

1974

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William & Mary Law School

Repository Citation

Swindler, William F., "Watergate and Constitutional Power - A Perspective for United States v. Nixon" (1974). *Faculty Publications*.
1600.

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Watergate and Constitutional Power

A Perspective for United States v. Nixon

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The Separation of Powers Tradition

The constitutional crisis of 1973-74 provided, among other things, an ultimate judicial commentary on the principle of separation of powers as enunciated by James Madison in 1788. Writing in *The Federalist*, Madison declared: "unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation . . . essential to a free government, can never in practice be fully maintained."¹ This theory of a kind of contrapuntal political harmony long awaited, and finally received, a judicial construction which, if not fully definitive, is at least a more tangible concept of constitutional law.

In *United States v. Nixon*,² the climax in a series of judicial excursions into this unexplored territory,³ the petition of the Special Prosecutor put the basic issue as follows:

Whether a claim of executive privilege based on the generalized interest in the confidentiality of government deliberations can block



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the prosecution's access to evidence material and important to the trial of charges of criminal misconduct by high government officials who participated in those deliberations, particularly where there is a *prima facie* showing that the deliberations occurred in the course of the criminal conspiracy charged in the indictment.⁴

¹ *The Federalist* (Cooke ed., 1961), No. 48.

² 42 *U.S.L. Wk.* 5239 (July 23, 1974).

³ Cf. also *Nixon v. Sirica*, 487 F.2d 700 (1973).

⁴ Docket No. 73-1766 (Sp. Ct. Oct. Term 1973). Petition for Writ of Certiorari, p. 3.

The unanimous Court answered in the negative; under the circumstances of the Watergate affair as it had developed by the early summer of 1974, the judicial power was "so far connected and blended" with the executive as to give the one "a constitutional control" over the other to prevent the frustration of the essential functions of the judicial process.

From 1788 to 1974, American constitutional thought had been both uncertain and ambivalent on the matter of discretionary powers in the executive. At the one end of this time frame, colonial memory translated executive discretion into arbitrary authority; at the other, in 1971, the Court of Appeals for the District of Columbia reiterated some of this historic conviction when it declared that no official of the executive branch could properly be the sole judge of his own privilege.⁵ In between these dates, political and judicial commentary has been sparse and rather contradictory. Alexander Hamilton, another contributor to *The Federalist*, believed that the constitutional checks upon Presidential power were substantially greater than those upon state governors;⁶ but a generation later Joseph Story recognized "incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions which are confided to it."⁷ Four times, between 1925 and 1968, the Supreme Court gave differing statements on the general principle.⁸

⁵ *Committee for Nuclear Responsibility v. Seaborg*, 463 F. 2d 788 (1971).

⁶ *The Federalist*, Nos. 69, 70.

⁷ *Commentaries on the Constitution* (1836), III, Sec. 1563.

⁸ Cf. *Myers v. United States*, 272 U.S. 52 (1925); *Humphreys' Exec. v. United States*, 295 U.S. 602 (1935); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Wiener v. United States*, 357 U.S. 349 (1968).

The issue as it developed in the Watergate crisis was confused to a certain degree by a confusion of terms. English common law and constitutional law have both distinguished between privilege, which was an insulation from the arbitrary power of the crown, and prerogative, which in essence was what remained of this power in the course of parliamentary curtailment. As for the Constitution of the United States, the term, "privilege," appears only in two contexts, and neither is the context of Article II. Moreover, the original meaning of the term as used in English law is evident from these contexts: in one case it clothes members of Congress with certain immunities under certain circumstances;⁹ in the other case it relates to individual citizens, and there its conjunctive expression—"privileges and immunities"—corroborates the meaning.¹⁰

As to prerogative, it has been treated as alien to American theory, unless one accepts as a term of art Holmes' reference to the courts' "sovereign prerogative of choice."¹¹ Even if the term be extended to the executive branch, it still is subject to the English definition—an authority inherent in the sovereign. (e.g., executive) until the legislative branch curtails or extinguishes it.¹² Lord Coke's renowned aphorism, "the King is under no man, but under God and the law," is better phrased in another part of his commentaries: "the King hath no prerogative but that which the law of the land allows him."¹³ A twentieth-century

⁹ U.S. Const., Art. I, Sec. 6, Cl. 1.

¹⁰ U.S. Const., Art. IV, Sec. 2, Cl. 1; and cf. *Long v. Ansell*, 293 U.S. 76, 83 (1934).

¹¹ Holmes, *Law in Science and Science in Law*, Collected Legal Papers (1920), 239.

¹² Cf. Dicey, *Law of the Constitution* (1885), 424.

¹³ *Case of the Proclamations*, (1610) 12 Co. Rep. 74.

English court has reiterated the principle.¹⁴ The common law principle—now potentially, if not actually, applied to American constitutional law—is thus unequivocal: discretionary power in the executive is continually subject to legislative and judicial definition and prospective curtailment.

First Judicial Test: The Grand Jury Subpoena

In midsummer 1973 the Watergate grand jury in the District of Columbia issued its historic subpoena for certain White House tape recordings and related documents. The subpoena was necessarily directed to the President, said Special Prosecutor Archibald Cox in the petition for a show cause order, “because the President took the unusual step of assuming sole personal custody . . . once the existence of the evidence was admitted.” This circumstance in turn led White House counsel Charles Alan Wright to declare that “the President has an absolute right to withhold material evidence merely by his own *ipse dixit* whenever he asserts that non-disclosure would be in the public interest and even though he has a personal and private interest in the question.”¹⁵

The District Court rejected the White House argument: “Executive fiat is not the mode of resolution of a conflict of views over the scope of executive privilege.”¹⁶ Indeed, where

the conflict concerns a non-discretionary matter, *e.g.*, “the obligation of the President to provide evidence,” the court concluded, the issue of privilege is irrelevant.¹⁷ The Court of Appeals sustained the District Court, finding that “a limited requirement that the President produce material evidence . . . is required by law, and by the rule that even the Chief Executive is subject to the mandate of the law when he has no valid claim of privilege.”¹⁸

If privilege is in fact relevant, the Court of Appeals disposed of the White House argument with little hesitation: “Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen.”¹⁹ Further, the court declared, it is not to be assumed that “an act is discretionary merely because the President is the actor,”²⁰ and if discretion equates with privilege, “the courts have repeatedly asserted that the applicability of the privilege is in the end for them and not the Executive to decide.”²¹

In the context of the special circumstances of the grand jury subpoena of 1973, the appellate opinion in *Nixon v. Sirica* established at least two principles: (1) executive privilege is confined exclusively to discretionary actions, and (2) the determination of whether a particular action is discretionary lies with the judiciary. Correlatively, the opinion, corroborating the District Court holding, makes clear that where an action is non-discretionary the executive is subject to

¹⁴ *Attorney General v. DeKeyser's Royal Hotel, Ltd.*, (1920) A.C. 508.

¹⁵ *Verified Petition for an Order, etc.*, *In re Grand Jury Subpoena*, Misc. Docket No. 42-73, U.S. District Court for District of Columbia, July 26, 1973, p. 21.

¹⁶ *In re Grand Jury Subpoena*, 360 F. S. 1, 6 (1973).

¹⁷ *Id.*, n. 21.

¹⁸ *Nixon v. Sirica*, 487 F. 2d 700, 722 (1973).

¹⁹ *Id.*, at 711.

²⁰ *Id.*, at 712.

²¹ *Id.*, at 713.

judicial process to compel proper compliance.²²

Second Judicial Test: The Senate Subpoenas

While the judicial branch thus confirmed its own power to compel executive compliance, the initial efforts to enforce subpoenas undertaken by the Senate Select Committee on Presidential Campaign Activities (the Ervin Committee) were dismissed by the District Court with prejudice.²³ Treating the Select Committee's motion for summary judgment as a civil complaint, and therefore raising the threshold issue of jurisdiction, the court rejected the arguments for a valid statutory (*n.b.*, not constitutional) basis for jurisdiction as asserted by counsel for the Committee.²⁴ Suggesting that the court was being requested "to invoke a jurisdiction which only Congress can grant but which Congress has heretofore withheld," the opinion declined to reach the merits but at the same time sent a clear signal to Congress itself.

Reading the signal, Congress promptly enacted legislation vesting in the District Court the specific jurisdiction it complained that it lacked.²⁵

The bill became law without Presidential signature—another rare constitutional procedure—and the Select Committee promptly issued a large number of new subpoenas for White House tapes and other records. Paradoxically, however, once the jurisdictional statute had been passed, neither the Senate Committee nor later the House Judiciary Committee showed any great interest in renewing the judicial test. Aware that time was running against the executive, the legislative branch elected to let the Special Prosecutor, now Leon Jaworski, and the courts do their work for them on the assumption (which turned out to be correct) that relevant materials would in due course make their way from the judiciary to the legislative.

This course of Congressional policy was, from a constitutional viewpoint, the most unsatisfactory feature of the great Watergate crisis: it left completely unresolved the question of the extent of Congressional power in reference to Madison's theory of interdependent government powers. After a tentative movement in the direction of judicial definition, Congress elected to restrict itself to political procedures. There were doubtless many explanations: by early 1974 the Senate Select Committee was beginning to wind down its activity at the same time that the House Judiciary Committee was warming to its own task; the sensational gaps and discrepancies in tapes submitted to the grand jury by White House counsel, now James St. Clair, and the oncoming trials of certain Watergate defendants all played a part in dissipating efforts to achieve a definitive constitutional statement on legislative subpoena authority in this context.

²² "We note . . . that courts have assumed that they have the power to enter mandatory orders to Executive officials to compel production of evidence. While a claim of absolute Executive immunity may not have been raised directly in these courts, there is no indication that they entertained any doubts of their power." *Id.*, at 714, citing *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 (1973).

²³ *Application of Senate Select Committee, etc.*, 361 F. S. 1282 (1973).

²⁴ *Id.*, at 1283.

²⁵ Act of December 3, 1973, P. L. 93-190 (93rd Cong., 1st Sess.).

Obiter: The Agnew Case

The collateral constitutional crisis revolving about Vice-President Spiro T. Agnew brought to the fore even more ambivalent Article II matters, which nonetheless have contributed to the considerations which must go into an ultimate definition of executive privilege and its limitations. First, was the question of the true nature of the vice presidential office *per se*—was it analogous, so to speak, to an estate in being or an estate in expectancy? Second, did any privilege in the executive office, and specifically in the Chief Executive, extend to one whose only express constitutional function is to be designated to succeed to the Presidency in the event of a vacancy? In the alternative, was the Vice-President, as the presiding officer of the Senate, subject to the general provisions of Article I (including Congressional privilege) rather than to the concept of privilege under Article II upon which the White House was relying?

The proceedings of the grand jury impaneled and sitting in Maryland²⁶ involved prospective criminal action against the Vice-President, and Mr. Agnew's counsel undertook to argue that either as an executive officer *in futuro* or as a legislative officer *de facto*, the Vice-President was immune from criminal process until removed from office by impeachment, resignation, or expiration of his term.²⁷ While counsel relied on the language of the Impeachment Clause²⁸ to support this argument, it was further

contended that one officer of the executive department—the Attorney General—ought not to be heard to charge criminally another member of the executive branch. Indeed, the language of the memorandum referring to this policy consideration strikingly illustrated the ricocheting problems of an administration already beginning to disintegrate: “The Framers [of the Constitution] could scarcely have intended that the President should have the power forthwith to incapacitate his rival effectively by a unilateral judgement of the Attorney General, the President's direct appointee.”²⁹

It is worth noting that an analogous argument was advanced by Mr. St. Clair in *United States v. Nixon*, the contention being that the courts lacked jurisdiction over an “internal dispute of a co-equal branch.”³⁰ St. Clair's brief also challenged the Watergate grand jury's naming of the President as an unindicted co-conspirator³¹—another novel and, indeed, unprecedented procedural step which the Supreme Court declined to consider, holding it to have been improvidently brought.³² For any collateral legal argument on these matters, students of the constitutional issues are thrown back upon the Agnew case. There the responding memorandum of the Department of Justice emphasized the limitation of privilege to Article I, called attention to the unimpaired constitutional status of the Vice-President Aaron Burr while subject to indictment in two states,³³ and suggested that immunity was to be implied only if subjecting a government

²⁹ Loc. cit. n. 26 supra, at p. 18.

³⁰ Docket Nos. 73-1766 and 73-1834 (Sp. Ct., October Term 1973). Brief for Respondent, pp. 27-44.

³¹ *Id.*, at 115-122.

³² 42 *U.S.L. Wk.* 5237, n. 2.

³³ Cf. *United States v. Burr*, 25 Fed. Cas. 30 (Case No. 14,692d) (1807).

²⁶ *Application of Spiro T. Agnew, In re Grand Jury Proceedings*, Civil Docket No. 73-965 (October 10, 1973).

²⁷ *Memorandum in Support of Motion*, *id.*, September 28, 1973.

²⁸ U.S. Const., Art. II, Sec. 4.

officer to criminal process would substantially impair his official functions.³⁴ But this whole matter was mooted when, on October 10, 1973, the Vice-President appeared in the District Court in Baltimore to enter his plea of *nolo contendere*, at the same time resigning his office.

The Final Judicial Test: The Nixon Case

Against the background of the respective judicial tests of grand jury and Congressional subpoena powers, the collateral question of Vice-Presidential status, the Senate committee investigation of Watergate and related political issues, and the House Judiciary hearings on impeachment, the final test of intergovernmental powers began on April 18, 1974 with the issuing of a subpoena *duces tecum* by Judge John Sirica's court for the District of Columbia.³⁵ The subpoena was issued in the case of *United States v. Mitchell et al.*, then involving seven former officials of the White House Staff or the Committee for the Reelection of the President.³⁶

On appeal from the subpoena order, the Supreme Court in *United States v. Nixon* concerned itself with two overriding considerations: justiciability and the claim of privilege. As

to the first of these, Chief Justice Burger stated unequivocally: "The mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend upon such a surface inquiry." In any event, the Chief Justice continued, an administrative regulation denying interposition of executive privilege in the case of the Special Prosecutor³⁷ was a rule which the United States itself, "as the sovereign composed of the three branches," is bound to enforce.³⁸

At the heart of the matter, and extending back to Madison's interdependency principle, was the definition of executive privilege or discretionary power. As to this, the Court declared at the outset:

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137 (1803), that "it is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177.

. . . Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.³⁹

To this the Court added:

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more,

³⁴ *Memorandum for the United States Concerning the Vice-President's Claim of Constitutional Immunity*, loc. cit. n. 26 supra.

³⁵ Loc. cit. n. 30 supra. Brief for the United States, p. 1.

³⁶ 42 *U.S.L. Wk.*, 5239, n. 3. One defendant, Charles Colson, pleaded guilty to a lesser charge and was removed from this group of defendants.

³⁷ 38 *Fed. Reg.* 30739.

³⁸ 42 *U.S.L. Wk.* 5240-41.

³⁹ *Id.*, at 5243.

can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances . . .

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Article III.⁴⁰

From this the holding inexorably followed:

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution on the claim that he has a privilege against disclosure of confidential communications . . .

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice . . .⁴¹

Thus, at length, the nature and condition of Article II discretionary power has been judicially suggested; the Burger opinion stresses the exceptional circumstances under which the power may be judicially limited, but equally important, it judicially recognizes the existence of the power. As Justice Holmes once stated in another context, "a power which must belong to and somewhere reside in every civilized government" must ultimately be found within the sense of the Constitution.⁴² Or, as Justice Jackson observed in 1952, "the art of governing under our Constitution does not

and cannot conform to . . . single Articles torn from context . . . Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."⁴³ The Steel Seizure Case, in which Jackson made his comment, established the judicial requirement that, at least in domestic matters, Presidential discretion was subject to Congressional guidelines. The case of *United States v. Nixon* now has added the proposition that the discretion is subject to judicial review.

Summary and Moral

In 1956 Presidential historian Clinton Rossiter wrote, concerning "occasional abuses of power:"

The President is in position to do serious damage, if not irreparable injury, to the ideals and methods of American democracy. Power that can be used decisively can also be abused grossly. No man can hold such a concentration of authority without feeling the urge, even though the urge be honest and patriotic, to push it beyond its usual bounds. We must therefore consider carefully the various safeguards that are counted upon to keep the President's feet in paths of constitutional righteousness . . . Blended together in judicious amounts, powers and limits make up a constitution, and the Presidency is nothing if not a constitutional office. Its powers are huge, but they are of no real effect—they

⁴⁰ *Id.*, at 5244.

⁴¹ *Id.*, at 5246.

⁴² Cf. *Missouri v. Holland*, 252 U.S. 416, 417 (1920).

⁴³ Concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 634 (1952).

are not, strictly speaking, powers at all—unless exercised through constitutional forms and within constitutional limits.⁴⁴

Discretion in the executive, in other words, is discretion in the use of discretion itself. To paraphrase a familiar judicial aphorism, the only ultimate curb on executive discretion is the executive's own sense of restraint.⁴⁵ Or, as has been more recently stated, "executive privilege is at most what the words suggest—a privilege or option the President has, and not a duty. There is no requirement that it be asserted . . . [R]ather, it stands more to be thrown into disrepute by its selective use, as in the Watergate affairs, when it has the appearance of a cover-up."⁴⁶

Executive privilege or prerogative, accordingly, is an option the American people will tolerate to the degree that they are persuaded that it is being responsibly used. This, in turn, rests largely upon the personal capacity of the President to inspire confidence and trust. There is danger of self-delusion, of course, in cases of executives endowed with the personal magnetism which it has become fashionable to call charisma—charisma being defined, in this instance, as the quality of goodness or even greatness which the observer persuades himself his subject must possess to be as believable as he is. Thomas Carlyle saw virtue in this type of hero-worship;⁴⁷ the modern American, particularly after the *denouement* of the summer of 1974, is currently cynical about the matter.

Deftness and restraint, nevertheless, will remain the touchstones for the effective use of Presidential power of all types. While it is true that the President is ultimately responsible to the electorate rather than to Congress,⁴⁸ any legislative power exercised by the President "must stem either from an act of Congress or from the Constitution itself."⁴⁹ And as Chief Justice Burger put it: "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications." To which he added: "But this presumptive privilege must be considered in light of our historic commitment to the rule of law."⁵⁰

⁴⁸ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

⁴⁹ *Id.*, at 585.

⁵⁰ 42 *U.S.L. Wk.* 5245.

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⁴⁴ Rossiter, *The American Presidency* (1956), 33-34.

⁴⁵ Cf. Stone, J., dissenting in *United States v. Butler*, 297 U.S. 1, 87 (1936).

⁴⁶ Van Alstyne, "President Nixon: Toughing It Out With the Law," 59 *A.B.A.J.* 1398-99 (December 1973).

⁴⁷ Cf. *London & Westminster Review*, No. 12 (1838).

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