Book Review: Executive Privilege: A Constitutional Myth

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Book Reviews

The Seedlings for the Forest


Reviewed by Ralph K. Winter, Jr.†

I

Were the author of Executive Privilege: A Constitutional Myth an academic obscurity tilling the fields of legal history, a reviewer might well resolve the conflict between magnanimity and candor in favor of the former. But Raoul Berger is a public figure, extolled in the media as an eminent authority and relied upon as the definitive scholar on questions of compelling public concern. What he writes is front page news in the New York Times,¹ the subject of long stories in weekly newsmagazines² and recommended by reviewers as important reading.³

This reader dissents. Executive Privilege: A Constitutional Myth is so inadequate as to be almost beside the point.

Indeed, media praise raises serious questions about how the media choose the legal scholarship they spotlight. Only a lack of acquaintance with Berger's work or a hypocritical affinity for the immediate political implications of his conclusions can explain this enthusiasm from such unlikely sources. This is a book, for example, which strongly suggests that President Eisenhower committed an impeachable offense when he directed a Deputy General Counsel of the Defense Department not to answer Senator Joseph McCarthy's questions as to conversations within the executive branch relating to ways in which the McCarthy investigations into the Army might be stopped.⁴ Berger's principal mode of analysis is far more compatible with the constitutional approach of those who would have impeached Earl Warren than with that of those who would impeach Richard Nixon. For Berger the sole

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1. N.Y. Times, May 15, 1974, at 1, col. 4.
4. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 235 (1974) [herein-after cited to page number only].
source of constitutional law is found in the specific expectations (in the narrowest possible sense) of the Framers of the provisions in question, expectations presumed to have existed in detail and discoverable through inferences drawn from obscure events of the past. Once discovered, moreover, these expectations become immutable rules of law, not to be modified by future generations no matter how unwise or unworkable they may seem in light of subsequent developments.\(^5\) Berger's treatment of the Constitution suggests that it resembles more a poorly drafted debenture bond than an enduring charter of government.

Shades of the John Birch Society, for that kind of cramped view of constitutional law has been the wellspring of so much of the more irresponsible rightwing criticism of modern decisions of the Supreme Court. If, indeed, Berger represents the length and breadth of our legitimate legal culture, then grave doubt is cast upon such decisions as *Brown v. Board of Education*\(^6\) and *New York Times v. Sullivan*,\(^7\) while unequivocal condemnation must be the lot of *Reynolds v. Sims*,\(^8\) *Harper v. Virginia Board of Elections*,\(^9\) *Shapiro v. Thompson*,\(^10\) *Roe v. Wade*,\(^11\) *Furman v. Georgia*,\(^12\) *Miranda v. Arizona*,\(^13\) *Mapp v. Ohio*,\(^14\) to mention only a few. And whatever happened to the Tenth Amendment?

My disagreement with Berger is not over whether the intent of the Framers of a constitutional provision is relevant and thus a constraint upon those who would construe the Constitution. More than most I think it is. But the discovery of constitutional intent is a multidimensional task with differing consequences for the shape of the law where differing variables exist. The development of governmental institutions, the experience gained through years of adjudication, and the growth of competing principles may all throw differing lights on constitutional intent and legitimately call for varying constitutional results. Of this more later,\(^15\) for it suffices here to point out that the principal analytic mode Berger employs is so narrow as to be of very limited usefulness.

\(^5\) Pp. 10-12.
\(^6\) 347 U.S. 483 (1954).
\(^7\) 376 U.S. 254 (1964).
\(^8\) 377 U.S. 533 (1964).
\(^12\) 408 U.S. 238 (1972).
\(^15\) See pp. 1734-36 infra.
Executive Privilege also suffers from serious analytic confusion. Berger treats the question of whether Congress may inquire into the conduct of the affairs of the executive branch, for instance, as being virtually the same as whether a valid concept of executive privilege exists. But the power to inquire and the right to invoke a privilege can easily coexist in a legal system. Indeed, they do in countless situations, for a privilege generally limits only the sources from which evidence may be taken rather than the subject matter which may be legitimately investigated. One's barber after all can testify to the very conversations one's attorney must keep confidential.

Berger also embarks on long tangents about presidential power to conduct foreign affairs or make war which really add little one way or the other. To be sure, executive privilege cannot attach where the presidency has no substantive powers. But to attempt to dispose of the executive privilege question by that route also strongly suggests that where powers exist, so does the privilege.

Beyond that, Berger often fails to distinguish between the very different concepts of absolute privilege and qualified privilege. While the tone and the title of the work seem to reject any form of privilege root and branch, much of the argumentation is directed only at claims of absolute privilege. For instance—and most important—Berger's discussion of Chief Justice Marshall's statements in United States v. Burr notes that they are inconsistent with the position that the President alone can determine whether or not documents relevant to litigation can be suppressed. But he does not go on to explore the implications of Marshall's statement that a presidential claim of confidentiality is to be weighed against the essentiality of the evidence to the case in which the great Chief Justice seemed very much to recognize a limited form of executive privilege.

There is a world of difference between denying any privilege and holding that a privilege exists which may be overcome in specified circumstances. Every judge who ruled on Watergate Special Prosecutor Cox's pursuit of presidential tapes rejected the notion that executive privilege is a "constitutional myth," with the majority concluding

19. E.g., pp. 190-91, 258-61. As a result, Berger's views on the ruling of the court of appeals as to Special Prosecutor Cox's pursuit of the tapes are ambiguous, Pp. 350-52. This problem is to some extent a function of Berger's style. See p. 1734 infra. 20. 25 F. Cas. 187 (No. 14,694) (C.C.D. Va. 1807).
21. Pp. 190-91. Berger in fact recognizes that Marshall held that only a "pressing need" could overcome presidential claims of confidentiality. Id. at 357, 360, 361.
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that a qualified privilege exists. Because Berger fails to address the question of whether the competing demands of privacy and need for information can be accommodated by the kind of rule these judges followed, his book is almost a nondiscussion of the problem.

This failure cannot be excused, moreover, by resort to "history," for his own catalogue of events fairly screams at the reader that only a laboriously tortured reading of the past supports the conclusion that executive privilege is a "constitutional myth." For example, George Washington and his cabinet—including Thomas Jefferson, Alexander Hamilton, Edmund Randolph—concluded that the President has discretion to refuse papers to Congress "the disclosure of which would injure the public." James Madison, when a member of the House of Representatives, argued flatly that the President had such power. And, in Marbury v. Madison and United States v. Burr, Marshall indicated that at least a limited right to resist disclosure existed in the executive branch.

Sure, one can bob and weave and split hairs over each of these instances. In the event, Washington gave up the papers. Marshals remarks in Marbury are dicta and involved civil litigation rather than a congressional request to boot. And, in Burr, Marshall declined to recognize the privilege as absolute. But by arguing that it is a "constitutional myth" on these grounds, Berger mistakes, not the trees, but the seedlings, for the forest.

Men such as these, familiar with the circumstances surrounding the framing and ratification of the Constitution and skilled in political and judicial statecraft, could not conceivably have said what they did if in fact the specific intent of the Founding Fathers was to deny any form of executive privilege. Indeed, they were leading members of that group and it flies in the face of common sense to write off their words and actions as inconsequential. To be sure, one cannot glean from their words, as William Rogers has, an absolute privilege, but

22. In re Subpoena to Nixon, 360 F. Supp. 1, 4 (D.D.C.) (Sirica, C.J.), aff'd, 487 F.2d 700, 713-17 (D.C. Cir. 1973) (per curiam); id. at 730 (MacKinnon, J., concurring in part, dissenting in part); id. at 763 (Wilkey, J., dissenting).
27. Pp. 188-89.

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only a strong will to reach a predetermined result can explain Berger’s wholesale rejection of their testimony.

Where the established past fails to fit snugly into the mold Berger has assigned to it, it is simply discarded as wrong. The famous and the mighty are not spared in this quest for a more perfect past, for Berger does not hesitate to label Washington “plainly wrong”32 in withholding from the House of Representatives, information on the Jay Treaty and to chide Jefferson, after “respectful consideration,” for holding views on executive privilege which Berger claims are based on a misreading of an English precedent.33

Despite his assertion that executive privilege is a “myth,” Berger proves at best (from his standpoint) that the Framers left the question of executive privilege to the future. At worst he demonstrates that the constitutional structure they created was such as to generate very strong pressures for such a privilege.

One cause of Berger’s analytic failures can be traced to style. The tone of his work is self-important and petulant. The chapter in which he tosses off statements by Washington, Jefferson, Madison and Marshall as irrelevant thus ends with the argument that Berger’s views are confirmed because a statement of those views was sent to William Rogers several years ago and returned without comment.34 At times it seems the subject of the book is not the general question of executive privilege but a series of articles, briefs or memos which take positions contrary to his own.35 In particular he attacks a memorandum submitted by Rogers to Congress when he was President Eisenhower’s Attorney General.36 Because that memo takes an absolutist position, it is more than a little vulnerable, but Berger too often seems to think that refuting it is the same as defending his own extreme position. In discussing Marshall’s statements in Burr, for example, Berger’s urge to show that the Rogers’ paper can find no support in that source seems to obscure from him the fact that his own position is equally undermined. So much of Berger’s argumentation is directed at defeating the straw men he sees around him that the need to establish his own case is lost in the effort.

32. P. 173.
34. P. 208.
A discussion of an issue such as executive privilege must begin with an exposure of the particular writer's view of the legitimate sources of constitutional law. I willingly stand with Berger in rejecting as the principal source of constitutional law the idiosyncratic views of those who happen to be in power at a particular time. Indeed, one major difference between constitutional and nonconstitutional rules is that the former create and define political power and are themselves subject to it only when certain requirements are met, such as an amending procedure. In general, then, constitutional language, structure and history ought to be the main sources of constitutional law.

Constitutional interpretation, however, is more than the assembly of historical minutiae from which inferences of intent may be drawn—or, in Berger's case, wrenched. We must keep in mind that there are several levels of legislative intent relevant to any examination of a constitutional provision. There are, of course, the specific, immediate expectations of the Drafters as to the legal effect the provision would have on the existing laws and practices of the day. A search for this entails examination of the usual data of legislative history: the historical circumstances in which the provision was drafted, the rhetoric which accompanied it, the substitutes or amendments which were rejected, past practices, and the specific issues (gleaned from statements of sponsors and so on) it was thought to resolve one way or the other.

In examining such material, one must be careful not to assume that a specific intent or expectation in fact existed. Berger indulges in a strong presumption against finding that the Framers left the resolution of an issue to the future, and that—as well as his strong personal distaste for executive privilege—leads to his cavalier treatment of the views of so many of our nation's early leaders.

It can be the case, moreover, that even the presence of a specific expectation on the Framers' part is not conclusive, if legislative intent in a broader and more fundamental sense is to be given effect. Constitutional language is usually more general than is warranted by the specific expectations of the Framers and it has thus long been thought that the boundaries of legitimate interpretation extend beyond those immediate expectations.

The American Constitution is more than a text of "do's" and

38. See p. 1734 supra.
“don’t’s.” It established a government composed of a variety of institutions and, as Charles L. Black, Jr., has eloquently expounded, one can legitimately find constitutional law in inferences drawn from “structure and relation.”39 As Black has argued, for example, the constitutional implications of federalism may well lead to legal conclusions which are quite valid but which find little support in the text itself.40 Such inferences, moreover, may touch on matters more fundamental than those which have found precise exposition in the text. The establishment of separation between the branches and the adoption of a representative form of government, for instance, have implications for the question of executive privilege.

A written constitution with difficult amendment procedures strongly encourages the body politic to add to the document only general declarations on matters of great import, leaving room for growth and change in the light of history and the perspective afforded by a deliberate elaboration as experience grows. General language may thus be taken as a signal that broad principles or theories of government transcending immediate political goals are involved, and this illustrates yet another sense in which we may properly speak of legislative intent. Brown v. Board of Education41 is a legitimate gloss on the Fourteenth Amendment, but not because its authors anticipated that “separate but equal” would be invalidated by its ratification. Quite the contrary, the preponderance of evidence tends to suggest the opposite.42 But it is legitimate, nevertheless, because experience plainly demonstrated what was not clear at the time of passage: “separate but equal” is inconsistent with the main purpose of the Amendment, the relief of legal obstacles based on race alone.

Intent in this broader sense can be determined only by resort to implications drawn in light of a variety of factors including the Framers’ expectations, the nature of our constitutional structure, and our experience with it. To be sure, this is a difficult task, for many elements will not accommodate each other easily and will look in inconsistent directions. Nevertheless, one must seek to reconcile the discordant elements and, where total harmony seems impossible, those who would give meaning to the Constitution must look to its core purposes and effectuate them, even at the cost of abandoning an irreconcilable fringe.

40. Id. at 11-32.
III

Berger’s framework of analysis is thus wholly inadequate. Indeed, even within that framework his argument is unconvincing. It is demonstrably the case—indeed, Berger has strengthened my own convictions on this score—that there was in no sense a final resolution by the Framers of the question of executive privilege and that general principles of governance and the structure of our political institutions must provide the answer.

The very idea of separation of powers—and the concomitant rejection of a parliamentary system, a rejection which Berger carefully underplays—implies that no one branch can dominate another except in a transient political sense and that each branch is entitled to arrange its own affairs so as to permit it to carry out and protect its functions and responsibilities efficiently. It implies, in short, that no branch be crippled and that they are to interact out of mutual strength, not mutual weakness. This goal thus requires an accommodation of competing constitutional values, for at some point the need for privacy and the need for information will conflict.

Although others have reached similar conclusions based on the Speech or Debate Clause, I have no doubt that legislators have a form of privilege attached to, say, conversations with their aides relating to official business, a privilege in my view better derived from constitutional structure and relationship than the specific constitutional provision. A similar privilege would, I think, attach to conferences among Justices of the Supreme Court and conversations between them and their law clerks, again so long as official business is involved.

For quite similar reasons—not to say for the sake of plain common sense—an analogous privilege ought to be recognized in the Executive. Indeed, the long history of de facto recognition alone might command the result even were there not other good reasons for doing so.

To begin with, the argument that denial of a privilege will greatly increase the information available to the public in the long run is overdrawn. Law can only do so much to offset the politician’s thirst for confidentiality, since government officials can adjust their affairs so as to decrease the flow of information. Berger makes much of what

43. See p. 1733 supra.
44. See pp. 1734-36 supra.
45. E.g., pp. 10, 11.
could have been learned from the Pentagon Papers, but if publication is anticipated, such studies will not be made.

The fear of constant exposure may thus shape the decisionmaking process in a way that is against the better judgment of those responsible for it. This may in turn reduce the quality of decisions. Internal debate may also be adversely affected, for advocacy of new or controversial points of view may be chilled. Additionally, the already excessive pressure to eliminate officials whose views differ from the accepted orthodoxy will be increased by the fears that division within the administration cannot be confined. Finally, the ability to compromise will be reduced since delicate negotiations are not possible if confidentiality is impossible. This was demonstrated by the Founding Fathers when they met in secrecy to write the Constitution, and few have since doubted both the wisdom and absolute necessity of that decision.

Those who clamor for total exposure simply do not like representative government. Under that structure, governmental officials are not robots responding to every momentary shift of opinion among their constituents. Representatives are expected to exercise independent judgment and to defend their decisions at periodic elections. This calls for them to lead rather than follow and implies that they may establish whatever decisional processes they believe appropriate. These processes themselves, of course, must be defended to the people.

Beyond efficiency and rationality, however, is the question of the independence of the executive branch. The ability to compel the divulgence of confidential conversations is power that can be used for indiscriminate purposes. Want a new dam in your district? Subpoena the President's appointments calendar. Want some pet legislation passed? Subpoena the President's diary. Overdrawn to be sure, but the unrestrained legal power to probe at will into the affairs of the executive branch can severely weaken the executive branch and perhaps subordinate it to Congress. Some form of executive privilege may be essential to the independence of the Executive.

The disclosure of the Nixon transcripts, I believe, illustrates the danger of divulging confidential conversations. A large part of the ensuing negative reaction was generated by material which was germane to neither impeachment nor criminal proceedings. Newspapers which had demanded release of the tapes to aid those proceedings

hesitated not at all to print stories about vulgar presidential language, how political considerations dominated presidential discussions, how his staff interrupted him, his indecisiveness in conversation, and so on—though the conversations of any President are unlikely to match the public image the White House puts forth. Politicians whose own connections with the administration belied their expressions of surprise at the nature of presidential conversations proceeded to denounce the President while his political enemies had a field day. Thus disclosure of material unrelated to but intertwined with matters of substantive importance may inflict crippling political damage.

Beyond that, inquiry into many matters that ought to be covered by a privilege will put subordinate officials in an exceedingly difficult position. For example, wholesale inquiry into internal conversations of the Executive will call for testimony by such officials which is counter to every political instinct and pressure imaginable. Some may be forced either to leave government or to perjure themselves; we ought not arrange our affairs so that those most apt to commit perjury are best qualified for survival in government service.

One cannot, however, move from this line of reasoning to the conclusion reached by the Rogers memorandum: that any matter the President believes cannot be published without damage to the national interest is privileged. Because the privilege is derived by implication from the structure of our government and the nature of the presidential office, it covers only matters fairly related to the exercise of the legitimate functions and powers of that office, not everything encompassed within a particular President's idiosyncratic view of the national interest.

IV

Because Berger assumes there is an ascertainable, optimal degree of secrecy, he is eager for legal rules governing congressional access to information in the executive branch. My quarrel with him is not so much over whether we need more or less secrecy as over whether a feasible general rule is in fact either attainable or wise. If the courts, for example, were to spell out that the President possessed an extremely broad executive privilege, Presidents might invoke it more frequently since the political cost of doing so would be less once the law "legitimated" it. Similarly, if the courts were to give Congress easy access to

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50. See, e.g., id., May 1, 1974, at 1, col. 4; Cover Up II, id., May 3, 1974, at 38, col. 1.
materials in the Executive Branch, demands for information might be more frequent with the consequent inevitable abuses.

The difficulty is that in any particular case no ascertainable legal weight can be given either to Congress' "need" to know or the "need" for executive privacy. This is because the legal principles are of only partial relevance to the actual dispute. For example, congressional demands for information usually result as much from a desire to make political gains through exposure as from a concern that legislation rest on adequate data. The Senate Select Watergate Committee, for instance, was formally established to pursue certain "legislative" goals. Although these goals would seem attainable only by an investigation of several presidential elections, the Senate, on a party line vote, restricted the Committee's jurisdiction to the 1972 campaign. Similarly, presidential resistance may often be generated as much by a fear of adverse public opinion or misunderstanding as by a desire to protect the quality of executive decisionmaking.

Most such cases have political concerns at their core, with one side seeking political advantage from disclosure while the other resists or seeks to control disclosure so that its actions appear in the best light. No one familiar with the workings of the Congress doubts that the very decision to hold hearings is essentially political, as is the presidential decision to invoke executive privilege.53

A general rule of law, however, must ignore these factors and focus on weighing the "legal" considerations: legislative purpose versus protection of the executive decisionmaking process. Because the political aspects simply cannot be weighed by the judicial method, they are lost in the process and will be recognized only randomly and accidentally. But the political aspects are of critical importance and just as legitimate as the "legal." If we are to have a sensible political process, exposure for exposure's sake and the executive's political resistance to it must both have a place in the system.

For this reason, I think political accommodation is the best way to resolve conflicts between Congress' "need" to know and the President's "need" for confidentiality. It tests the asserted needs by letting the public decide how much secrecy we ought to have, the way the public decides other matters of import in a democratic society. "How much secrecy?" is the people's business and we should not discourage their attention to that business by acting as though a final and infallible decision is available in the courts.

53. R. Winter, supra note 47, at 59.
Berger is able to write off political considerations because he views the Constitution as one might view an escrow agreement, that is, as a document which fully describes the institutions and powers it creates. His view of the presidency, drawn entirely from the bare words of Article II and pre-Convention “history,” is so arid and constricted that one wonders why anyone would bother to have elections to choose who would serve in such a mechanical and powerless post. This analytic framework does not permit one to view Congress and the presidency in their political as well as legal dimensions and his work thus displays a lack of any sense of the political process. His work is unidimensional and chooses the least relevant dimension at that. For that reason, there is an air of unreality about it.

V

The political question doctrine has not been favored as of late by the Supreme Court. Nevertheless, because of the political factors mentioned above, I think that congressional subpoenas in the area of executive privilege are a paradigm case of the doctrine’s continued usefulness, for the usual congressional probe raises issues which cannot be well resolved by the judicial process. Such considerations should not be disregarded, as they are when a court weighs the “legal” claims of legislative purpose and the need for confidentiality. These controversies, therefore, raise a classic nonjusticiable issue and should be so treated by the courts: a legal victory for the Executive, but on grounds which take no position on the claim of executive privilege.

This gives little legal power to Congress, but it has considerable political power to obtain information. Congress need not pass legislation without access to relevant information, it can refuse to confirm appointments when data are withheld, and it can provide for the automatic suspension of programs if information about their operation is not turned over to Congress. Finally, if strongly desired information is withheld, Congress may openly retaliate by cutting off funds for presidential staff.

So long as the courts do not decide the merits of the executive privilege questions and hold that such disputes are nonjusticiable, such retaliation would not be open to the constitutional challenge that it violates the separation of powers, as was claimed by President Eisenhower in the case of a congressional cutoff of foreign aid funds to

Peru.\textsuperscript{55} "The Congress is thus not impotent when it comes to enforcing its wishes against claims of executive privilege, and political accommodation is a viable means of resolving such a conflict."\textsuperscript{56} A President who withholds relevant information may also suffer great political damage, as President Nixon's troubles show. Indeed, post-Watergate Presidents will likely hesitate to invoke a privilege which has gotten such a bad name in recent times. Congress' power in this regard will ultimately depend upon its ability to mobilize public opinion behind its demands, and the public will get the amount of secrecy that it regards as proper.

Congress frequently wants information from the Executive which it might gather itself. While Berger regards a duplication of effort as a "costly folly,"\textsuperscript{57} one may well ask whether Congress ought to be so reliant on the Executive for information. That reliance may imperil legislative fact finding far more than any explicit claim of executive privilege.

In some cases, however, a very specific congressional need for information exists, and judicial enforcement of subpoenas might seem proper to some. The paradigm case would seem to be impeachment proceedings in which specific information relating to the commission of impeachable offenses is sought. "Here the legislative need may seem easier to weigh (though political considerations abound) because the investigation has quite precise goals established for it."\textsuperscript{58}

Still, enforcement would involve the judiciary in imponderable judgments so similar to—or perhaps more intractable than—those described above that one may well question the appropriateness of judicial intervention. If the garden variety congressional subpoena is unenforceable, for example, the enforcing court in the case of impeachment must determine that the impeachment inquiry is genuine and not simply a device to avoid the general rule. The court must determine, in short, that the House has not adopted the impeachment label solely to achieve access to judicial power.

Beyond that, a court enforcing a subpoena must make a determination of relevance, and that in turn calls for a decision on whether the matters under inquiry involve impeachable offenses. If, as Berger has asserted elsewhere,\textsuperscript{59} the impeachment process is ultimately subject to judicial review—a conclusion I regard as textually and institutionally

\textsuperscript{55} P. 288.
\textsuperscript{56} R. Winter, supra note 47, at 60.
\textsuperscript{57} P. 5.
\textsuperscript{58} R. Winter, supra note 47, at 60.
senseless—that is not a problem. But if impeachment is exclusively a congressional function, then the question of what is an impeachable offense is one to be avoided by courts at all stages. If, for example, a court were to enforce (or not enforce) a subpoena after deciding certain conduct constituted (or did not constitute) an impeachable offense, that would inevitably have a profound effect on the exercise of congressional responsibility. Although it would not legally bind either House or Senate to a particular definition of impeachable offenses, politically it would have virtually the same effect. The determination of whether an impeachable offense has occurred is a question of fact, law and politics in the highest sense, and the institutions entrusted with the power to make it must accept full responsibility for their decision without being either permitted or compelled to share it with an institution whose relation to that decision is wholly incidental. On balance therefore, I think courts ought to decline to intervene in impeachment subpoenas.

To be sure, this then raises the specter of Congress impeaching and convicting for failure to respond to its subpoenas, and that is not a welcome prospect. Still, there are areas of possible accommodation and compromise between the President and Congress which may lessen the cataclysmic nature of the conflict. And that conflict itself, while undesirable, may be preferable to the consequences of judicial involvement.

VI

Where subpoenas are issued in the course of criminal litigation or investigations, different considerations apply. The reasons for denying enforcement of congressional writs lie in the political nature of the conflict and the existence of alternative means of access. Where criminal proceedings are at stake, the political motivation of those seeking evidence may be less and the “legal” issues—need, relevance, a claim of confidentiality—are more easily weighed. There is, moreover, a real question as to whether confidence in our system of government and in the integrity of the presidency will not be sapped by a rule which, however well intentioned, appears to put the Chief Executive beyond the law. If persons thought to have committed criminal acts are shielded by such a privilege, a crisis of confidence in government can ensue. The very reason for having a privilege—protecting the institution of the presidency—may well thus call for limits on it and an absolute privilege may be counterproductive. Courts should, therefore, recognize the privilege as qualified or limited.
The privilege should nevertheless provide a wide umbrella of protection, to be overcome only by a strong showing of need. Prosecutors can, after all, be politically motivated, and the United States Code provides ample opportunity to make claims of probable cause. The showing of need should, therefore, be quite specific and the court should not compel disclosure unless satisfied that a genuine criminal investigation is involved.

The court should review the evidence in camera to determine whether the need for disclosure outweighs whatever harm it may do, to excise intermingled and irrelevant material, and to delete superfluous or embarrassing phrases and the like. By and large the decision of the Court of Appeals for the District of Columbia in the "tapes" case is adequate and a good example of this procedure.

VII

The most important lesson to be learned from Executive Privilege may lie in the wide exposure given it by the media. Berger's work on impeachment suffered from many of the same inadequacies and it too was widely publicized. Impeachment, however, was an otherwise obscure subject, and Berger was the only game in town. This is not the case with executive privilege, though, for that issue has spawned an extensive literature which easily surpasses Berger's work in quality. Indeed, most of Berger's material which bears directly on the issue was published years ago and was received at that time by the media and the profession with an understandable indifference.

One is tempted, therefore, to say that such a cramped, unidimensional view of constitutional law commands attention only because the conclusions it reaches have immediate political implications favored by those who are publicizing it. Since the implications drawn from Berger deserve a better legal foundation, and indeed have gotten it, one should better conclude that the media's view of legal scholarship is simply ill-informed and indiscriminate.

Spearing the Chief


Reviewed by Walter E. Dellinger†

In less than seventy pages of unfootnoted text, Professor Black has produced the most valuable analysis yet of that awesome constitutional weapon, the power of impeachment. Written with remarkable clarity and economy, this slender essay illuminates such murky and troublesome matters as the proper scope of “high Crimes and Misdemeanors,” the procedural and evidentiary rules to be followed in an impeachment trial, and the propriety of judicial review of a Senate verdict convicting and removing a President. This is not a partisan work written to attack or defend the incumbent President. It is animated by a passion of a different sort: a passion for lawfulness. If there is a central theme it is a deeply felt concern that the well-being of the nation vitally depends upon the impending impeachment proceedings being “visibly and faultlessly lawful.”1 Black’s Impeachment advances this goal by bringing to bear upon these difficult questions a combination of constitutional learning and good common sense.

In addressing the major unsettled issues surrounding the impeachment of a President, Black’s arguments seek reasonable and workable solutions that are compatible with the structure and spirit of the constitutional system. Although such arguments, as he notes, “do not have the fine savor of ancient learning . . . ,”2 Black’s sensitive analysis of constitutional structure and values often provides more useful insights than the historical search for the “intent of the Framers” that characterizes the work of Raoul Berger.3 This is seen in the discussion of a crucial contemporary issue: the question of the range of impeachable conduct embraced by the constitutional phrase, “Treason, Bribery, or other high Crimes and Misdemeanors.”4

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2. P. 4.
Counsel for the President and others have advanced the argument that a President may be impeached only for conduct that would be subject to criminal indictment, presumably under the United States Code. A historical approach is principally useful in negating this contention, for it tells us that "high Crimes and Misdemeanors" was a term of art, the traditional charging language of parliamentary impeachments; it thus cautions against the assumption that the words "Crimes" and "Misdemeanors" are intended to convey their contemporary common language meanings. Furthermore, the English and American precedents contain a number of impeachments based upon conduct that was clearly not indictable as a crime.

An interpretation that would confine impeachments to indictable offenses is especially suspect, moreover, when one considers the rudimentary nature of the early federal criminal code. Notwithstanding that the impeachment clause explicitly includes "all civil Officers," it was not until 1863 that a federal statute made bribery an offense for all these officials. It is no answer to suggest that this inadequacy could have been remedied by the existence of federal common law crimes. For if the Framers had been satisfied to leave the scope of impeachable offenses to case-by-case development in the fashion of the common law, surely they would not have paled at the thought that a similar process would continue for impeachment even if the federal judiciary subsequently renounced the authority to adjudicate common law crimes for private citizens.

Even under the more comprehensive federal criminal code that presently exists, conduct that should clearly warrant impeachment would not be covered. This, in itself, is the single most telling argument against a construction that would allow impeachment only for indictable criminal offenses.

Since most of the serious accusations concerning the incumbent President involve crimes—obstruction of justice, tax fraud, bribery—

7. Id. at 59-78.
10. Federal common law crimes were in fact eliminated by the Supreme Court in 1812. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).
11. Black offers a number of examples ranging from the humorous (hypothetical President moves to Saudi Arabia so he can have four wives and conducts business from there by wire, p. 33) to the chilling (hypothetical President uses tax system "consistently and massively" as a means of punishing opponents, p. 38).
one might ask whether the presence or absence of an indictable crime limitation on impeachment is of any current importance. Black, in fact, considers it "somewhat strange" that the question has assumed such prominence.12 I believe he thereby undervalues its importance. Even if a President is accused of conduct which most members of the society consider "criminal," this issue assumes an important secondary role. For if impeachment is strictly limited to statutorily enumerated offenses, all elements of the offense must be fully proven. If not, the President may be acquitted on a technical defense. For example, under such a view, the Senate would be obligated to acquit a President even though clear and convincing evidence showed him to have taken bribes, if the Senate concluded that he was not "an officer or employee or person acting for or on behalf of the United States, or any department" within the meaning of 18 U.S.C. § 201(a).13 Thus, restricting impeachable offenses to activities violative of a code designed to regulate the conduct of private citizens may produce clearly inappropriate results in a proceeding intended to determine whether the President should remain in office.

But if the constitutional standard of "high Crimes and Misdemeanors" is not constrained by the criminal code, what bounds are there? Can a President be impeached for ill-conceived policies or for a dreadful lack of administrative skills? It is here, in determining how an impeachable offense actually should be defined, that history is only of limited usefulness. Professor Berger moves from the fact that most of the members of the Constitutional Convention were generally aware of English impeachments to the more dubious suggestion that virtually any conduct which was the subject of impeachment in England from 1376 to 1787 should constitute grounds for removal of an American President. Thus, for Berger, the English precedents serve, "broadly speaking, to delineate the outlines of 'high crimes and misdemeanors,'"14 and they are reducible to "intelligible categories" such as abuse of official power, misapplication of funds, encroachment on or contempts of Parliament's prerogatives, and corruption.15 These are not very precise limits upon a power to depose a President chosen through the process of a national election.16 And, as Black notes, the

12. P. 34.
15. Id.
16. Berger himself appears to balk at some English precedents. He notes that "[t]oday impeachment and severe punishment for giving 'bad advice' seems extravagant." Id. at 71. He also suggests that the English practice of impeaching judges for rendering unconstitutional opinions would, if incorporated in the United States, be inconsistent with
English cases sometimes seem to prove too much by treating as "'high Crimes and Misdemeanors' petty acts of maladministration which no sensible person could think impeachable offenses in a President . . . ."\textsuperscript{17}

In contrast, Black presents arguments of subtlety and elegance that give meaningful and limited content to the perplexingly vague standards of "high Crimes and Misdemeanors." Reviewing the brief colloquy in the Constitutional Convention concerning the rejection of "mal-administration" and the insertion of "high Crimes and Misdemeanors" as grounds for impeachment, Black concludes that the acts charged in articles of impeachment should have about them "some flavor of criminality."\textsuperscript{18} He then proceeds to find further restraints on the sweep of impeachment implicit in the Framers' proscription of \textit{ex post facto} laws and bills of attainder. Parliamentary bills of attainder, often directed at public officials, made past conduct of the person attainted criminal, and imposed punishment for it, without judicial trial and without any necessary reference to the violation of preexisting law. Prohibition of attainders in the Constitution thus overlaps with the ban on \textit{ex post facto} laws. Though the letter of these provisions cannot apply (the phrase "high Crimes and Misdemeanors" is itself too vague to satisfy clear warning standards in ordinary criminal cases), the Framers' abhorrence of these devices—from which our law has never wavered—must mean that it would be demonstrably wrong for Congress to act in an impeachment proceeding as though these prohibitions did not exist. The spirit of these clauses can be approximated, Black contends, by treating as impeachable "those offenses, and only those, that a reasonable man might anticipate would be thought abusive and wrong, without reference to partisan politics or differences of opinion on policy."\textsuperscript{19}

In seeking affirmatively to suggest the scope of impeachable conduct, Black applies to the language "Treason, Bribery, and other high Crimes and Misdemeanors," the rule of construction and common sense, \textit{eiusdem generis}; when a general or indefinite term (such as "high Crimes and Misdemeanors") follows specific words (such as "Treason" and "Bribery"), the meaning of the general phrase ought

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17. P. 49.
18. P. 29.
Spearing the Chief

to be limited to the same kind or class of things as that of the specific words. He does not apply this rule in the simplistic fashion of those who suggest that because treason and bribery are indictable crimes, high crimes and misdemeanors can only be indictable offenses. Rather, Black suggests, one can draw from treason and bribery the common thread that they are acts "(1) which are extremely serious, (2) which in some way corrupt or subvert the political and governmental process, and (3) which are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of the words on the statute books."²⁰

It is important to note that the illegality of an act is not wholly irrelevant under this schema. The further removed an impeachment charge is from ordinary criminality, the less comfortable the House or Senate ought to feel. If this still seems "unbearably abstract"²¹ it becomes far less so in an important section in which Black applies his suggested principles to particular problems such as improper campaign tactics, unauthorized military operations, impoundment of funds, obstruction of justice, and income tax fraud.²² It is, in fact, principally through these discussions of hypothetical but realistic cases that the reader is able to understand Black's sensitive touch in dealing with the nuances of impeachable offenses.

Of the many procedural aspects of impeachment explained and examined in the book, one especially deserves critical discussion: the question of televising the impeachment proceedings. Believing that cameras and microphones have no more place in such solemn proceedings than they do in an ordinary criminal trial, Black strenuously opposes live radio and television coverage of a House impeachment debate or a Senate trial. Television and radio, he argues, "act upon what they purport to observe; what one sees and hears is not what would have occurred if these modern means of communication were not there."²³ And such coverage, he fears, would enhance the danger of a snow of telegrams affecting (or appearing to affect) the result. While these objections are substantial, they are, in my view, outweighed by countervailing considerations. It is unrealistic to assume, as Black does, that the public will be able satisfactorily to judge the proceedings by careful consideration of the record and transcript. That may be enough for history, but the present also has its claims. It is absolutely essential that average citizens throughout the nation be

²⁰ P. 37.  
²¹ Id.  
²² Pp. 41-46.  
²³ P. 20.
convinced that an impeached President was removed only after a demonstration of clear, convincing, and detailed evidence of guilt. Sober consideration of the record may be possible if one has available daily transcripts in the *New York Times*, but those who read only truncated wire service reports in the *Durham (N.C.) Morning Herald* may be left with the impression that something approaching a political coup has taken place. Moreover, the absence of full, live national television coverage may itself affect the outcome. Is it not possible that a member of the Senate, personally convinced by a careful and detailed presentation of the evidence that the President is guilty of impeachable offenses, might nonetheless be reluctant to vote for conviction if his constituents are significantly less aware than he of incriminating evidence? A television spectacle may well be the lesser of evils.

In a thoughtful concluding section, Black notes that certain tribal cultures know only two ways of dealing with deviant behavior: toleration and death. A troublemaker is simply endured and endured—and then set upon with spears. Finer gradations of sanction are unknown in these societies.

Looking beyond the present impeachment proceedings, Black states:

> In the long haul, we must put the spear of impeachment back in the closet, though coated with cosmoline against rust. There are infinitely numerous milder ways in which the elephantiasis of the presidency can be treated.\(^\text{24}\)

Problems such as presidential impoundment of funds, unauthorized military operations, and the use of the tax system to harass political opponents can be mitigated in the future if Congress will but use its vast constitutional powers to enact prophylactic legislation.

This is an extremely valuable book. It deserves to be read by all, but especially by the men and women who will constitute—if it comes to that—the Grand Inquest of the Nation and the High Court of Impeachment.

\(^{24}\) P. 69.
Media Chic


Reviewed by Clay T. Whitehead†

Within a relatively short time television has grown from insignificance to nearly total pervasiveness. Since the early 1950's we have become accustomed to this new medium, using it more hours each day¹ and increasingly relying upon it for advertising, entertainment, news, and political debate. Not surprisingly, the new medium and Presidents have found over the years a mutual attraction. Presidents need television to reach the electorate, and the TV medium finds presidential words and actions great "copy" (to stretch only slightly the newspaper term).

Presidential Television² documents the steadily expanding use of television by incumbent American Presidents. Following an analysis of the political implications and potential dangers of this phenomenon, the authors reach what seems to be the main point of the book: a series of proposals aimed at mandating an approximate equality of simultaneous television network time among the President, the Congress, and the party in opposition to the President.

The authors point out that the concern of the Framers of the Constitution was not that the President would become too powerful, but that he would not be noticed at all among the numerous members of Congress, whose personal constituencies would make them more powerful as a group.³ Today, the authors maintain, the President has confounded the Framers' predictions by becoming the most visible, and therefore most powerful, politician in the country. They set out

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¹ Total television viewing per home has been estimated to have reached 6 hours, 20 minutes per day in the over 60 million homes in the United States having television receivers. Broadcasting Mag., Broadcasting Yearbook 12 (1974).

² N. Minow, J. Martin & L. Mitchell, Presidential Television (1973) [hereinafter cited to page number only].

³ Pp. 102-03, citing The Federalist No. 73 (Hamilton sees a natural tendency of legislative authority to "intrude upon the rights and absorb the powers of the other departments").
to show that it is largely because of the visibility resulting from his frequent use and masterful manipulation of television that he outshines the Congress and the courts and leaves his opposition far behind.

The proposals advanced by the authors aim at correcting this situation, as they perceive it, by “balancing” presidential use of television in four ways: (1) simultaneously broadcasting live on all television networks during prime time at least four evening congressional sessions each year; (2) granting to the national committee of the largest political party opposing the President an automatic legal right of reply to presidential addresses during an election year and near the time of off-year congressional elections, under the same conditions of coverage that the President enjoyed; (3) televising voluntary debates between spokesmen of the two major parties two to four times annually; and (4) providing free time simultaneously on the three networks to all presidential candidates according to a formula giving equal time to the major party candidates and lesser amounts of time to minor candidates. The authors recommend that the equal time provision and the Fairness Doctrine not be applied to these broadcasts, in order to avoid legal challenges and to prevent the President from demanding more time to reply to them.

I

Unfortunately, the authors confuse the causes and the effects of the phenomenon they call “presidential television.” Because they deal almost exclusively with effects, their recommendations, and especially their proposed changes in communications law, smack of tinkering and manipulation rather than the redress of constitutional imbalances. The authors blame the President's frequent television appearances for what they consider his undue power over public opinion in comparison with that of Congress and the opposition party. This conclusion is inaccurate in two respects. First, the present authority and prominence of the presidency result not from television but from the historical growth of the involvement of the federal government, and thus of the

4. This last proposal was earlier developed in THE TWENTIETH CENTURY FUND COMM'N ON CAMPAIGN COSTS IN THE ELECTRONIC ERA, VOTERS' TIME (1969). This review will not discuss the proposals developed originally in that study. The authors also recommend that to preserve its judicial integrity, the Supreme Court should continue to avoid television coverage, while taking some steps to improve general press coverage of its functioning. Pp. 92-102.
6. For a summary of the authors' proposals, see pp. 161-63.

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Executive, in national and international affairs. Second, the President does not have control over the total amount and nature of his coverage on television, and there is no assurance that he will benefit from the exposure he does receive.

As the nation and the federal government both grew, so also did the power of the presidency. For the first 160 years of our constitutional history, this growth was unaided by television. By the dawn of the era of presidential television in 1947, when President Truman made an address from the White House to launch the Food Conservation Program, the fears of the Framers that the President would be an obscure and unnoticed figure had long been put to rest.

Because of the inherent nature of the office, a Chief Executive is able to supervise or control detailed administrative matters and to act quickly and decisively in circumstances where the pace of national and international events is too rapid for the more contemplative Congress. In both situations, the pragmatic approach of Congress has been to delegate increasing authority to the President in order to allow effective action. Congress has also deliberately accepted certain methods of conducting business which allow the President to set much of its agenda; a large portion of the congressional year is devoted to consideration of the President's budget and legislative proposals. Congress has an even lesser role in international relations, where the President has a constitutional primacy. Not surprisingly, much of the coverage of the President on national television has focused on foreign affairs.

The coverage of the President in all the mass media, including television, reflects his importance, prestige, and newsworthiness in national and foreign affairs. The President's central role is evidenced by the fact that he regularly gets headline coverage in the more than 60 million newspaper copies printed daily in the United States.

7. The authors almost entirely ignore these factors in their concern with television. There are only occasional, brief admissions that other factors even exist. "Because he can act while his adversaries can only talk, because he can make news and draw attention to himself, and because he is the only leader elected by all the people, an incumbent president always has had an edge over his opposition in persuading public opinion. Presidential television, however, has enormously increased that edge." Pp. 10-11. "Presidential power has expanded because of the growth in national involvement in foreign affairs, because of the increasing role of the federal government in national life, especially in social services, and because television has given the president more access than Congress to the public." P. 103. Even in these statements, however, television is still portrayed as the most significant factor.

8. P. 33.


10. For one illustration that coverage is predominantly on foreign affairs, see note 14 infra. In addition, there has been extensive coverage of presidential actions in areas where Congress has delegated authority to the President, for example, wage and price regulation during the Nixon Administration.


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well as extensive coverage in the national news and opinion magazines. The authors recognize the fact that "[a]lmost anything the President does is news." If "the modern trend in American government is towards an increasingly powerful president and an increasingly weak Congress," then television, like the other mass media, has only reflected that trend.

Furthermore, there is no evidence that the President's use of television confers any kind of political omnipotence. The political and social forces in this country are sufficiently diffuse to prevent presidential control of public opinion, and therefore, despite his use of television, the President may be defeated on unpopular policies and programs. For example, most of President Nixon's first term television addresses dealt with his Vietnam policies, which nevertheless remained less popular than most of his other domestic and foreign policies. More powerful countervailing forces were acting concurrently to diminish any television advantage that the President might have enjoyed.

Despite the significant amount of attention he gets, the President does not control television coverage. He is covered by the networks and local stations at the discretion of their own independent news departments, and has no right to demand television time. Furthermore, congressmen and other public figures frequently appear on television, and the views and activities of the President's opponents are regularly reported. In fact, if all programming is considered, senators and representatives appear on television much more frequently than the President.

12. By virtue of his office, the President of the United States—its constitutional leader, supreme military commander, chief diplomat and administrator, and preeminent social host—obviously ranks higher in the scale of newsworthiness than anyone else—defeated opposition candidate, national party chairman, governor, congressman, senator.

A presidential press conference is clearly news. So is his television address; a report of it will be on page 1 in tomorrow's newspapers. A presidential speech broadcast only on radio will be reported in the television news.

13. As of April 30, 1972, President Nixon had preempted network programming a total of 19 times to make addresses to the nation. Ten of these addresses, more than half, dealt with Vietnam or Southeast Asia policy. This subject, to which he devoted by far the most attention, never received as much public support as the authors' notion of the power of presidential television might predict.

14. At times, the President has had to bargain with the networks for a desired television time spot. The authors relate that an Eisenhower speech on the Quemoy-Matsu crisis was delayed until after prime time, while President Kennedy had to postpone a speech designed to prevent racial violence at the University of Mississippi from 8:00 p.m. to 10:00 p.m. (by which time rioting had already started). P. 35.

15. In 1973 alone:

16. In 1973 alone: [W]ell over 150 different Congressional spokesmen appeared on the NBC Television Network in more than 1,000 separate appearances of varying lengths. By contrast,
Even if the television news departments of the three national networks failed to provide such extensive coverage of Congress, and the local TV stations on their own news shows did not cover their local senators and representatives, the Federal Communications Commission's (FCC's) Fairness Doctrine would provide a regulatory check on presidential television.\(^\dagger\) In 1970, the FCC recognized that the large number of presidential addresses presented an unusual situation triggering television fairness obligations even when all other programming was nearly balanced.\(^\dagger\dagger\)

The impression left by the authors overstates the President's television advantage over Congress and the opposition party. If television under proper circumstances can be an electronic throne for the President, it can also be an electronic booby trap awaiting a chance slip or slur in an offhand remark, thereby causing an explosion of indignation or outrage and a consequent drop in the public opinion polls.

No President has been uniformly effective in his television appearances.\(^\dagger\dagger\dagger\) It is perhaps the unique intimacy conveyed by television that is responsible for its capacity to betray both the serious and the super-

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\(^\dagger\) J. Goodman, President of NBC, Statement Before the Jt. Comm. on Cong. Operations, Mar. 7, 1974, at 4 (hearings to be published).

\(^\dagger\dagger\) The CBS Evening News broadcast six nights a week to 18 million people a night included 222 interviews with or appearances by members of Congress from June 1, 1973, to last week [the week prior to Feb. 21, 1974]. In addition there were hundreds of other reports of Congressional activity on the CBS Evening News during that period.

\(^\dagger\dagger\dagger\) In 1973, for example, there were 51 appearances by members of Congress on Face the Nation alone. A. Taylor, President of CBS, Statement Before the Jt. Comm. on Cong. Operations, Feb. 21, 1974, at 2 (hearings to be published). Since June 1973, CBS has also implemented a more expansive reply policy for leading opposition figures to reply to presidential messages. \textit{Id.} at 5.

\(^\dagger\dagger\) The statutory basis for the Fairness Doctrine is the Communications Act, 47 U.S.C. § 315 (1970), but in reality the doctrine is an administrative concept grounded in the "public interest" standard governing broadcast regulation. 47 U.S.C. § 309 (1970). The doctrine requires that if a broadcaster gives time to present one side of a "controversial issue of public importance," he must provide a reasonable opportunity for the presentation of conflicting viewpoints. He must provide free time if paid sponsors are not available. There is no "equal time" requirement, and the broadcaster determines what time will be provided for the reply, the format to be used, and who the spokesmen for the other side will be. No individual or group has a right to time under the Fairness Doctrine, which is concerned only with the presentation of issues. \textit{See, e.g., Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,} 29 Fed. Reg. 10415 (1964); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (Fairness Doctrine held constitutional).

\(^\dagger\dagger\dagger\) It should be noted that this reviewer recommends abolition of the Fairness Doctrine because of the opportunities it creates for bureaucratic and political second-guessing of editorial judgments.

\(^\dagger\dagger\) Committee for the Fair Broadcasting of Controversial Issues, 19 P & F Radio Reg. 2b 1103 (1970).

\(^\dagger\dagger\dagger\) \textit{See, e.g.,} pp. 37, 40, 47, 48, 50-54, 58.
ficial weaknesses of a politician. The authors attribute the fall of Senator Joseph McCarthy in the mid-1950's to this effect.\textsuperscript{20} On a more subtle level the authors suggest that President Johnson's continued inability to use television to bridge what became known as his credibility gap marked his failure to win support for his Vietnam policies and caused his political power to wane.\textsuperscript{21} Perhaps this was also due to extensive television coverage of the application and effects of those policies.

Finally, having more to lose than to gain, an incumbent President nearing election time may choose to avoid the risks of television appearances in the hope that his opponent will be discredited and undermined by using television.\textsuperscript{22} Such a practice is wholly inconsistent with the authors' notion of television's invariably favorable influence on public opinion and political forces.

II

The authors' first proposal for ending the imbalance in television exposure is that Congress should permit television "on the floor of the House and Senate for the broadcast of specially scheduled prime-time evening sessions . . . ."\textsuperscript{23} At least four times per year, these are to be carried live by the three major networks simultaneously. "These broadcasts should be exempt from the 'equal time' law and the fairness and political party doctrines."\textsuperscript{24} Staging special evening sessions for television coverage appears well within the power of Congress and, at least at the outset, sufficiently interesting to warrant the three-network, simultaneous, prime-time coverage the authors seek to achieve.\textsuperscript{25} But the wisdom and propriety of such a congressional maneuver simply to counteract the President's use of television is doubtful.

\textsuperscript{20} P. 107.
\textsuperscript{21} See p. 47.
\textsuperscript{22} See, e.g., p. 58.
\textsuperscript{23} Pp. 122, 161.
\textsuperscript{24} Pp. 124, 161. The Fairness Doctrine is discussed in note 17 supra. The "equal opportunities" provision, 47 U.S.C. § 315 (1970), applies only to actual candidates during an election campaign. The political party doctrine, a creation of FCC case law, provides that if one major party is given or sold time to discuss candidates or election issues, the other party must be given, or allowed to buy, time (but not necessarily equal time). Pp. 87-89.
\textsuperscript{25} Prime time is defined as the peak television viewing hours for evening entertainment, generally 7:00-11:00 p.m. It is interesting to note that the only hour which is prime time for the entire nation is 10:00-11:00 p.m., eastern time. The suggested live sessions would have to begin late in the evening in Washington, D.C., to reach west coast viewers during prime time.
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While discussing ways to give Congress access to the media, the authors never really address the question of how congressional television will counteract presidential television, and their conclusion that "Congress needs television" is therefore without force. Since Congress is by nature pluralistic, many of the recent attempts of its members to present unified fronts have necessarily expressed only the least common denominator of their views and thus those efforts have lacked the impact of a singly-spoken presidential statement. It is hard to see how the prime-time congressional specials could be much better, unless carefully staged by the majority party leaders; yet if the specials were actually staged, both viewers and news commentators might see them as contrived performances. These special congressional sessions are therefore unlikely to improve significantly the image of Congress or provide an effective means of expressing opposition to the President.

In practice, it is doubtful that this proposal would result in the long-run balance to presidential television the authors seek. More often than not, Congress and the White House have been held by the same party, a situation that could give even greater exposure to the President's position and put the opposition party at a more serious television disadvantage when it is perhaps most dangerous to do so.

The authors also suggest that the congressional coverage under their proposal be exempt from the Fairness Doctrine. If the President and the congressional majority were of the same party, the President's opponents would not be represented by the televised congressional sessions, and they would lose the opportunity under the Fairness Doctrine to have these programs balanced by presentation of conflicting views. Moreover, if a broadcaster in this situation voluntarily attempted to balance the exempt congressional coverage by giving time to opponents of the President, there would be a danger that supporters of the President's policies might try to apply the Fairness Doctrine to this nonexempt coverage, forcing the broadcaster to give still more time to the presidential position.

Furthermore, this proposal seems to require the networks to broad-

26. P. 121.
27. Pp. 125, 130. In describing the attempts of Democratic party leaders to present opposition to President Nixon's Vietnam policy, the authors observe that the "quest for a consensus resulted in a watered-down response that George Reedy, President Johnson's former press secretary, said 'sounds like yapping' to most television viewers." P. 130. The authors also observe that the diversity within Congress creates severe limitations on its ability to rebut presidential television. P. 121.
28. See p. 1755 supra.
cast these congressional sessions. This raises the specter of government compelling its own coverage, a dangerous precedent. Currently, one of the checks on the political use of television is that the President and Congress can only request time, and the networks can therefore negotiate over the time of day and amount of time given. This protection would be removed if either the President or Congress were permitted to demand television time.

The authors have not given sufficient weight to First Amendment interests in their proposal to broadcast congressional sessions. A better solution, if Congress wishes to be more accessible to all of the media, would be to permit journalists to cover whatever congressional activities they consider newsworthy by means of print, radio, or television. Adequate television coverage of Congress could best be encouraged through improvement of congressional procedures. One proposal is to institute several reforms, including restructuring committees to remove overlapping jurisdictions, developing a more efficient method for reviewing the President's budget proposals, and coordinating the actions of the House and Senate, in the hope that such reforms would increase the visibility of Congress and make it easier for the press to cover congressional activities. Constructive proposals of this nature might profitably be undertaken before Congress schedules its debut on live, prime-time television.

When Congress does something newsworthy, it invariably receives broad coverage. All that Congress needs to do is open its doors, if it decides that the public needs “congressional television.” Journalists should be left to take care of the rest. Congress has no need to demand or legislatively require television coverage.

29. See, e.g., note 15 supra.
30. C. Edward Little, President of the Mutual Broadcasting System, points out that in 1972 congressional committees conducted 40 percent of hearings and other meetings behind closed doors. He notes encouragingly, however, that the trend towards closed meetings is being partially reversed in recent months. C. Little, Statement Before the Jt. Comm. on Cong. Operations, Feb. 21, 1974 (hearings to be published), citing 28 Cong. Q. Almanac 93 (1972).

But the final passage of a bill or a successful investigation are only parts of the legislative drama. The rest of the performance must also be comprehensible—both to achieve quality and to communicate effectively.

Reform can achieve this objective. The restructuring of committees, for example, can reduce overlapping jurisdictions, clarify responsibility, improve oversight, and encourage more rational planning—all of which would heighten the visibility of committee work and make it more accessible to the media, as well as produce a higher quality legislative product.
The next major proposal the authors develop is that:

[T]he national committee of the opposition party should be given by law an automatic right of response to any presidential radio or television address made during the ten months preceding a presidential election or within 90 days preceding a Congressional election in nonpresidential years.\(^3\)

Suggesting amendment of § 315 of the Communications Act of 1934,\(^3\) the authors propose that every broadcaster or cablecaster who carries a presidential appearance within the expanded response period provide "equal opportunities to the national committee of the political party whose nominee for President received the second highest number of . . . votes"\(^4\) in the most recent presidential election. The equal opportunities and fairness provisions are to be suspended for this reply by the opposition.\(^5\) The purpose of this proposal is "to insure equality in the electoral use of television."\(^6\)

If such a proposal were implemented, the result would be the replacement of editorial judgment in campaign coverage by a mechanical rule. It is no doubt true that fairness and objectivity are often lacking in network coverage of political parties and candidates. It seems more likely, however, that even with the limited diversity of only three networks, day-to-day news selection based on a reasoned, professional judgment is superior to the mechanical application of a law which forces broadcasters automatically to present spokesmen selected by the opposition party.

One need not peer far into the past to find examples of the potential mischievousness of such a law. When President Johnson was pursuing his Vietnam policies, most of the effective opposition was in his own party, while Republicans were generally less critical of the war. Since the proposed law would not limit the other party to the issues discussed by the President, the Republicans could have eschewed any discussion of the war and instead attacked the President on some unrelated and perhaps less important issue. Ultimately, the war would have been opposed less effectively by the President's real opposition in the time remaining to the networks for coverage of other news topics.

\(^{32}\) P. 161.
\(^{34}\) P. 161.
\(^{35}\) P. 162.
\(^{36}\) P. 153.
On the whole, granting the party out of power a right of free reply will make political debate in America more partisan and institutional rather than philosophical and issue-oriented.\textsuperscript{37} Such a provision may lock the current political scene into law by narrowing the range of expression to established partisans. Similarly, this proposal could hurt insurgent candidates running independently of the backing of party regulars by giving each national committee the power to select party spokesmen. Television debate of political issues is not likely to be strengthened by giving so much television control to the party regulars on the national committees.

The "opposition" to the President's policies can come from many sources. Whether that opposition is the other party, a local official, or the heir apparent within the President's own party, the wiser choice is to seek conditions under which each such group can receive news coverage to the extent that it is newsworthy and can also have a right to buy television time for itself. This latter issue of access rights, which would in many ways help achieve the authors' objectives, is explored in more detail below.

\section*{IV}

The authors propose also that "National Debates" among spokesmen of the national political parties be established on a voluntary basis for all concerned, with the stipulation that they be shown live during prime time with simultaneous major network coverage.\textsuperscript{38} Designed to facilitate the development of party positions, a dubious goal in itself, the debates would more than likely lead to many of the same results as the proposals for "opposition television" that were criticized above.

Political debates have always been voluntary for both participants and broadcasters. There has seldom been any hesitancy on the part of broadcasters to stage debates. The problem is that the incumbent, usually much better known, is often understandably reluctant to help provide an equal forum for his opponents. The National Debates would frequently meet the same obstacle. It is likely that they would never take place except when the strategies of all candidates coincide. Such debates therefore could never play a major role in balancing presidential television appearances.

\textsuperscript{37} The present Fairness Doctrine, in contrast, requires a balance of issues, not personalities or parties.

\textsuperscript{38} Pp. 155, 162.
The authors would vest in the national committees of each party the power to choose the spokesmen who will participate in these debates. They suppose that the "most arresting personalities and best debaters will be chosen."

More likely, the division within the national committees will often lead to compromise spokesmen noted only for their lack of further political ambition. Without the charismatic figures that television seems to require, the debates would probably languish very low in viewer popularity—except for those few occasions when they would have been interesting enough to command coverage anyway.

V

In developing their recommendations for giving television reply time to Congress and the opposition party, the authors almost completely ignore the question of allowing a private right of access. Giving access to groups other than Congress and the opposition party would make it possible to provide exposure for a wider range of political opinions. Had the authors considered the access issue in light of theories of broadcasting regulation and the requirements of the First Amendment, their recommendations might have been far different.

Despite the demand for some form of access by private groups, the Supreme Court ruled in Columbia Broadcasting System v. Democratic National Committee that broadcaster refusal to allow paid access to the airwaves in the form of "editorial advertisements" did not violate the First Amendment or the broadcasters' statutory duty to act "in the public interest." The Court, in considering the possibility of creating such a private right of access, said that it was necessary to weigh the interests in free expression of the public, the broadcaster, and the individual seeking access. It then held that the Congress was not unjustified in concluding that the interests of the public would be best served by giving full journalistic discretion to broadcasters, with the only check on the exercise of that discretion being

40. Conversely, if each party chose several spokesmen to represent various wings of the party, the debates could become little more than intraparty quarrels.
41. "Private right of access" refers to the practice of allowing individuals and groups to purchase television time to broadcast their views on politics or other subjects.
42. 412 U.S. 94 (1973). The Court overturned a ruling by the court of appeals that a flat ban on paid editorial announcements violates the First Amendment, at least when other sorts of paid announcements are accepted. Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971).
the FCC's public interest regulation of broadcasters. The majority opinion pointed out that choosing a method of providing access to individuals and private groups that relied on detailed oversight by a regulatory agency would simply increase government interference in program content, in view of the need to create regulations governing which persons or groups would have a limited right of access.\(^4\)

The Court stated, however, that the access question might be resolved differently in the future: "Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable."\(^{45}\)

The appearance of Presidential Television revives the concerns that took Democratic National Committee to the Supreme Court. The growing role of broadcasting in American politics, together with the increasing clamor for some form of access, may justify legislative re-examination of whether the broadcaster should be required in selling his commercial time\(^46\) to accept all paid announcements without discrimination as to the speaker or the subject matter.\(^47\) In this way, paid editorial announcements would stand on an equal footing with paid commercials and paid campaign advertisements. The broadcaster would sell advertising time exclusively on the basis of availability, the same way that newspapers and magazines sell advertising space. All

\(44.\) 412 U.S. at 126-27. The Supreme Court distinguished this type of "right of access" from enforcement of the Fairness Doctrine, which the Court described as involving only a review of the broadcaster's overall performance and "sustained good faith effort" to inform the public fully and fairly. However, the Court apparently was unaware of the gradual shift away from general enforcement of the Fairness Doctrine towards specific, case-by-case and issue-by-issue implementation. See Blake, Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes, 23 Fed. Comt. B.J. 75 (1969); Goldberg, A Proposal to Deregulate Broadcast Programming, 42 Geo. Wash. L. Rev. 73, 88 (1973); Robinson, The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967); Scalia, Don't Go Near the Water, 25 Fed. Comt. B.J. 111, 113 (1972), quoting Paul Porter from Hearings on the Fairness Doctrine Before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess., at 153 (1968). In effect, this shift in the method of enforcement has made the Fairness Doctrine similar to the type of "right of access" mechanism that the Court in Democratic National Committee said would regiment broadcasters to the detriment of the First Amendment. 412 U.S. at 127.

\(45.\) 412 U.S. at 131.

\(46.\) This proposal is limited to time reserved for paid commercials, not program time. A broadcaster would not be compelled to preempt regular programming. Commercial time on television falls generally in the range of 9 to 16 minutes per hour. The voluntary code of the National Association of Broadcasters allows nine minutes per hour during prime time, Broadcasting Mag., supra note 1; the amount of commercial time is greater during other times of the day.

\(47.\) Under present government regulation, the broadcaster is legally responsible for his commercial time as well as his program material. In a system of paid access, it may be sufficient that individuals and groups are civilly liable for slander, obscenity, false or deceptive advertising, incitement to riot, or other offenses, and therefore the broadcaster should perhaps be relieved of liability for any infractions of law by users of the station's facilities.
persons able and willing to pay would have an equal opportunity to present their views on television.\textsuperscript{48} This kind of access right would be compatible with the policy concerns of the Supreme Court in Democratic National Committee.\textsuperscript{49} This proposal would require no additional government administration or interference. Exempting access announcements from the Fairness Doctrine would cause a minimum of dislocation to the broadcaster's regular programming.\textsuperscript{50} Moreover, broadcasters would not give up any significant control over substantive programming if the right of access were limited to commercial time. Both the journalistic freedom of the broadcaster and the interest of members of the public in obtaining television time are therefore protected by the creation of this limited right of access.\textsuperscript{51}

By meeting some of the public demand for an electronic forum, developments in communications technology such as cable television will in the future almost surely reduce the hazards, real or imagined, from

\textsuperscript{48} This should not cause an unfair discrimination against groups which lack funds. Considering the amount of contributions which television appeals can attract, it is likely that any group with something important to say could raise money for the announcements by an on-the-air appeal. See, e.g., p. 118 (an antiwar group paid $60,000 for time, but received $400,000 in contributions). Small, unpopular, or extremist groups might have trouble raising funds, but regrettably some of these groups probably would also be denied time under the present Fairness Doctrine. Poor groups whose views were not represented on programming time would be able to compel at least some coverage of their views through enforcement of the broadcaster's statutory responsibilities.

\textsuperscript{49} In fact, this would conflict less with Democratic National Committee than would the authors' proposals, which show little regard for the public interest or the journalistic freedom of the broadcaster. The authors would take from the broadcaster control over large blocks of time now devoted to program material, and give it to groups which the FCC could not hold accountable under the public interest standard. This was one reason the Court accepted the FCC's refusal to require public access in Democratic National Committee. 412 U.S. at 125.

\textsuperscript{50} If the Fairness Doctrine were applied to paid political advertisements, the broadcaster might be forced to provide free time for replies during regular programming time. 412 U.S. at 123-24 (the Court apparently did not decide whether the FCC would be permitted or required to extend the Fairness Doctrine to paid political advertisements). This possibility would be avoided by explicitly exempting these announcements from the Fairness Doctrine as part of the proposal. Such an exemption, of course, need not affect application of the Fairness Doctrine to product advertisements. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). In addition, this proposal would leave the license renewal process available as a recourse in cases of extreme program imbalance.

The Fairness Doctrine, moreover, is not the source of this right of access. To use the Fairness Doctrine to justify a private right of access is to give it a function for which it was never intended.

\textsuperscript{51} In contrast, giving an unlimited right of access during regular programming time could remove a large amount of time from the control of the broadcaster and give it to individuals or groups. Since even proponents of access agree that this would be undesirable, they recommend more "limited" rights of individual access. But then it would be necessary to have detailed FCC-enforced regulations and standards to determine who would be entitled to time and which time slots would be made available. A right of access so constrained would result in the same type of governmental control over program content that was condemned in Democratic National Committee, 412 U.S. at 126.
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presidential television. In the meantime, the more limited medium of broadcast television must be made more responsive to individuals and groups seeking to express their points of view. The method by which this is done is crucial. Access can either be given on an ad hoc basis to those groups powerful enough to command it legally (such as Congress and the opposition party), as the authors suggest, or it can be sold on a nondiscriminatory basis. Only the latter proposal would be an improvement over the present system.

VI

The thrust of all of the authors' proposals is toward dictating to television viewers what they are to see, with paternalistic disregard for their actual desires. In doing so, the authors have lost sight of the substantial journalistic function that broadcasters share with publishers. Newspapers devote their space to those issues and events that the editors feel the readers will find most important. The more important the event, the more prominent is its position in more newspapers. No one tells a newspaper how many column-inches to devote to a certain topic, and certainly there is no law requiring the periodic coverage of specified events regardless of their newsworthiness.

To be sure, the "broadcasters' First Amendment" has come to be viewed as an abridged version of the original one. It is crucial, however, that intrusions on journalistic expression be severely limited. Most of the authors' proposals would impinge on free journalistic expression at a time when ways should be found to help preserve that expression. Indeed, the inevitable arbitrariness and complexity of such proposals provide the best arguments against legal controls over the use of television. The proposals go well beyond what is necessary to achieve many of the authors' goals and, unfortunately, fail to concentrate on the development of a general system of access that would be better designed to achieve those goals.

The major criticism of the authors' proposals, though, is that they

52. While the authors include cable systems in their suggestions, it is doubtful that anyone, including the President, should appear simultaneously on all of the potentially numerous networks in a medium of channel abundance like cable. It is also doubtful that all cable network organizations should be required to give free time to Congress or opposition parties, since there should be sufficient time for sale to accommodate everyone. Cable television, therefore, should be exempt from the programming requirements proposed by the authors.

53. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) (the right of the viewers and listeners is paramount to that of the broadcaster).

54. The First Amendment commands that "Congress shall make no law ... abridging freedom of speech, or of the press . . . ." U.S. CONST. amend. I.
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would impair rather than expand the ability of television to evolve into a medium reflecting a wide range of perspectives on the American social and political scene. With the extreme economic concentration of control over television programming by the three national networks\(^5\) and the growing scope of FCC programming regulations,\(^6\) we are already moving toward control of national television programming by a familiar coalition of big business and big government. Proposals such as those in this book serve only to entrench such a system and to constrain the diversity and free choice that should characterize American television.

*Presidential Television* provides an interesting and valuable addition to the literature on national politics by documenting the successes and failures of the evolving strategies that Presidents have devised in their efforts to adapt to the new television medium. But in the end, the authors fail to demonstrate the validity of their assertion that television has significantly and permanently altered the ebb and flow of America's political forces. We are left with presidential television as a still-evolving form, mastered neither by news departments nor Presidents, clearly something different from presidential radio and presidential headlines, very much a part of our political process, but hardly a fundamental threat to our constitutional system. The authors have discovered the dangers inherent in excessive concentration of presidential power. But, in seeking to check this power, they have chosen a course at variance with our most fundamental First Amendment principles, undermining the ultimate check on political power—an electorate that informs itself through a press unrestrained by government prescription.

55. The three networks originate about 64 percent of all programming for affiliated stations. *Broadcasting Mag.*, *supra* note 1, at 70. The percentage is higher during evening prime-time hours. Of the 700 commercial stations operating as of April 30, 1974, *Broadcasting Mag.*, June 3, 1974, at 40, only about 80 are not affiliated with the networks. Station ownership is also highly concentrated: Each of the networks owns the legal maximum of 5 VHF stations. Since these are in the largest cities, networks reach 25 to 35 percent of all TV homes with their own stations.
