NIXON CASE

71 Yale Law Journal 879 (1962)

Professor Hardin, a teacher of Evidence at Duke, wrote this article on Executive Privilege. He thinks the courts have been too hesitant to insist on in camera examination of material with respect of which executive privilege is asserted. He draws no distinction in principle between civil litigation to which the Government is not a party and criminal and civil litigation to which the Government is a party. He recognizes, of course, that in the latter cases - both civil and criminal - a court has the power of dismissing the Government's case (if it is a plaintiff, or deciding against the Government if it is the defendant) and of dismissing a criminal prosecution, whenever executive privilege is asserted with respect to material which is arguably relevant. Professor Hardin argues that the paramount interest is that of the public in the integrity of the judicial process:

"How can it be said that the public interest is served when, without regard to the merits, a court dismisses a criminal case in which, after solemn deliberation, a grand jury has returned an indictment?" - - P. 891.

Professor Hardin's critique of United States v. Reynolds, 345 U.S. 1, is particularly caustic. He refers
to the "obvious conceptual weakness" of the Court's opinion. It is enlightening to read what he says at pages 892 et seq.

Professor Hardin concedes that he is not a constitutional law authority, and he brushes aside constitutional considerations. Nor does he deal, except in a tangential discussion (p. 899, 200) with a claim of executive privilege by the President as distinguished from the executive branch.

He notes that:

"Despite all of the ducking and evading of the issue, the courts have never abandoned the claim that they decide finally the validity of claims of executive privilege. They have carefully avoided any implication that Cabinet Officers are not amenable to process and to contempt citation." P. 903.
Special Prosecutor's Brief - Power to Decide

(p. 48, et seq.)

The prosecutor's brief, after dealing with jurisdictional and justiciability issues, addresses the substantive constitutional issues. It recognizes, as the two basic points, the identical ones decided by CADC in *Sirica* (see my memorandum on that case).

**Roman I**

The courts have power and duty to decide (p. 48, et seq).

The SP's 'basic submission' - said to be controlling - is that:

"The courts, in the exercise of their jurisdiction under Article III of the Constitution, have the duty, and therefore, the power, to determine all issues necessary to a lawful resolution of controversies properly before them." (p. 48).

It is said that this duty includes resolving issues as to (i) the admissibility of evidence in a criminal prosecution, and (ii) the obligation to produce such evidence under subpoena.

The vesting of this responsibility is said to be "inherent in the constitutional duty of the federal courts, as the 'neutral' branch of government, to decide cases in
accordance with the rule of law". It is said to support rather than undermine the separation of powers.

The first case cited is Marbury, with Powell v. McCormick, 395 U.S. at 512, cited as a "See". It is noted that courts consistently have exercised the final authority to determine whether even the highest executive officials are acting in accordance with the Constitution and have issued appropriate decrees. E.g., Youngstown v. Sawyer, U.S. v. U.S. District Court, Kendal v. United States ex rel v. Stokes, 12 Pet. (37 U.S) 524 (alleged power of the President, acting through the Postmaster General, to withhold money owed pursuant to a contract.

Focusing on the Separation of Powers Doctrine "obscures a critical point: the exercise by one branch of constitutional powers within its own competency frequently requires action by another branch within its field of powers". (P. 51):

"Checks and balances were established in order that this would be a 'government of laws and not of men' ** The Doctrine of Separation of Powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. Myers v. U.S., 272 U.S. 52, 92-93. (Brandeis dissenting)." (p. 51, 52).

In applying the fundamental principle that the judiciary determines the law in any justiciable case, the SP - in a subsection of his argument (p. 52) relies on the
cases dealing particularly with assertions of executive privilege. He states at the outset that the "fundamental principle" requires courts to decide "what evidence must be produced, including whether particular materials are appropriately subject to a claim of executive privilege". He emphasizes that deciding this question is a part of the court's duty "to resolve authoritatively [such questions] whenever their resolution is an integral part of the outcome of a case or controversy within the court's jurisdiction" (p. 53).

I think the foregoing qualification (tying the duty into the "outcome of a case or controversy" before the court, is an important one. As indicated in Note 38, this distinguishes a criminal prosecution from an assertion by Congress to information in the hands of the President.

As would be expected, the SP then cites and discusses United States v. Reynolds, and states that since his decision "every Court of Appeals that has confronted the question has rejected a claim of absolute executive privilege to withhold evidence merely upon the assertion by the executive that disclosure would not be in the public interest.

The next case relied upon is Committee for Nuclear Responsibility v. Seaborg, 463 F. 2d 783, 792. Then: Nixon v. Sirica; Kaiser Aluminum v. U.S. (Justice Reed's opinion for the Court of Claims), plus several cases cited in Footnote
39 (which I have not read) and the recent and important English case of Conway v. Rimmer (Note 41), including the Stanford Law Review Comment thereon.

The SP argues that these precedents are "supported by compelling arguments of policy" (p. 57). The quotes from Reynolds are, of course, emphasized: As to "caprice of executive officers" and that "complete abandonment of judicial control would lead to intolerable abuses". The SP notes that abuses would indeed result because "the executive has an inherent conflict of interest when his actions are called into question if it is to decide whether evidence is to remain secret". Seaborg is cited for the language to the effect that an executive department would have power on its own say "to cover up all evidence of fraud and corruption" (p. 58).

The SP distinguishes cases in which the executive branch is free to decline to produce information when it is willing to suffer the loss of litigation, citing Alderman v. U.S., Jencks v. U. S. and Roviaro v. U.S.;

"But the existence of this remedial alternative in some cases does not support the proposition that the executive rather than the courts has the final authority for determining whether, legally, a claim of privilege is well founded or not . . . . In each case, this Court recognized that the courts had the ultimate responsibility for passing upon the claim of privilege; only after the courts made the decisive determination could the government elect whether to sacrifice
the case or produce the evidence found unprivileged." (p. 64)

The SP then moves on to a case, like the present one, where a third party is involved:

"A person who is not a party to the main lawsuit has no lawful 'election' other than to comply with a judicial determination overruling his claim of privilege... The cases have so held." (See cases cited in Footnote 46) (p. 65).

Moreover, "there is no such election when the very object of the legal proceedings is to acquire the information" (e.g., Freedom of Information Act cases).

Even if the President could dismiss the SP, it is argued that this 'solution' would be "impermissible" in this case. The President, himself subject to investigation with respect to the offenses charged in the indictment, is in no position to make the delicate judgment whether the greater public interest lies in producing the evidence and continuing the prosecution or abandoning the prosecution" (p. 66).

Comment: I wonder about this. Suppose there were no Special Prosecutor and that the case were being brought by the Attorney General. I would think the President could dismiss as a matter of power, but this would fuel impeachment claims.
President Not Immune From Judicial Orders (p. 67 et seq.)

This section of the SP's brief, somewhat repetitious, is in line with the Sirica holding.

No one denies that every other officer of the executive branch is subject to judicial process, and nothing in logic or constitutional history puts the President in a different category merely because he was personally elected. (pp. 68-69) [I wonder about this particular statement, as being elected is rather special]

The SP relies on Frenzburg v. Hayes; a long quote from Burr (71); United States v. Lee, 106 U.S. 196, 220; Steel Seizure case; Kerner; et seq.
NIXON CASE

Court of Claims

Action against the United States by a contractor with respect to a Government contract. The plaintiff moved for the production of a memorandum opinion submitted by a staff member of the General Services Administration, which the Court characterized as a confidential intra-agency opinion.

Justice Reed wrote the opinion, identifying "two legal issues: " (1) May the United States assert executive privilege with respect to this intra-agency memorandum on the ground that the public interest requires "open, frank discussion between subordinate and chief concerning administrative action"?; and (2) may the head of the agency of the Government determine the privilege for himself?

As to the privilege, and after reviewing the positions of the respective parties, the Court concluded that "the Government's claim of privilege for the document is well founded. It would be definitely contrary to the public interest in our view for such an advisory opinion on governmental course of action to be reduced . . . under the coercion of a bar against production of any evidence in defense of this suit . . . ." (T. 947).
As to the second issue, the Court held - relying on Reynolds - that "the power [to decide] must lie in the courts to determine executive privilege in litigation" (p. 947).

The opinion emphasized that when the United States "submits its controversies to the Judicial Department, it becomes amenable to its orders [the Court's orders] for determination". But the Court was careful to emphasize that the purpose of the privilege could be defeated by the mere disclosure in camera:

"It seems equally obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even unilaterally (in camera). When the head of an agency claims privilege from discovery on the ground of public interest, which is recognized as a basis for the claim, it seems to us a judicial examination of the sought for evidence itself should not be required without a much more definite showing of necessity than appears here" (947).

Accordingly, the Court did not even require in camera examination.

The principal merit of this case - written by the author of the Reynolds opinion - is that it reaffirms that the "right to decide" is in the Judiciary, at least where the United States is a party. Neither Reynolds nor Kaiser Aluminum involved a claim for evidence in the hands of a government agency which is not a party to the case.

L.F.B.
NIXON CASE

Sirica Case - Opinion of CADC

The two central issues in Sirica were whether (1) executive privilege is absolute with respect to presidential conversations, and (2) the President is absolutely immune from the compulsory process of a court. Although presented in Sirica in the context of a subpoena on behalf of a grand jury rather than the prosecutor, the present case centers around the same two issues. (See President's Brief, Questions Presented, Nos. 3 and 4)(p. 3), and the argument in the President's Brief commencing at p. 48 and extending to p. 82.

The purpose of this memorandum is to indicate some of the highlights and reasons of the CA in deciding these issues against the President in Sirica.

Is The Privilege Absolute (p. 20-27).

Although stated in terms of "absolutism", Judge Wilkie was closer to being right when he described this issue as "Who decides"? If the President alone may decide, the privilege is indeed absolute.

This CA started with the familiar proposition that a grand jury "has a right to every man's evidence" except
that "protected by a constitutional, common-law, or statutory privilege" (Branzburg). But the court acknowledged "the long standing judicial recognition of executive privilege" and its basis (p. 22). It is then flatly stated that:

"Counsel for the President can point to no case in which a court has accepted the executive's mere assertion of privilege as sufficient to overcome the need of the parties subpoenaing the documents." (22).

It was recognized that Presidents and Attorney Generals often have said that the President's privilege is absolute, but the "Supreme Court in United States v. Reynolds went a long way towards putting this view to rest." (p. 24) CADC then quoted from Seaborg (463 F. 2d at 793):

"Any claim to executive absolutism cannot override the duty of the Court to assure that an official has not exceeded his charter or flouted the legislative world". (p. 24)

CADC stated: "We adhere to the Seaborg decision. To do otherwise would be effectively to ignore . . . Marbury v. Madison, that 'it is emphatically the province and duty of the judicial department to say what the law is!' This means that courts must determine the validity of the assertion of privilege and its scope in a particular context.

Responding to the argument that the asserted privilege is absolute by virtue of the constitutional system
and the doctrine of separation of powers, CADC pointed to the frequent conflicts between the three branches and to the historic role of the Court in resolving these. CADC makes a good practical point as to consequences:

"If the claim of absolute privilege was recognized, its near invocation by the President or his surrogates could deny access to all documents in all the executive departments to all citizens and their representatives, including Congress, the courts as well as grand juries, state governments, state officials and all state subdivisions. The Freedom of Information Act could become nothing more than a legislative statement of unenforceable rights. Support for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers." (p. 27)

Conceding the lack of physical power to enforce an order, the CADC concluded that "the President is legally bound to comply with an order enforcing a subpoena". Although this claim of absolute executive immunity from process "may not have been raised directly before courts [which have issued mandatory orders to executive officers in the past], there is no indication that [these courts] entertained any doubts of their power. See Note 34, p. 12 for several cases cited. In addition reliance - for reasons not clear to me - is placed on Environmental Protection Agency v. Mink."
Youngstown Sheet and Tube v. Sawyer is said to be "the most celebrated instance of the issuance of compulsory process against executive officials. U.S. v. United States District Court, 407 U.S. 297 (my wiretap case); Kendall v. United States; and State Highway Commission v. Volpe (See p. 13) also are cited.

With respect to Youngstown, "it must stand for the case where the President has himself taken possession and control of the property" as well as for a case where, at his order, one of his Cabinet members has done so. As CADC notes:

"The practice of judicial review would be rendered capricious - and very likely impotent - if jurisdiction vanished whenever the President personally denoted an executive action or omission as his own".

Burr also is relied upon by CADC:

"The President, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and these motives may be such as to restrain the court from enforcing its production . . . . The occasion for demanding it ought, in such a case, be very strong, and to be fully shown to the Court before its production could be insisted on . . . ."

(p. 15) *

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* I believe this is from the second opinion of Chief Justice Marshall, when he responded to Burr's inquiry as to why Jefferson should not be compelled to comply fully the subpoenas.
CADC, commenting on Marshall's opinion, noted that he had drawn a distinction between a compliance order and the initial order to show cause why the subpoenaed documents should not be produced: "The Court was to show respect for the President in weighing those reasons (for not producing), but the ultimate decision remained with the Court". (p. 16).

In sum, CADC relied primarily on Burr and Youngstown as the most relevant authorities supporting its holding that a President may be ordered to comply with a court order, although the judiciary should be reluctant to issue such an order absent compelling reasons.

After resolving these two basic issues against the President, CADC then addressed the facts before it. (p. 28, et seq.)

The CADC concluded with respect to the tapes in question that disclosure could be ordered "unless the Court judges that the public interest served by nondisclosure of particular statements or information outweighs the need for that information demonstrated by the grand jury". CADC then held that in camera is a necessary and appropriate method of protecting the interest implicated (p. 33), and finally came to protective procedures (p. 37).
MEMORANDUM

TO: Messrs. Jeffries, Owens and Buckley
FROM: Lewis F. Powell, Jr.

The July 4th draft, of a possible memorandum to be circulated, accomplishes quite a transformation! As a general comment, I like it and certainly admire the speed with which it was produced. We have a long ways to go, however, prior to circulation and I hope all hands - including Gail - will be available.

What I would like to do, if it is feasible, is to circulate something by Saturday afternoon. If not, by noon on Sunday at the latest.

The memorandum to be circulated, apart from what I will call the "explanatory introduction", will consist only of two parts: Part A, substantially as now drafted but to be revised; and Part B, dealing with standards and procedures - which I understand John Buckley has been working on and will have a rough draft no later than Friday afternoon.

* * * * * *

I come now to my comments on the July 4 draft of the introduction and Part A.
1. The first two pages, down to the last paragraph on p. 2, are fine. But I get off the track beginning with the last paragraph on p. 2 through the first full paragraph on p. 4. It seems to me that most of what is said here belongs in Part A, where a good deal of it is repeated.

2. The greater part of the last paragraph beginning on page 4 is devoted to why we do not rely on Burr. I would omit this here, as I think we can make some use of Burr in Part A, accompanied by a footnote explaining Burr's limitations for present purposes.

3. It seems to me that the focus of Part A is not as sharp as it might be. We have all agreed that Judge Wilkie identified more clearly than most the central issue: "Who decides"? Although we come back to this issue toward the end of Part A, most of the discussion seems centered on whether or not the President has an "absolute privilege". In the end, these two amount to the same but conceptually I think of them as somewhat different. If indeed a privilege is absolute in the sense that no one may review an assertion of it, then the answer is that whomever has such a privilege also has the power to decide. But even the so-called absolute common law privileges (attorney-client, husband-wife and in certain instances against incrimination) are reviewable by a court to the extent to determine whether they are properly invoked in a particular case. Thus, if I am free to do so
under the authorities, I would say that the judicial branch has the right to decide when and under what circumstances a President may assert an absolute privilege. Merely calling it absolute does not deprive the court of jurisdiction. Indeed, I would prefer - unless we conclude that confusion would result - not to use the term "absolute", but to speak rather of "executive privilege", noting that it may be found to be absolute with respect to specific circumstances, (e.g., state secrets) or "qualified" even with respect to a generalized claim of confidentiality. In Reynolds, where the claim was to an absolute privilege the court asserted the power (though professing not to make a constitutional decision) to decide whether the circumstances justified such an assertion. Moreover, the Court did not rely upon the mere assertion of absolute privilege or secrecy. An affidavit was filed by the Judge Advocate General which went somewhat beyond the formal assertion of privilege by the Secretary of the Air Force.

I wonder if it wouldn't be well to frame the question addressed in Part A more in terms of those used by the parties in this case. See Question No. 3 in the President's brief, and his argument under Point Roman 4 (p. 48 et seq.). The SP's brief states the basic issue in a way that has strong appeal for me:
"Whether the courts, in the exercise of their jurisdiction under Article III of the Constitution, have the duty and, therefore, the power to determine all issues necessary to the lawful resolution of a criminal prosecution. E.R.P. 48, et seq.

4. Part A does not address, except tangentially, whether the President is immune from compulsory process of a court. The first two sentences in the last paragraph in the draft (p. 15) state that the President's privilege "is not absolute" and that "he may be ordered, in a proper case, to produce the requested materials". There is an undeveloped footnote which no doubt would amplify this abrupt transition. But neither CADC nor counsel in this case have assumed that it followed as a matter of course that a President could be ordered to deliver merely because a court had decided against the President on the claim of executive privilege.

In Sirica, the court stated that the President relied on two grounds: first, that "so long as he remains in office, the President is absolutely immune from compulsory process of a court; and second, that executive privilege is absolute with respect to Presidential communications, so that disclosure is at the sole discretion of the President." (p. 11). The court then went on for a number of pages (p. 12-20) to justify a holding that "the President is legally bound to comply with an order enforcing a subpoena".
This same recognition of two separate issues appears in the briefs of both parties. It is not clear to me that the distinction between the power of a court to decide (and issue a subpoena) and its power to order compliance are necessarily grounded in different principles that require different elaboration and analysis. I take it that you have a similar view. Yet, as CADC and counsel for both parties entertain a different view, we cannot ignore it. I suggest we discuss this. One possibility, that has some appeal to me, would be - at least in this draft - to avoid confusing the two issues but add a full footnote stating, in substance, that it does follow as a matter of principle that if a court has the duty and power under the Constitution to "decide" the question of privilege and thereupon to issue a subpoena directed to the President, the court also has the power to order compliance. It would make little sense for a court to go through the charade of the first step (or to have the power to do so), and then find itself impotent to issue an order of implementation. The judicial power ought not to be viscerated in this way. To be sure, the judiciary would have no means of enforcing its order against the President. But this is hardly unique, as the judiciary has no power to its own to enforce any of its orders in an ultimate sense. A contempt judgment is not self-executing.
In any event, the precedents which do exist - I believe - clearly assume the power of a court to order compliance. This is not only true in the executive privilege cases, but certainly was true in Youngstown. Also, it is clearly implicit in Chief Justice Marshall's opinion in *Burr* (See p. 15 of Sirica).

5. Apart from artful writing, the new and imaginative contribution of the Independence Day draft, (the new rocket sent aloft!) is explicated in the three paragraphs commencing on p. 13 through the first full paragraph on p. 15. Starting from the valid point that both Article II and Article III are involved by necessary implication, the draft proposes that the test is "whose constitutional responsibilities are more gravely affected". This involves a balancing of the need for confidentiality by the President (a generalized concern) with the necessity of the judiciary in a particular case to have access to evidence material to its just resolution. I do not believe I have seen the issue framed in quite this perspective before. I take it that none of our inadequate precedents does so. What about secondary authorities?

At first glance, this formulation would entitle the judiciary to win in every instance where the President's claim is merely a generalized interest and the court can be shown that the evidence is material. My brothers may
think this opens the door too widely. I wonder if we shouldn't narrow this at least to embrace criminal cases only. This may be the intent of the draft, although this is not self-evident to me. If so limited, I am inclined to agree with this test. If it should lead to a similar test in civil cases, I would have substantial misgivings. We need to talk about this.

6. If we have time, I would like for one of you to prepare a broad outline of the opinion with the view, possibly of attaching it to our memorandum. As I view it at the moment, Part I would be a statement of the case, including facts; Part II would deal with jurisdiction and justiciability (case or controversy), (political question)?; Part III, the power and duty of the judicial branch to decide (now addressed by our Part A); Part IV, standards and procedures (being drafted); and Part V, decision of this case, applying principles and standards previously articulated.

If our outline embraces only the foregoing, we should have an explanatory note to the effect that we would not reach the issues relating to the grand jury's naming of the President as an unindicted co-conspirator, nor would we decide any issue of fact. I am a little troubled by ducking both of these. The DC has sustained, in effect, the power of the grand jury, to name the President. A failure to reach that
issue may imply that we agree with it, even if we expressly state - as I would certainly insist as a minimum - that our failure to reach it implies no view as to whether the DC's holding in this respect was correct. As to one issue of fact, I am also in doubt: the DC has ruled that a prima facie case has been made for the in camera examination of the subpoenaed tapes. What do we say about this? Do we merely reach it implies no view as to whether the DC's...
NIXON CASE

United States v. Reynolds, 345 U.S. 1 (1953)

A Tort Claims Act suit by widows of civilians killed in the crash of a B 29 aircraft. During pre-trial, the plaintiffs moved under Rule 34 of FRCP for production of the Air Force accident investigation report. The government moved to quash the motion, claiming privilege. The Secretary of the Air Force filed a formal "claim of privilege", stating that "it would not be in the public interest to furnish this report . . . .", and that "the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." The Judge Advocate General of the Air Force also filed an affidavit with the Court, asserting that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."

In the Supreme Court, the government urged that the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest" (p. 6). The government further argued that it was relying upon "an inherent executive power which is protected in the Constitutional system of separation of power". (Footnote 9, p. 6.)
Chief Justice Vinson, writing for the Court, referred to the privilege as one "protecting military and state secrets", and said that "the principles which control the application of the privilege emerge quite clearly from the available precedents".

"The Court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet [it must] do so without forcing a disclosure of the very thing the privilege is designed to protect." (p. 8)

In Footnote 21, keyed to the foregoing quotation, an English case is quoted, with italics to the effect that "the decision ruling out such documents is the decision of the Judge... (end of italics). It is the Judge who is in control of the trial, not the executive".

The court then devoted most of its attention to how disclosure of the secret could be avoided while the Judge was making the decision as to the availability of the privilege. On this point, the Court concluded:

"... It is agreed that the Court must be satisfied from all of the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered (with respect to production of information) might be dangerous because of injurious disclosure could result.'"

Proceeding further, the Court said:

"Judicial control over the evidence in a case cannot be abdicated to the caprice of..."
executive officers". P. 10.

After noting that this was a time of "vigorous preparation for national defense", requiring secrecy with respect to military developments, and finding that there was a "reasonable danger" that the accident report would contain references to secret electronic equipment, the Court sustained the government's claim of privilege.

The Court noted that the Secretary of the Air Force had made a showing of "a reasonable possibility that military secrets were involved."

The Court also stated that "even the most compelling necessity [on the part of the person demanding the evidence] cannot overcome the claim of privilege if the Court is ultimately satisfied that military secrets are at stake". P. 11.

Comment: The above case is criticized rather severely by Professor Hardin in the Duke Law Review as having "obvious conceptual weaknesses". Also, the opinion is internally inconsistent in that on page 6 it expresses no need to reach the constitutional issue urged by the Government that the Constitution itself has the power to decide what is in the public interest; and yet then goes on to hold that the Court must decide and that it cannot "abdicate
to the caprice of executive officers".

But one thing is clear from the case, namely, that some showing - more than a mere formal claim of privilege - is required by the Government. Enough was contained in the statements of the Secretary of the Air Force and the affidavit of the Judge Advocate General to justify a conclusion that there was "a reasonable possibility that military secrets were involved". In the Nixon case, no justification beyond the public interest in candor has been shown. Query whether the conclusory statement by the President can bind the Court?