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# GERALD FORD, THE NIXON PARDON, AND THE RISE OF THE RIGHT

LAURA KALMAN\*

Much recent scholarship about the United States since World War II has focused on the liberal consensus. Historians have suggested that everyone we wrote about—from Franklin Roosevelt to Lyndon Johnson, Adolf Berle to Abe Fortas, Hugo Black to Allard Lowenstein—personified the promise and paradoxes of liberalism and asked when and why that liberal consensus faltered.<sup>1</sup> Some contend that liberalism unraveled at the end of the 1960s because policymakers overpromised in the realm of social justice and did not deliver, and Vietnam raised questions about the wisdom of their global vision.<sup>2</sup> Others blame Richard Nixon for polarizing the United States.<sup>3</sup> Still others say the racial politics and cleavages we associated with its backlash predated the 1960s and were rooted in the very rights-consciousness that was supposedly at the heart of post-World War II liberalism.<sup>4</sup>

Meanwhile, when conservatives write their history, they argue the tide turned in their favor in 1964 when Barry Goldwater wrested the Republican nomination from Nelson Rockefeller. Add to that Nixon's victories in 1968 and 1972, and Watergate becomes a bump in the road towards Ronald Reagan's inevitable 1980 victory.<sup>5</sup> Valuable as all these interpretations are, they downplay the survival of liberalism

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<sup>1</sup> See generally ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1995); WILLIAM H. CHAFE, *NEVER STOP RUNNING: ALLARD LOWENSTEIN AND THE STRUGGLE TO SAVE AMERICAN LIBERALISM* (1993); TONY FREYER, *HUGO L. BLACK AND THE DILEMMA OF AMERICAN LIBERALISM* (Oscar Handlin ed., 1990); LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* (1990); BRUCE J. SCHULMAN, *LYNDON B. JOHNSON AND AMERICAN LIBERALISM: A BRIEF BIOGRAPHY WITH DOCUMENTS* (1995); JORDAN A. SCHWARZ, *LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA* (1987).

<sup>2</sup> See, e.g., ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S* (Henry Steele Commager & Richard B. Morris eds., 1984).

<sup>3</sup> See, e.g., RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* (2008).

<sup>4</sup> See THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (1996).

<sup>5</sup> See, e.g., WILLIAM A. RUSHER, *THE RISE OF THE RIGHT* 161 (1984); LEE EDWARDS, *THE CONSERVATIVE REVOLUTION: THE MOVEMENT THAT REMADE AMERICA* 141 (1999). Steven F. Hayward provides a fascinating account of the history of both liberalism and conservatism together from the conservative perspective in *THE AGE OF REAGAN: THE FALL OF THE OLD LIBERAL ORDER, 1964-1980* (2001).

past the 1960s and ignore the extent to which liberalism and conservatism have coexisted in modern America.

Perhaps more than the 1960s, the early 1970s marked the high water mark of the liberal consensus.<sup>6</sup> *Roe v. Wade*, which grounded the right to abortion in the right to privacy, represented the apex of rights-based liberalism and perpetuated the division between public and private, a crucial facet to liberalism.<sup>7</sup> As President, Nixon often governed liberally even though he talked conservatively, and thus many conservatives regarded him as a traitor.<sup>8</sup> The rise of the modern Republican Party and the right was highly contingent: When Nixon resigned, both the Republican Party and conservatives seemed even more divided, endangered, and mired in scandal than they did after the 2008 election of President Barack Obama.<sup>9</sup> In this Article, I discuss a critical time for those forces and the rule of law, the first month of the Ford Presidency.

In 1974, it seemed as if everyone wanted to go to law school. Over 135,000 LSATs had been administered in 1973-74, almost double compared to any year during the 1960s.<sup>10</sup> Yet, so many of those involved in the Watergate cover-up were lawyers that *Time* magazine claimed “there ha[d] been no comparable conspiracy of lawyers in [all] history.”<sup>11</sup>

In the White House, in August 1974, one lawyer prepared to resign the Presidency to avoid impeachment and another prepared to assume it. The

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<sup>6</sup> BRUCE J. SCHULMAN, *THE SEVENTIES: THE GREAT SHIFT IN AMERICAN CULTURE, SOCIETY, AND POLITICS* 9, 20 (2002).

<sup>7</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>8</sup> William Rusher, Statement of Howard Phillips, *Conservatives Should Help Remove Nixon*, July 30, 1974 (Box 71, Folder: 9, William Rusher Papers, Library of Congress). David Greenberg provides an excellent history of historians’ depictions of Nixon as liberal in *Richard the Bleeding Hearted*, 30 *REVS. IN AM. HIST.* 156 (2002).

<sup>9</sup> Once again, it has become fashionable to proclaim the Republican Party an “Endangered Species.” See, e.g., *TIME*, May 18, 2009, cover. As Republicans and conservatives seek to rebuild their party and movement in the wake of Barack Obama’s 2008 election as President, they harken back to a similar journey out of the wilderness in the 1970s. “Think the Republican Party is in bad shape today?,” one conservative asked recently, “[y]ou should have seen it then. In the wake of stagflation, Watergate, and America’s first lost war—all either starting or ending in ignominy in the Nixon-Ford years—early GOP recovery was far from a betting favorite.” Jeffrey Bell, *Jeffrey Bell: Kemp Brought America Back from 1970s*, NEWSMAX, May 3, 2009, [http://www.newsmax.com/newsfront/jack\\_kemp\\_jeffrey\\_bell/2009/05/03/210151.html?s=al&promo\\_code=7FOD-1](http://www.newsmax.com/newsfront/jack_kemp_jeffrey_bell/2009/05/03/210151.html?s=al&promo_code=7FOD-1). Richard Viguerie, for example, exhorted conservatives to oppose the nomination of Justice Souter’s replacement by reminding them that even if they lose, the confirmation battle can do for them what the Panama Canal treaty fight did for them in the 1970s. *Talk of the Nation: Conservatives Take on Potential SCOTUS Nominees* (NPR radio broadcast May 20, 2009), <http://www.npr.org/templates/story/story.php?storyId=104349694>.

<sup>10</sup> Jordan A. Miller, “Why Is Everyone Taking the LSAT?”: *A Model of the Demand for Law School* 53 fig.1 (May 2004) (unpublished thesis, Stanford University), [http://economics.stanford.edu/files/Theses/Theses\\_2004/Miller.pdf](http://economics.stanford.edu/files/Theses/Theses_2004/Miller.pdf).

<sup>11</sup> José M. Ferrer III, *An Awful Lot of Lawyers Involved*, *TIME*, July 9, 1973, <http://www.time.com/time/magazine/article/0,9171,907523,00.html>.

resemblance ended there. Brilliant, cunning, secretive, and insecure Nixon divided the world into friends and enemies. In contrast, Ford thrived on camaraderie, conciliation and compromise.<sup>12</sup> By the time Ford was in the seventh grade, he had developed his philosophy of life: “Everyone, I decided, had more good qualities than bad. If I understood and tried to accentuate those good qualities in others, I could get along much better.”<sup>13</sup>

Ford’s sunny outlook fueled his rise in Congress. When Spiro Agnew resigned the Vice-Presidency in disgrace, Nixon reluctantly tapped Ford as the only Republican acceptable to the Democratic Congress.<sup>14</sup> The most damning complaint in Ford’s FBI file was that he once tackled someone in a football game after the whistle that signaled the end of play blew.<sup>15</sup> Ford was decent and engagingly humble: he said he was “a Ford, not a Lincoln.”<sup>16</sup>

Ford’s modesty seemed fitting. He had graduated in the top quarter of his class from University of Michigan, where he was also a football star and in the top quarter of his class at Yale Law School.<sup>17</sup> Nonetheless, he seemed neither articulate nor bright.<sup>18</sup> As Lyndon Johnson famously remarked, “Ford’s the only man I ever knew who can’t chew gum and fart at the same time.”<sup>19</sup> Ford often misspoke, as when he toasted President Anwar Sadat of Egypt and “the great people of the government of Israel” Sadat led.<sup>20</sup> Senate Majority Leader Michael Mansfield said that Ford has “had a remarkable career because he has been so unremarkable himself.”<sup>21</sup>

Yet, as Ford became President on August 9, 1974, his ordinariness and “accentuate the positive” philosophy was welcome.<sup>22</sup> Presidents since Theodore Roosevelt had so increased the power of the office that it had been commonplace to speak of an “imperial Presidency.”<sup>23</sup> Ford, with his modest virtues, seemed incapable of doing anything but cutting down the Presidency to the right size.<sup>24</sup>

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<sup>12</sup> *Gerald Ford: American Presidents Exclusive Gerald Ford Biography*, <http://www.american-presidents.com/gerald-ford> [hereinafter “*Exclusive Biography*”].

<sup>13</sup> GERALD R. FORD, *A TIME TO HEAL: THE AUTOBIOGRAPHY OF GERALD R. FORD* 46 (1979).

<sup>14</sup> Richard A. Ryan, *38th President from Grand Rapids restored honor to White House*, DET. NEWS, Dec. 27, 2006, <http://detnews.com/article/20061227/NATION/612270413>.

<sup>15</sup> ROBERT T. HARTMANN, *PALACE POLITICS: AN INSIDE ACCOUNT OF THE FORD YEARS* 73 n.\* (1980).

<sup>16</sup> FORD, *supra* note 13, at 112.

<sup>17</sup> *Id.* at 53, 56.

<sup>18</sup> *Exclusive Biography*, *supra* note 12.

<sup>19</sup> HARTMANN, *supra* note 15, at 30.

<sup>20</sup> *Id.* at 279.

<sup>21</sup> ‘*The Fords from Grand Rapids*,’ 219 THE NATION, Aug. 31, 1974, at 132.

<sup>22</sup> *Exclusive Biography*, *supra* note 12.

<sup>23</sup> ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* I (1973).

<sup>24</sup> Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon’s Shadow*, 83 MINN. L. REV. 1069, 1072 (1999).

Ford struck just the right note in his inaugural address.<sup>25</sup> Watergate actually raised a number of constitutional questions that Nixon's resignation left unanswered.<sup>26</sup> But, when Ford said the lesson of Watergate was that "our Constitution works" and that "our great Republic is a Government of laws and not of men," he voiced a misperception at once widely shared and deeply comforting.<sup>27</sup> Acknowledging the "internal wounds of Watergate" were "more painful and . . . poisonous than those of foreign wars," Ford pleaded to "let brotherly love purge our hearts of suspicion and of hate."<sup>28</sup> In all, he mentioned love three times, God four.<sup>29</sup> Ford's best line that confronted Watergate and promised to end the era: "My fellow Americans, our long national nightmare is over."<sup>30</sup>

After Ford's acclaimed speech, Americans could indeed contemplate the end to their Watergate nightmare and the beginning of healing. In part, it was relative. Anyone seemed better than Nixon.<sup>31</sup> But, Ford really did seem to represent a substantive improvement, particularly in his use of symbols to remind Americans that he was Everyman.<sup>32</sup>

Nixon never wanted Americans to see him as one of them. So uncomfortable did Nixon become at state dinners that he reduced them to fifty-eight minutes. As part of this effort, he banished the soup course, announcing that "men don't really like soup."<sup>33</sup> Ford, however, was easy and hospitable.<sup>34</sup> He substituted the "Michigan Fight Song" for "Hail to the Chief."<sup>35</sup> Nixon invited Democrats and reporters that he had labeled "enemies" to his first state dinner.<sup>36</sup> The public and reporters went wild when they learned Ford was toasting his own English muffins.<sup>37</sup> *A New Yorker*

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<sup>25</sup> President Gerald R. Ford, *Remarks on Taking the Oath of Office as President* (Aug. 9, 1974), <http://www.ford.utexas.edu/LIBRARY/speeches/740001.htm> [hereinafter "Ford, Remarks"].

<sup>26</sup> See, e.g., Rozell, *supra* note 24; Frank O. Bowman, III & Stephen L. Sepinuck, "High Crimes and Misdemeanors": *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517 (1999).

<sup>27</sup> Ford, *Remarks*, *supra* note 25.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> James Cannon, *Gerald R. Ford*, <http://www.pbs.org/newshour/character/essays/ford.html>.

<sup>32</sup> Ford, *Remarks*, *supra* note 25.

<sup>33</sup> H.R. HALDEMAN, *THE ENDS OF POWER* 110 (1978).

<sup>34</sup> FORD, *supra* note 13, at 156.

<sup>35</sup> *Id.* at 126.

<sup>36</sup> *Id.* at 140-41.

<sup>37</sup> Iconic Photos, *Gerald Ford and his Toaster*, <https://iconicphotos.wordpress.com/2009/06/16/gerald-ford-and-his-toaster/>.

cartoon featured a sleepy wife reminding her irate husband that “[t]he President of the United States of America makes his own breakfast.”<sup>38</sup>

Ford even seemed ready to rise above his own conservatism. He told liberals to “forget” his voting record, which reflected the need to satisfy Michigan constituents.<sup>39</sup> The secretary to the Chairman of the Congressional Black Caucus was so surprised to hear the President was on the phone that she thought it was a practical joke.<sup>40</sup> But, it *was* Ford on the phone, inviting caucus members by the White House for a chat, an invitation he repeated to Bella Abzug and feminists to whom he promised to fight for the Equal Rights Amendment.<sup>41</sup>

During Ford’s second week as President, he took action by highlighting his desire for national reconciliation and testified to the power liberal rhetoric retained in Washington. Key Congressional Republicans *urged* him to sound liberal, “to continue the healing,” to avoid divisive issues like busing.<sup>42</sup> They reminded him that “the President must represent *all* the people, including the poor and black . . . deserters and draft dodgers.”<sup>43</sup>

Nixon’s determination to protect his Vietnam policy had followed him down the road to Watergate,<sup>44</sup> and he had stressed the need to punish war resisters.<sup>45</sup> In his first show of leadership, Ford decided on a different approach.<sup>46</sup> He would make his position public, he resolved, not before a welcoming liberal audience, but a resistant conservative one.<sup>47</sup> Standing before thousands of stunned veterans of foreign wars, Ford reminded them that he had spoken of justice and mercy in his inaugural address and threw “the weight of my Presidency . . . on the side of leniency” and conditional amnesty.<sup>48</sup>

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<sup>38</sup> *Editorial Cartoon*, THE NEW YORKER, Sept. 9, 1974, at 32.

<sup>39</sup> Robert Sherrill, *What Grand Rapids Did for Jerry Ford—Vice and Versa*, N.Y. TIMES, Oct. 20, 1974, at 31, 86. According to the liberal Americans for Democratic Action, he had voted the ADA’s way just four times between 1970 and 1973. Stina Santiestevan, *Gerald Ford: The Man, The Record, The Prospect*, ADA WORLD, Aug./Sept. 1974, at 3.

<sup>40</sup> RICHARD REEVES, *A FORD, NOT A LINCOLN* 68 (1975).

<sup>41</sup> Eileen Shanahan, *Ford Again Backs Rights Proposal*, N.Y. TIMES, Aug. 23, 1974, at 34.

<sup>42</sup> William E. Timmons, Mem. for Robert Hartmann, Aug. 9, 1974 (Box 13, File: Aug. 9-14, 1974, William E. Timmons Files, Ford Library) (reporting on House Minority Leader John Rhodes and Senate Minority Leader Hugh Scott).

<sup>43</sup> *Id.*; see also William E. Timmons, Mem. for the President, Aug. 14, 1974, (Box 13, File: Aug. 9-14, 1974, William E. Timmons Files, Ford Library) (reporting Hugh Scott’s views on amnesty).

<sup>44</sup> See STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 108 (1990).

<sup>45</sup> Richard Nixon, News Conference (Jan. 31, 1973), <http://www.americanpresidency.org>.

<sup>46</sup> DOUGLAS BRINKLEY, *GERALD R. FORD* 67 (2007).

<sup>47</sup> *A Second Chance*, N.Y. TIMES, Aug. 20, 1974, at 34.

<sup>48</sup> Gerald Ford, Remarks to the Veterans of Foreign Wars Annual Convention (Aug. 19, 1974), <http://www.presidency.ucsb.edu/ws/index.php?pid=4476&st=&st1>; Geoff Shepard,

Next, Ford named his Vice President. Most Republicans listed Republican National Committee Chair George Bush as their first choice, and Bush wanted the job.<sup>49</sup> But, some on Ford's staff thought his selection would seem "weak and depressingly conventional [partisan] act."<sup>50</sup> So, Ford chose Governor Rockefeller of New York, conservative Republicans' anti-Christ.<sup>51</sup>

Since Franklin Roosevelt relieved Herbert Hoover, the national mood did not so quickly change. Democrats and many Republicans fell over themselves to say Ford had replaced "[the] national frown with a national smile."<sup>52</sup> According to the *Washington Post*, Ford was "the most normal, sane, down-to-earth individual to work in the Oval Office since Harry Truman left."<sup>53</sup> (Truman, who had been reviled when he departed from Washington, became a popular hero to Democrats and

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Mem. for Gen. Haig, Aug. 21, 1974 (Box 1, File: Kenneth Cole, Aug. 8-25, 1974, Alexander Haig Files, Ford Library) (reporting on reaction to speech).

<sup>49</sup> TOM WICKER, *GEORGE HERBERT WALKER BUSH* 36 (2004).

<sup>50</sup> JAMES CANNON, *TIME AND CHANCE: GERALD FORD'S APPOINTMENT WITH HISTORY* 423-25 (1994).

<sup>51</sup> Rockefeller had been anathema to Republicans on the right at least since 1964, when he unsuccessfully challenged Goldwater for the Republican nomination and portrayed Goldwater as the captive of the far rightwing. ROBERT ALAN GOLDBERG, *BARRY GOLDWATER* 172-73 (1995). Ironically, liberals had no use for a Rockefeller Vice Presidency, either. The ADA objected to Rockefeller's gifts to politicians, such as Henry Kissinger; his response to the 1971 Attica prison uprising, his social service and drug use policies, his hawkishness on national defense, and maintained that the Rockefeller family's wealth would create conflicts of interest for him. Americans for Democratic Action, Board Meeting of September 14-16, 1974 (Box 1, Folder: November 22-24, 1974, M 2001-087, State Historical Society of Wisconsin); *President Rockefeller*, ADA WORLD, Oct. 1974, at 5.

<sup>52</sup> Ford described this as his objective in *A Time to Heal*, *supra* note 13, at 127. From the Democratic side of the aisle, Senator Mansfield declared: "The sun is shining again." For an equally enthusiastic Republican perspective, see Robert Griffin, *The Man Who Happened to Become President*, in *THE FORD PRESIDENCY: TWENTY-TWO INTIMATE PERSPECTIVES OF GERALD R. FORD* 15 (Kenneth W. Thompson ed., 1988). Hugh Sidey gushed: "For ten years this nation has suffered from cardiac insufficiency. Now the heart is beginning to pump again under Jerry Ford. . . . The adjectives for all this have been extravagant: new wine, fresh breeze, clean broom. They are an accurate White House measure." Hugh Sidey, *So Like the Rest of America*, TIME, Sept. 2, 1974. *The New Republic* compared the nation to a child who had "swallowed something nasty and thrown up and feels better. Mr. Ford is everything that Nixon wasn't, with warmth and openness and decency, and he has engendered nationwide affection." TRB, *Postmortem*, THE NEW REPUBLIC, Aug. 24, 1974. Ford's adviser, Robert Hartmann, said that "no American President, possibly excepting General Washington, ever entered upon his official duties with a greater reservoir of public good will or with higher hopes for his success." HARTMANN, *supra* note 15, at 164. *But cf.* EDWARD BERKOWITZ, *SOMETHING HAPPENED: A POLITICAL AND CULTURAL OVERVIEW OF THE SEVENTIES* 74 (2006) (suggesting that "Ford's honeymoon with Congress and the press" was "never too passionate to begin with").

<sup>53</sup> David Broder, *Giving Mr. Ford a Chance*, WASH. POST, Aug. 14, 1974, at A16; *see also* MARK J. ROZELL, *THE PRESS AND THE FORD PRESIDENCY* 43 n.60 (1992).

Republicans at just this moment).<sup>54</sup> Americans rooted for Ford.<sup>55</sup> “I do not want a good honeymoon,” he told Congress, but “a good marriage.”<sup>56</sup> The honeymoon, however, was great.<sup>57</sup> Though every President gets one, there was something special about Ford’s honeymoon. People wanted desperately to believe that someone *could* heal the wounds of Watergate and Vietnam.<sup>58</sup>

In these first happy days of the Ford Administration, the fiercest hostility toward the new President seemed to lie inside the White House. Criminal charges related to Watergate had already dispatched many, but about four-hundred-and-eighty Nixon men remained.<sup>59</sup> Ford’s transition team, headed by Donald Rumsfeld, wanted him to clean house.<sup>60</sup> But, the President desired continuity and disapproved of a “purge.”<sup>61</sup> He begged everyone, especially Nixon’s last Chief of Staff, Alexander Haig, to stay on the job.<sup>62</sup> A skilled infighter and Nixon loyalist, Haig frustrated Ford’s every effort to step out of Nixon’s shadow.<sup>63</sup>

As Ford assumed the Presidency, he faced two troubling questions about his predecessor that Haig and other holdovers sought to influence. What should Ford do about the former President and his records—the forty-six million pages of paper and the nine-hundred and fifty reels of tape on which Nixon had recorded his conversations? Named an unindicted co-conspirator by the Watergate grand jury, Nixon had been subpoenaed to appear as a witness in the upcoming trials of his Administration officials and feared he himself might yet be indicted for obstruction of justice.<sup>64</sup> As Nixon prepared his testimony (and looked ahead to paying his lawyers by writing his memoirs), he “desperately” wanted access to the tapes.<sup>65</sup>

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<sup>54</sup> See MILLER CTR. OF PUB. AFFAIRS, UNIV. OF VA., *Impact and Legacy, in ESSAYS ON HARRY S. TRUMAN AND HIS ADMINISTRATION*, <http://millercenter.org/academic/americanpresident/truman> (last visited Apr. 19, 2010).

<sup>55</sup> See Mark Feeney, *Gerald Ford Dies at 93: An Unelected President, He Helped Salve a Wounded Nation*, BOSTON GLOBE, Dec. 27, 2006, at A1.

<sup>56</sup> Address to a Joint Session of the Congress, 1 PUB. PAPERS 7 (Aug. 12, 1974).

<sup>57</sup> See Feeney, *supra* note 55.

<sup>58</sup> See Linda Wertheimer, *Special Report: Former President Gerald Ford Dies; Sought to Heal Nation Disillusioned by Watergate Scandal*, NPR, Dec. 27, 2006, <http://www.npr.org/templates/story.php?storyId=6685816>.

<sup>59</sup> *Id.*

<sup>60</sup> FORD, *supra* note 13, at 148.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 147.

<sup>63</sup> See, e.g., HARTMANN, *supra* note 15, at 180, 232 (discussing Haig’s frustration of Ford’s attempt to take down portraits of Theodore Roosevelt and Woodrow Wilson, which Nixon had ordered hung alongside that of Dwight Eisenhower in the White House Cabinet, and to replace them with those of Harry Truman and Abraham Lincoln).

<sup>64</sup> FORD, *supra* note 13, at 164.

<sup>65</sup> *Id.*



The White House wanted to be unaffiliated with the Watergate scandal. “Get Nixon materials out of White House as soon as possible,” Rumsfeld advised.<sup>66</sup> “Quite apart from any illegal . . . dealings” revealed on the tapes, attorney Philip Areeda counseled, the “hair-down” discussions of politics there could “demean and embarrass the participants, the Republican Party, the Presidency, and . . . government generally.”<sup>67</sup> Past Presidents had treated their records as their private property.<sup>68</sup> Yet the tapes contained evidence courts might need and that Nixon might destroy.<sup>69</sup> Nevertheless, White House Counsel Fred Buzhardt ruled that the tapes were Nixon’s personal property.<sup>70</sup> Buzhardt then shaded the truth, leading Ford’s press secretary to believe he acted with Special Prosecutor Leon Jaworski’s approval.<sup>71</sup> The press secretary’s announcement that the Special Prosecutor had approved the decision to give Nixon the tapes created the impression the Ford Administration was working overtime to help Nixon and forced Buzhardt’s resignation.<sup>72</sup>

When it came to trying to persuade Ford to end his predecessor’s ordeal, Haig and other Nixon loyalists proved to be equally zealous. During Ford’s Vice President confirmation hearings, the committee asked him whether a President would have the power to prevent the criminal investigation and prosecution of Nixon. Ford had responded: “I do not think the public would stand for it.”<sup>73</sup> As the *New York Times* astutely observed, Ford’s answer did not preclude a pardon.<sup>74</sup>

According to Ford, Haig first pointedly informed him “that a President does have authority to grant a pardon even before criminal action has been taken against an individual” in a conversation on the morning of August 1, eight days before he became President.<sup>75</sup> When Ford recounted the conversation to aides, they told him the obvious: Haig might have proposed a deal by which Nixon would surrender the Presidency in exchange for Ford’s promise to pardon him, and Ford’s silence implied consent.<sup>76</sup> Ford telephoned Haig in the presence of witnesses to say he

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<sup>66</sup> Handwritten Note: “Don R.,” Aug. 1974 (Box 30, File: 1974-1977, Philip Buchen Files, Ford Library).

<sup>67</sup> Philip Areeda, Mem. for the President, Dec. 2, 1974 (Box 24, File: 1974-1977, John Marsh Files, Ford Library).

<sup>68</sup> FORD, *supra* note 13, at 164.

<sup>69</sup> *See id.* at 157.

<sup>70</sup> *See* BARRY WERTH, 31 DAYS: GERALD FORD, THE NIXON PARDON AND A GOVERNMENT IN CRISIS 72 (2006).

<sup>71</sup> *Id.* at 73.

<sup>72</sup> *Id.* at 71-80.

<sup>73</sup> Clifton Daniel, *Presidential Clemency: Ford Says He Will Decide Nixon Case After Legal Process Runs Its Course*, N.Y. TIMES, Aug. 29, 1974, at 21.

<sup>74</sup> *Id.*

<sup>75</sup> FORD, *supra* note 13, at 4.

<sup>76</sup> *Id.*

could make no commitments, and he had made none the previous morning.<sup>77</sup> He did not expressly rule out a pardon (and he did not allude to a late night 1:00 a.m. telephone conversation he had with Haig the previous evening).<sup>78</sup>

The pressure from Nixon's men continued after Ford became President with a drumbeat of warnings that Nixon suffered from potentially life-threatening phlebitis and was depressed, even manic.<sup>79</sup> Henry Kissinger told Ford that an indictment or a trial would have "grave physical and psychological repercussions" on Nixon and damage American credibility abroad.<sup>80</sup> On August 27, 1974, Nixon loyalist Leonard Garment spoke with several journalists who despised Nixon, but now favored an early pardon.<sup>81</sup> Garment then called on Abe Fortas, who had been a Supreme Court Justice until forced to resign from the bench because of one of Nixon's Presidential "dirty tricks."<sup>82</sup> Should Nixon receive a pardon, Garment asked.<sup>83</sup> It was "Ecclesiastes time," Fortas answered, "a time for . . . reconciliation, and not 'the horror' of a long state trial of the former President."<sup>84</sup> Perhaps others would also prove forgiving, Garment reasoned.<sup>85</sup>

At Haig's urging, Garment now drafted a memorandum for Haig and for Buzhardt's successor as White House Counsel and Ford's former law partner, Philip Buchen.<sup>86</sup> A quick pardon would be greeted by "a national sigh of relief" and would exorcise Nixon's ghost, freeing Ford to get on with governing.<sup>87</sup> At 10:30 a.m., after meeting with Ford to make the argument, Haig telephoned Garment to say, "It's all set."<sup>88</sup>

Wishful thinking as yet, but the matter was closer to resolution after Ford's first press conference four hours later. Ford had prepared for it as if for doctoral orals, undergoing mock questions on issues ranging from the economy to the Soviets.<sup>89</sup> But, from the initial inquiry—did he believe Nixon should have immunity from

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<sup>77</sup> WERTH, *supra* note 70, at 204-05.

<sup>78</sup> *Id.*

<sup>79</sup> John Herbers, *Ford Aides Silent on Link of Pardon and Nixon Health*, N.Y. TIMES, Sept. 14, 1974, at 61 (reporting that Nixon's son-in-law, David Eisenhower, had told Ford that Nixon was alternately despairing and euphoric).

<sup>80</sup> HENRY KISSINGER, YEARS OF RENEWAL 39 (1999).

<sup>81</sup> Leonard Garment, *Annals of Law: The Hill Case*, THE NEW YORKER, Apr. 17, 1989, at 90, 107 [hereinafter "Garment, *Annals*"].

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 108.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> FORD, *supra* note 13, at 157.

prosecution?—the media was interested in only Nixon’s fate.<sup>90</sup> And as Ford subsequently realized, his answers seemed contradictory, sometimes suggesting that Nixon should receive immunity soon; at others, that he would let the legal process run its course.<sup>91</sup>

After the press conference, Ford told Buchen to research the President’s pardon power: “Did [he] have the legal right to pardon someone who had not been indicted, or convicted, yet?”<sup>92</sup> Buchen worked in secret and recalled feeling “scared” to “even to get a book out of the library [with] a ‘P’ on the front of it.”<sup>93</sup> Even so, he easily found “enough law” to support a broad constitutional pardon power.<sup>94</sup> The President could issue a pardon before indictment, and acceptance constituted an admission of guilt.<sup>95</sup> The prospect of a pardon might solve another problem too, by encouraging Nixon to make a satisfactory disposition of those pesky records. If Ford intervened, Buchen said that he should do so soon.<sup>96</sup>

A week after the press conference, Special Prosecutor Jaworski also made it clear to Buchen that he did not want to indict Nixon if the President planned to pardon him.<sup>97</sup> The publicity around Watergate, Jaworski told Ford, ensured that at least nine months must elapse after indictment before jury selection.<sup>98</sup>

In response, Ford decided that a properly negotiated pardon would bring his Administration out of Watergate’s shadow. On the other hand, an indictment, followed by a trial, would not. The decision was simple. He confronted pressing domestic and foreign policy issues. He did not want to be distracted by “lawyers’ endless arguments” about the tapes and records and journalists’ incessant questions about Nixon’s legal status.<sup>99</sup> Ford said that Yale Law School taught him to see law as a tool of public policy, and while he “respected the tenet that no man should be above the law, public policy demanded that I put Nixon—and Watergate—behind us as quickly as possible.”<sup>100</sup> Ford’s determination also reflected his long relationship

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<sup>90</sup> *Id.*; President Gerald Ford, The President’s News Conference (Aug. 28, 1974), <http://www.presidency.ucsb.edu/ws/index.php?pid=4671>.

<sup>91</sup> FORD, *supra* note 13, at 158.

<sup>92</sup> *Id.* at 159.

<sup>93</sup> Philip W. Buchen, *Reflections on a Politician’s President*, in THE FORD PRESIDENCY, *supra* note 52, at 27, 38.

<sup>94</sup> *Id.*

<sup>95</sup> FORD, *supra* note 13, at 162-64.

<sup>96</sup> Personal Mem. of Counsel to President, ca. Sept. 3, 1974, at 4, (Box 32, File: Nixon Pardon-General (2), Buchen Files, Ford Library).

<sup>97</sup> LEON JAWORSKI, THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE 290 (1977).

<sup>98</sup> *Id.* at 291.

<sup>99</sup> FORD, *supra* note 13, at 159.

<sup>100</sup> *Id.* at 173; *see generally* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986).

with his predecessor and his compassion for Nixon's family.<sup>101</sup> "I looked upon him as my personal friend," Ford acknowledged, "[a]nd I had no hesitancy about granting the pardon, because I felt that we had this relationship."<sup>102</sup> Primarily, though, one adviser realized, the pardon was "a selfish act" to enable him "to get on with the business of the Ford presidency."<sup>103</sup> He was enjoying his work too much to share it with Nixon's ghost, faced pressing issues of the economy and foreign policy, and "had to get the monkey off my back."<sup>104</sup>

Having reached a decision that seemed reasonable enough from Ford's perspective, he then made several mistakes. First, he refused to demand an agreement with respect to the papers and tapes from Nixon that Congress would accept. Oddly, the President chose Benton Becker, an attorney under investigation for criminal misconduct, as his envoy to draft an agreement on the records for announcement with the pardon.<sup>105</sup> Nixon's representatives gave little to Becker during the negotiations; perhaps Haig tipped them off that Ford was not conditioning the pardon, as Buchen had recommended.<sup>106</sup> Nixon pledged to deposit his papers and tapes in the National Archives.<sup>107</sup> But, he retained exclusive power over access to them, the right to withdraw papers after three years had elapsed, and the guarantee that the tapes would be destroyed at his death or in a decade, whichever came first.<sup>108</sup>

Nor did Ford demand an admission of guilt and repentance from Nixon. Legally, acceptance of the pardon was an admission of guilt. For years after, Ford carried in his wallet an excerpt from the Supreme Court's decision in *Burdick v. United States*,<sup>109</sup> declaring that a pardon "carries an imputation of guilt; acceptance a confession of it."<sup>110</sup> But, Becker and others also let Nixon know that the President "welcome[d] a statement of contrition."<sup>111</sup> Ford blamed Haig when he did not get one, concluding that Haig let Nixon know "he didn't have to make an outright

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<sup>101</sup> Ford, Gerald, *Gerald R. Ford Pardoning Richard Nixon: Great Speeches Collection*, <http://www.historyplace.com/speeches/ford.htm>.

<sup>102</sup> Bob Woodward, *Ford, Nixon Sustained Friendship for Decades*, WASH. POST, Dec. 29, 2006, at A1.

<sup>103</sup> Robert T. Hartmann, *The Loyalists and the Praetorian Guard*, in THE FORD PRESIDENCY, *supra* note 52, at 89, 105.

<sup>104</sup> FORD, *supra* note 13, at 159.

<sup>105</sup> KUTLER, *supra* note 44, at 561.

<sup>106</sup> Office of the White House Press Secretary, *Press Conference of Philip Buchen, Counselor to the President* (Sept. 8, 1974).

<sup>107</sup> *Id.* at 563.

<sup>108</sup> Benton Becker, *The History of the Nixon Pardon*, 30 CUMB. L. REV. 31, 41 (2000); see also JOHN ROBERT GREENE, *THE LIMITS OF POWER: THE NIXON AND FORD ADMINISTRATIONS 199-200* (1992).

<sup>109</sup> *Burdick v. United States*, 236 U.S. 79 (1915).

<sup>110</sup> *Id.* at 94; Scott Shane, *For Ford, Pardon Decision Was Always Clear-Cut*, N.Y. TIMES, Dec. 29, 2006, at A1.

<sup>111</sup> FORD, *supra* note 13, at 166 (emphasis added).

admission of guilt.”<sup>112</sup> Predictably, Nixon acknowledged only having made “mistakes over Watergate,” a declaration so ambiguous it was counterproductive.<sup>113</sup>

Finally, Ford made the decision as if he were still in Congress, where, in those days, the heat disappeared when the battle ended.<sup>114</sup> Yet he also refused to lay the groundwork for the pardon by engaging in substantive discussions about it with key members of Congress and the Attorney General, who could have helped him justify it.<sup>115</sup>

The “full, free and absolute pardon” that the President announced upon his return from church on Sunday, September 8, 1974,<sup>116</sup> the same day daredevil biker Evel Knievel unsuccessfully attempted to rocket across Snake River, resulted in a public relations disaster.<sup>117</sup> Evel Knievel received millions for the stunt, but there was no silver lining for Ford.<sup>118</sup> It brought his honeymoon to a halt and left disillusionment and cynicism in its wake.<sup>119</sup> Two weeks after the President announced the pardon, the media reported: “Outside the White House, some 250 pickets from George Washington University lofted a bed sheet with the words ‘PROMISE ME PARDON AND I’LL MAKE YOU PRESIDENT.’”<sup>120</sup>

To be sure, the next generation would vindicate Ford. (It is still too soon to say whether “history” has). When he received the “Profile in Courage” award from the Kennedy Library in 2001, the citation dwelled at length on his decision to pardon Nixon.<sup>121</sup> At Ford’s death, *Newsweek* insisted that the pardon “spared the nation an ordeal of recrimination and allowed the healing to begin.”<sup>122</sup> But, I *challenge* the current conventional wisdom that the pardon was a good idea. I think that the pardon contributed to cynicism about government; and, furthermore, it was the worst political blunder between Dean Acheson’s statement regarding South Korea being

<sup>112</sup> Michael Beschloss, *Ford’s Long Shadow*, NEWSWEEK, Jan. 8, 2007, at 30, 33.

<sup>113</sup> Everett R. Holles, ‘Pain’ Expressed: Ex-President Cites His Sorrow at the Way He Handled Watergate, N.Y. TIMES, Sept. 9, 1974, at 1.

<sup>114</sup> BETTY FORD WITH CHRIS CHASE, THE TIMES OF MY LIFE 70 (1979).

<sup>115</sup> Bob Woodward, *Closing the Chapter on Watergate Wasn’t Done Lightly*, THE WASH. POST, Dec. 28, 2006.

<sup>116</sup> President Gerald Ford, Remarks on Signing a Proclamation Granting Pardon to Richard Nixon (Sept. 8, 1974), <http://www.presidency.ucsb.edu/ws/?pid=4695>.

<sup>117</sup> Christopher Ross, *Evel Knievel and Wide World of Sports: A Winning Combination*, ABC SPORTS, 2001, [http://espn.go.com/abcsports/wwos/e\\_knievel.html](http://espn.go.com/abcsports/wwos/e_knievel.html).

<sup>118</sup> Don Gilbert, *The World According to the American Daredevil*, POP SMEAR MAGAZINE, Sept.-Oct. 1998, available at [http://www.evel1.com/Shop/wrapper.php?file=pop\\_smear\\_2.php](http://www.evel1.com/Shop/wrapper.php?file=pop_smear_2.php).

<sup>119</sup> See Weekend News Review, Sept. 9, 1974 (Box 171, File: Pardon Statement, Robert Hartmann Files, Ford Library).

<sup>120</sup> *The Fallout from Ford’s Rush to Pardon*, TIME, Sept. 23, 1974, at 11.

<sup>121</sup> Press Release, President Gerald Ford and Congressman Lewis Receive 2001 Profile in Courage Award (May 21, 2001), <http://www.jfklibrary.org>.

<sup>122</sup> Evan Thomas with Barbara Kantrowitz, *The 38th President: More Than Met the Eye*, NEWSWEEK, Jan. 8, 2007, at 34.

outside the American defense perimeter and Bill Clinton's refusal to settle the Paula Jones case, which led to his impeachment.

Nixon's resignation and Ford's decision to pardon him were both controversial, and the pardon provoked a more negative reaction. For one reason or another, Nixon's decision to quit pleased two-thirds of those polled.<sup>123</sup> Yet, to Ford's "immense shock,"<sup>124</sup> almost the same percentage thought the pardon wrong.<sup>125</sup> Researchers later found that "Ford's pardon of Nixon was more highly correlated with the drop in political trust than were any of the previous events of Watergate."<sup>126</sup>

Reporters were even angrier than the public. In part, the pardon was their fault.<sup>127</sup> The President would have thought he could "get away with it," one admitted, because they had presented him as "irresistible."<sup>128</sup> Livid journalists "just turned a full 180 degrees and began to pound Ford and his lousy English muffins."<sup>129</sup> They had transformed him from frog into Prince Charming just one month earlier and now they made him a frog all over again.

Ford was worse off because suspicions he had made a deal with Haig raised questions about his integrity and decency. Those suspicions were apparently groundless. Ford's conversations with Haig and Nixon probably led them to guess a pardon was forthcoming.<sup>130</sup> But, no one has ever found evidence of a deal.<sup>131</sup>

Even without a deal, though, the announcement of the pardon remained problematic. Ford rationalized the pardon poorly, claiming it would heal the wounds of Watergate and that protracted litigation would stir "ugly passions."<sup>132</sup> Other trials—think those of Sacco and Vanzetti, Alger Hiss and the Rosenbergs, for example—had stirred ugly passions.<sup>133</sup> No one called off them.<sup>134</sup>

And if Ford "[a]bove all . . . wanted it understood that my fundamental decision to grant a pardon had nothing to do with any sympathy I might feel for Nixon personally or any concern I might have for the state of his health," as he insisted at the time, he was not thinking clearly.<sup>135</sup> Moreover, if Ford wanted to defend the

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<sup>123</sup> Deteriorating Trust in Government—What Was the Impact of Watergate?, Summer 1975 (Box 32, File: Nixon Pardon—General (3), Buchen Files, Ford Library).

<sup>124</sup> CANNON, *supra* note 50, at 386.

<sup>125</sup> *Id.*

<sup>126</sup> Deteriorating Trust in Government, *supra* note 123.

<sup>127</sup> JERALD F. TERHORST, GERALD FORD AND THE FUTURE OF THE PRESIDENCY 238 (1974).

<sup>128</sup> *Id.* (quoting columnist Mary McGrory).

<sup>129</sup> REEVES, *supra* note 40, at 92-93.

<sup>130</sup> Woodward, *supra* note 115.

<sup>131</sup> *Id.*

<sup>132</sup> Ford, *supra* note 116.

<sup>133</sup> Christopher Willcox, *The Saga of Sacco and Vanzetti*, THE N.Y. SUN, Aug. 15, 2007, <http://www.nysun.com/arts/saga-of-sacco-and-vanzetti/60558>.

<sup>134</sup> *Id.*

<sup>135</sup> WERTH, *supra* note 70, at 310.

pardon primarily by stressing the need “to heal the wounds throughout the United States,”<sup>136</sup> as he insisted publicly at the time, he should have toned down the portion of his statement declaring that “serious allegations and accusations hang like a sword over our former President’s head, threatening his health as he tries to reshape his life.”<sup>137</sup> This is especially true because journalists knew Nixon was playing golf and had seen him walking along the ocean in front of the California beachfront mansion to which he had been “exiled.”<sup>138</sup> Additionally, Ford should not have insisted that, “Richard Nixon and his loved ones have suffered enough.”<sup>139</sup>

Further, Ford’s timing was poor, guaranteeing that the pardon would become an issue in the upcoming Congressional elections. Why not wait until afterwards, especially when he could calm his predecessor with a telephone call saying a pardon was forthcoming?<sup>140</sup> More importantly, by acting when he did, Ford had “created the impression that he would have pardoned Nixon no matter what criminal charges might have been lodged against him or what evidence might have been presented to support them. In effect, the President said that no crimes that Nixon might have committed would [have] preclud[ed] a pardon.”<sup>141</sup> According to Senator Walter Mondale, a liberal Democrat, “no one wished the former President to go to jail, but to grant a pardon for unspecified crimes and acts is unprecedented in American history.”<sup>142</sup> Presidential pardons typically specified the acts the accused had committed.<sup>143</sup> Even though many did not want to see the former President sent to the country club prisons, to which so many of Nixon’s colleagues would be consigned, most sought a full accounting of the crimes he had allegedly committed.<sup>144</sup>

An indictment would have allowed the facts and allegations to come out first. True, Jaworski feared that indictment, followed by a pardon, would undermine the rule of law.<sup>145</sup> But Jaworski also knew the grand jury would indict Nixon “in a minute.”<sup>146</sup> Most of Jaworski’s staff “wanted to indict and signal President Ford that

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<sup>136</sup> President Gerald Ford, The President’s News Conference (Sept. 16, 1974), <http://www.presidency.ucsb.edu/ws/?pid=4717>.

<sup>137</sup> Gerald R. Ford, Address to the Nation Pardoning Richard M. Nixon (Sept. 8, 1974), <http://www.americanrhetoric.com/speeches/geraldfordpardonofnixon.htm>.

<sup>138</sup> *Was Justice Done?*, NEWSWEEK, Sept. 16, 1974, at 23; *The Nixon Medical File*, NEWSWEEK, Sept. 23, 1974, at 36.

<sup>139</sup> Ford, *supra* note 116.

<sup>140</sup> *Has Ford Learned Lesson? Outrage Over Pardon Shows Liberals Cannot Be Appeased*, HUMAN EVENTS, Sept. 21, 1974, at 1.

<sup>141</sup> Carey McWilliams, *But Who Will Pardon Ford?*, THE NATION, Sept. 21, 1974, at 226.

<sup>142</sup> *Reaction: Is the Honeymoon Over?*, TIME, Sept. 16, 1974, at 13.

<sup>143</sup> Jerry Carannante, Note, *What To Do About the Executive Clemency Power in the Wake of the Clinton Presidency*, 47 N.Y.L. SCH. L. REV. 325, 327 (2003).

<sup>144</sup> *Reaction*, *supra* note 142, at 13.

<sup>145</sup> JAWORSKI, *supra* note 97, at 267-68.

<sup>146</sup> *Id.* at 267.

a pardon was in order . . . if Nixon would admit his guilt,” a recommendation Jaworski admitted “had some merit.”<sup>147</sup>

And though evidence of rehabilitation almost always accompanied a pardon, in this instance there was none.<sup>148</sup> One clergyman aptly described the tone of Nixon’s statement acknowledging the pardon: “Get this behind me so that I can get on with writing my memoirs and tell that I was right in the first place.”<sup>149</sup> Ford should have required his predecessor to display repentance.

Now Ford had placed himself in an untenable position. On the one hand, he had damaged the principle of equal justice under law. How could the trials of the Watergate minnows proceed when the whale swam free? On the other, how could he free all the fish?<sup>150</sup> When a Presidential spokesman suggested on September 10, 1974, that pardons were “under study” for all former and prospective Watergate defendants, the ensuing uproar forced the White House to issue an immediate retraction.<sup>151</sup>

And no matter how the public felt about the pardon, few praised the agreement allowing Nixon to control his records. For example, when Buchen replied to a reporter’s question about “the right of history,” by saying that “the historians will protest, but I think historians cannot complain if evidence for history is not perpetuated which shouldn’t have been created in the first place,” he seemed to have taken leave of his senses.<sup>152</sup> Historians were not the only ones who wanted to know whether Nixon had committed criminal acts. Congress promptly abrogated the agreement by enacting the Presidential Recordings and Materials Preservations Act, requiring delivery of the tapes to the complete “possession and control” of the Archivist of the United States and ordering the Archivist to give highest priority to processing those portions of the tapes and other records that would “provide the public with the full truth . . . of the abuses of governmental power popularly identified [as] ‘Watergate.’”<sup>153</sup> (Nixon then sued to recover possession of the tapes, and the ensuing litigation tied up the release of most tapes for over two decades.)<sup>154</sup>

Congress also asserted itself by creating a committee that directed the President to explain the pardon. Prior Presidents had routinely declined to testify before a Congressional committee, but by October 1974, Ford was so frantic to defend the

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<sup>147</sup> *Id.* at 268.

<sup>148</sup> Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 *YALE L.J.* 1135, 1141 (2000).

<sup>149</sup> *The Theology of Forgiveness*, *TIME*, Sept. 23, 1974, at 35.

<sup>150</sup> Statement of the Association of the Bar of the City of New York, Sept. 11, 1974 (Box 32, File: Nixon Pardon Correspondence (3), Buchen Files, Ford Library).

<sup>151</sup> Press Release, Statement on Presidential Clemency and Pardons (Sept. 11, 1974), <http://www.presidency.ucsb.edu/ws/?pid=4703>.

<sup>152</sup> Press Conference of Philip Buchen, Sept. 8, 1974 (Box 35, File: Nixon Pardon--Press Conference (1) Sept. 8, 1974, Buchen Files, Ford Library).

<sup>153</sup> KUTLER, *supra* note 44, at 592.

<sup>154</sup> Tim Weiner, *Historian Wins Long Battle To Hear More Nixon Tapes*, *N.Y. TIMES*, Apr. 13, 1996, at 12.



pardon he agreed to appear.<sup>155</sup> Representative Elizabeth Holtzman fired seven questions at Ford. How could the President explain his failure to specify the crimes for which Nixon was pardoned, his refusal to require “any acknowledgement of guilt” from Nixon, his lack of consultation with the Attorney General, the “extraordinary haste in which the pardon was decided on and the secrecy with which it was carried out,” the accompanying agreement on the tapes, his choice of Becker as an envoy, and his failure to discuss the tapes agreement with Jaworski?<sup>156</sup> Returning to the theme of a deal, Holtzman referred to “suspicions . . . that the reasons for the pardon and the simultaneous tape agreement was to insure that the tape recordings between yourself and Richard Nixon never came out in public.”<sup>157</sup> The “most damaging aspects” of Ford’s appearance, one aide reflected afterwards, “were the unanswered questions posed by Ms. Holtzman and the likely adverse public reaction to them.”<sup>158</sup>

Amid all of the controversy over the pardon in 1974, the metaphor of Watergate as a national wound became stronger. Ford reasoned that “[y]ou can’t pull a bandage off slowly,” but even he began to wonder whether he had just rubbed salt in it.<sup>159</sup>

On November 5, 1974, the Democrats won forty seats in the House, giving them the two-thirds majority required to override Presidential vetoes; came just four votes shy of a two-thirds majority in the Senate; and swept the statehouses.<sup>160</sup> Democrats won even in twenty-one traditionally Republican suburban districts.<sup>161</sup> The Republicans now held only thirteen governorships and four state legislatures. Only thirty-eight percent of eligible voters cast a ballot. Voters overwhelmingly marked their ballots for liberal and left-liberal Democrats who inveighed against Watergate and the pardon, along with the economy.<sup>162</sup> Indeed, many believed that, despite Nixon’s victories in ’64 and ’72, the 1974 election returns represented “a great *party*

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<sup>155</sup> James M. Cannon, *Gerald Ford*, in CHARACTER ABOVE ALL: TEN PRESIDENTS FROM FDR TO GEORGE BUSH (Robert A. Wilson ed., 1995), available at <http://www.pbs.org/newshour/character/essays/ford.html>.

<sup>156</sup> Statements and Responses to Questions from Members of the House Judiciary Comm. Concerning the Pardon of Richard Nixon (Oct. 17, 1974), <http://www.presidency.ucsb.edu/ws/?pid=4471>.

<sup>157</sup> *Id.*

<sup>158</sup> Ken Lazarus, Memorandum for Phil Buchen, Oct. 17, 1974 (Box 34, File: Nixon Pardon, Hungate Subcommittee, Buchen Files, Ford Library).

<sup>159</sup> FORD, *supra* note 13, at 173, 179; see also Jerald F. terHorst, *President Ford and the Media*, in THE FORD PRESIDENCY, *supra* note 52, at 209, 214.

<sup>160</sup> JULIAN E. ZELIZER, ON CAPITOL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES, 1948-2000, at 161 (2004).

<sup>161</sup> DAVID S. BRODER, CHANGING OF THE GUARD: POWER AND LEADERSHIP IN AMERICA 349 (1980).

<sup>162</sup> ZELIZER, *supra* note 160, at 161; BRODER, *supra* note 161, at 349.

landslide” for the Democrats.<sup>163</sup> Across the spectrum of the Republican Party, there was despair.<sup>164</sup>

The national conservative weekly, *Human Events*, had been grimly charting Ford’s move left all fall.<sup>165</sup> Though the “[o]utrage [o]ver [p]ardon [s]hows [l]iberal [c]annot [b]e [a]ppeased,” it said, Ford didn’t seem to get it.<sup>166</sup> Instead of arguing for a strong defense, he had “virtually promis[ed] conditional amnesty for deserters and draft dodgers!”<sup>167</sup> He had “woo[ed] women’s libbers—endorsing the so-called Equal Rights Amendment and posing with an arm around far-out liberal Rep. Bella Abzug.”<sup>168</sup> He had left the Black Caucus “all smiles.”<sup>169</sup> The Rockefeller nomination was “most galling.”<sup>170</sup> *Human Events* characterized the future of American conservatism as “extremely precarious.”<sup>171</sup>

As the Republicans’ fortunes plummeted after Watergate, some Republicans thought their party should go the way of the Whigs. One conservative went to Ronald Reagan and asked him to lead the new party.<sup>172</sup> The Republican Presidential nomination in 1976, even if attainable, would require compromise with GOP power-brokers and prove “worthless” because there were so few Republicans, he warned.<sup>173</sup> Reagan seemed intrigued. He mused to the media, “I see the statements of disaffection of people in both parties,” and wondered, “[d]o you restore the confidence or do you change the name . . . ?”<sup>174</sup> His backers reined him in, and the day after the 1974 midterm elections Reagan denied that the GOP was dead.<sup>175</sup> He maintained that “the Republican Party represents basically the thinking of the people

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<sup>163</sup> James L. Sundquist, *Hardly a Two-Party System*, THE NATION, Dec. 7, 1974, at 582, 582.

<sup>164</sup> See, e.g., M. Stanton Evans, *Will the Republican Party Survive?*, NATIONAL REVIEW, Nov. 8, 1974, at 1285; *The Electoral Disaster*, NATIONAL REVIEW, Nov. 22, 1974, at 1334; *Conservative Lawmakers Suffered Badly*, HUMAN EVENTS, Nov. 16, 1974, at 4; Dick Behn, *Commentary: The GOP, Is there Still Hope for Republicans?*, RIPON FORUM, Nov. 15, 1974, at 1, 2.

<sup>165</sup> *Has Ford Learned Lesson?*, *supra* note 140, at 1.

<sup>166</sup> *Id.*

<sup>167</sup> *GOP Survival In Doubt: Is '72 Mandate Finished Under Ford?*, HUMAN EVENTS, Aug. 31, 1974, at 1, 6.

<sup>168</sup> *Militant Feminists Find Friend at White House*, HUMAN EVENTS, Sept. 7, 1974, at 4, 4.

<sup>169</sup> *GOP Survival In Doubt*, *supra* note 167, at 6.

<sup>170</sup> *Id.*

<sup>171</sup> *Reagan Should Make Immediate '76 Bid*, HUMAN EVENTS, Nov. 16, 1974, at 1.

<sup>172</sup> William Rusher, Memorandum for Michael Djordjevich, May 18, 1974, (Box 26, Folder 2: Rusher Papers, Library of Congress).

<sup>173</sup> *Id.*

<sup>174</sup> LOU CANNON, GOVERNOR REAGAN: HIS RISE TO POWER 401 (2003).

<sup>175</sup> *Id.*

of this country, if we can get that message across to the people. I'm going to try to do that."<sup>176</sup>

That was an announcement that should have created consternation in the Ford White House, particularly since Reagan constantly badmouthed Ford.<sup>177</sup> But Ford, Donald Rumsfeld, and Dick Cheney refused to take Reagan seriously despite warnings from staffers of future "severe rightwing problems."<sup>178</sup>

And so, Ford did not worry about conservative Republicans after the midterm elections. The activities of what would be called the "New Right,"<sup>179</sup> which had come into existence when Ford nominated Rockefeller and would take credit for Reagan's 1980 election, remained below the White House radar screen.<sup>180</sup> The New Right would not score its first legislative victory until the end of 1975 and would not find "the big issue" it searched for when it seized on the Panama Canal treaties in 1977.<sup>181</sup> The media ignored all conservative Republicans except for Reagan, whom it treated as a dimwit.<sup>182</sup>

Consequently, one conservative historian said that the Republican Party in 1974 seemed to be "sinking into oblivion."<sup>183</sup> In 1974, many of the politically powerful still spoke the language of liberalism and left-liberalism, and conservatism was in disarray. It was between 1975 and 1979 that two-failed presidencies, the growth of neo-conservatism, the "New Right," the religious right, anticommunism, and supply-side economics laid the groundwork for the transformation of the United States. Those who contended later that the tide had turned right in the sixties and that Watergate was a bump in the road towards Reagan's inevitable victory in 1980 rewrote the past.<sup>184</sup> The story of the growing power and appeal of conservatism and the Republican Party was more interesting than that. It was a story of the seventies.

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 402.

<sup>178</sup> William E. Timmons, Memorandum for Donald Rumsfeld, Oct. 25, 1974 (Box 20, File: Conservatives, Timmons Files, Ford Library); DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASS-ROOTS CONSERVATISM: A WOMAN'S CRUSADE 381 n.67 (2005) (speaking of Rumsfeld's and Cheney's attitude towards Reagan); CRAIG SHIRLEY, REAGAN'S REVOLUTION: THE UNTOLD STORY OF THE CAMPAIGN THAT STARTED IT ALL 203, 253 (2005) (maintaining that Cheney was nearly alone in the Ford White House to take Reagan seriously).

<sup>179</sup> Richard Viguerie, *Money, Message and Marketing*, THE NEW RIGHT AT HARV. 109, 115 (1983).

<sup>180</sup> SHIRLEY, *supra* note 178, at xix.

<sup>181</sup> Viguerie, *supra* note 179, at 116.

<sup>182</sup> SHIRLEY, *supra* note 178, at xix.

<sup>183</sup> *Id.* at 29.

<sup>184</sup> *Id.* at xxvii.