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The True Constitutionalist, Raoul Berger, 1901-2000: His Life and His Contribution to American Law and Politics

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When Raoul Berger turned ninety a little over a decade ago, he was presented with a book of letters from friends and admirers. Those sending their good wishes were among America's most distinguished jurists, public officials and scholars, including Chief Justice William H. Rehnquist, former Attorney General Edwin Meese III and Professor Philip B. Kurland. The collection was introduced by a letter from former President Ronald Reagan.

"Few men", Reagan wrote, "have contributed as much as you have to the maintenance of constitutional government and ordered liberty in the United States . . . . You have consistently called us back to our constitutional roots, challenged us to uncover them, and urged us to remain true to them. Your work is truly inspiring." Reagan concluded: "Your scholarship has helped to shape the debate that meant so much to my presidency." Having read those words, Berger, ever a man of the Left, looked up, smiled with eyes twinkling, and said: "Now *that* gives me mixed emotions!"

Such was the irony of his long and productive life that the last two decades of it found this dyed-in-the-wool liberal Democrat one of the great intellectual heroes of American conservatism. It was with the publication of his most controversial book, *Government by Judiciary: The transformation of the Fourteenth Amendment* (1977), that Berger found himself largely abandoned – even vilified – by former friends on the Left and warmly embraced by former critics on the Right.

His vice, or his virtue, depending on one's perspective, was that he had called into question, in the most radical way, the constitutional legitimacy of judges making policy choices they thought just and passing them off as constitutional interpretation. His powerful argument was that the original intention of the American Founders was the only means whereby the fundamental law could keep ordinary law and politics in check. A constitution that meant nothing more than what the judges said it meant was no constitution at all. The problem for those on the Left was that such a view cast constitutional doubt upon virtually every major Supreme Court decision, from that of school desegregation in *Brown v Board of Education* (1954) to the right of abortion in *Roe v Wade* (1973).

Berger had been warned. When he passed around the manuscript of *Government by Judiciary* for comment, one of his academic colleagues urged him not to publish it, pointing out that all those who had acclaimed his earlier work that had relied on the same originalist methodology would surely turn on him; he might publish, but he would certainly professionally perish. Berger, however, thought better of the legal academy and went ahead with the book, only to find himself pounced upon and derided as being everything from a poor historian to a racist. Berger, the unrepentant liberal, learned a harsh lesson about political correctness.

He had every reason to be stunned. While his scholarly career had stretched back to the early 1930s, most of his early work had been in the form of well-received articles in the major law reviews, on subjects such as administrative law. But later, especially after his retirement from the practice of law in 1965, he turned increasingly to legal history. After teaching for a brief period at the University of California, Berkeley, Berger settled into a quietly productive life as the Charles Warren Senior Fellow in Legal History at the Harvard Law School. He soon published *Congress v The Supreme Court* (1969), a study of the foundations of judicial review that found a very friendly audience among legal intellectuals.

Berger once described his scholarly journey as one of simply looking around for problems that needed solving, and historical questions that needed answering, and then setting about to solve the problems and answer the questions. One such question was whether there was any constitutional foundation to the claims of presidents to have an "executive privilege" to keep information within the executive branch from Congress. Intrigued by its first appearance as a constitutional doctrine during the Army–McCarthy hearings in 1954, Berger finally set

Raoul Berger, 1986

about to deal with the subject in a systematic way in 1963, with his first article appearing in 1965. His book, *Executive Privilege: A constitutional myth* – a title that neatly summed up his conclusions – was published by Harvard University Press in 1974, at the height of the Watergate scandal.

This was the second of a double punch against the Nixon administration. The year before, Berger had published *Impeachment: The constitutional problems*. His conclusion, one that made him the darling of the Democrats and the bane of Republicans supporting Nixon, was that the Constitution did not require an indictable crime for impeachment; the requirement for "high crimes and misdemeanors" included misuse of office as well. Impeachment was not a legal process, but a political one. Berger's explication of the original intention behind the impeachment provisions established an intellectual foundation from which Nixon's critics could successfully launch what would probably have been the first impeachment of a President in over 100 years, had Nixon not resigned. Berger became an academic celebrity, publishing articles in major newspapers, including the *Washington Post* and the *New York Times*, and testifying frequently before Congress.

With the appearance of *Government by Judiciary*, he learned that it was possible to irritate virtually everyone at one time or another. Where liberals had cheered and conservatives had grumbled over his studies of executive privilege and impeachment, conservatives now cheered and liberals grumbled over his indictment of judicial activism. The one thing that had not changed was Raoul Berger. His works were all based on his beliefs that the Constitution is properly understood only by recourse to the intentions of the Founders, and that the job of the judge, no less than of the legal scholar, is to dig for that original meaning. In Berger's view, the fact that his critics were moved more by their dislike of his conclusions than anything else only emboldened him.

Government by Judiciary was followed by *Death Penalties: The Supreme Court's obstacle course* (1982), arguing that the death penalty did not violate the constitutional ban on "cruel and unusual punishments"; *Federalism: The Founders' design* (1987), making the case that modern constitutional interpretation had lost sight of the important original boundaries between state and national power; and *The Fourteenth Amendment and the Bill of Rights* (1989), insisting that the use of the Bill of Rights against the states, through the judicially created doctrine of "incorporation", was without the slightest shred of constitutional legitimacy. Not surprisingly, he was never welcomed back into the liberal fold.

His excommunication never caused him to lose his original and deeply held beliefs; he remained a committed liberal until his death, on September 23, 2000, just four months short of his hundredth birthday. Thrilled at first by the election of Bill Clinton in 1992, he sadly watched as the fires of passion and perjury consumed Clinton's opportunity for greatness. When Clinton was impeached, many of those who believed it was the right course of action were the intellectual heirs of Berger, Republicans who had cut their constitutional teeth on *Impeachment* a quarter-century before. Painfully, Berger himself concluded not only that Clinton had indeed been properly impeached, but that he also deserved conviction and removal by the Senate.

During the last decade of his life, Berger continued to publish at a rate that a person half his age would have envied. While more than a few of his law-review articles were responses to his critics, many were original efforts to further the cause of originalism as he understood it. Those who disagreed with Berger inevitably found themselves given a public lesson or two in good history. He was fond of pointing out that making no response to one's critics meant that victory was "adjudged not to him who had the truth on his side, but by the last word in the dispute". Berger made sure he always had both the truth and the last word. And to have been on the receiving end of his rapier-like criticism was not a pleasant experience.

It might be easy to think Berger was a less than warm human being, seemingly a man of unyielding principle and staunch personal rectitude. Yet once they came to know him, many of his critics, and those whom he had criticized, realized that his scholarly integrity meant, at a minimum, that his exchanges were never personal. Sanford Levinson, for example, of whom Berger was very fond – even though he had him pegged as an "activist" – recently wrote that Berger "was a truly unique voice in American law. I agreed with him on very few things, but I will miss that voice and cherish the fact that I was on the receiving end of its not-so-gentle chastisement. He made all of us into better scholars, not least because one knew that he was ever ready to marshal his own scholarly resources against anyone he thought mistaken."

Berger's dedication to the Constitution and its original meaning was rooted in his nearly Jeffersonian confidence in the people. He believed, perhaps with an immigrant's appreciation (he was born in pre-Revolutionary Russia), that the Constitution is the fundamental law that holds the United States together as a society of free and responsible individuals. The American Constitution has had no greater patron, admirer, or defender than Raoul Berger, and he devoted nearly half a century to unravelling its mysteries and explaining its meaning and purpose. One suspects that, when a distant generation asks, as it surely will, who showed this generation how best to preserve and perpetuate America's justly revered Founding document, the answer will be simple: "Berger", they will say, "Raoul Berger." He was a true constitutionalist and a man for the ages.