

President Nixon: Toughing It Out with the Law

by William Van Alstyne

An exponent of toughing it out with the law, President Nixon makes such vast and startling claims to executive authority that the issue is changed from one of political judgment to the counterfeit issue of constitutional authority. This conduct has obscured the true issues in Supreme Court nominations, war powers, executive impoundment of funds, and executive privilege in the tapes controversy.

IN THE CASE of the Watergate tapes, President Nixon engaged in toughing it out with the law. In his own terms, this is a highly principled thing to do—standing on his authority as president, protecting the powers of the office from erosion, resisting pressures from Congress and the press, standing tall in the courts. This was his reiterated position as he attempted to make plain why nondisclosure of the tapes was required by the imperatives of candor and frankness in White House conversations.

The issue, as he put it, was not the lesser one of the possible value of the tapes to the Senate select committee or the special prosecutor, but the more enduring one of proper authority. To yield the tapes would be to violate the confidence of all persons having conversation with the president, even on the most sensitive issues, and to impair irreparably the operation of his office. The people must somehow be made to understand the problem in these impersonal and constitutional terms. They must be made to understand this even if it means discharging prosecutors and attorneys general.

As I listen to the president, however, I cannot avoid an uneasy feeling of *déjà vu*. Something about the situation does not quite hang together, and the unmentioned facts, once remembered, begin to take shape with similar uses he has made of toughing it out with the law.

In 1971 I combed through a decade of federal case reporters attempting to gain some perspective on the judicial decisions of G. Harrold Carswell, who was then under consideration before the Senate Judiciary Committee for appointment to the Supreme Court. I had a degree of personal interest in Judge Carswell's nomination, having previously thought a great deal about the earlier nomination of Clement F. Haynsworth, Jr.,

whose confirmation I had supported in testimony before the Senate Judiciary Committee. (In fact, I continue to believe that Judge Haynsworth would have served with distinction on the Supreme Court.)

In 1972 I was in the law library again, for a longer time, in an effort to trace the constitutional history of the war power.

Only a few months ago I looked up materials that might help me understand the basis for President Nixon's claim that somehow enabled him to impound funds Congress had appropriated to be spent. Somewhere in between, I had also been there to see whether, as the president claimed, he enjoyed an executive privilege to engage in domestic wiretapping without authorization by Congress or constitutional review by the courts.

Nixon Changed Issues, Deflected Attention

In each of these situations certain circumstances were repeated. For instance, in each President Nixon asserted a claim of constitutional authority that was itself so vast and startling as virtually to cause a shift in attention by an escalation of the issue. It was no longer a question of the propriety or merits of his position as a political matter but a larger and very different question of authority: not whether power was being used wisely and sensitively, but whether it existed on the colossal scale the president claimed.

Coincidence or not, escalation of the issue was adroitly employed to subdue criticism of the president's personal judgment, deflecting public attention away from the merits of what he was doing to the different matter of his technical authority to do it. Moreover, on those occasions when the courts rejected the transmogrified issue of authority, finding it without constitutional basis, even that conclusion was used to political advantage. The president would transfer the onus of "misunderstanding" to the judiciary, taking the high ground that he merely had tried faithfully to vindicate the responsibilities of his office, but that the judiciary had tied his hands.

In the case of the Watergate tapes, this political technique again repeated itself. Executive privilege, whatever its scope, is at most what the words suggest—a privilege or option the president has and not a duty. There is no requirement that it be asserted. When presidents have thought it important to remove doubt and to assist other departments of government in their undertakings, materials subject to the privilege have been re-

leased willingly. The privilege is hardly ravaged by the exercise of discretion in taking recourse to it; rather, it stands more to be thrown into disrepute by its selective use, as in the Watergate affair, when it has the appearance of a cover-up.

Who Can Exercise "Executive Privilege"?

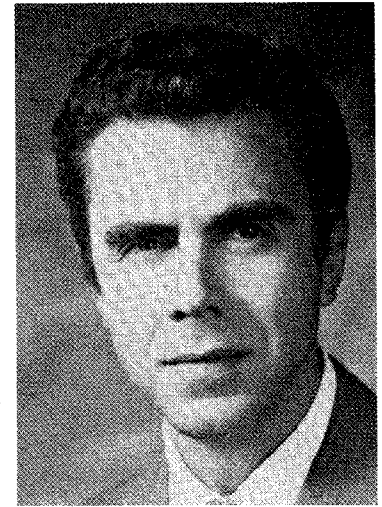
Second, the privilege is that of the president—not of anyone who happens to converse with him. It is emphatically dissimilar to other privileges the president used for comparison in his televised address of August 14, such as the privilege of a client not to have his attorney divulge certain matters without the client's permission (but note, even this does not run to statements of intention to violate the law), or of a patient not to have his physician disclose certain matters without his permission and relevant to his diagnosis. In respect to executive privilege, however, it is perfectly well understood that no one has a legal claim of curtaining anything he may have told the president from disclosure when the president thinks it in the public interest to report it.

Third, the president's use of the privilege in this instance was markedly at odds with his public commitment made before existence of the tapes was known that, in view of the fact that sufficient evidence respecting the appearance of White House involvement in criminal activities had accumulated, it would be his policy to reopen the investigation and co-operate with the select committee and the special prosecutor to restore public confidence. It is remarkable to think in what way the withholding of the tapes could have fitted that earlier description of the national interest.

Fourth, there is the fact that the president already had breached the confidences of parties to the conversations, not only releasing each person to testify as to what he said but also as to what others present during the same meeting said, even going so far as to lend certain among the tapes to H. R. Haldeman for Mr. Haldeman's appearance before the select committee. In essence, the president said that the national interest is best served by a self-serving breach of some person's confidence and the personal loan of the corroborative tapes to a person he knew would testify that the disputed substance of certain conversations confirmed his own version.

Nixon Could Have Confined His Objections

Finally, insofar as there may be portions of the tapes bearing on extraneous matters truly not pertinent to the business of the select committee or the special prosecutor, the president could have confined his objection to these. In case of a direct challenge that under the circumstances it would not be appropriate for the president alone to say which portions of which tapes were truly irrelevant (any more, say, than it would be appropriate for the select committee or the prosecutor to make that determination unilaterally), a federal court



A frequent author, William W. Van Alstyne is Perkins Professor of Law at Duke University. He is a graduate of the University of Southern California (B.A. 1955) and Stanford Law School (LL.B. 1958).

could provide an *in camera* review, exactly as has been done in similar disputes respecting the relevance of information sought on discovery when its examination by an outside party has been thought to be not necessary and possibly prejudicial. This was essentially the position taken by the decision of Chief Judge John J. Sirica of the United States district court in his decision of August 29 (360 F.Supp. 1), which was affirmed by the United States Court of Appeals for the District of Columbia Circuit on October 12. But President Nixon chose not to pursue his position in the Supreme Court.

The transmogrification of the issue to one of constitutional power is, in consequence, utterly counterfeit. Now that the claim of absolute privilege has been made, we cannot help but be interested in its judicial outcome. To suppose that the outcome of the legal issue in any way affects the original question of the way in which the president tends to conduct himself, however, is unquestionably to be gulled once again.

Taken even at face value, moreover, the many constitutional claims have themselves been remarkable, and here again there is a striking similarity with the way in which the president is toughing it out with the law by escalating the character of his claim to the point where it is the claim itself, rather than his conduct, that gradually captures the news and deflects attention. Perhaps nowhere was this better illustrated than in the Carswell nomination.

As the Senate was coming down to the wire on that nomination, the president sought to deflect criticism of his judgment by insisting that the "real" issue was simply one of executive prerogative versus congressional usurpation. Wasn't it clear, he emphasized, that the Constitution committed the power of Supreme Court appointments to the president? It was as though he wanted only to vindicate the responsibility of the office itself, acting as a dedicated surrogate of all presidents, past and future, determined to preserve their powers

against inroads by a jealous and partisan Senate. Judge Carswell was not the issue; rather, the issue was the Constitution. Redefined in that way, couldn't the public readily understand that, whatever the questioned merit of the nomination, it really wasn't the Senate's just concern?

But it was the Senate's concern, however the president sought to persuade us otherwise. In fact, it turned out that the president had misquoted the Constitution, substituting a power to "appoint" for the lesser power to "nominate" and eliding the part of the clause in the Constitution that refers to the Senate's "consent."

The other aspect of toughing it out with the law—the shifting of responsibility for the consequences after deflecting attention away from the original issue—also is apparent. The federal judiciary has been especially handy for this purpose, even more so than Congress.

In 1970 Congress had made no provision for wire-tapping or bugging suspected domestic dissidents without judicial authorization or accountability, but the president again was alert to his own responsibilities. "Separation of powers" and his prerogatives as chief executive precluded the courts from applying Fourth Amendment restrictions, he said. The president alone, unaccountable to anyone save at election time or by impeachment, assuming it could somehow be learned what the president was doing, would determine the occasions, groups, and persons to be surreptitiously monitored in the national interest.

"At Least He Had Done His Own Duty"

In 1972 the Supreme Court rejected this view (407 U.S. 297), denying that the Fourth Amendment exempted the executive from its provisions whenever he might claim that domestic security warranted invasions of privacy without judicial authorization, but still the president seeks vindication from the result. He has implied that the Court's decision is startling (although the lower courts had already held the same way, and, so far as I could determine, professional opinion regarded the president's own view as the only startling one), weakening to the public security, and possibly even subject to the naïve constitutionalism that characterized the anti-law-and-order excesses of the Warren Court. At least, he reassured us, he had tried to do his own duty to his office by his unflinching efforts of domestic surveillance.

I followed each of these issues with earnest academic interest, a little incredulous each time at the president's stated view of his own power, occasionally uneasy in the uncertainty that one or another court might be persuaded to his view (or that he might succeed in restaffing the Supreme Court with more compliant justices), but more nearly reassured when the "crisis" was past, and executive supremacy had not yet been read into the Constitution. But the recovery period was always shortlived.

The president plied the same approach again when

he presumed to impound funds appropriated by Congress for disbursement. Did the president really possess a double veto over acts of Congress? I was aware of the provision in Article I allowing a power of veto, but that, of course, is explicitly subject to being overridden by two-thirds majorities of both houses. Could there possibly be another, as the president claimed, nowhere mentioned in the Constitution but somehow implied in the office of the presidency—a double-speak prerogative to take care that the laws be "faithfully ignored" rather than "faithfully executed," as the language in Article II declares?

Judiciary Will Bear the Blame

Thus far, the courts have held overwhelmingly against this view, although the matter has not yet been decided by the Supreme Court. Evidently speaking for the president, Caspar Weinberger, secretary of the Department of Health, Education, and Welfare, discounted the numerous decisions against the president, making clear that nothing less than a decision by the Supreme Court would alter the president's course on this issue. Only if that Court will take responsibility will he desist, with the canny consolation of having depersonalized the issue and thrust the blame onto the judiciary.

Consider also the remarkable uses of "constitutional responsibility" the president's actions have reflected in Cambodia. A short time ago he stood tall against Congress in reassuring the country that should Congress forbid the use of funds for further military action in Cambodia, he was prepared to meet the responsibilities of his own office by diverting other appropriations already made. His presidential duty required no less of him, whatever might be lacking in Congress.

Only was it later to be learned that previous representations that the neutrality of Cambodia was being scrupulously respected were utterly false; that the president had authorized large scale bombing concealed beneath duplicitous reports for the benefit of several congressional committees that presumably might not have been trusted with the truth. Was this, too, merely a question of "privilege" or "authority"? Back in January of 1971, moreover, Congress repealed the Tonkin Gulf resolution, under which President Johnson supported his original actions in that area, but President Nixon was quick to point out that he never regarded that resolution of any importance to his authority.

Watergate: An Issue Elevated to a Crisis

The cases involving the Watergate tapes are doubtless interesting, and it is not at all wrong that they should be seen as posing important questions of constitutional law. But, as in so many other instances, it may also be useful to note that the crisis is upon us not so much because of an issue that could not be avoided otherwise, but that it is an issue inflated to the level of crisis only in light of the breathtaking character of the president's highly diverting view of his

authority. The president, it was argued in his brief in court, is not subject to the judicial process at all. The doctrine of "separation of powers" precludes courts or Congress from subjecting him to subpoena. He is the sole judge, moreover, of what the public interest may require in respect to papers or records within his custody. Neither courts nor Congress may presume to second guess a claim of executive privilege or to supererogate an authority to require an explanation of its basis or sufficiency. It is simply a matter entirely within executive discretion alone. Like domestic surveillance and the Fourth Amendment? Like appointing justices to the Supreme Court? Like the power of war? Like the power to impound funds and the duty to take care that the laws be faithfully ignored? Yes, evidently much like these.

Disdain for a Tacky Quotation

Last summer we watched with growing interest (and not a little apprehension) as John Ehrlichman toughed it out before the Senate select committee, laying claim to presidential powers of burglary as the president alone might think appropriate in the interest of national security. Is the Fourth Amendment subject to suspension by an act of executive privilege? The mere suggestion is disturbing, but there was Mr. Ehrlichman's very able counsel lecturing Senator Ervin that it might be so. At least, he pointed out, the Supreme Court had not had occasion to hold otherwise when the president claimed an interest in "national security." What had happened, Senator Talmadge asked, to the understanding that not even the king of England could enter the most humble and dilapidated dwelling of his realm without the owner's consent? Considerably "eroded," Mr. Ehrlichman suggested, with just a trace of disdain at the senator's tacky quotation.

None of this is to say that the Watergate tapes cases had an easy, foregone conclusion—that the courts were bound to hold against the president or, indeed, that they should so hold. Other issues involved in the cases might trouble a conscientious court, and there is an important area where claims of executive privilege should be treated with deference: not necessarily by utterly abdicating and forswearing any power of judicial review, as the president's brief argued, but simply in the careful and painstaking exercise of that review. A modest court, not desiring to appear unsympathetic to the needs of the presidency, even while being reluctant to affirm such far-reaching absolutes as President Nixon asserted, might struggle to find a less alarming basis at once more moderate and fair.

Tapes Aren't Crucial to Select Committee

It could do so were it to determine that the tapes at best are of only marginal value to the select committee since the committee's objective is to determine the need for additional corrupt practices legislation. Resolving particular conflicts of testimony regarding cer-

tain White House conversations may not be important to its task, and accordingly it might not be unreasonable to sustain the claim of executive privilege under the circumstances.

President Has Not Acted Consistently

The same analysis did not apply to the interest of the special prosecutor, since he was charged with the different task of determining whether existing criminal statutes (such as those concerning perjury and obstruction of justice) have been violated. Resolving conflicts of testimony by the possible corroborative (or exonerating) value of the tapes would be highly relevant to his responsibilities. But as to him, exactly as Charles Alan Wright, the president's counsel, suggested, there was also an alternative to forcing disclosure of the tapes contrary to the will of the president. If the court had concluded that indictments ought not be returned against persons when the president withholds material possibly vital to their prosecution or defense, it may simply declare that there can be no indictments or trials.

This need not have been the result, of course, and the case on the other side is itself very impressive—most especially as the president had not acted consistently with his own claim of a need to maintain the confidentiality of the conversations or even the confidentiality of the tapes he loaned to Mr. Haldeman. In confronting the courts with a direct challenge that the president is wholly immune to any inquiry at all, however, his lawyers may have encouraged the courts to find a way to avoid that issue, rather than to appear to act from animus toward the president and to accept the blame.

"Toughing It Out" Is a Last Resort

Whatever the outcome in particular cases, there is nonetheless a more depressing pattern that has emerged from this strategy of toughing it out with the law. The more generous view, that the president is simply an extraordinary activist who cares deeply about the separation of powers and means only to protect the integrity of his office from corrosive jealousies of a petty Congress and a permissive judiciary, is scarcely maintainable anymore. Rather, toughing it out with the law has been reduced to the most enfeebled function, a habitual last line of defense whenever nothing else is left to say.

In this sense, the Watergate tapes may even be a paradigm case in which the questionable propriety of a decision is sought to be submerged in the very different issue of technical constitutionality. The president displayed no seemingly concern for confidentiality in freely lending his tapes to the friendly witness, Mr. Haldeman, for instance. It is difficult to become indignant with Herblock's cartoon impression of how the president evidently saw it: "It's a privilege," he says brightly, as he hands over the tapes to Mr. Haldeman.

Possibly it was a privilege in the same sense that the Constitution may not forbid the president so to conduct himself, although it remains to be seen whether even this

is true, but it scarcely seems to matter a great deal—the list of “privileges” has simply gotten out of hand. Milk dealers are allowed a sudden price rise following organized contributions for the president’s personal benefit. The I.T.T. case is suddenly settled after a \$400,000 gift. American Airlines ransoms itself from political sky-jacking. Two plumbers “misunderstand” instructions and burglarize a psychiatrist’s office. The acting director of the Federal Bureau of Investigation also “misunderstands” and burns a file containing a falsified record implicating a former president in the assassination of a foreign head of state. Contributions given for campaign purposes are diverted to the defense of individuals under indictment for criminal invasion of opposition offices. Congress is lied to about the respected sanctity of a neutral country, and reports are falsified to make it believable. Letters are fabricated to misrepresent public reaction to presidential policy in mining foreign harbors, and polls are manipulated to demonstrate widespread support. A federal judge is invited to consider a presidential appointment while presiding over a criminal trial in which the administration has a direct political interest. Following a thorough investigation that was never held, a firm statement clearing all White House personnel of any involvement is issued. Co-operation is pledged, assurances are provided that no one is to be protected, but what may be useful evidence is curtailed in secrecy save for the most safe and symbiotic witness, even while the president’s counsel is advising

a court that confidentiality of the evidence from all others is so important to the president as to warrant the possible abandonment of indictment or prosecution as an alternative to any further disclosure whatever.

Merely interesting questions of law? An issue of privilege, perhaps, or one of separation of powers? Or, rather, a desperate strategy to avoid the inevitable consequences of incredible *hubris* and overwhelming scandal?

From one office window at the law school where President Nixon was an excellent student more than thirty years ago, admittedly, the view I have of all this is far from perfect. Increasingly these days, however, it is pretty much *deja vu*.

Calendar of Association Meetings

Annual Meetings

- 1974—Honolulu, Hawaii, August 12-16.
- 1975—Montreal, Canada, August 11-15.
- 1976—Atlanta, Georgia, August 7-12.
- 1977—Chicago, Illinois, August 6-11.
- 1978—New York, New York, August 5-10.

Midyear Meetings

- 1974—Houston, Texas, January 30-February 5.
- 1975—Chicago, Illinois, February 19-25.
- 1976—Philadelphia, Pennsylvania, February 12-18.

Notice by the Board of Elections

The following jurisdictions will elect a state delegate for a three-year term beginning at the adjournment of the 1974 annual meeting and ending at the adjournment of the 1977 annual meeting:

Alabama	Montana
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
Missouri	Wisconsin

Nominating petitions for all state delegates to be elected in 1974 must be filed with the Board of Elections at American Bar Association headquarters not later than January 30, 1974. All nominating petitions will be published in the March, 1974, issue of the *American Bar Association Journal*.

While it is desirable that more than the required minimum of twenty-five names of members of the Association appear on a nominating petition, only twenty-

five names of signers of any petition will be published, as provided by Section 6.3 (b) of the Association’s Constitution. Only signatures of members of the Association will be counted. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition. The petition must be accompanied also by a seventy-five word biographical sketch of the nominee. Forms for this purpose will be provided. The biographical sketch will be included in the ballot material sent to each Association member in the state for which the nominee is a candidate for the office of state delegate.

A candidate for nominee and all signers must be members of the Association whose membership is accredited to the state where the election is being held. There is no limit to the number of candidates who may be nominated in any state, and the nominations are made only on the initiative of members themselves.

Each nominee for the office of state

delegate is entitled to receive one list of the names and addresses of the Association members in his state. The list is to be made available only after the proper filing of a nominating petition, upon written request.

Forms of nominating petitions may be obtained from the Board of Elections at the headquarters office of the American Bar Association, 1155 East Sixtieth Street, Chicago, Illinois 60637. Nominating petitions must be received at the headquarters of the Association before the close of business at 4:45 P.M., January 30, 1974. Ballots will be mailed to the members in good standing, accredited to the states in which elections are to be held, not later than March 15, 1974, so that they will be received by members at approximately the same time as the March issue of the *Journal* containing the nominating petitions of the various candidates.

BOARD OF ELECTIONS

WALTER F. ROGOSHESKE, *Chairman*