ARCHIBALD COX

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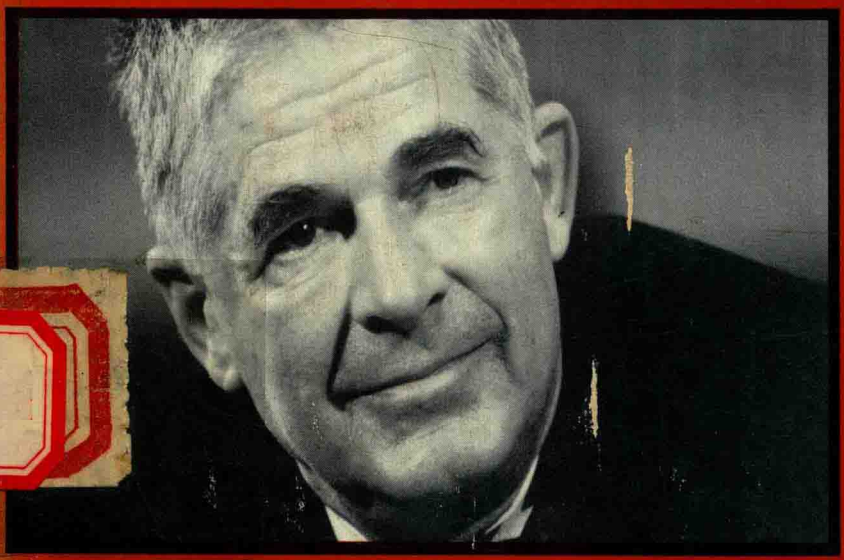

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by

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PREFACE

THIS book consists essentially of the four Chichele Lectures delivered at Oxford University under the auspices of All Souls College early in 1975. I am grateful to All Souls for encouraging me to organize my thoughts, to Oxford for the lively and stimulating audience, and especially to John Sparrow, the Warden of All Souls, for his warm hospitality upon my visits.

The lectures were designed for a general university audience, all educated, some with sophicated understanding of the U.S. Supreme Court but for the most part lacking professional legal training or specialized knowledge of American history and institutions. My purpose was partly expository—to show the kinds of questions with which the U.S. Supreme Court deals and the direction of recent decisions dealing with liberty and equality under a written constitution and Bill of Rights. The purpose was also partly jurisprudential—to face the currently pressing question, how far can and should the federal judiciary resolve by constitutional interpretation questions of public policy which are also fit for resolution through the political process? Both matters seem pertinent to British discussion of proposals for the adoption of a judicially enforceable Bill of Rights.

The lectures are presented here with only two kinds of revision.

First, freed from the constricting pressure of an undertaking to give four lectures of equal length, I

found that the material in the third and fourth of the lectures logically belonged under three heads rather than two. The revision led me to expand the discussion of Equality and the Constitution and the Affirmative Duty of Government.

Second, I have added footnotes referring the reader to the cases discussed in the text and also to judicial decisions and other legal writing developing the points in more depth, in greater detail, or from a different point of view. The references are by no means exhaustive.

Because American scholars in constitutional law tend to focus upon specific topics, there are few general yet comprehensive works about American constitutional law. The reader who wishes to pursue the subject historically will find the most useful single volume to be Robert G. McCloskey, *The American Supreme Court* (1960). This admirable little book traces up to the 1950s the Court's chief contributions to the development of the American nation and the evolution of its constitutional law. Published in 1960, it could not deal with the momentous changes during the tenure of Chief Justice Warren, but it can be supplemented by Cox, *The Warren Court* (1967), or Bickel, *The Supreme Court and the Idea of Progress* (1970). More detailed histories are Charles Warren, *The Supreme Court in United States History* (2 vols., rev. ed., 1926); William F. Swindler, *Court and Constitution in the 20th Century* (2 vols., 1970).

Among the best sources of general commentary are *Selected Essays on Constitutional Law* (Ass'n. of American Law Schools, 1934–61); *The Supreme Court Review* (an annual collection of commentaries published by the University of Chicago Press); *Supreme Court and Supreme Law* (ed., E. Cahn 1954); A. Bickel, *The Least Dangerous Branch* (1962); C. L. Black, Jr., *The People and the Court* (1962); P. A. Freund, *The Supreme Court of the United States* (1961); Learned Hand, *The*

Bill of Rights (1958); Robert H. Jackson, *The Supreme Court in the American System of Government* (1955); H. Wechsler, *Principles, Politics and Fundamental Law.* Writings upon specific constitutional issues are cited in the footnotes at appropriate points.

Cambridge, Mass. ARCHIBALD COX
July 1975

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INTRODUCTION

ALMOST a century and a half ago de Tocqueville observed, 'Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.'[1] The statement is equally true today. Judge-made law plays a much larger part in the government of the American people than of the British. Our judges are less attentive to the letter of the law or to precedent. They move freely in wider orbits. Both bench and bar make greater use of statistical and other social studies, and the line between law and policy is often blurred. These characteristics reach their peak in constitutional adjudication by the Supreme Court of the United States and the inferior federal courts.

My aims in these lectures about constitutional adjudication are three:

The first is expository: even at the expense of ploughing well-tilled fields I seek to indicate the kinds of questions with which the Supreme Court deals and the extent of the constitutional protection accorded individuals and minorities.

The second purpose is to inquire into the uses and abuses of constitutional adjudication as an instrument of social policy. Here the emphasis will be less on results than on the proper institutional limits of the judicial function. The definition of these limits raises highly complex problems: with what kinds of public questions may the judiciary properly deal through the processes of constitutional adjudication? When may it deal with them? Given a justiciable constitutional controversy, how far should the court substitute its determinations for the

[1] De Tocqueville, *Democracy in America*, 1956, i. 280.

conclusions of Legislative and Executive? With respect to the construction of the language of the Constitution? With respect to the social or economic conditions said to support the measure challenged as unconstitutional? In balancing competing values? Again, given a justiciable constitutional controversy, how far is the court free to adopt what it believes the wisest public policy? How far is it bound by the constraints of precedent and other ingredients of law?

Third, the lectures inquire into the sources of the 'legitimacy' of the Supreme Court's constitutional decisions. Within the term 'legitimacy' I mean to include not only the notion of the Court's adherence to some charter, however vaguely defined, but also the ability to command acceptance, and compliance, which often means consent.

The second and third points are obviously interrelated. What the Justices should bring within the ill-defined boundaries that mark the limits of their charter depends partly upon their competency, that is upon whether the problem will yield to the judicial method, but also upon whether the political branches of government, the rest of the legal profession, and enough of the public will accept what the Justices do as legitimate and therefore as deserving of consent and support.

These three purposes underlie all five lectures. I hope that they have an interest of their own even for a British audience, but they are not irrelevant to the current discussion of whether the United Kingdom would benefit from abridging Parliamentary supremacy by adopting a written bill of rights which courts would enforce. For the U.S. Supreme Court decisions on the rights of individuals and minorities might presage the effects of such a safeguard; and consideration of the sources of the legitimacy of our constitutional decisions may throw a little light upon whether similar British institutions could command sufficient support.

I

THE SUPREME COURT AND THE SYSTEM OF GOVERNMENT

1

EVEN the Watergate affair bears out de Tocqueville's observation upon the critical importance of law and courts in the American system of government. President Nixon's announcement that he would disobey a court order directing him to produce tapes and written memoranda covering nine Watergate conversations roused the public outburst which turned events towards impeachment. The decision of the U.S. Supreme Court ten months later sealed his fate, not merely by removing the last hope of legal justification for withholding more damning evidence, but psychologically by seeming to array the most respected branch of the government unanimously against him. The litigation over the Watergate Tapes, therefore, not only illustrates a major function of the federal judiciary but offers insight into the nature of our constitutionalism.

Two Watergate investigations were in progress in the spring of 1973. One, in the hands of a Special Prosecutor, was using a grand jury and other traditional processes of the criminal law. The second was conducted by a Select Committee of the U.S. Senate under the chairmanship of Senator Ervin with the aid of a large staff. Both were

pursuing the two major lines of inquiry into white-collar conspiracies: (1) seeking to induce a conspirator near the top to give evidence against his associates; (2) obtaining documentary evidence. Documentary proof could be found only in White House files, and the White House would not make them available. John Dean told a story which, if true, made out a criminal conspiracy to obstruct justice on the part of the President, a former Attorney General, and key White House aides, but Mitchell, Erlichman, and Haldeman contradicted Dean. The whole matter seemed likely to turn upon their relative credibility unless corroborative documentary evidence were discovered. At the end of June 1973 the Special Prosecutor was about to initiate a test of his right of access to White House documents, including a taped recording or summary of one Presidential conversation which had come to his attention.

At this juncture another White House aide told Senate investigators that there were taped recordings of all conversations that had taken place in the President's offices. The news was given to an astonished country. The Special Prosecutor took out a subpoena *duces tecum* under seal of the district court, requiring production before the Grand Jury of the tapes and written memoranda recording nine specified conversations. The Senate Committee issued its own subpoena. Both were addressed to Richard M. Nixon as President of the United States, because the President had issued a statement that he alone had control of the tapes and files.

Recently, in private conversation, a Scandinavian legal scholar expressed his outrage at this course. 'It is unthinkable', he said, 'that the courts of any country should issue an order to its Chief of State.' My friend's indignation undoubtedly reflects an ancient postulate of many legal systems, including those that declared a monarch's abstract duty to obey the laws. About a century ago, the

Attorney General of the United States invoked this kind of sovereign immunity in arguing in the Supreme Court that the President is beyond the reach of legal process:

> . . . I deny that there is a particle less dignity belonging to the office of President than to the office of King of Great Britain or of any other potentate on the face of the earth. He represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world.[1]

The Court dismissed the complaint, albeit upon somewhat different grounds, but no suit against a president had succeeded prior to the Nixon administration.

The claim of immunity could also be put—indeed it was put—in terms more pleasing to American ears. The Constitution is framed upon a theory of the separation of powers. The federal legislative power is vested in Congress, the executive power in a President elected separately from the Congress, and the judicial power in the courts. In theory, each of the three branches is independent and co-ordinate with the others. A holding that the President is personally subject to the orders of a court—President Nixon's lawyers contended—would effectively destroy the status of the Executive Branch as an equal and co-ordinate element of government; *ex hypothesi* one of three independent and co-ordinate branches cannot dictate to another.

The two subpoenas could also be resisted upon grounds of 'executive privilege.'[2] The Constitution says nothing about executive privilege but a number of earlier Presidents, including Dwight D. Eisenhower, had asserted that the Chief Executive has the right to decide finally and for all

[1] *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866).

[2] The history of 'executive privilege' and judicial precedents are discussed in Berger, *Executive Privilege* (1974); Cox, 'Executive Privilege', 122 U. of Pa. L. Rev. 1383 (1974).

purposes what information, documents, or other papers in the Executive Branch of the government shall be kept confidential. The argument is partly in terms of the equality and independence of the three branches: no one branch, it is said, may control the documents or papers of another. The argument is also practical: in order to perform his constitutional duties the President needs aides and advisers with whom he can debate policy freely and candidly; and freedom and candour depend upon assurance of the confidentiality that protects a man from public or political reprisals because of what he has said or thought.

At this point two strategies were available to the President. He could refuse to participate in the judicial proceedings instituted by the Special Prosecutor to enforce the Grand Jury's subpoena, upon the ground that a President has a moral and constitutional duty to act upon his own interpretation of the Constitution in the performance of his Presidential duties. Or he could submit the same arguments to judicial determination. If the judgment went against him, he could still fall back upon the first alternative, although this would put him in the position of defying an adverse court decision instead of simply ignoring the courts. Still, the risk of losing might not seem large to one who agreed with my Scandinavian acquaintance that it is unthinkable that a mere judge would issue an order to the Chief of State.

President Nixon chose the latter course. Judge Sirica thought the unthinkable and ordered the President to produce the tapes and papers. The court of appeals affirmed Judge Sirica's order.[1] From there, an appeal lay to the Supreme Court.

At this point President Nixon switched signals. He would no longer submit the question to the courts. The

[1] *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), affirming 360 F. Supp. 1 (D.D.C. 1973).

nine tapes he would submit to Senator Stennis (a respected but exceedingly conservative Southerner sympathetic to executive power and secrecy) to decide what should be delivered, but the rest he would withhold, disregarding the judicial command. The other subpoenaed papers would be withheld, again disregarding the judicial command. As Special Prosecutor I was instructed to forgo future resort to the courts to obtain evidence withheld under claim of executive privilege. These steps were announced on a Friday night. I refused to obey the instructions, thinking to lay before the country the question of Presidential duty to obey the law as declared by the Judicial Branch. The next night the President dismissed me and terminated the independence of the Watergate Special Prosecution Force.

It is worth pausing to recall that courts have no power to enforce their decrees against the Executive. They possess neither the purse nor the sword. Constitutionalism as a constraint upon government depends, in the first instance, upon the habit of voluntary compliance and, in the last resort, upon a people's realization that their freedom depends upon observance of the rule of law. The realization must be strong enough for the community to rise up and overwhelm, morally and politically, any notable offender.

Nor can the people's response be taken for granted. In the beginning President Jefferson stood ready to defy the Supreme Court and he would have been successful, as I shall explain in a moment. Lincoln disregarded a habeas corpus at the start of the Civil War. Franklin D. Roosevelt was ready to take his case to the country if the Supreme Court invalidated one of his financial measures. During the debate over access to the first set of tapes I found myself deeply worried by the risk that President Nixon, who seemed to have an imperial view of the Presidency, might also be tempted to defy the courts. *His* Presidency had

received an overwhelming popular endorsement less than a year before. The question of executive privilege might seem dryly technical. The people might think it unseemly for judges in lower courts to be issuing orders to the Chief of State. The evidence against the President was chiefly the testimony of John Dean and there were few, if any, signs that the country had turned against him. Suppose that the President's defiance were successful. The habit of compliance—the notion that a powerful executive official has no choice but to comply with a judicial decree—is a fragile bond. Who could say in an age of Presidential aggrandizement that if one President succeeded in his defiance, he and others might not follow that example until ours was no longer a government of law? How far was a man justified in provoking this kind of constitutional crisis with the outcome so uncertain?

My fears proved fantasies. President Nixon's announcement evoked a public reaction which his chief aide later described as a 'fire storm'. Within seventy-two hours the President changed his mind and promised to comply with the decree. A bit later, a new Special Prosecutor was appointed and the independence of the Watergate Special Prosecution Force was restored. The people proved their determination—and their moral and political power—to require the highest officials to meet their obligations under law.

I relate these events for three reasons:

First, they illustrate one of the principal functions of constitutional adjudication: the resolution of conflicts among different parts of our extraordinarily complex system of government, including disputes between the courts and the other branches.

Second, they raise the question: whence came the principle that even the President, the Chief of State, is subject to the rule of law, that is, to legal obligations under the Constitution and laws as declared by the courts?

You will not find the principle in the Constitution however carefully you read it.

Third, what are the sources and limits of the American people's attachment to constitutionalism—an attachment now so strong that it forced a popularly elected President to reverse his field and comply with the order of even an inferior court?

II

In a formal sense, the answers begin with the decision in *Marbury* v. *Madison* in 1803.[1]

The Presidential election of 1800 climaxed a political upheaval in which the Federalist Party yielded control of the Legislative and Executive Branches to the Jeffersonian Democrats. Thomas Jefferson supplanted John Adams as President of the United States. Most of the judges, however, were Federalists; and their tenure was for life. Just before leaving office President Adams and his Secretary of State executed the commission of one Marbury to be Justice of the Peace, but the Secretary forgot to deliver it. Ironically, the absent-minded Secretary was John Marshall, who was about to take office as Chief Justice of the United States and would write the opinion in the case resulting from his negligence. Secretary of State Madison, upon order of President Jefferson, withheld the commission. Marbury then brought an original suit in the Supreme Court seeking a writ of mandamus requiring Secretary Madison to deliver the commission.

President Jefferson and Secretary Madison were thus put to the same choice as President Nixon faced when the Special Prosecutor sought a judicial decree for the Watergate Tapes. Jefferson and Madison elected at the beginning simply to ignore the Court. Both were philosophically dedicated to asserting the independence, if

[1] 5 U.S. (1 Cranch) 137 (1803).

not the complete supremacy, of the elected representatives of the people. Both were politically committed to wresting the judiciary from Federalist control. In public debate their henchmen asserted a want of judicial power to issue orders to the Executive Branch.

The Court seemed to face Hobson's choice. To dismiss the case would apparently acquiesce in the Jeffersonian position. To issue the writ would invite President Jefferson and Secretary Madison to ignore it—a step they surely could and would have taken—while the country laughed at the Court's pretensions. Either result would confirm the independence of the Executive and Legislative from Judicial control.

The Court escaped the dilemma. Chief Justice Marshall first expounded the duty of the Executive to obey the laws and asserted the right of every citizen to judicial redress against executive illegality. He then determined that the refusal to deliver Marbury's commission was illegal, and also remediable by mandamus because the omitted act was ministerial. The stage seemed set for issuance of the writ, for an act of Congress gave the Supreme Court power to issue writs of mandamus in appropriate cases. But the Chief Justice took an unexpected turn. The act of Congress purported to give the Supreme Court original jurisdiction. The Chief Justice read the Constitution to say that in this situation the Court's only jurisdiction should be appellate. In such a case, he continued, it is the Court's duty to disregard the unconstitutional legislation; and this led to dismissal of the action. In this way the Chief Justice maintained the Federalist position of judicial supremacy over both the other branches of government upon questions of legal duty and constitutional interpretation, yet he avoided the issuance of a decree that President Jefferson would surely and successfully have disobeyed.[1]

[1] The best accounts of *Marbury* v. *Madison* and the struggle over the judiciary