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Lessons of Watergate

By Raoul Berger

CAMBRIDGE, Mass. — Among the casualties strewn in the wake of Watergate is the Presidential claim of uncontrolled discretion to withhold "confidential" information from the courts, raised to its highest pitch by Richard M. Nixon.

It was argued in United States v. Nixon that "it is for the Chief Executive, not the judicial branch, to decide when the public interest permits the disclosure of Presidential discussions." The United States Supreme Court's unanimous rejection of that claim came as no surprise to those who were familiar with the record of the treason trial of Aaron Burr before Chief Justice John Marshall, wherein President Thomas Jefferson claimed a privilege to withhold irrelevant portions of a letter written by Gen. James Wilkinson. The Burr case established that there is no absolute privilege for communications with the President, and that while the Court would give due respect to a Presidential claim of privilege the claim would be outweighed by the defendant's need for the information.

This is but a facet of the Court's function as "ultimate interpreter of the Constitution" to define the scope of the powers the Constitution confers. Had the Court accepted the Nixon claim, it would have opened the door to unchecked executive power, which, as Mr. Nixon's own conduct demonstrated, is an evil that the Founding Fathers justly dreaded.

And the Court would have undermined judicial review, for the Congress by parity of reasoning could equally claim that it too is master in its house, that it alone may determine what legislation it is authorized to enace. Yet ever since Marbury v. Madison (1803) the Court has held that some acts of Congress lie beyond Congress's powers.

In furnishing an unequivocal answer to the question of who decides the limits of the President's powers, the Court merely reaffirmed the long-standing doctrine that under our system of limited powers it is for the Court to determine those limits. Seldom has the Court enjoyed so unique an opportunity to reaffirm its paramountcy — a confrontation with a President who had lost the confidence of the Congress and the nation.

Another important matter decided by the Nixon case is that the President is subject to the orders of the Court. Once it is held that the Court may determine the perimeters of his powers, it must follow that the decision is enforceable. The Constitution is not a compilation of toothless exhortations. Ours is a government where all men, "from the highest to the lowest," as the Supreme Court has put it, are subject to the law.

In the early days of the Republic, counsel for Mr. Jefferson stated in the Burr trial that if the President failed to comply with a judicial summons, "the common means would be for the Court to issue an attachment to force him." It was a time, said the scholar Albert Beveridge, of "honest adherence to the American ideal that all men are equal in the eyes of the law."

To that egalitarian ideal we must return; there is no divinity that doth hedge a President about; once more we must regard him as did Mr. Jefferson's counsel, as "but a man," chosen by us to do a job.

Although United States v. Nixon was a criminal prosecution, the reasoning employed by the Court — the Presidential privilege may not impair the fair administration of justice — is plainly applicable to civil suits as well. Chief Justice Marshall, in dealing with executive disclosure in the Burr prosecution, alluded to the practice in civil cases.

So too, the Court's reasoning embraces the conduct of an impeachment by Congress. Surely the public interest in the "fair administration of justice" in the course of an individual prosecution is not nearly as important as the public interest in the "full disclosure of all the facts" before Congress when it is engaged in the impeachment of the President.

It cannot be left to the object of investigation to decide on its scope. If we are to cleanse the office of a man who has perverted the Presidency, an unhampered power of inquiry is indispensable. Here even more plainly the privilege for "confidentiality" must yield lest the paramount function of Congress be hamstrung.

Hardly less important is the general investigatory power of Congress, to mention only the Teapot Dome probe and that of the Watergate cover-up.

The history of most Congressional investigations into executive conduct, more often than not culminating in exposure of grave misconduct, is one of executive obstruction.

Time and again we have been reminded that the democratic system worked in dealing with the evils of Watergate only because of a wellnigh miraculous chain of accidents, ranging from the tape on the lock of the Democratic National Committee offices at Watergate to the fortuitous disclosure of White House tapes.

It is the nature of miracles that they are not recurrent. If we are not to be left at the mercy of such accidents, it must be open to Congress fully to inquire into executive conduct, as in fact had been the parliamentary practice at least since the early 17th century.

Investigation cannot wait for the emergence of criminality in full panoply. Like a grand jury, Congress must be free to investigate if only to assure itself that there is no ground for suspicion. If suspicion falls upon the President, he cannot be immune.

In what may prove to be one of the curiosities of history, Chief Justice Warren E. Burger, for the first time in our judicial annals, "rooted" Presidential privilege in the Constitution. When a similar statement was made earlier by another Justice, Chief Justice Burger commented, "Well, it may be rooted there, but you cannot find it there."

One is astonished that the Chief Justice should seize on precisely this case—where it had become increasingly plain that Mr. Nixon was invoking the privilege in order to conceal a conspiracy to obstruct justice—on just this unsavory occasion to legitimate and anoint Presidential claims that "confidentiality" is indispensable to conduct of the office.

But seasoned "court-watchers"—a breed akin to Kremlinologists, who are accustomed to read obscure portents — have pointed out that the opinion was stitched together in order to obtain a unanimous decision that would be "definite" enough for the intransigent Mr. Nixon to understand.

The real problem is posed not by communications between the President and his highest advisers but by the fact that under the same cover of separation of powers President Dwight D. Eisenhower claimed privilege against disclosure of communications between *all employes* of the executive branch so that they might "be completely candid in advising with each other," the theory on which Chief Justice Burger rested his doctrine of "confidentiality."

Not without "precedent" did Richard G. Kleindienst, as Attorney General, claim that no member of the executive branch (that is, 2.5 million employes) may talk to Congress—and by the same token, to the courts —without the President's permission, thus erecting a wall around the entire executive Establishment.

"Confidential" communications have frequently been the vehicle of corruption in government; and the judicially acknowledged power to ferret out such corruption would be crippled were the rationale of the Burger opinion to be given sweeping effect.

For me the over-arching lesson of Watergate may be stated in the words of an early statesman, Edward Livingston: "No nation ever yet found an inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and . . . slavery . . . only because the means of publicity have not been secured."

The mushrooming invocation of executive privilege for trivia as well as for the secret bombing of Cambodia abundantly demonstrates the truth of this observation.

Raoul Berger is Charles Warren senior fellow in American legal history at Harvard Law School and author of "Executive Privilege: A Constitutional Myth."