Commentary

FROM WATERGATE TO MARBURY V. MADISON: SOME REFLECTIONS ON PRESIDENTIAL PRIVILEGE IN CURRENT HISTORICAL PERSPECTIVES*

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The consequences of Watergate have obviously stirred problems of grave constitutional proportions. As lawyers we are bound to view them not only in their immediate political proportions, but also in a historical perpective responsive to Chief Justice Marshall's famous admonition, "we must never forget that it is *a constitution* we are expounding."[1] It is in that spirit, that I propose to inquire into the question of presidential privilege, at least, both in relation to its immediate impact on the problems of Watergate, as dramatically presented in *Nixon v. Sirica*,[2] and in relation to its long run implications for the office of the presidency and the practice of separation of powers.

I.

When the claim of executive privilege first surfaced as a critical issue in the Watergate investigation, most of us were aware that the privilege, though nowhere explicitly mentioned in the Constitution itself, had frequently been invoked by presidents since the time of Washington as a basis for refusing to respond to congressional in-

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1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

2. 487 F.2d 700 (D.C. Cir. 1973).

quiries concerning confidential matters within the executive departments. Most of us were not aware, however, that a similar claim had indeed been advanced and ruled upon in *Marbury v. Madison.*[3] The full report of that oft-cited but infrequently consulted decision reveals that Mr. Charles Lee, counsel for the petitioners, observed to the members of the Court then sitting: "however notorious the facts are, . . . yet the applicants have been much embarrassed in obtaining evidence of them."[4] Elaborating on this complaint, Mr. Lee explained that he was having difficulty in proving that commissions appointing the petitioners had indeed been signed by President Adams and sealed by the out-going Secretary of State, John Marshall himself. Subordinate clerks in the State Department were summoned as witnesses, but they did not have access to all the facts and their memories were imperfect. They could not say positively which of the commissions had been signed, sealed and recorded, or what had become of them.[5] Finally, Attorney General Levi Lincoln, who had been Acting Secretary of State, was summoned. But Mr. Lincoln was dubious about answering. His objections were of two kinds: "1st. He did not think himself bound to disclose his official transactions while acting as Secretary of State; and, 2d. He ought not to be compelled to answer anything which might tend to criminate himself."[6] After hearing argument on these questions, the Court said:

> that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it; and if he thought that anything was communicated to him in confidence, he was not bound to disclose it; nor was he obliged to state anything which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know.[7]

The next day, having had the benefit of further reflection, and perhaps consultation with the President, Mr. Lincoln reported that he was prepared to answer all the questions except what had become of the commissions. He explained that there were indeed some commissions signed by President Adams and sealed by the Secretary of

3. 5 U.S. (1 Cranch) 137 (1803).
4. *Id.* at 138.
5. *Id.* at 142-43.
6. *Id.* at 143-44.
7. *Id.* at 144-45. Only Chief Justice Marshall and Justices Washington and Chase participated in this ruling; Justices Paterson and Cushing were not present. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 237 (1926).

State in the Secretary's office when President Jefferson assumed the Presidency. Mr. Lincoln was not sure, however, that the petitioners' commissions were among them. Although this appeared to leave unsettled some of the key facts pertaining to the petitioners, both Court and counsel professed themselves satisfied.[8] Consequently, this particular aspect of *Marbury v. Madison* has sunk into relative obscurity. Nevertheless, it was a formal decision of the Supreme Court—the first, and perhaps the only, decision of the Court on the constitutional privilege attaching to confidential transactions and conversations between the President and his immediate subordinates.[9] Of course, like many other decisions of the Court, it is subject to conflicting interpretations. On one hand, the *Marbury* Court recognized that the claim of confidentiality might provide a good ground for refusal to answer the questions propounded to the Attorney General. On the other hand, the Court overruled the claim of privilege with respect to most of the questions asked. Finally, the basic ground for overruling the claim was that the subject matter ought to be in the public domain—matters which all the world had a right to know.[10] It is not surprising, then, to see *Marbury* cited on all sides of the present controversy. The important point, I believe, is that the Court recognized a species of executive privilege attaching to confidential conversations between the President and his aides, but arrogated to itself the authority to determine just how far that privilege extended.

II.

More famous and perhaps more directly relevant precedents are two opinions written by Chief Justice Marshall sitting as circuit judge in the Aaron Burr trials for treason and for the misdemeanor of undertaking war-like activities against a country with which the United

8. 5 U.S. (1 Cranch) at 145-46. James Marshall, the Chief Justice's brother, also supplied some of the missing facts in an affidavit which asserted that he had unsuccessfully tried to deliver certain commissions, among which, to the best of his knowledge and belief, were some addressed to the petitioners. *Id.* at 146. Presumably the Chief Justice, as Secretary of State, was well aware of what had happened up to the time he and Adams left office. There was also some indignation expressed in Congress at the Administration's reluctance to admit the facts. 1 C. WARREN, *supra* note 7, at 238-39.

9. Other decisions may be cited as relevant to the issue, but they may be distinguished on the grounds that they did not deal with constitutional claims and did not involve immediate subordinates of the President. *Compare* Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), *with* United States v. Reynolds, 345 U.S. 1 (1953). The two cases are discussed in text accompanying notes 31-38 *infra*.

10. 5 U.S. (1 Cranch) at 144-45. In retrospect, this seems an obvious ground for overruling the claim of confidentiality. However, had the Court not stated that the appointments became complete as soon as the commissions were signed and sealed, irrespective of delivery and recordation, *id.* at 155-62, it reasonably could have been contended that the appointments were both tentative and confidential until either delivery or recordation. In the particular case this would have been rather unrealistic since the Senate had already consented to the appointments.

States was at peace.[11] These decisions, too, can be cited on both sides of the current controversy.[12] The issue in the Burr trials germane to the present discussion was whether the defense could have access to letters written by General Wilkinson to President Jefferson. Defense counsel asserted they had good reason to suppose the letters might be extremely helpful to the defense—not only because Wilkinson was expected to be a key witness for the prosecution, but also because it was his report as Commanding General of the United States Army which had prompted Jefferson to issue a Proclamation declaring that "sundry persons, . . . are conspiring and confederating together to begin and set on foot, provide and prepare the means for a military expedition or enterprise against the dominions of Spain [Mexico]. . . ."[13]

Marshall's first opinion upheld the power of the court to issue a subpoena duces tecum directing the President to produce the letters, and developed with considerable relish the thesis that the President

11. United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C. Va. 1807); United States v. Burr, 25 F. Cas. 187 (No. 14,694) (C.C. Va. 1807). Burr was charged both with treason and with the misdemeanor of preparing to levy war against a country with which the United States was at peace. The charge of treason was based on "assembling an armed force with a design to seize the City of New Orleans, to revolutionize the territory attached thereto, and to separate the Western from the Atlantic states." The misdemeanor charge was based on "preparing and setting on foot within the territories of the United States a military expedition against the dominions [Mexico] of the king of Spain." 25 F. Cas. 2, 3-4 (No. 14,692a) (C.C. Va. 1807). Further details may be found in a Note appended by the Reporter to Chief Justice Marshall's opinion in this case. *Id.* at 15-24.

An interesting but inconclusive sequel to the Burr trials is brought out in Rhodes, *What Really Happened to the Jefferson Subpoenas*, 60 A.B.A.J. 52 (1974). After the acquittal on the misdemeanor charge, there was a hearing on a motion by the Government to commit Burr to the United States Circuit Court for Ohio for further trial on additional charges of treason and misdemeanor. Burr's counsel again demanded access to the entire Wilkinson letter; this Marshall refused, partly on the basis of Jefferson's assertion of irrelevancy and partly on the basis of Burr's failure to show the relevancy of the material withheld. Marshall then compounded the ambiguity by adding that Burr's counsel were entitled to draw whatever inferences they could from the omissions. Berger regards this ruling as entirely consistent with Marshall's previous ruling on the letter recognizing a qualified presidential privilege. See Berger, *The President, Congress and the Courts*, 83 YALE L.J. 1111, 1120-22 (1974).

12. Indeed, they were so cited in the arguments and opinions in Nixon v. Sirica, 487 F.2d 700, 716 n.74 (D.C. Cir. 1973); *id.* at 747-49 (MacKinnon, J., dissenting); *id.* at 782-88 (Wilkey, J., dissenting).

13. Jefferson, Proclamation of Nov. 27, 1806, 1 MESSAGES AND PAPERS OF THE PRESIDENTS 404-05 (1896). Jefferson did not public name Burr as the principal conspirator until his Message to Congress of Jan. 22, 1807, in which he set forth more of the conspiracy as developed in the Wilkinson communications. *Id.* at 412. As summarized by Jefferson, Burr

> contemplated two distinct objects, which might be carried on either jointly or separately, and either one or the other first, as circumstances should direct. One of these was the severance of the Union of these States by the Alleghany Mountains; the other an attack on Mexico. A third object was provided, merely ostensible, to wit, the settlement of a pretended purchase of a tract of country on the Washita claimed by a Baron Bastrop. This was to serve as a pretext for all his preparations, an allurement for such followers as really wished to acquire settlements in that country and a cover under which to retreat in the event of a final discomfiture of both branches of his real design.

Id. at 414.

of the United States, unlike the King of England, was not above the law:

> It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the president, as well as any other office of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject. By that of the United States, the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the executive chief, will be perceived by every person. . . . If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the president, that decision is unknown to this court.[14]

The logic of Marshall's observations may not be quite as apparent to us now as he assumed they would be.[15] However that may be, any weakness in the argument may prove only that the kings or queens of England are also subject to judicial process.

Chief Justice Marshall's second opinion was addressed directly to the question whether a presidential claim of absolute executive privilege based on the confidential nature of the communications was an adequate response to the subpoena.[16] At this point in the trials Burr had already been acquitted on the treason charge and the dispute between counsel had narrowed to a single letter from Wilkinson to the President, a copy of which Hay, attorney for the government, was willing to produce,

> excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined; the parts excepted being communicated to the president, and he having devolved on me the exercise of that discretion which constitutionally belongs to himself.[17]

Nevertheless, Mr. Hay also added: "The accuracy of this opinion I

14. 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C. Va. 1807).
15. We know, for example, that a king of England can resign and become a subject. I also know a lawyer in Chicago who represented suspects held in custody without trial in Northern Ireland, and who delights in exhibiting the acknowledgment of service of a petition for habeas corpus bearing the signature of Her Majesty Elizabeth Windsor, Queen of England, Scotland and Wales.
16. 25 Fed. Cas. 187 (No. 14, 694) (C.C. Va. 1807).
17. *Id.* at 190.

am willing to refer to the judgment of the court, by submitting the original letter to its inspection."[18]

Whether Marshall himself ever looked at the letter is not apparent; at any rate, counsel for Burr refused the compromise implicit in court inspection. They insisted that only they and their client could judge the relevancy of the disputed passage because only they knew just what their defense was to be. They also said they were entitled to everything that might discredit Wilkinson, one of the government's principal witnesses. In effect they were insisting upon something like the *Jencks* rule, long before it became a defense watchword.[19] Perhaps, too, like counsel for Mr. Ehrlichman and others, they were more interested in a ruling requiring production of the entire letter than they were in its content, because they surmised that the President would never yield completely and hoped the Court might then feel compelled to dismiss the prosecution.

If that was their real purpose, Marshall did his best to frustrate it, without at the same time capitulating to the government. Finally, reluctantly ruling on the motion, he said:

> I do not think precisely with the gentlemen on either side. I can readily conceive that the president might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure. The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on. I admit, that in such a case, much reliance must be placed on the declaration of the president; and I do think that a privilege does exist to withhold private letters of a certain description . . . .
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> . . . The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused.[20]

But the Chief Justice went on to point out that the President him-

18. *Id.* Mr. Hay even offered to permit counsel for Burr to examine the letter, subject to the condition that "[h]e would depend on their candor and integrity to make no improper disclosures; and if there should be any difference of opinion as to what were confidential passages, the court should decide." Burr's counsel, however, "united in refusing to inspect anything that was not also submitted to the inspection of their client." *Id.* For a more detailed account of the arguments see II REPORTS OF THE TRIALS OF COLONEL AARON BURR 504-33 (1969).

19. Jencks v. United States, 353 U.S. 657 (1957), held that the defendant was entitled to an order directing the government to produce for inspection all written or recorded F.B.I. reports in its possession that touched events to which the agents testified at the trial. The opinion also disapproved of the practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused. *Id.* at 668-69.

20. F. Cas. at 191-92.

self had made no objection to production of the whole letter; instead he had submitted the matter to the discretion of his attorney. Then Marshall added, "Had the president, when he transmitted it, subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all proper respect would have been paid to it; but he has made no such reservation."[21] Not surprisingly, Jefferson and his attorney quickly took the hint. The next time that Mr. Hay responded to the subpoena, he produced "a certificate from the president, annexed to a copy of Gen. Wilkinson's letter, excepting such parts as he deemed he ought not to permit to be made public."[22] The certificate made it explicit that it was now the President who said: "On reexamination of a letter of November 12, 1806, from General Wilkinson to myself, . . . I find in it some passages entirely confidential, given for my information in the discharge of my executive functions, and which my duties and the public interest forbid me to make public."[23] Here ends the recorded history of the Wilkinson letter; it seems almost incontrovertible that Burr's counsel never obtained the complete letter for purposes of the trial. Certainly Marshall never ruled on Mr. Hay's final submission. Of course, it turned out that Burr did not need the letter in order to prevail on the misdemeanor as well as on the treason charge. Perhaps it was all a tempest in a teapot; but it is not surprising that Judge Wilkey, writing one of the dissents in *Nixon v. Sirica*, emphasized that Jefferson's own claim of privilege was never overruled by Marshall.[24] Neither is it surprising that the majority emphasized the willingness of the prosecuting attorney to submit the entire letter to Marshall for his judgment on the relevancy of the disputed passages,[25] for that is exactly what they required in directing the submission of the disputed tapes to Judge Sirica in chambers.

III.

Turning now to the decision of the court of appeals in *Nixon v. Sirica*, we again find a compromise between two extreme positions. Both the President and the Special Prosecutor were challenging Judge Sirica's order—the President because the order required him to turn over the tapes to the judge; the Special Prosecutor because it did not require full and immediate disclosure of the tapes to the grand jury and did not assure the Special Prosecutor himself access to the tapes

21. *Id.* at 192.
22. *Id.* at 193.
23. 5 WRITINGS OF THOMAS JEFFERSON 190 (Washington, ed., 1861).
24. 487 F.2d at 781-88 (Wilkey, J., dissenting).
25. *Id.* at 710, 716 & n.74.

for the purposes of the *in camera* proceedings. The court responded by requiring the district judge to inspect the disputed items and evaluate any claim of privilege, leaving it to him to determine whether to permit access to them by the Special Prosecutor.[26] Thus the very question which was the sticking point in the *Burr* trials—the right of full access by opposing counsel before the court's determination of relevancy—was finessed by the court of appeals.

The majority per curiam opinion divides clearly into two parts. The first rejects the President's claim of immunity from judicial process, not only on the authority of Marshall's opinion in the first *Burr* trial, but also on the authority of the Supreme Court's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[27] which held invalid President Truman's seizure of the steel mills during the Korean War in order to avert a strike. The order in *Youngstown* ran not against the President, but against the Secretary of Commerce who had taken custody of the steel mills, but *Nixon v. Sirica* treats the distinction as immaterial both because the Secretary acted pursuant to an explicit order of the President and because it would make nonsense of the decision to assume that President Truman would have nullified the decision by himself taking custody of the steel mills.[28] Although there is no Supreme Court decision directly on point, the dissenters do not seriously challenge this part of the majority opinion, except to suggest that since the subpoena is realistically unenforceable against a defiant president, it would have been more appropriate to render a declaratory judgment than issue a subpoena.[29] This, it seems to me, presents a question

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26. *Id.* at 721. The court's opinion detailed the steps that were to be followed on remand:

> "Following the *in camera* hearing and inspection, the District Court may determine as to any items (a) to allow the particular claim of privilege in full; (b) to order disclosure to the grand jury of all or a segment of the item or items; or when segmentation is impossible, (c) to fashion a complete statement for the grand jury of those portions of an item that bear on possible criminality. The Districct Court shall provide a reasonable stay to allow the President an opportunity to appeal. In case of an appeal to this Court of an order either allowing or refusing disclosure, this Court will provide for sealed records and confidentiality in presentation.

Id. (footnote omitted).

27. 343 U.S. 579 (1952).

28. 487 F.2d at 711-12.

29. *Id.* at 794 (Wilkey, J., dissenting). Judge MacKinnon does not discuss directly the questions of immunity from suit or other process, except to say that the impeachment clause implies immunity from criminal prosecution until after the President has been removed from office through impeachment proceedings. *Id.* at 757 (MacKinnon, J., dissenting). Judge Wilkey characterized immunity as a "non-issue," saying:

> It can hardly be questioned that in any direct confrontation between the Judiciary and the Executive, the latter must prevail. Therefore, the "issue" of whether the President is amenable to court process is an illusory one. No one questions that the court can issue to the President a piece of paper captioned "Subpoena" and that the President owes some obligation at least to inform the court of how he intends to respond.

Id. at 792 (Wilkey, J., dissenting).

of tactics rather than of power, and I doubt very much that it would have provided a likely basis for reversal.

The second part of the majority opinion deals with the question of executive privilege, especially when asserted by the President himself. It states unequivocally: "We of course acknowledge the long-standing judicial recognition of Executive privilege," but immediately qualifies this statement by the assertion that "counsel for the President can point to no case in which a court has accepted the Executive's mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the documents."[30] The opinion notes that in 1968 the House of Lords explicitly reversed its long held view that executive or crown privilege is absolute.[31] It also finds support for its position in the Supreme Court cases of *United States v. Reynolds*[32] and *Environmental Protection Agency v. Mink*.[33]

Reynolds was a suit under the *Federal Tort Claims Act* arising from the deaths of air force crew members in the crash of a B-29 bomber during a test flight. The plaintiffs sought the official accident report, which the government withheld on the ground that it could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."[34] In a 6-3 decision the Court sustained the claim of privilege. However, Chief Justice Vinson, in the course of the opinion for the Court said: "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing disclosure of the very thing the privilege is designed to protect."[35] The Chief Justice also said: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[36] Theoretically, therefore, the *Reynolds* opinion can be cited on either side of the issue of absolute privilege. In more concrete terms, the Court in *Reynolds* simply decided that the government's statement that the official report did contain important military secrets was sufficient to sustain the claim of privilege in that case without examination of the report even by the court in *in camera* proceedings. In reaching this conclusion the Court was somewhat influenced by its belief that the plaintiffs had other ways of establishing their claim of negligence in the conduct of the flight.[37]

30. *Id.* at 713.
31. The English cases are discussed in *id.* at 713-14 n.60. See note 68 *infra.*
32. 345 U.S. 1 (1953).
33. 410 U.S. 73 (1973).
34. 345 U.S. at 5.
35. *Id.* at 8 (footnotes omitted).
36. *Id.* at 9-10.
37. This view was not shared by the dissenters, Justices Black, Frankfurter and

Mink, the other Supreme Court decision relied upon by the majority, was a suit by 33 members of Congress to compel disclosure under the *Freedom of Information Act of 1966*[38] of certain documents pertaining to underground nuclear tests held on Amchitka Island, Alaska, in 1971. The Information Act gives any interested person the right to sue for disclosure of governmental information, subject to various exceptions. One of the exceptions relates to matter "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."[39] Another relates to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."[40] The Supreme Court in a 5-3 decision held that the application of the first exception depended simply on whether the particular document had been classified "pursuant to Executive Order" as involving "highly sensitive matter that is vital to our national defense and foreign policy."[41] The trial judge was authorized to examine the document *in camera* to see if it was so classified, but not to determine if it was properly so classified. With respect to the exception for inter-agency or intra-agency memoranda, more intensive examination of the documents by the court was permitted to see if factual statements could be separated from confidential advice to the President. Here again the decision provides some ammunition for both sides of the controversy.

The majority opinion in *Nixon v. Sirica* then turns to the fundamental principles embodied in the separation of powers doctrine. The basic principle announced is that "[w]henever a privilege is asserted,

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Jackson, who thought that Judge Moris' opinion for the court of appeals established the contrary. *Id.* at 12. None of the opinions discussed the issue of privilege in constitutional terms; instead it was treated as a problem of applying federal discovery rules. Fed. R. Civ. P. 34, 329 U.S. 857-58 (1946) & *id.* Rule 37, 308 U.S. 48-49 (1937), *as amended*, FED. R. CIV. P. 34 and 37. Rule 34 provided for the discovery and production of documents and other things "not privileged." Rule 37(b)(2)(i) provided that if any party refuses to obey an order for production of any document the court may order that "the matters regarding which the questions were asked, . . . shall be taken to be established for purposes of the action in accordance with the claim of the party obtaining the order." But there was also reference in the Chief Justice's footnotes to 5 U.S.C. § 22 (1952), *as amended*, 5 U.S.C. § 301 (1970), which authorized the head of each department to prescribe regulations for "the custody, use, and preservation of the records, papers, and property appertaining to it." The Chief Justice suggested that section 22 might be regarded as "only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power." *Id.* at 6 n.9.

38. 5 U.S.C. § 552 (1970).

39. *Id.* § 552(b)(1).

40. *Id.* § 552(b)(5).

41. 410 U.S. at 84, *quoting* Exec. Order No. 10,501, 3 C.F.R. 375 (Supp. 1973). Mr. Justice Stewart wrote a concurring opinion emphasizing that the case presented "no constitutional claims and no issues regarding the nature or scope of 'Executive privilege'." 410 U.S. at 94. Justices Brennan and Marshall dissented in part, especially with respect to the holding on the first exemption. *Id.* at 95. Mr. Justice Douglas dissented more generally. *Id.* at 105.

even one expressed in the Constitution, such as the Speech and Debate privilege, it is the courts that determine the validity of the assertion and the scope of the privilege."[42] The opinion purports to find some support for this proposition in these words of Chief Justice Marshall: "It is emphatically the province and duty of the judicial department to say what the law is."[43] The position of the majority seems to be that if a question of privilege arises in a justiciable controversy before the courts, it is the business of the courts to resolve it, just as it is their business to resolve any other disputed question of law or fact in the case. Finally, the majority opinion asserts:

> If the claim of absolute privilege was recognized, its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and their representatives, including Congress, the courts as well as grand juries, state governments, state officials and all state subdivisions . . . . Support for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers.[44]

Turning to Chief Justice Marshall's opinion in the *Burr* trial, the Court concludes by saying: "We follow the Chief Justice and hold today that, although the views of the Chief Executive on whether his Executive privilege should obtain are properly given the greatest weight and deference, they cannot be conclusive."[45]

Having thus disposed of the claim of absolute presidential privilege, the opinion addressed next the question whether the privilege should be honored in this particular case. In one respect, the majority recognized that this was an obvious case for application of the privilege because the conversations involved were clearly confidential communications between the President and his immediate assistants, dealing at least in part with the President's official responsibilities. However, the same conversations were also clearly within the scope of the grand jury's investigation. They dealt, in part at least, with the immediate subject of the grand jury's investigation—the alleged coverup or conspiracy to obstruct justice; the grand jury was seeking evidence that might well be conclusive with respect to guilt or innocence of particular individuals under investigation. Furthermore, the President had himself recognized the relevance of the conversations to the investigations when he said: "Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation,

42. 487 F.2d at 714-15.
43. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 157 (1803).
44. 487 F.2d at 715.
45. *Id.* at 716.

including the Watergate affair and the alleged cover-up."[46] In short, the issue was no longer the confidentiality of the conversations themselves, but rather the secrecy of the tapes; and the court could see "no justifications, on confidentiality grounds, for depriving the grand jury of the best evidence of the conversations available."[47]

This part of the opinion is a partial adoption of the Special Prosecutor's argument that the President had in effect waived his privilege with respect to the conversations involved because he had authorized his aides to testify about such conversations and had promised not to invoke the privilege with respect to them. Nevertheless, the court did not fully adopt the waiver suggestion, perhaps because the scope of the waiver was itself controversial, and perhaps too because it regarded the waiver argument as not totally convincing. Furthermore, the court did not hold that all tapes pertaining to such conversations should be disclosed, but specified that "the District Court may order disclosure of all portions of the tapes relevant to matters within the proper scope of the grand jury's investigations, unless the Court judges that the public interest served by nondisclosure of *particular* statements or information outweighs the need for that information demonstrated by the grand jury."[48]

The separate dissenting opinions of Judges MacKinnon and Wilkey, also relied upon historical precedents and the doctrine of separation of powers. Judge MacKinnon's opinion points to a consistent history of successful resistance by 17 presidents[49] from Washington to Truman,[50] to subpoenas issued by congressional committees. Judge

46. *Id.* at 717.
47. *Id.* at 718.
48. *Id.*
49. *Id.* at 732-34 (MacKinnon, J., dissenting).
50. President Eisenhower's defiance of Senator McCarthy also illustrates this principle. This story is summarized in Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 9 GEO. WASH. L. REV. 623, 669-89 (1961). Senator McCarthy wanted members of the Army Loyalty and Security Board to appear before his committee. The Permanent Subcommittee on investigations of the Senate Committee on Government Operations, to testify regarding certain of their decisions. Counsel for the Army took the position that this was privileged matter and the Attorney General supported him. The ultimate confrontation occurred during the Army-McCarthy Hearings before the Special Subcommittee on Investigations of the Senate Committee on Government Operations, under the chairmanship of Senator Mundt, where attempts were made to elicit particulars regarding a conference held in the Attorney General's office. *Id.* at 680. At this point President Eisenhower wrote a letter to the Secretary of Defense, directing him to instruct employees of the Department not to testify as to the content of confidential communications which occurred in the course of "advising with each other on official matters." *Id.* at 683. This restriction was somewhat grudgingly accepted by the Committee. Other discussions of executive privilege especially worthy of consultation are, Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1044, 1287 (1965); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Hardin, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879 (1962); Rogers, *The Right To Know Government Business from the Viewpoint of the Government Official*, 40 MARQ. L. REV. 83 (1956).

MacKinnon further argued that there can be no distinction in principle between a congressional subpoena and a judicial subpoena so far as the scope of the presidential privilege is concerned.[51] Consequently, he regarded the congressional precedents as fully applicable. He also referred to instances when either Congress or the federal judiciary had insisted upon absolute control over its own documents.[52] Judge MacKinnon conceded that confidential communications between lesser executive officials may be entitled to only a qualified privilege,[53] but asserted that presidential communications are of a different order, and are entitled to an absolute privilege comparable to that accorded military and foreign affairs secrets..[54] Under this view, the possibility of a criminal conspiracy among the President and his advisors is irrelevant because the advisors do not control the privilege, and because, if the President is himself implicated, the only appropriate remedy is impeachment proceedings, until the President is removed and thus exposed to criminal prosecution.[55] The fact that the President may have also partially waived the privilege by permitting testimony with respect to some of the conversations is also irrelevant because the waiver covered only the substance of the conversations, not the manner of expression. "Rather what is sought to be preserved are the qualities of directness and candor that flow from discussions where it is unnecessary for the participants to dissemble, to seek the felicitous phrase, or to be concerned about interpretations that may be skewed if heard by an unfriendly audience."[56]

While expressing general agreement with Judge MacKinnon's views, Judge Wilkey added his own analysis of the separation of powers question. He criticized the majority opinion on the ground that it "never confronts the fundamental Constitutional question of separation of powers, but instead prefers to treat the case as if all [that] were involved was a weighing and balancing of conflicting public interests."[57] Judge Wilkey conceded that "[t]here *are* conflicting public interests

51. 487 F.2d at 737-38 (MacKinnon, J., dissenting). The facile equating of congressional and judicial subpoenas of the executive is open to serious question. A discussion of the particular considerations bearing on legislative-executive conflicts, as distinguished from judicial demands for information, appears elsewhere in this volume. Note, *The Justiciability of Confrontation: Executive Secrecy and the Political Question Doctrine*, 16 ARIZ. L. REV. 140 (1974).

52. 487 F.2d at 738-42 (MacKinnon, J., dissenting).

53. *Id.* at 745-46.

54. *Id.* at 752. In support of this proposition, Judge MacKinnon read *United States v. Reynolds*, 345 U.S. 1 (1953), as recognizing an absolute privilege for military or state secrets. *Id.* at 752-53.

55. *Id.* at 755-58. Judge MacKinnon's view is of course based on the doubtful assumption that the President is not subject to criminal prosecution while in office. *Compare* Berger, *The President, Congress and the Courts*, 83 YALE L.J. 1111, 1123-36 (1974).

56. *Id.* at 760.

57. *Id.* at 763 (Wilkey, J., dissenting).

involved," and that "they must be carefully weighed, balanced, and appraised." But he asserted that the decisive issue is "Who Does [*sic*] the weighing and balancing of conflicting public interests?"[58] and implied that when the President's confidential communications are involved, the President must do the weighing and balancing: "If the Chief Executive can be 'coerced' by the Judicial Branch into furnishing records hitherto throughout our history resting within the exclusive control of the Executive, then the Chief Executive is no longer 'master of his own house.' "[59] This case, he stressed, should not be confused with a case like *Youngstown* where the President reached out beyond his own house to seize someone else's property;[60] nor would he compare it with litigation like *Reynolds* where the government was properly a defendant in a suit for damages and always had the choice between producing any required documents and accepting defeat in the litigation.[61] In a closing comment entitled "A Healthy Tension," Judge Wilkey reminds us that perhaps the answers to all the conceivable problems of our government are not to be found in specific constitutional provisions or in the Supreme Court's interpretation of them; that the Founding Fathers may have "left inherent in the structure they had designed the possibility of irreconcilable conflict," and that "in their view, the possibility of irreconcilable conflict was not necessarily bad, because above all this would guarantee that the National Government could never become an efficient instrument of oppression of the people."[62]

Personally I have a great deal of sympathy for the general point of view expressed by Judge Wilkey in his concluding remarks. But the difficulty with Judge Wilkey's solution is that it would resolve the conflict entirely on the President's side, thus dispelling the healthy tension and uncertainty which previously prevailed. Like Justices Brandeis and Frankfurter, I believe that there is much to be said for not deciding hard constitutional questions—especially those dealing with separation of powers—so long as they can be avoided. This is especially true of the question of executive privilege. Any general answer to the problem opens up a classical parade of horribles on one side or the other. If the President's privilege is indeed absolute, could not some determined President cast a pall of secrecy over practically all operations of the government? But if it is qualified, so that a court can balance the need for confidentiality against the need for disclosure

58. *Id.*
59. *Id.* at 769.
60. *Id.* at 793.
61. *Id.* at 766.
62. *Id.* at 797.

in each particular case, how could a President and his advisors talk or write with any confidence that some of their most important conversations or documents would not be disclosed because some unsophisticated trial judge did not appreciate the need for confidentiality? Even if the President should ultimately prevail in the Supreme Court, what would be the chances of loss of confidentiality as the record progressed through three or more tiers of courts? Because the judges of the court of appeals were fully aware of the difficulties on either side they tried to avoid the dilemma by urging, in an intermediate order, that the Special Prosecutor and the President's counsel should try to work out a compromise.[63] Unfortunately, opposing counsel were unable to reach an agreement, and so there was no apparent escape from deciding the ultimate question.

IV.

At present writing, the "healthy tension" and uncertainty is far from abated. Although the President has acceded to the court's decision in *Nixon v. Sirica* he has obviously not abandoned his theoretical claim of an absolute privilege with respect to confidential communications whenever he chooses to claim it. Presumably the question might recur at any time in the course of the subsequent proceedings, either in another confrontation betwen the Special Prosecutor and the President, on the issuance of a subpoena by the House Judiciary Committee considering impeachment proceedings, or in the actual trial of the impeachment in the Senate.[64] Consequently, the wisdom of the Court's resolution of the question in *Nixon v. Sirica* assumes even greater importance.

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63. After hearing oral argument, the court suggested "an examination of the tapes by the Chief Executive or his delegate, assisted both by his own counsel, Professor Wright, and the Special Prosecutor, Professor Cox." The court added:

> If the President and the Special Prosecutor agree as to the material needed for the grand jury's functioning, the national interest will be served. At the same time, neither the President nor the Special Prosecutor would in any way have surrendered or subverted the principles for which they have contended.

Id. at 723-24. By letters of Sept. 20, 1973, Mr. Wright and Mr. Cox advised the court that their efforts to reach an agreement had not been fruitful. *Id.* at 725-26.

64. As this commentary goes to press all of the eventualities hypothesized in the text, except an impeachment trial in the Senate, have indeed been realized. Subsequent developments include the issuance of another subpoena to the President by the Special Prosecutor, Mr. Jaworski, who succeeded Mr. Cox, N.Y. Times, Mar. 22, 1974, at 1, col. 7; as well as the issuance of a subpoena to the President by the House Judiciary Committee. N.Y .Times, Apr. 12, 1974, at 1, col. 7-8. Judge Sirica ordered the President to turn over to the court tapes and other records of 64 White House conversations allegedly relating to the Watergate cover-up. *United States v. Nixon*, N.Y. Times, May 21, 1974, at 1, col. 8 and at 28, cols. 1-4. The President appealed to the court of appeals and Mr. Jaworski filed a petition for certiorari, asking for direct review in the Supreme Court. N.Y. Times, May 25, 1974, at 1, col. 8; 42 U.S.L.W. 3657-58 (1974). The Supreme Court granted Mr. Jaworski's petition on May 31, 1974 and set the case for argument on July 8, 1974. Wall Street Journal, June 3, 1974, at 1, col. 3, N.Y. Times, June 1, 1974, at 1, col. 8.

The weakest link in the majority position is the implicit assumption that each judge who faces the problem will be in a position to weigh realistically the public interest in disclosure for purposes of the particular case against the public interest in preserving the confidentiality of whatever state secrets may be involved, including those relating to national defense or foreign affairs. Yet this is the assumption that must underlie the court's order directing the trial judge to determine whether "the public interest served by nondisclosure of particular statements or information outweighs the need for that information demonstrated by the grand jury."[65] The judge presumably can determine how important the particular evidence is to the particular prosecutions. But how can he weigh the importance of those prosecutions to the national welfare as compared with the importance of not compromising certain national security operations or embarrassing our relations with some foreign governments? Let us assume, for example, that the grand jury is investigating charges of a plot centering in the office of the President to foment a revolution in Canada, a country with which we are at peace. The reports sought to be obtained are communications from the CIA to the President which are essential both to the establishment of the plot and also to the secrecy of CIA operations in Canada. Who should make the determination whether exposure of the plot or continued secrecy of CIA operations in Canada should be paramount? To me it seems apparent that the President, rather than the judges, should have that responsibility, even though we run the risk that he might use the excuse of CIA involvement to protect himself or his cohorts. The political process offers some means of checking such abuses. The decision itself would have to be announced in the form of a public response to the subpoena, and might, as Judge Wilkey suggested, subject the President to political risks far more serious than contempt of court charges.

On the other hand, if the President relies simply upon the need to preserve confidentiality to encourage uninhibited discussion in the Oval Office, the claim for absolute privilege is at its weakest and might well be overriden on the grounds that the evidence is essential to the prosecution or the defense. I assume the same would be true if the suspected conspiracy were hatched in the chambers of the Chief Justice between himself and his law clerks or even in the conference room of the Supreme Court of the United States among the Justices. This view is indirectly supported by the decision of the Supreme Court in *Gravel v. United States*,[66] holding that neither a Senator nor his

65. 487 F.2d at 718.
66. 408 U.S. 606 (1972).

aide was immune from questioning before a grand jury with respect to how the Senator obtained possession of the classified Pentagon papers and how arrangements were made for their publication. It is also supported by the Supreme Court's decision in *Clark v. United States*,[67] which held that the privilege against disclosure of jury deliberations did not preclude testimony about what transpired in the jury room when relevant to the trial of a juror for criminal contempt with intent to obstruct justice by deliberately giving false answers to questions relating to possible bias as a juror.

No doubt it will be objected that this proposed solution opens up avenues for abuse, in that the President might assert the interests of national security simply as a cover for the wrongdoing of himself or his associates. My own belief is, however, that this is not as easy in the real world as it is in our imagination. Despite the pious invocation of national security at many stages of the Watergate investigation, it has not yet been seriously suggested that it applied to any of the disputed tapes. If that were indeed the claim I believe that the ultimate remedy would realistically have to be, as Judge Wilkey observed, political rather than judicial sanctions. Assertions that confidential communications might be inhibited by the principle suggested are equally exaggerated. We must remember what an unusual chain of circumstances resulted in the present disclosures, and how far back in our history we have had to look for comparable precedents. It is unlikely that anyone advising the President on legitimate questions of public policy will stop to think twice because of possible disclosure in judicial proceedings. He or she is more apt to wonder whether the conversation is being taped in the first place, and if so, how it will sound in a presidential autobiography or some other historical memoir.

In short, although I applaud the immediate result of the decision in *Nixon v. Sirica*, I would confine its application to those instances where the President's claim of privilege is based simply upon the importance of keeping secret all confidential advice given to the President, as distinguished from claims of privilege based upon particular state secrets important to national security or the conduct of international relations.[68] Conversely, where the President's claim of privilege

67. 289 U.S. 1 (1933).

68. The distinction suggested in the text is somewhat similar to that made by some of their lordships in the English case of Conway v. Rimmer, [1968] A.C. 910, which overruled the earlier English precedents upholding an absolute Crown privilege. In *Conway* a police constable lost his job because he was suspected of stealing a torchlight from the locker of a fellow constable. He sought vindication through a suit for malicious prosecution against his immediate superior, who, he asserted had been instrumental in bringing charges of larceny against him. To help prove his case, the plaintiff

is plainly based upon an explicitly stated concern that national security or the conduct of foreign relations would be jeopardized by disclosure of the particular communications, I would say the claim must be allowed irrespective of the consequences to a successful prosecution.

Of course, I recognize that such a restatement of the principle and scope of the decision would satisfy neither the ardent supporters nor the ardent opponents of presidential privilege. Neither would it solve many of the other related problems which have been insistently knocking at the door during the course of the Watergate drama. Should the same principle apply, for example, to attempts of the Senate Watergate Committee itself, or to any other congressional investigating committee, to obtain confidential information from the executive departments?[69] Should it apply to the House Judiciary Committee, or to the House and the Senate when investigating possible grounds for impeachment, or trying an impeachment?[70] A change in the context of the proceedings itself requires a change in the statement of the issue. If the purpose of the investigating committee is to determine the need for new legislation, as the Watergate Committee occasionally explained its purposes, it no longer makes sense to

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asked for production of the reports dealing with his police service. They were refused on the basis of an affidavit sworn to by the Home Secretary, who described himself as "one of Her Majesty's Principal Secretaries of State," and who said that he had "personally examined and carefully considered all the said documents" and had formed the view that they fell within certain classes of confidential documents whose "production . . . would be injurious to the public interest." *Id.* at 913. Up to the House of Lords, this claim of privilege prevailed on the authority of the decision of *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, which sustained the Crown's claim of privilege with respect to the disclosure of the construction specifications of a submarine on a trial run during World War II. Some of their lordships thought that *Conway* could be distinguished from the submarine case, because the former involved the general claim that confidentiality of such documents was essential to candor and full discussion within the government, while the latter involved a specific claim of military secrets important to the national defense. [1968] A.C. at 439 (Reid, L.J.), 984 (Pearce, L.J.), 990-91 (Upjohn, L.J.). This kind of distinction might also be made between the affair of the White House Tapes and the *Reynolds* case, which involved secret equipment on the B-29 bomber.

69. This is the issue presented in *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521 (D.D.C. 1974), denying enforcement of the Ervin Committee's subpoena directed to the President for the same tapes that were surrendered to Judge Sirica in *Nixon v. Sirica*. Purporting to apply the same general standards as were enunciated in *Nixon v. Sirica*, Judge Gesell denied enforcement, placing particular emphasis on the fact that publicizing the tapes in a congressional investigation would jeopardize fair trials in the related criminal prosecution. *Id.* at 523. I think this result a sensible one, although the grounds were largely fortuitous. The courts would, I believe, be better advised to wash their hands of such direct conflicts between the President and Congress, leaving them to be resolved by the accommodations of political processes. This should not be analogized to a situation like Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), where private interests were directly involved and could be protected only by judicial intervention. *See* Note, *supra* note 51, at 156-60. The court of appeals affirmed Judge Gesell's decision on different grounds, holding that the Senate Committee had not demonstrated a compelling need for the tapes in dispute. N.Y. Times, May 24, 1974, at 12, col. 3.

70. *See* Note, *supra* note 51, at 156-60.

speak of the public interest in successful prosecution. In such a situation there would seem to be little likelihood of any convincing justification for overriding a plausible claim of presidential privilege, no matter what the basis of the claim. On the other hand, if the Committee frankly asserts a supervisory and informing function implicit in a mandate to expose corruption or abuse of power by the executive, the case for overriding a claim of executive privilege might take on additional strength. Nevertheless, in such a situation I believe that resort to the courts would be a snare and a delusion. If the executive departments, by order of the President or otherwise, were to withhold information essential to the proper discharge of a congressional function, the proper remedy would be either the denial of appropriations or resort to the impeachment process. A supine Congress, unwilling to use the great weapons clearly at its disposal, would gain nothing but contempt by reliance upon a judiciary, which itself must rely upon either the President or the Congress to enforce its decisions.

Even more emphatically, would it be nonsense to speak of resort to the courts to determine the propriety of a claim of presidential privilege at any stage of impeachment proceedings in either the House or the Senate. In principle there seems little doubt that the House or the Senate would be entitled to assert a right of access to all pertinent information required for the resolution of impeachment charges; presumably even the privilege against self-incrimination would have to yield in such a situation. Nevertheless, one might well imagine a President, even in impeachment proceedings, stoutly refusing to disclose secrets which he deemed essential to the national defense, no matter what the cost to his own appearance of guilt or innocence. Although the doctrine of political question is mostly out of fashion these days, I have no doubt that it would achieve a resounding resurrection if the attempt were made to impose upon the judiciary the responsibility for resolving such a dilemma. To this extent, then, I agree with Judge Wilkey in believing that the Founding Fathers may have "left inherent in the structure they had designed the possibility of irreconcilable conflict." In so doing they must also have trusted to the good sense of succeeding generations to prevent an impasse from developing into a catastrophe.