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Precedential Privilege

In the first Supreme Court test of the scope of executive privilege, President Nixon lost but the presidency gained.

There was more than face-saving to Mr. Nixon's statement, issued through his counsel, James St. Clair, that while he was "of course, disappointed in the result," he was "gratified" that "the Court reaffirmed both the validity and the importance of the principle of executive privilege—the principle I had sought to maintain."

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What the Court actually *reaffirmed* was a different principle: the rule of law. But the Court did hold, for the first time, that a generalized, presumptive presidential privilege has a constitutional base. Moreover, the Court suggested that certain specific claims of confidentiality might be accorded even greater deference in the future by the courts.

Thus in the course of compelling Mr. Nixon to surrender the tapes to Judge John Sirica, the Court may have made it easier for future Presidents to withhold information, especially from Congress. At minimum, the decision seems likely to lead to more frequent claims of executive privilege, more litigation and sharper judicial definition of the boundaries between executive and legislative powers — boundaries which have traditionally been pragmatic, flexible and imprecise.

This is speculation, of course. Chief Justice Warren Burger, writing for the Court, emphasized in a footnote that the opinion addressed only the conflict between the President's general claim of privilege and the specific needs of a criminal trial. *U.S. v. Nixon,* the Chief Justice wrote, was not concerned with the extent of the generalized executive privilege in civil litigation or conflicts with Congress, or with "the President's interest in protecting state secrets." Nor did the Court address the issue of executive privilege in impeachment proceedings.

But the 8-0 decision is broad and emphatic enough to have great impact in all of those areas. Impeachment is a special case; the decision should give no encouragement at all to Mr. Nixon's attempts to withhold evidence which the Congress wants in carrying out its explicit, exclusive constitutional duty to judge the conduct of President. If the President may not control the evidence in someone else's trial, it would be ludicrous for any court—if called on to decide the issue—to let the President dictate the evidence in his own case.

Setting the impeachment question aside, however, several aspects of the case appear to buttress the ability of Presidents to refuse congressional demands for information on White House decisions and activities. The first is the legitimacy which the Court bestowed on executive privilege in general. While the doctrine is nowhere mentioned in the Constitution, the Chief Justice wrote, "a presumptive privilege for presidential communications" is "fundamental to the operations of government and inextricably rooted in the separation of powers." Moreover, the public and presidential interest in preserving that confidentiality "is weighty indeed and entitled to great respect."

This gives the doctrine new, solid legal footing and great political weight. Until last Wednesday, those who advocated a general executive privilege had few judicial footnotes for their claim. Now they have a unanimous high court decision, with the added force of a single opinion by the Chief Justice himself.

The Court did hold that "a broad, undifferentiated claim" of confidentiality could fall in a conflict with other basic values, such as the specific needs of a criminal trial. Presumably such a general claim might also have to yield before the demonstrated need of a congressional committee for particular kinds of materials.

But the Court suggested that an even higher degree of privilege might exist where a President made a specific "claim of need to protect military, diplomatic or sensitive national security secrets." Those are, of course, precisely the policy areas in which Presidents are already most inclined to resist congressional inquiries—and the Court suggests that Congress in the future might be able to get even less information than is forthcoming now.

Suppose, for instance, that the Senate Judiciary Committee, in the exercise of its oversight powers, is examining the use of warrantless national-security wiretaps. Or suppose that the House Armed Services Committee wants to probe mysterious U.S. military moves in the Mideast. And suppose that the President, citing *U.S. v. Nixon,* refuses to furnish any information on grounds that "sensitive national security secrets" would be jeopardized. Assuming both branches of government pressed their claims, which of them would prevail—the President's assertion of privilege, or the committee's need to know how presidential power is being used?

To date, such conflicts have usually resolved themselves in political tests of strength and will. Congress threatens to cut appropriations or block appointments; the President holds pet congressional projects hostage, or beguiles key legislators by sharing some secrets secretly with them. The outcome of such maneuvering is usually less than a full airing of the facts—but it is also less than a binding precedent, and thus has the enormous advantage of leaving room for future flexibility and play between the two branches of government.

In response to President Nixon's assertions of broad privilege, many in Congress have become intrigued with possibilities for taking executive-privilege disputes to court without going to the extreme of citing a President or his subordinate for contempt. The Senate has passed and the House Government Operations Committee has reported a bill giving federal courts jurisdiction to hear such cases, and requiring the contested materials to be given to Congress unless a judge upholds a specific presidential claim of confidentiality.

That course, however, is not likely to be productive. The Senate Watergate committee has already tried it—and did not get any presidential tapes. And if *U.S. v. Nixon* encourages further resorts to court, the decision also suggests that the judiciary, in weighing the competing interests of the executive and Congress, may find for the President much of the time. There is "that high degree of deference" which the Court said that presidential records should receive. There is, beyond that, the special protection which, according to the Court, "state secrets" should enjoy.

There is another factor, too. In ruling that Mr. Nixon must turn over those tapes, the Court noted that presidential advisers are not likely to be inhibited by the possibility of "infrequent occasions of disclosure" of their comments in criminal trials. But congressional demands for disclosure are far more frequent and, courts could well conclude, therefore more threatening—even when the inquiry is otherwise justified.

To worry about such points is not to say that Presidents should have no secrets, or that the most sensitive policy deliberations in the Oval Office should be exposed to public and congressional scrutiny as a matter of course. Certainly some things have to be secret and some expectations of confidentiality are essential to the functioning of government.

But if one believes that future Presidents, as well as Mr. Nixon, should be as forthcoming and accountable as possible, then *U.S. v. Nixon* has worrisome aspects. The decision should be scrutinized not only for the presidential powers which the Court rejected and the confrontation it resolved, but also for the powers which the decision did sanction and the future conflicts which may result.