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This Fundamentalist on the Constitution Would Like to 'Storm the White House'

By ISRAEL SHENKER
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CONCORD, Mass.—Raoul Berger thinks of himself as a Dutch housemaid sweeping out dark corners of the Constitution. Impeachment, for example, was a dark corner until Mr. Berger wrote the first comprehensive book about it. Now the dust is flying around executive privilege.

Every few months he lays his broom aside long enough to testify before a Congressional committee, transforming himself from Dutch housemaid into Dutch uncle.

In recent years, with an office at Harvard and the title of Charles Warren Senior Fellow, he is writing and testifying full-time and has won recognition as a leading authority on constitutional relations between Congress and the President.

Though mild of mien, he speaks pungently, unintimidated by Senators, unfazed by questions, unwilling to trim his beliefs to conventional wisdom.

Testifying on executive privilege last April, he told the Senators: "You don't need more hearings, you need gumption... You'll be treated [like office boys] until you stand up on your hind legs and kick them in the slats."

'I'd Storm the White House'

There was talk of subpoenaing Presidential people and paper, and under English parliamentary law, Mr. Berger noted, anybody refusing a House of Commons subpoena would be thrown into the Tower of London.

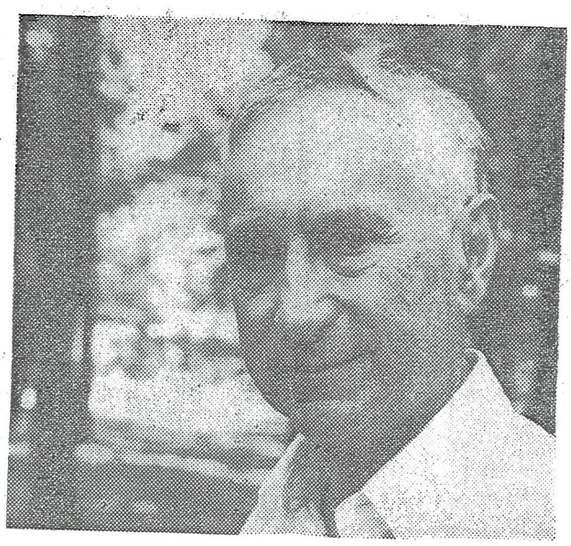
"Hear that, Senator Ervin?" Senator Edmund Muskie asked.

Mr. Berger went on: "If I had six Senator Ervins, old as I am, I'd storm the White House."

Senator Sam J. Ervin Jr. is 76, and Mr. Berger is four years younger, and it would be difficult to determine who cherishes the Constitution more.

"I'm a fundamentalist," said Mr. Berger in an interview at his home here. "I believe with Jefferson: Bind them down with the chains of the Constitution. The alternative is a Constitution writ on water, a Constitution that allows a Johnson or a Nixon to embroil us in war. As between a Constitution framed by a group of men of the highest wisdom, and a White House camarilla, I'll stand with the Constitution."

At an age when most men are standing down, he has whirled into a new career as public scold and prying scholar. He works in his law school office or at home, where a plaque at the front door gives his latest incarnation a motto: "La Vita Nuova."



The New York Times

Raoul Berger, Charles Warren Senior Fellow at Harvard

In Search of Noble Goals

The old life began in Russia, where he lived till he came to America, at age 4. "My father impressed on us that there was a chance to live like a complete human being, to have noble goals," he said.

He had been named Raoul after a character in Meyerbeer's opera, "The Huguenots," and he became a concert violinist.

"America was not a musical country, and I realized I was selling buggy whips in the age of the automobile," he said. "I had to get out of the bear trap, even at the cost of gnawing a leg off."

At age 26 he enrolled in the University of Cincinnati, because he could earn his living playing violin in Cincinnati's Symphony Orchestra.

Though married, he quit his job after graduation and decided to study medicine. When he saw his first cadaver he realized his future was not medicine but law.

On graduation from law school he was 34, oldest in his class. When he sought work as a law teacher he discovered that openings for Jews were limited.

"The treasure of a nation is talent, and what a pity it is to bar talent from flowering," he said. "What a wealth of Nobel Prize winners we acquired by taking people out of cloaks-and-suits and admitting them to universities."

After two years he was given a fellowship to the Harvard law school, and he sold a violin to keep himself alive while he studied. But he did not yet understand his thirst for scholarship, and he wanted to join a law firm.

Sells Violin to Live

Government was more accessible, and he spent six years there, winding up as general counsel of the Alien Property Custodian. "You can't sit like the 7th son of a 7th son in a brown study," Mr. Berger said. "I learned, like a donkey, where to put my foot. My life as a musician gave me courage to decide — sometimes against the advice of subordinates. 'I'm sticking my neck out,' I told them. 'Let me hang for my sins and not yours.'"

He went into private practice, and made an excellent living. When his wife died in 1958, he gave up his law practice and left for Europe. In Vienna, after a layoff of 30 years, he even gave a recital. "I couldn't meet the standards of my own ear," he said afterward. "I could feel myself slipping, so I sold the Strad and gave up playing."

The dean of the law school at Berkeley offered him a teaching post, and finally, at age 61, Mr. Berger could fulfill his early ambition.

He left Berkeley, in 1965, married again, and moved from Manhattan to a delightful home where the new life's refrain is sung daily by birds instead of raucous sirens.

Taking life's delights as an invitation to labor, he plunged into a study of judicial review. "It's not that I think judges are necessarily wiser than administrators," he said. "But people who work in a field begin to think they know better than anyone else. They become Big Brothers—telling the public what's best for it, as Nixon did when he said the people are like sheep and need a shepherd."

First Book Published

In 1969 Harvard University Press published the study as Mr. Berger's first book, "Congress v. The Supreme Court."

Writing, like narcotics, is habit-forming, and the new author set to work on a second book, beginning with a simple question: Isn't there an easier way to get rid of corrupt judges than impeachment?

He puzzled over the Constitution's provision that impeachment was for "high crimes and misdemeanors." Did this mean "high crimes and high misdemeanors"?

"I'm an earthy fellow, so I said let's find out," Mr. Berger said.

His research took him back to the impeachment of the Earl of Suffolk in 1386, and he found that the ordinary misdemeanor of criminal law was nowhere mentioned until the 16th century, and it shed no light on high misdemeanors. The framers of the Constitution regarded "high crimes and misdemeanors" as having a limited and technical content, Mr. Berger decided, and did not mean to leave the President at the pleasure of the Senate.

If, after conviction, the President maintains that his conduct did not constitute a high crime and misdemeanor, Mr. Berger would favor the Supreme Court's determining whether the acts indeed fell within the technical limits intended by the Constitution.

All this was outlined in Mr. Berger's second book, "Impeachment—The Constitutional Problem," published last February, fortuitously in time for unexpected relevance.

Takes Up New Issues

Two good things led to another, so Mr. Berger began working again on executive privilege and separation of powers, on which he had in 1965 written a long monograph. "Separation of powers does not confer a power, it protects a power elsewhere granted," he said. "So the question is, did the Constitution give Congress the power to investigate, and if so, did it authorize the President to withhold information?

"The Supreme Court looked to Parliamentary practice and found investigation an inherent legislative attribute which the framers intended both houses to have. Parliamentary history shows the most comprehensive, untrammeled power to inquire across the board, going all the way back to 1621, and no evidence that any minister objected to the scope of inquiry. Nor is there any minister objected to the scope of inquiry. Nor is there any evidence in the records of the Constitutional Conventions that the Founders intended to curb in any way the power of 'the grand inquest of the nation.'

"You can't bootstrap and create power by saying: 'I have it.' President Nixon cannot root his claim in the Constitution when he refuses to turn papers or tapes over to Congress. Whether it's the Cambodia issue or the impoundment issue, Congress has the duty to insist on powers delegated to it by the Constitution. The Court, if asked by Congress, should decide. If the Court refuses to decide, the Congress is empowered to impeach the President for subversion, of the Constitution or action in contradiction of Law."