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Foreword

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UNITED STATES v. NIXON: AN HISTORICAL PERSPECTIVE*

I. FOREWORD

by D.S. Hobbs**

Professor Raoul Berger has made important and timely contributions to the argument surrounding executive privilege. His *Executive Privilege: A Constitutional Myth* (1974)¹ and a plethora of related articles² constitute a broadside attack on those who have argued that there is an implied presidential power to withhold information from the other branches of government. His conclusion is that the historical evidence supports no such power. According to Berger, what has become commonly accepted as "executive privilege" is in fact a "myth," created by executive partisans and naively nurtured by numerous commentators. The paper, which is the subject of the roundtable discussion in this issue of the *Review*, represents Berger's summary of his thesis as seen in the aftermath of *United States v. Nixon*.³

Mr. Berger's argument has been widely commented upon in the law reviews. Since these comments have been primarily by lawyers,⁴ it is most appropriate that the *Review* afford Berger a forum—with a format of *his* choosing⁵—to air his ideas in the company of historians.

* The main paper by Professor Berger, and the comments by Professors Ellis, Benedict, and Lofgren were originally delivered before a meeting of the Organization of American Historians, Boston, Massachusetts, April 17, 1975. The replies by Professor Berger were written subsequent to this meeting.

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1. R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974) [hereinafter cited as BERGER].

2. See Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975); Berger, *Executive Privilege: A Reply to Professor Sofaer*, 75 COLUM. L. REV. 603 (1975); Berger, *Executive Privilege, Professor Rosenblum, and the Higher Criticism*, 1975 DUKE L.J. 921; Berger, *The Incarnation of Executive Privilege*, 22 U.C.L.A.L. REV. 4 (1974) [hereinafter cited as *Incarnation of Executive Privilege*]; Berger, *Executive Privilege and Congressional Inquiry*, 12 U.C.L.A.L. REV. 1044 (1965); Berger, *Executive Privilege: Some Counter Criticism*, 44 U. CINN. L. REV. 166 (1975); Berger, *The President, Congress and the Courts*, 83 YALE L.J. 1111 (1974).

3. 418 U.S. 683 (1974).

4. Of the reviewers cited in notes 6-10 *infra*, all but Rosenblum, who is both a professor of law and a political scientist, are either law professors or practicing attorneys.

5. It is interesting that now that Professor Berger finally has been provided an opportunity to publish his debate with historians, he has demanded a format closely

In the roundtable, Professors Michael Les Benedict and Richard E. Ellis suggest, to Berger's evident annoyance, that his is not the only reading of history. Lest the sensitive reader be surprised by the vituperative, *ad hominem* nature of Berger's responses to their insightful and largely generous comments, it should perhaps be noted that Berger's style bears a remarkable resemblance to that of a not-so-disinterested M.P. during the question period in the House of Commons, and has been variously described as "self-important and petulant,"⁶ "decidedly tilted,"⁷ "wholly one-sided,"⁸ "combative,"⁹ and "adversary."¹⁰

Before remarking briefly upon the question of Berger's historical analysis, which is raised by Benedict and Ellis, I should like to comment on an interesting query in Professor Charles A. Lofgren's paper, to which Berger elected not to respond.

The question which intrigues Lofgren is "why" *United States v. Nixon* was written the way it was, with a presumptive executive privilege simply assumed. He suggests that the opinion, which is lacking in reasoned elaboration, was a committee-drafted compromise effort, inspired at least in part by a desire to present a united front in view of the uncertainty regarding presidential compliance.¹¹ The explanation cer-

resembling that of a trial where the moving party enjoys the first and last word. This perhaps is an odd posture for one who bristles, as does Berger, when it is even suggested that his history is advocacy. On the other hand, such a stance is of course not unreasonable if one is convinced that historical evidence is amenable to final and binding judgment.

6. Winter, Book Review, 83 YALE L.J. 1730, 1734 (1974) [hereinafter cited as Winter]. For a reply, see Berger, *Executive Privilege: Some Counter Criticism*, 44 U. CINN. L. REV. 166 (1975) [hereinafter cited as *Counter Criticism*].

7. Albert, Book Review, 74 COLUM. L. REV. 1360 (1974). For a reply, see *Counter Criticism*, *supra* note 6, at 182 *et seq.*

8. Sofaer, Book Review, 88 HARV. L. REV. 281, 284 (1975). For a reply, see Berger, *Executive Privilege: A Reply to Professor Sofaer*, 75 COLUM. L. REV. 603 (1975).

9. Richman, Book Review, 27 STAN. L. REV. 489, 494 (1975).

10. Rosenblum, Book Review, 69 NW. U.L. REV. 653 (1974). Unlike the reviewers cited in notes 6-9 *supra*, Professor Rosenblum had very little but praise for EXECUTIVE PRIVILEGE. For his flattery, Rosenblum is rewarded with a sermon about his failure to note the incompatibility between *United States v. Nixon* and the Berger thesis. Berger, *Executive Privilege, Professor Rosenblum, and the Higher Criticism*, 1975 DUKE L.J. 921.

11. Professor Lofgren calls attention to Mr. St. Clair's statements at oral argument which note that the President has *his* obligations under the Constitution. The Court may have been more impressed with the White House announcement of July, 1973, that the President would obey only a "definitive" Supreme Court ruling and the President's subsequent refusal to define "definitive". See Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 U.C.L.A.L. REV. 76, 77 (1974) [hereinafter cited as Mishkin].

tainly makes sense, and is in accord with what little we know about High Court behavior in novel and delicate cases of great moment.

I am not, however, sure that Lofgren is on target when he suggests that in deciding to compromise and conceal its internal disagreements the Court underestimated or misread its support in the "national constituency" of public opinion. It seems equally plausible that the Court correctly perceived that public opinion was united only on the limited proposition that the unindicted co-conspirator, who was just coincidentally the President, should turn over the so-called Watergate tapes; and that there was no consensus on the broader question of the nature of presidential authority and the separation of powers in the abstract. If the Court anticipated public support that was essentially result oriented and thus saw its role as that of the Nation's constitutional schoolmaster, its opinion in *United States v. Nixon* was a triumph in many respects. With a broad stroke of the judicial pen the Court succeeded in resolving a stubborn controversy; reminding both the President and the Nation with an understandable, albeit overly simplistic, argument that it is a government of Laws in this Land; preserving the authority of the presidential office with a display of dignified deference; maintaining its posture of neutrality by avoiding any reference to the incumbent President's possible involvement in the Watergate coverup; and reaffirming its own institutional autonomy.¹²

These considerations may explain the opinion; but of course they do not justify it. Normally we do not expect the Court to use an opinion as a vehicle for returning the country to normalcy and concord or, for that matter, for protecting its own institutional interests. Whether this particular lapse, whatever the causes may in fact be, from principled adjudication can be justified is a difficult question. One does not have to accept Berger's pristine view of constitutional exegesis to be troubled by the Court's apparent attempt to mass the country in order to facilitate a political settlement.

In assessing the Court's performance it is worth bearing in mind, additionally, that unlike many other opinions which have allegedly lacked a principled foundation, *United States v. Nixon*, with all its *ipse dixit*s and assorted dicta, probably has not committed either the Court or the country to very much in the way of constitutional doctrine which

12. See generally Mishkin, *supra* note 11. Professor Mishkin has presented, by far, the most thorough elaboration and evaluation of the political considerations involved in *United States v. Nixon*.

extends beyond the Watergate matter.¹³ All that we have been told is that the presumptive "presidential privilege" based on the need for "confidentiality" gives way to the ends of our system of criminal justice.¹⁴ How the privilege will fare when, for example, the balance involves demands for information in the context of civil litigation,¹⁵ a congressional inquiry¹⁶ (including impeachment), a presidential assertion of a privilege based on the necessity to protect military, diplomatic or sensitive national security secrets¹⁷ or an alleged need to protect the "confidentiality" of communications involving low level bureaucrats¹⁸ is apparently left to the future. The essentially *ad hoc* nature of the decision makes it, at least for the present, readily distinguishable from the Court's handicraft in, for example, *Brown v. Board of Education*,¹⁹ *Miranda v. Arizona*,²⁰ *Abington School District v. Schempp*²¹ or *Reynolds v. Sims*,²² which involved long range national commitments to broad, much debated policies.

Before leaving the question raised in the comments of Berger and Lofgren concerning the merits of the opinion in *Nixon*, several points might well be made.

(1) The question-begging in the opinion does not displease only those who support the Berger view of executive privilege. The Court subjected the President's view to an equally short shrift treatment. The President claimed—not without respectable support²³—that the Consti-

13. See Henkin, *Executive Privilege: Mr. Nixon Loses but the Presidency Largely Prevails*, 22 U.C.L.A.L. REV. 40 (1974) [hereinafter cited as Henkin].

14. 418 U.S. at 712-13.

15. "We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation" *Id.* at 712 n.19.

16. "We are not here concerned with . . . congressional demands for information" *Id.* There would appear to be nothing in *Nixon* which would preclude a future court from holding that the need for information by Congress *always* outweighed the President's need for confidentiality.

17. "We are not here concerned with . . . the President's interest in preserving state secrets." *Id.* But see *id.* at 706, to the effect that a claim of national security might preclude *in camera* inspection of requested evidence (dictum).

18. The Court's confidentiality argument is based on a "valid need for protection of communications between *high* Government officials and those who advise and assist them" *Id.* at 705 (emphasis added). The question is: "[H]ow high is 'high'." *Incarnation of Executive Privilege, supra* note 2, at 22.

19. 347 U.S. 483 (1954).

20. 384 U.S. 436 (1966).

21. 374 U.S. 203 (1963).

22. 377 U.S. 533 (1964).

23. See Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and*

tution dictated that the final determination about what executive information was available to the other branches was a matter of absolute presidential discretion. This assertion of an absolute privilege was quite summarily rejected on the authority of references to *Baker v. Carr*²⁴ and to *Marbury v. Madison*²⁵ to the effect that it was emphatically the function of the judicial branch to determine what the "law" is.²⁶ This is hardly responsive to the President's argument that the "law" controlling the case mandated executive "discretion." To say that the Court "decides who decides" does not explain why the "who" is not the executive.²⁷

(2) Mr. Lofgren prefaces his criticism of *Nixon* with a reference to the fact that (unlike Chief Justice Burger in *Nixon*) John Marshall in the quite "unremarkable" case of *Marbury v. Madison* "went to some lengths to defend his position." The great Chief Justice's argument for judicial review, however lengthy, is remarkable precisely because of its question-begging quality.²⁸ *United States v. Nixon* and *Marbury v. Madison*, it might be added, have more in common than question-begging. Just as John Marshall's opinion sacrificed William Marbury's commission to the political whim of Madison and Jefferson in exchange for judicial review and the power to mandamus executive officers in the performance of their "ministerial" duties, Warren Burger's opinion left Richard Nixon's presidential tenure exposed to the harsh and ultimately fatal judgment of public opinion in return for the recognition of executive privilege and the authority of the Court to determine the scope of that privilege. If the Marshall opinion fared better in the short run, it is only because there were no law reviews in 1803.

Professors Benedict and Ellis are in good company when they suggest that Berger wrenches more out of history than is justified by the evidence. Although the early response to Berger's *Executive Privilege*

the Impeachment Process, 22 U.C.L.A.L. REV. 30, 34 (1974) [hereinafter cited as Gunther].

24. 5 U.S. (1 Cranch) 137 (1803).

25. 369 U.S. 186 (1962).

26. 418 U.S. at 704-05.

27. See Gunther, *supra* note 23, at 34-35; Karst & Horowitz, *Presidential Prerogative and Judicial Review*, 22 U.C.L.A.L. REV. 47, 55-56 (1974) [hereinafter cited as Karst & Horowitz].

28. "Marbury v. Madison in essence begs the question [of the Court's authority]." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 2 (1962) (noting the similar critiques of Robert G. McCloskey, Judge Learned Hand, Thomas Reed Powell, and James Bradley Thayer).

Contrary to Lofgren's claim, Marshall's justification of judicial review is not more lengthy than Burger's argument for a presumptive executive privilege. The judicial review argument takes up five pages in 1 Cranch; the executive privilege argument is made in ten pages of the U.S. Reports.

was, as its author likes to remind us, laudatory,²⁹ subsequent examinations, mostly in the law reviews, have for the most part been highly critical.³⁰ I suspect that the harshness of many of the reviews has as much to do with Berger's rhetorical style as with the substance of his argument. A polemical and tendentiously stated thesis is likely to draw response in kind, especially when it can be anticipated that its author will answer even the most circumspect criticism with ill-humored intolerance.³¹

Both Benedict and Ellis correctly absolve Berger of the charge that he selectively marshals evidence to reach a predetermined result. (Benedict's employment of the phrase "lawyers' history" to describe Berger's history is, I believe, simply loose usage, to which Berger responds with exaggerated hurt.) Their quarrel with Berger, if I understand them correctly, is that his reading of history does not sufficiently acknowledge the possibility of ambiguity. In other words, Berger has no preconception about the "true understanding" of executive privilege, but rather an implicit faith that there must have been *a* definitive understanding. Thus Berger presents evidence which shows, *inter alia*, that the Founders had a general expressed attachment to Parliamentary precedents, a broad power of congressional inquiry, and open government—attachments which are clearly logically incompatible with a belief in an *unqualified* executive privilege—as supporting the proposition that the Framers were unequivocally opposed to any privilege whatsoever. What Benedict and Ellis conclude is that while Berger has refuted the royalist position that the executive privilege is absolute, the historical evidence does not conclusively support the argument that the Framers clearly intended that the executive have no constitutionally based privilege. For them the evidence permits various inferences.

For example, Benedict argues Jefferson's notes of a Cabinet meeting during the St. Clair incident show that Washington and his Cabinet concluded that the President had the right to withhold from Congress papers, "the disclosure of which would injure the public."³² Berger rejects this as "precedent" and considers the Cabinet discussion "academic" because Washington did turn over all papers; because Jefferson misunderstood the Walpole precedent, upon which the Cabinet, in part, relied; and because the Jefferson notes were not "exhumed" until 1957.³³ All of the

29. See, e.g., *Incarnation of Executive Privilege*, *supra* note 2, at 11 n.40.

30. See, e.g., notes 6-9 *supra*.

31. See, e.g., Berger's replies to his critics, cited in notes 6-8, 10 *supra*.

32. Berger, *supra* note 1, at 168.

33. *Id.* at 168-69.

observations are correct. Yet, as Professor Winters has elsewhere argued,³⁴ this does not derogate from the fact that Jefferson's memo reflected the views of President Washington, Secretary of the Treasury Hamilton, and Attorney General Randolph, all prominent members of the Constitutional Convention, who agreed that there was at least some executive discretion to withhold information.

Further, as Ellis notes, during the discussion of the Jay Treaty, Washington refused to turn over papers to the House on the ground that it had no role in treaty-making, and argued that if the House wanted the papers for impeachment, it must expressly so state. Madison, then a member of the House,

thought it clear that the House must have a right, in all cases, to ask for information which might assist their deliberations He was as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure at the time. . . .

If the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though responsible judge within his own department.³⁵

Professor Berger responds to this evidence by arguing that Washington asserted no general right to withhold information. "That Washington should thus have attempted to limit the powers of the House rather than to insist on executive privilege suggests a doubt whether he could safely invoke such an executive power."³⁶ As for Madison's statement, which was first introduced into the executive privilege debate by Berger, it is thrust aside primarily because Madison's position was rejected by the House.³⁷ Madison, who Berger acknowledges elsewhere as the principal architect of the Constitution,³⁸ is somehow discounted because he was outvoted by a transient House majority, a group, it should be noted, whose principal spokesmen were not at the Founding in Philadelphia.

34. Winter, *supra* note 6, at 1733.

35. *Id.* at 174, quoting 5 ANNALS OF CONGRESS 773 (2d ed. 1834).

36. *Id.* at 172.

37. *Id.* at 177-79. Berger seems to think it significant that Madison agreed that the "meaning of the Constitution would be established, as far as depends on the vote of the House of Representatives." *Id.* at 177 n.89. However, all Madison's statement shows is (1) that he agreed to the undeniable proposition that a majority of the House determined the House's constitutional position; and (2) that his own argument was derived from the Constitution.

38. *Id.* at 61.

This brief review of some of the evidence suggests that the historical facts are not so clear, and that there is much room for interpretation. Any interpretation must address itself to some thorny problems—problems appropriate for the historians but not, I would argue, for the Court. To begin with, there is the question of how much weight is to be accorded a given statement. For example, how much relative weight is to be assigned James Wilson's repeated references to Congress as the "Grand Inquest of the Nation" and Madison's quoted statement in the House? Berger seems, in part, to put the latter statement in the "self-serving" category, which includes comments made in the context of specific disputes between the branches, and thereby to dismiss it.³⁹ But can it realistically be claimed that it was Madison rather than the House that was mouthing "self-serving" words? In any event, there is not much constitutional history left if self-interested remarks are excluded.

Additionally, given that words and deeds must be interpreted, primary reliance upon such evidence raises the question of whether the correct inference has been drawn. For example, is it not possible that for political, *i.e.*, "self-serving" purposes, Washington chose to argue the narrower ground of the House's limited power rather than to assert a broad claim of executive privilege? Berger's interpretation of this incident indicates how one can have it both ways: strong assertions of executive authority can be ridiculed as "self-serving," while more modest claims can be regarded as statements against interest and thus accorded the status of "evidence." Berger's assessment may of course be correct. But the basic question of whether we want the courts to make such subtle and difficult judgments remains. One may admire Berger's deftness in dealing with disparate pieces of evidence but still prefer that the court avoid such speculation.

I simply am unable to see how Berger can advert to any *clear* intent on the part of the Framers, when Washington, Jefferson, Hamilton, Madison, and Randolph all appeared unaware of that intent. To be sure, Washington turned over the papers, Jefferson's notes were apparently unknown to contemporaries, and Madison was outvoted in the House. But how does this evidence account for the fact that they evidently believed, and clearly so stated, that there was a constitutional power to withhold information from Congress? Were they dissembling? There is no evidence that they were. Were they believers in the mischievous doctrine that it was a *Constitution* they were expounding? They most certainly were not. As Berger never tires of reminding us, Madison and Jefferson

39. Berger, *supra* note 1, at 166.

were early adherents of the view that the Constitution means what the Framers said it meant. Were they simply mistaken? Perhaps they were; all men are fallible. But is it likely that they were totally ill-informed or forgetful about a matter about which there was no doubt in 1789? These questions are the essence of the debate in which the panelists engage. In answering these questions for themselves I would hope that the readers will bear in mind a point Professor Berger made so well in another context: What the Framers believed is sometimes a better guide to their intentions than the precedents.⁴⁰

Mr. Berger has approached history in much the same manner as a judge in a civil case examines the evidence with a felt sense of the obligation to decide definitively one way *or* the other. If history were the extent of a judge's evidence, Berger has authored an impressive opinion—and, one might add, a well-circulated opinion. The difficulty of course is that history is not the only aid to judicial wisdom. In contrast to Berger, a number of commentators have joined the Court in eschewing history almost altogether in their analysis of executive privilege.⁴¹ A number⁴² have adopted Professor Charles Black's approach⁴³ and have analyzed the problem in terms of the "structure and relationship" of our governmental system. A number have simply read history differently.⁴⁴

If, as I believe, there is something to be said for the proposition that the Framers did not consciously consider the problem of executive privilege in all of its aspects, it is then difficult to agree with Benedict and Ellis that the Court in *Nixon* had an obligation to discuss history at any great length. Protracted essays demonstrating the inconclusive nature of history are not normally the grist of judicial opinions. A footnote by the Court noting the disagreement between Berger and his adversaries over the very existence of a privilege would no doubt please Clio and amuse Hegel, but it would have added very little to the rationale of *United States v. Nixon*.

40. R. BERGER, CONGRESS v. THE SUPREME COURT 45-46 (1969).

41. See, e.g., Ratner, *Executive Privilege, Self-Incrimination, and the Separation of Powers*, 22 U.C.L.A.L. REV. 92 (1974).

42. See, e.g., Winter, *supra* note 6; Karst & Horowitz, *supra* note 27.

43. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

44. See, e.g., Henkin, *supra* note 13, at 44: "That there is sometimes a public interest in withholding information has been recognized from our national beginnings . . ." "[T]here is an executive privilege . . . as old as our national history . . ." *Id.* at 45.