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THE DISSENTING OPINIONS OF NIXON V. SIRICA: AN ARGUMENT FOR EXECUTIVE PRIVILEGE IN THE WHITE HOUSE TAPES CONTROVERSY*

by

Francis William O'Brien**

In United States v. Nixon, Nos. 73-1766 and 17-1834 (United States Supreme Court, July 24, 1974), the Supreme Court rejected the proposition that executive privilege could be based only upon the generalized interest in confidentiality of executive conversations. However, the Court clearly recognized that if the President relied upon executive privilege to protect communications relating to military, diplomatic, or sensitive National Security secrets, the privilege becomes virtually absolute. Similarly, Mr. Chief Justice Burger, who delivered the opinion of the Court, stated that "[t]he privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." In this Article the author has elucidated the legal and political foundations of this concept which has historically been a part of our constitutional system of government.

In the last few months a great deal has been written about Watergate and President Nixon, much of it highly critical of the Chief Executive and his staff and supportive of Judge Sirica and his stance on the matter. In order to obtain a more balanced outlook it is appropriate for us to consider a view that has been largely ignored, that expressed in the dissenting opinions written by two judges on the appellate court which rendered its decision on the Watergate tapes October 12, 1973.1

In June 1972 a federal grand jury was impanelled to inquire into an alleged break-in of the Democratic headquarters in Washington. When it was learned in mid-1973 that President Nixon had recorded many of his personal conversations and telephone calls to and from people allegedly involved in the Watergate break-in, the grand jury requested that it be given the recorded tapes.2 On July 23 Special Prosecutor Archibald Cox, acting on behalf of the grand jury, petitioned the District Court for the District of Columbia to issue a subpoena to the President for these tapes. This subpoena was granted on July 23, 1973.3 The President declined to produce the subpoenaed tapes. Whereupon, on August 29, John Sirica, Chief Judge of the

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2. For the basic facts in this and the following paragraph, see id. at 704-05.
district court entered an order as a means of enforcing the subpoena previously issued. That order commanded President Nixon to produce nine recorded conversations to be examined by the judge in camera to determine whether or not they were to be exempted from disclosure to the grand jury because of an "executive privilege." President Nixon challenged this order and appealed to the Court of Appeals for the District of Columbia. All seven judges who heard the appeal agreed that the courts have jurisdiction to consider a President's claim of executive privilege. Five judges, in a twenty-nine page per curiam opinion, approved Judge Sirica's order, with certain modifications. Judge MacKinnon and Judge Wilkey dissented, each explaining why he believed President Nixon was correct in refusing to comply with Judge Sirica's order.

I. THEORETICAL BASIS OF THE EXECUTIVE PRIVILEGE CONCEPT

The two dissenters supported their position with a multitude of arguments. They were in substantial agreement with one another and wrote separate opinions merely because lack of time made it impossible to collaborate on one single opinion. It is not the purpose of this Article to analyze all the arguments advanced by Judges MacKinnon and Wilkey, but simply to present those arguments which appear to have the greatest significance. In doing so the ensuing discussion will depart at times from the exact sequence followed by the dissenters themselves.

Separation of Powers. It was Judge MacKinnon who expounded upon the constitutional principle of separation of powers at considerable length, seeing in this principle a strong support for an absolute executive privilege. His argument was that article II, section 3, of the Constitution imposes on the President the duty faithfully to execute the laws. From this duty Judge MacKinnon argued that there flows the implied right to have preserved the absolute confidentiality of "the integrity of the deliberative processes of the executive office." The guarantee of such confidentiality, he wrote, is to be found in the principle of separation of powers, which relates to the internal operations of each branch of government.

Judge MacKinnon admitted that there exists a certain dependence of each branch of government on the other two by reason of the principle of checks and balances. But he was of the opinion that both Judge Sirica and the majority on the appeals court had erroneously interpreted the checks and balances and the separation of powers concepts to justify the breach of executive confidentiality. Judge MacKinnon then quoted a passage from the "Lectures on the Law" by James Wilson who, he believed, accurately

4. 487 F.2d at 729. The dissenters naturally addressed themselves primarily to the arguments found in the per curiam opinion of the majority on the appeals court, but their opinions also encompassed the position advanced by Judge Sirica.
5. Id. at 750-52.
6. Id. at 750.
7. Id.
8. Id.
9. Wilson was on the first Supreme Court of the United States. He had represented Pennsylvania at the Constitutional Convention in 1787 and is generally consid-
stated the true nature of these two constitutional principles:

[E]ach of the great powers of government should be independent as well as distinct. When we say this, it is necessary—since the subject is of primary consequences in the science of government—that our meaning be fully understood, and accurately defined; for this position, like every other, has its limitations; and it is important to ascertain them.

The independence of each power consists in this, that its proceedings, and the motives, views, and principles, which produce those proceedings, should be free from the remotest influence, direct or indirect, of either of the other two powers. But further than this, the independency of each power ought not to extend. Its proceedings should be formed without restraint, but when they are once formed, they should be subject to control.\textsuperscript{10}

Wilson then proceeded to describe the nature of the interdependency of the branches of government. "It consists in this, that the proceedings of each, when they come forth into action and are ready to affect the whole, are liable to be examined and controlled by one or both of the others."\textsuperscript{11}

To observe these twin principles in operation, a person might imagine a President interviewing a number of people giving their candid views on several potential nominees for an important ambassadorship or high government agency post. It is not unlikely that the conversation would touch upon delicate matters relating to the candidates' personal and intimate lives. Because of these intimate revelations, the President could pass over the seemingly more qualified nominees and choose a less likely candidate. Thus, the Senate might suspect an unseemly deal. If so, they could check the President by refusing to confirm his nominee. They might even utilize other information to probe into an alleged bribe. But the principle of separation of powers forbids them from demanding to see or hear the conversations of the President with his confidants which he had while in the process of making the final selection. The disclosure of such conversations might be helpful to them in learning why certain men were passed over, but acquiescence to their demands would constitute an intolerable burden to the President in carrying out a necessary executive function.

The reverse side of the coin reveals a similar immunity protecting Congress when it is engaged in its function of law-making. If a bill is passed on recommendation of a committee—at least a committee meeting in closed session—surely the President would be barred from demanding matter therein discussed before he signed or vetoed the act. But he could use his veto as a check on the final product of the Congress. The courts are similarly prohibited from seeing this private testimony, although they might strike the law down under proper circumstances.

The judiciary also enjoys a confidentiality of its own which is protected by the separation of powers principle. There are, however, checks on judges

\textsuperscript{10} 487 F.2d at 750-51, quoting 2 J. Wilson, Works 409-10 (1804).
\textsuperscript{11} 487 F.2d at 751.
and their tribunals, including impeachment and restriction of court jurisdiction, although both of these seem, in actual practice, weak and ineffectual.

Thus, it is clear that the political edifice erected in 1787 seems to provide, in a fairly acceptable fashion, governmental organs which enjoy the necessary freedom for operation, while being held in bounds by reasonable checks. In addition, one can think of a myriad of extra-constitutional checks of a political nature which restrain politicians and the political branches of government.

All of the matter discussed thus far in this section will be reviewed again later in this Article, but because of its paramount importance, it seemed desirable to expose it early in this presentation of executive privilege under the separation of powers rubric.

Various Privileges of the Three Coordinate Branches. Judge MacKinnon and Judge Wilkey urged other practical arguments. Judge MacKinnon observed that the Presidential Libraries Act of 1955 "bestows an absolute privilege upon papers and sound recordings deposited . . . with presidential libraries" subject to the Administrator of General Services. The papers of Presidents Eisenhower, Johnson, and Kennedy can be revealed to none except the donors or archival personnel until the passage of time or circumstances no longer require such restrictions. "It would be incongruous," Judge MacKinnon concluded, "to accord a greater confidence to the materials of a deceased President than to the materials of a living, incumbent President."

Judge MacKinnon also referred to the congressional privilege of protecting documents of the Congress from grand jury scrutiny. Judge Wilkey noted that in the recent case of United States v. Brewster a committee staff director and counsel were subpoenaed to testify in certain criminal proceedings, but the Senate resolved on October 4, 1972: "[T]hat by the privileges of the Senate . . . no evidence in the possession . . . of the Senate of the United States can, by the mandate of process of ordinary courts of justice, be taken from such possession . . . but by its permission." It further resolved that in that particular case the person involved could take to the judicial inquiry no papers under his control as staff director.

The courts themselves jealously guard matters they consider confidential. In the 1971 case of New York Times v. United States Chief Justice Burger wrote:

With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost se-

12. Id. at 744 (MacKinnon, J., dissenting).
13. Id.
14. Id. at 738 (Wilkey, J., dissenting).
17. Id.
security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.19

Judge MacKinnon noted that "Justice Brennan has written that Supreme Court conferences are held in ‘absolute secrecy’ for ‘obvious reason.’ "20 The late Justice Frankfurter "has said that ‘the secrecy that envelopes the Court’s work’ is ‘essential to the effective functioning of the Court.’ "21 Judge MacKinnon also referred to this sentence from a 1953 Statement of the Judges: “The Judiciary works in conditions of confidentiality and it claims a privilege against giving testimony about the official conduct of judges."22

One can imagine the cries of outraged indignation from the Justices of the Supreme Court if the President were ever to demand their conference notes. Would the Court yield these conference notes to him or to a congressional committee investigating possible fraud or a suspected compromise of an unseemly character among the Justices to reach a controversial and critical five-to-four ruling?23 In the aftermath of the Abe Fortas resignation in 1969, suggestions were put forward that a code of conduct should be composed to assure the probity and objectivity of the members of the high bench. The reaction of the Court was probably most accurately stated by Max Frankel in an article in which he wrote that “the Justices are said to be determined to resist any effort by Congress or other outside authority to impose ethical standards . . . upon them. . . . [M]ost Justices [believe] that they must be their own final judges.”24

Judge Wilkey also thought that the Executive's claim to privacy could be founded upon the first amendment.25 The President has a right and duty to be fully and frankly informed and to breach his privacy by requiring disclosure of the Presidential tapes would unquestionably have a "chilling effect" on those who speak with him. One commentator discussing the per curiam decision has observed that Presidents often tend to become isolated.26 Would the isolation become more pronounced if Presidential advisers were fearful of speaking freely?

II. CONGRESS AND EXECUTIVE PRIVILEGE

A major argument made by both Judge MacKinnon and Judge Wilkey was the fact that seventeen Presidents from Washington to Truman have

19. Id. at 752 n.3 (Berger, C.J., dissenting).
20. 487 F.2d at 740 (MacKinnon, J., dissenting).
22. 487 F.2d at 740 (MacKinnon, J., dissenting).
23. Suppose that Congress made no such investigation, thus leaving the President with the order to enforce “the supreme law of the land.” Could he demand the critical conference notes or at least refuse compliance with the legal decision, or is there something in the Constitution that compels the Executive always to defer to every federal judge? Cf. Ex parte Merryman, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).
24. N.Y. Times, May 18, 1969, at 1, col. 3.
25. 487 F.2d at 767 (Wilkey, J., dissenting).
asserted that the President could at his own discretion withhold confidential papers from Congress. In 1796 an indignant House of Representatives asked Washington for all Presidential papers concerning the negotiations of the controversial Jay Treaty. The President refused, stating:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

In 1791 General Arthur St. Clair was dispatched on a military expedition into the Ohio territory and when his army was routed and the venture became a humiliating debacle, a greatly disturbed Congress in 1792 demanded all pertinent papers on the grounds that it had "a right to know." But again President Washington refused, stating that such disclosure would not serve the public interest.

In 1837 President Jackson was called upon to furnish certain papers to the House which was investigating the integrity of the executive departments. His response included these charged words: "I shall repel all such attempts as an invasion of the principles of justice, as well as of the Constitution, and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish Inquisition."

In 1842 President Tyler refused to furnish the House with papers relative to applications for offices in the executive department. To support his refusal, he set forth certain principles governing privileged communications and concluded that these principles were applicable to evidence whether sought by a legislature or by a court.

Judge MacKinnon presented examples of similar statements from other Presidents up to and including Truman. He then addressed himself to a contention made by Mr. Cox:

The Special Prosecutor contends that custom and usage between the executive and legislative branches are not controlling because the sub-

27. 487 F.2d at 732-34 n.9 (MacKinnon, J., dissenting). The total number of such refusals recorded is 29.
28. 35 THE WRITINGS OF GEORGE WASHINGTON 2 (J. Fitzpatrick ed. 1940). For additional information on this incident, see W. BINKLEY, PRESIDENT AND CONGRESS 43-44 (1947). President Washington stated that he had given all the papers to the Senate and that his refusal to turn them over to the House was based on the latter's lack of any constitutional treaty-making power. Therefore, some may deny that his action is any precedent for President Nixon's action.
29. 31 THE WRITINGS OF GEORGE WASHINGTON, supra note 28, at 15 n.41. The following is also highly relevant to the question of executive privilege: "We . . . were of one mind . . . that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those the disclosure of which would injure the public. Consequently [the Executive was] to exercise a discretion." Id.
30. Quoted by Judge MacKinnon in Nixon v. Sirica, 487 F.2d at 734 (dissenting opinion). The resolution of December 14, 1836, called for a committee of nine "with power to send for papers and persons, and with instructions to inquire into the condition of the various Executive Departments etc." 4 CONG. GLOBE 26 (1837) (24th Cong., 2d Sess.). Jackson's reply is found in 13 CONG. DEB. part 2, app. at 202 (1837). It was sent to the House on Jan. 26, 1837.
31. 3 A. HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 181 (1907).
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poena in this case was not issued by Congress, but by a federal court pursuant to a grand jury investigation. However, a congressional sub-
poena issued for the purpose of obtaining facts upon which to legislate carries at least as much weight as a judicial subpoena issued for the purpose of obtaining evidence of criminal offenses. The only differ-
ences between these two types of subpoenas occur in the subject matter to which the subpoena power may be directed. Congressional sub-
poenas seek information in aid of the power to legislate for the entire nation while judicial subpoenas seek information in aid of the power to adjudicate controversies between individual litigants in a single civil or criminal case. . . . Thus, both congressional and judicial subpoenas serve vital interests, and one interest is no more vital than the other.a

III. THE BURR TRIALS

There are only a limited number of instances involving the executive and the judicial branches which are pertinent to a discussion of Judge Sirica's subpoena to President Nixon. In 1800 circuit Justice Chase was asked to subpoena President Adams and certain congressmen in United States v. Cooper.33 He refused to subpoena the President. The reports state no rea-
son, so perhaps little can be concluded from this refusal.

In the 1803 case of Marbury v. Madison,34 when the Supreme Court was investigating the location of certain documents, Justice Marshall disavowed as "absurd" the accusation that his Court was attempting "to intrude into the cabinet, and to intermeddle with the prerogatives of the executive."35 And when Attorney General Lincoln asserted that he could not be required to give facts which had come to his knowledge while acting in his official capacity as Secretary of State, the Court agreed that he was not bound to disclose anything that was communicated to him in confidence.36

But the case with the closest similarity to Nixon v. Sirica is United States v. Burr37 which was decided in 1807. Actually there were two trials in that year—one for treason and one for the misdemeanor of leading troops against a foreign power with which the United States was at peace. Burr was ac-
quitted of both charges.38 In each case President Jefferson was deeply in-
volved, largely because of two letters written to him by General James Wil-
kinson, an unsavory character whom Jefferson had appointed Governor of the Louisiana Territory.39

32. 487 F.2d at 737 (MacKinnon, J., dissenting).
34. 5 U.S. (1 Cranch) 137 (1803).
35. Id. at 144-45.
36. Id. at 144.
37. United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807). The Burr cases began on Nov. 8, 1806, and continued for almost a year. The affair covers 207 pages in vol. 25 of Federal Cases, of which much is not pertinent to the Nixon case. The most important of the several opinions on various phases of the case are those given in the case that began on June 9, 1807. The sole issue at this date was not Burr's guilt but his right under the 6th amendment to have President Jefferson sub-
poenaed to appear as a witness at his trial and to bring certain documents with him. Justice Marshall ruled that Burr had such a right.
The President was determined to secure the conviction of Burr and he had been very active in gathering evidence and securing witnesses against his former Vice-President. On January 22, 1807, in his message to Congress, Jefferson asserted that Burr's "guilt is placed beyond question." But on June 10, 1807, Burr insisted that Jefferson's accusation rested largely on information in the Wilkinson letter of October 21, 1806. Thus, he demanded to see this communique and other documents in order to prepare his defense adequately.

John Marshall, sitting as a trial judge in Richmond, Virginia (a common practice of Supreme Court Justices in those days), did issue two types of subpoenas to Jefferson. One required that he appear personally as a witness (subpoena ad testificandum) at the trial. This Jefferson simply ignored. The other subpoena was a subpoena duces tecum which required Jefferson to furnish the court and the defense with the letters. The majority and dissenting opinions in the Nixon case differ in their interpretation of what thereupon ensued, but Judge Wilkey's opinion is much fuller and appears more accurate than the interpretation presented by the majority.

On June 10, 1807, during the first Burr treason trial, Justice Marshall issued a subpoena to Jefferson ordering him to produce the Wilkinson letter of October 21, 1806. George Hay, who was the prosecuting attorney in the case, sent this information on to the President, who on June 12, 1807, responded as follows:

Reserving the necessary right of the President of the U.S. to decide, independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated, and to...
whom, I assure you of my readiness under that restriction, voluntarily
to furnish on all occasions, whatever the purposes of justice may require
. . . . I . . . devolve on you the exercise of that discretion which it
would be my right & duty to exercise, by withholding the communica-
tion of any parts of the letter which are not directly material for the
purposes of justice.46

But this letter of Wilkinson was never produced in Burr's first trial, and
on September 1, 1807, the jury found him not guilty.47

The second trial began on September 3, 1807, on the charge that Burr
had attempted to lead a military force into Spanish territory, while the
United States was at peace with Spain.48 On that day he "referred to the
letter [that of October 1806] which had been demanded of the President
but not yet produced."49 Burr complained that it had often been promised
but never delivered. The next day he also asked to see the November 12th
letter for which he requested and was awarded a subpoena issued to Hay.50
Hay thereupon submitted an excerpted version, the deletions being made
by himself on discretionary power granted by the President. Hay avowed
that, in his opinion, the parts omitted were not pertinent or necessary for
the defense of the accused. He stated that there were two passages in the
letter which he could not submit to public inspection; and he did not think
that the contents of the passages could be extorted from him under any cir-
cumstances, adding that even force would not compel him to divulge these
passages.51

On September 4th Justice Marshall issued a second subpoena duces tecum
to the United States Attorney,52 and on September 7, 1807, President Jeffer-
son responded as follows:

46. 11 BERGH, WRITINGS OF THOMAS JEFFERSON 228-29.
47. 25 F. Cas. at 181.
49. Id. at 189.
50. Id. at 190. On Sept. 3 Hay revealed to the court President Jefferson's latest
communication with him after he heard that Justice Marshall had issued the subpoena
(most likely the June subpoena): "He reserved to himself," he wrote, "the province
of deciding what parts of the letters ought to be published." Id.
51. Id. at 191. See also 2 REPORTS ON THE TRIALS OF BURR 511 (D. Robertson,
recorder, 1808). Hay's words were: "I would sooner submit to be committed . . . ."
However, Burr would not accept this excerpted version even though Hay stated that
he was willing to give the original letter to the court to test the accuracy of the version
he presented. Justice Marshall appears to have agreed on the compromise and this
would seem to give solid support to Judge Sirica's position in the Nixon case. But it
was Hay who suggested this species of in camera scrutiny, not President Jefferson or

52. 25 F. Cas. at 192. Justice Marshall remarked that "it is probable that those
parts of the letter which are withheld, are of much less importance than gentlemen sup-
pose; and that the effect of their production would be to dissipate suspicions which are
now entertained, and to show that the subject of the controversy is by no means pro-
portioned to the zeal with which it has been maintained." Id. at 191. President Jeffer-
son appears to have had similar sentiments, at least about the first Wilkinson letter,
for on June 21, 1807, he wrote to Wilkinson: "[I]f you have a copy of it [the sub-
poenaed letter of Oct. 21, 1806] and choose to give it in, it will, I think, have a good
effect." 11 BERGH, WRITINGS OF THOMAS JEFFERSON 249. Therefore, it would appear
that President Jefferson's difficulties with Justice Marshall—at least as to the October
letter—were based not on possible embarrassing revelations but on the claim that ex-
ecutive privilege should override a court's subpoena power. This claim he also ex-
pressed to Hay in his letter of June 23, 1807. See note 46 supra, and accompanying
text.
I received, late last night, your favor of the day before, and now re-enclose you the subpoena. As I do not believe that the district courts have a power of commanding the executive government to abandon superior duties & attend on them, at whatever distance, I am unwilling, by any notice of the subpoena, to set a precedent which might sanction a proceeding so preposterous. I enclose you, therefore, a letter, public & for the court, covering substantially all they ought to desire. If the papers which were enclosed in Wilkinson's letter may, in your judgment, be communicated without injury, you will be pleased to communicate them. I return you the original letter.

On the same day he wrote again to Hay, enclosing a copy of the requested letter with certain passages omitted for reasons stated as follows:

P.S. On re-examination of a letter of November 12, 1806, from General Wilkinson to myself (which having been for a considerable time out of my possession, and now returned to me,) 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. I have therefore given above a correct copy of all those parts which I ought to permit to be made public. Those not communicated are in nowise material for the purposes of justice on the charges of treason or misdemeanor depending against Aaron Burr; they are on subjects irrelevant to any issues which can arise out of those charges, and could contribute nothing towards his acquittal or conviction. The papers mentioned in the 1st and 3rd paragraphs, as enclosed in the letters, being separated therefrom, and not in my possession, I am unable, from memory, to say what they were. I presume they are in the hands of the attorney for the United States. Given under my hand this 7th day of September, 1807.

As Justice Marshall pointed out on September 4, the deletions had originally been made by Mr. Hay and not by President Jefferson personally. But Marshall asserted that only the President himself could so delete a letter or simply refuse to produce one. If the President would thus act and give a reason for his action, then said Marshall: "In no case of this kind would a court be required to proceed against the president as against an ordinary individual."

Justice Marshall then balanced the right of the accused to see evidence he thought relevant to his defense against the President's prerogative to withhold such evidence. He does not state what should be done to resolve the conflict, but he distinguished between the court's authority to issue a subpoena and its authority to enforce it against an unwilling President. He, thus, clearly said enough to justify the conclusion by Judge Wilkey that Justice Marshall would and did allow the President to make the final decision.

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53. 11 Bergh, Writings of Thomas Jefferson 365. This letter seems to indicate that the President himself had received a second subpoena although the records, as noted above, mention the recipient as the United States Attorney and not President Jefferson. The "letter" mentioned by President Jefferson as "covering substantially all they ought to desire" indicates that he had done some deleting from a letter, but Judge Wilkey, dissenting in Nixon, does not believe this was the one of Oct. 21, 1806. 487 F.2d at 786. It seems quite clear that it was the subpoenaed letter of Nov. 12, 1806.

54. 11 Bergh, Writings of Thomas Jefferson 363-64.

55. 25 F. Cas. at 192.

56. 487 F.2d at 787. What if Justice Marshall had not been satisfied with Presi-
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Much of what was said in both Burr’s trials is still shrouded in fog which is not entirely dissipated even by today's many distinguished commentators. Many suspect that both Justice Marshall and President Jefferson were deliberately vague so as to avoid any precipitous action or untoward confrontation on the question of presidential immunity. According to Judge Wilkey’s dissent in *Nixon*, the *Burr* trials leave undecided the ultimate issue of whether the President or the judiciary should decide when the public interest dictates that materials in the hands of the President should be disclosed. However, if we go by what was actually done in that case, the Chief Executive determines what should prevail in any given case: the public interest in obtaining the information, or the public interest in preserving the confidentiality of the information by use of executive privilege.57

The five-man majority in the *Nixon* case believed that Justice Marshall and Mr. Hay both agreed to some kind of an *in camera* inspection of the November 12 letter and, thus, they argued, this action could serve as a suitable precedent for the order of Judge Sirica. Judge Wilkey denies such a conclusion.58 It should be noted that Burr himself rejected such a compromise59 and, therefore, Justice Marshall never performed an *in camera* inspection. Subsequently, according to Judge Wilkey, the President himself “came forth with his excerpted version and certificate as to what had been deleted and why, and Justice Marshall said nothing and did nothing.”60 There is no evidence whatever that President Jefferson agreed that Justice Marshall was to be the final judge as to the applicability of the privilege, and Jefferson’s explanation and had insisted on seeing the full letter? There is some strong indication that in that eventuality, President Jefferson would have instructed the United States Marshal to serve no more orders on the President, and that he would even have used force to resist the court. 487 F.2d at 763; 9 THE WRITINGS OF THOMAS JEFFERSON 62 (P. Ford ed. 1898). The letter in which Jefferson revealed this resolution of mind is merely a draft and, according to Ford, may never have been sent. However, Beveridge writes that President Jefferson shortly after Sept. 4, 1807, actually did this: He “directed his district attorney to tell the United States Marshal to obey no order of the court.” A. BEVERIDGE, supra note 39, at 518-19.

57. 487 F.2d at 787-88:
   The full 12 November letter was never produced; the 21 October letter was never produced in the first trial for treason, and there is no record that even a copy was produced in the second trial for misdemeanor.
   If we go on what was actually done, the *Burr* trials prove that the final ‘weighing of the public interest’ is done by the Chief Executive.
   If we go on what was said by Marshall, the *Burr* trials leave the ultimate issue of Who finally decides the public interest completely undecided, for Marshall never faced up, even verbally, to a confrontation with the President himself with the issue drawn on the question of separation of powers.

58. Id. at 788.

59. 25 F. Cas. at 190.

60. 487 F.2d at 787. The official reports completely support this conclusion of Judge Wilkey. See 25 F. Cas. at 192-93, where the court stated:
   On Saturday, the 5th of September, Mr. Hay stated to the court that he would immediately send an express to Monticello (where the president then was) for instructions in relation to producing the letter, and that he would probably get a return by Tuesday evening. . . . On [Wednesday, September 9] Mr. Hay presented a certificate from the President, annexed to a copy of Gen. Wilkinson's letter, excerpting such parts as he thought ought not to be made public.

This refers to President Jefferson’s letter of Sept. 7. See note 53 supra, and accompanying text. Absolutely nothing more is reported about President Jefferson's action in the relevant place of Federal Cases or in 2 REPORTS ON THE TRIALS OF BURR, supra note 51, at 537-39.
nor that Marshall should have authority to demand that the complete letter be given to Burr if he determined that the deletions were unwarranted. The official reports prove no more than that Hay would have allowed inspection; and this solely for the purpose of testing the accuracy in the two versions.

As for other documents demanded by Burr, President Jefferson observed in his June 12, 1807, letter to Hay that the request seemed to cover months of correspondence such "as would amount to laying open the whole Executive books." But he promised to get the Secretary of War "to examine his official communications . . . . If the researches . . . should produce anything proper for communication, and pertinent to any point we can conceive in the defense before the court, it shall be forwarded to you."

In another letter to Hay, written June 17, 1807, he avowed his willingness to supply all executive documents requested by the defense, "from a desire of doing anything our situation will permit in furtherance of justice." Again, these are ambiguous words indicating perhaps that his "situation" as President might foreclose his providing certain documents. This became explicit later in this letter, the contents of which President Jackson asked Hay to communicate to the court.

With respect to papers, there is certainly a public and private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication.

Thus, all we know for certain is that Jefferson furnished nothing to the court upon subpoena but one letter from which he had deleted certain matters.

Some contemporary writers have, nonetheless, stated that President Jefferson voluntarily complied with Justice Marshall's order. It is true, Jefferson occasionally expressed his willingness to furnish all relevant documents. For

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62. Id.
63. 11 BERGH, WRITINGS OF THOMAS JEFFERSON 229-30.
64. Id. at 232.
65. Such writers perhaps rely on information found in 25 F. Cas. at 67, where President Jefferson's letters of June 12 and 17, 1807, are reproduced. It is noteworthy that he stated in his June 12 letter that Hay is to exercise the power to delete irrelevant material from the Wilkinson letter of Oct. 21, 1806. 11 BERGH, WRITINGS OF THOMAS JEFFERSON 229. He also stated that Burr would have to be more specific in his demands for documents from the various departments and that then he would be sent "anything proper for communication, and pertinent to any point we can conceive in the defense before the court . . . ." Id. at 230 (emphasis added).

It is also pertinent that in June and July of 1806 two persons in a criminal suit before the United States Circuit Court for the District of New York made affidavit that three cabinet members and three clerks in the State Department had evidence necessary for their defense. But when summoned to appear and testify in court they refused, writing to the two judges on July 8, 1806, that President Jefferson "has specially signified to us that our official duties cannot . . . be at this juncture dispensed with." A. BEVERIDGE, supra note 39, at 436 n.1. No further action to compel their appearance was taken. This hardly manifested a readiness on President Jefferson's part to compel with court orders demanding witnesses for the defense.
instance, as shown above, on June 12, 1807, he wrote to Hay of his "readiness . . . voluntarily to furnish on all occasions whatever the purposes of justice may require . . . ." Yet he did not explain who was to decide what letters satisfied this requirement. But in the previous sentence he stated that he had reserved for himself the general right to decide what papers were to be communicated. Finally, he qualified the phrase "readiness to furnish" with the phrase "under that restriction." Moreover, Jefferson ended his letter by authorizing Hay to withhold certain passages in the recently subpoenaed letter of October 21, 1806.

What, then, are we to conclude about the papers which President Jefferson actually handed over to the court? We clearly know that he furnished the court one subpoenaed paper—a deleted copy of a letter written on November 12, 1806. It is true that on June 21, 1807, he wrote Wilkinson that he had delivered to the Attorney General (not the court or the defense) all the papers he "possessed, respecting Burr and his accomplices, when he went to Richmond [in March] . . . ." This was long before the subpoena of the October 21 letter, which, he assured Wilkinson, he would not communicate without his [Wilkinson's] consent. Two days later, June 23, when writing to Hay, he referred to certain papers and said that "we find several missing, without being able to recollect what has been done to them. . . . No research shall be spared to recover this letter [probably the one of October 21, 1806] . . . ." It also seems significant that Jefferson told Congress that the "mass" of information he had received on Burr's activities was "voluminous," some of which was "delivered . . . under the restriction of private confidence," something which precluded his exposing names.

From the above it seems certain that President Jefferson, in spite of the liberality that his letters often exude, did not, as some recent commentators have stated, turn over all documents to the court. His June 21, 1807, letter assures us that he had supplied the Attorney General with "all the papers" he possessed on Burr, but it is mere speculation to conclude, as some have apparently done, that this manifested a predisposition to give them to the accused to assist in his defense.

Both Caesar Augustus Rodney, the Attorney General, and George Hay, the government's prosecuting attorney in the Burr trial, were devout Jeffersonian Republicans appointed by President Jefferson. Hay, with Jefferson's support, had just recently been a floor manager of the impeachment of two federalist judges. Rodney was nominated Attorney General three days before Jefferson's "Burr is guilty" speech to Congress, in which he promised that the case was immediately to be turned over to the courts of justice.

66. See note 46 supra, and accompanying text. In this letter, he also said he had sent to Hay copies of "two letters from the Secretary of War." 11 BERGH, WRITINGS OF THOMAS JEFFERSON 231.
67. Id.
68. Id. at 230.
69. Id.
70. Id. at 253.
71. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 412 (Gov't Printing Office 1896-99).
Thus, the President perhaps may have professed his deepest desires to aid Burr in his defense against the charge of treason, but he most devoutly wished to see Burr convicted; and the papers given to Rodney and Hay, prior to receiving Justice Marshall's subpoena, were surely intended to produce a conviction, not to promote an acquittal.

Actually, the single fact pertinent to the whole discussion is that neither of the two specific subpoenas issued by Justice Marshall was honored by President Jefferson. One subpoenaed letter was never produced and the other was furnished only after Jefferson had deleted certain passages. Upon the presentation of this letter to the court, Marshall said nothing and did nothing. Moreover, on each occasion Jefferson asserted that it was his prerogative as President to determine what papers could be kept from judicial scrutiny. 72

Another point of capital importance was that Justice Marshall's sole argument for issuing the subpoenas for the letters was Burr's claim that the sixth amendment gave the accused a constitutional right to have the compulsory process of the court to obtain evidence deemed necessary for his defense. But in the case of Nixon v. Sirica that issue was not present, for a grand jury has no such constitutional right to subpoena this kind of mate-

72. It seems pertinent to list here what a number of modern scholars of recognized distinction have written—long before the Watergate affair—on the question of executive privilege. For the most part, they are referring to the Burr case.


R. CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 299 (13th ed. 1966): "Chief Justice Marshall had subpoenaed President Jefferson at the time of the trial of Aaron Burr for treason, only to have his subpoena ignored . . . ."

C. Pritchett, THE AMERICAN CONSTITUTION 175 (2d ed. 1968):

Marshall had been one of the first to recognize the judicial untouchability of the President operating in the executive field. So far as the President's 'important political powers' were concerned, he said, the principle is that 'in their exercise he is to use his own discretion and is accountable only to his country in his political character, and to his own conscience.' In two important post-Civil War cases the Court ratified this doctrine and extended it to include even the President's duty to enforce the law.


"Jefferson when President . . . [refused] to respond to Chief Marshall's subpoena in Aaron Burr's trial for treason [and he cast] the robe of his immunity over three members of his cabinet and three clerks in the State Department whose testimony was desired by the defense in another trial." Then relying on the JOURNAL OF WILLIAM MACLAY 167 (E. Maclay ed. 1890), Corwin continues:

In addition to his duty to the laws, a supplementary basis of the President's power to do this is the principle of his own immunity from judicial process. The question whether there was such a principle was discussed at the very beginning of the government by Vice-President Adams, Representative Fisher Ames, and Senator William Maclay. The first two stated the conclusion that a President in office was answerable to no judicial process except impeachment. The President, they argued, was above 'all judges, justices, etc.,' and secondly, that judicial interposition involving the President personally was liable to interfere with the operation of the governmental machinery. This too, seems to have been future Chief Justice Oliver Ellsworth's opinion; Maclay thought decidedly otherwise.


(Paraphrasing President Jefferson) "The President, he said, had duties which were superior to his duties as a citizen. In general, Jefferson's argument has since been sus-
EXECUTIVE PRIVILEGE

Thus, had Justice Marshall been presented with facts identical to those in the Nixon case, we have no indication of how he might have responded. But we do know, as shown above, that, even when presenting Burr's sixth amendment claim, he wrote with great deference about the Executive's counterargument. And finally, when Jefferson refused to furnish the demanded material, Marshall said nothing more and did nothing more.

IV. RECENT CASE LAW PRECEDENT

Other than the Burr case nothing in American jurisprudence is similar to the situation in Nixon v. Sirica. Strangely enough, the per curiam opinion in the Nixon case states that the "courts' assumption of legal power to compel production of evidence within the possession of the Executive surely stands on firm footing," and then cites the 1952 case of Youngstown Sheet & Tube Co. v. Sawyer. Judge Wilkey noted that "Youngstown involved no documents, no tapes, no Presidential conversations—no assertion of a constitutional privilege of any kind." In Youngstown President Truman had refused to use a law passed by Congress to handle a labor situation, employing instead a procedure Congress had considered and rejected. Given these facts, it is simple to justify the particular intervention by the Court, but the decision provides no precedent for Judge Sirica's order.

Judge Wilkey cited the 1953 case of United States v. Reynolds as more pertinent. Here a military aircraft had crashed, killing certain civilian observers. In a suit against the United States their widows asked to see the Air Force's accident investigation report, but the Secretary of the Air Force claimed that it contained material on secret equipment that rendered the report privileged against disclosure. In a six-to-three decision, the Court upheld this claim. Referring to Burr as "authoritative," the court then analo-gized this situation with the fifth amendment:

There are differences in phraseology, but in substance it is agreed that the court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' Hoffman v. United States, 341 U.S. 479, 486-487 (1951). If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure.

73. That issue would arise if one of the defendants in a trial growing out of the Watergate affair were to claim that certain information on the tapes was necessary for his defense. Even then, the Burr case would seem to be strong precedent for allowing the President to decide whether to release the testimony sought. Should he decide that the public interest forbids disclosure, a jury might well be forced to return a verdict of not guilty. That is exactly what happened in the two Burr trials, though this verdict seems unrelated to Jefferson's action.
74. 487 F.2d at 709.
75. 343 U.S. 579 (1952).
76. 487 F.2d at 793 (Wilkey, J., dissenting).
77. 343 U.S. at 579.
78. 345 U.S. 1 (1953).
79. 487 F.2d at 795 (Wilkey, J., dissenting).
Judge Wilkey wrote that the Court had forbidden even in camera inspection to see if there was justification for the claim, just as in cases of persons invoking the fifth amendment where no in camera inspection is made of the matter to be shielded from disclosure. In a similar manner, Judges Wilkey and MacKinnon would allow Presidential immunity if the circumstances demonstrated that there were reasonable grounds to conclude that confidentiality in carrying out executive functions might be infringed.

There are, of course, dangers involved in allowing executive privilege, just as there are dangers involved in the allowance of fifth amendment pleas. Likewise, many criminals have certainly gone free because they have successfully invoked the fourth amendment prohibition against the use of evidence, unimpeachable in itself but obtained by an unlawful search and seizure. The dissenters, likewise, would rather accept the possibility that people involved in Watergate might not be punished than to compromise the fundamental precepts underlying executive privilege.

V. NIXON V. SIRICA

The Majority Opinion. All seven judges agreed that a President does enjoy a special privilege not enjoyed by other citizens to keep his communications confidential and immune from disclosure even to courts and grand juries. Disagreement arose only over the extent of this freedom from disclosure. The majority wrote: “We of course acknowledge the longstanding judicial recognition of Executive privilege. . . . [T]he Judiciary has been sensitive to the considerations upon which the President seems to rest his claim of absolute privilege: the candor of Executive aides and functionaries would be impaired if they were persistently worried that their advice and deliberations were later to be made public.” But the majority would not accept the view that a mere assertion of the privilege is sufficient to defeat the claim that a Presidential document is needed for some valid function. Specifically the majority thought that an in camera inspection by a judge was justifiable in this case for the purpose of balancing the need of the tapes against the necessity for their non-disclosure.

The Dissenters. Judge MacKinnon wrote that he “would recognize an absolute privilege for confidential Presidential communications [if] related to the performance of Article II duties.” He concluded that “the President would then be free voluntarily to type up a transcript of the recordings that are the subject of this litigation and present it to the grand jury with the material deleted that he considers confidential. He could explain the deleted material. As to the deleted material the President’s action would be

81. 487 F.2d at 795 (Wilkey, J., dissenting).
82. That is, the defendant cannot be forced to reveal to the judge the precise information which he claims will incriminate him. See, e.g., United States v. Reynolds, 345 U.S. 1, 8 (1953).
83. 487 F.2d at 797 (Wilkey, J., dissenting). Judges MacKinnon and Wilkey stated that they gave “general concurrence” to each other’s dissent. Id. at 762.
84. Id. at 713.
85. Id. at 719.
86. Id. at 730 (MacKinnon, J., dissenting).
submitted to the test of public opinion . . . ." 87

Judge Wilkey took a similar position, stating bluntly that "the critical is-
sue . . . is, in the shortest terms, who decides the applicability of the Execu-
tive privilege—the Judicial Branch or the Executive Branch." 88 He ad-
mitted that the term "‘absolute’ privilege sounds somewhat terrifying—until
one realizes that this is exactly the way matters have been for 184 years
of our history, and the Republic still stands." 89 Judge Wilkey would rely
for protection from irresponsible action on "the practical capacity of the three
independent Branches to adjust to each other [and] their sensitivity to the
approval or disapproval of the American people." 90

VI. CONCLUSION

The Special Prosecutor, Mr. Cox, argued that the case was so unique
that there were the most cogent arguments in favor of disclosure of the
tapes, as against President Nixon’s claim of executive privilege. 91 As noted
above, the dissenters’ response was that the alleged uniqueness did not jus-
tify a compromise of a privilege that could have damaging results in the
future for the conduct of the Presidency. 92

Actually, Cox seemed to imply that President Nixon himself was some-
how guilty and that this was the unique circumstance which justified a re-
lexation of the immunity privilege. Judge MacKinnon’s answer was that the
grand jury should not—indeed, perhaps could not—confront President
Nixon with a possible indictment, even in a prima facie case, because indict-
ment of a President must always be preceded by impeachment. 93

The dissenters failed to develop another argument against Judge Sirica’s
order—an argument that had been suggested by President Jefferson in the
Burr case. President Jefferson complained that if he were forced to honor
Justice Marshall’s subpoena, other judges in Maine, New Orleans, or in other
distant places would have grounds for issuing similar orders. 94 He would
thus find himself “so bandied about” that he would be incapable of address-
ing himself with suitable attention to his superior duties as Chief Executive.

Actually, President Jefferson was not “bandied about” to any significant
degree, but he was compelled to devote considerable time in responding to
Justice Marshall’s demands. Likewise, President Nixon has been so pre-
occupied with Watergate matters and Judge Sirica’s orders that it is a minor
miracle that any executive business is carried on at all. Moreover, since
the decision in Nixon v. Sirica we have seen President Nixon “bandied

87. Id. at 761 (MacKinnon, J., dissenting). This is the course of action which
President Nixon chose to take when he released (some six months after the decision
in Nixon v. Sirica) typewritten transcripts of conversations with aides, to the committee
of the United States House of Representatives which was investigating legislation con-
cerning the impeachment of the President.
88. Id. at 763 (Wilkey, J., dissenting).
89. Id. at 799 (Wilkey, J., dissenting).
90. Id.
91. Id. at 755-56 n.116.
92. Id. at 730, 750.
93. Id. at 756-58.
94. F. HIRST, LIFE AND LETTERS OF THOMAS JEFFERSON 420 (1926).
about" by congressional committees, judges, and prosecutors, all seeking an incredible number of documents and tapes.

It is, of course, desirable that political corruption cease and that those guilty be punished. But the crime which was under investigation by the grand jury was the alleged break-in at Watergate. Some assert that the break-in was a high crime, some a dirty trick, and others suggest that it was only a prank which simply has to be accepted in a country long accustomed to tough and robustious conduct in its political campaigns.

Perhaps Watergate would not have shaken the nation in such a seismic fashion if so many other perplexing actions of the Nixon Administration had not surfaced at the same time. Perhaps neither the grand jury nor Cox nor Judge Sirica would have insisted so resolutely on hearing the tapes had they not hoped that the tapes would throw some light on these actions.

But from a legal standpoint the single justification for demanding the recorded conversations was the Watergate break-in and the possible criminal action to be brought against the perpetrators. Let us assume, however, that without the tapes, no indictments would ever be returned and no convictions ever obtained. Would it be a calamity of major importance if the alleged offenders were not put behind bars? Of course, many Americans are always relentless in their pursuit of justice where there is a scent of any criminal activity. *Fiat justitia, ruat coelum.* "Let justice be done, though the heavens fall." But is it desirable to give rein to such relentlessness when the cost is so high? The circumstances of the Watergate controversy present legal and political consequences of broad dimensions. The basic constitutional precept of executive confidentiality is challenged. In addition, the effective operation of the executive branch of the government—in domestic and international matters of high import—is jeopardized because of this protracted controversy.

In France, a nation highly sophisticated in matters of political scandal, the financial journal *Valeurs Actuelles* recently wrote an article under the headline "Masochistic America" in which it said that "[T]he destruction of President Nixon is nonsensical, both constitutionally and politically . . . ."95 People might well be justified in wondering if this will be the verdict of history a decade hence when a sobered America recovers from today's intoxication with excessive draughts of Watergate.

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