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Book Reviews: Executive Privilege: A Constitutional Myth

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BOOK REVIEWS

EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH. By Raoul Berger.† Cambridge, Mass.: Harvard University Press. 1974. Pp. 430 $14.95. Reviewed by Professor Charles A. Rees.‡

"Executive privilege . . . is a myth."—RAOUL BERGER.

"The doctrine of executive privilege . . . is rooted in the Constitution, which vests 'the Executive Power' solely in the President . . . ."—RICHARD M. NIXON.

The Supreme Court of the United States recently held that the President has a qualified privilege for confidential communications.[1] When the constitutionally protected interests of another branch of government conflict with the privilege, however, a question is raised for judicial determination. That is, the courts have the duty in a proper case to define the scope of the privilege and to resolve the "competing interests in a manner that preserves the essential functions of each branch."[2] In the particular case before it, the Supreme Court concluded that the privilege was outweighed by a demonstrated need for evidence in a pending criminal prosecution. Thus, executive privilege may have to be qualified by *judicial* commands for information.

The subject of Raoul Berger's *Executive Privilege* is whether the privilege must yield to demands by *Congress* for information. That matter has never been determined by the Supreme Court. The usefulness of Berger's book may, in large part, be measured by the extent to which his conclusions about executive privilege vis-à-vis congressional inquiry are consistent with the Supreme Court's subsequent conclusions in *Nixon* about the privilege vis-a-vis court subpoena.

After examining the *Nixon* decision, this review will consider the relevance of the decision to the problem of resolving competing claims of Presidential privilege and congressional inquiry. Then, Berger's *Executive Privilege* will be analyzed and a tentative conclusion reached about how those competing claims are to be resolved. Finally, Berger and his other works will be viewed.

THE NIXON DECISION

In connection with the prosecution of the seven indicted "Watergate cover-up" defendants, the Special Prosecutor moved to subpoena the President for certain tapes and other material. The trial court, finding that the Special Prosecutor made a sufficient showing to justify a subpoena before trial, issued the subpoena. The President moved to

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1. United States v. Nixon, — U.S. —, 94 S.Ct. 3090 (1974).

2. *Id.* at 3107.

quash the subpoena on the grounds that: (1) the dispute, being intra-executive between the Special Prosecutor and the President, was not justiciable; (2) the materials were privileged; and (3) the judiciary was without authority to review the President's claim of privilege. The trial court denied the motion to quash and ordered production of the subpoenaed items.[3] The President appealed from the order to the Court of Appeals. Upon petition of both parties, the Supreme Court granted *certiorari* before judgement.

The Supreme Court affirmed the order of the trial court.[4] After disposing of preliminary issues, regarding its jurisdiction to hear an order which was not "final", the justiciability of an intra-executive dispute and whether the subpoena was unreasonable or oppressive, the Supreme Court considered the issue of whether the President had a privilege not to produce information relating to confidential communications subpoenaed in a pending criminal prosecution. First, the Supreme Court decided that (in the final analysis) it, not the President, had the constitutional duty "to say what the law is" with respect to the claim of privilege. Second, the Court found that there was a privilege for confidential presidential communications, necessary, as a practical matter, to the exercise of the President's enumerated constitutional powers and consistent with the doctrine of separation of powers. That privilege was held, however, to be qualified, not absolute, in view of the need for a workable government—specifically, the judiciary's constitutional duty to do justice in criminal prosecutions. Third, the Court identified the judicial system's needs for disclosure and held that, in the case before it, they outweighed presidential privilege. Those judicial (and public) needs include compulsory process to develop all relevant facts in a pending criminal prosecution and to vindicate the defendants' constitutional rights in a criminal trial to confrontation of opposing witnesses, compulsory process of witnesses in their favor and due process. In weighing privilege against disclosure, the Court concluded that the consequences of rejecting the privilege in occasional criminal prosecutions would have no significant harmful effect on the public's interest in having candid and objective presidential decision-making. On the other hand, allowance of the privilege would have a significantly harmful effect on the pending criminal prosecution by impairing the function of the judiciary and violating the constitutional rights of the defendants. Finally, the Court stated the appropriate protective measures to be taken by the trial court upon receipt of subpoenaed materials: examination *in camera* by the trial judge, isolation of admissible and relevant material for release to the Special Prosecutor, excision of material not meeting the tests of admissibility and relevance and return under seal to the President, and scrupulous protection of presidential confidentiality at each step.

In *Nixon*, the Supreme Court dealt only with that aspect of execu-

3. United States v. Mitchell, 377 F. Supp. 1326 (D.D.C. 1974).
4. United States v. Nixon, — U.S. —, 94 S.Ct. 3090 (1974).

tive privilege relating to confidential presidential communications.[5] The Court suggested, however, that in a case involving military, diplomatic or national security secrets, which relate to the President's express constitutional duties as Commander-in-Chief and (with the Senate) maker of treaties, the public's interest in confidentiality would be much weightier. Indeed, in such cases the President might even be able to demonstrate that there should be no *in camera* disclosure to the court, much less disclosure in a public trial.

THE PROBLEM

The Supreme Court in *Nixon* expressly reserved the question of whether the President had a privilege not to produce information relating to confidential communications demanded by *Congress*.[6] The problem with using *Nixon* as a precedent in such a situation was recognized by the Special Prosecutor in briefing his case:

> Because there is no legislative analogy to the historic judicial duty to determine all questions of law necessarily raised by a case or controversy, rejection of the claim of executive privilege in the present case does not necessarily suggest any answer to the distinct questions of the scope of the President's right to stand on a claim of executive privilege *vis-a-vis* the Congress or of the role, if any, of the courts in such a confrontation. History provides a great variety of opinions on the relative

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5. The opinion expressly limited itself to a claim of privilege in a pending criminal prosecution, not in civil litigation. However, it would appear that the same principles would apply in civil cases, that is (1) executive privilege would be qualified, not absolute, (2) the courts would have a role in resolving competing constitutional claims and (3) the interests in disclosure might outweigh the claim of privilege. Those conclusions seem justified by dictum in United States v. Reynolds, 345 U.S. 1 (1953), which is cited with approval by the Court in *Nixon*, and by precedents dealing with procedural due process in civil cases.

   In *Reynolds* a government claim of privilege for military secrets was sustained in a civil suit, when the private parties plaintiff failed to make a sufficient showing of need for the information sought by discovery. The Supreme Court reserved to the judiciary, however, the final determination of privilege in such cases.

   The interests of the judicial system and of private litigants in disclosure may be just as weighty in civil, as in criminal, cases. Certainly, the judiciary's constitutional duty to do justice is no less in one than in the other. Also, civil litigants have rights of due process which include the rights of confrontation of opposing witnesses and compulsory process. Goldberg v. Kelly, 397 U.S. 254 (1970) (*semble*). Even if the government is not involved as a party, the exertion of judicial power in civil cases is sufficient to invoke the due process rights of the private litigants. Shelley v. Kraemer, 334 U.S. 1 (1948), and Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

6. This question had earlier been resolved in favor of nondisclosure in the case of an inquiry by the Senate Select Committee on Presidential Campaign Activities, in view of the critical "need to safeguard pending criminal prosecutions from the possibly prejudicial effect of pretrial publicity." Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 523 (D.D.C. 1974). There, the court expressly reserved the question of whether congressional demands pursuant to an impeachment inquiry would have prevailed. *Id.*

> rights of the Executive and the Congress in such a situation . . . .[7]

The question of the value of the *Nixon* precedent in the context of a Congressional demand for information was specifically considered in the *Report on the Impeachment of Richard M. Nixon, President of the United States* by the Committee on the Judiciary of the House of Representatives.[8] The question was raised because the third Article of Impeachment accused Nixon of unlawfully failing to produce materials subpoenaed by the Committee. The *Report*, after noting the *Nixon* holding that separation of powers could not justify presidential withholding of information from a criminal prosecution, concluded:

> It is even clearer that the doctrine of separation of powers cannot justify the withholding of information from an impeachment inquiry. The very purpose of such an inquiry is to permit the legislative branch, acting on behalf of the people, to curb the excesses of another branch, in this instance the Executive.[9]

The *Report* reserved the question of the limits of legislative power in contexts other than impeachment.[10] In the view of one committeeman, Congressman McClory, the Supreme Court's conclusion, that an

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7. Brief for Appellee at 53 n. 38, United States v. Nixon, — U.S. —, 94 S.Ct. 3090 (1974).
8. 120 CONG. REC. 8967 (daily ed. Aug. 22, 1974).
9. *Id.* at 9026.
10. The *Report* unpersuasively concludes that judicial review would be inappropriate, where an impeachment inquiry's subpoena for Presidential information was met with a claim of privilege. *Id.* at 9026–27. This conclusion was based on the arguments that (1) article I, § 2 of the Constitution vests "the sole Power of Impeachment" in the House of Representatives; (2) the federal courts may lack subject matter jurisdiction to hear such a case; (3) the subject is a nonjusticiable "political question"; and (4) in considering the question, the courts would have to determine whether the subpoenaed material was relevant to an impeachment inquiry, a question which would require a ruling on the scope of constitutional grounds for impeachment which might conflict with the views of the House and Senate.

    The first, third and fourth arguments seem clearly contrary to the thrust of Powell v. McCormack, 395 U.S. 486 (1969), where the Supreme Court set aside the exclusion of a member by the House of Representatives (a function specifically entrusted by the Constitution to the House) for conduct not falling within the express qualifications for membership set by the Constitution. *See* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 103–21 (1973), and I. BRANT, IMPEACHMENT: TRIALS AND ERRORS 181–98 (1972); *contra*, C. BLACK, IMPEACHMENT: A HANDBOOK 53–63 (1974), and COMM. ON FED. LEGISLATION OF THE BAR ASS'N OF THE CITY OF NEW YORK, THE LAW OF PRESIDENTIAL IMPEACHMENT 36–43 (1974); *contra*, individual views of Berkovitch & Schwarz, *Id.*, at 52–57. The arguments also appear to conflict with the recent restatement by the *Nixon* court of the proposition that "it is emphatically the province and duty of the judicial department to say what the law is."

    With respect to the second argument, the report cites Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973), where statutory subject matter jurisdiction was held lacking in an action by the Senate "Watergate Committee" to enforce two subpoenas issued by it to the President. But, aside from the strictly limited original jurisdiction of the Supreme Court, all the subject matter jurisdiction of the federal courts is statutory. Article III of the Constitution provides at least two bases for a statute giving the federal courts subject matter jurisdiction to hear a

absolute executive privilege would make the government unworkable and would impair the role of the courts, applied with even stronger force in an impeachment proceeding. The Congressman withheld judgement on the question of whether national security or diplomatic secrecy would justify the privilege in an impeachment proceeding.[11]

In the minority view of Congressman Hutchinson, and certain other committeemen, the rationale of *Nixon* supported the existence of some measure of executive privilege in the context of an impeachment inquiry. In such an inquiry, the claim of executive privilege should not be followed automatically by impeachment, but by contempt proceedings in which the President would be permitted to show why his failure to comply was not contemptuous.[12]

In Congressman Froehlich's view, it followed from *Nixon* that the conflicting claims of executive privilege and congressional demands for information in an impeachment proceeding should be weighed, not by either of the two contending branches of government, but by the courts.[13]

Thus, the better views expressed in the *Report* support the application of the *Nixon* principles in a conflict between a general claim of executive privilege and a specific congressional demand for information in an impeachment inquiry: the privilege is qualified, not absolute; the judiciary may properly review any such conflict; and resolution of the competing interests may require disclosure of relevant information.

THE BOOK

Berger's *Executive Privilege* deals primarily with the President's withholding of information from Congress, not the courts. Berger does suggest, however, that the case for congressional inquiry is much stronger than the case for judicial inquiry, since it is within the province of the legislature, not the courts, to investigate the executive branch. Legislative inquiry into executive conduct is based on the traditional legislative concerns of inquiry as a prelude to impeachment, oversight of the conduct of war, accounting for expenditure of public moneys, establishing a basis for legislation and ensuring the proper execution of the laws.

Neither legislative inquiry nor executive privilege is expressly mentioned in the Constitution. Berger concludes, however, that legislative

case involving an impeachment inquiry's subpoena which is met with a claim of privilege: the judicial power of the United States extends to cases "arising under this Constitution" and to "Controversies to which the United States shall be a Party". Congress has recently enacted legislation authorizing the "Watergate Committee" to enforce any subpoena issued to an official in the executive branch. Pub. L. No. 93-190, 87 Stat. 736 (Dec. 18, 1973). That such lesislation might be unconstitutional as impinging upon the impeachment power vested solely in the House is a variation of the first argument considered above.

11. 120 CONG. REC. *supra*, at 9057.
12. *Id.* at 9100.
13. *Id.* at 9107-08.

inquiry, but not executive privilege, is *implicit* in the Constitution. His conclusion relies heavily on an extensive study of British parliamentary practice prior to the Constitutional Convention in 1787.[14] The case for legislative inquiry is that: (1) at the time of the Convention, it was an historical attribute of the power to legislate; (2) it was understood and accepted by the Framers of the Constitution; (3) up to the time of the Convention, it had traditionally accompanied the express power of the legislature to impeach; and (4) it is the reciprocal of the President's express duty under article II, § 3 of the Constitution to furnish "information of the State of the Union."

On the other hand, Berger concludes that executive privilege was not supported by pre-Convention precedent, nor mentioned in the deliberations of the Framers, nor understood by them to be implied in the separation of powers. Montesquieu himself acknowledged that the legislature has the right to examine whether its laws have been executed.[15] To rely on the separation of powers to support executive privilege is to assume the conclusion. It must first be established whether there is a pre-existing power protected by the separation of powers.

Berger rejects subsequent custom and usage as a constitutional basis for the privilege[16] on the ground that the President may not unilaterally expand his own powers, especially when that expansion would impede the established legislative power of inquiry. In fact, Congress, far from acquiescing in presidential withholding of information, has usually pressed its inquiry.

Even assuming that custom and usage after 1789 could establish executive privilege, Berger examines the precedents which various Presidents have claimed constitute custom and usage. Those precedents include: the issuance of a subpoena duces tecum to President Jefferson by Chief Justice Marshall, sitting as a circuit judge, in the trial of Aaron Burr; and Attorney General Richard G. Kleindienst's claim that executive privilege might logically be extended by the President to apply to every one of the 2,500,000 employees of the executive branch. The

14. This reliance has been criticized on the ground that precedents from the British system, where ministers are directly accountable to Parliament, are not fully applicable in our system, where there are three individual but equal branches. Pollak, *Book Review*, Washington Post, June 30, 1974 (Book World), at 1. *See also* W. BAGEHOT, THE ENGLISH CONSTITUTION 220–26 (Kegan Paul ed. 1925). Bagehot, in comparing the English and American Constitutions, concluded that the ultimate authority in England was the House of Commons, while in America there were many sovereignties: branches of the federal government, state governments and people.

Pollak's criticism and Berger's use of sources, suggest the more general problem of selecting "legislative history" for interpreting the Constitution. At one time or another, Berger refers to English practice, colonial practice, early state constitutions and practice, the Articles of Confederation, records of the Convention, *The Federalist*, proceedings of the state ratifying conventions, contemporaneous construction by the First Congress and President George Washington, and subsequent usage.

15. 1 C. DE S. MONTESQUIEU, THE SPIRIT OF THE LAWS 187 (Philadelphia, 1802).

16. For a contrary view, based on Supreme Court authority, of the role of custom and usage, *see* Nixon v. Sirica, 487 F.2d 700, 730–31 & n.5 (D.C. Cir. 1973) (MacKinnon, J., concurring and dissenting).

author concludes that the precedents are self-serving misinterpretations of the historical record and contrary to the American tradition of openness in government.

Berger also examines, and rejects, the practical arguments for executive privilege. These arguments, and the reasons for their rejection, are: (1) Congress has control over appropriations and legislation, and has power to impeach, by which it may curb excessive claims of privilege—these remedies being too drastic; (2) Congress may leak information it receives from the executive branch—such leaks being no more commonplace than executive leaks and, when necessity arises, may be stopped by limiting congressional access; (3) executive files containing derogatory information should remain private—the executive branch having misused such files and overstepped its investigatory authority, because Congress has not exercised oversight; and (4) candid interchange of opinions should be preserved—the risks of disclosing such opinions being less than the risks of abuse, for example, Vietnam and Watergate.

In applying the *Nixon* precedent to a conflict between executive privilege and congressional inquiry in order to determine whether there is a privilege in the case of such an inquiry, Berger's work is not particularly useful. While *Nixon* would appear to support a recognition of the privilege in the congressional context, *Executive Privilege*, written prior to *Nixon*, rejects the privilege outright. However, to the extent there is some justification for the privilege, Berger would limit it to confidential communications between the President and his immediate advisers (excluding communications relating to illegal acts) and to disclosure of certain subject matters which would actually injure the public interest.

In using *Nixon* as a precedent in the congressional context, Berger's analysis is helpful in at least two respects. First, he concludes that the conflicting claims of executive privilege and congressional inquiry may appropriately be resolved by judicial review. That is, a "boundary dispute" as to separation of powers should not ultimately be determined by either of the disputants, but by the courts. The author considers, and rejects, the limitations of the "case or controversy," standing and political question doctrines.

Second, Berger's analysis is useful in suggesting that congressional inquiry, pursuant to functions other than impeachment, may be just as weighty as an impeachment inquiry, and that all are more weighty than judicial inquiries in pending litigation. (The House Committee on the Judiciary likewise considered a congressional impeachment inquiry, involving the maintenance of a "workable government," to be weightier than a criminal prosecution, which was involved in *Nixon*.) Consequently, the author makes no attempt to differentiate among the article I functions of Congress which might conflict with executive privilege. Indeed, he sees congressional inquiry as a whole, deriving initially from the power of impeachment.

Based on *Nixon* and Berger's *Executive Privilege*, it may tentatively

be concluded that a resolution, "in a manner that preserves the essential functions of each branch," of conflicting claims of executive privilege and congressional inquiry will involve the following considerations: (1) the President has (a) a qualified privilege for confidential communications "necessary and proper" to the exercise of his enumerated constitutional powers and (b) a somewhat broader specialized privilege where military, diplomatic or national security secrets are involved; (2) on a showing of need, pursuant to the legislative function, *McGrain v. Daugherty*,[17] and a showing of relevance, *Watkins v. United States*,[18] congressional inquiry may be expected ordinarily to outweigh the former, but not necessarily the latter, privilege; (3) the courts may properly resolve any dispute; (4) the role of the courts will be primarily (a) to determine which kind of privilege is involved, what communications are within the privilege and who may assert the privilege, (b) to measure legislative need and relevance, (c) to weigh conflicting interests, particularly where the specialized privilege requires consideration on a case-by-case basis, and (d) to determine what protective measures need to be taken by Congress to protect presidential confidentiality or the military, diplomatic or national security secrets.

THE AUTHOR

According to a biography furnished by his publisher, Berger was born in Russia. After coming to this country as a child, he studied to be a concert violinist. At age 26 he abandoned the concert hall for a legal career, studying at the University of Cincinnati (A.B. 1932), Northwestern University (J.D. 1935) and Harvard Law School (LL.M. 1938). He has filled legal positions with the Securities and Exchange Commission, the Department of Justice and the Alien Property Custodian, later engaging in private practice in Washington, D.C. and Chicago. In 1965 Berger retired to devote himself to a study of major legal problems. Before becoming Charles Warren Senior Fellow in American Legal History at Harvard Law School, he was Regents Professor of Law at the University of California at Berkeley.

Mr. Berger's publications are many, including *Congress v. The Supreme Court* (1969) and *Impeachment: The Constitutional Problems* (1973). Much of *Executive Privilege* is based on three of his law review articles: *Executive Privilege v. Congressional Inquiry*;[19] *The Presidential Monopoly of Foreign Relations*;[20] and *War-Making by the President*.[21] That the first and basic article was written between 1963 and 1965 rebuts any claim that Berger was motivated by politics, rather

17. 273 U.S. 135 (1927).
18. 354 U.S. 178 (1957).
19. 12 U.C.L.A. L. Rev. 1044, 1288 (1965).
20. 71 Mich. L. Rev. 1 (1972).
21. 121 U. Pa. L. Rev. 29 (1972).

than scholarship, on his writing of *Executive Privilege*. In addition to being a revision of those articles, *Executive Privilege* includes a chapter, "The Cost of Secrecy," based on the *Pentagon Papers* and later sources, and an "Epilogue," relating to last year's "Nixon Tapes" decision, *Nixon v. Sirica*.[22]

Berger has also written many articles on separation of powers and administrative law subjects.

22. 487 F.2d 700 (D.C. Cir. 1973)