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HOWARD H. BAKER, JR.: A LIFE IN PUBLIC SERVICE A Special Issue

PREFACE AND OVERVIEW

HOWARD H. BAKER, JR. AND THE PUBLIC VALUES OF COOPERATION AND CIVILITY:

A Preface to the Special Issue

Theodore Brown, Jr.

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An Overview

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IMAGES FROM A LIFE IN PUBLIC SERVICE

APPENDIX:

Selected Speeches, Remarks, and Articles



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THE SENATE WATERGATE COMMITTEE:

Its Place in History and the Discovery of the White House Tapes

James Hamilton¹

INTRODUCTION

I am pleased to be here to honor Senator Howard Baker, with whom I worked closely during the Watergate Committee's investigation and whom I have long admired.

My topic is the Senate Watergate Committee and its place in history, a place secured in part because of its discovery of the White House tapes. I want to tell you about how those tapes were discovered, because it is a good tale and because it also illustrates some of the broader points that I want to make this morning.

Watergate is a topic that I know first-hand for it consumed a year-and-a-half of my life. It was a time of little sleep and greatly reduced social life. It was a time when my tennis game went to hell.

It was also a unique experience. My main assignment, being responsible for the investigation of the Watergate break-in and cover-up, was at the time about the best job for a young lawyer in America. I very much appreciate being given that opportunity by Senators Sam Ervin and Howard Baker, and Chief Counsel Sam Dash.

I. THE WATERGATE HEARINGS IN HISTORICAL CONTEXT

Congressional investigations, of course, have played a significant role in American life for most of the nation's history.² That point can be made just by mentioning a few of the major investigations of the last century. Indeed, to recall their names is to remind that congressional investigations are very much the stuff of our history.

In the years 1912-1913, there were the "Money Trust" investigations by a House Banking and Currency Subcommittee. These investigations focused on concentrations of economic power in the hands of men such as J.P. Morgan and John D. Rockefeller and led to the passage of major antitrust laws—the Clayton Act and the Federal Trade Commission Act.³

In the early 1920's, the Senate investigated the Teapot Dome bribery and graft scandals in the Harding Administration, which involved both the Attorney General

¹ James Hamilton is a partner in the Washington office of Bingham McCutchen LLP and was Assistant Chief Counsel of the Senate Select Committee on Presidential Campaign Activities—the Senate Watergate Committee.

² On congressional investigations generally, see JAMES HAMILTON, *THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS* (1976); James Hamilton, Robert F. Muse, & Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115-76 (2007).

³ For the Money Trust investigation, see HAMILTON, *supra* note 2, at 6-7; JOEL SBLIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 51 (1982); TELFORD TAYLOR, *GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 63-65* (1955).

and the Secretary of the Interior.⁴ Will Rogers branded the scene the "great morality panic of 1924."⁵

In the 1930's, in a precursor of the investigations of recent times, the Senate Banking and Currency Committee, led by the committee's chief counsel, Ferdinand Pecora, examined manipulations of the stock market during the Great Depression. The result was the passage by Congress of the major securities legislation that governs the markets today.⁶

Starting in 1938 and running past mid-century were the so-called "loyalty investigations," which sought to discover the extent of Communist activity and influence in American life. These investigations often used methods now held in disrepute. The investigative abuses of Senator Joseph McCarthy, who chaired the Senate Committee on Government Operations, were revealed in the explosive Army-McCarthy hearings. Eventually McCarthy was condemned by the Senate for his conduct. Richard Nixon first came to prominence during the House Un-American Activities Committee's investigation of accused Soviet spy Alger Hiss.⁷

More useful were the 1950-51 hearings of the Senate Special Committee to Investigate Organized Crime headed by Senator Estes Kefauver of Tennessee, which examined the illicit activities of many gangland figures, such as crime boss Frank Costello. These were among the first, and most significant and widely viewed, of the early televised congressional hearings.⁸

During 1987, there was the Iran-Contra investigation conducted jointly by select committees of both houses of Congress. This investigation concerned the sale of arms to Iran and the distribution of the proceeds to rebels in Nicaragua.⁹ They made the scheme's mastermind, Marine Colonel Oliver North, a national figure.

In the 1990's, there was a spate of investigations:

- The 1990-91 Keating Five hearings by the Senate Ethics Committee, which examined whether five prominent senators had improperly

4 For the Teapot Dome investigation, see HAMILTON, *supra* note 2, at 7.

5 *Id.* at 7; BURL NOGGLE, *TEAPOT DOME: OIL AND POLITICS IN THE 1920S* at vii (1962), quoted in Gary A. Fine, *Reputational Entrepreneurs and the Memory of Incompetence: Melting Supporters, Partisan Warriors, and Images of President Harding*, 101 *AM. J. SOCIOLOGY* 1159, 1174 n.17 (1996).

6 For the Pecora investigation, see HAMILTON, *supra* note 2, at 7-8; TAYLOR, *supra* note 3, at 65-67.

7 For the McCarthy investigations and the House Un-American Activities Committee's hearings, see HAMILTON, *supra* note 2, at 8-9; see also TED MORGAN, *REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA* 187-222, 428-504 *passim* (2003); THOMAS C. RBEVBS, *THE LIFE AND TIMES OF JOE MCCARTHY* 207-15, 459-637 *passim* (1982).

8 For the Kefauver Committee's investigation of organized crime, see HAMILTON, *supra* note 2, at 9-10; CHARLES L. FONTBAY, *ESTES KEFAUVER: A BIOGRAPHY* 164-186 (1980); TAYLOR, *supra* note 3, at 240. For a generally negative view of the Kefauver Crime Committee, see WILLIAM H. MOORE, *THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME, 1950-1952* (1974).

9 For the Iran-Contra investigation, see *Report of the Congressional Committees Investigating the Iran-Contra Affair: Hearings before the H. Select Comm. To Investigate Covert Arms Transactions with Iran and the S. Select Comm. On Secret Military Assistance to Iran and the Nicaraguan Opposition*, 100th Cong., 1st Sess., H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1987).

done favors for savings-and-loan mogul, Charles H. Keating, Jr., who had contributed heavily to all of them.¹⁰

- The 1991 confirmation hearing of Supreme Court Justice Clarence Thomas, which heard allegations of sexual harassment by his former aide, Anita Hill.¹¹
- The campaign finance hearings held in 1997 by the Senate Committee on Governmental Affairs, chaired by Senator Fred Thompson (R. Tenn.), which involved, *e.g.*, the extent of foreign money that made its way to the Clinton reelection campaign and business-as-usual events such as a fundraiser at a Buddhist temple.¹²
- And finally, the impeachment proceedings against President Clinton.¹³

Congressional investigations continue unabated in this century. Just in the last several years there have been major investigations into our latest financial crisis and the recent oil spill in the Gulf of Mexico.¹⁴ And now that the Republicans have taken control of the House, many investigations into the conduct of the Obama Administration may follow.

II. THE WATERGATE COMMITTEE INVESTIGATION

A. *The Significance of the Watergate Investigation*

But none of these other investigations, as momentous and important as they may have been, concerned more significant issues or commanded the attention of the nation more than the Senate Watergate Committee investigation. None dealt more with the fabric of what we are as a nation, and none were conducted with more success. Let me spend a little time considering why all of this was so.

10 For the Keating Five hearings, see http://topics.nytimes.com/topics/reference/timestopics/subjects/k/keating_five/index.html.

11 For the Thomas confirmation hearings, see Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 *Geo. Wash. L. Rev.* 969 (1992); Donald P. Judges, *Confirmation as Conscientiousness-Raising: Lessons for the Supreme Court from the Clarence Thomas Confirmation Hearings*, 7 *St. John's J. Legal Comment.* 147 (1991).

12 For the Senate Governmental Affairs Committee's campaign finance investigation, see *Final Report of the Senate Committee on Governmental Affairs: Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, 105th Cong., 2d Sess., S. REP. NO. 105-167 (1998).

13 For the Clinton impeachment proceedings, see *THE IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON: THE OFFICIAL TRANSCRIPTS, FROM THE HOUSE JUDICIARY COMMITTEE TO THE SENATE TRIAL* (1999).

14 For the congressional investigations into the financial crisis and the Gulf oil spill, see, *e.g.*, U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, 111TH CONG., *WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE* (2010); Jim Snyder, *Congress Opens Probe into Gulf Coast Oil Spill*, *THE HILL*, May 10, 2010, available at <http://thehill.com/blogs/e2-wire/677-e2-wire/96865-congress-opens-oil-spill-probe>.

Part of the reason, of course, was the magnitude of the wrongdoing being investigated. Watergate, it must be remembered, involved not just the break-in at the Democratic National Committee's headquarters in the Watergate office building and the subsequent cover-up, but also massive illegal corporate contributions to the Nixon reelection campaign; a wide-ranging series of dirty tricks, some quite puerile, designed to sway the presidential election of 1972; and an unlawful scheme to use the resources of the executive branch to reelect President Nixon.

Watergate also involved a cast of characters worthy of fiction. There was President Nixon, as enigmatic as the best-known person in America perhaps could be. Nixon was a man of considerable ability, but as every new release of tapes of his conversations reveals, he was beset by dark demons that overwhelmed both his judgment and moral principles.

Watergate had the snarling duo of presidential aides, John Reichmann and Charles Colson, who were public relations nightmares for the Administration. Reichmann could not speak to the Committee without curling his upper lip in a sneer. Colson was notoriously reported as saying he would walk over his grandmother to reelect Nixon.

Some would add President Nixon's Chief of Staff, Bob Haldeman, to this twosome. But in my dealings with Haldeman, I found that I rather liked him, which made me question both my own judgment and character.

And then we had the Watergate burglars, which included four tough Cuban-Americans, with Bay of Pigs and CIA backgrounds. Also involved in the burglary was the maniacal Gordon Liddy and the shadowy Howard Hunt. Hunt was a former CIA agent. Liddy was an operative of the Committee to Reelect the President, affectionately referred to, at least by the Watergate Committee majority staff, as CREEP. Neither Liddy or Hunt seemingly had ever seen a clandestine, nefarious scheme they could not fondly embrace, no matter how bizarre and bound for failure it might be.

And finally, on the other side, was a genuine folk hero, Sam Ervin, who, with his pungent humor, his rectitude, his Southern drawl, and his iconic, dancing eyebrows was the right man for this troubled, historical time.

The Senate Watergate investigation was also successful because of good staff work. Chief Counsel Sam Dash insisted on a rigorous, fearless investigation, and he received that from his staff. But Sam also knew how to tell a story to draw the public into the investigation and to convey its import. That is what the hearings of the Spring and Summer of 1973 did. Those hearings were the best soap opera on television, and the nation was glued to the tube. One day around 60 million people heard White House Counsel John Dean testify about Nixon's role in the cover-up and about how he told Nixon that there was a cancer growing on the presidency.

The Senate Watergate investigation also was successful because of the partnership between Senator Ervin and Senator Baker, which I observed closely during my stint on the Committee staff. There obviously was a strong friendship and tremendous mutual respect between these two extraordinary men. And each seemed committed to making the investigation as non-partisan as possible.

They succeeded in this goal in a remarkable way regarding an investigation as controversial as any in American history. Consider, for example:

- that the massive Watergate Final Report that condemned a Republican administration was unanimous,
- that the decision to subpoena the President for the White House tapes was unanimous, and
- that the decision to sue the President when he didn't comply was by unanimous vote on a motion made by Senator Baker.

Can one even imagine such unanimity on such a highly charged issue in today's highly partisan climate?

Senator Ervin paid tribute to Senator Baker in his book on Watergate. Ervin noted that Senator Baker was a "stalwart East Tennessee Republican" with a "strong sense of loyalty to the Republican Party." "I suspect," Ervin wrote, "that the White House undertook to bring much pressure on him to influence his conduct as a member of the committee." "If it did," Ervin said, "it *failed* in its purpose." He added: "As vice chairman, Senator Baker rendered faithful service to the committee in its quest for the truth ... and earned my enduring gratitude."¹⁵

This is not to say that there were not some tensions within the Committee. It would have been miraculous if there had not been. But as a Democratic staff member, I felt that the investigation essentially was a non-partisan effort and that I was working for Senator Baker as well as Senator Ervin.

Permit me a personal reflection about Senator Baker that showed he also considered that I was on his team.

In 1974, when we were wrapping up the investigation, in court against the President about the tapes, and beginning work on the Final Report, I came down with a bout of kidney stones that sent me to the hospital—an experience I would not recommend. One Committee member took the time to visit me there—Senator Baker. I am sure he has long forgotten that act of kindness. But I have not.

B. The Discovery of the White House Tapes: Part I

There is a final reason the Senate Watergate investigation was successful, and that is because we discovered the White House tapes that brought down a President. In the few minutes remaining, I want to tell you how that came about. It was no accident.

There were clues that something like the taping system existed. For instance, John Dean testified that, in an April 5, 1973, conversation with the President, Nixon went behind his chair to a corner of an office in the Executive Office Building and, in a nearly inaudible tone, said that he was probably foolish to have discussed Hunt's clemency with Colson. This gave Dean an inkling that the conversation was

¹⁵ SAM J. ERVIN, JR., *THE WHOLE TRUTH: THE WATERGATE CONSPIRACY* 25 (1980) (emphasis added).

taped. Ironically, it was later revealed that the recording device in that office had run out of tape before that conversation occurred, and it was not recorded.

Moreover, as Fred Thompson recounts in his book on Watergate, before Dean testified, then-White House counsel Fred Buzhardt called him and gave him in great detail the White House version of Nixon's conversations with Dean and others. Thompson prepared and distributed a memo of his conversation with Buzhardt, which at least suggested that there was some kind of record of the conversations.¹⁶

In any event, on Friday, July 13, 1973, the Committee's staff interviewed Alexander Butterfield. I gave the order to interview Butterfield because he had been an assistant to the President and in Haldeman's ambit. But demonstrating my usual perspicacity, I decided not to go to the interview, because I thought that he had nothing important to say.

At the end of the over three-hour interview, Deputy Minority Counsel Don Sanders, who had Fred's memo, asked Butterfield if there was any basis for the implication in Dean's testimony that White House conversations were recorded. Butterfield, an honest man, said yes and revealed the existence of the White House taping system. Actually, he was surprised that we hadn't known already, because we had interviewed others who also knew—Haldeman and Larry Higby.

I learned of this testimony early the next morning, Saturday, July 14, when Sam Dash called to tell me about it.

C. *The Watergate Committee Leaks: A Brief Digression*

Now I must digress to discuss a galling incident.

As is well known, the Watergate Committee was plagued by leaks. Senator Baker once remarked that, although the Senate Watergate Committee did not invent the leak, we had elevated it to its highest art form. The running joke was that the Capitol Hill press corps would go out of business if a certain senator's Xerox machine were to break down.

So maybe it was not surprising that, as they recount in their book, *All the President's Men*, Bob Woodward and Carl Bernstein also learned of the tapes on Saturday, July 14, even before many Committee members and senior staff knew about it. Amazingly, however, *Washington Post* executive editor Ben Bradlee initially thought this was only a "B plus" story, not worthy of immediate attention, so nothing about the tapes was published by the *Post* until after Butterfield's testimony.¹⁷

Who leaked this information, I don't know for sure. But the senior majority staffer in the session with Butterfield was later best man in Bob Woodward's wedding.¹⁸

¹⁶ FRED D. THOMPSON, *AT THAT POINT IN TIME: THE INSIDE STORY OF THE SENATE WATERGATE COMMITTEE* 83 (1975).

¹⁷ CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* 330-31 (1974).

¹⁸ THOMPSON, *supra* note 16 at 82.

D. *The Discovery of the White House Tapes: Part II*

When Sam Dash called me early on Saturday, July 14, he said, let's go tell John Dean what we've just learned. A little later, Sam picked me up, and we drove to Dean's townhouse in Alexandria, Virginia.

John and his glamorous wife, the always well put-together Mo, met us at the front door. John had a quizzical look on his face, for he did not yet know the purpose of our visit.

We went upstairs to their living room. John and Mo sat on a couch. After some preliminary conversation, Sam sat down to their left. I stood before John and Mo by the mantelpiece where I could look directly at John. I wanted to see his reaction when Sam told him what we now knew.

When Sam finally did, John broke into a wide smile, for he knew the tapes essentially would confirm his damning testimony about Nixon. As John recounts it in his book, *Blind Ambition*, he then said to Sam:

Sam, do you know what this means, if you get those conversations? It would mean my ass is not hanging out there all alone. It means that you can verify my testimony. And I'll tell you this, you'll find out that I've undertested, rather than overtested, just to be careful.¹⁹

On Monday morning, July 16, Ervin, Baker, Dash, and Thompson met and decided to put Butterfield on the stand that afternoon. I was dispatched to summon him. When I told Butterfield that his presence was required that day, he was distinctly displeased. Indeed, he refused to appear. He said that he was preparing for a trip to Russia on Federal Aviation Administration business, of which he was then the chairman, and that he was too busy to attend.

I relayed Butterfield's response to Senator Ervin. Ervin grew agitated. His eyebrows cavorted; his jaw churned. Finally he said to me: "Tell Mr. Butterfield that, if he is not here this afternoon, I will send the Senate sergeant at arms to fetch him."

Now, I have carefully refrained from discussing the law of congressional investigations so far in these remarks. It is too early in the morning for a discourse on law. But I must do so briefly now.

The Senate has the constitutional power, if a lawful order or subpoena is ignored, to send its sergeant at arms to arrest the miscreant and to imprison him in the Capitol. This power has not been used since World War II, having essentially been replaced by use of the contempt of Congress statute that allows criminal prosecution for disobedience. Nonetheless, the power still exists.²⁰

But this power only can be exercised by a vote of the full Senate. Sam Ervin did not have the right, on his own, to dispatch the sergeant at arms to arrest Butterfield. Ervin, a great constitutional scholar, undoubtedly knew that, but he nonetheless

¹⁹ JOHN DEAN, *BLIND AMBITION* 332 (1976).

²⁰ See generally, HAMILTON, *supra* note 2, at 85-91; Hamilton, Muse & Amer, *supra* note 2, at 1132-33.

instructed me to deliver his message to Butterfield, which, having located him in a barber chair, I did faithfully.

That message changed his mind, and later that afternoon Butterfield, now contrite and neatly coifed, arrived at the Committee to give his electrifying testimony. The subpoena I served on him for that testimony still hangs in my office.

Before Butterfield's testimony, Senator Baker approached Sam Dash and asked Sam to let Fred open the questioning, because minority aide Don Sanders had asked the fateful question to Butterfield. Sam thought about this request for a while and then, as he describes in his book, *Chief Counsel*, reluctantly agreed, because he thought it was only "fair."²¹

I have heard Fred say that asking that question was a big boost to his political career. I wonder if Sam, an ardent, unabashed liberal Democrat until the day he died, would have so graciously agreed to Senator Baker's request had he been prescient enough to realize the later political advantage it afforded. I'm certain Sam would have been pleased to assist Fred in becoming a prominent actor. But a Republican Senator, probably not.

It was, however, a good thing for the Committee that Fred took the lead in questioning Butterfield. It demonstrated, as Senator Baker knew it would, that the investigation was non-partisan, and that Republicans and Democrats alike wanted all the facts to come out, no matter how dire the results were for the Nixon Administration. Perhaps it also helped achieve unanimity in the votes to subpoena and sue the President.

It is another irony of Watergate that the Senate Committee, although it discovered the tapes, never actually obtained them but had to settle for transcripts. The D.C. Circuit found that the case involved not just a political question but was justiciable—that is, it could be decided by a court—and that the President's executive privilege was not absolute, but was subject to a balancing test. But the Court ultimately held that the President's interests in protecting the tapes outweighed the Committee's need for them.²²

The ruling was frustrating and odd, because the transcripts were public and the House Judiciary Committee, which was conducting impeachment proceedings concerning the President, had the actual tapes. Nonetheless, precedent was established that was recently applied in the House Judiciary Committee's suit against Bush White House officials, Harriet Miers and Joshua Bolten. The U.S. District Court for the District of Columbia, relying on the Select Committee's case, held that the suit against Miers and Bolten could proceed, that the President did not have an absolute executive privilege, and that the House had a right to the testimony and materials it sought.²³ In 2008, I wrote an amicus brief in the *Miers* case supporting the House on behalf of, among others, Senator Dan Inouye, who had been a member of the Watergate Committee. Nearly forty years earlier, I had

21 SAMUEL DASH, *CHIEF COUNSEL: INSIDE THE ERVIN COMMITTEE—THE UNTOLD STORY OF WATERGATE* 184 (1976).

22 Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

23 Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).

written the briefs in the Senate Watergate Committee case, proving, I guess, that in Washington we are all recycled.

But this recent opinion is only a very small part of the legacy of the Senate Watergate Committee. It also spawned significant legislation, for example, the central elements of the Nation's campaign finance laws and the Ethics in Government Act of 1978, including the misused, now discarded, but not lamented Independent Counsel statute.²⁴

But beyond that, the Senate Watergate Committee is an enduring model of how to do things the right way, how to investigate thoroughly and fairly, and how to seek the truth in a non-partisan manner. Much of that legacy is due to the beneficial partnership that Senator Ervin and Senator Baker forged. That is one reason why it is most appropriate to honor Senator Baker by this symposium, and to hope that maybe, just maybe, his example of civility and cooperation may influence some of the more reckless, short-sighted partisans on both sides of the aisle who today inhabit Capitol Hill.

24 Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867-73 (1978).