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A Delicate Balance

EXECUTIVE PRIVILEGE: A Constitutional Myth. By Raoul Berger. Harvard. 430 pp. $14.95

By LOUIS POLLAK

IN EARLY 1973—at the commencement of the second Nixon term, when the events we now know as "Watergate" were still covered up—Raoul Berger published his major study of *Impeachment: The Constitutional Problems.* And as that book came from the press, Berger was already far advanced on the important book he has just published—*Executive Privilege: A Constitutional Myth.* It is an intriguing footnote to intellectual history that these two books, conceived in the timelessness of scholarly inquiry, had timeliness thrust upon them. Because they are timely, they were bound to be—and indeed already are—hugely influential. And—as is not always the fate of topical works—they will, I think, endure.

Both books are studies in the separation of powers. *Impeachment* centers on the history, content and mode of exercise of the power of Congress to inquire into the "treason, bribery, or other high crimes and misdemeanors" of high government officials, including the president. Berger's major contribution, based on close scrutiny of parliamentary precedents antedating the Constitution, is to dispel the notion, beloved of President Nixon's lawyers, that the venerable English phrase—"high crimes and misdemeanors"—is confined to indictable offenses. More problematical is Berger's view—searchingly challenged by Charles L. Black Jr. in his forthcoming *Impeachment: A Handbook*—that a Senate judgment of conviction is subject to judicial review.

Executive Privilege examines the asserted authority of the president and those who act in his name, to withhold information sought by Congress in aid of its various constitutional powers, especially impeachment. As in *Impeachment,* Berger begins by drawing heavily on pre-constitutional parliamentary precedents to show that ministers of the crown were not immune from legislative demands for information, especially those arising out of parliamentary concern that ministers had abused their official authority. Berger then undertakes to show that our own history has, in the main, conformed to this understanding. And in the course of this latter demonstration Berger heaps coals of fire on the government lawyers who, chiefly from President Eisenhower's administration onwards, have sought to derive from our constitutional history documentation of presidential authority to determine unilaterally what information the executive branch may conceal from legislative scrutiny.

I think Berger succeeds in showing that the government-lawyer history so regularly trotted out in the last two decades is unreliable. But Berger's assured contrary assertion that executive privilege is a constitutional myth seems to me not wholly satisfactory. The parliamentary precedents seem to me less compelling in this context than in the impeachment context. In the latter context, it is fair to suppose that the framers meant to draw on parliamentary usage when they explicitly incorporated into the Constitution words to which Parliament had given operative content through many decades. But it is less than self-evident that in establishing a government which, unlike the British model, presupposed three separate-but-equal branches, the framers meant Congress to have the full range of supervisory authority Parliament had over ministers directly accountable to Parliament. To describe Congress—as Berger does—as the president's "partner . . . in the conduct of our government" is appropriate. To enlarge the term — Berger does—to "senior partner," adds connotations more congenial to Westminster than Washington.

To enter these caveats is not to say that President Nixon is right in arguing, as he did in his letter of June 9, 1974, to Chairman Rodino, "that the executive must remain the final arbiter of demands on its confidentiality." In my judgment Congress must have as *(Continued on page 4)*

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much information as it requires to fulfill its constitutional responsibilities. And generally speaking it would seem that the need for detailed information about particular episodes of alleged official wrongdoing is greater when Congress is exercising its impeachment authority than when Congress is investigating in aid of legislation (wherefore, the Rodino committee's demands for disclosure seem weightier than the Ervin committee's). But standing against the duty of Congress to fulfill its constitutional responsibilities is the duty of the executive branch to fulfill its constitutional responsibilities. And abstract rhetoric about the importance of legislative oversight of executive conduct cannot substitute for an exercise of judgment as to which constitutional claim is weightier with respect to a particular congressional demand for, and a particular presidential refusal of, particular information. It is unsatisfactory to have such a judgment made unilaterally by the president. But it is also unsatisfactory to have that judgment made unilaterally by the House or Senate or both.

The decisive question—what accommodation will permit each of the contending branches to continue to carry out its assigned constitutional responsibilities?—is not an easy one. But it is the question which must be posed—as Berger convincingly showed in his first book, *Congress vs. The Supreme Court*, a major study of congressional authority to curtail the Supreme Court's appellate jurisdiction. If this is the right question, what arbiter is best equipped to fashion a sensible answer?

One of the major strengths of the American constitutional system is that we have an arbiter experienced in the resolution of disputes between any two of the three equal branches. That arbiter is the department of government which Hamilton denominated (with a recent second from Alexander Bickel) "the least dangerous" branch—the judiciary. To press that arbiter into service here would seem to make good sense. Yet it has been suggested by some that, if Congress were by law to seek to confer authority on the federal courts to entertain applications for enforcement of the House Judiciary Committee's subpoenas directed at the executive branch in aid of the impeachment investigation, the jurisdiction sought to be conferred would be unconstitutional. Such a dispute between the legislative and executive branches—so the argument runs—would be a "political question" arising out of the "political" impeachment process, not a "case" or "controversy" of the kind federal courts have constitutional power to resolve. One of the most valuable parts of *Executive Privilege* is the chapter in which Berger argues that constitutional doubts of this sort are insubstantial. I concur in Berger's assessment. And I would add that House Judiciary Committee submission to a federal court of a claim that particular data are relevant to a potential article of impeachment need not be read as a concession that an ultimate Senate finding of presidential guilt would be subject to judicial review. A federal court could make a preliminary determination whether requested information reasonably relates to the proof or disproof of a particular charge against the president and could make a further preliminary determination that the charge does or does not lie within the large universe of what the House and Senate might reasonably regard as impeachable offenses, without asserting subsequent authority to decide judicially whether the Senate's verdict of guilt rests on evidence satisfactory to a court of an offense judicially defined as falling within the ambit of the impeachment clause.

So I would hope that if President Nixon persists in defying the House Judiciary Committee, that committee would, before yielding to its natural impulse to convert defiance into an article of impeachment, seek legislation authorizing the committee to go to the federal district court in Washington for orders enforcing its subpoenas. For the president to veto such legislation might be fruitless, since Congress could override it, but would in any event be perilous. Such a veto would seem to substantiate, what I surmise is the fact, that the president is far more fearful of disobeying the courts than of disobeying Congress. If the president, wrapped in the grandeur of his office, defies a Congress which has not enlisted the support of the judiciary, the president may succeed in playing the winning hand of Andrew Johnson. But if the president defies a final court order, the calamities of the "Saturday Night Massacre" will descend on him again magnified one-hundredfold.

The president may, of course, confront a final court order within a matter of weeks, if Mr. Jaworski prevails in the Supreme Court. If the president's invocation of executive privilege in that case is unavailing against an adversary who is the president's subordinate in the executive branch, the president's legal position vis-a-vis the House Judiciary Committee is likely to be seriously weakened. But the supposed converse need not follow: A victory for the president, as against one of his own subordinates, may do little to strengthen the president's claim to immunity from the process of the legislative branch. The exact relevance of the Jaworski-Nixon case to the expectable confrontation between the president and the House Judiciary Committee will of course depend not alone on the Supreme Court's judgment but also on the rationale relied on in the court's opinion. But, without waiting to learn whether Mr. Jaworski will win or lose and on what grounds, the House Judiciary Committee would be well advised to ask now for the legislation which would entitle the committee to seek judicial validation of the authority which — with the support of Raoul Berger —it properly asserts. □