

So that we can be perfectly candid

Nearly four-decade-old Nixon grand jury transcripts are a lesson for any litigator dealing with a difficult witness



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Litigation

On July 29, 2011, D.C. U.S. District Judge Royce Lamberth granted the petition of scholar Stanley Kutler to unseal Richard Nixon's 1975 Watergate grand jury testimony, because "special circumstances" of "historical interest" in Watergate trumped Rule 6(e) grand jury secrecy. *In re Petition of Kutler*, 800 F.Supp.2d 42 (D.D.C., 2011). On Nov. 10, 2011, the actual stenographic pages, 297 in all, were released in PDF format with a few pages or lines "screened" out due to Freedom of Information Act exemptions, including national security.

The two full days of 36-year-old testimony sprawl with new yet familiar Nixon-isms. The former president promises to "be perfectly candid" under oath, but his answers are way dodgy, including that an IRS report his White House instigated on then-DNC chairman Larry O'Brien "may" have been in the "mass of material that comes across a president's desk" (p. 197). Nixon recalls he did not "want to give the store away" on Watergate. (p. 293). Instead, he shows his core.

To "be perfectly clear," this is unvarnished Nixon, who always fascinated in a Shakespearean way: flaws, tragedy and abiding paranoia that punctuated bold policy moves during America's 1968 to 1973 social upheaval. It all ending with the 20th century's greatest televised legal hearings that propelled many of us into law and journalism. This short article argues lawyers should read these transcripts.

The 11 hours of testimony June 23 to 24, 1975, took place in San Clemente under questioning by skilled Watergate prosecutors including Henry Ruth, Judith Denny and Jay Horowitz on different subjects, and armed with transcripts of tapes and the

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notes of Nixon aides. Nixon had counsel Herb Miller and Stan Mortenson present, a major departure for grand jury proceedings, but he needed little protection. Two (unnamed) grand jurors were flown to California for the sessions. By then, Nixon had been pardoned by Gerald Ford, and thus his only exposure was for perjury before the grand jury.

The questioning over two days addressed White House tapes and the missing 18.5 minutes, cash campaign contributions from Howard Hughes and others, whether ambassadorships had been paid for, misuse of IRS power over Larry O'Brien, wiretapping Daniel Ellsberg and Morton Halperin in the Pentagon papers melee, destruction of wiretap documents, and whether Patrick Gray lied to Congress.

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There are goombah details, such as pal Bebe Rebozo being a "check picker-upper" for contributors' entertainment expenses (p. 133), and political cash transactions in the White House: Rosemary Woods "at my request, went down to the [White House] safe. She counted it and came back and ... she must have thought the place was bugged because she handed me a sheet of paper, a little sheet, a note, saying one hundred thousand dollars." (p. 126.) Yet the power of Nixon as witness, however contemptible, is the central story for lawyers.

VICTIM OF DOUBLE STANDARD

Nixon jousts with the prosecutors, rambling on how important matters (e.g. Vietnam, China) dimmed his recollections of domestic illegalities. He paints himself a victim of dirty politics and on the mallet-end of a double standard. Throughout, Nixon's legal training maddeningly qualifies his answers, while he disarmingly skewers col-

leagues and opponents.

Kevin Spacey playing Richard III was no less dramatic than Richard Nixon lamenting fate to his grand jury: "[A]ll have paid a heavy price. I am paying mine." (p. 218) He invites prosecutors to "be absolutely as tough as you want to be. It is your job," (p. 52), but decries being unfairly targeted: "[I]n other words, the special prosecutor's office is only interested in the IRS harassment activities insofar as it deals with Mr. O'Brien? It is not interested in any harassment that the IRS may have done or is doing or has done with regard to, say, me, my friends, or anything like that?" (p. 177)

Nixon posits that if "Democratic senators and others, including some Republicans who are taking this sanctimonious attitude," were put "to the same test you have put us, you would find that we come out rather well." (p. 219) Classically, Nixon bemoans that "people who steal classified documents are made heroes and those that publish them get Pulitzer Prizes," while he went about the thankless work of preventing "massive leaking" that threatened American lives. (p. 255)

QUALIFYING RECOLLECTION

Nixon makes failure of memory a theme: "[I]f I say 'to the best of my recollection' it will be only because I have not had an opportunity to have access to my own records." (p. 13) He cripples the reliability of answers as hearsay or speculation, leaving his examiners little first-hand meat: "I can speculate why I might have said that, if you want to know what my speculation is, about Halde- man and Ehrlichman staying out of it [a *Time* magazine article on wiretaps]." (p. 203) He has the temerity to apologize directly: "I want the grand jurors to understand when I say I don't recognize something, it isn't because I am trying to duck a question." (p. 242)

Nixon frequently invokes matters of state taking precedence in his mind over (mundane) matters of plumbers and cronyism. When asked about a Dec. 5, 1972, memo stating an "understanding" that a campaign contributor was promised an ambassador post, Nixon responds: "Let me tell you what was going on Dec. 5," and then rattles off in that answer the "sadness" of POWs, that the "Paris peace talks had broken down," and that Kissinger was traveling to Moscow to prevent "the North Vietnamese from launching another offensive." (p. 51)

Nixon makes his inability to support an indictment of Patrick Gray a failure of evidence and not of the witness: "[I]t would be easy for me to sit here and try to nail Pat Gray to the mast, and I would if, first, if there were any evidence." (p. 295)

CHANGING UP THE QUESTION

When asked a point-blank question, Nixon alters the subtext. Regarding a specific 20-minute 1973 conversation with Al Haig on the infamous 18.5-minute-gap tape, Nixon responds that he must have been discussing the "Agnew crisis" since "we decided [then] Mr. Agnew had to go," and that discussions about the erased tape were "just a technical matter, and we were thankful it hadn't happened on something that had been subpoenaed." (p. 97) While Judge John Sirica ruled that the tape had been subpoenaed, Nixon leaves his grand jury interlocutors in the fog of preoccupied memory and excuse.

Later, asked if Patrick Gray had been un-

truthful in "stonewalling" Congress on knowledge of wiretaps, as aides' notes showed, Nixon shifts irrelevantly to J. Edgar Hoover: "I am sorry. Mr. Hoover, over a period of 50 years, always stonewalled that question and he was technically truthful." (p. 289)

DEFLECT AND SELF-DEPRECATE

When cornered, Nixon redirects questions with self-deprecating barbs, apologia without remorse and humor. "In the office of the presidency I did the big things and did them reasonably well and screwed up on the little things." (p. 99) Noting his slurred speech on the tape with the missing 18.5 minutes, he says, "I wonder what I had had to drink that day when I heard my own voice. This is such a bad tape." (p. 92) He testifies he told Haldeman to look into how the tape was erased: "[L]et's find out how this damn thing happened. I am sorry, I wasn't supposed to use profanity. You have enough on the tapes." (pp. 112-113)

Nixon also shamelessly places ends above means. In an answer regarding wiretapping in the Navy, Nixon says, "[I]t was vitally important that he [Yeoman Radford] be tapped to see whether this mania he had developed for leaking was continuing." (p. 277) Even though "I want the jury and the special prosecutors to kick the hell out of us for wiretapping and for the plumbers and the rest," he implores his audience, "if as a result we have saved American lives, which we did in Vietnam by shortening [the war] and 'reducing the threat of nuclear destruction by arms limitation with the Russians,' then that was preferable to 'total openness, with no security whatever. ... Maybe a lot of people don't care, but I care a great deal. I think all of you care a great deal. That is what Yeoman Radford was about."

Some of the most disarming lines are one-off put-downs. Los Angeles U.S. District Judge Matthew Byrne is "too old" to lead the FBI. (p. 126) "As far as career ambassadors [go], most of them are a bunch of eunuchs." (p. 25) Joseph Kennedy had been "a pretty good appointment [as ambassador to Britain], as a matter of fact, up to a point. After all, at least he increased the Scotch supply." (p. 47) Questioning whether J. Paul Getty contributed to his campaign: "[Did] Getty really give in '70? Q Yes, he did. A. He's a real tightwad." (p. 142) Regarding the columnist Jack Anderson whom the Nixon camp reviled, Nixon says, "The Post, incidentally to its credit, put Mr. Anderson on the page with the funny papers." (p. 144) As to Martha Mitchell: "How he [Attorney General John Mitchell] stood that woman that long, I will never know." (p. 240)

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Kutler notes: "[T]he grand jury after that testimony [June 1975] had a chance to sit and indict [others] but they did not." Nixon's outsize flaws, misdirection and lawyerly lack of recall may have contributed, in the shadow of his pardon, to the folding up of the Watergate grand jury indictments. In the end, he delivered up no fish smaller than himself.

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