Saturday Night With Elliot Richardson and Robert Bork: A Case Study in Exemplary Executive Branch Lawyering

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Abstract

In the wake of both the “torture memos” written by the Bush Administration’s Office of Legal Counsel and the U.S. Attorney scandal that led to the resignation of Attorney General Alberto Gonzales, a large literature appeared criticizing the performance of high-ranking Bush-era executive branch lawyers. But there is very literature highlighting incidents of good executive branch lawyering — especially under trying circumstances.

In this article, I try to buck this trend by examining the events surrounding the so-called “Saturday Night Massacre”: the extraordinary evening in October of 1973 when President Nixon ordered Attorney General Elliot Richardson to fire Watergate Special Prosecutor Archibald Cox, and Richardson resigned rather than carry out the order. After Richardson’s Deputy William Ruckelshaus also refused the order and was fired, then-Solicitor General Robert Bork finally did the deed and fired Cox.

Even though Richardson and Bork took different actions on that fateful night, I argue that in fact both men made excellent decisions given their different circumstances and institutional roles. In coming to this conclusion, I show that exemplary executive branch lawyers consider far more than just what they should do according to “the law.” Rather, good decisionmaking requires high-ranking executive branch lawyers to act in a way that takes into account the political, personal, and institutional ramifications of their decisions just as much as — or perhaps even more than — the legal considerations.

Because the legal officials in Nixon’s Department of Justice engaged in nuanced, sensitive analyses of their respective options, the country and the Department of Justice were well-served in a time of deep crisis. My hope is that, in looking closely at this incident, we can learn some useful lessons about how executive branch lawyers should make hard decisions when the next crisis hits.
SATURDAY NIGHT WITH ELLIOT RICHARDSON AND ROBERT BORK:
A CASE STUDY IN EXEMPLARY EXECUTIVE BRANCH LAWYERING

“But if the time should ever come . . . when my office would require me to either violate my conscience or violate the national interest, then I would resign the office; and I hope any conscientious public servant would do the same.”
—John F. Kennedy, September 1960

I. Introduction: What An Executive Branch Lawyer’s “Conscience” Consists Of

Whenever the subject of resignation for policy reasons by government officials comes up, the invocation of “conscience” inevitably follows. Justice Scalia, for instance, claims that he does not “feel empowered to revoke those laws that I do not consider good laws. If they are stupid laws, I apply them anyway, unless they go so contrary to my conscience that I must resign.” In 2004, a British barrister involved in the defense of suspected terrorists resigned for “reasons of conscience” in light of the way the detainees were being treated under the law. When a federal judge resigned in 1990 because he thought the mandatory federal sentencing guidelines were too harsh, he said that he “just can’t do it anymore.” These explanations make it seem like decisions to resign for policy reasons can in fact be surprisingly simple, involving

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5 I say for “policy reasons” because I want to exclude resignations for purely personal reasons — i.e., when Attorney General Richard Thornburgh resigned to run for Senate in 1991 — or resignations under suspicion of wrongdoing — i.e., when Attorney General Richard Kleindienst, who was directly implicated in the Watergate scandal, resigned in 1973, or when Attorney General Alberto Gonzales resigned in 2007 amidst allegations he had improperly dismissed a number of U.S. Attorneys and perjured himself before Congress. Those are both very different situations than the one I discuss here.
cases where an official has in her mind the list of strong beliefs that make up her “conscience,” and then if she’s asked to do anything that goes strongly against it, she quits.

This is slightly simplified, of course. What I want to underscore, though, is that, even for lawyers and judges, the typical conception sees this type of resignation as a deeply personal act. While such resignations are sometimes then accompanied by interviews or other attempts to speak out in public to try to change decisions or policies or to encourage law compliance, the popular conception of a decision to resign sees resignation as falling somehow outside of one’s job description. It is an act of courage and principle, fundamentally different than the daily compromises and sublimation of personal preferences that every government lawyer and even Attorney General knows is key to performing his role properly. In the legal sphere especially, resignations thus are often seen in black and white: someone is asking an inferior to “break the law,” and the official cannot do so “in good conscience.”

I do not want to minimize the courage it takes to resign under protest as an Attorney General, nor do I want to minimize the great impact of a resignation on one’s career and professional reputation. In the context of executive branch lawyering, though, I want to place such resignations as in fact sitting firmly “within” the job description. When a high-ranking executive branch lawyer considers resignation, he should not — and, based on the limited historical accounts we have, does not — couch the decision solely in terms of “morality” or one’s unknowable “conscience.” Nor does he do threaten to resign simply because someone else is asking him to “break the law.” Rather, the decision to resign and even the logistics surrounding the revelation to the public of his decision should take into careful account all of the

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6 See, e.g., ANN WRIGHT & SUSAN DIXON, EDs., DISSENT: VOICES OF CONSCIENCE (2008) (book telling stories of “dozens of government insiders and active-duty military personnel who spoke out, resigned, leaked documents, or refused to deploy in protest of government actions [related to the Iraq War] they felt were illegal”).
factors — legal, institutional, political, personal — that the best executive lawyers weigh every day in making more routine decisions. Thus, when Kennedy said, in the epigram quoted earlier, that he would resign as President if his “office would require [him] to either violate [his] conscience or violate the national interest,” to the high-ranking executive branch lawyer, there is in fact no distinction between these two. The decision to resign for policy reasons and how to do so should turn entirely on the national interest, writ large.\(^7\) Put another way, this essay tries to show that the kind of courage it takes to resign under protest as Attorney General is just an extension of the kind of professional courage that one hopes that the AG exhibits every day.

In this essay, I illustrate this point by analyzing the events surrounding the only resignation for policy reasons by an Attorney General in the last century: that of Attorney General Elliot Richardson, on October 20, 1973, as part of the so-called “Saturday Night Massacre.” The case study is particularly appropriate because three actors faced what seems initially to be an identical decision: comply with a Presidential order to fire Special Prosecutor Archibald Cox, or resign. On that Saturday in October, Richardson resigned; his deputy William Ruckelshaus, who was next in the line of succession, then tendered his resignation as well (but was in fact technically fired); but Robert Bork, who, as Solicitor General, was next in line, complied with the order and fired Cox. Given this high-level description, it is easy to conclude that either Richardson must have been “right” and Bork “wrong,” or vice versa.

However, in the complex world of executive branch lawyering, things are not this simple. In fact, Richardson and Bork were differently situated and, like the best executive branch

\(^7\) I want to limit this broad statement in other way: the analysis in this paper applies only to high-ranking political appointees. The calculus may be different for, say, a career attorney in the Department of Justice who no longer personally agrees with certain policy decisions of the Department. Her decision about whether or not resign may, in fact, be much more “personal” than the account I give here.
lawyers should, they both took account of the national interest and their professional role as Attorney General in coming to their decisions. Both Richardson and Bork managed to navigate these waters quite successfully under especially trying circumstances.

The case study consists of two parts. First, in Part II, I recount the events leading up to and including the massacre of October 20, 1973. Part III then examines the actions of Richardson and Bork by asking more than just what the law required of them or what their “consciences” told them to do. Instead, I try to tease-out, in detail, all of the factors that each of the principals weighed in making their decisions, first in setting up the institutional arrangements that led to the showdown and then on that fateful day in October itself. In so doing, I show how, even though Richardson and Bork made different decisions, the way things played out was perhaps the best possible outcome. Part IV briefly concludes.

II. What Happened

A. The Beginning: April-May, 1973

In the spring of 1973, President Nixon needed a new Attorney General. His second Attorney General, Richard Kleindienst, was about to resign due to his known association with those implicated in the Watergate burglary and allegations about his personal involvement. The President sought a new attorney general who “could restore public confidence in the leadership of the Department of Justice.” President Nixon turned to Elliot Richardson, then serving as the Secretary of Defense, who was a long-time Republican with a reputation for independence and no association whatsoever with the Watergate burglary. The investigation into the burglary and the question of Nixon’s involvement was beginning to consume the country, and Nixon

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“promised Richardson full control of the Watergate investigation.”9 Nixon left to Richardson’s discretion whether or not to appoint an independent special prosecutor to lead the investigation.10

Richardson quickly decided that he would need to appoint a special prosecutor because the “investigation of Watergate . . . had to be independent in fact as well as in appearance.”11 Indeed, in the growing controversy, it is difficult to imagine that the Senate would have confirmed any Attorney General nominee without a promise to nominate a special prosecutor.12 His choice for the position was Archibald Cox, and Richardson let the Senate Judiciary Committee know of this choice during the confirmation process. Since Cox was the former Solicitor General in the Kennedy and Johnson Administrations, the Democratic Senate was satisfied that he would not be swayed by any political pressure to go easy on the President and his associates, and Richardson was confirmed.13

In the course of the hearings, the Senate pressed Richardson and Cox on the details of the arrangement. Though Richardson insisted that the “Attorney General [must] retain that degree of responsibility mandated by his statutory accountability,” over the course of five days of hearings, Richardson promised a great deal of independence to the prosecutor, and Cox promised to take advantage of that independence. The idea of having a fundamentally independent team of prosecutors was the “key understanding” that lead to the confirmation of Richardson — really, the confirmation of the package of Richardson and Cox.14

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10 Id.
11 Richardson at 42.
13 Richardson at 42.
The promises made to the Senate by Cox and Richardson were codified in a “charter” of the office that was negotiated with the Senate Judiciary Committee and published in the Federal Register.\(^{15}\) As Richardson describes it, the charter contained three key provisions. First, the special prosecutor would have “full authority” over the investigation. Second, the Attorney General would maintain “ultimate accountability” — that is, it was clear that the authority was delegated directly from the Attorney General. Third, and perhaps most critically, the charter codified promises made to the Senate that “the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part.”\(^{16}\) Publicly, President Nixon supported the arrangement, saying that “[w]ith his selection of Archibald Cox . . . Richardson has demonstrated his own determination to see the truth brought out. In this effort he has my full support.” Nixon also promised that the White House would cooperate with the investigation, saying that “executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct.”\(^{17}\) Thus, a unique institutional arrangement was put in place in May of 1973 by virtue of the promises made at the confirmation hearings.

It is worth pausing here to examine two key decisions that Richardson made that would shape the subsequent events. The first was the decision to appoint a special prosecutor at all, and then to work closely with the Senate in creating and codifying its terms. This is an unusual arrangement; despite the fact that Attorneys General typically exercise a good deal of independence, they are nonetheless paradigmatic executive officials subject to Presidential control and direction. After confirmation, the Attorney General is not technically answerable to

\(^{16}\) Id.; see also Richardson at 42.
\(^{17}\) These statements from a May 22 press release are quoted in Gormley at 244.
United States Senators in any meaningful way. Yet these were extraordinary circumstances, and Richardson and Nixon both apparently recognized that, without oversight by the Senate as to how the Watergate investigation would be conducted, no attorney general could be confirmed. The idea that this particular Attorney General was somehow bound by his promises to the Senate because he was confirmed only with an understanding that his relationship with the President would be different than had traditionally been the case for Attorneys General was an unprecedented and critical one.

The second decision was the appointment of Cox, a known Kennedy loyalist as well as a member of the Harvard Law faculty, as special prosecutor. Richardson later wrote that he “regarded as unimportant” the fact that Cox “was identified as a Democrat and been appointed solicitor general by President Kennedy.” But even though Nixon publicly praised the appointment of Cox, he and his inner circle privately loathed the choice. Nixon later wrote that “[i]f Richardson had searched specifically for the man whom I would have least trusted to conduct so politically sensitive an investigation in an unbiased way, he could hardly have done better than choose Archibald Cox.” I return in Part III to whether Richardson could have done anything differently at this early stage that might have prevented the events that unfolded six months later.

B. The End: October, 1973

In July of 1973, FAA Administrator Alexander Butterfield revealed the existence of a secret taping system in the White House. Cox subpoenaed nine of these tapes as part of the investigation, and, on October 12, 1973, the Court of Appeals for the D.C. Circuit affirmed an

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18 Richardson at 43.
19 Quoted in Ambrose at 145.
20 See Ambrose at 192–94.
order by Judge John Sirica requiring that the President turn over the tapes.\textsuperscript{21} Nixon, invoking executive privilege,\textsuperscript{22} neither appealed to the Supreme Court nor intended to comply. Instead, Alexander Haig, an advisor to the President, informed Richardson that the President was prepared to turn over not the tapes themselves but a transcript “personally prepared” by the President.\textsuperscript{23} At the same time, the President would have Cox fired, so as to “moot the case” and end the demand for the tapes. Haig here cited as his authority a recent article by Yale Law Professor Alexander Bickel, which argued that “Cox has no constitutional or otherwise legal existence authority except as he is a creature of the attorney general, who is a creature of the President.”\textsuperscript{24} Thus, according to the Bickel theory that Haig mentioned to Richardson, the President “can discharge Mr. Cox and appoint someone else in his place . . . who will follow his direction to abandon the demand for the White House tapes.”\textsuperscript{25}

Richardson’s immediate response was to threaten to resign.\textsuperscript{26} The political ramifications of this were immediately clear to Haig, who went back to the President to craft a compromise. The President’s advisors came up with a scheme called the “Stennis plan,” where Mississippi Senator John Stennis would listen to the requested tapes and prepare transcripts for the court. The details of the proposal evolved over the course of a week, but, while Richardson endorsed

\textsuperscript{21}Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).
\textsuperscript{22}Nixon’s earlier promise not to invoke executive privilege referred only to “testimony,” which his advisors distinguished from such things as tapes and documents.
\textsuperscript{23}Gormley at 323.
\textsuperscript{24}\textit{Id.} The Bickel article is \textit{The Tapes, Cox, Nixon, The New Republic}, Sept. 29, 1973, at 13. It is worth noting that Haig’s reliance on this article for the proposition that the President has the authority to immediately dismiss Cox and moot the case is almost laughable: whether or not this was the correct legal conclusion, the article is not even two pages long, cites no legal authority, and does not mention the charter of the office, the “extraordinary improprieties” standard, nor the promises made to the Senate by Richardson.
\textsuperscript{25}Bickel at 13.
\textsuperscript{26}Richardson at 69.
certain versions of it and tried to persuade Cox to accept it, Cox never did.\textsuperscript{27} On Friday, October 19, 1973, the deadline for Nixon to appeal to the Supreme Court expired; Nixon was now in open defiance of a court order to turn over the tapes. That night, Nixon sent a letter to Richardson “regret[fully] intruding to this very limited extent” on Richardson’s independence in matters dealing with Watergate and directing him to order that Cox “make no further attempts by judicial process to obtain tapes, notes, or memoranda of Presidential conversations.”\textsuperscript{28} Richardson read Cox the letter, but told him that he was only informing him of it, and not ordering him to comply.

In a letter to the President the next day, Richardson noted that the letter gave him “serious difficulty” in light of the promises made at his nomination hearings and in the charter of the office of the Special Prosecutor, which stated that the Attorney General not “countermand or interfere with the Special Prosecutor’s decisions or actions.”\textsuperscript{29} At virtually the same time, Cox held a press conference to announce that he would insist on compliance with the court order.\textsuperscript{30} Immediately afterwards, Haig called Richardson to tell him that he was to fire Cox.\textsuperscript{31} The stage was thus set for the Saturday Night Massacre: Richardson had to either fire Cox, or refuse and resign.

Richardson requested an in-person audience with the President. The President urged him not to resign, citing not only concerns pertaining to the immediate situation but also the impact.

\textsuperscript{27} The reasons that the proposals were inadequate to Cox — even though he was in fact willing to accept some solution involving neutral third-parties — are explained in Gormley at 318–37.
\textsuperscript{28} Quoted in full in Gormley at 342.
\textsuperscript{29} Richardson at 70.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
Richardson’s leaving in the middle of a crisis in the Middle East would have.\textsuperscript{32} The final exchange the two had that day, as told by Richardson, is remarkable:

“I’m sorry,” the President said, “that you insist on putting your personal commitments ahead of the public interest.” I could feel the rush of blood to my head. “Mr. President,” I said in as even a voice as I could muster, “I can only say that I believe my resignation is in the public interest.” Nixon backed off, acknowledging that it was our perception of the public interest that differed.\textsuperscript{33}

Richardson resigned, and the next in line to be Attorney General, William Ruckelshaus — whom Richardson later described as an “alter ego” who “shared whatever constraints [Richardson] was subject to”\textsuperscript{34} — tendered his resignation as well, but was instead fired.

Robert Bork, the solicitor general, was next in line at the Department of Justice — indeed, he was essentially last in the line of succession, as “[i]t’s not clear would have happened if Bork had refused” to comply with the President’s order to fire Cox.\textsuperscript{35} In fact, both Richardson and Ruckelshaus were worried that, if Bork quit, “the dominoes could fall indefinitely, far down the line, leaving the Department without a strong and adequately qualified leader.”\textsuperscript{36} That would not only jeopardize all of the other critical functions of the Department, but it would also put at risk the continued vitality of the Watergate investigation itself.\textsuperscript{37}

Richardson and Ruckelshaus also believed that Bork “was in a different moral position” from the two of them. Bork had been confirmed before the Watergate probe widened and had not

\textsuperscript{32} Id. The President was referring to the 1973 Yom Kippur War between Israel and many Arab states, which began on October 6, 1973. Richardson, who had been both the Secretary of Defense and the Under Secretary of State prior to becoming Attorney General, was anxious to advise the president on such matters, and noted that “by far the hardest part” of the meeting was refusing the President’s request that he at least delay his resignation in light of the crisis. Id.

\textsuperscript{33} Id. at 70–71.

\textsuperscript{34} Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States at 3133 (1987) (testimony of Elliot Richardson) (hereinafter “Richardson Testimony”).

\textsuperscript{35} Ruckelshaus Address.

\textsuperscript{36} Richardson Testimony at 3133.

\textsuperscript{37} Id.
been involved in any of the compromises with the Senate that his two superiors had been; moreover, as solicitor general, Bork had been unaware of and entirely uninvolved in any of the earlier machinations. Accordingly, given that the firing of Cox was now inevitable, and the only question was how much havoc would be wreaked in the Department of Justice, Richardson and Ruckelshaus urged Bork to stay on and fire Cox. Immediately after resigning, Richardson told Bork that “[s]omebody has to do it. [Cox] is going to be fired. You should do it.”

Initially, Bork thought he should fire Cox but then also resign himself. Though Bork believed that the President had the legal authority to order him to fire Cox, he did not want to appear to be an “apparatchik”; Bork thought that the “opprobrium attached to that term would impair his usefulness as Acting Attorney General.” But Richardson and Ruckelshaus convinced Bork that this “murder-suicide” would be the worst of both worlds. “Why would the best possible man to be Acting Attorney General quit after having gone through with the most distasteful and painful part of the job?” Richardson asked rhetorically during the confirmation hearings of Bork’s nomination to the Supreme Court. Bork finally did the deed and stayed on as Acting Attorney General. Cox was fired, and Haig ordered the director of the FBI to seal off the

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38 **JAMES DOYLE, NOT ABOVE THE LAW: THE BATTLES OF WATERGATE PROSECUTORS COX AND JAWORSKI 187–91 (1977).** Bork was in fact so far removed from these events that he went into the office that Saturday to “work on a Supreme Court brief and to answer a letter on the meaning of the Constitution from a grade school class.” *Id.* at 188. By all accounts, he had given no thought whatsoever to the resignation issue before Friday night, October 19, at the earliest — and probably not until Saturday.

39 *Id.*

40 *Id.*

41 Whether Richardson also believed this is hard to say. I address it in Part III.B.

42 Richardson Testimony at 3122–23.
offices of the Watergate Special Prosecution Force.\textsuperscript{43} No other members of the Department resigned.\textsuperscript{44} The massacre was over.

III. Analysis: What Mattered?

A. The Set-up: Could This Have Been Prevented In May?

It is useful to consider whether handling things differently at the outset could have led to a different and, perhaps, less dramatic outcome in the end. Richardson’s predecessor, Richard Kleindienst, is a proponent of this view, as he is highly critical of Richardson’s handling of the appointment of a special prosecutor and his choice of Cox in particular. Kleindienst notes that there was essentially no communication from Richardson to the President with regard to the charter and duties of the special prosecutor nor whom Richardson would choose for the job; conversely, there was no communication back from the President to Richardson when the President made his statements approving of Cox and that Nixon would not invoke executive privilege with regard to “testimony.”\textsuperscript{45} Richardson was thus serving at the pleasure of the President, but the relationship was bereft of healthy lines of communication from even before he was confirmed — indeed, Richardson seemed to have more allegiance to the Senate than to the President. Richardson’s ability to provide counsel to the President, one of the most critical functions of any Attorney General, was thus immediately and irrevocably hampered. This also led to a clear split between who the President’s lawyers were and those lawyers on the “other side,” prosecuting him, while Richardson existed in a kind of netherworld between the two:

\textsuperscript{43} Doyle at 193.
\textsuperscript{45} Kleindienst’s critique is laid out in RICHARD KLEINDIENST, JUSTICE: THE MEMOIRS OF ATTORNEY GENERAL RICHARD KLEINDIENST 175–89 (1985).
Kleindienst thus notes that Nixon “wound up with less than one half of an attorney general.”

Finally, when the Senate and Richardson negotiated terms of the office of Special Prosecutor, they never came to any understanding about what conduct would constitute the “extraordinary improprieties” that Richardson had agreed would provide cause for dismissal.

This is a powerful critique, and the question of how justice in the Watergate investigation could have been done while avoiding the massacre is intriguing. His criticisms ultimately fail to gain any traction, however. First, the unusual arrangement, whereby the Attorney General seemed as answerable to Congress as to the President, was the only truly viable option in light of the expanding sphere of the Watergate allegations. Moreover, the arrangement was limited to matters pertaining to Watergate. When it came to other issues, the Attorney General, at least in principle, retained his traditional role; indeed, in his initial discussions about the job, Richardson told the President that he hoped to be involved as an advisor “on matters of judgment” that did not even involve the Department of Justice. Of course, it quickly became clear that Watergate poisoned the relationship and cut-off the lines of communication — but it’s hard to see how a different institutional arrangement would have prevented that. So long as Watergate was being investigated at all by anyone in the Department of Justice, Nixon’s relationship with his Attorney General would be strained. Thus, rather than proving that Richardson erred in agreeing to certain institutional arrangements, this episode instead provides an illustration of the importance of having an Attorney General who can provide sound counsel. Richardson could not do so, through no fault of his own, and things went downhill very quickly from there. Indeed, involving the President in the arrangements and even the interpretation of “extraordinary improprieties”

46 Id. at 188.
47 Id. Kleindienst actually refers to “gross improprieties” instead of “extraordinary improprieties,” but this appears to be a mistake in referring to the language of the charter.
48 Richardson at 41.
would only have drawn further ire from Congress and cast further doubts on the ability of the prosecutor to do his job independently.

Second, the choice of Cox was both wise and necessary. Neither the Senate nor the country would have accepted the appointment of a Republican as special prosecutor, as Richardson himself recognized. Cox’s temperament also made him a good choice: he was not a fiery career prosecutor and trial lawyer but instead a cerebral law professor and appellate lawyer. Thus, all things considered, Richardson’s choice actually minimized the risk of a high-profile confrontation as much as he could. That Nixon was skeptical of Cox personally and thought he was out to get the President was no reason not to hire him. As became clear later, Nixon irrationally thought many people were out to get him.

The fundamental flaw in Kleindienst’s critique is that he fails to recognize that, by May of 1973, the conduct of many executive branch actors, and suspicions of involvement by the President himself, had swung the center of power in the government from the executive branch to Congress. Ambrose thus observes that, beginning with the confirmation hearings of Richardson, “[t]he Congress, which had been overwhelmed by the executive branch since FDR’s days, was reasserting itself.” The office of the Attorney General was not immune to this shift. Constitutional structure and the historical role of Attorneys General mattered far less in May of 1973 than the practical realities of the power struggle between the branches. The critical point to recognize is that Elliot Richardson may have technically and constitutionally served at the pleasure of the President — but in reality, he served at the pleasure of Congress, at least when it came to Watergate. That reality could not have been altered, and it would dictate all that followed.

49 Id. at 42.
50 Ambrose at 146.
B. The Massacre: Law, and What Else?

The decisions in that critical week in October were so complicated, with so many moving pieces, that it’s difficult to find a place to begin analyzing them. This may seem surprising: given that these were lawyers, the beginning and the end of the analysis may at first seem to be the legal one. Did Nixon have the “legal” authority to give the order to fire Cox? Did the Attorney General have the authority to comply?

These are difficult questions, yet, remarkably, no one seems to have cared very much about definitive answers to this question. There was, of course, a charter of the office of the Special Prosecutor, published in the Federal Register, that stated that the Special Prosecutor was not to be fired except for “extraordinary improprieties.” Yet as best I can tell, no one in the White House produced a written analysis of the President’s authority to order that Cox be fired. Within the Department of Justice, Richardson has alluded to getting an opinion from his Office of Legal Counsel on this issue, but that document has not been made public that I am aware of (and there is no indication that, if an opinion was obtained, it was shared with anyone in the White House). Based on the sparse accounts that I could find, it is difficult even to tell what advice OLC in fact gave Richardson. Cox told his biographer that, in early October of 1973, he and Richardson had a conversation where Cox reminded Richardson that “only [Richardson] could fire the special prosecutor; the president could not.”\(^{51}\) In Cox’s account, Richardson responded by saying “Yes, that’s what the Office of Legal Counsel here in the Department tells me.”\(^{52}\) However, in his 1987 testimony in the Bork hearings, Richardson said that he had an “opinion of the Office of Legal Counsel of the Department of Justice, to the effect that the

\(^{51}\) Gormley at 319.
\(^{52}\) *Id.* at 319–20.
President could have fired Cox himself at any time.” I do not know how any OLC opinion could have contained both of those conclusions simultaneously.

The best after-the-fact legal authority supports the proposition that, in fact, the Attorney General did not have the authority to fire Cox without cause, that Nixon did not have the inherent authority to do so, and that therefore Cox was unlawfully terminated. This conclusion rests on the combination of a district court case, brought by Ralph Nader but subsequently vacated as moot because Cox did not participate, that held that Cox’s firing was unlawful; dicta in the Supreme Court’s later opinion in *United States v. Nixon* that “[s]o long as this regulation [i.e. the Special Prosecutor’s Charter] is extant it has the force of law”; and the Court’s later decision in *Morrison v. Olson*, which held that the for-cause removal provision of the Independent Counsel Act was constitutional. On this purely legal analysis, Richardson was right to resign, and Bork was a hatchet man, complicit in Nixon’s trammeling of the Rule of Law. Some decisions to resign may be hard, says this view, but this one was not: the Attorney General cannot flagrantly and openly assist the President in breaking the law.

But Richardson himself has repeatedly criticized this reasoning as being “excessively legalistic,” and I think that he is correct. Though I don’t meant to downplay the legal significance of the charter, there is much more to the story than a few lines in the Federal Register — and a good executive branch lawyer considers all of the factors in play. Indeed, among the trio of Richardson, Ruckelshaus, and Bork, the attitude that comes through from reading multiple accounts is best summed up by Richardson’s later reflection that “[i]t did not

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53 Richardson Testimony at 3123.
57 Richardson testimony at 3123.
occur to anyone on Saturday, October 20, 1973, that the mere fact that my agreement with Archibald Cox had been published in the Federal Register, constituted a legal barrier . . . . I do not believe it did.”

That statement — that a regulation promulgated in the Federal Register just didn’t matter; it was an agreement between Richardson and Cox, not a binding regulation — seems radical in some ways, especially when said by someone who resigned precisely to *vindicate* the rule of law.

In order to make sense of Richardson’s statement, let me articulate many of the “non-legal” considerations that were in play, and show why they, too, were important:

1. **The personal promises of Richardson (and, by association, Ruckelshaus) to the Senate.** Richardson worked directly with the Senate Judiciary Committee to design the role of the Special Prosecutor. He also made personal assurances to Cox, with whom Richardson already had a relationship, that he would not interfere with the investigation. Thus, while the court in *Nader v. Bork* may have been correct that the “explicit and detailed commitments to the Senate” had “moral or political implications” but “no legal effect,” those moral and political implications should and did matter a great deal to the key players, even if they did not matter to a judge. Richardson, in notes prepared on the October 19, cited as his number one reason for why he should resign as “[i]t was a condition of my confirmation that I appoint a Special Prosecutor, and I reserved the right to fire him only in the case of some egregiously unreasonable action.”

Richardson talks in terms of a promise made to the Senate, not in terms of what any law or regulation required. Bork never made these same promises.

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58 *Id.* Note that several days after firing Cox, Bork did in fact issue an order rescinding the regulation, retroactive to the date of Cox’s firing. The legality of that action was rejected in *Nader*, 366 F. Supp. at 108.


60 Richardson’s notes are reproduced as “Tab C” of *Hearings Before the Senate Committee on the Judiciary: The Special Prosecutor* at 280 (1973).
2. The balance of power between the President and the Senate, and the continuing vitality of the Watergate investigation. Related to the first point is the fact that, in 1973, the Senate held a great deal of power over the executive branch. Richardson’s promises codified that. Thus, it’s fair to say that both Richardson and Bork had to give Congressional priorities a good deal more weight than perhaps would normally be the case for an Attorney General. Congress would clearly be against interference with Cox, but at the very least, Congress would have wanted to ensure that the investigation continued unabated. In accordance with this, Bork later said that one reason he decided not to resign after firing Cox was to ensure that the investigation would keep going, and that was indeed the case: Bork quickly reopened the prosecutor’s office and hired Leon Jaworski, who ultimately challenged assertions of executive privilege in the Supreme Court and won. Indeed, in November of 1973, Bork even revised the removal provisions governing the Special Prosecutor to ensure greater Congressional involvement.

3. The need for stability in the Department of Justice. As I mentioned earlier, the succession in the Department if the solicitor general were to resign is unclear, and having no leader in place could jeopardize the myriad other functions of the Department. After Bork fired Cox, no other officials resigned in protest — the combination of Richardson’s resignation and Bork’s subsequent actions seems to have stemmed the internal tide.

4. The traditional role of the Attorney General. Both Richardson and Bork considered the impact of a resignation on the relationship between the President and the Attorney General; indeed, Bork knew that the Attorney General especially cannot be considered to be fully obedient to every whim of the President. The independence of the office, however, was

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sufficiently maintained by Richardson’s and Ruckelshaus’s departure along with Bork’s continuation of the investigation.

5. The fact that no one knew what the tapes contained, and the President may have, in fact, been innocent. Looking back, it’s easy to say that Bork was incorrect and unprincipled in carrying out Nixon’s order, because if he had refused, perhaps Nixon’s role in Watergate would have been revealed sooner. But at the time, no one knew what the tapes contained. Without this knowledge, as Bork later said, he did not feel it was appropriate to “have a junior officer facing [the President] down in public.”\(^{64}\) Again, the way events unfolded during the massacre put the public on notice of the President’s arguable defiance of the law, but also allowed a fair judicial process to proceed. Had the entire Department of Justice left en masse that day in October of 1973, it would have been hard to imagine Nixon could have survived much longer at all; but to precipitate his demise then would have been to do so before anyone definitively knew he was guilty. It also would have been an exaggerated response to the President’s lack of immediate compliance with the subpoena and violation of the terms of Cox’s charter. The President’s actions in responding to the subpoena were, perhaps, against the law, but they do not seem so egregious and obviously wrong as to necessitate the immediate resignation by the President that the disintegration of the Department of Justice may have caused.

6. Foreign policy. October of 1973 was a tumultuous month outside of America as well; as mentioned earlier, there was a war raging in the Middle East, and the needs of dealing with that crisis put great stress on all of the principal. There were also Cold War-related concerns: Richardson recalls that President Nixon told him that “Brezhnev would never understand it if I

\(^{64}\) Id.
let Cox defy my instructions.” Indeed, in light of these Middle East crises, Ruckelshaus told Alexander Haig that he would be willing to wait a week to resign if the President could postpone his official order directing the Attorney General to fire Cox. Haig refused the offer.

7. The understanding of the public. There were internal machinations, and then there was the way the public would perceive and understand the showdown. All of the principals did a fairly good job on this account — Cox held that fateful press conference saying that he would go back to court to enforce the subpoena on Saturday afternoon, and Richardson held a press conference on Tuesday, October 23 (the first working day after the massacre) to explain that “[a]t stake, in the final analysis, is the very integrity of the governmental processes I came to the Department of Justice to help restore.” Indeed, the principals did quite a good job of conveying the issue of law compliance to the public, and there was an incredible response: the White House received a record amount of negative mail and telegrams, and talk of Nixon’s resignation and impeachment increased dramatically in the media.

8. Personal ambitions. Finally, it would be foolish to assume that the personal career prospects of all of the principals did not figure into this in any way. Richardson was a very prominent Republican, and, only weeks before the massacre, had been on Nixon’s shortlist for the Vice Presidential vacancy created by Spiro Agnew’s departure. Meanwhile, Bork, while less ambitious politically, must have been eyeing a job as a federal judge, especially on the Supreme Court (a position, of course, that he did succeed in being nominated for). I do think, however, that personal ambitions played a surprisingly small role here for both men — certainly

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65 Richardson at 40.
66 Boyle at 191–92.
67 Elizabeth Drew, Autumn Notes: I, NEW YORKER, March 11, 1974 at 42, 90.
68 Gormley at 361.
69 Drew at 57.
for Richardson, and even for Bork, who not only aspired to be a judge but relished the job as Solicitor General, but nonetheless was willing to resign himself after firing Cox.

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The above list shows that there was more — much more — that went into the decisionmaking of the principals than just “what does the law say?” That is how it should be. An ideal outcome would somehow simultaneously balance the promises made to the Senate; encourage law compliance by the President; educate the public about what happened; allow the investigation to proceed in a fair and independent manner; preserve the integrity of the Attorney General and the Department of Justice; and minimize the disruption of other critical functions of government, at home and abroad. In the end, the actions of Richardson — not just his resignation, but also his press conference, his urging of Bork to stay on, and so forth — and Bork — his firing of Cox while doing the best he could to ensure that the Watergate investigation would continue and would continue to be independent — combined to strike an ideal balance among all of these factors. Once it’s clear that Cox would have been dismissed in some way since that is what the President wanted, we can see how the sum total of Richardson’s and Bork’s decisions managed to balance the aforementioned interests. A message was sent about the magnitude of Nixon’s undermining of the rule of law by Richardson’s resignation, but no out-of-proportion crisis was precipitated in the DOJ, and the investigation could continue in a fair and independent way, because Bork stayed on and carried out the order.

If Richardson had not resigned, but instead complied “under protest,” then the message to the public and the rest of the government about the magnitude of Nixon’s recalcitrance and misfeasance would have been insufficient. But the resignation of the Attorney General and the Deputy Attorney General was an appropriate response to the magnitude of Nixon’s conduct. By
contrast, if Bork had resigned as well, then the collateral damage would have been far higher: chaos at the Department of Justice, a complete erosion of the important role of the Attorney General as subject to Presidential control, and a substantive pre-judgment of Nixon and many of his colleagues without knowing all the facts or going through any meaningful judicial proceedings.

Moreover, because all of the principals actually thought of the charter of the office as more of a matter of a confirmation hearing “promise” to the Senate and not as a legally binding regulation, the fact that Bork violated the regulation does not have the force it normally would. Also, as mentioned, the existence of the regulation doesn’t end the matter in any event, with the vitality of the Department of Justice in the balance and the fact that whether the President had the inherent authority to order that Cox be fired was at least an open question. Things happened quickly, and under conditions of great uncertainty. In the end, though, the massacre should be thought of a fine example of Attorneys General considering not just the “law” but a number of other factors to get an outcome genuinely in the national interest. Accordingly, Bork’s actions especially must be thought of holistically and not merely “doctrinally.” When they are, I think he acted wisely.

IV. Conclusion: Executive Branch Lawyering At Its Best

Explicit comparisons to other, more recent confrontations between executive branch lawyers and the White House are beyond the scope of this essay. However, by analyzing in detail the decisionmaking processes of the key players in this extraordinary episode, I hope that I have illustrated how important it is for high-ranking executive lawyers to view resignation (and the threat of resignation) as another tool firmly within his toolbox and not something that sits outside of it. I also hope that this essay has showed that, under conditions of great uncertainty, the best
decisions are made only when the high-ranking lawyer takes stock of a wide array of factors — indeed, in some sense the institutional, the political, and the pragmatic must be at least co-equal to the strictly “legal,” as they were to all parties in both May and October of 1973. Richardson, Ruckelshaus, Bork, and Cox all did exemplary jobs. By collapsing President Kennedy’s distinction between doing what their “conscience” required and acting in the “national interest,” the events of the Saturday Night Massacre show high-level executive branch lawyering in one of its finest hours.