Book Reviews

The Seedlings for the Forest

Executive Privilege: A Constitutional Myth. By Raoul Berger. *Cambridge, Mass.: Harvard University Press,* 1974. Pp. xvi, 430. $14.95.

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 newsmagazines[2] 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.
2. NEWSWEEK, May 27, 1974, at 74; TIME, May 27, 1974, at 12, 15.
3. N.Y. Times, May 5, 1974, § 7 (Book Review), at 1.
4. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 235 (1974) [hereinafter 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).
9. 383 U.S. 663 (1966).
10. 394 U.S. 618 (1969).
11. 410 U.S. 113, *rehearing denied*, 410 U.S. 959 (1973).
12. 408 U.S. 238 (1972).
13. 384 U.S. 436 (1966).
14. 367 U.S. 643 (1961).
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.[16] 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[17] or make war[18] 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.[19] For instance—and most important—Berger's discussion of Chief Justice Marshall's statements in *United States v. Burr*[20] 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[21] 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

16. *E.g.*, pp. 15-48, 182.
17. Pp. 117-62.
18. Pp. 60-116.
19. *E.g.*, pp. 190-91, 358-61. 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.

that a qualified privilege exists.[22] 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."[23] James Madison, when a member of the House of Representatives, argued flatly that the President had such power.[24] And, in *Marbury v. Madison*[25] and *United States v. Burr*,[26] 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.[27] The "preponderance of sentiment in the House . . . ran counter to Madison."[28] Marshall's remarks in *Marbury* are dicta and involved civil litigation rather than a congressional request to boot.[29] And, in *Burr*, Marshall declined to recognize the privilege as absolute.[30] 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,[31] 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).
23. Pp. 168-69.
24. P. 174.
25. Pp. 185-87.
26. Pp. 187-91.
27. Pp. 168-69.
28. P. 174.
29. Pp. 186-87.
30. P. 191.
31. Pp. 163-66.

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.
33. Pp. 169-71.
34. P. 208.
35. Among his targets are: Bishop, *The Executive's Right to Privacy: An Unresolved Constitutional Question,* 66 YALE L.J. 477 (1957); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy,* 54 YALE L.J. 181, 585 (1945); Rostow, *Great Cases Make Bad Law: The War Powers Act,* 50 TEXAS L. REV. 833 (1972).
36. Pp. 163-208.

II

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,[37] 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.[38]

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

37. *See, e.g.*, pp. 10-13.
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 Education*[41] 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.

39. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).
40. *Id.* at 11-32.
41. 347 U.S. 483 (1954).
42. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955).

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[43] and that general principles of governance and the structure of our political institutions must provide the answer.[44]

The very idea of separation of powers—and the concomitant rejection of a parliamentary system, a rejection which Berger carefully underplays[45]—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,[46] 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.[47]

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.
46. *Cf.* Gravel v. United States, 408 U.S. 606 (1972).
47. The remainder of this review draws on R. WINTER, WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER 53-62 (1974) [hereinafter cited as WINTER].

could have been learned from the Pentagon Papers,[48] 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[49]

48. P. 284.
49. *See, e.g., Pattern of Deception*, N.Y. Times, Mar. 28, 1974, at 30, col. 1.

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[50]—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[51] 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.[52] 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

50. *See, e.g., id.*, May 1, 1974, at 1, col. 4; *Cover Up II, id.*, May 3, 1974, at 38, col. 1.
51. *Cf. id.*, May 4, 1974, at 1, col. 8.
52. Pp. 163-66.

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.[54] 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

54. Powell v. McCormack, 395 U.S. 486, 518-49 (1969).

Peru.[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."[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,"[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."[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,[59] the impeachment process is ultimately subject to judicial review—a conclusion I regard as textually and institutionally

55. P. 288.
56. R. WINTER, *supra* note 47, at 60.
57. P. 3.
58. R. WINTER, *supra* note 47, at 60.
59. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 103-21 (1973).

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[60] 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[61] 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,[62] one should better conclude that the media's view of legal scholarship is simply ill-informed and indiscriminate.

60. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).
61. Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1044 (1965).
62. Bickel, *Wretched Tapes (Cont.)*, N.Y. Times, Aug. 15, 1973, at 37, col. 7.