U.S. v. NIXON, 50 YEARS LATER

Written by Dan Lawton*

In March 1973, at age 11, I got hit by a car while crossing Chapman Avenue in Fullerton. I was on my Schwinn bike. My dad and brothers were waiting for me on the other side of the street. We were on our way to Carl's Jr. for lunch. I was in the crosswalk, but I didn't look both ways, and I never knew what hit me. I wound up at St. Jude Hospital for six weeks in traction, then the treatment for a boy with a broken femur, tibia, and fibula. After that I went home in a body cast that went from chest to toes. My parents rented a hospital bed and installed it on their screened-in back porch. There I spent the next six weeks on my back. Today someone in my condition would be up and around and in a walking cast, but back then that was what they did to you. Family and friends expressed sympathy at my predicament. I didn't consider it to be that bad. Not having to go to school or do chores, and being waited on hand and foot by my mom, seemed too good to be true. My parents had a small black-and-white TV with a pair of rabbit ears. They set it on a table at the foot of the bed. I was in heaven.

The start of my six weeks encased in plaster coincided with the opening of the hearings of the Senate Select Committee on Presidential Campaign Activities in Washington, D.C. The three national TV networks offered gavel-to-gavel coverage of the proceedings every day.

Ours was a Nixon household. My dad had grown up poor in Bellflower and put himself through college. Richard Nixon had grown up in Yorba Linda and Whittier, attended Fullerton High School, and, for a time, practiced law out of a small office nearby. My dad admired Nixon as a lot of other Americans did, as a self-made man who had succeeded with no money of his own and zero advantages going in, the antithesis of the rich and powerful Kennedys. As a kid whose knowledge of American law and politics was next to nil, I had no reason to question my father's esteem for the 37th president of the United States. Confined to bed and free of any responsibilities, with my brothers at school most of the day, I focused on the little black-and-white TV down at the foot of the bed.

What came out of it was, to me, extraordinary. A stern-looking panel of senators stared across a green felt table at a young man seated in front of a battery of microphones. The young man was John Dean, a lawyer who worked at the White House. The cameras had found his wife, Maureen, a pretty blonde woman who wore her hair in a ponytail and sat, stoic, poised, and silent, behind Dean. Her husband spoke in a deep baritone and read out a long written statement that spanned several days. Occasionally, the committee's chief counsel, a law professor named Sam Dash, whispered in the ear of the committee chairman, Sam Ervin.

Dean's tale had its genesis in the wee hours of June 17, 1972, in the Watergate, a mixed-use office and residential complex in Washington,

D.C. On that night, a 34-year-old security guard named Frank Wills, walking his rounds alone during the small hours, had made an odd discovery: a piece of duct tape covering the lock of a door which led to a parking lot. He removed the tape and continued on his rounds. When he returned 30 minutes later, another piece of tape covered the same lock. Wills called police, who entered the building and quickly discovered five men hiding in the offices of the Democratic National Committee. They had been sent there by President Nixon's re-election campaign committee, to copy documents and bug the phones.

You probably know the rest. President Nixon and several henchmen, including Dean, tried to cover up the connections between the Nixon re-election campaign and what the president's press secretary, Ron Ziegler, disdainfully called "a third-rate burglary." They paid hush money to the burglars, suborned perjury, and destroyed evidence. They tried to discourage the FBI from investigating the matter.

By the time senator Ervin convened his committee in May 1973, Nixon had already coasted to re-election by a lavish margin six months earlier. But, to Senator Sam Ervin and his colleagues, that mattered not. What mattered was whether the president and his men had committed "illegal, improper, or unethical conduct . . . during the Presidential campaign of 1972, including political espionage and campaign finance practices crimes." The Senate had put them to work about a month before my accident, given them a $500,000 budget, and directed them to turn in a final report by February 28, 1974.

I watched the hearings every day while my dad was at work and my brothers at school. Mornings, I devoured the *Los Angeles Times*, which covered the proceedings closely.

In the meantime, a jury convicted the burglars. The judge, John Sirica, sentenced all of them to federal prison. Eventually, a grand jury indicted the Attorney General, John Mitchell, and several other White House officials for conspiracy to defraud the government and obstruct justice. Nixon himself was named as an "unindicted co-conspirator."

What changed everything that happened after that was the tapes.

Nixon, as compulsive and secrecy-obsessed as any man who had ever been president, had had the Secret Service install a clandestine audiotaping system in the Oval Office, in a hideaway office he kept across the street in the EOB, in the Cabinet Room, and at Camp David. The sound-activated system captured all telephone and in-person conversations within range of the microphones on Sony open-reel tape recorders. Nixon had the system turned off in July 1973, after the Ervin committee had exposed its existence to the world. But, by that time, he'd recorded plenty of evidence of his own criminal conspiracy.

The special prosecutor, Archibald Cox, subpoenaed the tapes. Nixon fired Cox. Then he had his lawyers move to quash the subpoena, but Judge Sirica said no. The case wound up in the U.S. Supreme Court, with an expedited briefing schedule the court said was dictated by the "public importance of the issues presented and the need for their prompt resolution."

In July 1974, the situation was unprecedented. The court had never before defined the scope of the federal courts' power to enforce a subpoena for the president's confidential communications in a criminal case.

As an able lawyer who boasted a little Supreme Court experience himself, Nixon had to like his odds. Five of the Justices had been nominated by either Dwight D. Eisenhower or Nixon himself, and Nixon had nominated one of them, Warren Burger, to be Chief Justice only five years earlier. That a majority of the Justices would rule that the president had to turn them over just because a prosecutor wanted them seemed hard to imagine.

By the summer of 1974, the three months I'd spent flat on my back was a distant memory. But Nixon and Watergate were still on my mind. My dad's zeal for the president had waned severely. It had something to do with transcripts of the tapes, which Nixon had heavily edited and released as a sop to prosecutors and the public in lieu of voluntarily parting with the tapes themselves. The national media had gleefully cherry-picked and reported excerpts of the transcripts. Where not redacted with the prim euphemism "expletive deleted," the transcripts reflected the president's use of terms like *cocksucker* and *bullshit* and *Christ* and *goddammit* and *the Jews are all over the government*. To my dad, a devoutly religious man who had uttered a curse word in my presence once in my life and admired Nixon since his own childhood, this was gravely shocking.

So was what happened at oral argument at the Supreme Court on July 8, 1974, when James St. Clair took the lectern on behalf of Nixon, to argue that executive privilege put Nixon's tapes beyond the subpoena power of the federal courts.

Courtroom lawyers didn't come any bigger and badder than St. Clair, a giant of the Boston bar and a partner of the venerable law firm Hale and Dorr. But the Justices seemed deeply skeptical of his argument. To Thurgood Marshall, the issue was simple: didn't the federal courts have the power to enforce their own subpoenas in a criminal case, albeit one involving the president?

> Marshall: Can this Court decide what's necessary for trial of a criminal case?
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> St. Clair: It can, sir, with respect to third parties, but it should not involve itself with the executive function of prosecuting the case.
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> Marshall: My only question was, that this is a subpoena *duces tecum* that was issued by a judge. Right?
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> St. Clair: Yes, sir.
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> Marshall: Slightly judicial.

(P. Irons & S. Guitton, May It Please the Court (The New Press 1993) p. 31.)

Only 16 days later, the court published its decision. The Justices were unanimous. By an 8-0 vote (Rehnquist, who had formerly worked for Mitchell, recused himself), the court rejected executive privilege as a basis for resisting the subpoena. Nixon hadn't asserted any need to protect military, diplomatic, or sensitive national security secrets. He'd only argued broadly that forced production of his confidential conversations would be "inconsistent with the public interest." Nonsense, said the court. A generalized interest in confidentiality couldn't prevail over the fundamental demands of due process of law in the fair administration of a criminal case by a federal judge. The concluding line of Justice Burger's opinion added that the mandate would issue "forthwith." Nixon had to produce the tapes, and now. (*United States v. Nixon* (1974) 418 U.S. 683, 716.)

For Nixon, it was the end of the road, legally speaking. One of the tapes, the so-called "smoking gun," clearly showed Nixon trying to shut down the FBI's investigation of Watergate. It was obstruction of justice all right, and it showed Nixon had been lying to the nation all along. Nixon quit, said goodbye to his White House staff in a heartfelt tearjerker of a speech that might have touched the cold heart of even the most rabid Nixon-hater, boarded Marine One on the south lawn of the White House, and decamped to his house in San Clemente, a few miles south of where we lived.

John Dean is eighty-three years old, living in Los Angeles, and still married to Maureen. In May of 2022, I was stunned when he agreed to be interviewed for this article. He remains active, lecturing at USC, producing a recently-released documentary about Watergate on CNN, and writing about the uses and abuses of executive power by our presidents. I asked him what lessons Watergate holds for lawyers today, be they young or old, fifty years after Frank Wills found the tape on the door at the Watergate in the middle of the night and called the police.

"Number one is, truth is the only route to go for everybody in these situations," he said. Had Nixon only told the truth at the outset, he'd have finished his second term, and the word *Watergate* would have never entered the national lexicon as a synonym for corruption, lying, and criminality at the highest level of the U.S. government.

Another lesson, Dean said, was competence.

"One of the things Rules of Professional Conduct says is, 'If you're not competent, you shouldn't be practicing law.' One of the first things I did after the arrests at the Watergate was to tell [counsel to the president John] Ehrlichman, 'We've got to hire a criminal lawyer. We don't know what the hell we're doing. I don't have a criminal lawyer on my staff. To my knowledge, you don't have any knowledge of the criminal law, and we're going to make a mistake if we're not careful here.' And, boy, we made every mistake you can make, and for that very reason."

I asked Dean what Nixon might have done had he not resigned and flown to San Clemente on August 8, 1974, cutting short his second term in order to avoid the inevitable impeachment and conviction in the Senate.

"I think there would have been even more aggressive use and abuse of the presidency and its powers for what we might broadly describe as political evil," Dean replied. "Nixon was increasingly using the IRS to audit his enemies. He was frustrated by the Congress in some of his appointments. I think it would have just gotten worse. Watergate was a good thing, in a sense. Because for at least a couple decades there were some checks on the presidency and it certainly made several generations more conscious about the problems of a president who abuses powers.

"Candidates run for office and they talk about abuse of presidential powers . . . I'm thinking Obama, for example. Did you see him turn any powers away, or back in? No, they don't. The powers stay there, and the presidents use them. Then you have an accumulation of those powers. When the separations frustrate those powers, presidents seem to abuse them. We're at a point now where the system doesn't really work well at all."

I thought about what that meant: Mass secret surveillance of American citizens by the executive branch. Torture of suspected terrorists and enemy combatants in secret prisons by federal agents. Men confined for years without charges or trial at Guantanamo Bay. Women, children, and other innocents killed by missiles launched in secret by CIA-piloted drones thousands of miles away and declared *collateral damage*. The imposition of martial law and a forced do-over of the 2020 presidential election. That last didn't happen – but, if the former national security adviser to president Donald Trump, lieutenant general Michael Flynn, had had his way, it would have.

Ten years after my broken leg and Ervin committee TV binge, I started law school at Georgetown. One of the professors was Sam Dash. I never took any of his courses. I should have made an appointment with him during his office hours, just to thank him for the work of his committee during 1973 and 1974. But, like a lot of law students, I was too preoccupied with my own little world to take the time.

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