Counsel can continue to operate in a legal and ethical way is to legislate the ethics rules, and for Congress to use their oversight power to amend the legislation as needed.

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138. 92 Stat. 1824.

139. *Id.*

140. Sam Berger & Alex Tausanovitch, *Lessons from Watergate: Preparing for Post-Trump Reforms*, CTR. FOR AM. PROGRESS (July 30, 2018), https://www.americanprogress.org/issues/democracy/reports/2018/07/30/454058/lessons-from-watergate/ [https://perma.cc/6HQX-4H2F].

141. *Id.*

2. ENFORCEMENT OF NEW LEGISLATION

In the Ethics in Government Act, Congress also created the Office of Government Ethics to oversee the submission of the financial disclosures and ensure compliance with the Act.[142] However, the office is severely understaffed and lacks any authority to asses any action, punitive or otherwise, to enforce compliance.[143] Therefore, it is incumbent on Congress to strengthen the office and to increase its mandate in conjunction with the higher ethical standards it should impose on the White House Counsel's office.

A way to enable this office to take on this mandate would be to include reporting provisions in legislation that would be more specific than just Rule 1.13. While the rule does provide for reporting up (and if necessary out) potential misconduct by an organization's officers, in the case of any executive branch lawyer and the White House Counsel in particular, the "up" would be to the president himself, who is the unitary head of the executive branch.[144] Reporting up in a situation like the one McGahn was in would seem foolish, if not outright dangerous. I suggest Congress consider the establishment of a whistleblower-type protection, wherein the lawyer (or whomever is "reporting up") would be able to report to an Inspector General and not risk either personal punishment or the proverbial "sweeping under the rug."[145] An obvious wrinkle in such a possible remedy would be the removal of an executive branch officer from the normal unitary executive chain of command, which may trigger some constitutional issues.[146]

CONCLUSION

The purpose of the Office of White House Counsel has in the past been an area of confusion. As actions by the current administration have shown, the line between the office's mandate and the president's personal affairs has begun to blur. Congress needs to act to ensure that future administrations do not go so far astray as to lead to another dark incident similar to Watergate.

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142. 92 Stat. 1824.

143. Peter Overby & Marilyn Geewax, *Ethics Office Director Walter Shaub Resigns, Saying Rules Need to Be Tougher*, NPR (July 6, 2017), https://www.npr.org/2017/07/06/535781749/ethics-office-director-walter-shaub-resigns-saying-rules-need-to-be-tougher [https://perma.cc/E7VZ-39TQ].

144. *See* Lessig & Sunstein, *supra* note 19, at 8.

145. *See* Whistleblower Protection Act of 1989, 103 Stat. 16, codified as 5 U.S.C. § 2302(b)(8)-(9), which created such a framework for the reporting by government employees the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to public health and safety.

146. *See supra* note 74 for resources regarding the constitutionality of such an officer.