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See Also

Response

Nixon's Revenge

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We live in the shadow of Richard Nixon's presidency. More than thirty years after he resigned from office in disgrace, Nixon remains the benchmark of presidential misconduct; he is the president against whose misconduct the misbehavior of any other president is measured. The fallout from his misconduct included several landmark precedents that guide all three branches to this day in their respective considerations of presidential privilege, immunity, and accountability. In the field of presidential impeachment, the House of Representatives looks primarily for guidance from the Judiciary Committee's approval of three impeachment articles against Nixon, as it did in President Bill Clinton's impeachment proceedings. In the field of executive privilege, virtually all the leading cases involved Richard Nixon. Most famously, in *United States v. Nixon*,¹ the Supreme Court unanimously rejected Nixon's claim to an absolute executive privilege and instead upheld a qualified one.² Subsequently, courts routinely use the balancing test set forth in *Nixon* for adjudicating executive privilege claims. In the field of executive immunity, *Nixon v. Fitzgerald*³ stated the basic rule that a president is entitled to absolute immunity from civil actions based on official conduct.⁴ Courts still follow this decision. In *Clinton v. Jones*,⁵ the Supreme Court did not reject the prior rule but merely found it inapplicable to the circumstances of Clinton's civil liability for pre-presidential

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1. 418 U.S. 683 (1974).

2. *Id.* at 707.

3. 457 U.S. 731 (1982).

4. *Id.* at 749.

5. 520 U.S. 681 (1997).

misconduct.⁶ The fallout from Nixon's presidency further includes *Morrison v. Olson*,⁷ in which the Court upheld the mechanism—the Independent Counsel Act—that Congress had designed to avoid the problem of a president's firing the prosecutor investigating him, as Nixon had done to then-Special Prosecutor Archibald Cox.⁸ When we think of presidential abuse of power, we think of Richard Nixon and how the lessons and precedents established by his abuses of power are useful guides for handling arguably similar presidential misconduct in the future.

In his excellent Article, Laurent Sacharoff suggests that if there is a problem in the Supreme Court's handling of the constitutional issues arising from Nixon's misconduct it is that the justices were not tough enough on Nixon.⁹ Sacharoff reevaluates the significance of one of the most overlooked precedents in the aftermath of Nixon's resignation—*Nixon v. Administrator of General Services*.¹⁰ While the Supreme Court ultimately rejected Nixon's challenge to the constitutionality of the Presidential Recordings and Materials Preservation Act, Nixon prevailed on the seemingly innocuous point that former presidents are entitled to some limited claim of executive privilege.¹¹ At the time, this victory seemed relatively harmless because the Court had determined that whatever privileged interest Nixon might have had in his tapes was clearly outweighed by other factors, including the need to ensure presidential accountability. Sacharoff suggests, however, that Nixon's victory is not so innocuous or harmless because it is tantamount to the proverbial loaded gun lying around, in that it might be used by some former president (he suggests perhaps George W. Bush) with disastrous consequences.¹² Sacharoff forcefully argues that the entitlement of former presidents to assert any kind of claims of executive privilege is flatly inconsistent with the Constitution's "antimonarchical premises" and thus should be overruled.¹³ Instead, he proposes, the Constitution should be construed as establishing a complete bar against former presidents from exercising *any* of the powers or privileges of the office of President of the United States.

There is a lot to like in Sacharoff's Article. It is well written, thorough, thoughtful, and makes a forceful, seemingly irrefutable case. The central argument—that the Constitution entitles *only* the current occupant of the office of President to exercise its powers and invoke its privileges—is likely to accord with most people's intuitions. I especially like that, in the course

6. *Id.* at 694 n.19.

7. 487 U.S. 654 (1988).

8. *Id.* at 682.

9. Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 TEXAS L. REV. 301, 306 (2009).

10. 433 U.S. 425 (1977).

11. *Id.* at 439.

12. Sacharoff, *supra* note 9, at 302–03.

13. *Id.* at 321–25.

of his analysis, Sacharoff consults the major sources of constitutional meaning—text, history (including original meaning and historical practices), and structure. This is a methodology that I often use myself, and he uses it well.

There is, as I said, a lot to like about the Article, but I reach a different conclusion when I consult the same sources. I believe Sacharoff reads too much into some but not enough into other sources. More precisely, I think he reads too much into the “antimonarchical premises” of the Constitution and too little into other sources, including structure and precedent.

In each Part of this Response, I suggest alternative readings to those of Sacharoff of different sources of constitutional argumentation. Part I considers both judicial and non-judicial precedents. I do not agree that *Nixon v. Administrator of General Services* was wrongly decided. It is a stronger precedent than Sacharoff suggests, one that in fact all three branches have endorsed, and the outcome in *Nixon v. Administrator of General Services* accords with other legislative enactments and presidential decrees. In Part II, I focus on structure, and suggest that Sacharoff makes the mistake of sometimes equating power with privilege. It does not follow that because former presidents lack all the powers of the presidency they must lack all its privileges. Nor does it follow that because the current occupant of the office of President has primary control over the privilege that former presidents necessarily must lack *any* input on it at all. Claims of executive privilege are not the same as exercises of power. It is in the nature of a power that it may only be wielded by limited authorities, while it is in the nature of an executive privilege that the concerns underlying it are not neatly restricted in time or space solely to the occupant of the office. In the third and final Part, I consider three analogies that might inform our judgment about the extent to which former presidents might or should have any control over executive privilege. These analogies are government attorney–client privilege, the ownership rights of retired Justices and judges in their personal papers, and the possibility of post-resignation impeachment. Neither the courts nor Congress has denied the opportunities to former government officials to make claims of attorney–client privilege or retired Justices and judges to make claims of ownership rights in their personal papers. It would be incongruous not to afford former presidents similar access to the balancing tests that have been used in the courts and the Congress to determine the extent to which former officials of one kind or another may assert certain limited privileges. Moreover, former presidents are not completely immune from being impeached—or held accountable—for their misconduct in office. I do not construe the Constitution to allow them to be entirely at the mercy of other authorities once they leave office.

In the end, I regard a major difference between my analysis and that of Sacharoff to be methodological: He favors a bright-line rule (a formalist approach) to questions of privilege, while I think the Court’s balancing test

(functionalism) has worked fine in this context. The advantage of a bright-line rule is that it provides clear guidance to presidents and other authorities on who is entitled *and* who is not entitled to make claims of executive privilege. The difficulty is that a bright-line rule in this context has difficulty fitting the real-world, practical realities of the structure of our government or the nature of communications between presidents and their closest advisors. The advantage of the balancing test employed by the courts in privilege disputes is that it takes into account the competing concerns over executive privilege. While Richard Nixon won something in each of the executive privilege cases that bears his name (qualified privilege in the first¹⁴ and a limited prerogative to claim executive privilege in the second¹⁵), it is noteworthy that in every case the Court determined that his interests were outweighed by other concerns. Nor should the interests of sitting presidents in controlling executive privilege invariably prevail, for even they, as the Court has said, do not have absolute say over executive privilege. Instead, as the judicial precedents, historical practices, and structure suggest, sitting presidents have a significant but sometimes not the only or even the last say over executive privilege. In short, Richard Nixon did a lot of bad things, but not every constitutional argument he made—or that was made by his lawyers¹⁶—was bad.

I. Nixon's Judicial and other Legacies

The first problem with the argument that former presidents may not make any claims with respect to executive privilege is that precedent does not support it. To begin with, *Nixon v. Administrator of General Services* is a much stronger case than the Article seems to suggest. The case itself expressly holds that a former president is entitled to make claims of executive privilege.¹⁷ In fact, all nine Justices agreed on this point. The disagreements among the Justices in the majority were not about whether any former presidents might be entitled to make limited claims of executive privilege but rather over whether the act at issue constituted an unlawful bill of attainder. Indeed, it is noteworthy that the act at issue sought to regulate only one former President's control over his papers (or entitlement to assert executive privilege)—Richard Nixon's.¹⁸ Hence, the act was not designed to address at all the entitlements of any other former presidents to make claims

14. *United States v. Nixon*, 418 U.S. 683 (1974).

15. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

16. I should note that the lead lawyers for Nixon on the brief were Jack Miller and Nathan Lewin, two of the named partners in the law firm then known as Miller, Cassidy, Larroca & Lewin. Jack Miller died shortly before the publication of Sacharoff's Article; he had argued the case, and the victory that Nixon won in the case is among the many surprises that Jack Miller pulled off in a long, distinguished career as a lawyer's lawyer. I am one of the many academics who had the privilege of working with Jack Miller at the firm that proudly bore his name.

17. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 439 (1977).

18. *Id.* at 484 (Stevens, J., concurring).

of executive privilege. Nevertheless, there was unanimity among the Justices that former presidents are entitled to make claims of executive privilege.

Moreover, the Court, in its majority opinion, relied on an official opinion from the Justice Department's Office of Legal Counsel (OLC) on the question of former presidents' entitlement to make claims of executive privilege. The Court noted that "[t]he Attorney General advised that the historical practice of former presidents and the absence of any governing statute to the contrary supported ownership [of the tapes and other materials] in [*Nixon*]."¹⁹ The Court then quoted approvingly from the OLC opinion that "'[h]istorically, there has been consistent acknowledgment that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity."²⁰ This statement suggests that, in fact, Nixon had "absolute ownership" of the materials covered by the act. It would follow that other former presidents have "absolute ownership" over personal papers and certain other materials which they believe are protected by executive privilege. This is strong stuff, but that is not all. The Court went further to "reject the argument that only an incumbent President may assert [executive privilege] claims and hold that [Nixon], as a former President, may also be heard to assert them."²¹ Furthermore, the federal law at issue provided that some material would be returned to Nixon and provided him with the opportunity to assert claims over the covered material even though the Court recognized that those claims might be overridden, as the act provided, by competing considerations.²² In short, all three branches agreed that former presidents are entitled to make at least some claims of executive privilege.

Indeed, the Court, just a few years later, decided *Nixon v. Fitzgerald*, perhaps the most significant judicial victory Nixon ever won for the presidency. The Court held, significantly, that presidents retain, even after leaving office, absolute immunity to civil lawsuits based on their official conduct.²³ Sacharoff does not challenge this decision, though it recognizes an important benefit to which former presidents have as much claim as current ones. *Nixon v. Fitzgerald* remains good law and was followed by the Court unanimously in *Clinton v. Jones*.²⁴ *Nixon v. Fitzgerald* is plainly consistent with the point that some of the attributes (as opposed to the powers) of the presidency extend to former occupants of the office.

19. *Id.* at 431.

20. *Id.* (quoting 43 Op. Att'y Gen. 1, 226 (1974)).

21. *Id.* at 439.

22. *Id.* at 444.

23. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

24. 520 U.S. 681 (1997).

Further support for former presidents' limited claims of executive privilege may be found in the form of the 1978 Presidential Records Act (PRA), which, unlike the law at issue in *Nixon v. Administrator of General Services*, applies to all presidents.²⁵ The PRA stated that an outgoing president could designate a period, up to 12 years, of restricted access to his papers.²⁶ The statute required this to be done before the end of the President's term, but it still asserted a privileged interest going forward.²⁷ If anyone sought access to a restricted document during the time designated by the outgoing president, the Archivist has an obligation to consult with a former president.²⁸ The PRA also specifically stated, "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President."²⁹ This language seems to suggest, *inter alia*, that Congress believed that former presidents might have some claim to executive privilege. Moreover, in his order implementing the PRA, President Reagan required that both the current and former president be given 30 days' notice before the release of any papers under the PRA, during which time either the current or the former president could request additional time.³⁰ And President Reagan's order specifically provided for claims by a former president. This seems to constitute further precedent from both Congress and the Executive Branch that former presidents have at least some limited claim to executive privilege.

The Court's decision in *Nixon v. Administrator of General Services* would almost certainly not have been any different had the government's lawyers stressed the antimonarchical premises of the Constitution to the Court. For one thing, I do not think the Justices were unmindful of or insensitive to this aspect of the Constitution. Eight of the nine Justices in *Nixon v. Administrator of General Services* had participated in *United States v. Nixon*,³¹ and were thus fully aware of the nature and magnitude of Nixon's abuses of power (which included defying a court order to turn over subpoenaed materials). They were in an excellent position, at the time, to appreciate the ramifications of any decisions that cut him or the presidency any slack. Just five years later, seven of the nine Justices who had participated in the Watergate tapes case participated in *Nixon v. Fitzgerald*, which is more at odds with the so-called antimonarchical premises of the Constitution than even *Nixon v. Administrator of General Services*. Nevertheless, the Justices upheld Nixon's (and every other former

25. Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. §§ 2201–2207 (2006)).

26. *Id.* § 2204(a).

27. *Id.*

28. *Id.* § 2204(b)(3).

29. *Id.* § 2204(c)(2).

30. Exec. Order No. 12667, 54 Fed. Reg. 3403 (Jan. 23, 1989).

31. The difference was that Justice John Paul Stevens had replaced Justice William O. Douglas.

president's) absolute immunity from civil damages for their official conduct.³² With four dissenters in the latter case, the majority could not avoid being made aware of the risks of Nixon's victory in the case. The problem is not that the Court was naïve or insensitive to the Constitution's structure or the consequences of its decisions; the problem is that, for all the strengths in Sacharoff's Article, he makes some overly bold assertions.

II. Functionalism's Enduring Significance

At least three of the claims made in the Article are too broad. The first is the formalist methodology that Sacharoff suggests for resolving whether a former president may assert claims of executive privilege. Sacharoff's solution is a bright-line limitation on presidential prerogative; it would disallow, or reject, any ability of former presidents to assert a claim of executive privilege.³³ The problem is that in adjudicating claims of executive privilege the Supreme Court has consistently employed a different test—a functional one, which requires balancing. The Court has eschewed the bright lines of absolutism and instead systematically weighed the competing considerations in any given dispute. So, one problem with Sacharoff's argument is that the Court has refused to draw the bright line he suggests. In fact, it has employed a very different test over the years.

The question is not whether *Nixon v. Administrator of General Services* was wrong but rather whether the Supreme Court employed the wrong methodology. Sacharoff's answer is that it did because it failed, in his judgment, to take the antimonarchical premises of the Constitution into account.³⁴ I have already suggested that the Justices did not make that mistake (or that recasting the claim would not have produced a different outcome). In fact, the balancing test that the Court employs actually takes antimonarchical concerns into account. The Court's track record has not been to hand a blank check to presidents or former presidents with respect to their claims of powers and privileges (ranging from its decisions in the *Steel Seizure Case*³⁵ to *Clinton v. Jones* to its more recent ones on the Bush administration's restrictions on Guantanamo Bay detainees' access to lawyers and courts³⁶). In *Nixon v. Administrator of General Services*, the balancing test did not reject the Constitution's antimonarchical premise (insofar as Sacharoff defines it); indeed, the latter seemed to have come out on top.

A second, contestable broad assertion is that because the Constitution does not vest former presidents with any official powers, they therefore have

32. *Fitzgerald*, 457 U.S. at 749.

33. Sacharoff, *supra* note 9, at 304.

34. Sacharoff, *supra* note 9, at 306.

35. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

36. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

no entitlements to make claims of executive privilege. There is a step missing here. I am sure that no one seriously argues that former presidents—any more than Justices, members of Congress, or other officials—are entitled to hold onto their powers after leaving office. They certainly do not. A former president may no more issue an executive order or make judicial nominations (to take but two examples) than a retired Justice may retain the authority to vote in cases that come before the Court or a former Speaker of the House may retain the authority to make committee assignments. It is, in fact, in the nature of the office (and the Constitution of course) that former officials retain absolutely no formal authority after they leave office.

It is, however, in the nature of the presidency that certain attributes of the office do not automatically cease to have any force after a president departs office (voluntarily or otherwise). Indeed, the Supreme Court approvingly quotes from the Solicitor General's brief that

[t]he confidentiality necessary to this exchange [between a president and his closest advisors] cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.³⁷

This is a strong endorsement of a principle that transcends an individual presidency. It is not at odds with the constitutional structure but rather is a reasonable inference from it.

It would be anomalous to rule otherwise. We expect former presidents (and former officials from the other branches) to continue to be bound by various confidences after they leave office even though the Constitution is not supposed to constrain private action. It would be anomalous if we could restrict a president's disclosure of certain information after he leaves office but deny him (and the other officials or aides involved) the opportunity to block the disclosure of various confidences made for his benefit while he was the President.

Under these circumstances, not much if anything is lost if we do adopt Sacharoff's broadest assertions. First, we can expect that current presidents will vigilantly protect the confidences of their predecessors for many reasons. Not the least of these is that current presidents recognize that they need to do so in order to ensure that their confidences are respected by their successors. Second, courts are highly unlikely to be cavalier in balancing competing considerations in adjudicating executive privilege disputes. The concern that a former president might not have a good enough reason to maintain confidentiality (as was the case, in part, in the Nixon cases) is likely to be accorded the value to which it is entitled. Indeed, former presidents may make such claims but with the expectation that they may (and will) be easily

37. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (citation omitted).

outweighed by all sorts of things, including the enduring interests in presidential accountability.

Also, it should not go without saying that there is something odd about Sacharoff's appeal to an antimonarchial principle to argue that former presidents should be denied any access to executive privilege. After all, when a new monarch comes to the throne, the old monarch either is dead or has been forcibly deposed and is imprisoned or in exile. In either event, one cannot imagine a former monarch making any claim sounding in prerogative. The mere fact that we have former presidents who hang around making legal claims further underscores just how antimonarchial we are.

Moreover, as Sacharoff notes,³⁸ President Obama not only withdrew an executive order by President George W. Bush on his and Vice President Cheney's respective authorities to claim executive privilege³⁹ after leaving office but also substituted for it his own executive order "maintain[ing] a role for former Presidents" in asserting claims of executive privilege.⁴⁰ President Obama's order clearly reflects *his* preferred balancing of the competing claims that he and President Bush may each make to executive privilege. While Sacharoff construes Obama's Executive Order as removing the former President's veto power over the incumbent president's desire to disclose information, I am less sure. President Obama's order is significant because it does not fully reject former President Bush's ability to assert a claim to executive privilege. To the contrary, President Obama's order supports a limited claim of a former president to executive privilege. Yet, President Obama's order may not be the last word on the balancing of the competing interests of current and former presidents with respect to executive privilege. A subsequent president, if not Congress, might well strike a different balance, which, in any event, would not displace or preclude any constitutionally grounded executive-privilege claim that a former president may make.

III. Supporting Analogies

There are three interesting analogies that Laurent Sacharoff does not consider in his Article. Each is consistent with an entitlement of former presidents to assert limited claims of executive privilege.

The first involves the chambers papers of federal judges, including Supreme Court Justices. Indeed, the Federal Judicial Center, a federal agency, formally declares that

[t]he chambers papers of a federal judge remain the private property of that judge or the judge's heirs, and it is prerogative of the judge or the

38. Sacharoff, *supra* note 9, at 304 n.17.

39. Exec. Order No. 13,233, 3 C.F.R. 815 (2002), *reprinted in* 44 U.S.C. § 2204 (2006).

40. Sacharoff, *supra* note 9, at 347.

judge's heirs to determine the disposition of those papers. Neither federal statute nor the policies of the Judicial Conference of the United States make any provision for the preservation of federal judges' papers.⁴¹

To begin with, the control of Justices and judges over their personal papers illustrates the critical distinction between power and privilege. No one believes that a former Justice wields any of the power that he or she once had as a member of the Court. At the same time, I am not aware of any authority which questions whether they may retain discretion over their personal papers. So, Lewis Powell was completely responsible for his personal chamber papers after leaving the Court, but he retained no authority to take back a vote in any case (even though he apparently wanted to do just that in at least a couple cases). President Nixon's claim—and perhaps President George W. Bush's likely claim in the future—might be akin to a retired Justice's or judge's interest in his chamber papers; he would consider that the protection of the communications in certain documents from release as critically important to the special relationship that existed at the time they were made.

A possible response to this analogy is that executive and judicial privileges are basically different and thus should be treated differently. One might argue that the institutional interests in judicial independence are personal to a particular judge, do not disappear or end when the judge retires, and extend beyond a particular judgeship so that it might not be compromised at any time. One might argue further that there is nothing in the presidency that corresponds to the institutional interests in judicial independence, that there is an interest in public accountability that transcends a particular presidency, and that this interest argues for a former president's retaining no executive privilege after leaving office. Nevertheless, judges and Justices are not responsible for the exercise of all the powers of their branch, whereas presidents typically are, and the need for candor or confidentiality extending beyond a particular official's time in office seems to be at least as strong for a president as it is for a judge or Justice. If there is any difference, it is that concerns about public accountability are likely to be stronger with respect to communications with a president than with respect to communications among judges (or by judges with their clerks). Of course, the balancing test employed in executive-privilege disputes is well suited to take these differences into account.

The next analogy leads to a similar conclusion. Sacharoff finds support for his position from the ways in which courts have ruled on the attorney-client privilege in private practice.⁴² He notes, among other things, that the

41. FED. JUDICIAL HISTORY OFFICE, FED. JUDICIAL CTR., A GUIDE TO THE PRESERVATION OF FEDERAL JUDGES' PAPERS 1 (2d ed. 2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/judgpa2d.pdf/\\$File/judgpa2d.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judgpa2d.pdf/$File/judgpa2d.pdf).

42. Sacharoff, *supra* note 9, at 332–38.

privilege belongs to the client and not to the attorney.⁴³ So much is true. Yet, it is also true that there is a government attorney–client privilege.⁴⁴ No doubt, some communications with a president implicate an attorney–client privilege, not just executive privilege. The concerns with respect to maintaining confidentiality of some of these communications are identical, for all practical purposes, to those for executive privilege—the candor and frankness of the counsel are completely jeopardized if it does not retain any of its special or privileged status after a president leaves office.

There is another possible analogy. Former presidents are not necessarily immune to impeachment for their misconduct in office. The language of Article II does not rule out initiating impeachments against former presidents. The operative language of Article II—that “[t]he President . . . shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes or Misdemeanors”⁴⁵—says nothing about the timing by which an impeachment or conviction must take place. The pertinent text leaves open—and does not rule out—the possibility that a former president may be impeached for certain kinds of misconduct even after leaving office (including perhaps the reckless release of privileged communications). This construction of the clause is reinforced by the fact that one of the unique sanctions in the impeachment process—disqualification⁴⁶—would be available as a sanction in any proceeding against a former president.

If a former president is subject to impeachment, it is possible that he may claim executive privilege in a dispute over evidence with Congress. In such a circumstance, members of Congress must consider whether former presidents may make such claims and whether such claims have any merit. The bright-line rule that Sacharoff favors would deprive a former president of the opportunity to make any claim of executive privilege in his defense. His rule would thus leave a former president completely vulnerable to how the current president and members of Congress view the merits of any claim of executive privilege. This would include placing former presidents completely at the mercies of Congress *and* the President in any impeachment proceeding in which there is a dispute over executive privilege. A different rule might provide for a more even playing field on which former presidents may make whatever claims they deem appropriate and Congress makes the principal judgments about their relative merits. Otherwise, the deck is stacked against former presidents in any proceeding in which their accountability is at stake.

43. *Id.* at 332.

44. *See generally In re Lindsey*, 148 F.3d 1100, 1104–05 (D.C. Cir. 1998) (defining and explaining government attorney–client privilege).

45. U.S. CONST. art. II, § 4.

46. *Id.* § 3, cl. 7.

A final difficulty remains. The question is what if the communication or advice delivered to a president was not recorded? A balancing test can easily handle this, since it takes into account competing considerations, including the nature of the communications. The bright-line rule advanced by Sacharoff suggests, however, that the recording (or non-recording) of a communication is relevant. It would likely be his position that the communication is not entitled to any protection at all, though I have no idea how the current president would be able to exercise absolute control over this communication without having to debrief his predecessor thoroughly (and I mean *thoroughly*). Otherwise, the information goes not with the office but with the former occupant. Under such circumstances, the current president is at a distinct disadvantage since he has very little practical control over (or perhaps even any knowledge about) the information or the communication involved.

Conclusion

Laurent Sacharoff makes a very forceful case for denying to former presidents any entitlement to make claims of executive privilege. The strong support that he marshals on behalf of his argument includes the need for a current president to have complete control over such claims just as much as he needs to have complete control over the exercise of the unique powers of the presidency. The difficulties with this strong claim are that the Supreme Court has rejected it, all three branches have recognized some entitlement in former presidents to make limited claims of executive privilege, and executive privilege loses force if the people who were supposed to enjoy its benefit lose any claim whatsoever in retaining that benefit once they leave office. The fact that President Nixon's lawyers persuaded the Supreme Court to recognize limited entitlements of former presidents to make claims of executive privilege is not a problem, since it accords with both the reasons for a privilege in the first place, *and* the balancing test employed by courts to resolve executive privilege disputes is well suited to take into account the competing concerns of both former and current presidents over the merits of particular executive privilege claims. As such, *Nixon v. Administrator of General Services* was not a mistake; it is one of the positive legacies of a presidency in which so much else went wrong.