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**UNITED STATES v. NIXON: WHO
KILLED COCK ROBIN?**

Philip B. Kurland*

The tumult and the shouting dies—
The Captains and the Kings depart—
Still stands Thine ancient sacrifice,
An humble and contrite heart.
Lord God of Hosts, be with us yet
Lest we forget, — lest we forget!
Kipling, *Recessional*

I.

Even if God be dead, the American Constitution lives. Strained to the tearing point, it has survived its most rigorous testing since the Civil War. An American President has been deposed; an American government has fallen. Never before. Never again!

The role of the Supreme Court in the events called Watergate and in their culmination has been an active one, an important one, a bizarre one. Certainly it was not a role contemplated by the authors of the American Constitution. In large measure, the part played by the Supreme Court may be seen in three cases, each of which was heard in extraordinary session after the close of regular business.

The first was the decision in *New York Times Co. v. United States*,¹ perhaps better known as the *Pentagon Papers Case*. Watergate had its origins in the purloining and publication of the Pentagon Papers. It was that event that exacerbated the paranoia of the Nixon administration, that called forth the Plumbers and other extraconstitutional devices by a chagrined executive who was not himself the villain of the Pentagon Papers: his predecessors, Kennedy and Johnson, were. It will also be recalled that the holding of the Court in the *Pentagon Papers Case* was that pub-

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¹ 430 U.S. 713 (1971).

lication of the papers could not be enjoined;² three concurring Justices held that those who had stolen the papers might be subjected to criminal prosecution.³ Hence the Ellsberg trial, the concealment of break-ins and wiretaps, and White House behavior that looked suspiciously like an attempt to bribe a trial judge with a different federal appointment. (One may query also the behavior of a trial judge who heeds the siren's call not once but twice).

The second relevant Supreme Court decision occurred in the summer of 1972. The decision in the *Democratic Convention* cases,⁴ if a non-decision may be called a decision, was a refusal to interfere with the obscene capture of the Democratic national convention by the McGovern forces. Thus the Democratic party fielded a candidate who assured a Republican victory. And, after the media destroyed the candidate of their own creation, it became impossible for McGovern to utilize the break-in to Democratic headquarters in a way that a more credible candidate might have done. Coverup was possible not only because Nixon was what he was, but also because McGovern was an election opponent who gave Nixon title to a landslide vote of about 47,000,000 voters. Nixon did not see the election for what it was, as much a rejection of McGovern as an affirmation of Nixon. Nixon was bemused by a belief in a "mandate." (Even today if a Nixon-McGovern contest were to be rerun, the outcome would be dubious.)

Having thus contributed tangentially to the events of Watergate, in the summer of 1974, the Supreme Court proceeded to oust a President. The case bore the portentous title: *United States v. Richard M. Nixon*.⁵ It was rushed to decision, skipping adjudication in the intermediate appellate court,⁶ so that its effect would be plainly felt in the impeachment processes that were under way. Even before the event, it was easy to predict that the Court's decision would be determinative of the viability of the Nixon presidency. The decision was reached on July 24, 1974; the House Judiciary Committee voted impeachment articles on the 31st of July and the 1st of August; the President all but confessed his implication in the Watergate coverup when he published the tapes ordered produced by the Court, on August 5, 1974; the President resigned on August 9, 1974.

² *Id.* at 714.

³ *Id.* at 730-48 (Stewart, White & Marshall, JJ., concurring).

⁴ *O'Brien v. Brown*, 409 U.S. 1 (1972); *Cousins v. Wigoda*, 409 U.S. 1201 (1972).

⁵ 94 S. Ct. 3090 (1974).

⁶ *United States v. Nixon*, 94 S. Ct. 2637 (mem.).

The decision of the Supreme Court in this case was a political decision not a judicial one. Relying primarily on slogans, non-sequiturs, and a recognition of the fact that public opinion was in its corner and not in that of the executive, the Court proudly proclaimed the supremacy of the judiciary. Jefferson's fears had been realized, once again. The judgment may well have been the right one. But it is difficult, if not impossible, to find its justification in the unanimous opinion authored by the Chief Justice.

II

The first question addressed by the Court was whether there was a final, *i.e.*, reviewable, order for it to consider.⁷ The case arose, it will be recalled, on the issuance of an order to enforce a third-party discovery subpoena. Ordinarily, the grant or denial of such an order, the Court noted, would not be reviewable because it is not a "final" order.⁸ Such an order would become reviewable only on the failure to obey it and a consequent holding that the delinquent party was in contempt of court.⁹ But, said the Court, dredging up a 1918 case, *Perlman v. United States*,¹⁰ where it is "unlikely that the third party would risk a contempt citation," the order could be reviewed without a contempt proceeding.¹¹

Moreover, said the Court, whether a President of the United States "can be cited for contempt" was an open question. He ought not to be put into the position of risking a contempt citation before the order could be reviewed. Therefore, the Court held, there was present a final order for purposes of review.¹²

Some, like me, may find some difficulty in discovering logic in the Court's reasoning. And here we cannot avoid a demand for reason by the invocation of Holmes's famed dictum about "the life of the law." For experience is even more wanting than logic.

Certainly the result might be accepted, reviewability might be justified, because of the extraordinary nature of the proceedings. But that was not the ground offered. And the reasons that were proffered create more questions than they resolve. The big one, of course, is why, if it is dubious that a President may be subject to a contempt citation, was it certain that he was properly subjected to the kind of order that was before the Court for re-

⁷ *Id.* at 3098.

⁸ *Id.*

⁹ *Id.* at 3099.

¹⁰ 247 U.S. 7 (1918).

¹¹ 94 S. Ct. at 3099.

¹² *Id.*

view? If the answer turns on the availability of sanctions, the answer to both questions would seem to be the same. Of more practical significance, perhaps, if less majestic, is the question why the rule derived from *Perlman* should not be of general application? Should not all third-party discovery subpoenas be the subject of immediate review, since no third-party is likely to be "willing" to subject himself to the risks of contempt? Even if the issue were refined to cover only refusals to comply on the ground of one privilege or another, the lower courts will be concerned with many cases of third-party discovery orders where the claim of "finality" will be made. One may expect that the "finality" rule of *Nixon* will not find general applicability.

III.

The Court's second question labelled "Justiciability,"¹³ also offered a result without adequate justification. The argument made by President's counsel was that the conflict between the Special Prosecutor and the President was an "intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution."¹⁴ This, it was urged, made the issue a "political question" and one not appropriate for the courts to decide.¹⁵

Once again the reasoning is interesting, but it hardly marches to the conclusion, which may, nevertheless, be correct. The Court begins with an irrefutable statement: "The mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend upon such a surface inquiry."¹⁶ What then does it depend upon? That is a lesson we cannot learn from this opinion, for the conclusion is not a principled answer but an ad hoc response:

In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision.¹⁷

The unique nature of the case was demonstrated in the opinion, if demonstration was required, but "the applicable law" was barely adumbrated by a series of citations hardly relevant to the

¹³ *Id.* at 3100.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 3102.

case before the Court. The Court did proclaim that the power of the Attorney General was derived from Congress, which had been a question of some dispute when the issue of Congressional appointment of a Special Prosecutor was being debated.¹⁸ It went on to state that the Attorney General had redelegated some of that authority to the Special Prosecutor by regulation that had "the force of law."¹⁹ It concluded by declaring that, pursuant to these regulations, the Special Prosecutor had the authority to take the action in question.²⁰

The Court might have been saying, although it did not say it in so many words, that where there is a break in the chain of command within the Executive Branch, as was the case here by reason of the regulation, an "intra-branch dispute" cannot be settled within the Branch, since the senior official has no authority over the junior official with regard to the issue in question. This explains why an administrative agency in conflict with the executive may ask for resolution of that controversy by the judiciary: an administrative agency is not within the chain of command that leads to the President. And the Court held it irrelevant that the Attorney General, who is subordinate to the President, could have revoked the regulation that broke the chain of command, so long as he did not do so. There was also the suggestion that the Attorney General could not withdraw the regulation in light of the provision in the regulation that "the Special Prosecutor was not to be removed without the 'consensus' of eight designated leaders of Congress."²¹ This is a more doubtful proposition, at least if the analogy to legislative action really governs. Certainly one Congress cannot delegate its authority in a manner to preclude a subsequent Congress from revoking it.

IV.

The third question was of somewhat less moment. Did the subpoena conform to the standards established under rule 17(c) of the Federal Rules of Criminal Procedure?²² Although the Court conceded that rule 17(c) "was not intended to provide a means of discovery for criminal cases,"²³ it was exactly that use of 17(c) that was validated here. The Court relied first on the discretion of the trial court to justify this conclusion and then held:

¹⁸ *Id.* at 3100.

¹⁹ *Id.* at 3100-01.

²⁰ *Id.* at 3101-02.

²¹ *Id.* at 3102.

²² *Id.*

²³ *Id.* at 3103.

From our own examination of the materials submitted . . . we are persuaded that the District Court's denial of the President's motion to quash the subpoena was consistent with Rule 17(c). . . . The subpoenaed materials are not available from any other source, and their examination and processing should not await trial in the circumstances shown.²⁴

The effect of this ruling may well be to enlarge the scope of the subpoena power in criminal cases for discovery purposes. A reluctant judiciary that has heretofore severely confined criminal discovery, especially by defendants, may find in the *Nixon* case a mandate for opening discovery to defendants where the materials sought have "valid potential evidentiary uses,"²⁵ which is all that the Special Prosecutor demonstrated here.

V

The fundamental question of the existence and scope of "executive privilege" was thus opened for decision.²⁶ And once again the Court resorted to maxims and *ipse dixit*s to support the conclusion that the asserted privilege could not be sustained. Its basic proposition was that the demands of the judicial process overrode the needs of the Executive Branch for protection of its confidential communications. On the reasoning of the Court, it would be necessary to hold that none of the confidential communications privileges now extant, whether that of husband-wife, lawyer-client, physician-patient, priest-penitent, would protect against a subpoena for production of such materials. The reasoning is sparse. A few quotations suffice to reveal it. The reader may find problems in the Court's language, particularly if he substitutes any of the other confidential communications privileges for that which is the subject of the Court's judgment:

In this case we must weigh the importance of the general privilege of [lawyer-client, etc.] confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the function of the courts. A Presi-

²⁴ *Id.* at 3105.

²⁵ *Id.* at 3104.

²⁶ *Id.* at 3105.

dent's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated.²⁷

Were we to accept these propositions at face value, each of the confidential privileges would fall when the contents of those communications were sought for use in a criminal trial. But there can be little doubt that the Court's reasoning in this case is good for this case only. It purports to justify a conclusion that the Court obviously thought necessary in the circumstances of the grim political situation with which the country was faced. Except for the need to throw the weight of its popular support behind the trial court's judgment, it could have denied review and avoided the embarrassments of rationalizations that cannot justify its results.

The Court hardly explicated the complicated concept of executive privilege and its proper and improper use. In the face of strong, if not conclusive, evidence that "executive privilege" is a "myth," as Professor Berger has asserted,²⁸ the Court simply assumed its existence. While its most important use has been to frustrate legislative rather than judicial inquiry, the Court chose to suggest that it was not deciding the propriety of the assertion of executive privilege vis-à-vis the legislature. Its judgment was limited to access to confidential communications in criminal cases:

We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence in criminal trials.²⁹

For the present, we must be grateful to the Court for extricating the Nation from a constitutional crisis of the gravest proportions since the Court's decision in *Dred Scott v. Sandford*.³⁰ As with *Dred Scott*, the future may not deal kindly with the means by which the Court accomplished its end. Its holding that article II is the source of the confidential communication privilege,³¹

²⁷ *Id.* at 3109-10.

²⁸ See R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974).

²⁹ 94 S. Ct. at 3109 n.19.

³⁰ 60 U.S. (18 How.) 393 (1857).

³¹ 94 S. Ct. at 3106, 3111.

which the opinion validates for the first time, may create momentous problems. And there must be some doubt that the constitutional structure is enforced by an opinion that says no more than: "The President cannot assert that he is the law, because we are the law." *L'état, c'est nous*. Nor should we forget that the cause of the constitutional crisis, the imperial presidency, is not cured by the removal of President Nixon from office. By its decision, the Court has eliminated a symptom, it remains for the Congress and the new President to effect a cure of the disease.