

Watergate's Unanswered Questions: 40 Years of Hindsight

From My Remarks

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INTRODUCTION

The following material has been adapted from my remarks at this symposium. This is not a transcript of that talk, but rather a few edited selections of the subjects I addressed. If this material appears a bit disjointed, that is because this was a question and answer session, and I have summarized and digested matters that arose. Also, because I am currently working on a book about the unanswered questions relating to Watergate, the items I have pulled from my remarks relate more to the process of writing the book than the content of the book. (Plus, extemporaneous remarks do not always translate well from the spoken to the written form.)

A. Uncovering & Organizing the Conversations

No information is more historically important, nor more fundamental to understanding Watergate, than the question of how could a political figure as savvy and intelligent as Richard Nixon make such a mess of his presidency? It is a question I am trying to answer in my work-in-progress. The only way to answer this question is to fully and carefully examine what Nixon did, when he did it and why he did it. Most of that information can be found in Nixon's secretly recorded White House conversations.

I thought at the time I started this book project that nearly all the important information in these recorded conversations was easily available. I assumed that as soon as Nixon's tapes had become public, someone had transcribed the material that might be of interest or importance. I was aware that the Watergate Special Prosecutor Force (WSPF) had transcribed about eighty conversations, although I soon discovered many of these transcripts are only portions of conversations and most are not very accurate since they were merely first drafts. About twenty of the WSPF transcripts are excellent because they were used in the cover-up trial, so the parties involved listened to them, heard what they heard, and made corrections in the transcripts. There are another sixty transcripts prepared

for the WSPF by Federal Bureau of Investigation (FBI) secretaries that are really only very rough drafts, and almost useless. In addition, historian Stanley Kutler, in his book *Abuse of Power: The New Nixon Tapes*, published only partial transcripts of three hundred and twenty Watergate related conversations. In total, I found four hundred mostly partially transcribed conversations relating to Watergate and realized that this is barely the tip of the iceberg.

To my surprise, no one had ever bothered to assemble a comprehensive catalog of all of Nixon's Watergate-related conversations from June 20, 1972, his first day back at the White House following the arrests of the burglars at the Watergate, to July 13, 1973, when the plug was pulled on the taping system after Alex Butterfield informed the Senate Watergate Committee about its existence. When I completed that cataloging process I found that there are almost two thousand Nixon conversations relating to this subject—some very brief while others are quite long. The audio quality of the conversations varies greatly. Recorded telephone calls are generally the most audible. Many of the room conversations are virtually impossible to hear, which means they are almost impossible to transcribe. Fortunately, the technology has improved since the Nixon era, so I have been able to take the tapes from the National Archives and improve their audio quality to some degree. I have digitized conversations that the National Archives had not yet digitized.

In short, my initial assumption that most of Nixon's Watergate-related conversations had been transcribed was very wrong. In fact, these conversations have been largely ignored, and no one outside the National Archives staff has ever listened to the bulk of these conversations. To understand this history these conversations are essential. I have had a team of graduate students working on the transcripts for over a year and we are now well beyond the halfway point. There is no way to follow what really happened, and why, without full transcripts. And, frankly, it is fascinating what I am discovering.

We know the general story regarding Nixon's activities in Watergate but we don't know how it unfolded day-by-day, week-by-week, and then year-by-year. For his memoir, Nixon had his secretaries transcribe conversations during the first few weeks after the arrests at the Watergate. It appears they transcribed about thirty conversations. Yet to understand how Nixon dealt with Watergate, it is necessary to go far beyond the first weeks of activity to learn what Nixon was learning, when he was learning it, and why he was learning it. To understand his actions it is necessary to appreciate what was provoking him, and what actions he took as he acquired information.

One of the striking things I've learned is how little information the President was given early on. He was not told some of the most important information relating to the cover-up by his top aides: White House Chief of Staff Bob Haldeman and his top domestic policy adviser John Ehrlichman.

Nixon was not informed of the fact that following the leak of the so-called Pentagon Papers (a classified study of the origins of the war in Vietnam) there had been a White House sanctioned break-in of Daniel Ellsberg's psychiatrist's office by Gordon Liddy and Howard Hunt to get information to discredit Ellsberg for his role in leaking this information, and that two of the men who were used in the Ellsberg break-in were in the D.C. jail after being arrested during the Watergate break-in. Not surprisingly, this fact was a matter of real concern to John Ehrlichman, because he had approved the Ellsberg break-in, yet he withheld this information from the President. In fact, the reelection committee, which had authorized the Watergate break-in, might have been cut loose to fend for themselves had there not been that link back to the White House. But Nixon was not given this information for months, and not until after his White House was deeply involved in a cover-up.

Needless to say, new information is emerging from my transcripts, and not merely because no one else has transcribed most of these conversations but also because I hear things that nobody hears. For example, in October 1972 I visited Henry Petersen, the head of the Criminal Division at the Justice Department, who informed me that Mark Felt, the number-two man at the FBI, who we now know was Deep Throat, was leaking information. A lawyer for *Time* magazine had informed Petersen that Felt was leaking and they were concerned they might be getting grand jury information, which is unlawful. After Petersen shared this information, I took it back to the White House and told Haldeman, who in turn reported it to Nixon. Stanley Kutler, in his transcripts of this October 19, 1972 conversation, did not hear what I heard. At one point Kutler has Nixon saying to Haldeman, after being told about Felt's leaking, "You know what I'd do with him, the bastard?" Kutler's transcript never answers the question. But I heard Nixon say something very different, as have others I have asked to listen to my tapes, which have been scrubbed with the latest technology. On my copies it is very clear that Nixon said, "You know what I'd do with him: Ambassadorship." A huge difference. This is what Nixon would later do with Central Intelligence Agency (CIA) Director Richard Helms, appointing him ambassador to Iran to move him out and keep him happy. So I am finding information on these recorded conversations that others have missed because not only is the technology better, but because I know the players and the circumstances.

B. Nixon's Grand Jury Testimony

While doing research for my work-in-progress at the National Archives, I rediscovered testimony of Richard Nixon that I had actually forgotten about, probably because it had been sealed and would, I thought, never be available. Nixon had testified, after he resigned from office, before the last Watergate Grand Jury. Because he had been pardoned by President Ford for any and all of his conduct while President, he had no

criminal exposure nor could he rely on the Fifth Amendment to not answer questions. That pardon, however, did not include anything after he had resigned. Thus, when testifying before a grand jury he risked being charged with perjury if he was not truthful. At the time Nixon appeared before the grand jury, the WSPF was still actively investigating a campaign contribution to Nixon from billionaire Howard Hughes; misuses of the Internal Revenue Service for political purposes during the Nixon presidency; the sale of ambassadorships by the Nixon White House; and the eighteen and a half minute gap on a June 20, 1972 conversation that had been subpoenaed by the special prosecutor. Under the Federal Rules of Criminal Procedure, grand jury proceedings are secret and these records typically remain sealed forever. Thus, only a handful of people knew what Nixon had said when asked about these matters during his testimony, and they were prohibited by law from revealing this information.

When in Washington doing research, I lamented this fact to a friend, Alan Morrison, an associate dean at George Washington University School of Law. Alan asked me if I was aware that the Second Circuit had released the secret grand jury testimony of Richard Nixon in the Alger Hiss case during the McCarthy era, as well as grand jury testimony from Julius and Ethel Rosenberg. I had not been aware, and Alan explained that this grand jury testimony had been released because of its historical importance. He said that the chief judge of the federal district court where a grand jury sits has it within his or her power to release such historic testimony. Alan, who had been one of the cofounders of the Public Citizen Litigation Group, thought they might be interested in representing historians interested in Nixon's June 1975 grand jury testimony. I spoke with Stanley Kutler, and he was very interested in leading this effort, and working with Public Citizen. He assembled a who's who group of American historians to join in a petition requesting the court disclosure of Nixon's grand jury testimony. The action was filed in the U.S. District Court for the District of Columbia, and after examining the facts submitted for the interested historians by Public Citizen, Chief Judge Royce Lamberth unsealed Nixon's grand jury testimony. The Nixon Presidential Library has posted the material online, and it is revealing.

C. Mark Felt's (or Deep Throat's) Misinformation

Mark Felt, who was in charge of the FBI's day-to-day investigation of Watergate, and who we now know was the infamous Deep Throat (mythologized by the movie "All the President's Men"), is one of the most celebrated leakers in American history. Felt, as the associate director of the FBI, was the number-two man during Watergate, knew virtually everything the FBI knew. Indeed, his initials are on countless documents that crossed his desk during that investigation. For that reason, I find it incredible that Felt provided a remarkable amount of totally inaccurate information.

In their book, *All The President's Men*, Woodward and Bernstein set forth the information they learned from Deep Throat. I once had occasion to gather all that information and was surprised by how much of the information was bad. More recently, in working on my book, I have discovered that Felt was providing information that he appears to have concocted, for it is nowhere to be found in the FBI files. As the Nixon-recorded conversations show, we knew Felt was leaking, and that he was doing it to undercut the acting FBI Director Patrick Gray. We knew that Felt wanted the job of FBI director, and he apparently believed that by leaking, it would show Nixon that Gray could not control the FBI.

Recently, a very able investigative journalist and historian, Max Holland, has written a terrific book about Mark Felt, *Leak: Why Mark Felt Became Deep Throat*, and further confirmed our perception at the time about Felt's motives. Watergate cannot be fully understood without appreciating the issues Max Holland has addressed in his book.

D. Reforms After Watergate

Watergate caused Washington to reexamine the way it did business, and that, in turn, provoked many reforms. This is not the time or place to catalogue those reforms, rather I merely want to point out that most of those post-Watergate reforms have vanished. A few examples will make the point. The Senate Watergate Committee recommended, and Congress approved, the creation of an Independent Counsel Law, a prosecutor who could investigate a President, Vice President and other high level officials—and not be fired by the President, as had happened during Watergate. Congress adopted a number of new campaign finance and reporting laws and created the Federal Elections Commission. In the aftermath of Watergate, investigative journalism saw a dramatic increase, with most every news organization encouraging such reporting. In brief, new formal and informal restrictions were imposed on presidents; from controlling their ability to enter wars, to the way they handled their presidential papers, not to mention how they campaigned for the office.

As we approach Watergate's fortieth anniversary, I find it striking that virtually all of these post-Watergate reforms have disappeared for one reason or another. The Independent Counsel Act is gone. Congress allowed it to expire after both Republicans and Democrats were adversely affected by the law. Campaign finance reform has been affected by a number of U.S. Supreme Court rulings, most recently by *Citizens United*, which has produced a new flood of money into the 2012 presidential campaign cycle. The Federal Elections Commission is still in existence, but it is something of a joke, for this bi-partisan group cannot agree on anything. Even investigative journalism has become the exception rather than the norm, because journalism has been changed by the Internet and investigative journalism is not always profitable.

Nonetheless, there is a distinctive exception to the disappearance of the post-Watergate reforms. During my testimony before the Senate Watergate Committee, I commented about the fact that a disproportionate number of lawyers found themselves on the wrong side of the law during Watergate. The American Bar Association (ABA) took note of this fact as well, and assembled a commission to examine legal ethics and professionalism. I was told by several involved in the ABA's undertaking that my testimony had been something of a trigger. In the years following Watergate, the ABA developed a Model Code of Professional Conduct, required separate bar examinations on ethics, and created a program for continuing legal education, which is mandatory in many states. These ethics and professionalism reforms imposed by organized bars, state by state in the aftermath of Watergate, have remained very much in place. They are as important today as they were in the years immediately after Watergate when the ABA, and state bars, decided they were going to do something to address the kinds of mistakes attorneys made during Watergate.

E. The Watergate CLE

In December of 2010, I received a call from a friend in Cleveland, Jim Robenalt, who is a partner in the multi-state law firm Thompson Hine. Jim had just completed a Continuing Legal Education (CLE) course that had examined the tragic shootings at Kent State University on May 4, 1970. Since this tragedy occurred while I was the Associate Deputy Attorney General of the United States, he was curious about my recollections, which were few because I had not been involved with the matter. However, it provoked a conversation about how typically boring CLE classes can be made very interesting by drawing on lasting lessons from historic events. To make a long story short, Jim (a presidential scholar when not practicing law) and I decided to assemble a CLE based on Watergate.

I had spoken at CLEs for years, and had always been disappointed by the use made of this history as a teaching tool. Given the fact that so many attorneys made mistakes during Watergate, there is an abundance of material from which to draw. Jim Robenalt, who specializes in complex business litigation, typically represents business entities, and as he began looking at the rules of professional conduct that emerged from Watergate (and later Enron), he noticed dramatic changes in the rules of professional conduct relating to entities. For instance, following Watergate the role of White House Counsel vis-à-vis the President and the Office of the President of the United States have been clarified (White House counsel represents the office, not the person who is elected to the office), and when we applied the ABA's Model Code of Professional Conduct to the events that occurred during Watergate, we discovered very telling results.

To clarify our thinking, we wanted to talk with an expert, and I knew one who had knowledge of Watergate: Ronald Rotunda. Rotunda had been

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an attorney with the Senate Watergate Committee and with whom I had spoken about these events several years earlier. Best of all, I discovered Ron was The Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University School of Law, which was only about an hour's drive from my home. I called him, told him what Jim and I were doing, and asked if he would walk me through the ABA's Model Code in the context of Watergate, and he graciously agreed to do just that, which helped us focus our attention. Based on information from Professor Rotunda and with Jim's skill and experience as a trial lawyer, we narrowed the program to focus on the first week at the Nixon White House following the arrests at the Watergate. It was during that week that the die was cast for the Watergate cover-up, so the mistakes made that week provided a powerful teaching tool for what an attorney should not do when representing an entity with a powerful person in charge. More strikingly, had the ABA's Model Code existed in June 1972, I sincerely believe it would have changed history.

Jim and I gave a two-hour edition of The Watergate CLE at Chapman University School of Law the day before this symposium, with Ron Rotunda joining us. Working with Ron led not only to the development of our CLE program, but to this Watergate Symposium, where we have all had a chance to visit this history. My sincere thanks to Ron, Chapman University Law School, and the editors of this journal for organizing and bringing together some of those involved in making this history and providing the opportunity to examine its meaning for attorneys today.