

# Watergate and Vietnam: The Cold War Origins of a Constitutional Crisis

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Watergate is usually thought of as the scandal and constitutional crisis which followed the June 1972 burglary of the Democratic National Committee headquarters at the Watergate complex in Washington, D.C. by persons associated with President Nixon's reelection committee and the subsequent cover-up, led by Nixon himself, of White House involvement in the burglary.

As such, it is regarded as a domestic crisis centrally involving President Nixon's efforts to undermine his political opponents.<sup>1</sup> Legal scholars at least are not familiar with the substantial evidence showing that the origin of much (though certainly not all) of what we call "Watergate" lies in the foreign policy of the Johnson and Nixon administrations.<sup>2</sup> It has long been appreciated by historians of the Vietnam War that there was a meaningful link between Watergate and the domestic intelligence operations used to counter the war's critics.<sup>3</sup> In this respect, there is a case to be made that this symposium should have been held in 2011, the fortieth anniversary of the White House-ordered break-in to the office of Daniel Ellsberg's psychiatrist in Los Angeles.

In this essay, I situate Watergate within the context of the Cold War and the Vietnam War in particular. This perspective might be called

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\* Rutledge C. Clement, Jr. Professor in Constitutional Law, Tulane Law School. Copyright by Harvard University Press. All rights reserved. I thank the participants at the conference for their comments. This essay is drawn from a larger project on war powers. The project is based on an extensive review of diplomatic history and is tentatively titled *Long Wars and the Constitution: Presidents and the Constitutional Order From Truman to Obama* (Harvard University Press, forthcoming 2013).

<sup>1</sup> See, e.g., WILLIAM BUNDY, *A TANGLED WEB: THE MAKING OF FOREIGN POLICY IN THE NIXON PRESIDENCY* 470 (1998); JOHN YOO, *CRISIS AND COMMAND* 371 (2009).

<sup>2</sup> BUNDY, *supra* note 1, at 472.

<sup>3</sup> See GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975*, at 299-300 (4th ed. 2002); ROBERT MANN, *A GRAND DELUSION: AMERICA'S DESCENT INTO VIETNAM* 687 (2001); MARILYN B. YOUNG, *THE VIETNAM WARS: 1945-1990*, at 238, 260-61 (1991).

“Watergate as foreign policy.” Certainly Nixon’s misdeeds ran in many directions besides those connected with the June 1972 burglary.<sup>4</sup> To see Watergate afresh and understand how it makes sense as a crisis of what I call the “Cold War constitutional order” requires some rearranging of standard understandings.

The premises of the Cold War order, generally supported by the public, required presidents to have the ability to respond if necessary with the full panoply of military force to the challenge of communist expansion.<sup>5</sup> President Johnson was simply the latest heir to this legacy.<sup>6</sup> When the Vietnam War did not go as expected, the presidency became a cockpit of tension and frustration.<sup>7</sup> The strains of war led Johnson and his successor Richard Nixon to a fixated concern with internal security. They turned the capacities of the intelligence agencies, built-up during the Cold War, inward against American citizens.<sup>8</sup> This was one of the key causes of Watergate.<sup>9</sup>

This essay elaborates on this foreign policy explanation of Watergate in three parts. In Part I, the scene is set by showing how an increased concern with internal security by both the Johnson and Nixon administrations flowed from the Vietnam War. Part II concentrates on the Nixon administration and sets Watergate within the context of Nixon’s foreign policy and the Cold War more generally. Part III explains why Watergate was a genuine constitutional crisis and how it, somewhat ironically, came to interfere with Nixon’s conduct of foreign policy.

#### I. FROM JOHNSON TO NIXON: VIETNAM AND INTERNAL SECURITY

War imposes unique psychological stress on the inhabitant of the Oval Office. The risks attendant to war and the personal responsibility that any President would feel for the men and women under his command tend to occupy the mind and crowd out everything else. Because LBJ and his top advisers made the decision for war without any meaningful participation by

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<sup>4</sup> For useful accounts of the events surrounding the Watergate scandal, see generally FRED EMERY, *WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON* (1995); KEN GORMLEY, ARCHIBALD COX: *CONSCIENCE OF A NATION* (1997); STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1990) [hereinafter KUTLER, *WATERGATE*]; STANLEY I. KUTLER, *ABUSE OF POWER: THE NEW NIXON TAPES* (1997) [hereinafter KUTLER, *ABUSE*]; J. ANTHONY LUKAS, *NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS* (1988); MICHAEL SCHUDSON, *WATERGATE IN AMERICAN MEMORY: HOW WE REMEMBER, FORGET, AND RECONSTRUCT THE PAST* (1992).

<sup>5</sup> See Stephen M. Griffin, *Reconceiving the War Powers Debate* 39–40 (Tulane Univ. School of Law, Working Paper No. 11-06), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1943652](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943652)[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1943652](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943652).

<sup>6</sup> ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961–1973*, at 105–06 (1998) [hereinafter DALLEK, *JOHNSON*].

<sup>7</sup> *Id.* at 155–56.

<sup>8</sup> EMERY, *supra* note 4, at 4–5.

<sup>9</sup> See *id.*

Congress, the stress was all the greater.<sup>10</sup> Consider that *fewer than six months* after his muted July 1965 announcement that he was escalating the war, LBJ and his administration were under extraordinary strain.<sup>11</sup> Even in the fall of 1965, the administration could sense that the public was not strongly behind the war.<sup>12</sup> While this may have troubled them, it would not matter if their expectations of quickly forcing North Vietnam to negotiate had worked as planned.<sup>13</sup> When this did not occur by the end of the year, the administration plunged into a series of recriminations and a fruitless debate about a bombing halt.<sup>14</sup>

Somewhat unexpectedly, the decision for war had narrowed the range of options available to the President. Once LBJ chose bombing as the method to force North Vietnam to negotiate, bombing had to work.<sup>15</sup> This had the further effect of making administration policy hostage to the responses of the governments in both South and North Vietnam.<sup>16</sup> LBJ could sense that now he *had* to win or his presidency would be forever discredited.<sup>17</sup> A war fever took hold in the executive branch, creating a vicious circle, which undermined effective policymaking as officials saw that the President wanted only good news and interpreted new developments in their most favorable light.<sup>18</sup> It did not help that they were susceptible to the same distortions in viewpoint that afflicted the President; they also knew that their personal credibility was on the line.<sup>19</sup>

Under the strains of war, the Johnson administration's attitude toward critics took a hard set. By early 1966, LBJ thought that Senate critics such as J. William Fulbright were actually under communist influence.<sup>20</sup> The ideological domestic downside of the Cold War associated with McCarthyism had returned with a vengeance. Federal Bureau of Investigation (FBI) Director J. Edgar Hoover encouraged LBJ in his belief that critics of the war were subversives and operated from the worst motives.<sup>21</sup> All of the major intelligence agencies—the FBI, the Central Intelligence Agency (CIA), National Security Agency (NSA), as well as the Army—developed covert domestic intelligence programs aimed at

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10 DALLEK, JOHNSON, *supra* note 6, at 155–56, 283.

11 *Id.* at 344–45.

12 *Id.* at 290–91.

13 *See id.* at 284–85.

14 *See id.* at 345–46.

15 *See id.* at 343.

16 *See id.* at 240–41.

17 *See* FREDRIK LOGEVALL, CHOOSING WAR: THE LOST CHANCE FOR PEACE AND THE ESCALATION OF WAR IN VIETNAM 369–70 (1999).

18 DALLEK, JOHNSON, *supra* note 6, at 103, 356–57, 377–78, 388, 470–71; LOGEVALL, *supra* note 17, at 370–72. *See also* DAVID KAISER, AMERICAN TRAGEDY: KENNEDY, JOHNSON, AND THE ORIGINS OF THE VIETNAM WAR 460–61 (2000).

19 *See* DALLEK, JOHNSON, *supra* note 6, at 470; KAISER, *supra* note 18, at 462; LOGEVALL, *supra* note 17, at 389.

20 DALLEK, JOHNSON, *supra* note 6, at 352.

21 *Id.* at 367.

monitoring and disrupting opposition to the war.<sup>22</sup> Presidents Johnson and Nixon both believed that the antiwar movement was inspired by agents of international communism.<sup>23</sup> When careful investigation by the intelligence agencies showed this to be false, they in effect ordered the agencies to prove the relationship.<sup>24</sup>

How did the strains of war and internal security affect Nixon?<sup>25</sup> When he took office, there were still well over 500,000 U.S. troops in Vietnam with combat action continuing at a high tempo.<sup>26</sup> Nixon rejected the option of a quick withdrawal in favor of a strategy that had several elements in pursuit of his overall goal of “peace with honor”—a negotiated settlement in which the North Vietnamese would somehow be persuaded to withdraw their forces and guarantee the viability of the South Vietnamese government.<sup>27</sup> Roughly, Nixon’s policy with respect to Vietnam was to satisfy domestic pressure for an end to the war by withdrawing U.S. forces, but slowly enough to preserve meaningful military options.<sup>28</sup> To compensate for the withdrawal, the U.S. would build up South Vietnam’s ability to resist, a process of “Vietnamization,” which had begun under Johnson.<sup>29</sup> More ambitiously, Nixon wanted to reframe the war against a new global strategy of détente with the Soviet Union and opening relations with China. He felt sure that these leading communist states could bring pressure to bear on North Vietnam.<sup>30</sup>

Sooner than Nixon anticipated, his Vietnam strategy involved him in new military responses, as North Vietnam continued to exert significant pressure—especially by using its sanctuaries in Cambodia, which was nonetheless a neutral country.<sup>31</sup> At the same time, the reaction of the antiwar movement and the public generally was always a concern.<sup>32</sup> So

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<sup>22</sup> *Id.* at 486–87.

<sup>23</sup> *Id.* at 489 (discussing Johnson’s beliefs); MELVIN SMALL, *THE PRESIDENCY OF RICHARD NIXON 70* (1999) (discussing Nixon’s beliefs).

<sup>24</sup> DALLEK, *JOHNSON*, *supra* note 6, at 489; SMALL, *supra* note 23, at 70.

<sup>25</sup> For histories of Nixon’s administration and foreign policy, see generally BUNDY, *supra* note 2; ROBERT DALLEK, *NIXON AND KISSINGER: PARTNERS IN POWER* (2007) [hereinafter DALLEK, *NIXON*]; RAYMOND L. GARTHOFF, *DÉTENTE AND CONFRONTATION: AMERICAN-SOVIET RELATIONS FROM NIXON TO REAGAN* (rev. ed. 1994); DAVID GREENBERG, *NIXON’S SHADOW: THE HISTORY OF AN IMAGE* (2003); JEFFREY KIMBALL, *NIXON’S VIETNAM WAR* (1998); RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* (2008); SMALL, *supra* note 23. For useful memoirs and biographies, see generally WALTER ISAACSON, *KISSINGER: A BIOGRAPHY* (2005); RICHARD NIXON, *RN: THE MEMOIRS OF RICHARD NIXON* (1978).

<sup>26</sup> Henry Kissinger, *Vietnam’s Lessons*, *L.A. TIMES*, May 31, 2007, <http://www.latimes.com/news/opinion/commentary/la-oe-kissinger31may31,0,3265672.story>.

<sup>27</sup> KIMBALL, *supra* note 25, at 72–73.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 73; see *Military: 1969 – Vietnamization*, GLOBALSECURITY.ORG (May 7, 2011, 2:05 PM), <http://www.globalsecurity.org/military/ops/vietnam2-vietnamization.htm>.

<sup>30</sup> Don Keko, *Nixon and Détente*, EXAMINER.COM (Aug. 12, 2001), <http://www.examiner.com/american-history-in-national/nixon-and-detente>

<sup>31</sup> President Richard M. Nixon, *Address to the Nation on the Situation in Southeast Asia*, MEKONG.NET, <http://www.mekong.net/cambodia/nixon430.htm> (last visited Mar. 20, 2012).

<sup>32</sup> KIMBALL, *supra* note 25, at 166.

when Nixon decided to bomb Cambodia early in 1969, his first year in office, he determined it would have to be conducted in secret, something difficult to do with a major military operation.<sup>33</sup> When news of the operation leaked, Nixon was upset and ordered FBI Director J. Edgar Hoover to wiretap the phones of administration aides and journalists.<sup>34</sup>

Major antiwar protests were scheduled for the fall of 1969. At roughly the same moment, Nixon was considering “Duck Hook,” a major strike to force North Vietnam to settle the war on U.S. terms.<sup>35</sup> Nixon knew that this expansion would require unusual “mental resolve” and a “go-for-broke public relations campaign, in which he would have to expend most or all of his political capital to survive ‘the heat.’”<sup>36</sup> Duck Hook was dropped, but the idea of the decisive intervention remained.<sup>37</sup> Nixon appreciated by the end of 1969 that the war was now his responsibility in full.<sup>38</sup> Taking control of the war amid hostile domestic opposition would mean going on the offensive both abroad and at home.<sup>39</sup> In April 1970, Nixon ordered U.S. troops to invade border regions in Cambodia to eliminate the North Vietnamese sanctuaries.<sup>40</sup> It was characteristic of Nixon’s Vietnam strategy that all of these deliberations occurred in secret; thus Nixon shared his plans with very few people other than Henry Kissinger, his National Security Advisor.<sup>41</sup> This occasioned intense stress, as Nixon considered it an operation he knew would be perceived as expanding the war.<sup>42</sup>

Nixon did not foresee how much crisis management the Cambodian invasion would impose on his administration. Universities all over the U.S. demonstrated in protest and several of Kissinger’s aides resigned.<sup>43</sup> Under considerable pressure, Nixon began to act erratically.<sup>44</sup> In the period leading up to the invasion, he seemed hyperactive to his subordinates, indulging in an “aggressive mania” as he attempted to steel himself for ordering a major military operation without congressional or public support.<sup>45</sup> The invasion of Cambodia was perceived, not without cause, as a major expansion of the war by members of Congress and the antiwar movement.<sup>46</sup> The unprecedented backlash and public protest that was the

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33 DALLEK, NIXON, *supra* note 25, at 118; KIMBALL, *supra* note 25, at 131.

34 KIMBALL, *supra* note 25, at 136.

35 *Id.* at 159.

36 *Id.* at 160.

37 *Id.* at 170–71.

38 *Id.* at 169–70.

39 *Id.* at 170.

40 *Context of ‘April 24–30, 1970: Nixon Orders Invasion of Cambodia; Kissinger Staffers Resign Rather than Participate in Coordination’*, HISTORY COMMONS, <http://www.historycommons.org/context.jsp?item=a04242670parrotsbeak&scale=2#a04242670parrotsbeak> (last visited Mar. 20, 2012).

41 *Id.*

42 KIMBALL, *supra* note 25, at 196–97.

43 *Id.* at 213.

44 DALLEK, NIXON, *supra* note 25, at 198–200, 205; ISAACSON, *supra* note 25, at 260–62.

45 *See* KIMBALL, *supra* note 25, at 204.

46 *See id.* at 221.

result of the Cambodian invasion was the turning point that gave significant credibility and impetus to efforts already underway to curb the war-making power of the executive branch.<sup>47</sup>

It was at this moment, amid the superheated atmosphere produced by the Cambodian invasion, when Nixon summoned the chiefs of the major intelligence agencies to chastise them for not cooperating more effectively against the nation's *domestic* enemies.<sup>48</sup> It would have been appropriate for Nixon to raise this issue with respect to foreign enemies, as the lack of cooperation between Hoover's FBI and the CIA had been causing trouble for many years.<sup>49</sup> But like Johnson, Nixon was convinced that the antiwar movement was inspired and led by communist agents.<sup>50</sup> Not only was this false, a fact that the intelligence agencies had already confirmed, but it also illustrated the Nixon administration's isolation from reasonable voices within the antiwar movement with which it could have had a meaningful dialogue about how to wind down the Vietnam War.<sup>51</sup> Nixon, however, had worked himself into such a temper that he saw antiwar protesters on campuses as terrorists threatening the state itself.<sup>52</sup> As summarized by historian Jeffrey Kimball, "[t]he Vietnam War heightened Nixon's sense of world crisis, contributed to his emotional tension, compounded his personality disorders, and influenced his stratagems and tactics for dealing with home-front and foreign issues."<sup>53</sup>

The solution to the lack of cooperation among the intelligence agencies was later known as the Huston Plan, after the White House aide who wrote it at Nixon's direction.<sup>54</sup> The plan called for the centralization of domestic intelligence activities in the White House and involved aggressive, illegal measures such as break-ins to combat domestic protest.<sup>55</sup> When FBI Director Hoover objected, fearing disclosure of illegal activities, the plan was formally abandoned.<sup>56</sup> Informally, however, these options continued to percolate at the White House.<sup>57</sup> If the intelligence agencies would not take suitable action on their own, the White House itself would go operational and conduct break-ins and wiretaps in pursuit of information that would discredit its political enemies.<sup>58</sup> This effort was a principal origin of what came to be known as Watergate.<sup>59</sup>

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47 *Id.* at 220–21.

48 KUTLER, WATERGATE, *supra* note 4, at 98–99.

49 SMALL, *supra* note 23, at 56.

50 Tom Wells, *Running Battle: Washington's War at Home*, in *LONG TIME GONE: SIXTIES AMERICA THEN AND NOW* 75, 89 (Alexander Bloom ed., 2001).

51 SMALL, *supra* note 23, at 70.

52 DALLEK, NIXON, *supra* note 25, at 208; GREENBERG, *supra* note 25, at 82.

53 KIMBALL, *supra* note 25, at 225.

54 *See* KUTLER, WATERGATE, *supra* note 4, at 96–101 (detailing the Huston Plan).

55 LUKAS, *supra* note 4, at 33.

56 *Id.* at 32–34.

57 *Id.* at 35–37.

58 *See id.*

59 *See generally* PERLSTEIN, *supra* note 25.

## II. NIXON, THE COLD WAR, AND WATERGATE

To understand Nixon's presidency in the context of the Cold War, we should keep in mind that Nixon always intended to be a foreign affairs President. He wanted to be remembered in history as someone who brought peace to the United States and the world.<sup>60</sup> Nixon retained beliefs with respect to foreign policy that he had formed as Senator, and as Vice-President in the Eisenhower administration.<sup>61</sup> He accepted the verities of the Cold War and saw the conflict between the United States and communist countries as central.<sup>62</sup> At the same time, he perceived strategic opportunities arising from the relatively new conflict between the Soviet Union and China.<sup>63</sup> Nixon saw Vietnam in this context. It was a war he had to settle, but on a global basis with terms favorable to the U.S.<sup>64</sup>

It was crucial to Nixon's conception of his presidency that he wanted to carry out this far-reaching strategy entirely in secret in order to announce it at the right moment to secure his place as one of the greatest presidents in history, confound his political opponents, and achieve reelection.<sup>65</sup> This meant that during his administration an enormous amount of diplomatic and military activity occurred off the bureaucratic books.<sup>66</sup> This did not bother Nixon, as he entered office with grievances against a number of government agencies centrally important to foreign policy, such as the State Department and the CIA, which he felt had mistreated him as Vice-President.<sup>67</sup> Partly for this reason, he resolved to be his own Secretary of State and he and Kissinger centralized control of foreign affairs and national security policy in the White House.<sup>68</sup> The State and Defense Departments, as well as the CIA, were often cut out of both formulating and implementing policy.<sup>69</sup> The White House and especially the national security staff thus went "operational" in foreign affairs from the beginning of Nixon's presidency.

This organizational setup assisted Nixon in making swift, decisive moves to advance U.S. interests. With respect to intelligence policy, for example, John Ranelagh makes the valuable point that although the CIA had become something of a status quo agency by the late 1960s, Nixon did

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60 GARTHOFF, *supra* note 25, at 30; SMALL, *supra* note 23, at 60–62.

61 See *America and the Cold War: The Truman, Eisenhower and Kennedy Years*, ACADEMIC AMERICAN, <http://www.academicamerican.com/postww2/coldwar.html> (last updated Jan. 5, 2012) (describing the views on foreign policy which were dominant while Nixon was Vice-President).

62 JOHN RANELAGH, *THE AGENCY: THE RISE AND DECLINE OF THE CIA* 546 (1987); ROBERT D. SCHULZINGER, *A TIME FOR WAR: THE UNITED STATES AND VIETNAM, 1941–1975*, at 332 (1997).

63 SMALL, *supra* note 23, at 64–65; *Sino-Soviet Border Clashes*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/war/prc-soviet.htm> (last visited Apr. 7, 2012).

64 See SMALL, *supra* note 23, at 65.

65 *Cf. id.* at 61–62.

66 See *id.* at 54.

67 *Id.* at 55; DALLEK, NIXON, *supra* note 25, at 84.

68 See DALLEK, NIXON, *supra* note 25, at 84–85; SMALL, *supra* note 28, at 51–52.

69 DALLEK, NIXON, *supra* note 25, at 84–85; SMALL, *supra* note 23, at 51–52; RANELAGH, *supra* note 62, at 499–501, 538–39, 540–41.

not want to be a status quo President.<sup>70</sup> He wanted aggressive action to create a more favorable balance of power.<sup>71</sup> Historian Kimball has argued persuasively that Nixon's "madman theory" of exercising power in unpredictable ways was related to the Eisenhower administration's "massive retaliation" policy.<sup>72</sup> While Nixon saw himself as an American Charles de Gaulle, a world leader in the grand European manner, his chief diplomat Kissinger thought the primary objective of the government was order.<sup>73</sup> Neither Nixon nor Kissinger believed in democratic governance in foreign affairs in the sense of building support for their policy in Congress and the Senate.<sup>74</sup>

Any breach in the wall of secrecy around the White House, and thus Nixon's and Kissinger's diplomatic efforts was therefore a mortal threat.<sup>75</sup> It was all the worse if the breach could be traced to someone who was part of the antiwar movement, a movement which to them was inspired by foreign communists and led by revolutionary terrorists.<sup>76</sup> Thus the administration had a severe reaction in June 1971 to Daniel Ellsberg's leaking of the Pentagon Papers to major newspapers including the *New York Times*.<sup>77</sup> The Papers were a secret Department of Defense history of the Vietnam War ordered by Robert McNamara during the Johnson administration.<sup>78</sup> Nixon commanded his aides to destroy Ellsberg's credibility and, by extension, the credibility of the antiwar movement in the eyes of the public.<sup>79</sup> Unbelievably, Nixon and his aides planned to dig up information on both Ellsberg and the Johnson administration by committing illegal break-ins.<sup>80</sup>

Nixon's remarks on the Pentagon Papers and Ellsberg, recorded by his taping system in the White House, leave an indelible and disturbing impression. Nixon believed the young lawyers on his team did not have the proper attitude:

These kids don't understand. They have no understanding of politics. They have no understanding of public relations. John Mitchell is that way. John is always worried about is it technically correct? Do you think, for Christ sakes, that the *New York Times* is worried about all the legal niceties? Those sons of bitches are

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<sup>70</sup> See RANELAGH, *supra* note 62, at 546.

<sup>71</sup> *Id.* at 546, 552; KIMBALL, *supra* note 25, at 33.

<sup>72</sup> See KIMBALL, *supra* note 25, at 76-77; Francis A Boyle, *The Relevance of International Law to the 'Paradox' of Nuclear Deterrence*, 80 NW. U. L. REV. 1407, 1413 (1986).

<sup>73</sup> BUNDY, *supra* note 1, at 517; ISAACSON, *supra* note 25, at 45; KIMBALL, *supra* note 25, at 2, 148; SMALL, *supra* note 23, at 61-62.

<sup>74</sup> ISAACSON, *supra* note 25, at 206-07, 327, 486-87; KIMBALL, *supra* note 25, at 189; SMALL, *supra* note 23, at 61-62, 242.

<sup>75</sup> DALLEK, NIXON, *supra* note 25, at 208.

<sup>76</sup> *Id.*

<sup>77</sup> See KUTLER, ABUSE, *supra* note 4, at 3-37; KUTLER, WATERGATE, *supra* note 5, at 110.

<sup>78</sup> Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1 DUKE L.J. 1, 9 (1981).

<sup>79</sup> See KUTLER, ABUSE, *supra* note 4, at 3-37.

<sup>80</sup> *Id.*



killing me. I mean, thank God, I leaked to the press [during the Hiss controversy]. This is what we've got to get—I want you to shake these (unintelligible) up around here. Now you do it. Shake them up. Get them off their Goddamn dead asses and say now that isn't what you should be talking about. We're up against an enemy, a conspiracy. They're using any means. We are going to use any means. Is that clear?<sup>81</sup>

Nixon went on to refer to a scheme to burglarize the Brookings Institution, a Washington think tank, to retrieve classified documents on Vietnam he believed might be in its possession.<sup>82</sup> He continued, “Did they get the Brookings Institute raided last night? No. Get it done. I want it done. I want the Brookings Institute’s safe *cleaned out* and have it cleaned out in a way that it makes somebody else [responsible?].”<sup>83</sup>

The Special Investigative Unit (commonly known as “the Plumbers”), a team set up in the White House to combat leaks, was available to conduct the projected break-ins.<sup>84</sup> One was carried out in September 1971—a burglary of the office of Ellsberg’s psychiatrist in Los Angeles.<sup>85</sup> Once this occurred, Nixon and his men were ensnared in a criminal conspiracy.<sup>86</sup> Everyone involved in the operation knew something that could be of mortal danger to Nixon and his top aides in the White House.<sup>87</sup> Historians have argued that when the burglary at the Watergate complex was discovered in June 1972, Nixon had to lead a cover-up of this operation to ensure that the links between the Ellsberg and Watergate burglaries would not be discovered.<sup>88</sup>

These operations were carried out in the main by E. Howard Hunt, who had recently retired from the CIA.<sup>89</sup> Hunt had participated in various CIA operations, including the Bay of Pigs.<sup>90</sup> Nixon and his aides believed that Hunt could be relied on to carry out the kind of operations originally anticipated in the Huston plan.<sup>91</sup> When Hunt needed men to help him, he turned to Cubans who had been trained by the CIA to commit acts of sabotage against Castro.<sup>92</sup> Many of these same people were involved in the 1972 break-in at the Watergate complex along with James McCord, a former chief of security at the CIA.<sup>93</sup>

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<sup>81</sup> *Id.* at 8. John Mitchell was the Attorney General. *John Newton Mitchell*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/ag/aghistspage.php?id=66> (last visited Apr. 8, 2012).

<sup>82</sup> See KUTLER, ABUSE, *supra* note 4, at 8.

<sup>83</sup> *Id.*

<sup>84</sup> KUTLER, WATERGATE, *supra* note 4, at 111–12; KUTLER, ABUSE, *supra* note 4, at 28.

<sup>85</sup> KUTLER, ABUSE, *supra* note 4, at 28.

<sup>86</sup> See NIXON, *supra* note 25, at 841–42.

<sup>87</sup> SMALL, *supra* note 23, at 238, 276.

<sup>88</sup> See e.g., SMALL, *supra* note 23, at 238, 276. For Nixon’s remarks in his memoirs see NIXON, *supra* note 25, at 841–42.

<sup>89</sup> RANELAGH, *supra* note 62, at 521.

<sup>90</sup> *Id.*

<sup>91</sup> See KUTLER, ABUSE, *supra* note 4, at 3–6, 27–28.

<sup>92</sup> LUKAS, *supra* note 4, at 94–97.

<sup>93</sup> SMALL, *supra* note 23, at 255.

After the Watergate burglars were arrested, the leading idea among Nixon's men was to quash the FBI investigation by claiming that Watergate was a CIA operation having to do with the Bay of Pigs.<sup>94</sup> Nixon was later convicted in the court of public opinion by the disclosure of a June 23, 1972 tape in which Nixon ordered his chief of staff, H. R. Haldeman, to order the CIA to carry out this plan.<sup>95</sup> CIA Director Richard Helms and his deputy Vernon Walters were confident that Watergate had nothing to do with the Bay of Pigs and resisted White House overtures to assist with the cover-up.<sup>96</sup>

Ironically, there was an important sense in which Watergate *did* relate to the Bay of Pigs. The various break-ins were carefully planned, requiring training, discipline, and knowledge of specialized equipment.<sup>97</sup> The men carrying them out could not be ordinary criminals—that would leave the administration too vulnerable to involvement with unpredictable characters. The Kennedy and Johnson administrations invested significant resources in training a covert army of operatives against Castro.<sup>98</sup> After the Bay of Pigs invasion failed in 1961, these operatives were based in the Miami area.<sup>99</sup> In this respect, the Cold War efforts against Castro, particularly in the Kennedy administration, became braided together with Nixon's efforts to destroy domestic opposition to his war policies in a very dangerous way. It is likely that the break-ins could not have occurred as they did had these operatives, accustomed to living above the law, not been available to the administration.<sup>100</sup> The Cuban operatives were hard-line anticommunists who perhaps believed they were acting to protect the United States against the communist-inspired antiwar movement.<sup>101</sup>

Nevertheless, once they were caught, the imperatives of a criminal conspiracy took over.<sup>102</sup> This put the President of the United States in the incredible position of being vulnerable to blackmail by the Watergate burglars.<sup>103</sup> The country was fortunate that Hunt and his fellow conspirators simply wanted Nixon to give them money to pay for their defense and expenses.<sup>104</sup> Suppose they had wanted changes in government policy? This dire possibility was a logical consequence of the President becoming involved in a conspiracy to break the law.

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94 KUTLER, ABUSE, *supra* note 4, at 61–62, 67–70.

95 *Id.* at 67–70. *See also* KUTLER, WATERGATE, *supra* note 4, at 218.

96 KUTLER, WATERGATE, *supra* note 4, at 221; RANELAGH, *supra* note 62, at 522–30; SMALL, *supra* note 23, at 277.

97 *See* LUKAS, *supra* note 4, at 94–101, 190–93, 196–200.

98 *Id.* at 95.

99 *Id.* at 95–96.

100 *Id.* at 94–96.

101 *See* KUTLER, WATERGATE, *supra* note 4, at 254.

102 *Id.* at 248–49 (detailing issues such as “hush money”).

103 *Id.* at 249.

104 *See id.*

If Watergate had simply been a matter of the June 1972 burglary and the subsequent rather improvised cover-up, it might be appropriate to view it as an external hindrance to the administration's foreign policy initiatives.<sup>105</sup> But Watergate was inextricably connected with the foreign policy of the Nixon administration and thus with the Cold War itself.<sup>106</sup> The maintenance of the Cold War, and any conventional war such as Vietnam, required an enormous effort on the part of the government to maintain morale on the domestic front.<sup>107</sup> President Truman had the public behind him when he went to war in Korea in June 1950, despite the lack of congressional authorization, given that the preceding three years had seen a rising public concern over the communist challenge.<sup>108</sup> Nixon's task of garnering public support for military actions in Vietnam was far more difficult, and thus suggested the waning of the Cold War. He knew the Vietnam War was unpopular and that the end would at least have to be in sight by the time he ran for reelection.<sup>109</sup> He decided to combat the antiwar movement with all the means available to him, including intelligence capabilities built since the 1950s.<sup>110</sup> This pushed the entire political system into a constitutional crisis.<sup>111</sup>

### III. WATERGATE AS A CONSTITUTIONAL CRISIS

Watergate has been regarded as a paradigm case of a constitutional crisis, not simply in the heat of the moment, but in the sober reflection of history.<sup>112</sup> However, a few knowledgeable and historically-minded scholars have surprisingly claimed that it was not.<sup>113</sup> The problem with these accounts may be an overemphasis on the fact that the Watergate crisis ended in Nixon's prospective impeachment and resignation, procedures allowed by the Constitution, rather than with riots and troops in the streets.<sup>114</sup> Although we can be thankful that Nixon did not attempt to retain

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<sup>105</sup> This appears to be the view of diplomatic historians with experience in government. See BUNDY, *supra* note 1, at 470; GARTHOFF, *supra* note 25, at 458–59, 485.

<sup>106</sup> See GARTHOFF, *supra* note 25, at 458–59.

<sup>107</sup> See, e.g., KIMBALL, *supra* note 25, at 165–67 (discussing having Nixon speak at universities and devising a POW plan to help alleviate negative public opinion over the Vietnam War).

<sup>108</sup> GARY R. HESS, *PRESIDENTIAL DECISIONS FOR WAR* 31–32 (2d ed. 2009).

<sup>109</sup> KIMBALL, *supra* note 25, at 62; SMALL, *supra* note 23, at 64–67.

<sup>110</sup> See *supra* Part I.

<sup>111</sup> See generally Griffin, *supra* note 1.

<sup>112</sup> See, e.g., GREENBERG, *supra* note 25, at 333–34; John W. Dean, *forward* to WATERGATE AND THE RESIGNATION OF RICHARD NIXON: IMPACT OF A CONSTITUTIONAL CRISIS, at x (Harry P. Jeffrey & Thomas Maxwell Long eds., 2004); KUTLER, WATERGATE, *supra* note 25, at 209, 316; THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH* 118–19 (2006); SEAN WILENTZ, *THE AGE OF REAGAN* 8 (2008).

<sup>113</sup> See Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 712, 742 (2009) (calling the events and aftermath of Watergate a political crisis); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2131 n.175 (2002) (stating that “the Nixon episode led to substantial constitutional conflict, and eventually to constitutional change, but not to crisis”).

<sup>114</sup> U.S. CONST. art 2, § 4 (discussing impeachment of the President, Vice-President and civil officers of the U.S.); U.S. CONST. amend. XXV, § 1 (stating that if the President should, among other

his office by force, the inescapable *constitutional* aspect of Watergate was how all of the circumstances I have highlighted flowed from Nixon's abuse of his office, an office whose powers had been greatly altered by the post-1945 constitutional order. Nixon's extreme abuse of his powers was not the only reason Watergate was a constitutional crisis; the consequences of Watergate also mattered. One consequence was that it rendered Nixon ineffective as President, especially with respect to foreign policy.<sup>115</sup>

By the time of Nixon's inauguration for his second term in January 1973, the Watergate cover-up was in a deep predicament.<sup>116</sup> The blackmail demands of the burglars were escalating and various parties in the White House saw themselves as under threat of being implicated in the cover-up.<sup>117</sup> As a result, Nixon would be effective as President for only three more months. At the beginning of the pivotal month of April 1973, Nixon's popularity and standing with the public were still intact.<sup>118</sup> But Nixon had conceded to his chief of staff H. R. Haldeman that governance would become impossible if public pressure increased.<sup>119</sup> By the end of the month, a mounting series of disclosures had forced him to dismiss Haldeman and John Ehrlichman, his two most essential aides.<sup>120</sup>

After the dismissal of Haldeman and Ehrlichman, Nixon sank into a depression and for some periods could not function as President.<sup>121</sup> During the October 1973 Arab-Israeli war, Nixon was incapacitated by the sudden crisis, which followed from his dismissal of special prosecutor Archibald Cox, and was unable to make crucial foreign policy decisions.<sup>122</sup> Another special prosecutor, Leon Jaworski, was appointed, and Nixon's time in office (until his resignation in August 1974) was consumed by Watergate.<sup>123</sup> He could not take meaningful action, for example, in addressing the serious energy crisis in the winter of 1973, which was the consequence of the war in the Middle East.<sup>124</sup>

Watergate was also a constitutional crisis because in some sense, Nixon willed it to be. Arguably like other conservatives during the 1970s, he sensed the high degree of entrenchment liberals had achieved in

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things, resign, the Vice-President shall become President).

<sup>115</sup> See GARTHOFF, *supra* note 25, at 458–59.

<sup>116</sup> KUTLER, WATERGATE, *supra* note 4, at 247–51.

<sup>117</sup> *Id.*

<sup>118</sup> SMALL, *supra* note 23, at 282.

<sup>119</sup> KUTLER, WATERGATE, *supra* note 4, at 263.

<sup>120</sup> *Id.* at 318–20.

<sup>121</sup> See DALLEK, NIXON, *supra* note 25, at 544–45; KUTLER, WATERGATE, *supra* note 4, at 324–25; SMALL, *supra* note 23, at 270–71. See also Nixon's revealing comments in his memoirs. NIXON, *supra* note 25, at 848–49.

<sup>122</sup> BUNDY, *supra* note 1, at 433, 440; DALLEK, NIXON, *supra* note 25, at 522, 528; ISAACSON, *supra* note 25, at 514, 531.

<sup>123</sup> ISAACSON, *supra* note 25, at 514; KUTLER, WATERGATE, *supra* note 4, at 427–29.

<sup>124</sup> See FRANKLIN TUGWELL, THE ENERGY CRISIS AND THE AMERICAN POLITICAL ECONOMY: POLITICS AND MARKETS IN THE MANAGEMENT OF NATURAL RESOURCES 105 (1988).

institutions both inside and outside the government.<sup>125</sup> It is likely he was weary of struggling with a persisting Democratic Congress and the interest groups that supported the Democratic Party. After the 1972 election in particular, he was obsessed with seeking revenge on the many people and groups whom he believed had wronged him.<sup>126</sup> As he recounted in his memoirs: “In this second term I had thrown down a gauntlet to Congress, the bureaucracy, the media, and the Washington establishment and challenged them to engage in epic battle.”<sup>127</sup> Another self-willed moment of crisis occurred when Nixon fired special prosecutor Cox and earned the whirlwind of an impeachment inquiry.<sup>128</sup> The significant point is that Nixon deliberately generated crises as a way of coping with the unwelcome reality that there were effective limits on his ability to reorder the policy universe. He certainly had no scruples about challenging any checks and balances the original Constitution put in his way. This was the most fundamental reason why “Watergate”—Nixon’s way of managing the burdens of the Cold War—was a constitutional crisis, but one intimately linked to the pursuit of the nation’s foreign policy.

#### CONCLUSION

Watergate can be usefully understood as part of an immense drama in which the constitutional order with respect to foreign policy and war powers founded after 1945 became increasingly unstable. The appalling costs of the Vietnam War and the crash of Nixon’s presidency showed the jerry-built and provisional character of the Cold War constitutional order. The qualitative difference that war makes to government reasserted itself with a vengeance and showed that the kind of deliberation allowed by the post-1945 order was shockingly inadequate. The premises of the Cold War order would never again be sufficient by themselves to compel the nation to engage in conventional war. A further consequence was the crippling legacy of the loss of trust in government. While Vietnam and Watergate were not the only causes of the decline of trust in government in the 1960s and 1970s, they were significant contributors to a decline that was permanent in the sense that it has never been restored to the level prevailing before the war.<sup>129</sup> In this respect, we are still dealing with the consequences of Vietnam and Watergate.

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<sup>125</sup> NIXON, *supra* note 25, at 761–62.

<sup>126</sup> ISAACSON, *supra* note 25, at 474.

<sup>127</sup> NIXON, *supra* note 25, at 850.

<sup>128</sup> KUTLER, WATERGATE, *supra* note 4, at 427–29.

<sup>129</sup> See Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 3 ANN. REV. POL. SCI. 475, 480–81 (2000).