

Baby Boomer Cultural Wars

Geoff Shepard
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[Written in February of 2009 in response to a question posted as a follow up to the Frost/Nixon essays, but not previously published elsewhere.]

Both movie and stage play versions of *Frost/Nixon*, while winning wide acclaim, have triggered questions as to the historical accuracy of their portrayal of former President Nixon. Similarly, a recent front page story in *The New York Times* reported on a long-simmering controversy over the accuracy of transcripts of Nixon's White House tapes first published in 1987.

What is it about Nixon—and particularly about Watergate—that engenders such continuing controversy? Here is one possible explanation.

There is a segment of our population that was radicalized by its opposition to the Vietnam War—and for whom elements of that opposition it remains the defining event in their cultural being. For the most part, this is the group of males (and the women who admired them) who were subject to the Selective Service draft during the height of the War: roughly speaking, those born between 1943 and 1950, and hence draft-eligible between 1964 and 1969 (after which the lottery removed the uncertainty of being drafted).

For some in this group, the challenge to all authority figures made it difficult to later hold positions in a capitalistic system, so they found their ways into academia and the creative arts (including journalism)—where they have garnered far more influence on our culture and succeeding generations than might otherwise have occurred.

For most males in this segment, every major decision of that era was made with one eye on its potential impact on the likelihood of being drafted. Did you stay in college? It was an automatically guaranteed deferment. Did you go immediately to graduate school? As long as you made 'satisfactory progress', it kept you out of the draft. Did you get married? That would qualify you for a different deferment. Because individual draft boards had to meet specific quotas, however, there were frequently different standards being enforced. In some localities, for instance, marriage was not enough—you also had to have had a child to qualify.

Having lived through that era (and having chosen to join an Army ROTC program to assure my completion of law school), I have college classmates—and very good friends—who became conscience objectors, fled to Canada (never to return), obtained medical disqualification (the enviable 4F classification) or berated their teachers for passing grades to stay in college.

After all, being drafted meant going to Vietnam and going to Vietnam meant near-certain death. Thus, opposing the War and resisting the draft were seen as life or death matters—especially since this was the first war where the horrors of battlefield realities were broadcast nightly into America's living rooms.

For this group of baby boomers, there simply is no possibility of rational discussion of that War or admission of any other interpretation of events.

- You cannot suggest that one of President Nixon's foreign affairs achievements was bringing about its honorable end; that there were over 500,000 American troops in Vietnam when he took office and less than 250 when he left. No, Nixon 'prolonged' the war to help with his re-election.
- You cannot suggest that Henry Kissinger negotiated ably and well during that same period. No, Kissinger is a war criminal—who still hasn't been brought to justice.
- You cannot suggest that the Tet Offensive was a military disaster for the North Vietnamese and that the War was lost because of political opposition at home and Congressional initiatives designed to cut off support for the South Vietnamese. No, the War was a mistake from the outset—but certainly not the fault of President Kennedy, who first put troops there.
- And you certainly cannot suggest that the War was another in a series of skirmishes in which the world's superpowers sought to expand their influence through support of dissident factions in various locations. No, Vietnam was a civil war which the North had every right to pursue, even though relying on extensive support from China.

Perhaps as bad, it has become a cultural imperative for this group to actively oppose any US intervention that might result in another such war. The most cogent example of this was the situation faced by the Congress when President George H. W. Bush requested a declaration of war following Iraq's Kuwait invasion in the early 1990s. The debate was highly instructive as prominent Democrat after prominent Democrat announced why they simply could not vote to go to war—even for a US ally invaded without provocation.

And, even today, one of Israel's major challenges is that this same feeling results in lingering opposition to any military support for their survival: it is becoming more and more apparent that they are unwise to count on overt, active military support from a Democratically controlled United States government.

And, such it is with any debate over the presidency of Richard Nixon. He is seen by this segment of our citizenry as the personification of the Vietnam War—and therefore as inherently evil. As a consequence, there is almost no hope of rational discussion of different aspects of his presidency—even thirty years after his resignation.

I have written before on this, but the distortions of the *Frost/Nixon* movie and the lost impact of Deep Throat's true identity on the movie version of *All the President's Men* are dismissed as inconsequential because Nixon was a crook—and anything that suggests otherwise is not worthy of calm consideration, but to be denounced and dismissed as mere rantings of a former member of his White House staff.

The most recent event in the ongoing saga of Watergate is Peter Klingman's rather forceful accusation that Professor Stanley Kutler fudged on the transcripts of Nixon's White House tapes reproduced in his 1997 book, *Abuse of Power: the New Nixon Tapes*. One indication of the importance of the debate is that it received rather prominent coverage in *The New York Times*, not otherwise known for even-handed reporting on this subject matter. Let me assure you that there is much more to come on the validity of transcripts of the White House tapes and it will be fascinating to watch how it all unfolds.

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Someone asks, "Did Nixon actually break any laws? Whenever his name comes up, everyone calls him a crook. When I ask them what law he broke, no one knows," and is dismissed as just not getting it.

For the record, in late July of 1974, the House Judiciary Committee adopted articles of impeachment for obstruction of justice (Article I), misuse of powers (Article II) and failure to comply with House subpoenas (Article III). Nixon resigned in the face of certain impeachment by the full House—and the substantial likelihood of conviction after trial before the Senate.

Impeachment, of course, is a political act—and does not constitute conviction in a court of law. It is said that the Deputy Special Prosecutor, in that one month between Nixon's resignation and his pardon by President Ford, asserted that there was not sufficient evidence to bring a criminal case against the just-resigned President—but we shall never know what might have happened, because Ford's pardon precluded any indictment. Nixon did state, in his nationally televised press conference on November 17, 1973, Nixon said

People have got to know whether or not their President is a crook. Well, I'm not a crook. I've earned everything I've got.

This is why his many of his critics so much enjoy asserting the contrary.

What is so interesting—and exemplary of this ongoing cultural wars left over from the Rebellious '60s is that a cogent argument can be made that Nixon was unfairly hounded from office—figuratively, the last victim of the Vietnam War.

Here, in very summary form, are the underpinnings of that argument, taken in reverse order:

- Article III (Failure to comply with House subpoenas): This is easily the weakest of the three articles. The House of Representatives can demand whatever it wants from its co-equal branch, but courts have consistently ruled that the President need not comply. The Supreme Court's ruling on the White House tapes was that they had to be turned over to Judge Sirica for review of claims of executive privilege before being turned over to the Watergate Special Prosecutor for use in criminal prosecutions. Earlier, separate decisions had already ruled against the House and Senate.

- Article II (Misuse of power; violation of oath of office): The separation of powers dictated by our Constitution presupposes Legislative-Executive clashes over a wide range of issues. Indeed, there are a whole series of articles in The Federalist detailing concerns of how an aggressive Legislature would seek to undermine the Executive Branch—but reiterating that their decision that the uncertainties of foreign aggression required that responsibility for conduct of foreign affairs be centralized—in the main—in the President.

Two post-Watergate developments seem to undermine this Article

- Revelations from the Church Committee hearings suggest that steps taken by President Nixon differed little from those of his predecessors, at least back to World War II. During that period, both the CIA and the FBI were engaged in surveillance activities unauthorized by court order (i.e.: without search warrants): The FBI undertook an average of 125 black bag jobs each year and some 125,000 first class letters were opened and reviewed, all without prior court approval. An Attorney General opinion from the 1950s authorized such actions in the name of national security—and the FBI operated under a clear distinction between wiretaps (which required court authorization) and listening devices unconnected to a telephone line (i.e.: bugs) that didn't.
- Publication of a book, authorized--but then suppressed--by the House Judiciary Impeachment Inquiry staff that detailed Presidential clashes with Congress stretching back to George Washington. (Woodward, C. Vann, Ed. *Responses of the Presidents to Charges of Misconduct (Including Accusations of High Crimes and Misdemeanors from George Washington to Lyndon Johnson): An Authoritative History Requested by Counsel John Doar for the Impeachment Inquiry Staff Investigation*. New York: Delacorte Press, 1974)

In the words of Renata Adler, one of Hillary Rodham's Yale Law classmates who also served with her on the Impeachment Inquiry staff,

In view of the Church Committee's account of the conduct of previous administrations, including violations of law and abuse of power since at least 1936, the first two Articles seemed to dissolve. The problem with all three Articles, and with their accompanying Summary of Information and Final Report, and with the thirty-odd volumes of Statements of Information, . . . all those volumes never quite made their case or any case. [Adler, Renata. "Searching for the Real Nixon." *Atlantic Monthly*, December, 1976, p. 78]

There also are two books worthy of note that suggest entirely different interpretations of events culminating in the Watergate break-in: Secret Agenda: Watergate, Deep Throat, and the CIA by Jim Hougan (Random House, 1984) and Silent Coup, The Removal of a President by Len Colodny (St. Martin's Press, 1991). The former suggests the CIA was deeply involved in the caper and happy to see a President they distrusted brought down. The latter suggests John Dean's involvement, on behalf of his then-

fiancée, Maureen Dowd, is the real key to understanding the rationale behind the Break-in. Both are well worth reading.

- Article I (Obstruction of Justice): In spite of Adler's dismissal, this Article requires greater explanation—since it lies at the very heart of the Watergate scandal. The accusation that Nixon knowingly participated in a conspiracy to obstruct justice—executed, in the main by White House Counsel, John W Dean is grounded in three factual elements:
 - Dean's Testimony: John Dean testified at the Ervin Committee hearings that, while he did not personally inform the President of his cover-up actions, he had come to the conclusion—based on his knowledge of the situation—that the President must have known from others (i.e.: Bob Haldeman). Dean also was lead prosecution witness at the Cover-up trial and testified extensively against Haldeman, John Ehrlichman and John Mitchell.
 - The Smoking Gun Tape: Release of the tape of the June 23, 1972 Nixon/Haldeman conversation, during which the President clearly authorizes Haldeman to pursue Dean's suggestion of getting the CIA to stop FBI interviews of Watergate-related figures, is unambiguous confirmation of an obstruction of justice. Its public release, on August 5, 1974 (following the Supreme Court's decision) led to President Nixon's announcement of resignation three days later.
 - Dean's Cancer on the Presidency Tape: The transcript of this tape (from March 21, 1973) was released by the White House on April 30, 1974. In it, the President clearly toys with the idea of meeting Howard Hunt's monetary demands, which Dean describes as blackmail. There is no resolution in the taped conversation itself and the White House maintained the issue disappeared when it was ascertained later that afternoon that Dean was unaware that Mitchell had authorized Hunt's partial payment the day before. The Watergate Special Prosecutor, however, learned that delivery of Hunt's payment did not actually occur until the evening of March 21st—allowing the possibility that Nixon's staff had following his clear inclination and authorized meeting Hunt's blackmail demands.

Perhaps surprisingly, events and discoveries of the past thirty years, allow a somewhat different analysis. This essay is not the proper place for a full discussion, but here is a sample of the more detailed response:

- John Dean Testimony: Dean's Ervin Committee testimony occurred before public knowledge of the White House taping system. When reviewed—and in spite of his much ballyhooed memory—an analysis by the Special Prosecutor documents no less than nineteen different instances where his testimony differed substantially from or was not supported at all by relevant tapes. Moreover, different documentation in those same files reveals that Dean's statements to career prosecutors 'changed dramatically' over the course of a month of interviews—from no mention of a conspiracy or involvement of Haldeman, Ehrlichman or Nixon, to his later claim that they were all in it

together. Needless to say, a changed story by the principal accusing witness can really blow a hole in a prosecutor's case. Perhaps this is why such exculpatory evidence was kept from defense counsel.

- The Smoking Gun Tape: As it develops, the effort to stop the FBI from “going in an entirely new direction” was to prevent possible disclosure of substantial campaign contributions from two prominent Democrats. Interviews of their intermediaries were postponed for nine days and—when interviewed, it was determined that no law had been broken. While this may literally constitute an obstruction of justice, it is not one that would ever be prosecuted. What is key to understanding this, however, is the appreciation that the Nixon and Haldeman's motivation to accept Dean's suggestion concerning the use of the CIA clearly differed substantially from Dean's own motivation to bring about a successful cover-up.
- Dean's Cancer on the Presidency Tape: The idea that Haldeman instructed Mitchell to authorize Hunt's payoff is simply wishful thinking on the part of the Watergate Special Prosecution Force. The White House voluntarily released this tape of its own accord—after assuring itself that Dean had misinformed the President about the status of Hunt's blackmail demands (because he not yet been informed of Mitchell's advice to pay a portion of Hunt's monetary demands). Even John Dean never accused his White House colleagues of instructing Mitchell to make the payoff.

Just where does this leave us? If the factual underpinnings lack substance, how was a sitting President driven to resign?

At the risk of setting off another ‘firestorm of protest’, allow me to briefly summarize an alternative interpretation of events (which is laid out in considerable detail in my recent book).

First, it is abundantly clear that neither Nixon, Haldeman nor Ehrlichman knew of the break-in in advance—but White House counsel, John Dean, had participated in meetings with Attorney General Mitchell that put him at risk of prosecution.

When the White House learned of Mitchell's risk, he was removed as head of Nixon's re-election campaign (CRP) within two weeks of the Break-in. Dean would have faced the same immediate fate, but he kept his risk of prosecution from his White House superiors, telling them instead that no one on the White House staff knew of the break-in in advance. While perhaps technically true, Dean certainly knew of Liddy's campaign intelligence plan (since he was assigned responsibility for its origin and personally recruited Liddy for that job)—and that Liddy's plan envisioned bugging Democratic National Committee headquarters.

Second, instead John Dean was assigned responsibility for keeping on top of the investigation—and for being sure potential problems stayed at CRP, which at the very least was a separate entity from the White House itself.

Instead, Dean cast his lot with others at CREP who also were in great danger of prosecution and became—in his own words—the ‘chief desk officer’ for the cover-up. He consistently advised the White House that no clean breast of things could be made, since that would undermine legal positions already taken by various CRP officials. In essence—and in my belief—he sucked his White House superiors into his ongoing criminal cover-up.

Third, career prosecuting attorneys in the US Attorney’s office in the District of Columbia (Earl Silbert, Seymour Glanzer and Donald Campbell) broke the cover-up case—and its collapse caused Dean not only to switch sides and offer up his former colleagues by becoming a prosecution witness, but to retain a Kennedy clan intimate as his criminal defense counsel. He also took many files from the counsel’s office—which he shared with prosecutors and Kennedy clan Democrats in his effort to obtain a lesser sentence.

Fourth, Kennedy clan Democrats used this opportunity to impose a Special Prosecutor, whose senior staff consisted almost entirely of lawyers who had worked together in Robert Kennedy’s Department of Justice. They removed the career prosecutors, postponed their promised comprehensive indictment for over eight months, and built an investigative staff of almost a hundred people that soon launched a series of investigations unrelated to the Watergate cover-up—including developing information on at least five potential Republican opponents in the 1976 election and sending FBI and/or IRS agents to interview over 150 Republican contributors to the 1970 bi-elections—with the goal of paving the way for Ted Kennedy to run for President and restore the Kennedy political dynasty to power.

Finally, Dean was essentially set free in exchange for his changed testimony against Mitchell, Haldeman and Erlichman—and the required notice of his ‘dramatically changed’ testimony was kept hidden from their defense counsel.

While I certainly didn’t expect my arguments—accompanied with an Appendix of over two dozen documents from Watergate Special Prosecution Force files—to be persuasive to everyone, especially after three decades of silence, I at least thought publication would lead to more serious academic debate.

We’ll just have to wait and see about my generation’s toleration for different points of view. In a sense, I very much agree with Barack Obama’s point that we need to get beyond this continued debate over the Vietnam War that continues to poison our political landscape. I must say, I feel somewhat sorry for following generations who have no real understanding of the passions and life-changing events of that era—including the assassinations, inner-city riots and protest marches recently recalled in Tom Brokaw’s book, Boom!

For my own part, however, I plan to continue to speak out in defense of our thirty-seventh president. In the near term, this will include raising new issues that challenge the validity of the

Watergate Cover-up verdicts (where another book is under preparation) and the correctness of White House tape transcripts (where I am especially sensitive, having been—as one of President Nixon’s defense attorneys-- the object of a 1975 criminal investigation).

Geoff Shepard holds degrees from both Whittier College (Nixon’s alma mater) and Harvard Law School. Following graduation, he spent five years on Nixon’s White House staff; first, as a White House Fellow and then as a member of the Domestic Council staff. He also functioned as Fred Buzhardt’s principal deputy during the Watergate defense effort, where his duties included finalizing transcripts of the White House tapes being released to the House Judiciary Committee and to the public. His book, *The Secret Plot to Make Ted Kennedy President, Inside the Real Watergate Conspiracy*, was published last year by Penguin Sentinel.