

# Watergate Whitewater WikiLeaks

The Campbell University Norman Adrian Wiggins School of Law is pleased to announce the ***Campbell Law Review Fall 2017 Symposium***

Watergate, Whitewater, & WikiLeaks:  
Privacy, Policy, and the Public Trust in the Age of Information

~A Symposium on the Legal and Ethical Issues Surrounding the Conduct and Communications of  
Government Officials~

## **Symposium Overview**

### *Background*

More than forty years have passed since President Richard Milhous Nixon resigned in the face of impending impeachment proceedings. Nixon's resignation followed an investigation into what was initially dismissed by the White House as a "third-rate burglary"<sup>1</sup> of the DNC offices in the Watergate complex. The Watergate Scandal still bears significance to historians and legal scholars alike. Watergate, easily recognizable as the greatest political scandal of all time,<sup>2</sup> serves as the nexus of origin for a great many of the issues that the American Congress, Executive, Judiciary, and public continue to confront in the twenty-first century.

Issues related to privacy in the public sector, the growing public mistrust of government officials, and policy and legislation designed to address those issues can be traced from the Watergate Affair of the 1970s, through the Whitewater Scandal of the 1990s, to the many WikiLeaks document and email releases of the twenty-first century. This symposium explores those issues of privacy, policy, and the public trust.

### *Watergate: The Seminal Event*

On March 4, 1974, John N. Mitchell, head of Nixon's reelection committee and then former Attorney General, along with six others, was indicted on charges "including conspiracy to defraud the United States and to obstruct justice."<sup>3</sup> The following month, on motion of Special Prosecutor Leon Jaworski, the United States District Court for the District of Columbia ordered President Nixon to produce evidence "relating to 64 confidential conversations between the President and his closest advisors."<sup>4</sup> Included amongst the subpoenaed evidence were certain audio tapes—the "Watergate Tapes."<sup>5</sup> In a motion to quash, Nixon challenged the validity of the

---

<sup>1</sup> Ron Ziegler, President Nixon's Press Secretary <http://www.washingtonpost.com/wp-srv/politics/special/watergate/timeline.html>

<sup>2</sup> See e.g., List 25, *25 Biggest Political Scandals in History*, <http://list25.com/25-biggest-political-scandals-in-history/5/>; Allen Butler, *Top Ten US Political Scandals*, <http://www.huntingontheatre.org/articles/Now-Or-Later/Top-Ten-US-Political-Scandals/>; Washington Week, *When Power Corrupts: 16 of the Biggest Political Scandals of the Last 50 Years*, <http://www.pbs.org/weta/washingtonweek/blog-post/when-power-corrupts-16-biggest-political-scandals-last-50-years>.

<sup>3</sup> U.S. v. Nixon, 418 U.S. 683, 687 (1974).

<sup>4</sup> Brief for Respondent, Cross Petitioner, Richard M. Nixon, President of the United States at 5, U.S. v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1776, 73-1834), 1974 WL 174855, at \*7.

<sup>5</sup> Alexander P. Butterfield, Administrator of the Federal Aviation Administration and former Deputy Assistant to the President, revealed the existence of the tapes during his testimony before the Senate Watergate Committee on July

court's order, asserting that the production of his confidential conversations with his advisors would be contrary to the public interest.<sup>6</sup> The question of whether Nixon could be compelled to produce the tapes eventually elevated to the Supreme Court of the United States.<sup>7</sup>

President Nixon argued that his “sole discretion to decide what presidential communications he [would] disclose . . . [was] grounded in the right of privacy and constitutionally protected freedom of expression.” The President also argued that “[t]o breach his privacy would unquestionably have a ‘chilling effect’ on those who otherwise would counsel and confide in the President with complete candor and honesty.”<sup>8</sup> In response to Nixon’s privacy argument, the Supreme Court acknowledged the President’s right to privacy, stating, “[t]he expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens.”<sup>9</sup> The Court further explained that the President’s right to privacy must be balanced against “the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.”<sup>10</sup> Nonetheless, the Court compelled the production of the tapes, which were properly subpoenaed by the U.S. Senate Watergate Committee. U.S. Senators Sam Ervin (D-NC) and Howard Baker (R-TN) co-chaired the committee. The subpoena was served by now-former North Carolina Attorney General Rufus Edmisten, who was then an aide to Senator Ervin.

The recent release of heretofore sealed and archived documents relating to or generated by principal Watergate figures including Judge Sirica and Watergate Special Prosecutor Leon Jaworski, has revealed a startling pattern of ex parte communications between Judge Sirica, other federal judges, and the Watergate prosecution team. These documents cast a different light on the Watergate civil proceedings and criminal trials and challenge limits on ex parte communications.

### *Whitewater: An FOIA Exemption Means What it Says*

In a June 2, 1996 article, *Hillary Clinton and the Whitehouse Controversy: A Close-Up*, *Washington Post* reporters David Maraniss and Susan Schmidt cited then-First Lady Hillary Rodham Clinton as attributing her “secretive or defensive” appearance over the four years of questioning about her role in the Whitewater Scandal to her overestimation of the “‘zone of privacy’ that is allowed public figures.”<sup>11</sup> Public interest in the Clintons’ role in the failed real estate venture arose following a March 8, 1992 *New York Times* article entitled *THE 1992 CAMPAIGN: Personal Finances; Clintons Joined S.&L. Operator in an Ozark Real-Estate*

---

16, 1973. See Book 5 of Presidential Campaign Activities of 1972, Watergate and Related Activities, Phase I: Watergate Investigation 2073, 2089. A letter dated July 16, 1973 from the President’s counsel, J. Fred Buzhardt, to the Chairman of the Senate Watergate Committee confirmed the existence of the tapes. *Id.* at 2090. <https://www.maryferrell.org/showDoc.html?docId=145090&search=tape#relPageId=280&tab=page>

<sup>6</sup> *Nixon*, 418 U.S. at 704.

<sup>7</sup> Brief for Respondent, *supra* at \*3.

<sup>8</sup> *Id.* at \*69.

<sup>9</sup> *Nixon*, 418 U.S. at 708.

<sup>10</sup> *Id.*

<sup>11</sup> David Maraniss and Susan Schmidt, *Hillary Clinton and the Whitewater Controversy: A Close-Up*, THE WASHINGTON POST (June 2, 1996).

*Venture*.<sup>12</sup> Shortly after the article’s publication, a six-year, \$50 million investigation ensued. In September of 2000, Independent Prosecutor Robert Ray, successor to Kenneth Star, declared the matter closed.<sup>13</sup> According to Ray, his office had determined that there was not sufficient evidence to convict either the president or first lady of any criminal wrongdoing.<sup>14</sup>

While Independent Prosecutor Ray had closed the book on the Whitewater investigation in October 2000, the old controversy once again reared its head in 2016 amid Hillary Clinton’s bid for the presidency when Judicial Watch sought access to certain Whitewater investigation records under the Freedom of Information Act.<sup>15</sup> In its complaint, Judicial Watch alleged that the National Archives had violated the Freedom of Information Act by failing to produce the requested records.<sup>16</sup> The National Archives argued that Mrs. Clinton had “a significant personal privacy interest in avoiding disclosure of the drafts of the proposed indictment,”<sup>17</sup> invoking Exemption 7(c) of the FOIA, which “protects ‘records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy.’”<sup>18</sup>

District Court Judge Reggie B. Walton ultimately granted the defendant National Archives’ motion for summary judgement after finding that the public interests presented by Judicial Watch, Inc. in support of its request did not “advance the purpose of the FOIA” and thus did not “sufficiently outweigh Mrs. Clinton’s privacy interests in the drafts of the proposed indictment to justify an unwarranted invasion of Mrs. Clinton’s Privacy.”<sup>19</sup>

#### *The Twenty-First Century’s Fifth Estate: Of WikiLeaks and Such*

It was the Fourth Estate—the traditional news media—via two young reporters, Carl Bernstein and Bob Woodward of the *Washington Post*, that shone a light on President Nixon’s involvement

---

<sup>12</sup> Jeff Gerth, *THE 1992 CAMPAIGN: Personal Finances; Clintons Joined S. & L. Operator in an Ozark Real-Estate Venture*, THE NEW YORK TIMES (March 8, 1992).

<sup>13</sup> Whitewater: Case Closed, CBSNews.com, September 2000 <http://www.cbsnews.com/news/whitewater-case-closed/>

<sup>14</sup> *Id.*

<sup>15</sup> Josh Gerstein, *Feds Fight Disclosure of Hillary Clinton Whitewater Indictments Drafts*, Under the Radar (February 3, 2016) <http://www.politico.com/blogs/under-the-radar/2016/02/feds-fight-disclosure-of-hillary-clinton-whitewater-indictment-drafts-218681>. While the Freedom of Information Act, signed into law by President Lyndon B. Johnson in 1966, predates the Watergate Scandal, it was Watergate that prompted the 1974 amendment to strengthen the Act by adding “new requirements, timeframes, sanctions for wrongly withheld information, and necessary language waiving fees for journalists and public interest groups.” *History of FOIA*, Electronic Frontier Foundation <https://www.eff.org/issues/transparency/history-of-foia>

<sup>16</sup> *Judicial Watch, Inc. v. National Archives and Records Administration*, Civil Action No. 15-740 (RBW) (DATE? Not sure how to cite this, so maybe no date is required?)

<sup>17</sup> *Id.* Exemption 7(c) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(c) does not impose a time limitation on the exemption period while Exemption 5 does. Exemption 5 of the FOIA expressly limits application of the deliberative process privilege to records created less than 25 years before the date on which the records were requested. Additionally, Judge Walton made no mention of the time that had elapsed between the creation of the proposed indictment and the date of the Judicial Watch’s FOIA request, further suggesting that elapsed time is not a factor in determining the applicability of 7(c). See *Judicial Watch* at 18–26.

<sup>18</sup> *Id.* at 19.

<sup>19</sup> *Id.* at 26.

in the Watergate cover-up. But as that estate now struggles to maintain its place in the Age of Information, the Fifth Estate—non-traditional media outlets including social media and blogs that were once limited to the confines of counter culture—has taken its place as the public’s primary source of information.

The twenty-first century ushered in a new era of technology, communication, and information. The early 2000s saw texting, Facebook, and Twitter explode in popularity followed closely by other popular social media sites such as Flickr, Tumblr, Instagram, and Snapchat.<sup>20</sup> As access to information through technology has increased our connectivity to one another, so too has it opened portals to access information once out of reach of the general public.

In 2006, Julian Assange founded WikiLeaks, a self-described “multi-national media organization and associated library.”<sup>21</sup> WikiLeaks claims to have published more than 10 million documents in the eleven years since its founding. Those documents consist of “large datasets of uncensored or otherwise restricted official materials involving war, spying and corruption.”<sup>22</sup> Included amongst WikiLeaks’ millions of documents are the personal and campaign-related emails of Hillary Clinton and Clinton’s campaign chairman, John Podesta.<sup>23</sup> Podesta’s emails are believed to have been hacked by a group of Russian hackers using the name “Fancy Bear,”<sup>24</sup> employing a technique called “spear phishing.”<sup>25</sup> In order to access a target’s private account information, spear phishers send what appears to be a legitimate email requiring the addressee to change his username or password using a link. When the unsuspecting victim clicks the link, enters a new username and password, the information is sent to the hacker who can then freely access the target’s account.<sup>26</sup>

The technique successfully used against John Podesta has been employed to threaten the security and confidentiality of lawyers and their clients. A hacker called “Oleras” used spear-phishing to hack the systems of some of the United States’ and United Kingdom’s biggest law firms to access inside information about pending mergers and acquisitions.<sup>27</sup>

### *Today: Policy and the Public Trust*

Arguably, the events surrounding the Watergate Affair irrevocably damaged the public trust. Even now the public struggles with the notion that government officials—particularly members of the judiciary, officers of the court, and elected officials—are honorable public servants whose

---

<sup>20</sup> *The History of Social Media: Social Networking Evolution*, History Cooperative: As Short History of Nearly Everything <http://historycooperative.org/the-history-of-social-media/>

<sup>21</sup> *What is WikiLeaks*, WikiLeaks.org <https://wikileaks.org/What-is-Wikileaks.html>

<sup>22</sup> *Id.*

<sup>23</sup> *See Leaks*, WikiLeaks.org <https://wikileaks.org/-Leaks-.html>

<sup>24</sup> *The Podesta Emails Released by WikiLeaks*, CBSNews.com <http://www.cbsnews.com/news/the-john-podesta-emails-released-by-wikileaks/>

<sup>25</sup> Lorenzo Franeschi-Bicchierai, *How Hackers Broke into John Podesta and Colin Powell’s Gmail Accounts*, Motherboard [https://motherboard.vice.com/en\\_us/article/how-hackers-broke-into-john-podesta-and-colin-powells-gmail-accounts](https://motherboard.vice.com/en_us/article/how-hackers-broke-into-john-podesta-and-colin-powells-gmail-accounts)

<sup>26</sup> *See Id.*

<sup>27</sup> Ed Beeson, *Anatomy of a Hack: How Cybercriminals Are Breaching BigLaw’s Defenses*, Law360 (March 24, 2017).

interests emanate from a place of altruism rather than self-serving ambition. Questions surrounding President Nixon's involvement in the cover-up of the Watergate conspiracy and his subsequent resignation from that high office forever tarnished the office of President of the United States and gave rise to legislation designed to protect the American Public from a government that operates in the shadows. Likewise, the complicity of several members of the judiciary and more than twenty attorneys in the affair, including the President, altered the positive public perception of attorneys as honorable servants to something less than respectable. Now some forty years hence, Watergate's enduring legacy continues to color public and scholarly discourse on matters related to policy and the public trust and thus provides a suitable foundation from which to explore those same issues today.

## Breakfast with Keynote Address

Keynote speaker delivers keynote address highlighting experiences with privacy violations as a public figure.

## Morning Panels

---

### THE 5<sup>TH</sup> ESTATE PANELS

#### **Panel 1: The 5<sup>th</sup> Estate: The End to Privacy in the Public Sector?**

Central to the privacy theme is the question of how to balance a government official's right to privacy against the need to protect the public through the transparent conduct of the people's business, as articulated by the Supreme Court in *U.S. v. Nixon*—particularly in the twenty-first century where technology has rendered privacy virtually non-existent. To that end, panelists will consider issues of privacy in the public sector filtered through the lens of the many challenges wrought by the ever-increasing use of technology to store, process, and access data and information.

This Panel will be comprised of scholars, practitioners, and cyber security experts. Topics of discussion will include emerging technologies, threats to cyber security, and the need to protect confidential client information.

- **“Spear Phishing”** the latest threat to the privacy of public figures and law firms.
- Methods to protect sensitive information from access by cyber criminals.

#### **Panel 2: The 5<sup>th</sup> Estate and the Public's Ever-Increasing Appetite for Information**

The ever-expanding smorgasbord of social media outlets seems to have given rise to an insatiable public appetite for information. Spurring the feeding frenzy are politicians who use social media to communicate directly with their constituents—unfiltered and unaffected by the bias of traditional news media. The months leading up to the 2016 presidential election were colored by a flurry of social media activity by the two leading contenders. Both Hillary Clinton and Donald Trump made regular use of Twitter to deliver their respective messages directly to the American Public. President Trump's continued unabashed use of social media—Twitter in particular—to communicate with his supporters and attack his opponents has caused some to consider the wisdom and potential liability of veering so far off the beaten path.

- **Unidentified Panelist(s)** explore the benefits and potential legal pitfalls associated with using unfiltered social media posts to communicate with the public.

## Buffet Lunch and Watergate Perspectives Panel

Raleigh, N.C. Attorney and former President of the American Bar Association, Alfred P. Carlton, Jr., moderates this Panel discussion featuring panelists who are intimately acquainted with Watergate.

- **Judge Malcolm J. Howard** – Senior United States District Judge of the United States District Court for the Eastern District of North Carolina and Deputy Special Counsel to President Richard M. Nixon
- **Geoff Shepard** – Attorney, author of *The Real Watergate Scandal: Collusion, Conspiracy, and the Plot That Brought Nixon Down*, and White House staff member under President Richard M. Nixon,
- **Rufus Edmisten** – Attorney, former N.C. Secretary of State, former N.C. Attorney General, Gubernatorial Candidate, and Deputy Chief Counsel for the Senate Watergate Committee
- **Eugene Boyce** – Attorney and Assistant Majority Counsel for the Senate Watergate Committee

## Afternoon Panels

---

### POLICY AND THE PUBLIC TRUST PANELS

Panelists here address issues related to government activities and communications and their impact on the public trust. The focus of Panel 3 is judicial communications. The focus of Panel 4 is Watergate's impact on reform legislation, the evolution of legal codes of conduct as well as any presently emerging issues related to these codes.

#### **Panel 3: Emerging Issues in Judicial Communications**

##### **Watergate's Judge Sirica: A Case Study in the Ills of Improper Judicial Ex Parte Communication**

- **Unidentified Panelist** opens panel with a discussion of judicial ex parte communication and its detrimental impact on the constitutional right to due process using Watergate and Judge Sirica's alleged improper ex parte communications as a case study.

### ***Republican Party of Minnesota v. White: Electing the Judiciary***

In 2002, the United States Supreme Court held that a Minnesota Supreme Court rule prohibiting candidates for judicial election from “announcing their views on disputed legal and political issues”<sup>28</sup> was a violation of the First Amendment Right to Free Speech. Opponents of judicial elections have since expressed concern over the growing politicization and the resultant diminishing independence of the judiciary.

- **Unidentified Panelist** discusses the impact of *Minnesota v. White* on judicial communications with respect to the First Amendment and the ongoing debate regarding the appropriateness of judicial selection through the partisan electoral system.

### **Social Media and Emerging Issues in Judicial Communications**

- **Unidentified Panelist** discusses issues related to judges’ use of social media such as Facebook and Twitter.

### **“From the Bench” View of Ex Parte Communications**

- **Chief Justice Mark Martin** discusses judicial perspectives and challenges related to ex parte communications.

### **Panel 4: The Legacy of a Suffix?<sup>29</sup> Policy and the Public Trust Since Watergate**

While Watergate by no means represents the first instance of congressional investigation into the activities of the Executive,<sup>30</sup> the highly-publicized affair precipitated a significant surge in the public’s demand for access to information and the accountability of public officials. As articulated by law professor and author Stanley I. Kutler, “Watergate . . . served as prescription to alter the political and legal landscape . . . in the United States.”<sup>31</sup> These alterations came in the shape of reform legislation designed to address abuses of power, limitations on campaign financing and contributions, and revisions to legal and judicial codes of conduct intended to

---

<sup>28</sup> *Minnesota v. White*, 536 U.S. 765, 768 (2002).

<sup>29</sup> Stanley I. Kutler, *In the Shadow of Watergate: Legal, Political, and Cultural Implications*, 18 NOVA L. REV. 1743, 1743 (1993-94).

<sup>30</sup> Such investigations, which are grounded in the public informing function of Congress, (*See Watkins v. U.S.*, 354 U.S. 178, 199-201 (1957)), date back to the Presidency of George Washington. (United States Senate, *A History of Notable Investigations*, <https://www.senate.gov/artandhistory/history/common/briefing/Investigations.htm>. [<https://perma.cc/P29R-4L6S>]). The first such inquiry, initiated in 1792 by a resolution of the House of Representatives, was precipitated by the Army’s surprising defeat by five Native American tribes in the Ohio territory. (Samuel Dash, *Congress’ Spotlight on the Oval Office: The Senate Watergate Hearings*, 18 Nova L. Rev. 1719, 1725 (1993-94). The Commanding General, attributed the army’s defeat to the failure on the part of the War Department to provide adequate provisions. In its effort to find answers and empowered by the House Resolution, the House Committee issued the first-ever Congressional subpoena of the Executive—specifically the War Department. (Dash at 1725–26). Much as Nixon would do over a century and a half later, Washington and his staff questioned the Executive’s obligation to provide the subpoenaed information to Congress.

<sup>31</sup> Kutler, *supra* note 29, at 1744.



discourage if not prevent ethical lapses of the magnitude demonstrated by the lawyers (to include the President) implicated in the scheme.<sup>32</sup>

In 1978, Congress passed the Ethics in Government Act. Amongst its provisions was Congress' response to Nixon's dismissal of Special Prosecutor Archibald Cox, who had been appointed to oversee the investigation of the Watergate Scandal.<sup>33</sup> The act, intended to ensure fair investigation of high-ranking government officials suspected of wrongdoing, provided for the appointment of a special prosecutor by a three-judge panel. Perhaps most notably, the act insulated the special prosecutor (later, "independent counsel") against summary removal by the Executive.<sup>34</sup> The independent counsel provision of the Ethics in Government Act, expired in 1999.<sup>35</sup> Since then, advocates on both sides of the aisle have called for its reinstatement in response to perceived failures by the Executive to properly investigate alleged abuses of power by high-ranking officials.

On May 17, 2016, Representative Michael Turner (R-OH) introduced H.R. 5217—the Independent Counsel Reauthorization Act of 2016.<sup>36</sup> In a press release, Turner stated that Reauthorization of the Independent Counsel Act was necessary due to the Obama Administration's failure to appoint non-partisan, independent investigators to examine "the IRS[']s targeting [of] taxpayers for their political beliefs [and] Secretary Clinton's use of a private email server."<sup>37</sup>

More recently, President Donald Trump's firing of FBI director James Comey—an act some have already dubbed "Comeygate"<sup>38</sup>—has given rise to renewed calls for the appointment of an independent prosecutor to investigate the Trump camp's ties to Russia.<sup>39</sup>

- **Unidentified Panelist(s) discuss** the present-day implications of the policy and legislation that grew out of the Watergate scandal, particularly as related to recent calls to reauthorize the Independent Counsel Act of 1978.

---

<sup>32</sup> *Id.* at 1748-49; Mark Stencel, *Watergate 25: The Reforms*, Washingtonpost.com, <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/legacy.htm#ethics>

<sup>33</sup> Kutler, *supra* note 29, at 1749–51.

<sup>34</sup> *Id.*

<sup>35</sup> Press Release, Congressman Mike Turner, TURNER Works to Reauthorize the Independent Counsel Statute (May 25, 2016) <https://turner.house.gov/media-center/press-releases/turner-works-to-reauthorize-the-independent-counsel-statute> [https://perma.cc/LD8X-W7KG].

<sup>36</sup> *H.R. 5271-Independent Counsel Reauthorization Act of 2016*, Congress.Gov, <https://www.congress.gov/bill/114th-congress/house-bill/5271/text>

<sup>37</sup> Press Release, *supra* note 35.

<sup>38</sup> David Paul, *Post Comeygate Trump Is In Real Peril*, Huffingtonpost.com, [http://www.huffingtonpost.com/entry/comey-gate-decline-in-polls-pose-real-risks-for-trump\\_us\\_5917875ee4b00ccaac9ea393](http://www.huffingtonpost.com/entry/comey-gate-decline-in-polls-pose-real-risks-for-trump_us_5917875ee4b00ccaac9ea393) [https://perma.cc/3C9F-CZV3].

<sup>39</sup> Tim Fernholz, *What to Expect When You're Expecting the US Government to Appoint a Special Prosecutor*, Quartz Media, LLC, <https://qz.com/980386/trump-special-prosecutor-how-an-independent-counsel-could-be-appointed/>