GlobalResearch
Center for Research on Globalization

America's Democracy in Crisis: Is "Executive Privilege" Undemocratic

By John Kozy
Global Research, November 03, 2009
3 November 2009

Region: USA
Theme: History, Law and Justice

Keeping an eclectic system consistent is difficult, especially if the borrowing system is fundamentally different from the system borrowed from. Taking a feature from one and placing it into another often compromises the latter's fundamental nature, because implicit contradictions are often hidden and difficult to detect.

The essence of democracy is fundamentally egalitarian. This egalitarianism is enshrined in such commonly known dictums as all men are created equal, one man one vote, equality under the law, and no man is above the law. Monarchy, on the other hand, is hierarchical. Some groups of people are granted privileges not available to others. The systems are fundamentally different, and privilege of any kind compromises democracy's essential nature.

Executive privilege, deliberative process privilege, state secrets privilege, and public interest immunity are forms of English crown privilege. They are attributes of monarchial systems. All are derived from the common-law principle that the internal processes of the executive branch of government are immune from normal disclosure, and all are based on the belief that by guaranteeing confidentiality, the executive branch receives more candid advice than would be given if confidentiality were not assured. Such advice, it is claimed, results in better decisions for society as a whole, but not a jot of empirical evidence has ever been cited to support this claim. In fact, the evidence supports the opposite view, that confidential advice results is decisions that produce horrid results for society.

There is even an obvious absurdity in the claim itself, and that no one has recognized it is a mystery. If advice given to the executive branch of government actually produces beneficial results, why would anyone, especially a politician, want to keep the advice confidential? Why wouldn't the advisors want to take credit for it? On the other hand, people are unlikely to want to take responsibility for advice that results in bad consequences, and the confidentiality merely serves to protect those persons from blame. If the advice also advocates breaking the law, the confidentiality puts advisers of the executive branch above the law, granting them a privilege unavailable to the people as a whole, compromising the democratic nature of society. Executive privilege turns the executive branch of government into a species of monarchy, the essence of which is that someone is above the law.

Monarchs have rarely been called enlightened. Many were openly vicious. That such monarchs should appoint advisors with similar vicious character traits is natural. That such people would want their advice to be kept secret is also natural. Monarchies do not exist for the benefit of their peoples. Louis XIV (1638–1715) said it nicely when he said, "*L'état, c'est moi!*" The French people were his to do whatever he wanted with. Interestingly enough, the

first public discussions of crown privileges in England appeared during the reign of Charles I (1600–1649). So introducing executive privilege into the American governmental system set the nation's political progress back four hundred years, and Americans, who fought two wars with the British to free themselves from the yoke of English monarchial government, now find themselves living under one where the executive branch has acquired monarchial attributes. But the United States of America was founded on enlightenment principles during the Age of Enlightenment, so the federal courts have, whether in maliciousness, ignorance, or sheer stupidity, abolished the republican nature of the government by allowing claims of privilege.

It is true, of course, that the Supreme Court has waffled in dealing with such claims. In United States v Nixon, the Court writes "The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion." But this last sentence is reminiscent of the Papacy's claim against Galileo that the Earth's position at the center of the universe is too obvious to require examination. If there is one thing that seekers of truth discover early on it is that nothing is so obvious that it escapes examination. In fact, such people learn that claims of obviousness always require examination; yet the Court often bases decisions on what appears "obvious" or "too plain to require further discussion." In reality, there is nothing obvious about this claim. Nevertheless, the Court also writes in the same decision "To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III." So what the Court takes away with one hand it often gives back with the other.

The Court never has judged a question of privilege by its overall effects on the fundamental nature of the government but always on some perceived "practical" consideration, such as "national security," "military secrets," "diplomatic confidence," all of which are slippery slopes to national disasters. The Court has always ignored admonitions such as that given by Botts to Chief Justice John Marshall in the trial of Aaron Burr: "If you determine that we be deprived of the benefit of important written or oral evidence by the introduction of this State secrecy, you lay, without intending it, the foundation for a system of oppression." The Court was relieved of the responsibility of having to decide the matter because Jefferson supplied the required documents.

Often, the Court entertains arguments provided to support secrecy which are ludicrous. For instance, in relation to the release of additional torture photographs, the President has said, "My belief is the publication of these photos would not add any additional benefits to our understanding of what was carried out in the past by a small number of individuals" and "The most direct consequence would be to further inflame anti-American opinion and put our troops in greater danger." But it is difficult to understand how the release of photographs would put troops whose lives are already in danger in further danger. What kind of further danger is there?

Furthermore, the anti-American forces in the Middle East don't need to do anything to "further inflame anti-American opinion." And if they wanted to, faking and publishing photographs depicting behavior even more scurrilous than that depicted in those

photographs already released would be easy. Sure, the American government would deny their authenticity, but who would believe it? The only thing the American government could do to gain conviction would be to release the original photographs which makes the attempt to conceal them ridiculous. In fact, it has recently been reported that there have been protests in the Afghan capital, Kabul, over allegations that foreign troops in the country burnt a copy of the Koran, that hundreds of Kabul University students led the latest protest, and that they burned an effigy of US President Barack Obama. Of course, the US-led NATO force denied the claim, but no one believes the denial.

Other claims entertained by the Court are even worse. The Glomar response, for instance, where the government neither confirms nor denies the existence of documents to Freedom of Information Act requests excludes the possibility of being questioned. The Justice Department's recent position in Shubert v Obama is similar. The claim is that asserting the state secrets privilege is necessary "to protect against a disclosure of highly sensitive, classified information that would irrevocably harm the national security of this country," and the Attorney General writes, "I believe there is no way for this case to move forward without jeopardizing ongoing intelligence activities that we rely upon to protect the safety of the American people." Not only is there no way to question these claims, they don't even address the question raised, which is not whether the ongoing intelligence activities are relied upon by the government but whether they are legal. All of these claims put agents of the government above the law.

Furthermore, the claim that the revelation of specific information would harm the nation is counterproductive. Nations are harmed in many ways, one of which is their reputations both domestically and internationally. Far more nations have been destroyed by internal forces than by forces from abroad. In fact, forces from abroad that succeed in destroying nations often manage that because the attacked nation has already been destroyed from within. It happened to the Roman Empire.

Secrets make people suspicious of attempts to hide wrongdoing. When a government loses the trust of its people, the nation is harmed. And when the government seeks to keep secret actions being carried out in foreign nations, the attempt is fruitless. Foreign nations know or at least suspect when they are being meddled with. The international community views the meddling nation as a pariah.

In fact, it is impossible to argue convincingly for executive privilege. That no such argument has ever been produced is shown by the persistence of the controversy and the Court's continuing ambivalence. Whenever executive privilege is invoked, objective observers always react by concluding that the government has lied or broken the law and the lies and violations of law are being covered up. Many now have adopted the maxim, don't believe anything until it's officially denied, so that people initially uncertain about claims that the government has lied come to that conclusion when the lie is denied and the evidence is kept secret. Citing executive privilege is not an effective way to gain the people's trust and govern effectively. The Court should make clear that it is never appropriate. In a democracy, no one should ever be above the law.

Secretary of State, Hillary Clinton, said, "We've got to do a better job explaining to the world what we're doing," while being interviewed by Leslie H. Gelb. The previous Bush administration expressed similar sentiments. Alan Fisher, a Scottish journalist reporting from Islamabad wrote, "I went to the Islamic university in Islamabad on Tuesday after news of the double bombing there broke. . . . A young man . . . started blaming me and 'my people' for

the bombing. . . . He said: 'This is all your fault, all your bloody fault.' pointing his finger at me angrily. 'You Americans, you are sitting there, you are doing this.' The world's people know "what we're doing," because we're doing it to them. Only the American people are being kept from knowing it.

There is an old Henry "Henny" Youngman joke that goes like this: A man goes to his doctor and says, "Doctor, when I do this it hurts." The doctor says, "Well don't do that." This joke provides all officials in democratic governments with this lesson: When an action is being proposed that would be too offensive to be revealed to the public, don't approve it, because if it is done, it will surely hurt. The government's covered-up lies have done far more damage to the United States of America than terrorists ever could have. In fact, those lies have produced the terrorists and severely limited our Constitutional rights. Ron Paul is right: they're over here because we're over there. In reality, the best defense against enemies is not to make any. Attempts to keep wrong doing secret never work and are destroying the nation in the guise of protecting it.

Some claim that "the U.S. Constitution is elitist in origin and nature, and does not include any clause providing for state intervention directed towards the removal or, at least, mitigation of social inequalities; nor does it acknowledge any social or economic rights....In addition to that, the U.S. Constitution is strictly centered on the protection of the *status quo* and dominant elites' power, and even on the empowerment of the state for the repression of the common citizen and for the domination over foreign nations." Although it is true that the members of the Constitutional Convention were drawn form the Colonial elite and that most were lawyers with economic interests in the Colonial economy which was British in nature, the claim, cited above, is based on well-known elementary fallacies. Unless the author or authors of a document specifically place their intentions in the document, those intentions become irrelevant. Once written, a document stands on its own. And the Constitution's preamble clearly contains the aspirations and intentions the founders wanted the new nation to fulfill, none of which are aimed at protecting the *status quo* and the dominant elites. The founders also explicitly stated the dangers of foreign entanglements.

Yet the Constitution has been subverted and the nascent nation destroyed by the Court's willingness to inject monarchial English common law principles into the American legal system for which not even the slightest justification can be found in the Constitution. English crown privilege is one of them. As a result, all the often claimed enlightenment aspects of American society are merely cosmetic. The Justices of the Court, those who have sworn to protect and maintain the Constitution, are the ones chiefly responsible for destroying it. The Constitution may not be perfect, but it's much better than many realize. It is the Court which has failed to read it carefully that is at fault.

John Kozy is a retired professor of philosophy and logic who blogs on social, political, and economic issues. After serving in the U.S. Army during the Korean War, he spent 20 years as a university professor and another 20 years working as a writer. He has published a textbook in formal logic commercially, in academic journals and a small number of commercial magazines, and has written a number of guest editorials for newspapers. His on-line pieces can be found on http://www.jkozy.com/ and he can be emailed from that site's homepage.

Comment on Global Research Articles on our Facebook page

Become a Member of Global Research

Articles by: John Kozy