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# Reflections on the Legacy of Watergate

by  
RICHARD BEN-VENISTE\*

## Introduction

In 1977, after the Watergate appeals had been decided, my Watergate colleague, George Frampton, and I recounted our experiences and perspectives on the Watergate investigation and aftermath in a book entitled *Stonewall*.<sup>1</sup>

On December 8, 1998, during my testimony before the House Judiciary Committee considering the impeachment of William Jefferson Clinton, Representative Robert Goodlatte (R-Va.) was kind enough to remind me of certain observations I had made some twenty years earlier. I quote from the transcript of that proceeding:

Mr. Ben-Veniste, you actually set this story straight a long time ago, long before you ever heard of Paula Jones or Monica Lewinsky, long before Bill Clinton was ever on the national scene. You wrote a book back in 1977 called “Stonewall, The Real Story of the Watergate Prosecution” by Richard Ben-Veniste and George Frampton, Jr. In that, in the closing, you wrote about the Watergate proceeding:

“Did the system work? True, the nationally televised debate and vote on articles of impeachment was a shining hour for the House Judiciary Committee. But all in all, the total course of the committee’s investigation exposed the extreme political nature of impeachment.” This is about the Watergate proceeding.

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1. Richard Ben-Veniste & George Frampton, Jr., *STONEWALL: THE REAL STORY OF THE WATERGATE PROSECUTION* (1977).

"The cumbersomeness of the process, its politicization, and the unwillingness of so many in Congress to recognize objectively the stark facts of criminal wrongdoing that were put in front of them make the Nixon impeachment case an unpromising precedent."<sup>2</sup>

Mr. Goodlatte continued:

Here is where I think you are so farsighted, more farsighted than anybody who has been before the committee today: "Next time, might it not be a potent defense for a President charged with wrongdoing to argue that his conduct, however improper, fell short of the spectacularly widespread abuses of the Nixon administration. If Watergate or more is what it takes to galvanize the impeachment mechanism, can we really rely on it to protect us in the future against gross executive wrongdoing?"<sup>3</sup>

I thank Representative Goodlatte for an excellent jumping-off point to begin a discussion of my perspectives on Watergate. My concern in 1977 was with the substantial partisan resistance to impeachment in the face of clear violations of law involving the President's abuse of the authority of his office. I never imagined that impeachment would be attempted under circumstances where the allegations of presidential misconduct boiled down to lying in a civil deposition about an illicit consensual carnal relationship.

## I. The Watergate Case

Let us remember that the Watergate case, unlike the roving congressional and independent counsel investigations virtually co-extensive with the Clinton presidency, started with a serious crime—the electronic bugging and burglary of the opposition political party by individuals closely tied to the sitting President.

In the aftermath of the arrests of the burglars, who were in the process of replacing a malfunctioning electronic device and photographing documents, an elaborate cover-up evolved, orchestrated by the White House Counsel, the President's Chief of Staff, the Chief Domestic Advisor, the President's personal lawyer, the former Attorney General, and others high up in the Administration, in order to obstruct investigators from obtaining evidence of the origins and sponsorship of the burglars' activities. The cover-up enjoyed the sometimes active cooperation of the Deputy Director of the CIA and the Acting Director of the FBI, and had the passive acquiescence of the new Attorney General.

It should be remembered that because of the overlap of personnel used in various other White House projects, the Watergate

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2. *Impeachment Inquiry: William Jefferson Clinton, President of the United States: Hearing Before the Comm. on the Judiciary House of Representatives, 105th Cong. 252 (1998).*

3. *Id.*

cover-up also served to shield against discovery of the White House link to the break-in of Daniel Ellsberg's psychiatrist's office in an attempt to smear Ellsberg, who faced trial for revealing the Pentagon papers; the misuse of the IRS, the FCC, and other agencies to punish those on Nixon's enemies list; the wiretapping of journalists; the forging of government documents; the proposed fire-bombing of the Brookings Institution; the surreptitious surveillance of political opponents; and the use of thugs to rough-up anti-war demonstrators. When one adds to that the misuse of the CIA to obscure the money trail in Watergate, the secret payments of hush money and promises of executive clemency to insure the silence of those already caught, the organized effort to commit perjury and destroy evidence, the description used by John Mitchell—"the White House horrors"—seems a particularly apt summary of how untethered from constitutional and lawful constraint the Nixon White House had become.

My post-Watergate concern about the process was based on the fact that the House Impeachment Committee had irrefutable evidence through the tape recorded advocacy of President Nixon himself—that payment of hush money to the burglars should continue—that even if it took a million dollars over the coming years, he was confident he could raise the cash. In this stunning March 21, 1973 conversation, Nixon rejected John Dean's proposal that he pull the plug on the cover-up and that the guilty parties in the obstruction of justice step forward and accept their punishment in the hope that such surgery would save the President himself from the lethal cancer Dean had diagnosed. Despite this and much, much more, ten Republican members of the committee voted against the resolution of impeachment. In fairness, they did ultimately withdraw their support for the President, but only when the so-called "smoking gun" tape was produced.

## II. Perspectives on Watergate

There can be no doubt that the public's regard for the presidency eroded dramatically during the last third of the twentieth century. The Vietnam War, the Watergate scandal, and the Iran-Contra affair were each events of varying seismic proportion in diminishing the credibility of the presidency at the point when President Clinton's wantonly selfish conduct, exacerbated by his semantic hairsplitting, provided his political enemies with the wherewithal—at long last—to launch their quest to remove him from office.

### A. Congress

As presidential authority waned in the years after Watergate,

Congress vastly expanded its investigative oversight over executive branch functions. Such investigations, with their concomitant leaks and hearings have become a regularly used weapon in Washington's political struggles. During the Clinton presidency, congressional committees have routinely issued extraordinarily broad subpoenas, whose intrusiveness would have been unthinkable twenty-five years ago. The level of partisanship observed in the impeachment of President Clinton exceeded anything seen in recent times, and routinely went far beyond anything experienced in Watergate. It was left to the Senate to restore some sense of proportionality to the Congress, through more dignified process and, of course, ultimate vote to acquit.

### **B. The News Media**

Media attention to the unfolding Watergate scandal was circumspect and slow in building, with the notable exception of the *Washington Post*. Media deference to the White House now seems a relic of the distant past, as journalism's pendulum has swung far off plumb.

The trivialization—the O.J. Simpsonizing—of the national media, with remarkably few exceptions, has led to the lowest public regard for journalism in recent times. As lines between news, political analysis and entertainment have all but vanished, it can be confidently said that while the media may be neither pro-left nor pro-right, it has demonstrated that it is implacably and uncritically pro-scandal. And as two Republican Speakers of the House recently learned, once the media sharks begin their feeding frenzy, those entering the roiling waters of conflict may find themselves on a one-way trip to Davy Jones' locker.

### **C. The Independent Counsel**

Archibald Cox and Leon Jaworski demonstrated that in high-level corruption investigations, the chief currency of the prosecutor is the credibility of the investigation. This credibility is comprised of the gravity of the allegation under investigation and the professionalism, objectivity, and fairness demonstrated by the prosecutor's actions. The very *raison d'être* of an independent counsel is the public's confidence in the integrity of the investigation. While Archie Cox was under virtually constant attack by the Nixon White House—culminating in his abrupt removal by the President—neither he nor our office responded outside the boundaries of our authority. There was never a leak of damaging information, even after the trauma of the Saturday Night Massacre and our receipt of the most explosively damning evidence—when the President was forced to turn over the

tape-recorded conversations subpoenaed by the grand jury.

When we transmitted evidence of obstruction of justice and subornation of perjury to the House Judiciary Committee, it was by way of motion to Chief Judge Sirica. The submission contained no advocacy or interpretation, much less any recommendation. Judge Sirica, in authorizing its submission to the Committee, found that the transmittal rendered no judgments, and that the grand jury had taken care to respect its own limitations and the rights of others. And that was the extent of our contact with the impeachment. Leon Jaworski would no sooner have injected himself into the impeachment proceedings by expressing an opinion—much less testifying—than he would have appeared before the Supreme Court in love beads and bell bottoms.

In the Whitewater independent counsel investigation, the currency of the investigation suffered a series of devaluations resulting from the realization that there was no cognizable criminal offense to investigate and from a series of incidents involving leaks of sensitive information, misuse of investigative resources, harassment of witnesses, and the perception that political considerations and personal moral judgments had overshadowed the mandate to conduct a fair and objective investigation into the existence of criminal misconduct. It was hardly surprising that after the Whitewater/Lewinsky experience, there was little support in the nation or on either side of the aisle in Congress for reauthorization of the independent counsel statute.

In sum, it is my view that, since Watergate, the pendulum has swung too far off center through the trivialization of the drastic remedy of impeachment, the over-intrusiveness of congressional investigation of the executive for partisan political motives, the over-dramatization by the media of the significance of political scandal, and by the misapplication of the awesome powers of the independent counsel through the overzealous pursuit of the targets of investigation.

While ours is a government of laws, it must also be recognized that the effectiveness with which our laws are enforced and the public's confidence in the fairness of the system are dependent in no small degree on the ability, integrity, and judgment of those individuals entrusted with the authority to investigate and prosecute.

To return to Representative Goodlatte's unsolicited testimonial for my musings of two decades ago, let me close with two additional observations from the epilogue of *Stonewall*:

The independence of the Watergate Special Prosecution Force and the vitality of the criminal-justice system would have been for naught without the political accident that yoked President Nixon's fortune in May of 1973 to a man of integrity and independence like

Cox. It was Cox's resolve to mount a truly thorough investigation that made the system work, not the charter insisted upon by the Senate Judiciary Committee. Had Cox been less adamant about assembling a highly professional staff, and we less intent upon using our power cautiously and responsibly, the effectiveness of our investigation could have been undercut by a political backlash long before any indictments were returned.<sup>4</sup>

Neither Congress nor the Executive has shown much interest in acting upon the recommendations made by the Ervin Committee, the Special Prosecutor or others who have studied Watergate closely. Congressional attempts to reduce the corrupting role of money in politics by legislating campaign-financing reform have been wrapped up in the members' narrow self-interest as much as the interest of our public weal. . . . [W]e are far better at exposing the errors of the past than at working meaningful changes in the system to insure that the same wrongs do not recur.<sup>5</sup>

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4. STONEWALL, *supra* note 1, at 394.

5. *Id.* at 393-94.