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Executive Privilege: A Constitutional Myth, by Raoul Berger

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Book Review

EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH. By Raoul Berger. Cambridge, Massachusetts: Harvard University Press, 1974. Pp. xvi, 430. $14.95.

In this volume, the third in what one reviewer has lavishly praised as a "connected trilogy . . . one of the scholarly landmarks of our time,"[1] Raoul Berger has arrayed the gleanings of his research into Anglo-American constitutional and legal history in a scathing assault on modern conceptions of the doctrine of executive privilege. Notorious events of recent months, culminating in the United States Supreme Court's decision in the case of the presidential tapes, *United States v. Nixon*,[2] have presumably made unnecessary any definition of the term. For the benefit of any reader who may have just returned from an extended stylitic seclusion, it refers to the power, asserted to be derived from the Constitution, of the President (and, under some formulations, of lesser officials of the executive branch) to resist disclosure of information demanded by the other branches of government. While most commonly asserted against congressional demands for documents within the control of the Executive, the privilege is conceived by some as having more or less equal application as against judicial processes, as instanced by the contentions advanced on behalf of President Nixon in the "tapes case," in which the Supreme Court expressed broad approval of the privilege in general, while overriding it in the result.[3]

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1 Wills, Book Review, N.Y. Times, May 5, 1974, § 7 (Book Review), at 1, 2. The earlier two are R. BERGER, CONGRESS v. THE SUPREME COURT (1969), and R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

2 —— U.S. ——, 94 S. Ct. 3090 (1974).

3 The Court's opinion appears not to have taken the slightest account of Berger's book; at least there is no reference to it. This treatment was rather odd for a study proclaimed just two months prior to the decision as a "scholarly landmark," Wills, *supra* note 1, at 2, relating to a question to which the Court had not previously addressed itself. It may be, however, that with the specter of presidential defiance not then having been dispelled, any of the Justices who might have read Berger and been persuaded by his thesis that executive privilege is a "constitutional myth," chose to keep their peace and acquiesce in Chief Justice Burger's opinion in the interest of having the Court speak with one "definitive" voice. In any event, that opinion placed the Court's imprimatur on executive privilege as a constitutional postulate having substantial weight and scope. It was at pains to base the narrow holding on the peculiarly compelling interest in making all relevant evidence available in a criminal trial, when confronted with what was termed the President's "generalized interest in confidentiality." —— U.S. at ——, 94 S. Ct. at

Champions of executive privilege, academic and otherwise, have uniformly pointed to the principle of separation of powers as furnishing its constitutional underpinning.[4] Their argument has been an essentially "structural" one, in the sense Professor Black has used the term; that is, dependent upon a logic deducible from the pattern of institutional arrangements established by the Constitution, rather than upon any exegesis of its text.[5] It could hardly be otherwise. There is no language anywhere in the Constitution conferring upon Executive an immunity analogous to that explicitly accorded Congressmen by Section 6 of Article I.[6] The notion is, however, that were there not such a barrier against efforts to extract confidential information in the possession of the Executive, that branch would be impeded in carrying out its constitutional responsibilities. The Framers cannot be thought to have intended that any branch be hobbled in its legitimate activities by encroachments on the part of the others. Thus it is argued that there must be an implied constitutional power of the President and his principal subordinates to withhold information if its disclosure would, in their judgment, undermine the performance of executive functions. Management of military and international affairs are most frequently cited as the prime examples of executive functions wherein a large measure of

3109. It implied that had the President invoked military or diplomatic secrecy, the claim of privilege would have been entitled to absolute recognition on a basis not allowing of even judicial scrutiny, much less judicial balancing of the privilege against the demand for disclosure. Even in the absence of military or diplomatic secrets, the Chief Justice laid great stress upon the protection to which any confidential presidential communication is due at the hands of the courts, and left open the possibility that claims of executive privilege might be renewed on a more particularized basis at the district court level. The opinion did not, of course, speak to the matter of Congress' entitlement to information in the face of assertions of executive privilege—the principal concern of Berger's book—but in view of its frequent acknowledgment of the "great deference" which the doctrine of separation of powers was said to command with respect to such assertions, it is not surprising that President Nixon's spokesmen were reported to have found in it broad vindication for his position refusing full compliance with the House Judiciary Committee subpoenas. For the tender treatment of executive privilege by the courts generally, see Annot., 19 A.L.R. FED. 472 (1974).

[4] Scholars have tended to view the privilege as a qualified one, which should not be taken as availing against any and all demands for disclosure. *See, e.g.*, Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755 (1959), and Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957). More practically-minded exponents of the privilege have generally inclined toward an absolutist position. *See, e.g., Hearings on S. 848, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923, & S. 2073 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, and the Subcomms. on Separation of Powers and Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., vol. 1, at 18-52 (1973) (testimony of Richard Kleindienst).

[5] C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

[6] "[F]or any Speech or Debate in either House, they shall not be questioned in any other Place."

secrecy is argued to be essential.

It is Berger's thesis that executive privilege and the arguments adduced in its support are pernicious nonsense. Bristling with indignation at what he regards as shoddy and slapdash misinterpretations and even misstatements of the historical evidence bearing upon the Framers' intent by exponents of the privilege, Berger devotes the major portion of this book to a reexamination of the historical data he regards as pertinent to this issue. His premise is that the Framers specifically intended the Executive to have no constitutional power to interpose against Congress' plenary power of inquiry into all matters affecting the commonweal, including foremost whether and how the President and his subordinates are taking care "that the Laws be faithfully executed."[7] In the author's view, "[w]hatever may be the merits of the practical arguments for confidentiality. . . . [p]ractical desiderata cannot be converted into constitutional dogma." (p. 186).

Berger, here and elsewhere throughout the book, appears to lay himself open to the criticism of espousing an unduly simplistic approach to constitutional interpretation which assumes that final and immutable Truth respecting every question was once and for all formulated and embodied in a text, and that all issues as they arise over time should be concluded by efforts to discern the meaning of its author.[8] In a manner resembling the biblical fundamentalist's attitude toward divine revelation, Berger seems to accord no place to *traditio*, the gradual unfolding of doctrine through time in response to changing circumstances and evolving perceptions, wherein new understandings emerge from the accretive process of opposing assertions and acquiescenses, of countering claims and denials. The inadequacy of a philosophy of constitutional interpretation that focuses as exclusively upon the Framers' intent as Berger's recurringly does must be acknowledged by anyone not prepared to denounce the expansion of federal regulation areas which by the criterion of "original intent" are clearly reserved for state and local government.

In fairness to Berger, though, however much one might cavil with his theory of constitutional interpretation as a general matter, it should be borne in mind that this book is first and foremost a philippic against those who, like former Attorney General William Rogers,[9] have pur-

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[7] U.S. CONST. art. II, § 3.

[8] This is essentially the criticism leveled at the book by Professor Winter in his recent review, Winter, Book Review, 83 YALE L.J. 1730 (1974).

[9] *See, e.g.,* SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG. 2D SESS., THE POWER OF THE PRESIDENT TO WITHHOLD INFORMA-

ported to locate executive privilege specifically in the original constitutional understanding. It may indeed be characteristic of studies as polemical as this that in terms of methodological premises, they tend to mirror the arguments they are directed against, even as they reach opposite conclusions. But if one is persuaded that Berger and his adversaries are playing the right game in the first place, Berger beats them hands down at virtually every turn. At least, his scholarship ought to pose severe embarrassment for anyone who would persist in seeking to derive a warrant for executive privilege from the deliberations of the Philadelphia Convention.

For Berger, the beginning and the end of constitutional explication lies in discerning the original intent which animated the text. He does not, however, share the complementary fundamentalist notion that such intent is discoverable from textual scrutiny alone, without recourse to extrinsic evidence. While adept at the sort of textual explication familiar to lawyers, the principal concern of this study is to assemble and analyze the historical evidence left by the Founding Fathers, by the thinkers whom Berger deems most influential in shaping their ideas of government, and by the major figures of the early national period of our history presumably most in touch with the pristine constitutional understanding on the subject of executive privilege. The effort to reconstruct, from prior, contemporaneous, and subsequent statements and events, what the Framers thought about some question which they failed to address explicitly in the document they produced has, of course, been essayed many times before, often in quest of unexpressed intent relating to matters of greater import than executive privilege.[10] The primary sources of the most direct, contemporaneous evidence are the records of the Constitutional Convention, *The Federalist*, and *Elliot's Debates in Several State Conventions on the Adoption of the Federal Constitution.*

TION FROM THE CONGRESS 74 (Comm. Print 1958). The so-called "Rogers Memorandum," written, or at least signed by, William P. Rogers as U.S. Attorney General under President Eisenhower, has the dubious distinction of being the *locus classicus* among expositions of executive privilege. Berger says of its "historical peregrinations" that they are "a farrago of internal contradictions, patently slipshod analysis, and untenable inferences." (pp. 165, 164.) The tendentiousness of this document, promulgated over the signature of the chief legal officer of the United States, is all the more appalling when it is considered that opinions of the Attorney General are regarded as quasi-judicial in character.

[10] Most readily coming to mind are the studies by Charles Beard, Louis Boudin, and William Crosskey purporting to establish, primarily by recourse to history, that the Founding Fathers did (in the cases of Beard and Crosskey) or did not (in the case of Boudin) intende to endow federal courts with the power of judicial review. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); L. BOUDIN, GOVERNMENT BY JUDICIARY (1932); W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

From these and other sources, Berger adduces support for the proposition that the Framers generally entertained a pronounced suspicion of executive power, and accordingly manifested in a variety of ways a determination to make its exercise accountable to the Congress. In this, his interpretation wholly accords with that of virtually everyone who has studied the constitutional and political thought of the time, shaped as it so largely was by American experience with an overbearing British king and cabinet.

More questionable, however, is Berger's contention, largely grounded upon the frequent reference in debate to the House of Representatives as the "Grand Inquest of the Nation," that the Framers thereby manifested an intent to incorporate in the American Constitution the same unlimited powers of inquiry vis-à-vis the executive as had been increasingly asserted throughout the 17th and 18th centuries on behalf of the British House of Commons as against ministers of the Crown. It may be that he reads too much into a coincidence of language when he finds in the frequent use of that attractive phrase a considered purpose to transpose to the American setting an allocation of constitutional power that emerged in the British. He also takes insufficient account of the historical and political context in which unbounded claims for the Commons' plenary powers of inquisition were advanced; that is, the century or so from which most of Berger's examples are taken, which saw the achievement of parliamentary supremacy in Britain. Indeed, Berger seems often to imply that the Framers conceived of the American executive as little more than the agent of the legislature, on the model of the modern British cabinet, rather than as the independent and coequal branch of government it has conventionally been understood to be.

In his handling of evidence of what was said and done respecting executive privilege by principal figures of the early national period of American history, Berger's argumentation calls to mind Santayana's caution against resorting to history for support in the manner of looking over a crowd to pick out one's friends. The problem is not that Berger selectively ignores instances which argue against his thesis. Rather, the difficulty is with Berger's method of attempting to explain away the episodes and pronouncements that might be thought to speak against his position. He is often prone to, in Maitland's words, "mix up two different logics, the logic of authority, and the logic of evidence."[11] The former is characterized by an insistence upon arguing

[11] F. MAITLAND, *Why the History of English Law Is Not Written*, in THE COL-

with historical events in the manner of the advocate trying to distinguish unfavorable precedents. For example, Jefferson reported that at a meeting of Washington's cabinet, demands by the House of Representatives for reports relating to a botched military expedition were considered. The Cabinet concluded that the President could properly refuse to deliver papers "the disclosure of which would injure the public."[12] Is the weight of this conclusion as historical evidence lessened, as Berger seems to believe, by the fact that Jefferson supposedly "misunderstood" the episodes from British parliamentary history upon which he relied?

Similarly indicative of Berger's affinity for the logic of authority rather than that of evidence is his treatment of the much-controverted episode of the Burr subpoena.[13] If executive privilege is nothing but a lately-concocted constitutional "myth," then how does one account for the following responses of President Jefferson to the United States District Attorney respecting the subpoena *duces tecum* for production of the Wilkinson letters?

> Reserving the necessary right of the President of the U.S. to decide, independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated, & to whom, I assure you of my readiness under that restriction, voluntarily to furnish on all occasions, whatever the purposes of justice may require.[14]

> All nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary alone. He, of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication.[15]

Berger simply fails to explain why, if executive privilege is nothing

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LECTED PAPERS OF FREDERIC WILLIAM MAITLAND 480, 491 (H. Fisher ed. 1911).

[12] 1 THE WRITINGS OF THOMAS JEFFERSON 189-90 (P. Ford ed. 1892), *discussed by* Berger at 168-71.

[13] Actually, two subpoenas were issued in the course of Burr's successive trials for treason and on a misdemeanor charge. Since by the time the second subpoena issued, the Wilkinson letter at which it was directed had been forwarded by Jefferson to George Hay, the U.S. Attorney, with some portions already deleted, only as to the first was Jefferson in substance the respondent. The opinions of John Marshall, presiding as a circuit judge at the Burr trials, setting forth his ruling on the matter, are found in United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807), and United States v. Burr, 25 F. Cas. 187 (No. 14,694) (C.C.D. Va. 1807). The precise chronology of this litigation and the shifting status of the Wilkinson letter are so perplexing as to have led even Dumas Malone, Jefferson's great biographer, into some admitted confusion. See the exchange of letters between Malone and the ubiquitous reviewer, Wills, Book Review, THE NEW YORK REVIEW OF BOOKS, July 18, 1974, at 36-40.

[14] Letter from Thomas Jefferson to George Hay, June 12, 1807, in 9 THE WRITINGS OF THOMAS JEFFERSON 55 (P. Ford ed. 1898).

[15] Letter from Thomas Jefferson to George Hay, June 17, 1807, in *id.* at 57.

but a latter-day fabrication, Jefferson (not usually regarded as having entertained extravagant notions of executive prerogatives) claimed, as President, to have discertion to withhold information when he thought "the public interests" so required. Was there something here that Jefferson "misunderstood"? Berger's treatment of this episode resembles that of the advocate coping with an unfortunate decision in point—that is, seeking to reduce what was said to mere dicta in view of the actual result, as "the logic of authority" would entitle him to do. But for the historian, what people say is often as important, and sometimes more so, than what they do. This would seem to be the case here if what Jefferson thought about executive privilege is believed to cast some light on what the Framers intended. Viewed in its historical significance, it scarcely matters that Jefferson did in fact supply the subpoenaed documents, especially when compliance was attended by an emphatic reservation of his "necessary right"[16] to remain "the sole judge" of the occasions for non-disclosure in the interest of "the advantageous conduct of . . . affairs."[17] It might be rejoined that these words of Jefferson, which Berger relegates to a footnote, should be discounted as those of self-interested party whose ox was just then being gored, but he observes no like stricture when quoting numerous congressional spokesmen on the other side of the issue.

In general, Berger's historical arguments seem most effective in demolishing the specious efforts by others to use history to establish a lineage for executive privilege from the original intent or understanding of the Founding Fathers, and are least persuasive when they purport to establish that the opposite is true. Yet it is no small service that Berger has performed in removing, one hopes permanently, such shabby derelicts as the Rogers Memorandum[18] from the landscape of constitutional history. In the final analysis, however, this reviewer is persuaded to return nothing more conclusive than a Scotch verdict—not proven.

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[16] Letter from Thomas Jefferson to George Hay, June 12, 1807, in *id.* at 55.
[17] Letter from Thomas Jefferson to George Hay, June 17, 1807, in *id.* at 55.
[18] POWER OF THE PRESIDENT, *supra* note 9.

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