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Governmental Secrecy and the Founding Fathers: A Study in Constitutional Controls

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GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS. By *Daniel N. Hoffman.* Westport: Greenwood Press. 1981. Pp. ix, 339. $35.

The landmark litigation over governmental secrecy spawned by the Vietnam and Watergate debacles[1] left many questions unresolved. Paramount among them is the extent of Congress' power to demand access to information held by the executive branch. Former Watergate Special Prosecutor Archibald Cox, characterizing the issue as a "political question," doubts the ability of the courts to develop manageable standards for resolving this issue,[2] and suggests that it would be best left "to the ebb and flow of political power."[3] In opposition to this view, Daniel N. Hoffman's *Governmental Secrecy and the Founding Fathers* provides powerful ammunition for proponents of judicial intervention. The nonjudicial precedents collected in Hoffman's study of the "Federalist period" demonstrate convincingly the failure of the political process, even at the hands of the Founding Fathers themselves, to develop standards for solving interbranch secrecy disputes that even remotely resemble rules of law.[4]

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1. *See, e.g.,* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); United States v. Nixon, 418 U.S. 683 (1974); Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); New York Times Co. v. United States, 403 U.S. 713 (1971); Senate Select Comm. v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

2. *See* Baker v. Carr, 369 U.S. 186, 217, 222 (1962).

3. Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1424-26 (1974). *See also* Sofaer, Book Review, 88 HARV. L. REV. 281, 292-93 (1974) (reviewing R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974)).

4. Hoffman's discussion of executive privilege relies primarily on five incidents which occurred between 1787-1800. In 1792 a House committee investigating the massacre of an entire Army division led by General St. Clair requested documents from Secretary of War Knox. Although Secretary of State Jefferson's diary indicates that the Cabinet advised the President that he had discretion to refuse to make any disclosure that would be injurious to the public, the President acquiesced to the House request. In 1794 the Senate conducted an investigation into the conduct of the Ambassador to France, Gouveneur Morris. Washington complied with a request that he turn over Morris' official correspondence, but the submission was carefully censored. The same year a House committee investigating certain transactions conducted by Secretary of the Treasury Hamilton requested proof of presidential authorization. Hamilton asserted executive privilege, but eventually complied with the Senate's request. In fact, the President himself supplied verification of Hamilton's statements. In 1796, Washington refused outright to comply with a House request for papers relating to John Jay's negotiation of a treaty with the British. Washington told the House that since the treaty power was vested solely in the Executive and the Senate, and impeachment was not under consideration, the requested papers did not relate to any matter properly under the House's cognizance. Two years later President Adams ignored this "precedent" and complied with the request of opposition House Republicans that he disclose the so-called XYZ papers, which related to treaty negotiations with the French.

Although the "precedents" Hoffman cites have been discussed in the literature on executive privilege, Hoffman is the first writer to analyze all five incidents with detailed consideration of the political environment in which they occurred. *See, e.g.,* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 167-79 (1974); A. BRECKENRIDGE, THE EXECUTIVE PRIVILEGE 29-37 (1974); SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 77-93, 133-37 (1976); J. WIGGINS, FREEDOM OR SECRECY 248-259 (1964); Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A. J. 941, 943-44 (1958).

Hoffman's conception of the "rule of law" is fundamental to his arguments. Without rejecting the judicial model of "dispassionate and precedent-biased reflection" (p. 6), he asserts that a political model of the rule of law — "one which holds that there is a genius built into the very structure of government, which helps to rationalize and balance the flow of decision-making even though participants may have selfish, conflicting, or irrational ends in view" (p. 7) — also plays a legitimate role in our constitutional system. In the absence of a judiciary willing and able to act as the final arbiter of interbranch disputes,[5] the degree to which the Founding Fathers succeeded in "legalizing" the executive privilege issue must be judged by the political model. Hoffman's contribution is the identification of the factors which made, and continue to make, the problem of executive secrecy particularly unsuited for "legalization" by the political process.

Hoffman finds that lack of constitutional guidance was not such a factor. Indeed, he subtitles his book "A Study in Constitutional Controls," and begins with the Constitutional Convention of 1787. There the framers conceived that effective government required a single, strong executive able to act with speed and secrecy when the situation required it. They were determined, however, that the executive branch should be accountable for its actions. How were these competing goals to be reconciled? Hoffman responds, "The answer lay in the president's relationship with Congress — in the crucial device of separation of powers" (p. 31).

The Founding Fathers, by Hoffman's account, assumed that the sharing of power by coequal branches would also entail the sharing of information.[6] The Constitution as thus framed, he argues, "subjected governmental secrecy to the rule of law in a subtle, partial, but meaningful sense" (pp. 40-41) by providing "norms and processes" (p. 41) under which interbranch communication rules could be developed. Yet Hoffman finds that these rules never developed in fact. He notes that the actual practices

> emerged neither from a process of careful, collective deliberation about the costs and benefits for the nation of adopting one rule or another, nor from a sensible, stable compromise between the institutional claims of the several governmental bodies, but from a series of piecemeal decisions, each of which was strongly affected if not entirely dominated by the short-run partisan and policy concerns of those participating. [P. 9.]

Hoffman does not attribute the failure to achieve "a rational and balanced communication system" (p. 196) to any lack of commitment to constitutional ideals. "After all, the Founding Fathers invested a very substantial effort in constitutional analysis and debate. Many of their efforts were impressive in quality and were designed not for public effect but for decision-makers' consumption" (p. 230). Rather, Hoffman argues that a protracted state of emergency in foreign affairs and sharp political division

5. The courts' ability to so intervene was not established until after the period of Hoffman's study. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Their willingness remains an open question.

6. Presumably the president must share information on such executive matters as treaties and appointments in order to obtain the "advice and consent" of the Senate. U.S. CONST. art II, § 2, cl. 2. The Constitution also requires the President "from time to time [to] give the Congress Information of the State of the Union" to aid it in its legislative functions. U.S. CONST. art II, § 3.

at home combined to produce a "situation inauspicious for the development of stable secrecy/publicity norms" (p. 227). Foreign crises gave the executive almost *carte blanche* to act with secrecy and dispatch, and division within Congress made it impossible for the institution as a whole to defend its prerogatives: "Administration supporters usually were loath to assert congressional prerogative to the detriment of party interests, and even the opposition party often behaved as if it would rather capture the presidency than weaken it" (p. 225).

However "inauspicious" these circumstances were for principled discussion of executive secrecy, Hoffman argues that it is precisely the confluence of internal unrest and foreign crisis that elevates secrecy to the forefront of debate. Citing the Vietnam era as the only other period in which these factors were simultaneously present, he concludes that the political process fails to provide a rule that strikes the proper balance when it is most necessary (pp. 257-60).

So long as interbranch communication is regulated by the political process, Hoffman sees Congress suffering a more or less steady erosion of its constitutional powers. Though he considers the War Powers Act of 1973 and the Freedom of Information Act of 1974 healthy developments, he fears they will not survive as the presidency regains its "imperial momentum" (p. 260). The effectiveness of Hoffman's suggestion for correcting the historical imbalance, "an office of legal counsel to the Congress, endowed with plenary subpoena power and standing to sue in court" (p. 260), depends upon the willingness of the judiciary to intervene in "the ebb and flow of political power."[7]

True to its title, Hoffman's study encompasses more than the early assertions of executive privilege before Congress. Other governmental secrecy problems discussed include the establishment of internal regulations by the executive branch and the two houses of Congress. While these developments help to illustrate the Founders' reliance on "institutional pluralism" for reconciling the goals of effective and accountable government (p. 19), contemporary constitutional lawyers will be most interested in what happened in that "zone of twilight"[8] where institutional prerogatives overlap. Hoffman acknowledges that "[c]ommunications from the executive to Congress were the key focus of secrecy conflict in the Federalist period" (p. 234), and his conclusions primarily address this aspect of the secrecy problem.

James Russell Wiggins once cited the legal debate over congressional access to executive papers as an example of the unreliability of "Lawyers as

7. The controversy concerning the House of Representatives contempt proceedings against former Environmental Protection Agency administrator Anne M. [Gorsuch] Burford, for refusing to supply subpoenaed documents, illustrates some of the difficulties of judicial intervention. Rather than prosecute, the Justice Department filed a civil suit against the House challenging the constitutionality of the subpoena. The House contested the Justice Department's use of the "United States" designation in the caption. *See Gorsuch Contempt Case Evokes a Counterpunch*, N.Y. Times, Dec. 31, 1982, at 6, col. 5. Ultimately the EPA and House investigators reached an out-of-court settlement. *See Accord is Reached For House Access to Files of E.P.A.*, N.Y. Times, Feb. 19, 1983, at 1, col. 6.

8. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Judges of History."[9] Though it does not offer a resolution of the legal issues involved, Hoffman's thoughtful and unusually readable book should provide fuel for future debate.

9. J. WIGGINS, *supra* note 4, at 245-69.