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The Court Gets a C

"Surprising casualness" (Raoul Berger of Harvard). "Dangerous nonsense" (Gerald Gunther of Stanford). "Disturbingly cavalier" (Paul J. Mishkin of Berkeley).

Such observations fairly spewed out when the editors of the *UCLA Law Review* asked nine constitutional experts to assess the Supreme Court's *U.S.* v. *Nixon* decision last summer in the case of the White House tapes. This week the *Law Review* will publish the responses as a legal symposium, and despite the popular admiration that greeted the court's ruling, the academics for the most part rated the opinion at barely a gentleman's C.

The problem was not the decision's result. No one quarreled with that. "The judgment may well have been the right one," conceded Philip B. Kurland of the University of Chicago. "But it is difficult, if not impossible, to find its justification in the unanimous opinion authored by the Chief Justice."

We Are the Law. For a start, the scholars criticized the court's reasoning on the question of why it had the power to decide the case. Chief Justice Warren Burger twice cited the 1803 observation of Chief Justice John Marshall that "it is emphatically the province and duty of the Judicial Department to say what the law is." But Stanford's Gunther argued that the use of the Marshall dictum was misleadingly broad; every constitutional issue, he said, is not automatically reviewable by the court. One example: impeachment. Chicago's Kurland put the point neatly when he noted that the opinion "says no more than 'the President cannot assert that he is the law, because we are the law.' *L'état, c'est nous.*"

The court's central conclusion on Executive privilege drew even more fire. Burger held that the privilege was "intrinsically rooted" in the constitutional separation of powers, but "must yield to the demonstrated, specific need for evidence in a pending [federal] criminal trial." Several of the experts wondered why the needs of a civil suit would be any less, or for that matter the needs of a state proceeding or a congressional inquiry. Nor could they understand the suggestion that a presidential claim based on national security might bar even judges from reviewing the material. "We are not told," said Columbia's Louis Henkin, "why the President's judgment . . . is conclusive in some instances and hardly matters in others, or why courts can be trusted with some 'secrets' but not with others."

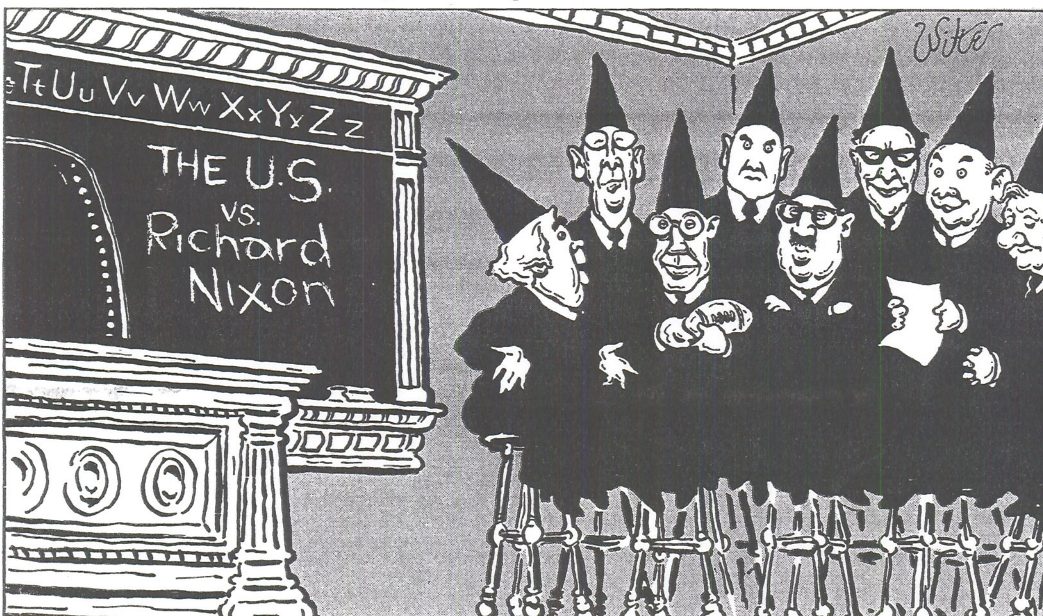
If Executive privilege can be breached despite being "intrinsically rooted" in the Constitution, Henkin wondered, then why not other privileged relationships such as those between husband and wife or lawyer and client. Harvard's Berger, a leading student of the subject, maintained his view that Executive privilege has no basis in the Constitution at all. He expressed surprise at the court's failure even to discuss that idea. Instead the court relied on the "plain" need for confidential consultation between a President and his aides. "But because a result is practical, it does not follow that it is constitutionally required," Professor Berger wrote.

However tough-minded they were, most of the critics did give due weight to the difficult political situation faced by the Justices. The President had hinted that he might ignore a court decision, especially if it were not "definitive." Whatever Nixon meant, he put real pressure on the Justices to file a unanimous opinion in an effort to muster all the court's prestige for a possible confrontation with a recalcitrant President. Inevitably, the opinion "suffers intellectually from the fact of that unanimity," which was "achieved at some cost to a fuller examination of the issues," said Duke's William Van Alstyne.

Too Eager. Another result of the desire to head off criticism, said Berkeley's Mishkin, was that the court did not wish to seem to be judging Nixon's guilt and therefore avoided any "allusion to possible [criminal] implication of the President himself." That deprived the Justices of the chance to frame forthrightly a rule strong enough but narrow enough to deal only with a President suspected of wrongdoing.

Mishkin and Gunther both felt that the court found itself in such compromising difficulties because of its willingness, even eagerness, to accept responsibility for solving major national problems—an expectation that the public increasingly shares. Urging a "diminished appetite for the judicial *deus ex machina,*" Gunther pointed out that while the court's quick action in the tapes case soon brought down the President, it also short-circuited the impeachment process that was bringing needed new strength and admiration to the Legislative Branch. "The court's stepping in meant a self-fulfillment of the prophecy that Congress would not succeed," said Mishkin, who then added a personal conclusion: "The wisdom and propriety of the court's action is for me a most difficult and fundamental problem. I write at the moment still feeling the relief engendered by Mr. Nixon's resignation and am thus inclined to believe that the court's action was justified. [It was done] however, at the cost of a weak opinion which may prove unfortunate as precedent."

"Well, at least we get an A for good intentions . . ."



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