'The Cult of the Robe' And the Jaworski Case

By Philip B. Kurland

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THIRTY YEARS ago, Judge Jerome N. Frank, a dyed-in-the-wool New Dealer and a spokesman for legal realism, condemned the "cult of the robe." What Frank was attacking was the frustration of liberal legislation by conservative judges. He voiced two basic objections. One was that the role of the judiciary that prevented the effectuation of legislative action was essentially anti-democratic. Second, he objected to the erroneous notion that somehow or other human beings who don the judicial robe thereby became vested with the capacity for wisdom and judgment denied to members of the other branches of government. The dogma of the cult of the robe was judicial infallibility.

Since 1945, the cult of the robe has grown immeasurably, but its constituency has changed. No longer do we hear that the judiciary is undemocratic, perhaps because in the interim we have had a redefinition of democracy which is no longer related to majority rule. No longer do we hear that the judiciary is conservative because, in fact, it espouses positions voiced by self-styled liberals. The belief in the omniscience and omnipotence of the judiciary now belongs to the political left even more surely than it once was claimed by the political right.

The fact remains, however, that the judiciary—particularly the federal judiciary—is politically irresponsible. The fact is, too, that its ken has been extraordinarily expanded, in the same way that the power of the presidency has recently been expanded, by usurpation of authority that was originally vested by the Constitution in the legislative branch. The same kind of abuse of institutional power that characterizes the Watergate scandal underlies the creed of the cult of the robe.

I think that no good can come from the widespread belief that the judiciary is the ultimate forum for resolution of every major political, economic or social question that confronts our society. For one thing, experience tells us that such solutions as the judiciary can in fact afford are frequently phantasms. The Supreme Court purported to provide the solution for the most endemic problem of American society, the separation of the black and white races. And the court can take credit for focusing governmental attention on the problem. But to the degree that there have been partial resolutions of the difficulties, they have tended to come from the legislature and the executive rather than the courts. The court undertook to solve the problem of prosecutorial abuses in criminal cases. But its solutions have not deterred prosecutorial abuses; they have only afforded exoneration for some who would otherwise have been punished for crimes they admittedly committed.

United Press International

Leon Jaworski: undeliberate speed.

Suppose, however, we had a belief in the effectiveness of the judiciary for solving such basic problems. And I would emphasize that the judiciary's effectiveness in resolving disputes between individuals or between the government and an individual ought not to be doubted, if largely because the other branches of government are prepared to enforce such judicial actions. Nevertheless, the effective concentration of power that the worshippers of the robe would accomplish would be dangerous to our fundamental freedoms as similar concentration in the executive has proved to be. However benevolent the Supreme Court may be thought to have been, there can be no assurance of the benevolence of the inheritors of the power acquired by those we admire.

Berle Concerned

A. A. BERLE—one of FDR's original Brain Trust—wrote in 1967: "Ultimate legislative power in the United States has come to rest in the Supreme Court." While he approved the result, he was nevertheless concerned that the court obviously lacked adequate resources, staff and machinery to solve the vast problems of social, political and economic conditions in this country. He would solve this difficulty by affording the court a group of councillors, much as the 1939 Reorganization Act afforded the President a group of councillors which grew into the fourth branch of national government that caused the Watergate scandal. And even Berle conceded that: "The will of the most enlightened court is not the same as the will of the elected representatives of the people, and may cease to be the will of the people itself. Acceptance of its mandates based on respect for the court is not the same as acceptance of active laws commanding popular assent after political debate."

In short, to make of the Supreme Court the ultimate legislative power in the United States—which is the basic principle of the cult of the robe—may lead to impotence on the part of the court to perform even its quintessential function, protection of the individual from the tyrannies of government. Certainly it means destruction of democratic principles.

Yet it must be admitted that the members of the cult that now worships judicial power are many. The low esteem in which both of the other branches of the national government is now held

is a major factor in making converts to the cult. Lawyers are among them in great numbers. The high priests of the cult are academic lawyers and professorial political scientists. And today there is none more certain of the omnicompetence of the judiciary than the judiciary itself, and not least the federal judiciary led by the Supreme Court.

Jumping at a Fly

THE MOST RECENT example of the Supreme Court's faith in its own wisdom and power is its decision to undertake to resolve the Watergate mess. At the behest of Special Prosecutor Leon Jaworski, the court took the extraordinary step of authorizing him to bypass the Court of Appeals for the District of Columbia so that the Supreme Court could quickly decide whether he was entitled to evidence that he wanted from the President in order to prosecute the Watergate coverup defendants. Up to that "point in time" the court had lacked the opportunity to resolve the fundamental political problems that had bemused and confused the two political branches of the government as well as the people. It leaped at the chance thus afforded it like a trout jumping at a carefully cast fly, with possibly the same result.

Why should the court take this case for expedited hearing and disposition? Certainly the case itself did not call for such display of energy.

The issue afforded it for decision was all but unique. The question of whether a prosecutor has the right to compel his superior to produce evidence for his use is not one likely to arise with any frequency. The question is clearly different from the issues of executive privilege that are created where the demand on the executive comes from the legislature or even where the demand emanates from a defendant. Denial of the legislature by the executive is almost commonplace and refusal of defendant's claims for evidentiary matter from the prosecution is not uncommon. But refusal of the executive to supply itself with usable evidence is a rarity. I submit that it cannot be the issue itself that called for such premature certiorari.

Judgment by Deadline

EVEN IF THE question were "certworthy," what was the need for such dispatch? It could not be that a criminal case demands such immediate trial that a postponement of a few months could not be afforded. No issue in a criminal case has been so rushed to judgment except for the *Saboteurs* case at the beginning of World War II, the *Yamashita* case at the close of World War II, and the *Mine Workers* criminal contempt case in 1948. And I do not hesitate to suggest that none of these judgments covered the court with glory. Nor can we say that some of the court's more recent escapades in hurried judgments afforded examples of brilliant or even persuasive opinions. Nonetheless, it may be said of the *Pentagon Papers* case and of the *Democratic Convention* case that time was of the essence. That cannot be said here.

Judgment by deadline is inconsistent with the proper role of the judiciary. Political decisions may be made quickly because they need not be rationally justified. But as Mr. Justice Frankfurter told us in *Kinsella v. Kruger:*

"Time is required not only for the primary task of analyzing in detail the materials on which the court relies. It is equally required for adequate reflection upon the meaning of these materials and their bearing on the issues now before the court. Reflection is a slow process. Wisdom, like good wine, requires maturing.

"Moreover, the judgments of this court are collective judgments. They are neither solo performances nor debates between two sides, each of which had its mind quickly made up and then closed. The judgments of this court presuppose full consideration and reconsideration by all of the reasoned views of each. Without adequate study there cannot be adequate deliberation and discussion. And without these, there cannot be that full interchange of minds which is indispensable to wise decision and its persuasive formulation."

No, there is nothing intrinisic in the case that would warrant such a speed—up of the judicial process. It would have to be matters extrinsic to the case that have caused the court to leap into the fray, The only explanation of the need for such undeliberate speed is the potential importance of the decision to the impeachment process, which might well be concluded before the court expressed its opinion, if the court were to proceed in the ordinary course of business.

Indeed, had the case presented to the court derived from an attempt to enforce the subpoenas of the House Judiciary Committee, one might have acknowledged the need for speedy resolution. But the fact remains that the House Judiciary Committee has chosen not to enforce its subpoenas through the courts. The only way for the court to participate in the impeachment processes, then, was by this indirect means. And it would appear, such an opportunity was not to be missed. Never mind that few things are quite so clear about the Consitution as the decision of its authors to exclude the Supreme Court from any role in the impeachment processes.

Washington Post

Justice Frankfurter: "Reflection is a slow process."

No Real Precedents

HOW WILL the decision in this case affect the impeachment processes? There are several possibilities.

First, although the executive privilege question raised here is very different from that which would be presented by a House or Senate subpoena or that which might derive from Judge Gerhard Gesell's decision relating to John Ehrlichman, the opinion—or more likely the eight opinions—may paint with broad brushes. The subject of executive privilege in the absence of statutory guidelines is *terra incognita.* There are no real precedents. The case will have to be decided on first principles, however short of time the court may be to frame those principles on the basis of adequate study. And so, a decision here may well prove to be controlling on the obligation of the President to respond to the House and Senate subpoenas.

Second, if the Court does order the production of the data here, should the President refuse to obey, he will certainly be faced with the charge of an impeachable offense in refusing compliance with a Supreme Court judgment, an offense that is most likely to afford a base for conviction in the Senate. Should he obey the subpoena, the data thus afforded would quickly become evidence in the impeachment process in the House, evidence which might not otherwise have been available to it.

Third, if the Court finds that the President need not comply with Jaworski's subpoena, the conclusion that could quickly be reached by the public is that he has acted lawfully not only with regard to the Jaworski subpoena, but equally so with regard to the demands of the House and Senate. In that event, such presidential success could very well bring the impeachment proceedings to a screeching halt, however unwarranted the inferences.

In short, victory in this battle by either side may well be dispositive of the impeachment processes, although in fact none of the substantive issues in the impeachment case will have been decided by the court.

Court Will Be Hurt

IT IS POSSIBLE that the court may say that this conflict between a prosecutor in the Executive Branch and the head of the Executive Branch is not meet for judicial review. Depending on how the court says this, it may or may not leave the question of definition of executive privilege for future delineation by the courts or by the conflicting political branches.

No matter how it decides the case, however, unless the opinion is rendered by a unanimous court—which is a most unlikely possibility on so short a time schedule — the judgment will be viewed as a purely political resolution, not a judicial one. The court's credibility will be hurt whatever the decision. And it should be remembered that the only power that the court can assert is the power of public opinion.

It is not too late, of course, for the court to dismiss the writ of certiorari as improvidently granted. But then it would deny itself a leading role in the impeachment of a President which, we may be thankful, is a phoenix that rises only once a century.

The perfume of Watergate is the odor of arrogance. It smells no better on the judiciary than on the executive. I can only wish that the justices of the Supreme court were not such ardent adherents of the cult of the robe.