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Comment on Executive Privilege in Light of United States v. Nixon

Charles A. Lofgren

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C. *Charles A. Lofgren**

Raoul Berger has shown an uncanny sense of timing. In the past two years, he has produced two significant books, one on impeachment and the other on executive privilege, just as the subjects have become topics of sustained national debate. In this debate, his scholarship has doubtlessly given aid and comfort to those intent on whittling down what Professor Schlesinger has called the "imperial presidency."[185] Accordingly, it would be easy to accuse Professor Berger of putting history to partisan use. By his own testimony, he admits to having changed his mind since the mid-1950's about the value of secrecy in government. For example, he now finds that "[Senator Joseph] McCarthy's horsewhipping of General Zwicker is hardly to be weighed in the same scales with Lyndon Johnson's stealthy escalation of our commitment in Vietnam."[186]

Mr. Berger's works, including his present paper, may be briefs against executive power; at the outset, though, I think it is important to absolve him of the charge that his scholarship is merely subservient to the needs of the moment. His interests in the area of executive power substantially pre-date recent controversies and, as evidenced by his publications, extend back to 1965.[187] This leads me to one question which will take Mr. Berger away from his paper itself, but which I believe would be interesting to have him discuss: How did he come to focus so much of his attention as early as a decade ago on the area of executive power? After all, I suspect there lurks in each of us a certain envy of someone who is able to bring the past to bear significantly on the present.

Let me turn to more substantive questions which I see arising out of the paper and directly out of *United States v. Nixon.*[188]

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* Roy P. Crocker, Associate Professor of History, Claremont Men's College.

185. A. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973).

186. *See* note 2 *supra.*

187. *See Congressional Inquiry, supra* note 124.

188. In thinking about Mr. Berger's paper, I have benefited from a number of sources, including Westin, *Foreward* to UNITED STATES V. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT xi (L. Friedman, ed. 1974) [hereinafter cited as Westin]; Freund, *The Supreme Court 1973 Term—Foreward: On Presidential Privilege,* 88 HARV. L. REV. 13 (1974); *The President, supra* note 3; Sofaer, *Book Review,* 88 HARV. L. REV. 281 (1974); Winter, *Book Review,* 83 YALE L.J. 1730 (1974); "Executive Privilege, Yes or No?," Lecture given by Alpheus T. Mason, Pomona College, Claremont, California, Feb. 20, 1975. *See generally A Symposium on United States v. Nixon,* 22 U.C.L.A.L. REV. 1 (1974).

Mr. Berger remarks that "[a]gainst 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 [executive privilege] . . . ."[189] But to the extent that a contextual element deserves stressing, I wonder if the element making the opinion remarkable was not instead the Court's apparently favorable strategic position in rendering its decision. Mr. Berger takes note of this favorable position, and he is surely correct. Compared with the situation in 1952 when the *Steel Seizure Case*[190] was decided, the Court in 1974 could count on fairly complete national support in taking a stand against the executive branch.

To put the matter differently, if there is no sound basis for a constitutional claim of privilege, then the opinion in *United States v. Nixon* is indeed questionable for its handling of the central constitutional issue it addresses. Moreover, even if a firmer basis can be found for executive privilege, the fact remains that the Court's opinion is still deficient in that it mainly asserts, but does not demonstrate, the existence of such a basis. As Mr. Berger stated in his article, *The Incarnation of Executive Privilege*:[191] "[E]ven more than an historian, the Court is called upon to take discrepant evidence into account, to explain why it is given no weight."[192] In this regard, there is a revealing contrast: When Chief Justice Marshall in *Marbury v. Madison*[193] claimed the power of judicial review, he was advancing a claim which his contemporaries evidently found quite *un*remarkable.[194] He nevertheless went to some length to defend his position. Chief Justice Burger, despite real debate over the point at issue, almost summarily found that "a presumptive privilege for presidential communications . . . is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution."[195] Absent is any notion of opposing evidence; absent is reasoned exploration which gives a court's decision force beyond

189. *See* text accompanying note 17 *supra.*

190. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

191. *See Incarnation of Executive Privilege, supra* note 3.

192. *Id.* at 11.

193. 5 U.S. (1 Cranch) 49 (1803).

194. *See, e.g.*, 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 231-268 (rev. ed. 1926). It was, of course, Marshall's dictum that Marbury was entitled to his commission—not the claim to judicial review—which aroused contemporary debate. *Id. See also* R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE EARLY REPUBLIC 53-68 (1971).

195. 418 U.S. at 708.

being the fiat of a handful of appointed judges. If we can conclude that the Court possessed a national constituency in and out of Congress which was ready for a full and reasoned exploration, then the "Tapes Case" was truly remarkable.

I want to be "perfectly clear"; it is valuable to examine, as Mr. Berger has done, whether the Court had adequate grounds for its decision. In fact, it is a necessary first step. What I mean to suggest is that besides assessing the Court's opinion in this manner, and in large part because this approach arguably reveals the opinion as deficient, the constitutional historian might well go a step further and ask *why* the Court took the position it did, in the manner it did, and at a time when external factors were apparently conducive to a fuller exploration.

Toward the end of his paper, Mr. Berger briefly mentioned an explanation which has been advanced by several Court watchers, and which I too wish to develop.[196] Their suggestion is that the opinion carries all the marks of a joint—you might say "committee-drawn"—effort. The Court, they have theorized, perceived that it had to speak with one voice or it might invite presidential resistance. Professor William Van Alstyne notes that a "delicate exchange"[197] occurred during oral argument of the case. Asked if the President was leaving the matter of the subpoena to the Court to decide, presidential attorney James St. Clair replied: "Yes, in a sense." When asked, "In what sense?" he said, "In the sense that this Court has the obligation to determine the law. The President also has an obligation to carry out his constitutional duties." Seconds later, St. Clair reaffirmed, "This is being submitted to this Court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution."[198]

Thus, beyond its undoubted awareness of speculation in the press over whether the President would obey a court order, the Court was further warned of the potential difficulties it faced. In this situation, as Professor Paul Mishkin has written, even concurring opinions "could diffuse the impact of the Court's judgment . . . ."[199] Moreover, given the existence of a majority in favor of production of the tapes, any justice otherwise inclined to dissent must have paused at the thought that division would hurt the Court's overall institutional position.

196. I here draw freely from Mishkin, *supra* note 85, at 76, 86-9; Van Alstyne, *supra* note 82, at 116, 120-23; Westin, *supra* note 188, at xv-xvi.

197. Van Alstyne, *supra* note 82, at 123.

198. *Id.*

199. Mishkin, *supra* note 85, at 87.

Significantly, in attempting to reconstruct what happened in conference on the basis of "court sources" reported in the press, Professor Allan Westin suggests that four Justices initially favored "a broad opinion limiting the concept of executive privilege. . . ."[200] Yet all members of the Court recognized the value of unanimity, and accordingly each justice had immense bargaining power. Hence, to simplify the give and take over specific issues, we find emerging into the final opinion the not easily reconciled assertions both of constitutional privilege and of the requirement that the privilege yield to the needs of the judiciary for evidence.[201] Both sides thereby gained something. In the process the Court was able to skirt the touchy issue of the President's status as an unindicted co-conspirator; this was an issue which would have required exploration had the President's privilege been treated as merely an evidentiary privilege.

Someday, of course, we may have better accounts of the "why" of the opinion in the "Tapes Case." I mean primarily to suggest here that of the deficiencies of the opinion, combined with the Court's favorable national support base in the case, leads one to ask "Why"? Parenthetically, however, one should also note that the necessity-for-unanimity explanation tends to call into question whether the Court actually saw itself in the strong position in which others have viewed it.

In looking at executive privilege in light of *United States v. Nixon*, a further question arises: What effect did the decision have upon the position of Congress vis-a-vis the other branches? As a matter of law, it would seem that Congress in an impeachment proceeding certainly has a claim on evidence as strong as the claim the Court asserted for the judicial branch, and probably a stronger one. But what of the impact of the decision on the "working" constitution? Would Congress have emerged in a better position had the impeachment process run its course without being aborted by a court-induced resignation? Relatedly, would Congress' position have been better sustained in the absence of the Court's quotation of Marshall's view in *Marbury* that "it is emphatically the province and duty of the judicial department to say what the law is"?[202] Professor Gerald Gunther argues that the Court's reiteration of this claim influenced a number of congressmen on the Judiciary Committee, and made them less willing to accept the notion that contempt of the Committee's efforts to obtain evidence was itself an independent

200. Westin, *supra* note 188, at xvi.
201. 418 U.S. at 707, 711-13.
202. 418 U.S. at 703, 705, *quoting* 5 U.S. (1 Cranch) at 70.

impeachable offense.[203] Instead, says Gunther, the Court's use of Marshall's statement encouraged the congressmen to see such contempt as a matter for the courts to rule upon.[204]

While these questions take one beyond the immediate focus of Mr. Berger's paper, they flow from it and go to the issue of the historical significance of *United States v. Nixon*, including its influence on the actual constitution of government in America. This is, indeed, an important problem in constitutional history.

203. Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 U.C.L.A.L. REV. 30, 33-38 (1974).

204. *Id. But see* Van Alstyne, *supra* note 82, at 124-27.