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Replies

Raoul Berger

IV. REPLIES

by Raoul Berger

A. A Reply to Professor Ellis

(1) Professor Ellis takes exception to my view that Congress was designed to be the "senior partner" in government. He agrees, however, that in the beginning there was a pervasive belief among Americans that the legislative branch should predominate.[205] But he points to a progressive disenchantment with state legislatures in the 1776-1787 period, and states that by 1789 the Founders were committed to a "strong and independent" executive. Of course, I was fully aware of this development, the details of which were set forth in my 1969 book *Congress v. The Supreme Court.* Ellis concedes that "this . . . does not 'prove' that the Framers definitely intended the Executive branch to have the right to deny legislative inquests whenever it pleases, but it certainly casts doubt on Berger's claim that the Framers intended the legislative branch to be the 'senior partner in the Government.' " Thus Ellis leaves the heart of my thesis alone and singles out one of many cumulative details.

Even so, the vast disproportion between the battery of powers conferred on Congress—the power of the purse,[206] of war-making,[207] of providing for the general welfare,[208] *etc.*—contrasted with the few skimpy powers conferred upon the President,[209] including the trivial authority to request written opinions from members of his Cabinet,[210] alone testifies as to which branch was meant to be "senior." To be sure, the President was intended to be "independent and strong," but within the ambit of his enumerated and narrowly circumscribed powers. We forget for example, that the sole textual grant of power to the President, contained in three words—Commander-in-Chief[211] was merely meant, according to Hamilton, to make him "first General," and that "it belongs to Congress only, to go to war."[212] Although James Wilson was

205. *See* BERGER, CONGRESS, *supra* note 101, at 10-16.
206. U.S. CONST. art. I, §§ 7, 8, 9.
207. *Id.* § 8, cls. 11, 12, 13 & 14.
208. *Id.* § 8, cl. 1.
209. *Id.* art. II.
210. *Id.* § 2.
211. *Id.*
212. EXECUTIVE PRIVILEGE, *supra* note 5, at 62-63, 69.

the "leader of the 'strong executive'" party, the "only powers he conceived strictly Executive were those of executing the laws and appointing officers."[213] His view was shared by Roger Sherman[214] and others; it was repeated in the Ratification Conventions, and much later reiterated by Justice Holmes, Brandeis, Black, Douglas, Frankfurter and Jackson.[215] Wilson, in short, conceived the President chiefly as the agent for executing the laws made by Congress.[216] It was Madison, chief architect of the Constitution, who stated that "[i]n a republican government, the legislative authority necessarily predominates . . . ."[217] How deep-rooted and continuing popular distrust of the Executive remained is illustrated by the fact that James Wilson still found it necessary in 1791 to admonish the people that they now elected the Executive and should therefore discard the prejudices which they derived from royal appointments of governors.[218] What better illustrates where the people put their trust than the placement of the impeachment power in Congress—the power of removing the President from office for the abuse of power or betrayal of trust.

At no point did I argue that the President "should be subject to the legislative control." Instead I showed that *after* he acted, he was *accountable* to Congress through the centuries-old power of "oversight" exercised by the "Grand Inquest of the Nation." Accountability is different from control; and today former high executive officers—McGeorge Bundy, Clark Clifford, Arthur Schlesinger and Theodore Sorenson, among others, insist that accountability is the keystone of democractic government.[219]

Ellis is given to generalizations divorced from specific facts, but generalizations, as Justice Holmes observed, do not settle concrete cases.[220] Each particular problem must be examined against the context of the particular facts, as I attempted to do in my studies of the war

213. *Id.* at 52, *quoting* CORWIN, *supra* note 101, at 11 & 1 FARRAND, *supra* note 111, at 66.

214. *Id.* Roger Sherman "considered the Executive magistracy as nothing more than an instrument for carrying the will of the Legislature into effect." 1 FARRAND, *supra* note 111, at 65 *quoted* in EXECUTIVE PRIVILEGE, *supra* note 2, at 52.

215. EXECUTIVE PRIVILEGE, *supra* note 2, at 52-3, 59.

216. *Id.* at 53.

217. *Id.* at 50, *quoting* THE FEDERALIST No. 51, *supra* note 26, at 338.

218. *Id.* at 49 n.2.

219. *See, e.g.*, A. SCHLESINGER, THE IMPERIAL PRESIDENCY *passim* (1973); T. SORENSON, WATCHMEN IN THE NIGHT: PRESIDENTIAL ACCOUNTABILITY AFTER WATERGATE *passim* (1975).

220. Lochner v. New York, 198 U.S. 45, 76 (Holmes, J., dissenting).

powers, the power of legislative investigation and the foreign relations power. With respect to those powers, I submit, there is precious little "historical difficult[y] involved in determining with accuracy and clarity the Framers' original intent."[221] For Ellis' assertions that I have "determined the original intention of the Framers for more things than . . . the evidence will allow," and that I am "forced to find clarity and meaning in the Constitution where none really exists," he offers fragments drawn from Attorney General William Rogers' memorandum of which he himself says that Berger "devastates both the logic and history" thereof. Nevertheless he selects two fragments for resuscitation.

Ellis first charges that my "interpretation of the meaning of the Treasury Act of 1789 is open to serious question." That Act provides that it shall be "the duty [of the Secretary of the Treasury] to . . . give information [to Congress upon request] . . . respecting all matters . . . which shall appertain to his office . . . ." One who contradicts the plain meaning of statutory terms must adduce convincing evidence that the intention of the draftsmen was quite different from what they said in the statute. What does Ellis produce? "The intent of that piece of legislation . . . 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." It may be doubted whether a cabinet member who "is not required to report to Congress" would consider himself less "important"; he would likely feel himself privileged. But in truth Ellis garbles the history that was spread out in my book. Hamilton had drafted a statute that would permit him to come to Congress at his pleasure to advise Congress,[222] and thereby had aroused resentment in the House at the "intrusion." In consequence that Act was whittled down to impose a duty to report upon request, which merely articulated the familiar parliamentary practice. No similar statute was drawn with respect to the other departments because they attempted no similar "intrusion," and because the statute was merely declaratory of the historical power of "oversight."[223] For this

221. In regard to the war powers, my views are shared, to name only the most recent publications, by L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); Lofgren, *War Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); Reveley, *Constitutional Allocation of the War Powers Between the President and Congress*, 15 VA. J. INT'L LAW 73 (1974). The basis of my war powers chapter was published in a law review in 1972. *See Warmaking, supra* note 124.

222. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65 (now 31 U.S.C. § 1002 (1970)). *See* EXECUTIVE PRIVILEGE, *supra* note 5, at 38-9.

223. *See* EXECUTIVE PRIVILEGE, *supra* note 5, at 198-200.

we have the weighty testimony of Attorney General Caleb Cushing in 1854:

> By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with the other Secretaries . . . .[224]

It is this history that Ellis sums up by saying the Act of 1787 "was symbolic of the expansion of executive influence and power and not of legislative supremacy . . . ."!

Next Ellis invokes Washington's refusal of the Jay Treaty papers to the House, although he had given them to the Senate, and cites Madison's statement that the President had discretion to withhold information. Berger, says Ellis, "dismisses its significance because the House of Representatives *did not formally* endorse Madison's point of view." In actual fact it did more, it plainly repudiated that view and insisted throughout upon delivery of papers.[225] Madison well knew that the construction of the Constitution was fixed by the House, not by Madison standing in opposition thereto.[226] John Adams, then Vice-President, was in complete sympathy with the House.[227] Moreover, after Hamilton had suggested to Washington that he should invoke his "discretion" to withhold,[228] Washington chose rather to challenge the jurisdiction of the House to inquire because it was not a partner in the treaty-making process.[229] The inference that he had no stomach for invocation of "discretion" to withhold is confirmed by the statement in his refusal of the papers that he had no disposition "to withold any information . . . which could be required of him by either House as a right,"[230] as his turnover of the papers to the Senate attests. A scholar who would impeach the judgment of another needs more solid grounds than Ellis has mustered.

Special significance is attached by Ellis to the alleged fact that "the House was not able to force Washington to lay before it the papers demanded. . . ." In truth, the matter never came to a head; no subpoena was issued, no articles of impeachment were filed. Despite the

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224. *Id.* at 200, *quoting* 6 OP. ATT'Y GEN. 326, 333 (1856).
225. *Id.* at 174-78.
226. *Id.* at 177 n.89.
227. *Id.* at 173. For similar sentiments of Jefferson, *see id.* at 176 n.81.
228. Berger, *Executive Privilege: A Reply to Professor Sofaer*, 75 COLUM. L. REV. 603, 608 (1975).
229. EXECUTIVE PRIVILEGE, *supra* note 5, at 172.
230. *Id., quoting* 5 ANNALS, *supra* note 118, at 76-62.

omission of Congress over the years to take such steps towards enforcement of its demands, it is generally acknowledged that Congress has power to demand information from the President, as Attorney General Cushing said in 1956.

(2) The second point made by Ellis is that "a preoccupation with the Framers' 'original intention' . . . would surely become a rigid, narrow, absolutistic and backward looking device that could verge on a form of ancestor worship." Now Ellis agrees that the attitude "that the Constitution can be so loosely interpreted as to mean anything they want it to mean has dangerous implications," and that "there are dangers in the continued arrogation of power by the executive department." Since fear of a "rigid" Constitution is hypothetical, whereas interpretive license has proven real, I would choose the lesser of the two evils. The war-making power, for example, but for the "conduct" of war by the "first General," was plainly conferred upon Congress. Can we condone the reallocation by the President of those powers to himself on the theory that otherwise we will arrive at "ancestor worship?" The excess of Mr. Nixon in still other constitutional areas cries out against such philosophizing. The basic premise of our "limited" federal government is that its officers must stay within limits; in the words of Jefferson, we should "bind . . . down from mischief by the chains of the Constitution those whom we entrust with power."[231] Ellis would convert those chains to ropes of sand. It is for that reason, that I stress that where the "original intention" is clear, it must be given effect. If the "sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it," said Madison, "there can be no security for a consistent and stable government, more than for a faithful exercise of its powers."[232] For the abiding value of Madison's counsel we need look no further than Richard Nixon.

But, says Ellis, the amendment process is "impracticable," it is "extremely difficult to correct mistakes when they are made." To my mind this affords added reason for giving no constitutional footing to such "mistakes." Because the process of amendment is "difficult," it does not follow that the agents of the people may change the Constitution without consulting them. An agent, said Hamilton "cannot new-model his

231. WARREN, *supra* note 50, at 148.

232. EXECUTIVE PRIVILEGE, *supra* note 5, at 97, *quoting* 9 J. MADISON, WRITINGS 191, 372 (G. Hunt ed. 1900-1910).

own commission."[233] Let it be admitted that the "amending process enormously increases the power of minority and special interest groups to block change." But they were empowered to do so by the Constitution itself, and apart from reading article V out of the Constitution, I prefer the judgment of one-quarter of the States, where the Founders placed it, than to turn it over to a self-appointed elite. If in truth "the changed conditions of the twentieth century have in many ways made outdated eighteenth century ideas about how power should be distributed and controlled," let the change be made by the people as the Constitution requires, not by future Nixons or closet philosophers. As Myers McDougal stated: "Government by a self-designated elite—like that of benevolent despotism or Plato's philosopher kings—may be a good form of government for some peoples, but it is not the American way."[234]

B. A Reply to Professor Benedict

(1) Professor Benedict labels my book "lawyers' history," but adds that he does "not mean that in a pejorative sense." It has no other. The coiners of the phrase, Professors Alfred Kelly and Paul Murphy, used it to describe the selection, creation and suppression of historical facts by judges and lawyers to rationalize a preconceived result;[235] what Benedict calls "history designed to give direct guidance to present-day decision makers." That label fits no work of mine. My studies of executive privilege were first publishd in 1965,[236] when I was an academician; and my *High Crimes and Misdemeanors*[237] was in the hands of the editors in the summer of 1970, long before there was an "impeach Nixon" cloud on the horizon. No "decisions" were impending that called for a lawyers "guidance." All of my scholarly publications, reaching back to 1935,[238] had their source in unalloyed intellectual curiosity: "how and why," to use Benedict's words, did this or that doctrine arise.

To make his point, Benedict says of my *Executive Privilege* that it "stakes out a position and sustains it . . . it is legal advocacy." That is

233. *Id.* at 94, *quoting Letters of Camillus*, 6 A. HAMILTON, WORKS, 166 (H. Lodge ed. 1904) [hereinafter cited as *Camillus*].

234. *Id.* at 345 n.15, *quoting* McDougal & Lans, *supra* note 79, at 577-78.

235. Kelly, *Clio and the Courts: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64 (1963).

236. *Congressional Inquiry*, *supra* note 124.

237. IMPEACHMENT, *supra* note 124.

238. *See* Berger, *Contributory Negligence as a Defense to Nuisance*, 29 ILL. L. REV. 372 (1934); Berger, *Usury in Installment Sales*, 2 LAW & CONTEMP. PROB. 148 (1935).

no more "advocacy," or unscholarly, than those who sustained the position that phlogiston gave an inadequate explanation of combustion. But Benedict is hardly the man to venture such criticism. He carried on his extended apprenticeship under the wing of a leading Revisionist of the Reconstruction era. The Revisionists, remarks Professor Alfred Kelly, a sympathizer, have "quietly junked" the "historiography of the 1930's," "mainly by altering the premises on which [their] analysis rests."[239] Now one who "alters premises" starts with a preconception.[240] Benedict himself published a Revisionist version of the impeachment of Andrew Johnson, in which Johnson is painted in unrelieved black, the Lucifer of Reconstruction who should have been hung from the nearest tree.[241] A comparison of this study with the balanced Revisionist studies of Eric McKitrick[242] and W.R. Brock[243] will give the reader a taste of Benedict's "objectivity." I too published a study of the Johnson impeachment, but I belong to no school; I approached the Johnson impeachment and Reconstruction without any preconceptions whatsoever, without seeking to prove anything, merely soaking myself in the record of the trial and drawing my conclusions therefrom. So I may fairly claim that my study of the Johnson impeachment, which affords a basis of comparison, yields nothing to Benedict's "objectivity"; if anything, it was Benedict, not I, who tailored his study to his "staked out position."

(2) To a constitutional historian, be his approach that of American history or legal history, the starting point with respect to a question of constitutional power must be the Constitution. Since there are no express constitutional provisions that bear on executive privilege, inquiry had to begin with the English practice on which our institutions are modeled. So the Supreme Court held on the very issue of Congressional inquiry.[244] In tracing the English parliamentary development and how that practice was adopted by the Framers, I pursued the "how" path Benedict recommends. The "why," I found, was a profound distrust of

239. Kelly, *Comment*, in NEW FRONTIERS: THE AMERICAN RECONSTRUCTION 40, 41 (1966).

240. For such Revisionists, writes Kelly,

> Southern rupture of the Union becomes a deliberate attempt to preserve a way of life at once obsolete and morally evil, so that the Republican refusal to conciliate the South on slavery and secession becomes patriotic and enlightened public policy rather than something corrupt, stupid or benighted.

Id. at 41. What is this but to "stake out a position" which determines all that follows.

241. *See* BENEDICT, *supra* note 148.

242. E. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960).

243. W. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 1865-1867 (1963).

244. McGrain v. Daugherty, 273 U.S. 135, 161 (1928).

executive power shared by the English and the Founders. My study of parliamentary records persuaded me that the legislative power of inquiry was untrammeled, that there were no executive claims of right to withhold information from Parliament and that, as the historical evidence shows, the Founders intended to endow Congress with the powers of the "Grand Inquest of the Nation" despite the separation of powers.

Having established the inquisitorial power of the Grand Inquest, having found no pre-1789 historical warrant for executive claims of a right to deny information to Congress, I turned to what Benedict himself labels a "rote catalog of past instances of withholding" by a number of presidents. Are these what he refers to when he states that there "*are* strong historical arguments on the other side?" If so, I would remind him, in the words of Lord Chief Justice Denman, that: "The practice of a ruling power in the state is but a feeble proof of its legality."[245] My critique of these "precedents" is regarded as "devastating" by Professor Archibald Cox,[246] Victor Rosenblum,[247] A.L. Sofaer[248] and Garry Wills.[249] Assume that those "precedents" retain some credibility, can a President or a succession of presidents revise the Constitution single-handedly? That was what Harry Truman, Lyndon Johnson and Richard Nixon attempted with respect to the war powers; and eminent historians are in agreement that such a reallocation of the powers granted to Congress is unconstitutional. As Hamilton said, "an agent cannot new-model his own commission."[250] Nor can a democracy tolerate presidential revision of the Constitution. Benedict is, therefore, in error when he asserts that I set out to find "whether there is a legal precedent." Instead I turned to English and American constitutional history to trace a source of power. It is he, not I, who devotes the bulk of his discussion to the post-1792 "precedents." What Parliament and the Founders said and did are no less historical "facts" for being viewed by a lawyer.

Benedict points up his distinction between an historian's and a lawyer's approach by reference to a number of these "precedents," remarking that for an historian these incidents "demonstrate how even the early Presidents began to create constitutional doctrine," whereas I discount them. I did more; I demonstrated that presidential bootstrapping *cannot*

245. Stockdale v. Hansard, 112 E.R. 1112, 1171 (Q.B. 1839).

246. Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974) [hereinafter cited as Cox].

247. Rosenblum, Book Review, 69 NW. U.L. REV. 653 (1974).

248. Sofaer, *Book Review*, 88 HARV. L. REV. 281 (1974).

249. Wills, Book Review, N.Y. Times at 1 (May 5, 1974).

250. *Camillus, supra* note 233, at 166.

create constitutional power notwithstanding their desire to create "constitutional doctrine." Apparently Benedict himself has no respect for mere "rote cataloguing" of such incidents. Does an historian engage in advocacy when he subjects such incidents to critical analysis, particularly when the Executive seeks to convert them into "constitutional doctrine?" It is not, therefore, enough to say, as does Benedict, that by 1880 there were two sets of precedents, that "each side could cite . . . constitutional texts." In fact, there were no constitutional texts. The task of the scholar is to sift the "two sets" and to decide which represents constitutional design. One must learn to distinguish between "precedent" and psuedo-precedent.

Benedict reproaches me for not attending more carefully to the political conflicts out of which these "precedents" arose; but in my view they had no bearing on the issue whether power was conferred on the Executive by the Constitution to withhold information. These conflicts neither added to nor detracted from what powers were granted by the Constitution, the subject of my study. Shifting political interests that influence given presidents to withhold information cannot affect the provisions of the Constitution, explicit or implicit. Benedict stresses that "Washington's decision to withhold from the House of Representatives his instructions to the Jay Treaty negotiators was part of the bitter conflict between his Federalists and the newly organizing Republicans over a broad range of issues of which foreign policy was the most important." That sheds no light on the question: what power to withhold did he have under the Constitution? Far more important is the ground Washington assigned for withholding from the House papers he had delivered to the Senate—not a claim of "discretion" to withhold but that the House had no "right" to the papers because it was not a partner in treaty making. In discussing such cases, parenthetically, Benedict needs to bear in mind that it is not given to the President to determine the limits of Congress' power; that task is reserved to the courts. In sum, the reason Washington assigned for withholding is also an historical *fact* and it illuminates the scope of the "constitutional doctrine" that Washington allegedly "began to create." A lawyer is not the less an historian because he considers one fact more important than another, for historians differ among themselves as to what are the relevant facts, as the Revisionist version of Reconstruction which "junks" that of predecessor historians, abundantly testifies.

A word prompted by Benedict's reference to the Grant and Cleveland claims that Congress can inquire only where it can legislate; and that where the President has independent power inquiry is barred. They

overlook the historic legislative power of "oversight," of inquiry into legislative conduct, a rubric of parliamentary inquiry recognized by Montesquieu,[251] by Justice Holmes,[252] and by the Supreme Court's reference in *Watkins v. United States*[253] to Congress' power to inquire into executive "corruption and inefficiency . . . ."[254] In a democracy it is perilous to hold that a President is unaccountable in any area of executive power, as Watergate taught afresh.

Finally, Benedict states that presidents rested on their oath to defend the Constitution and on their obligation to execute the laws, as if that gives the "precedents" constitutional footing. Can it be that one charged with execution of the laws may keep secret from the lawmakers how they are being executed? Certainly this was not the view of Parliament, nor of Montesquieu, the apostle of the separation of powers. So too, the "obligation to defend the Constitution" begs the question: what does the Constitution contemplate—executive secrecy or executive accountability? Was Richard Nixon justified in relying on his "oath" and "obligation" to withhold information from Congress and the Courts? These, I submit, are not merely proper but crucial questions for historians.

My demonstration that the "Legislative Power" embraced unfettered legislative inquiry into executive conduct and was in the contemplation of the Founders has generally been ignored or slighted by the academicians. Does my evidence stand up; are my inferences justifiable? That, I suggest, is what calls for further study and not the discredited presidential "precedents" which Professor Cox newly dismissed,[255] and which Benedict and Ellis would rehabilitate. If Benedict draws "little comfort" from seeking "to extract a general principle of constitutional law from historical precedent" it is because he has focussed on the psuedo-precedents to the neglect of parliamentary history and its reception by the Founders.

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251. *See* MONTESQUIEU, *supra* note 56, at 187, *quoted in* EXECUTIVE PRIVILEGE, *supra* note 5, at 3-4.

252. J. HURST, JUSTICE HOLMES ON LEGAL HISTORY 98 (1964). *See also* EXECUTIVE PRIVILEGE, *supra* note 5, at 4 n.14.

253. 354 U.S. 178 (1957). *See also* EXECUTIVE PRIVILEGE, *supra* note 5, at 42 n.159.

254. 354 U.S. at 187.

255. COX, *supra* note 246, *passim.*