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## II. EXECUTIVE PRIVILEGE IN LIGHT OF *UNITED STATES v. NIXON\**

*by Raoul Berger\*\**

It is with considerable diffidence that a lawyer appears before a body of professional historians, being well aware of the disdain with which historians justly regard "lawyer's history." By way of extenuation, I may say that as long ago as 1942, I took Justice Black to task for revising constitutional history in *Bridges v. California*<sup>1</sup> to accord with his predilections—predilections which I shared—in reliance on a demonstrably erroneous reading of the common law and the history of the first amendment.<sup>2</sup> And not long since I read Mr. James St. Clair a lecture for his cavalier version of the history of "high crimes and misdemeanors."<sup>3</sup>

Historians, I suspect, regard lawyers as congenitally incompetent to write history because they are bred as advocates in an adversary system. The achievements of Frederic Maitland alone should shake that view. Nor are historians unstained by advocacy; they are not virgins who stumble in the dark on nuggets of truth which they then string on a necklace. Gibbons, Spengler and Toynbee each had a thesis to which he often bent the facts. All judgment is inescapably subjective, that of an historian no less than that of a judge. The measure of competence is self-awareness of our biases, capacity to discount them and to look unblinkingly at discrepant facts. There is in addition the corrective supplied by the criticism of fellow professionals, the factor, said J.W.N. Sullivan, that perhaps more than any other contributed to the advancement of science.<sup>4</sup> Recall too that criticism of an historian is likely to be delayed, whereas the lawyer receives his verdict with fair promptness. Before the court renders judgment it will have heard his adversary, ready to pounce

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\* Professor Berger's paper is also being printed in the MARYLAND HISTORIAN (Fall 1975).

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1. 314 U.S. 252 (1941).

2. See Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602 (1942) [hereinafter cited as *Constructive Contempt*].

3. Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1137-55 (1974) [hereinafter cited as *The President*]; see Berger, *The Incarnation of Executive Privilege*, 22 U.C.L.A.L. REV. 4, 4-7 (1974) [hereinafter cited as *Incarnation of Executive Privilege*].

4. J.W.N. SULLIVAN, *THE LIMITATIONS OF SCIENCE* 173-74 (1952); see H. MULLER, *THE USES OF THE PAST* 31-32 (1952) [hereinafter cited as MULLER].

like a hawk on every omission, oversight, or distortion. Thus a lawyer is taught to be scrupulous in his version of the facts.

Let me then avow my own bias: with Patrick Henry I regard secrecy in government as an abomination.<sup>5</sup> That represents an 180 degree turn, for McCarthyism and its progenitors had left me with a profound aversion to congressional witch-hunting investigations. Nevertheless, as I burrowed through volume upon volume of congressional hearings I became convinced that the evils of secrecy outweighed inquisitorial abuses.<sup>6</sup> Revolting as was McCarthy's horse-whipping of General Zwicker, it is hardly to be weighed in the same scales with Lyndon Johnson's stealthy escalation of our commitment in Vietnam. The *Wall Street Journal*, that staid citadel of conservatism, recently stated that "the pattern of the past several decades strongly suggests that the theoretical dangers of government-by-fishbowl are greatly outweighed by the actual fact of excessive secrecy."<sup>7</sup> For this I have furnished abundant documentation.

Now for *United States v. Nixon*;<sup>8</sup> at the suit of Special Prosecutor Leon Jaworski, the Supreme Court ordered President Nixon to turn over to him certain taped conversations.<sup>9</sup> The Court rejected the President's claim of absolute privilege to withhold information from the courts and implicitly held that the President was amenable to process. Ever since *Marbury v. Madison*,<sup>10</sup> the Court has claimed paramount power to demark the boundaries of power granted to the other branches. Had the Court bowed to Nixon, Congress equally could maintain that it is "master in [its] own house,"<sup>11</sup> and alone may determine what legislation it is authorized to enact. Rarely, if ever, has the Court enjoyed a better opportunity to affirm its interpretive paramouncy; seldom could it be so sure that Congress and the people would be behind a judgment that the discredited President must yield.

In these aspects the judgment had long since been anticipated by Chief Justice Marshall in the *Trial of Aaron Burr*.<sup>12</sup> Professor Paul

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5. See R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 204-05 (1974) [hereinafter cited as EXECUTIVE PRIVILEGE].

6. See *id.* at 234-303.

7. *Wall Street J.*, Nov. 20, 1974, at 26, col. 2 (E. ed.); at 22, col. 2 (Pac. ed.).

8. 418 U.S. 683 (1974).

9. *Id.* at 706-07.

10. 5 U.S. (1 Cranch) 49 (1803).

11. Brief for Richard Nixon at 36-37, 74, *United States v. Nixon*, 418 U.S. 683 (1974), quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629-30 (1935).

12. *United States v. Burr*, 25 F. Cas. 30 (No. 14, 692d) (C.C.D. Va. 1807).

Freund, like myself, concluded that the *Burr* case established that "there is no absolute privilege in a criminal case for communications to which the President is a party"; and that while the Court would give due respect to his privilege claim, it would "weigh the claim against the materiality of the evidence and the need of the accused for its production."<sup>13</sup> There was no need in *Burr* to decide the President's amenability to process because Marshall was prepared on non-production to dismiss the prosecution,<sup>14</sup> a sanction that would have been extremely unpalatable to Jefferson, who was all afire to press Burr's prosecution for treason. And it needs to be remembered that Jefferson's own counsel conceded that the ordinary process could issue to compel compliance by the President.<sup>15</sup>

The novelty of *United States v. Nixon* resides in the fact that for the first time in our history the Court found that presidential privilege was rooted in the Constitution. Chief Justice Burger held that "a presumptive privilege for Presidential communications . . . is fundamental to the operations of government and inextricably rooted in the separation of powers";<sup>16</sup> that "to the extent this interest relates to the effective discharge of a President's power, it is constitutionally based;"<sup>17</sup> and that the privilege "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties."<sup>18</sup> Against the sleazy background of "White House Horrors" and Nixon's resort to "executive privilege" in order to conceal his participation in a conspiracy to obstruct justice, it is remarkable that the Court should have chosen the occasion to legitimate and anoint a privilege which there was ample reason to believe was being monstrously abused.<sup>19</sup>

Having erected a constitutional wall around presidential privilege, the Court then proceeded to make a breach in it: it reasoned that the privilege could not be permitted to "gravely impair the basic function of the courts,"<sup>20</sup> and the "demands of due process of law in the fair administration of criminal justice."<sup>21</sup> One may ask with Professors Louis

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13. Freund, *The Supreme Court, 1973 Term—Foreward: On Presidential Privilege*, 88 HARV. L. REV. 13, 30-31 (1974) [hereinafter cited as Freund]; *The President*, *supra* note 3, at 1111-22.

14. Freund, *supra* note 13, at 31; *The President*, *supra* note 3, at 1120-21.

15. *The President*, *supra* note 3, at 1111 n.1.

16. 418 U.S. at 708.

17. *Id.* at 711.

18. *Id.* at 705.

19. *But see* text accompanying notes 85-87 *infra*.

20. 418 U.S. at 712.

21. *Id.* at 713.

Hekin and Philip Kurland, why must the President's "constitutional" privilege yield to judicial necessities, while the lawyer-client and doctor-patient privileges—mere judicial constructs—remain untouchable?<sup>22</sup> The breach of this privilege to prevent impairment of the "fair administration of criminal justice," the Court explained, was because "the separate powers were not intended to operate with absolute independence,"<sup>23</sup> and because, borrowing from Justice Jackson, the Constitution contemplated that "practice will integrate the dispersed powers into a workable government."<sup>24</sup> Notwithstanding what government lawyers had argued was an established practice, Justice Jackson rejected President Truman's seizure of the steel mills on the ground that it ran counter to an implicit policy of Congress.<sup>25</sup> From this it appears that an invasion by one branch of the powers of another is outside the sanction of integration into a "workable government."

Of course, "the separate powers were not designed to operate with absolute independence"; they were "blended." When that blending provoked charges that the Constitution "violated the sacred maxim of free government," Montesquieu's separation of powers, Madison showed in *The Federalist Nos. 47 and 48* that Montesquieu's model, the British Constitution, as well as various state constitutions, exhibited blendings such as executive veto of legislation, executive appointments of judges and the like.<sup>26</sup> Because some powers were similarly blended in our Constitution, it does not follow that the Court has a roving commission to do additional blending in the interest of a "workable government." On the contrary, the rule, as stated by Chief Justice Taft, is that

[f]rom this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.<sup>27</sup>

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22. Henkin, *Executive Privilege: Mr. Nixon Loses but the Presidency Largely Prevails*, 22 U.C.L.A.L. REV. 40, 44 (1974) [hereinafter cited as Henkin]; Kurland, *United States v. Nixon: Who Killed Cock Robin?*, 22 U.C.L.A.L. REV. 68, 73-74 (1974) [hereinafter cited as Kurland].

23. 418 U.S. at 707.

24. *Id.*, quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

25. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring).

26. THE FEDERALIST NO. 47, at 320 (Mod. Lib. ed. 1937) (J. Madison) [hereinafter cited as THE FEDERALIST].

27. *Myers v. United States*, 272 U.S. 52, 116 (1926).

Then too, we must distinguish, as did Judge Learned Hand<sup>28</sup> and James Bradley Thayer,<sup>29</sup> between the final say of the judiciary "as to when another 'Department' has overstepped the borders of its authority,"<sup>30</sup> and the "Department's" unhampered authority to make choices within those borders. In Hand's words, "it is quite as important that within its prescribed borders each 'Department' . . . shall be free from interference."<sup>31</sup> Control of executive discretion was disclaimed by Chief Justice Marshall,<sup>32</sup> and that disclaimer was underscored in *Decatur v. Paulding*.<sup>33</sup> There mandamus was sought against the Secretary of the Navy, and the Court stated:

The Court could not . . . revise his judgment in any case where the law authorized him to exercise discretion or judgment. . . . The interference of the Courts with the performance of the ordinary duties of the executive department of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.<sup>34</sup>

Given that the privilege for confidentiality, on the Court's reasoning, "derive[s] from the supremacy" of the President within his sphere,<sup>35</sup> and is related "to the effective discharge" of his powers,<sup>36</sup> it should follow that he is the exclusive judge of what is required for that "effective discharge." Curtailment of that discretion in the interest of the judicial function would be an encroachment on the executive power. The Court's appeal on this scope to "due process" does not, in my judgment, advance the argument, because "due process" was not designed to redistribute the constitutional grants to the separate branches.

Not for a moment do I concede that "confidentiality" has constitutional roots; my object has been to show that the Court's reasoning raises a constitutional question respecting its power, on a plea of "workable government," to breach the confidentiality barrier it erected. So too, it needs to be asked whether the Court is empowered to interfere with the exercise of presidential discretion within the prescribed borders. These questions, I submit, call for reexamination of the Court's *assumption* that presidential confidentiality is constitutionally based.

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28. L. HAND, *THE BILL OF RIGHTS* 31 (1962) [hereinafter cited as HAND].

29. Thayer, *The Origins and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135, 144, 148 (1893).

30. HAND, *supra* note 28, at 31.

31. *Id.*

32. The province of the court is . . . not to inquire how the executive, or executive officers, perform duties in which they have a discretion.

*Marbury v. Madison*, 5 U.S. (1 Cranch) 49, 64 (1803).

33. 39 U.S. (14 Pet.) 497 (1840).

34. *Id.* at 515-16.

35. 418 U.S. at 705.

36. *Id.* at 711.

Because of the paucity of precedent in the "evidentiary privilege" cases—the cases for calls for disclosure arising in the course of litigation—Mr. Nixon's counsel, James St. Clair, invoked the "precedents" of presidential withholding from Congress.<sup>37</sup> Here the Court's statement that presidential privilege is "inextricably rooted in the separation of powers"<sup>38</sup> meets its severest test. Before turning to the few historical scantlings the Court furnished for its "confidentiality" doctrine, let me briefly put before you my approach to constitutional interpretation. Though it can muster the great names of Jefferson and Madison, it is now in disrepute. In the euphoria engendered by the Warren Court's civil liberties opinions, the intelligentsia forgot the sorry role the Justices played for decades in obstructing economic regulation by reading their laissez-faire predilections into the Constitution. As the Burger Court gains momentum, I hazard, the intellectuals may once more come to doubt whether the Court should be the great teacher, educator, and self-appointed reviser of the Constitution.<sup>39</sup> Just now such doubts are unpopular, but I am confident that you will exhibit the tolerance that, as Herbert Muller stated, is "indispensable for the pursuit of truth."<sup>40</sup>

In a nutshell, I am an adherent of the "original intention" school. Though fully aware of large areas of amorphous language and the difficulties of ascertaining that intention, I believe, like Jefferson, that the meaning of the Constitution is "to be found in the explanations of those who advocated . . . it."<sup>41</sup> "[I]f that be not the guide in expounding it," said Madison, "there can be no security for a consistent and stable government, more than for a faithful exercise of its powers."<sup>42</sup> Reliance on the Marshall dictum that "it is a constitution we are expounding . . . a constitution intended to endure for ages to come, and consequently to be adapted to the various *crises* of human affairs"<sup>43</sup> is misplaced. It was uttered in the course of a discussion of the *means*

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37. Brief for Richard Nixon at 54-58, *United States v. Nixon*, 418 U.S. 683 (1974).

38. 418 U.S. at 708.

39. Compare the dissenting opinion of Justice Thurgood Marshall in the recent anti-busing case: "[T]he Court today takes a giant step backwards." *Milliken v. Bradley*, 418 U.S. 717, 782 (1974).

40. MULLER, *supra* note 4, at 43.

41. EXECUTIVE PRIVILEGE, *supra* note 5, at 97, quoting 4 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 446 (2d ed. 1836) [hereinafter cited as ELLIOT].

42. *Id.*, quoting 9 J. MADISON, *WRITINGS* 191, 372 (G. Hunt ed. 1900-1910) [hereinafter cited as MADISON].

33. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

essential to the execution of a granted power and, as Marshall stated, it would have required nothing less than a "legal code" to attempt vainly to spell out all such means.<sup>44</sup> He himself emphatically disclaimed "the most distant allusion to any extension by construction of the powers of Congress."<sup>45</sup> "Virtually unlimited discretion . . . to meet twentieth century needs," as Professor Gerald Gunther stated, cannot be extracted from Marshall's dictum.<sup>46</sup>

Let that arch "activist," Justice Black, speak:

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with the duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification.<sup>47</sup>

To be sure, this was when Justice Black rejected the predilections that the majority of his brethren were reading into the Constitution; he was ever ready to read in his own. But as I wrote in the dawn of the "reconstructed Court," I like it no better when the Court reads my predilections into the Constitution than when *McReynolds & Co.* read in their own.<sup>48</sup> At any rate, historians, for whom scrupulous intellectual honesty is the highest morality, cannot play both sides of the street, depending on which value judgments are currently the judicial vogue.

Ours is a government by consent of the governed. The people, said James Iredell, "have chosen to be governed under such and such princi-

44. *Id.*

45. Quoted in G. GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 185 (1969) [hereinafter cited as GUNTHER]. When *McCulloch* came under attack, Marshall, speaking to the above-quoted passage, stated:

[I]t does not contain the most distant allusion to any extension by construction of the powers of Congress. Its sole object is to remind us that a Constitution cannot possibly enumerate the means by which the powers of government are carried into execution.

*Id.* Again and again he repudiated any intention to lay the predicate for such "extension by construction." "There is," he said, "not a syllable uttered by the court [that] applies to an enlargement of the powers of congress." *Id.* at 182. He rejected any imputation that "those powers ought to be enlarged by construction . . ." *Id.* at 184. See also EXECUTIVE PRIVILEGE, *supra* note 5, at 97.

46. GUNTHER, *supra* note 45, at 20-21.

47. *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting). For earlier utterances to the same effect, see *Twining v. New Jersey*, 211 U.S. 78, 106-07 (1908) (Moody, J.); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.).

48. See *Constructive Contempt*, *supra* note 2, at 604-05.



ples. They have not consented or promised to submit upon any other.”<sup>49</sup> Distrustful of the abuse of power, the Founders meant, in the words of Jefferson, to bind our agents “down from mischief by the chains of the Constitution.”<sup>50</sup> The chains employed by the Founders were words, and it is our paramount duty to ascertain what they meant by them, not to alter their meaning on the pretext that in the course of time those words have come to mean something else.

Let me now turn to the history that bears on executive privilege. Looking to the parliamentary practice at the adoption of the Constitution, the Supreme Court held in 1927 that “the power of inquiry . . . was regarded and employed as a necessary and appropriate attribute [of the] legislative power” and was conferred on Congress.<sup>51</sup> Parliamentary records disclose that inquiry covered the entire spectrum of executive conduct. With the exception of an incident during the Walpole investigation in 1742, which misled Jefferson, I found no executive refusal to turn over information between 1621 to 1742.<sup>52</sup> An 80 year old Walpole adherent, John Scrope, who was indispensable to the functioning of the Treasury, was therefore not jailed by the Commons upon his refusal to furnish information. But his expendable associate, Nicholas Paxton, was thrown into the Tower.<sup>53</sup> In 1701 Charles Davenant stated that “no one has ever questioned the legislative authority ‘to enquire into, and correct the Errors and Abuses committed by those [who exercised] Executive power.’”<sup>54</sup> That was confirmed 130 years later by the great English historian, Henry Hallam.<sup>55</sup> In short, there is no pre-1787 basis for the

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49. Quoted in 2 G. McREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 146 (1857).

50. Quoted in C. WARREN, *CONGRESS, THE CONSTITUTION AND THE SUPREME COURT* 153 (1925) [hereinafter cited as WARREN].

51. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927); see WARREN, *supra* note 50, at 161.

52. See EXECUTIVE PRIVILEGE, *supra* note 5, at 15-31. I went no further because the 18th century Parliament had been suborned by the Crown and had lost the trust of the Colonists. As J.H. Plumb stated, the Founders meant to “avoid the seeming corruption of the British Constitution of the 18th century, in which the executive—headed by the king—appeared to dominate the legislature to its own corrupt advantage.” Plumb, *Notes from London*, N.Y. Times, June 6, 1973, § 6, at 20-24. See also J. CLIVE, *MACAULAY* 124, 125 (1973). One may doubt whether a Parliament so dominated made demands on the Crown which it was likely to refuse.

53. EXECUTIVE PRIVILEGE, *supra* note 5, at 28-29, 170.

54. Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 558 (1974) (footnote omitted), quoting C. DAVENANT, *ESSAYS UPON I. THE BALANCE OF POWER. II. THE RIGHT OF MAKING WAR, PEACE, AND ALLIANCES. III. UNIVERSAL MONARCHY.* (1701).

55. See 3 H. HALLAM, *CONSTITUTIONAL HISTORY OF ENGLAND* 143 (1884).

proposition that there is an "inherent" executive power to withhold information from the legislature.

But, you may ask, was not all this changed by the separation of powers? Here I can only summarize a number of points which lead to a contrary conclusion. (1) Montesquieu, the Founders' oracle on the separation of powers, said that the legislature "has a right, and ought to have the means, of examining in what manner its laws have been executed . . .,"<sup>56</sup> in which the English, he stated, enjoy an advantage over some governments where public officers "gave no account of their administration."<sup>57</sup> (2) James Wilson paid tribute to the House of Commons, the Grand Inquest of the Nation, because it "checked the progress of arbitrary power . . . . The proudest ministers of the proudest monarchs . . . have appeared at the bar of the house to give an account of their conduct . . . ."<sup>58</sup> References to the House as the "Grand Inquest of the Nation" are sprinkled through the records of the several Conventions,<sup>59</sup> but in no case was protest made that this power was too broad or had to be curtailed for the protection of the Executive. The reason, I suggest, is that in the Revolutionary Period, to borrow from Bernard Bailyn, "faith ran high that a better world . . . could be built where authority was distributed and held in constant scrutiny."<sup>60</sup> (3) Given the recognized English practice, we may say with Chief Justice Marshall, "[i]t would . . . be expected that an opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms."<sup>61</sup> This requirement was recently applied by the Burger Court to save the common law immunity of judges in the teeth of comprehensive statutory coverage.<sup>62</sup> By the same token, the established common law power of the legislature should not be cut down by implication in favor of the President.

56. 1 C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 187 (1802) [hereinafter cited as MONTESQUIEU].

57. *Id.*

58. 2 J. WILSON, *WORKS* 731 (R. McCloskey ed. 1967).

59. EXECUTIVE PRIVILEGE, *supra* note 5, at 35.

60. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 319 (1967). This is confirmed by James Wilson's statement in the Pennsylvania Ratification Convention: "The executive power is better to be trusted when it has no screen . . . . [The President cannot] hide either his negligence or inattention." 2 ELLIOT, *supra* note 41, at 446.

61. *United States v. Burr*, 25 F. Cas. 55, 165 (No. 14,693) (C.C.D. Va. 1807).

62. *Pierson v. Ray*, 386 U.S. 547 (1967). The statute, 42 U.S.C. § 1983 (1970), "makes liable every 'person' who under color of law deprives another of his civil rights." 386 U.S. at 554. The Court held that "[t]he immunity of judges . . . is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 554-55.

(4) The Marshall requirement is confirmed by the Act of July 31, 1789, which imposed upon the Secretary of the Treasury "the duty . . . to . . . give information [to Congress] . . . respecting all matters . . . which shall appertain to his office."<sup>63</sup> Are we to conclude that this Act, drafted by Hamilton, co-author of *The Federalist*, enacted by the first Congress in which sat about twenty Framers and Ratifiers, signed by President Washington, who had presided over the Convention, violated the separation of powers? (5) Finally, Jefferson, in the famous General St. Clair memorandum (never communicated to Congress in a case where all the information was delivered), made no reference to the separation of powers, but common law lawyer that he was, turned to English precedents for light on the executive duty to turn over information.<sup>64</sup> Not long after, Marshall, a vigorous expositor of the Constitution in the Virginia Ratification Convention, considered President Jefferson's qualified claim of privilege in the *Burr* trial in terms of the evidentiary privileges created by judges in litigation, without the slightest intimation that the separation of powers played any role.<sup>65</sup> Respect for the presidential office, yes; but that respect had to yield to the fair administration of justice.

Of these and similar historical data you will find no mention in Chief Justice Burger's opinion. He *assumed* that "a presumptive privilege for presidential communications . . . is fundamental to the operation[s] of government . . . ."<sup>66</sup> Elsewhere I have shown that Parliament was no respecter of such confidence,<sup>67</sup> as the Founders were well aware,<sup>68</sup> that

63. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66 (now 31 U.S.C. § 1002 (1970)).

64. EXECUTIVE PRIVILEGE, *supra* note 5, at 168-69. Four years later, when the Jay Treaty confrontation occurred, Washington could recall only that a request for information had been made some years earlier, but not the action taken; he did remember that "[c]ases of this kind are to be found in the proceedings of the British House of Commons but I do not recollect the result." 34 WRITINGS OF GEORGE WASHINGTON 481-82 (J. Fitzpatrick ed. 1940) [hereinafter cited as WASHINGTON]. Thus, Washington confirms that the relationship between the legislature and the executive was viewed in terms of the English practice rather than the inherent executive power to withhold information.

65. See *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807); EXECUTIVE PRIVILEGE, *supra* note 5, at 187-91; WASHINGTON, *supra* note 64, at 191 n.156.

66. 418 U.S. at 708.

67. See EXECUTIVE PRIVILEGE, *supra* note 5, at 23. That no such principle obtained in the practice of Parliament is shown by its inquiry in 1714 as a prelude to the impeachment of the Earl of Oxford and other high ministers. Among the witnesses examined were Thomas Harley, brother of the Earl of Oxford, and Matthew Prior, envoys to France, who were interrogated as to their instructions by the ministers to negotiate a secret treaty behind the back of their Dutch allies. *Id.*

68. "Pernicious advice" by the Ministers to the Crown was a repeated ground of

in this country administration long proceeded without the benefit of such a doctrine;<sup>69</sup> and that for practical purposes the doctrine was really launched in 1954 by President Eisenhower and was invoked for communications between *any* employees of the Executive branch, not merely for the President;<sup>70</sup> and that it had been rejected by an eminent Court of Appeals,<sup>71</sup> which won the endorsement of Justices Black, Frankfurter and Jackson, while the majority of the Supreme Court reversed on other grounds.<sup>72</sup>

For the proposition that there is "nothing novel about governmental confidentiality," Chief Justice Burger relied on the fact that "[t]he meetings of the Constitutional Convention in 1787 were conducted in complete privacy."<sup>73</sup> Notwithstanding, *in the Constitution* the Framers authorized secrecy by Congress alone: article I, section 5, clause 3, requires Congress to keep and publish journals, except "such parts as may in their judgment require Secrecy." On familiar principles, the omission to make similar provision for the President exhibits an intention to withhold such power from him. Moreover, had power been given him to withhold information from the *public*, it yet would not extend to withholding from Congress, the senior partner in government.<sup>74</sup>

Chief Justice Burger also cited<sup>75</sup> *The Federalist No. 64*, which deals with the treaty power, a power shared with the Senate. There John Jay said he appreciated that negotiations with those who preferred to "rely on the secrecy of the president" might arise, but he stressed that such secrecy was with respect to "those preparatory and auxiliary matters which are no [*sic*] otherwise important . . . than as they tend to facilitate the objects of the negotiations."<sup>76</sup> This is narrowly limited

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impeachment; and Francis Corbin in the Virginia Ratification Convention, Harry Pendleton in South Carolina, and James Iredell in North Carolina alluded to such "advice" as an impeachable offense. *Id.* at 185-86. Given impeachable "advice," inquiry whether it was given was an indisputable prerequisite and cannot be barred on constitutional grounds; let alone that the Senate has a right to participate fully in the conduct of foreign relations. *Id.* at 117-62.

69. See *Incarnation of Executive Privilege*, *supra* note 3, at 25.

70. See C. MOLLENHOFF, WASHINGTON COVER-UP 45-46 (1962); *EXECUTIVE PRIVILEGE*, *supra* note 5, at 213-14.

71. *United States v. Reynolds*, 192 F.2d 987 (3d Cir. 1951), *rev'd on other grounds*, 345 U.S. 1 (1952).

72. *United States v. Reynolds*, 345 U.S. 1 (1952); see *Incarnation of Executive Privilege*, *supra* note 3, at 13.

73. 418 U.S. at 705 n.15.

74. See *Incarnation of Executive Privilege*, *supra* note 3, at 14-15.

75. 418 U.S. at 708 n.17.

76. *THE FEDERALIST* No. 64, *supra* note 26, at 435 (J. Jay).

secrecy. Even so, James Wilson stated in the Ratification Convention that he was "not an advocate of secrecy . . . even in forming treaties."<sup>77</sup> James Iredell said in the North Carolina Convention that it is the President's "duty to impart to the Senate every material intelligence he receives."<sup>78</sup> In the words of McDougal and Lans, "[t]he testimony of delegates to the Constitutional Convention clearly indicates the intention of the draftsmen that the Senate participate equally with the President in the step-by-step negotiation of treaties."<sup>79</sup> Blind-folded participation was far removed from their design. Thus, the claim of confidentiality gains little or nothing from *The Federalist No. 64*.

Notice must be taken of the gratuitous repetition of unfortunate dictum in *United States v. Reynolds*,<sup>80</sup> that some military, diplomatic, and other national security interests may have an absolute privilege, shielded even from judicial inspection *in camera*.<sup>81</sup> Current events should have persuaded the Court that judges are more to be trusted than John Erlichman and his like, who proved anew Justice Jackson's statement that "[s]ecurity is like liberty in that many crimes are committed in its name."<sup>82</sup> As Professor Henkin commented, we are not told "why the President's judgment in balancing public interests is conclusive in some instances and hardly material in others, or why courts can be trusted with some 'secrets' and not with others."<sup>83</sup>

All in all, *United States v. Nixon* is a remarkable opinion; practiced Court watchers, Professors Kurland,<sup>84</sup> Mishkin<sup>85</sup> and Van Alstyne,<sup>86</sup> suggest that it was pieced together in order to obtain a unanimous

77. 2 ELLIOT, *supra* note 41, at 506.

78. 4 ELLIOT, *supra* note 41, at 127.

79. McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1 & 2), 54 YALE L.J. 181, 534 (1945) [hereinafter cited as McDougal & Lans].

80. 345 U.S. 1 (1952).

81. 418 U.S. at 710-11, *quoting* *United States v. Reynolds*, 345 U.S. 1, 10 (1952).

82. *Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1951) (Jackson, J., dissenting).

Professor Van Alstyne comments that

[t]he reiteration from *Reynolds* was unnecessary. It is surprising that it drew no disclaimer from any other Justice. Ironically, it may even imply that Mr. Nixon would have prevailed in the case had he once again incanted the magical words of "national security."

Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 U.C.L.A.L. REV. 116, 118 (1974) [hereinafter cited as Van Alstyne].

83. Henkin, *supra* note 22, at 45.

84. Kurland, *supra* note 22, at 74.

85. Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 U.C.L.A.L. REV. 76, 86-87 (1974) [hereinafter cited as Mishkin].

86. Van Alstyne, *supra* note 82, at 122-23.

decree that even Mr. Nixon could regard as "definite." One can only hope Professor Kurland correctly prophesies "there can be little doubt that the Court's reasoning in this case is good for this case only."<sup>87</sup>

Finally, few would quarrel with the proposition that as a practical matter presidential communications with his immediate counsellors, barring suspicion of criminality, should be respected; and Congress generally has done so. So too, raw, unevaluated files that besmirch an individual should be withheld, as Senator Sam J. Ervin proposed.<sup>88</sup> The evil lies deeper, in the wholesale claim of privilege for every communication between the 2,500,000 employees of the Executive establishment, made by Attorney General Richard Kleindienst, echoing the 1954 Eisenhower directive.<sup>89</sup> That would pull an iron curtain about the entire operation of the Executive branch.<sup>90</sup> It suffices to quote an early statesman, Edward Livingston:

No nation ever yet found an inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and . . . slavery . . . only because the means of publicity had not been secured.<sup>91</sup>

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87. Kurland, *supra* note 22, at 74.

88. *Hearings on Executive Privilege: The Withholding of Information by the Executive Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 440 (1971).

89. EXECUTIVE PRIVILEGE, *supra* note 5, at 254-55.

90. *See, e.g., id.* at 236, 249, 255.

91. *Quoted in id.* at 347, *quoting* Reynolds v. United States, 192 F.2d 987, 995 (3d Cir. 1951), *rev'd on other grounds*, 345 U.S. 1 (1952).