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

Michael Les Benedict

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B. *Michael Les Benedict**

Professor Berger need offer no justification to historians for his work. He has contributed not only to our understanding of legal and constitutional history but also to the resolution of current legal-constitutional problems which have engaged our attention as citizens. Professor Berger worries that historians derogate "lawyer's history" and perhaps even believe lawyers "congenitally incompetent to write history because they are bred as advocates in an adversary system."¹²³ In the course of his chastisement of the Supreme Court for its recognition of the doctrine of executive privilege in *United States v. Nixon*, he denies the distinction between "lawyer's history" and "historian's history."

While I do not suggest that lawyers are inherently incapable of writing history, Professor Berger's work on executive privilege—his books and articles upon which his paper is based¹²⁴ —*is* lawyer's history. I do not mean that in a pejorative sense. It is not bad history, but it is a kind of history that professional historians ordinarily do not write and lawyers do—history designed to give direct guidance to present-day decision makers.

The task Professor Berger set for himself when he began this work was to find out whether there is legal precedent for the doctrine of "executive privilege" against congressional inquiry, and, if so, what are its boundaries. He concluded that the doctrine itself is "a constitutional myth," and that there are no limits to Congress' power of inquiry into the operations of government¹²⁵ —at least none that the executive can draw at its own nonreviewable discretion. The book which embodies his argument and evidence is a powerful legal treatise. It stakes out a legal position and sustains it, among other ways, through historical inquiry. It is legal advocacy.

How is that different from what historians do? Professor Berger

* Associate Professor of History, Ohio State University.

123. See text following note 3 *supra*.

124. See, e.g., EXECUTIVE PRIVILEGE, *supra* note 5; Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972) [hereinafter cited as *Foreign Relations*]; *Incarnation of Executive Privilege*, *supra* note 3; *The President*, *supra* note 3. See also R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973) [hereinafter cited as IMPEACHMENT]; Berger, *Warmaking by the President*, 121 U. PA. L. REV. 29 (1972) [hereinafter cited as *Warmaking*]; Berger, *Executive Privilege v. Congressional Inquiry* (pts. I & II), 12 U.C.L.A.L. REV. 1043, 1287 (1965) [hereinafter cited as *Congressional Inquiry*].

125. See EXECUTIVE PRIVILEGE, *supra* note 5, at 35-48.

points out that we historians are not “unstained by advocacy,” and are not—to modify his metaphor—“virgins who stumble on Truth in the dark.”¹²⁶ That is certainly true; we all make subjective judgments. But we make them in answer to different questions. For Professor Berger the question is, Is there legal precedent for “executive privilege”? For an historian investigating the same subject, the questions would likely be, How and why did the doctrine of “executive privilege”—erroneous or not—develop? To what degree and over what opposition has it gained acceptance, and why? Ultimately, one might well decide that there is little legal precedent for the doctrine; one might conclude that past experience with such claims indicates that the doctrine is dangerous. But I believe that those judgments would not be central to the obligations of an historian. They are not responses to the *historical* questions I outlined.¹²⁷

What are some of the practical effects of these different approaches? Professor Berger, seeking legal precedents for claims of executive privilege, discounts the importance of the St. Clair¹²⁸ and *Burr* trial¹²⁹ episodes during the Washington and Jefferson administrations. He points out that Washington did not act upon his Cabinet’s agreement that the President had the right at his discretion to refuse to transmit to Congress papers “the disclosure of which would injure the public.”¹³⁰ Moreover, Professor Berger argues that Jefferson’s concurrence in that Cabinet understanding was based on a faulty assessment of English law.¹³¹ Jefferson, as President, privately denied Chief Justice John Marshall’s right to subpoena him or his papers; these denials, however, were vitiated by his public compliance.¹³²

Professor Berger may be right in dismissing the value of these “precedents” as legal authority. But for an historian investigating the development of the concept they are critical. They demonstrate how even the

126. See text following note 3 *supra*.

127. As citizens and intellectuals concerned with the present operation of our society, we do have nonprofessional obligations to it. If we have perceptions based on historical information at our command, we should share those perceptions and the information on which they are based. Many of our finest historians have done so—Henry Steele Commager, John P. Roche, and Arthur M. Schlesinger—come to mind immediately.

128. See generally EXECUTIVE PRIVILEGE, *supra* note 5, at 167-69.

129. *United States v. Burr*, 25 F. Cas. 30, 55 (Nos. 14692d, 14693) (C.C.D. Va. 1807).

130. EXECUTIVE PRIVILEGE, *supra* note 5, at 168, quoting 1 T. JEFFERSON, WRITINGS 189-90 (P. Ford, ed. 1892-1899).

131. *Id.* at 167-71.

132. See generally *id.* at 187-91.

early presidents began to create constitutional doctrines with which to wage personal or political conflicts.

The claim of executive privilege is part of a presidential arsenal of weapons with which chief executives have fought essentially political battles. Executive power has not grown in a vacuum. It has developed in the course of numerous struggles over issues with far more immediate meaning for Americans than the institutional arrangement of governmental powers. Washington's decision to withhold from the House of Representatives his instructions to the negotiators of the Jay Treaty¹³³ was part of the bitter conflict between his Federalists and the newly organizing Republicans. This conflict encompassed a broad range of issues of which foreign policy was the most important.¹³⁴ The Burr trial, in which President Jefferson attempted to withhold portions of a letter subpoenaed by the defense, involved a personal struggle between the President and his old enemy, John Marshall. This struggle had obvious implications for Marshall's Federalist party and Jefferson's Republicans.¹³⁵ Similarly, President Jackson's claim of executive power to limit congressional access to information was part of a general battle over economic and social policy embodied in the "Bank War," during which Jackson, in the words of one scholar, "transformed the presidential office . . . infus[ing] it with much of the power it enjoys today."¹³⁶

In each of these conflicts, Presidents harnessed constitutional arguments based on their oaths to defend the Constitution and their obligation to execute the laws. They utilized political influence derived from their institutional position as head of state, and they appealed to the Americans' confidence in the executive office. In response, opponents marshalled *their* constitutional arguments and congressional influence; they appealed to the fear of executive power that was as much a part of the American heritage as faith in individual Presidents. Each battle left

133. *Id.* at 171-79.

134. See J. MILLER, *THE FEDERALIST ERA 1789-1801*, at 164-79 (1960); N. CUNNINGHAM, *THE JEFFERSONIAN REPUBLICANS: THE FORMATION OF PARTY ORGANIZATIONS 1789-1801*, at 74-85 (1957).

135. See C. HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835*, at 279-88 (1944). See generally 3 BEVERIDGE, *supra* note 122, at 398-545.

136. R. REMINI, *ANDREW JACKSON AND THE BANK WAR 10* (1967). Jackson's effort to destroy the Bank of the United States led directly to the creation of the second American party system; his supporters and opponents literally organized around the issue of presidential power, as well as the social and economic policies he was seeking to promote through those powers. In fact, Jackson's opponents called their new political organization the *Whig* party, to underline their claim to the anti-monarchical heritage of the American Revolution. *Id.* at 129.

new authorities and precedents on each side for use in the next. By 1861, therefore, Americans had traditions both of executive power and opposition to it, traditions dating from before the framing of the Constitution.¹³⁷

The Civil War compelled an unprecedented accretion of power in the presidency, and modern champions of the office have turned to the Lincoln era to provide early sustenance for claims of inherent executive power.¹³⁸ But that growth did not come at the expense of Congress; in fact, the Civil War marked a tremendous growth in congressional power as well. Congress created a national banking system,¹³⁹ suppressed state banks,¹⁴⁰ reordered the national finances,¹⁴¹ financed and subsidized transportation and communication development,¹⁴² established national

137. Professor Berger persuasively documents the Americans' fear of executive tyranny during the Revolutionary Era, and his appreciation of that fear is the sturdy foundation against which he tests later claims of executive privilege. See EXECUTIVE PRIVILEGE, *supra* note 5, at 49-59. See also IMPEACHMENT, *supra* note 124, at 97-101. However, the Constitution was also framed in part in response to legislative tyranny. The Framers took administration of the laws out of the hands of Congress, where it was lodged under the Articles of Confederation, and placed it in the hands of an independent executive. The authority of the President which emerged from the constitutional debate was far broader than that of the state executives. This broad authority resulted precisely because many Americans had come to believe that power itself was dangerous no matter where held—even in the hands of legislatures, which were so long believed to be the protectors of liberty. The Framers' response was a division of power among governing institutions so that, in Jefferson's words, "no one could transcend their legal limits, without being effectually checked and restrained by others." *Quoted in* WOOD, *supra* note 103, at 453. See generally *id.* at 547-53; R. Berg, Presidential Power and Royal Prerogative 223-326, (unpublished Ph.D. dissertation in the University of Minnesota Library).

138. See Letter from Theodore Roosevelt to Otto Trevelyan, June 19, 1908, in H. HAGEDORN, THE THEODORE ROOSEVELT TREASURY: A SELF-PORTRAIT FROM HIS WRITINGS 193-95 (1957); P. HERRING, PRESIDENTIAL LEADERSHIP: THE POLITICAL RELATIONS OF CONGRESS AND THE CHIEF EXECUTIVE 15-18 (1940); J. KALLENBACH, THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP 446-51, 460-62 (1966); L. KOENIG, THE CHIEF EXECUTIVE 247-49 (1964); G. MILTON, THE USE OF PRESIDENTIAL POWER 1789-1943, at 107-22 (1944); T. ROOSEVELT, *A Charter of Democracy*, in 17 THE WORKS OF THEODORE ROOSEVELT 119, 121, 123-24, 139 (W. Andrews ed. 1926); C. ROSSITER, THE AMERICAN PRESIDENCY 22-23, 54-55, 82, 102-03, 141-42, 228-52 (1956).

139. Act of June 3, 1864, ch. 106, 13 Stat. 99.

140. Act of June 30, 1864, ch. 173, § 110, 13 Stat. 223, at 277-78.

141. Act of June 3, 1864, ch. 106, 13 Stat. 99; Act of February 23, 1863, ch. 58, 12 Stat. 665. See L. CURRY, BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS 181-206 (1968) [hereinafter cited as CURRY].

142. Act of July 1, 1862, ch. 120, 12 Stat. 489. See also Act of March 3, 1865, ch. 102, 13 Stat. 526; Act of March 3, 1865, ch. 103, 13 Stat. 520; Act of May 5, 1864, ch. 79, 13 Stat. 64; Act of March 3, 1863, ch. 98, 12 Stat. 772; Act of July 12, 1862, ch. 56, 12 Stat. 624; Act of July 5, 1862, ch. 38, 12 Stat. 620; Act of April 25, 1862, ch. 30, 12 Stat. 618. See also CURRY, *supra* note 141, at 116-48.

scription,¹⁴³ provided the mechanics for state-subsidized higher education,¹⁴⁴ promoted agricultural development,¹⁴⁵ and provided a federal bureaucracy to oversee the transition from slave to free labor in the South.¹⁴⁶ Moreover, it took congressional action finally to free the slaves and to legitimize and regularize Lincoln's limits on wartime civil liberties.¹⁴⁷

If proof was needed that Congress retained its institutional power during the War, it was provided by the great struggle between President Andrew Johnson and the Republican congressional majority over Reconstruction. With adversaries controlling different branches of government, the political issue inevitably became one of control of institutional power. Ultimately, the contest ended with a congressional victory—Johnson's impeachment trial and capitulation on the Reconstruction issue.¹⁴⁸ The post-Civil War era has generally been considered an age of congressional supremacy over the Executive, but the reality was something less. Republicans themselves had a stake in promoting the prestige of the presidency during the Grant administration. And while attacks on presidential power continued through Grant's terms, especially in regard to the use of military force to police the political process in the South, most of these attacks emanated from those who had sustained Johnson.¹⁴⁹

Against this background, there were several instances of claims of executive power to withhold information from Congress. In 1876 Presi-

143. Act of March 3, 1863, ch. 75, 12 Stat. 731. See H. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 215-23 (1973) [hereinafter cited as HYMAN]; J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 239-74 (1964) [hereinafter cited as RANDALL].

144. Act of July 2, 1862, ch. 130, 12 Stat. 503. See CURRY, *supra* note 141, at 108-15.

145. Act of July 2, 1862, ch. 130, 12 Stat. 503; Act of May 15, 1865, ch. 72, 12 Stat. 387. See P. GATES, *AGRICULTURE AND THE CIVIL WAR* 259-71, 283-300, 301-23 (1965).

146. Act of March 3, 1865, ch. 90, 13 Stat. 507. See G. BENTLY, *A HISTORY OF THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION* *passim* (1955); W. McFEELY, *YANKEE STEPPFATHER: GENERAL O.O. HOWARD AND THE FREEDMEN* 20-23 (1968).

147. U.S. CONST. amend. XII; Act of March 3, 1863, ch. 81, 12 Stat. 755. See HYMAN, *supra* note 143, at 245-62; RANDALL, *supra* note 143, at 118-214.

148. See M. BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1973) [hereinafter cited as BENEDICT]. Cf. D. DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON: A HISTORY* (1903). For background on the conflict between presidential and congressional claims of authority over Reconstruction, see H. BELZ, *RECONSTRUCTING THE UNION: THEORY AND POLICY DURING THE CIVIL WAR* 2-7 and *passim* (1969).

149. See L. COOLIDGE, *ULYSSES S. GRANT* 421-24 (1917); W. HESSELTINE, *ULYSSES S. GRANT, POLITICIAN* *passim* (1935).

dent Grant refused to answer a House resolution inquiring into what official duties he performed while absent from Washington.¹⁵⁰ In 1877 John Sherman, Secretary of the Treasury, refused to give reasons publicly for the change in the management of the New York Custom House.¹⁵¹ In 1886 President Cleveland refused to transmit papers relating to his removal of federal officers.¹⁵² Additionally, in 1879, a House committee, while assessing a rather distantly related matter, recognized an unrestricted right in the President to withhold information.¹⁵³

Like earlier controversies over "executive privilege," these instances were manifestations of deeper political conflicts. Congressional Democrats sought to embarrass the corruption-ridden Grant administration with the query about his official activities outside Washington.¹⁵⁴ Treasury Secretary Sherman's refusal to turn over papers or testify about the New York Custom House personnel changes was part of Hayes's deadly war over patronage with New York's powerful Republican Senator Roscoe Conkling.¹⁵⁵ Cleveland was reluctant to give his reasons for

150. Letter from U.S. Grant to the House of Representatives, May 4, 1876, in 7 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 361-66 (1898) [hereinafter cited as RICHARDSON].

151. To answer in an official way the questions put to me would not only compel me to violate the trust and confidence reposed in me by the President, necessary for the transaction of the business of this Department, but to disclose papers of a confidential character filed in the Department I do not think it within the just limits of the intercourse of the Senate with executive officers to answer in writing, or even verbally, all the questions submitted by you—nor have I ever known such an instance.

. . . .

. . . . To answer your questions would compel me to state to a committee of the Senate the reasons of an appointment by the President, to disclose confidential communications between the President and the Secretary, and to enter into an arraignment and accusation of the officers superseded.

Letter from John Sherman to Roscoe Conkling, Chairman of the Senate Comm. on Commerce, Nov. 17, 1877, in 17 CONG. REC. 2332 (1886) (remarks of Senator Kenna) [hereinafter cited as Letter of John Sherman].

152. See G. CLEVELAND, PRESIDENTIAL PROBLEMS 3-76 (1904); 1 R. McELROY, GROVER CLEVELAND: THE MAN AND THE STATESMAN: AN AUTHORIZED BIOGRAPHY 166-83 (1923); A. NEVINS, GROVER CLEVELAND: A STUDY IN COURAGE, 257-65 (1932).

153. H.R. Rep. No. 141, 45th Cong., 3d Sess. (Mar. 5, 1879).

154. See U.S. Department of Justice, Is A Congressional Committee Entitled to Demand and Receive Information and Papers from the President and Heads of Departments Which They Deem Confidential, in the Public Interest?, *Hearings on the Availability of Information from Federal Departments and Agencies, Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 84 Cong., 2nd Sess., pt. 12, at 2892, 2901 (1956).

155. See D. CHIDSEY, THE GENTLEMAN FROM NEW YORK: A LIFE OF ROSCOE CONKLING 244-54, 267-70 (1935); K. DAVISON, THE PRESIDENCY OF RUTHERFORD B. HAYES 164-65 (1972); A. HOOGENBOOM, OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883, at 155-63, 167-71 (1961); D. JORDON, ROSCOE CONKLING OF NEW YORK: VOICE IN THE SENATE 267-301 (1971); Shores, *The*

replacing Republican office-holders with Democrats at least in part because he had promised during his campaign to eliminate politics from the civil service.¹⁵⁶

A superficial look at these controversies has comforted supporters of the executive privilege.¹⁵⁷ In none of them was Congress able to force the President to divulge the information he retained. In several Congress finally gave in on the political issue that had precipitated the constitutional fight. For example, Congress ultimately confirmed President Cleveland's appointees despite his refusal to transmit the specific reasons and supporting documents for the removal of their predecessors.¹⁵⁸ In one case it was a committee of Congress itself that voluntarily conceded a discretionary right to the President to withhold information.¹⁵⁹

Opponents of the doctrine, however, might take heart from closer analysis. President Grant did not claim a discretionary right to withhold information when he refused to answer the House's inquiry into his extra-White House official activities, but rather he denied that Congress could demand information where it had no power to legislate. That is, he did not claim an executive power, instead he challenged Congress' jurisdiction:

What the House of Representatives may require as a right in its demand upon the Executive for information is limited to what is necessary for the proper discharge of its powers of legislation or of impeachment.¹⁶⁰

If this precludes the general and unlimited power of inquiry in the Congress posited by Professor Berger,¹⁶¹ it still falls far short of the power claimed in recent times for the President to withhold from Congress at his uncontrolled discretion any information he deems fit. Moreover, I have found no record of Congress' response.

The 1877 precedent also seems less sturdy under close analysis. When Senator Conkling sought to protect his political allies in the New York

Hayes-Conkling Controversy 1877-1879, in 4 SMITH COLLEGE STUDIES IN HISTORY, No. 4 (1919) [hereinafter cited as Shores].

156. See H. MERRILL, *BOURBON LEADER: GROVER CLEVELAND AND THE DEMOCRATIC PARTY* 102-04 (1957); H. MORGAN, *FROM HAYES TO MCKINLEY: NATIONAL PARTY POLITICS 1877-1896*, at 249-54 (1969) [hereinafter cited as MORGAN].

157. See, e.g., A. BRECKENRIDGE, *THE EXECUTIVE PRIVILEGE: PRESIDENTIAL CONTROL OVER INFORMATION* 45-48, 101-02 (1974); *Att'y Gen. Memo, supra* note 93, at 13-16; Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941, 944 (1958); Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B.J. 103, 121-26, 238-40 (1949) [hereinafter cited as Wolkinson].

158. See notes 151, 156 *supra*.

159. See note 153 *supra*.

160. Quoted in 7 RICHARDSON, *supra* note 150, at 362.

161. EXECUTIVE PRIVILEGE, *supra* note 5, at 15-48.

Custom House by asking Secretary Sherman for the grounds of their removal, Sherman did refuse to answer on broad grounds of confidentiality similar to those forwarded today, as well as on separation of powers grounds:

To answer . . . the questions put to me would not only compel me to violate that trust and confidence reposed in me by the President, necessary for the transaction of the business of this Department but to disclose papers of a confidential character . . . and to enter into the discussion of questions totally immaterial to the nominations submitted to the Senate

The President has the power to nominate . . . and it is within the power of the Senate to either confirm or reject.

. . . To answer your questions would compel me . . . to disclose confidential communications between the President and the Secretary¹⁶²

But the Senate hardly can be said to have acquiesced. President Hayes' nominees to replace Conkling's Custom House cronies were refused confirmation, largely because Conkling argued that no derelictions had been proven against his friends.¹⁶³ Hayes finally did succeed in winning Senate confirmation for new appointees over a year later, *but only after* Sherman voluntarily sent the Senate a detailed statement of the charges against the original officers.¹⁶⁴

The 1886 battle over President Cleveland's instructions to his Attorney General to withhold correspondence regarding the replacement of federal officers also appears less formidable on inspection. The letters included demands for Democratic access to patronage which would have been seriously embarrassing to an administration already under attack for failing to fulfill its commitment to civil service reform.¹⁶⁵ Cleveland ordered the refusal on two grounds: first, that the correspondence was private and not the sort of official papers Congress had the right to see,¹⁶⁶ and second, that the Senate had no jurisdiction over removals from office and therefore had no right to demand papers involving that question, "save through the judicial process of trial and impeachment."¹⁶⁷ Cleveland specifically assured the Senate that he did not claim

162. Letter of John Sherman, *supra* note 151.

163. Shores, *supra* note 155, at 244.

164. *Id.* at 257-58.

165. MORGAN, *supra* note 156, at 249-54; J. SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE 265-67 (1968).

166. 8 RICHARDSON, *supra* note 150, at 377-79.

167. *Id.* at 379-82.

that the President could order a subordinate to withhold information simply because he "is the servant of the President,"¹⁶⁸ the Nixonese ground claimed by Attorney General Kleindienst in 1973.¹⁶⁹ Cleveland's claim boiled down to one involving the definition of official papers and to the jurisdictional argument made by Grant in 1876 that Congress could not demand papers where it could not legislate, except in the case of impeachment.

The battle in Congress was waged on these grounds alone, with Cleveland's defenders affirming

once for all, that any and every public document, paper, or record on the files of any Department, or in the possession of the President, relating to any subject whatever, over which either House of Congress has any grant of power, jurisdiction, or control under the Constitution, is subject to the call or inspection of either House for use in the exercise of its constitutional powers and jurisdiction But if all the power granted in the Constitution over the subject matter . . . is vested . . . in the President exclusively, the only rightful custodian of all such papers or documents is the chief executive.¹⁷⁰

But the Senate rejected even this limited restriction on its power of inquiry, by voting to censure the Attorney General for obeying the President's instructions.¹⁷¹

The House Judiciary Committee's spontaneous affirmation of presidential power to withhold information came in connection with a quite different case. Minister to China, George F. Seward, accused of financial speculation in his prior Chinese post, refused to honor the subpoena *duces tecum* issued by the House Committee on expenditures in the State Department on the basis of his right against self-incrimination.¹⁷² When that committee recommended that Seward be held in contempt,¹⁷³ the question was referred to the House Judiciary Committee, which sustained Seward's position on several grounds, and gratuitously added its view favoring executive privilege.¹⁷⁴ The decision found

168. *Id.* at 377.

169. 1 *Hearings on S. 858, S. Cong. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923, and S. 2073 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers and Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 46 (1973).

170. S. REP. NO. 135, 49th Cong., 1st Sess. 2810 (1886).

171. 17 CONG. REC. 2810 (1886).

172. H.R. REP. NO. 117, 45th Cong., 3d Sess. (1879).

173. *Id.*

174. H.R. REP. NO. 141, 45th Cong., 3d Sess. (1879).

its way into Hind's Precedents,¹⁷⁵ and thence into the defense of executive privilege.¹⁷⁶ But the House Judiciary Committee never was able to present its report in the hectic closing hours of the forty-fifth Congress. The opinion did not pertain to the question before the committee, and the committee itself admitted that it had "been impossible . . . to afford . . . time in which this grave question might be more satisfactorily and exhaustively examined."¹⁷⁷ Moreover, only a filibuster by Republicans prevented House Democrats from voting to impeach Seward on articles, one of which was based in part on his refusal to transmit his books.¹⁷⁸

That each of these instances of executive withholding are indeed weaker than they first appear, and stem from political conflicts between the congressional and executive branches while controlled by opposing parties, is underscored by the fact that Lincoln, the President who made the greatest claim for executive power during the nineteenth century, never claimed the power to withhold information from Congress, even though he was burdened with one of the most powerful, far-reaching, and active investigating committees ever created by Congress—the Joint Committee on the Conduct of the War. That committee reviewed military tactics and strategy, evaluated commanders' abilities, assessed the administration of the armed forces, investigated the efficiency and honesty of military procurement, and watched over the regulation of commercial intercourse with the rebels. Authorized to inquire into the conduct of the war generally, its "powers were as broad as they were absolute," one commentator has written, "for it is difficult to discover any large activity of the administration in that period from 1861 to 1865 that did not have a more or less close relation to the conduct of the war."¹⁷⁹ Lincoln refrained from challenging its authority even though the committee trenched directly upon his authority as commander-in-chief of the armed forces and by 1864 verged on open hostility to his administration.¹⁸⁰

To an historian it is apparent that by the 1880's two cogent, well-documented, almost traditional arguments had been established on both

175. 3 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 1699, 1700 (1907).

176. See Wolkinson, *supra* note 157, at 238-40.

177. H.R. REP. NO. 141, 45th Cong., 3d Sess. (1879); H.R. REP. NO. 117, 45th Cong. 3d Sess. (1879).

178. CONG. REC. 2347-85, *passim* (1879).

179. Pierson, *The Committee on the Conduct of the Civil War*, 23 AM. HIST. REV. 550, 560 (1928).

180. Trefousse, *The Joint Committee on the Conduct of the War*, 10 CIVIL WAR HIST. 5, 19 (1964).

sides of the issue of the President's power to withhold information from Congress. Each side could cite precedents, constitutional texts, congressional debates, and arguments from legal authorities, and each could appeal to contradictory, yet commonly held notions of American government.

This conclusion offers little comfort to lawyers seeking to extract a general principle of constitutional law from historical precedent, of course. Yet is it proper for a legal scholar to throw up his hands and give up on historical investigation as a tool of legal analysis, grouching that "the historical episodes . . . are ambiguous, unyielding to conceptual analysis, and the unique product of the particular political struggle from which they arose"?¹⁸¹ Is it right that the Supreme Court, familiar as it must be with the historical debate, should have decided the main issue of *United States v. Nixon* without reference to historical precedent? Should we be satisfied with the bald, undocumented *pronunciamento* that the Constitution's enumeration of executive powers implies a presidential right to confidentiality (a much broader privilege than Grant or Cleveland contended for) "too plain to require further discussion"?¹⁸²

By nature legal argument is historical. It turns on *precedent*. The word itself demonstrates that present law derives its authority from the past. Lawyers and courts must not ignore history simply because its complexities and ambiguities trouble them. Nor is the requirement satisfied by the sort of superficial skimming of history that marks so much legal argument. Like most legal advocates, the defenders of executive privilege *have* turned to history for support, and they have performed the rote task of cataloging past instances of executive decisions to withhold information from congressional scrutiny, secure in the probably unconsciously held conviction that this is all that is required. They make superficial assertions about the intent of the Framers to build a rigid separation of powers, to vest a latent "executive power" in the President. Historians wince. How often we know that glib legal assertions about the past are based on shallow understandings. However, we are not lawyers; we carp from the outside.

But Professor Berger demonstrates for all to see how powerful a weapon sophisticated historical analysis can be in the lawyer's arsenal. His analysis literally demolishes the historical arguments of his opponents, simply because he understands and conveys the intellectual envi-

181. Frohnmayer, *An Essay on Executive Privilege*, in *ESSAYS ON EXECUTIVE PRIVILEGE* 1, 17 (1974).

182. 418 U.S. at 705.

ronment at the time the Constitution was framed. He digs into the circumstances of his opponents' precedents; he simply works harder at history than they do. As a result he can train heavy artillery on their ill-prepared fortifications. But there *are* strong historical arguments on the other side. Proponents of the doctrine of executive privilege should study their own precedents more intently and develop a control over their history.¹⁸³

Of course history will not provide *the* correct answer to the riddle of executive privilege. Advocates on either side will arrive at differing conclusions. But that is why we have courts. Given sophisticated historical arguments, judges must decide where the weight of history lies. Is it not better that those decisions be based on thorough, professional historical research than the simple culling of quotes and listing of events that is all too common?

Professor Berger and other leading legal scholars¹⁸⁴ fear the effect of *United States v. Nixon* in legitimizing the "executive privilege" doctrine. As a citizen, I must say I share that concern, especially since the Court speaks of a right to "confidentiality." It makes pale by comparison another, more professionally-oriented disappointment. That is that the Supreme Court in deciding this case, which turns so obviously on historical evidence, chose to ignore that evidence. I sympathize with Professor Berger's defense of the lawyer's use of history. "Lawyer's history," when well done, plays an important role in our constitutional system. And I know he sympathizes with me when I express my wish that lawyers themselves—and in this case the Supreme Court—would share his appreciation.

183. See, e.g., text accompanying note 137 *supra*.

184. See, e.g., *A Symposium on United States v. Nixon*, 22 U.C.L.A.L. REV. 1 (1974).