November 24, 1987

The Honorable Lewis Powell, Associate Justice (Retired)
United States Supreme Court
Washington, D.C. 20543

Dear Mr. Justice Powell:

Thank you so much for meeting with Professor Phillip Cooper and myself last week in conjunction with our book on the Supreme Court for Oxford University Press. It was indeed an honor for us to have had the opportunity to talk with you about the Court and its personnel, especially Justices Black and Douglas.

Toward the end of the conversation I asked you a question about the Nix v. Nixon case in the Supreme Court. May I take this opportunity to ask you one additional question. It involves the issue of executive privilege. Reading and re-reading the Douglas papers that illuminate this case, one notes that three justices, Douglas, Brennan and White, seemed strongly opposed to the Court elevating the executive privilege to constitutional status. Indeed, Douglas wrote an eighth version of a concurring opinion just four days before the Court announced Nix v. Nixon that focused on that question and White suggested to Chief Justice Burger that he might write a separate opinion because of the Chief Justice's views on executive privilege. (You, too, evidently [from a review of the Douglas material] wrote a strong defense of executive privilege as a constitutionally derived right of the president.)

Why was it that the Court moved, unanimously, to the Burger/Powell view that executive privilege was constitutionally based? Why didn't Douglas and/or White write separately on this issue?

Thank you so much for your counsel on this matter. I have greatly appreciated your words and will want to show you some of the material before we send it off to Oxford University Press.

Sincerely yours,

Howard Ball
Dean
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Dear Dean Bell:

This is a reply to your letter of November 24. You inquire why, in view of questions as to executive privilege evident in Douglas' papers, the Court unanimously approved an opinion that recognized executive privilege as constitutionally derived.

Some 13 years have passed since the Tapes Case, and my memory therefore may not be entirely dependable. But I had drafted and printed a concurring opinion some 11 pages in length, a draft I did not circulate. A longhand note attached to the draft states that "I plan to file this opinion (after editing and possibly with additional sections) if we cannot agree unanimously on one opinion". (I had underscored the word "one").

In this draft, I stated that "to the extent that the interest in confidentiality pertains to the President's effective exercise of his executive powers, it is ... constitutionally based." My draft recognized that strong public interests justify a President's privilege, but that it is not absolute. I concluded:

"Thus where the President's ground for withholding subpoenaed materials from use in a criminal trial is only the generalized interest in confidentiality, I believe his decision is not binding on the courts. ... I do not reach this conclusion lightly nor do I wish to suggest that courts may presume to order the President of the United States to produce confidential materials absent compelling justification."

In notes I prepared as a basis for discussion at one of our Conferences, I stated that a "general expectation
of confidentiality is essential to the effective exercise of [presidential] power." And that "the privilege asserted by the President is based on the Constitution. Art. II."

Justice Douglas, as you noted, had prepared an opinion. If he had filed his, I planned to circulate and file mine. But all of us recognized the utmost importance of unanimity if it possibly could be reached. Douglas, to his credit, was finally persuaded. I think the opinion of the Chief Justice on the privilege issue is sound, and I am happy that it was unanimous.

I enjoyed visiting with you and Professor Cooper, and look forward to your book.

sincerely,

Dean Howard Hall
College of Social and
Behavioral Sciences
The University of Utah
205 Orson Spencer Hall
Salt Lake City, Utah 84112

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Sincerely,

Dean Howard Ball
College of Social and Behavioral Science
The University of Utah
205 Orson Spencer Hall
Salt Lake City, Utah 84112

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Salt Lake City, Utah 84112
There is my personal notebook on the Maximum Taper Case. It contains some, but not all, of the memoir which I developed in the course of my study. At this my thinking evolved on to the analysis, my judgment on to the result remained constant and free from doubt.

NOTEBOOK CONTENTS INTERFILED IN THIS CASE FILE
MAY 5, 2008