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III. COMMENTS ON EXECUTIVE PRIVILEGE IN LIGHT OF *UNITED STATES v. NIXON*

A. *Richard E. Ellis**

I have a number of fundamental disagreements with the general thrust and some of the details in Raoul Berger's paper, which for the most part is a restatement of themes he developed in his recent influential book, *Executive Privilege: A Constitutional Myth*.⁹² Before elaborating on these disagreements, however, I wish to indicate that there are a number of important areas in which we agree.

Professor Berger is correct that executive privilege is neither absolute nor wholesale. He effectively devastates both the logic and history used in former Deputy Attorney General William P. Roger's 1958 memorandum.⁹³ I also agree that there are dangers in the continued abrogation of power by the Executive branch, and I share much of his uneasiness with Chief Justice Burger's opinion in *United States v. Nixon*. Finally, as an historian, I am indebted to Professor Berger for clarifying many of the historical issues involved in the development of executive privilege. Historians usually shy away from the technical, legal and constitutional questions. Professor Berger has cut through a large mass of material effectively, and raised a number of relevant questions. While I am not always in agreement with the answers he offers to the questions he raises, I am fully cognizant of the fact that many of his questions are the right ones; and it is possible to come up with meaningful answers only after the right questions have been asked.

My objections to Berger's work arise primarily from his preoccupation with determining the original intent of the Framers of the United States Constitution.⁹⁴ My reservations about this approach revolve around two main points. The first, and more elusive of the two, has to do with its theoretical and practical implications. The second concerns the historical difficulties involved in determining with accuracy and clarity the Framers' original intent.

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92. EXECUTIVE PRIVILEGE, *supra* note 5.

93. *Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, The Power of the President to Withhold Information from Congress*, Memorandums of the Att'y Gen., 85th Cong., 2d Sess. (1958) [hereinafter cited as *Att'y Gen. Memo*]. See also EXECUTIVE PRIVILEGE, *supra* note 5, at 163-208.

94. See notes 41-50 *supra* and accompanying text; EXECUTIVE PRIVILEGE, *supra* note 5, at 60-75.

Professor Berger is rightly concerned that the attitude of those people who believe the Constitution can be so loosely interpreted as to mean anything they want it to mean has dangerous implications. But he does not seem to realize that his own panacea for this problem—the discovering of the Framers' "original intention"—has implications that are equally dangerous. Although useful as a tactic in a given situation, a preoccupation with the Framers' "original intention," over the long run, surely would become a rigid, narrow, absolute and backward looking device that could verge on a form of ancestor worship. To depend simply or even primarily upon the amendment process⁹⁵ to alter the meaning of the Constitution⁹⁶ is not without serious problems; the amendment process is both so slow as to be impractical and so fundamental as to be dangerous because it is extremely difficult to correct mistakes once they are made.⁹⁷ Moreover, placing the power to alter the meaning of the Constitution solely in the amending process increases enormously the power of minority and special interest groups to block change.

While Professor Berger does not go so far as to claim that it is possible to ascertain the original intention of the Framers on every constitutional question, I believe that in his present paper and in *Executive Privilege*, as well as in his other books, he has determined the original intention of the Framers for more things than the evidence will allow. Berger makes much of the fact that in the period immediately after 1776 there was a pervasive belief among Americans that the executive branch of the government should definitely be kept subordinate to the legislature.⁹⁸ Support for this contention comes from the results of the struggles between the King and Parliament in England during the seventeenth and eighteenth centuries⁹⁹ and from the events in America leading up to independence, when the colonial legislatures were associated with the successful patriotic cause while the colonial governors were the leading spokesmen for the King's interests.¹⁰⁰ As a

95. U.S. CONST. art. V.

96. See note 47 *supra* and accompanying text; EXECUTIVE PRIVILEGE, *supra* note 5, at 91-2.

97. See McDougal & Lans, *supra* note 79, at 293.

98. See text accompanying notes 59-60 *supra*.

99. See text accompanying notes 51-55 *supra*; EXECUTIVE PRIVILEGE, *supra* note 5, at 15-31. Cf. J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603-1689 (1957); Turner, *Parliament and Foreign Affairs 1603-1760*, 38 ENG. HIST. REV. 172 (1919).

100. See L. LARABEE, ROYAL GOVERNMENT IN AMERICA ch. V (1930); Bailyn, *The Origins of American Politics*, in I PERSPECTIVES IN AMERICAN HISTORY 52-54 (1967).

consequence, when the first state constitutions were written after 1776, the prerogatives of the governors were sharply limited while the legislatures were given enormous control over the executive branches.¹⁰¹

If this were all there was to the revolutionary experience pertaining to the relationship between the executive and legislative branches of the government, then it indeed would be strong support for Berger's claim that the Framers intended Congress to be "the senior partner in government."¹⁰² But this is not all there was to the revolutionary generation's thought on the matter. A number of scholars, most notably Gordon S. Wood¹⁰³ and M.P.C. Vile,¹⁰⁴ have shown that American thought between 1776 and 1787 on the relationship between the legislative and executive branches was a good deal more complicated and dynamic. Simply stated, these authorities have concluded that experiences during the 1780's convinced many Americans, particularly those who brought about the adoption of the United States Constitution, of three things: that legislative supremacy was fraught with problems and dangers; that an effective way to limit the power of the legislature was through a system of checks and balances; and that this system would allow, among other things, for a strong and independent executive, an executive that would not be subject to legislative control as were many of the governors under the constitutions written just after 1776. This striking reversal of thought on the independence of the Executive was justified on the ground that circumstances in the post-1776 period were fundamentally different from those that existed prior to independence. Before 1776 the colonial governors were appointed by the King and were removable only by the King; therefore, it was necessary to try to make them accountable to the colonial legislatures for their actions.¹⁰⁵ After 1776, when a republican form of government was established throughout America, proponents of an independent Executive argued that the Governor

101. See EXECUTIVE PRIVILEGE, *supra* note 5, at 49-50, 51-2, wherein it is stated "that in most early state constitutions the Governor's office was 'reduced almost to the dimensions of a symbol.'" *Id.* at 49, quoting E. CORWIN, THE PRESIDENT: OFFICE AND POWERS (3d ed. 1948) [hereinafter cited as CORWIN]. Professor Berger, in his works, provides examples from the constitutions of Virginia and Maryland. *Id.* at 49-50 n.5. See also R. BERGER, CONGRESS v. THE SUPREME COURT 8-12 (1969) [hereinafter cited as BERGER, CONGRESS]; C. WARREN, THE MAKING OF THE CONSTITUTION 176-77 (1937).

102. See note 74 *supra* and accompanying text.

103. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969) [hereinafter cited as WOOD].

104. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967) [hereinafter cited as VILE].

105. See WOOD, *supra* note 103, at 132-61. See also Jensen, *Democracy and the American Revolution*, 20 HUNTINGTON LIB. Q. 21-42 (1957).

should be made directly accountable to the people by elections and should not be made subject to legislative control.¹⁰⁶

Not all Americans agreed on the need for a strong and independent executive, but the proponents of this idea became increasingly stronger as the 1780's wore on.¹⁰⁷ It was this point of view—that urging the creation of a strong and independent executive—which dominated the Constitutional Convention during the summer of 1787, finding institutional expression in the creation of the office of the President.¹⁰⁸ This, of course, does not “prove” that the Framers definitely intended the executive branch to have the right to deny legislative inquests whenever it pleased. However, it certainly casts doubt upon Berger's claim that the Framers intended the legislative branch to be “the senior partner in government.” Although at times the evidence is unclear and contradictory, the most sensible conclusion concerning the attitude of the Framers about the complicated question of the relationship of the executive and legislative branch of the government is that it was very much in flux, and as a consequence the Constitution is unclear on this matter.

Because of his commitment to an “original intent” interpretation of the Constitution, Berger is forced to find clarity in the meaning of the Constitution where none really exists. He does not seem to recognize that as enormously capable as the Founding Fathers were, and as skillful and impressive a document as the Constitution is, it is by no means a perfect document. There are many reasons for this.

The summer of 1787 in Philadelphia was hot and unpleasant, and many of the delegates were eager to go home. For that reason as the convention drew to an end they were not always attentive to constitutional niceties. Additionally, it was generally recognized by the convention that the fight over ratification, as indeed it turned out to be, was going to be a close and difficult one; for tactical reasons it was therefore necessary to leave some things unprovided for and other things ambiguous.¹⁰⁹ It is also clear that there were many points on which the Framers could not reach any kind of agreement. For example, the articles of the Constitution dealing with the executive and legislative branches of the government are elaborate and detailed, while the one dealing with the

106. WOOD, *supra* note 103, at 435-53.

107. *Id.*

108. *Id.* at 519, 521, 547-53. See also VILE, *supra* note 104, at 158-60.

109. Roche, *The Founding Fathers: A Reform Caucus in Action*, 60 AM. POL. SCI. REV. 799-816 (1961).

judiciary is extremely brief.¹¹⁰ The reason for this according to Gouverneur Morris, a leading member of the committee that drafted the Constitution, was that "on that subject conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases, which expressing my own notions would not alarm others"¹¹¹ For a combination of these reasons, plus perhaps even a few that as yet have to be discovered, the Framers did not provide much direction as to what the exact relationship between the different branches of the government should be. Except for the provisions dealing with the making of treaties,¹¹² the President's veto power,¹¹³ and the making of certain appointments,¹¹⁴ and impeachments,¹¹⁵ the subtleties of how the executive, legislative, and judicial branches should interact were left to the future to work out.

In pushing his case for legislative supremacy, Berger tries to demonstrate that in the years immediately following the adoption of the Constitution "the established common law power of the legislature" to investigate the executive was "not . . . cut down by implication in favor of the President."¹¹⁶ He cites in particular the Treasury Act of 1789¹¹⁷ which required the Secretary of the Treasury to report directly to Congress. Berger's interpretation of the meaning of the Treasury Act of 1789 is open to serious question. The intent of that piece of legislation, drafted by the then Secretary of the Treasury Alexander Hamilton, was to make the head of the Treasury Department a more important officer than the other cabinet members, who were not required to report to Congress, and to allow the Executive Department to influence congressional proceedings in economic and financial matters.¹¹⁸ In short, the Treasury Act of 1789 was symbolic of the expansion of executive influence and power and not of legislative supremacy as Berger asserts.

110. Compare U.S. CONST. arts. I & II, with U.S. CONST. art. III.

111. Letter of Gouverneur Morris to Timothy Pickering, Dec. 22, 1814, in 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 420 (1911) [hereinafter cited as FARRAND].

112. U.S. CONST. art. II, § 2.

113. *Id.* art. I, § 7.

114. *Id.* art. II, § 2.

115. *Id.* art. I, §§ 2, 3; art. II, § 4.

116. See text following note 62 *supra*.

117. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66 (now 31 U.S.C. § 1002 (1970)); see text accompanying note 63 *supra*.

118. 1 ANNALS OF CONGRESS 615-31 (1834) [hereinafter cited as ANNALS]; see Meyer, *A Note on the Origins of the "Hamiltonian System,"* 21 WM. & MARY Q. 579 (1964). For a good treatment of pre-1787 executive imperialism in financial and economic matters, see E.J. FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE 1776-1790, at 109-76 (1961).

Whether or not any of this proves the Framers *intended* the President to have a right to deny congressional demands for information is a moot point. However, during the debate over the adoption of the Jay Treaty,¹¹⁹ James Madison, despite his bitter opposition to the adoption of the treaty, indicated he

thought it clear that the House might have a right, in all cases, to ask for information which might assist their deliberations He was as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure at the time. . . .

If the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them because he was the competent though responsible judge within his own department.¹²⁰

Berger cites this quote in *Executive Privilege*,¹²¹ but dismisses its significance because the House of Representatives did not formally endorse Madison's point of view. It is equally if not more significant that the House was not able to force Washington to lay before it the papers demanded on the diplomatic background of the Jay Treaty. Moreover, when Jefferson became President in 1801 he endorsed Madison's position on executive independence and discretion. In an early draft of his first annual message, written in the late fall of 1801, Jefferson included a passage which clearly expressed his feelings on the relationship between the different departments of the government:

Our country has thought proper to distribute the powers of its government among three equal and independent authorities, constituting each a check on one or both of the others, in all attempts to impair its Constitution. To make each an effectual check, it must have a right in cases which arise within the line of its proper functions, where, equally with the others, it acts in the last resort and without appeal, to decide on the validity of an act according to its own judgment, and uncontrolled by the opinions of any other department. We have accordingly, in more than one instance, seen the opinions of different departments in opposition to each other, and no ill ensue. The Constitution moreover, as a further security, against violation even by a concurrence of all the departments, has provided for its own reintegration by a change of the persons exercising the functions of those departments. Succeeding functionaries have the same right to judge of the conformity or non-conform-

119. See EXECUTIVE PRIVILEGE, *supra* note 5, at 171-79.

120. 5 ANNALS, *supra* note 118, at 773.

121. EXECUTIVE PRIVILEGE, *supra* note 5, at 174.

ity of an act with the Constitution, as their predecessors who passed it. For if it be against the instrument, it is a perpetual nullity.¹²²

The point is that at the time of the adoption of the United States Constitution, there was rapidly growing sympathy for the idea of a strong and independent executive, and this idea found increasing support during the first administrations under the Constitution—both Federalist and Jeffersonian. Opponents of this development, and there were many, were generally unsuccessful and ignored. This, to be sure, does not indicate that the Founding Fathers believed that executive independence was to be absolute, for surely the impeachment provision of the Constitution indicates otherwise. Neither does it indicate that the President has a right to interfere with, or prevent, the bringing to justice of criminals. Further, it is not meant to deny the legitimacy of the concerns of those who worry about the steady growth of presidential power that has recently taken place. The solution to this serious problem, I believe, does not lie either in determining the “true intent” of the Framers or in the rewriting of history for partisan purposes, but in realistically recognizing that in some areas the Constitution is imperfect and that the changed conditions of the twentieth century have in many ways made outdated eighteenth-century ideas about how power should be distributed and controlled. The need is to look forward, not backward, though in such an endeavor the past need not necessarily be an enemy.

122. *Quoted in* 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 605 (1919) [hereinafter cited as BEVERIDGE] (spelling and grammar of the passage have been modernized).