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Book Review: Executive Privilege: A Constitutional Myth

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BOOK REVIEWS

*Reviewed by Bernard Robert Adams**

EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH, by Raoul Berger, Cambridge, Harvard University Press, 1974. 430 pp. $14.95.

At 10:30 Sunday morning, September 8, 1974, President Gerald R. Ford issued to Richard M. Nixon a "full, free, and absolute pardon" for all acts which may be crimes committed during Mr. Nixon's term of office. With this act, the "Watergate era," as least as far as the conduct of the President may have been concerned, is officially at an end. With this decision, any further investigation as to the culpability of Richard M. Nixon is officially at a close; also, preempted are questions of legal significance which were prompted by the Watergate break in and subsequent acts of coverup. One of those questions relates to the authority of the President of the United States to withhold documents, in whatever shape or form, from the Congress and the courts.

While the Supreme Court in *United States v. Nixon*[1] did decide that President Nixon had to deliver certain tapes and documents to Judge Sirica for an *in camera* inspection, it necessarily left many questions about executive privilege unanswered by confining itself to the narrow facts of the case. Thus, the Supreme Court's opinion applies predominantly to those situations where the documents bear evidence dealing with criminal conduct presently under investigation.[2] The larger debate on the full contours of the executive privilege doctrine is still to be ultimately and finally resolved.

While the Nixon case in its largest form presented an historically dramatic confrontation between the Executive and Legislative Departments and raised the spectre of confrontation between a President and the courts, it did not represent a conclusion to the debate over the extent of the public's right of access to governmental information. This debate and refinement will not be confined to the conduct of relations between the office of the President and other branches of government; all citizens have an interest in the availability of information upon which government action is based.

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[1] ____ U.S. ____, 94 S. Ct. 3090 (1974).

[2] ____ U.S. ____, 94 S. Ct. 3090, 3105, 3108, 3109 (1974).

Often, a specific citizen, be he a government official or a private citizen, has need for a bit of data or a fact which was the basis of a decision made by a department of government.[3] If the governmental agency which made the decision is part of the executive branch, it is possible for the department head through the use of Presidential power to attempt to shield that data from public disclosure.[4] It is the potential conflict between an agency's perceived need for confidentiality and the individual's right to know which forms the heart of the problem of executive privilege.

On a more institutional level, the ability to control information is the ability to shape public opinion and to control the processes of government. Our government has been sensitive to abuses of office, and its tripartite form attempts to allocate, balance, and divide power in such way that government shall always be fairly and justly administered. However, in order for the government process to work, those participants in governmental action who would attempt to act in a wise and fair fashion need information upon which to base their decisions. It is the ability, therefore, to gather, to assess and to interpret this data which is perhaps the key to power in the United States. In addition to information being the basis of decision making, full access to facts is the basis for governmental control. It is only if each branch of government can understand what the others are doing that it is possible for them to exercise their constitutional functions of coordination, supervision and review. It is here, therefore, that the confines of the debate about executive privilege become crucial. If it is possible for the occupant of the Oval Office to control the flow of information about his conduct and the conduct of those people who are working directly under him, it is also possible for that occupant to shield from the public view the true direction of the course of the nation. It is here that one realizes the importance of full and free disclosure.

Congress, in passing the Freedom of Information Act,[5] attempted to make full and free disclosure of facts and data possessed by the various branches of the executive department the rule. However, Congress fully realized that there might be circumstances where disclosure would not benefit the country and where it might do positive harm either to individuals or to the nation as a whole. In this context,

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[3] This need can be articulated by a litigant during discovery under FED. R. CIV. P. 26, *cf. U.S. v. Reynolds*, 345 U.S. 1 (1953), or by a request under the "Freedom of Information Act," 5 U.S.C. § 552 (1970); *cf.* Epstein v. Resor, 296 F. Supp. 214 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

[4] This withholding could be supported by a general claim of executive privilege or by a more specific reference to one of the nine possible exceptions to disclosure in the Freedom of Information Act, 5 U.S.C. § 552 (b) (1) (9) (1970).

[5] 5 U.S.C. § 552 (1970). While the general purpose of the Act is full access to information, the statute itself contains grounds that would justify secrecy. See note 4, *supra*.

the idea of an executive privilege comes to the fore. Executive privilege is designed to protect state secrets or items bearing on the national defense and security from unwarranted disclosure.[6] As Mr. Justice Burger pointed out in the *Nixon* case, what is important in the context of executive privilege is a balancing; a balancing of the need to know; the importance of knowledge, when compared to the need of the nation as a whole; and the need for self-preservation and security.[7]

On a more routine level, privilege is a topic that lawyers deal with in a great many situations. The attorney-client privilege is one for which lawyers should have a great sense of understanding. The need to encourage a client to speak openly and freely so that the lawyer can gather the facts is perhaps at the root of this privilege of protecting a client's disclosure to his counsel. With this in mind, it should not be hard to realize that many of the same determinants behind the ordinary attorney-client evidentiary privileges can be expanded and made more important with respect to the idea of executive privilege. Not only are we concerned with preserving the security of the country, but we are concerned with strengthening the processes by which decisions are made. It is important, if not crucial, for the President to be able to know that his advisors will speak openly and candidly without fear of retribution for their opinions if their judgments turn out to be ill considered in the course of debate. It is important for us as a people to know that those men to whom we have given power will not limit the free exchange of ideas among themselves out of a concern for having statements attributed to them in public that they would be much happier to leave as private statements. Yet, given all of this, it is still important for us as a people that we not overly shield, overly insulate, and overly protect those very same men we want to encourage to debate. It is with this sense of balance, that the topic of executive privilege must be approached.

In his book *Executive Privilege: A Constitutional Myth,* Raoul Berger traces the origins and development of the doctrine of executive privilege. In addition, Mr. Berger outlines those rationales which would support the withholding of information. However, Mr. Berger, in scholarly fashion, completely refutes the justifications for a broad holding of executive privilege and attempts to sketch in a logical and forceful manner those reasons that militate in favor of the narrowest possible reading of executive privilege as an abstract proposition. It is his view that if executive privilege is to be invoked, it is for the courts, on a case by case basis, to do that which must be done: balance the interests of the executive against the need for information in

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[6] A full definition of the concept is provided by Berger as . . . "the President's claim of constitutional authority to withhold information from Congress . . ." and the "judicial branch." BERGER EXECUTIVE PRIVILEGE, p. 1 *supra* and notes 1-3 *supra.*

[7] ____ U.S. ____, 94 S. Ct. 3090, 3107, 3111 (1974).

society. In support of his case, Mr. Berger reveals as slim reeds those historical "precedents" which have been invoked consistently by the defenders of executive privilege. Each refutation is thoroughly researched and documented. Mr. Berger's technique is to develop each rationalization for executive privilege and then strip away its legal and historical justifications. The reader is left with the defender's feeble skeleton of policy arguments, and, thanks to Mr. Berger, well prepared to evaluate them.

If the reader were to attempt to characterize Raoul Berger's *Executive Privilege,* the words thorough, comprehensive, and persuasive would initially be applied. However, some other more unfortunate modifiers also could be appended to the list. The book is dense. Reading *Executive Privilege* is an exhausting experience. The book lacks momentum. One finishes it with a feeling of agreement with Mr. Berger, but unable to reconstruct the argument. In addition, the book appears to suffer from one fault that did not beset Mr. Berger's earlier work on impeachment.[8] While *Impeachment* was written over a period of years and its publication happened to coincide with national events, *Executive Privilege* seems to have been rushed to press because of the timeliness of the topic and the success of its predecessor. The book draws most heavily on a series of older law review articles written by Mr. Berger. As a result, parts of the book do not fit together as well as they should.

On final analysis, however, Raoul Berger's work is an excellent legal source book for the interested, albeit committed, reader. *Executive Privilege* provides the only exhaustive study of a very important topic, not just in the confines of our most recent national tragedy, but in the longer term perspective. The discussion goes beyond the problems of a particular President to deal with the problems of American society. It is in this sense that Mr. Berger's book will achieve its importance; for with its discussion of the place of executive privilege in our national decision making, Raoul Berger's book fulfills its function. In the years to come, the final decisions will be made by courts as to the parameters of the doctrine of executive privilege. In all likelihood, these decisions will be made with continuing reference to *Executive Privilege: A Constitutional Myth.*

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[8] R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1974).

*Reviewed by Daniel M. Migliore**

JOHN MARSHALL: A LIFE IN LAW, by Leonard Baker, New York, Macmillan Publishing Co., Inc., 1974. 770 pp. $17.95.

Amidst the turbulance and passion of the American Revolution, few men are as distinctive as John Marshall. Whether exhorting the minutemen, winning glowing plaudits from fellow lawyers, ascending to eminence as a diplomat, or preserving the institutional power of the Supreme Court as Chief Justice, John Marshall's life glitters richly with compassion and integrity.

Leonard Baker's biography of Marshall is a solid work, frequently compelling thoughtful considerations of the vast implications that Marshall's diverse career had on that society he served with such salience. Baker's work, portioned soldier, lawyer, diplomat, and judge, illuminates those cultural and professional values to which zealous loyalists pledged their allegiance. The portrayal of Marshall's continuity of ideologic commitment, often out of cadence with popular persuasions, puts the frustration, dedication, and conflict of the era into sharp focus.

Marshall, the son of an industrious and successful landowner, was a precocious child and a voracious student. Equipped with formidable intelligence and a disciplined temper, Marshall, at 19, served as a commander in the military. During the early years of the revolution, Marshall fought in numerous battles of noted historical moment. These encounters served to reinforce his well learned respect for property and enlighten his attitude toward slavery. Marshall's affection for the military continued after the signing of the Declaration of Independence. His prowess as a leader and close relationship with George Washington provided Marshall with access to many of the army's crowned jewels. He was recognized through decoration and towed into Washington's command group, a courtship later to bear a wealth of fruit for John Marshall. After being discharged at the age of twenty-four, his high regard for economic security and interest in fashioning a "just system of law" persuaded him to pursue a formal education. He enrolled in the College of William and Mary.

Marshall was a popular and successful student. Although distractingly enamoured of one Polly from Yorktown, whom he later married, he achieved membership in Phi Beta Kappa. Marshall's indulgence in formal education proved quite modest. One year after entering college he successfully petitioned Governor Thomas Jefferson

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for a license to practice law. That Marshall's legal career began with the imprimatur of Jefferson is not without irony considering the enmity that later developed between them.

Marshall's reputation as a skilled Richmond lawyer rose meteorically. Distinguishably casual in attire and style, he won praise from professional colleagues, clients, and community acquaintances. His success in court and popularity in Richmond converged in 1782 with his election to the General Assembly. Public service, however, soon proved his private torment. Beliefs impressed upon him during childhood were often out of rhythm with prevailing political attitudes. The most thorny and perplexing issue to Marshall at that time was the Jeffersonian campaign for religious freedom in Virginia. Although deeply concerned about the preservation of individual liberty, Marshall was unable to abandon his commitment to the established church in order to support the mandates of religious freedom. Marshall did not seek re-election but spent the next few years practicing law, establishing his family, and pondering the problems that had beset the United States after the revolution.

Increased social ferment developed under the Articles of Confederation and the principles of voluntarism. The result of this agitation was the Constitutional Convention of 1787. Marshall, instinctively gravitating toward federalism, publicly urged the strengthening of the central government. In the months that followed, Marshall, through debate and address, illuminated his allegiance to a federalist government. After his efforts were rewarded with Virginia's ratification of the Constitution, he returned to his prospering law practice in Richmond. This serenity and comfort was not long to be enjoyed by John Marshall. For, as Baker posits in one of his most pithy plums, "America does not permit its citizens such luxuries." Baker adjusts historical context and styles Marshall's renewed sense of responsibility as a commitment to "refresh the tree of liberty." Although with considerably less drama, Marshall again became involved with problems of national import.

By 1973 the excesses of the French Revolution had begun to rend the fabric of the American society. President Washington, favoring American neutrality, charged Marshall with the responsibility of selling the administration's stance and parrying Jeffersonian insistence on intervention. The resulting Jay Treaty, coined a sellout of American dignity, catapulted Marshall from a frontrunning Virginian federalist to a leading federalist in the nation. With difficulties in France exacerbating, President Adams sought a more politically acceptable mode of negotiations. He named three persons as envoys and members plenipotentiary to France. Unlike the other two appointments, Marshall had not demonstrated proclivities toward public service. However, his deep interest in the French crises persuaded him to accept the office.

Although Marshall lacked diplomatic acuity, his craft as an advocate and mastery of sound judgment quickly gained him respect. Marshall's talents were not long left untested. Recently defrocked Talleyrand, then minister of France, met Marshall's aversion to conciliation with noted sophistication. Talleyrand sought to weaken American standing and bloat French coffers while staging clandestine meetings with each American. Marshall's insistence on open negotiations and a settlement which would not compromise America's ability to remain independent survived the drama of Talleyrand's Machiavellian tact. Despite the diminished effectiveness of the envoy and the distasteful notoriety it received, Marshall's reputation remained unblemished. As anticipated however, the posture of the negotiations precipitated a healthy rub between the Jeffersonian republicans and John Marshall, an ardent conflict soon to become more acute.

Marshall returned to Richmond in 1799 intending to resume the practice of law and reacquaint himself with his family, but the political atmosphere in Richmond dictated an alternate course. With the congressional election nearing, federalists sought a formidable opponent for the Jeffersonian incumbent. John Marshall was the most logical choice. Although unimpressed with the proposition, Marshall yielded under the advisement of George Washington. Marshall's candidacy drew party division into sharp focus. Federalists believed Jeffersonian indignations inimical to the national welfare, while Jeffersonians accused federalists of an enmity toward republicanism and a desire to introduce a British modeled monarchy. Although federalist certainty lessened as the political tempest heightened, Marshall won the election by a scant majority.

As a congressman, Marshall remained responsive to public demand, yet dedicated to his personal conviction. He sustained his "strong attachment" to popularity but continued to be indisposed to sacrifice his integrity. Shortly after Marshall's introduction to Congress, President Adams purged a portion of his cabinet and nominated Marshall as Secretary of War. Three days after his confirmation, Marshall was re-nominated, this time as Secretary of State. He remained in this capacity until his nomination to the United States Supreme Court in 1801.

During the waning days of his administration, President Adams feared the demise of the federalist party. The appointment of John Marshall, while serving to retard this cessation, helped fashion the courts as political battle grounds. Jeffersonians perceived the Supreme Court, in particular, the principal target of attack.

Despite the innocuousness of the early Marshall court, his arguments and decisions displayed a solid dialectic, a unique responsiveness and a strict devotion to the preservation of the Court as the primary interpreter of the Constitution. Amidst a hive of controversy,

Marshall firmly styled the posture of the Court. In *Marbury v. Madison*[1] he enunciated the hearty doctrine of judicial review, a broadening of judicial authority so disarming that Jeffersonians called for a general purgation of the judiciary. The test, however, of the Court's independence and "exceptional moralty" surfaced in 1807 in the trial of Aaron Burr.

Burr was accused of attempting to dismember the nation. Marshall suspected that while a conviction would serve to vindicate and, worse yet, popularize President Jefferson for having publically pronounced Burr a traitor, a finding of innocence would precipitate distrust in the integrity and neutrality of the Court. Marshall scrutinized the facts and pondered the enigmatic motivations of Burr with his usual calm and persevering circumspection, while Jefferson became increasingly suspicious of judicial vengeance. The trial closed with the jury finding that Burr "is not proved to be guilty under this indictment," but Marshall's involvement did not cease. He was burned in effigy, criticized in newspapers and denounced in speeches.

Through the remaining twenty-seven years of his sitting, Marshall presided over numerous landmark cases. Among these are: *McCulloch v. Maryland*,[2] *Dartmouth College v. Woodward*,[3] *Fletcher v. Peck*[4] and *Gibbons v. Ogden*.[5] After his retirement in 1834, he was active in clubs, distinguished societies, and prestigious community organizations. Marshall bore his declining health stoically. Shortly before his death he said "could I find the mill which would grind old men and restore youth, I might indulge. . . . but as that is impossible, I must be content with patching myself up and dragging on as well as I can." On July 6, 1835, Marshall died.

Baker's work ably tows the reader through the elaborate edifice that was John Marshall's career. The study was mostly scholarly and well written. Despite an excess of the breast-beating of grand America, Baker offers a fair overview by flushing out Marshall's traits and preferences. He neglects, however, to posit even a whispered mea culpa for those preferences meriting a healthy contrition. The presentations of Marshall's judicial opinions, albeit a cogent digest, is analytically sluggish and less than illuminating on the societal values they served. Let me conclude however, that if the reader can endure Baker's bias, his passage through the book will be satisfactory and rewarding.

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[1] 5 U.S. (1 Cranch) 137 (1803).

[2] 17 U.S. (4 Wheat.) 316 (1819).

[3] 17 U.S. (4 Wheat.) 518 (1819).

[4] 10 U.S. (6 Cranch) 87 (1810).

[5] 22 U.S. (9 Wheat.) 1 (1819).