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Executive Privilege: A Means of Concealing Truth

IF CONGRESS is to meet its constitutional duties as a "check and balance" on executive authority, if Congress is to properly meet its lawmaking and fund-allocating responsibilities, if Congress is to have the faith of its constituency, then its members must be fully informed.

These statements seem axiomatic: Wise judgments require complete information. Good legislation requires complete information.

The greatest source of complete information is the executive branch, by its structure, nature, and definition of duties. It is here that the laws enacted by Congress are put into practical application, and it is here that dozens, hundreds or even thousands of people in the various agencies have access to the small print and know where the bodies are buried. The vast federal bureaucracy is much better equipped than Congress, in terms of personnel, reporting procedures and detailed expertise, to reveal or educate with respect to the thousands of programs gathered under the executive tent. Unfortunately, the bureaucracy is equally tooled to conceal. Granted the need for secrecy in areas of diplomatic negotiations, wartime actions, planning and weaponry, there would seem to be little else known to the executive branch which should not be known to Congress as well.

From our earliest days, however, Presidents have invoked the claim of "executive privilege" in order to retain in secret certain communications exchanged between the President and his advisers. President Jefferson, in refusing to deliver documents requested by Chief Justice Marshall during the treason trial of Aaron Burr, put it this way: "All nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication."

As early as 1792, President Washington had been faced with the question of the criteria a President should apply in determining what information should be released to Congress in the public interest. General St. Clair had led a disastrous invasion in the Northwest Territory, and Congress demanded all documents connected with the expedition. As related by Thomas Jefferson, Washington asked his Cabinet to advise him what to do, "because it was the first example and he wished that as far as it should become a precedent, it should be rightly conducted. . . . He could readily conceive that there might be papers of so secret a nature as they ought not to be given up."

The Cabinet advised that the papers in this case be delivered to the House of Representatives, and Washington so ordered. In the Cabinet's considered judgment, the House of Representatives had the *right* to institute inquiries to the executive branch, and "the Executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public."

Four years later, in 1796, this criterion was defined more explicitly by President Washington in response to a request

from the House of Representatives, then considering an appropriation to carry out the provisions of the Jay Treaty, for disclosure of the instructions to the ambassador who negotiated that treaty. The President declined the request, explaining:

> The nature of foregoing negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. . . . As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light; and as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.

President Washington thus drew a distinction between past records of military operations and past records of diplomatic negotiations which might inhibit the success of future such negotiations. Ultimately the Supreme Court, in

United States v. Curtiss-Wright, acknowledged the President's authority to withhold from Congress *some* information in the field of foreign affairs.

The authority to claim executive privilege in proper cases is not questioned. Likewise, however, it has never been questioned that Congress has the right to receive classified information. Assistant Attorney General William Rehnquist, commenting on executive privilege before the House Foreign Operations and Government Information Subcommittee on June 29, 1971, testified as follows:

> The Freedom of Information Act, which may be said to have established a "right to know" on the part of the public, exempts from its disclosure requirements "matters that are . . . specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." This exemption in the Freedom of Information Act justifies refusal on the part of the Executive to make classified material available to the general public. *But the mere fact of classification by itself does not constitute sufficient basis for withholding information from a committee of Congress, since most, if not all, congressional committees themselves are fully authorized to receive classified documents.* [Emphasis added.]

Mr. Rehnquist later pointed out, "The doctrine of executive privilege has historically been pretty well confined to the areas of foreign relations, military affairs, pending investigations and intragovernmental discussions." That last hazy category, "intragovernmental discussions," obviously could be used to withhold *all* communications between federal employees, and thus, in the end, all information which the Congress or the courts might feel necessary to meeting their own constitutional obligations.

The primary rationale for claiming executive privilege has been the argument that a President could not expect candid advice from his subordinates, or between them, if they feared the possibility of ultimate publication of such advice. All of us are willing to be more explicit, candid and therefore truthful, when we can be assured that our words won't be repeated to persons other than the intended listener. As Assistant Attorney General Rehnquist put it, "The President must be free to receive from his advisers absolutely impartial and disinterested advice, and those advisers may well tend to hedge or blur the substance of their opinions if they feel that they will shortly be second-guessed either by Congress, by the press, or by the public at large."

The rationale is in some areas justified—the fitness and abilities of fellow federal employees, strategy and tactics in legal cases, property acquisition and condemnation, national security and diplomatic negotiations. But there is a balancing factor of the public interest involved when it comes to facts involving pending legislation and actions requiring congressional approval. The state of California has recognized this balance by enacting the so-called Brown Act, which limits secret sessions of city councils to personnel decision-making, legal and property-acquisition matters.

As between the Congress and the executive branch, it would appear that this last category of executive privilege should indeed be "very narrowly construed" in areas where congressional ability to make wise decisions requires complete information.

Presidents have paid lip service to this concept, but in recent years their actions have belied their words. Shortly after he took office, for example, President Nixon sent Chairman John Moss of the House Government Information Subcommittee a letter in which he said:

> Knowing of your interest, I am sending you a copy of a memorandum I have issued to the heads of executive departments and agencies spelling out the procedural steps to govern the invocation of "executive privilege" under this Administration. . . .
>
> I believe, and I have stated earlier, that *the scope of executive privilege must be very narrowly construed. Under this Administration executive privilege will not be asserted without specific Presidential approval.*
>
> I want to take this opportunity to assure you and your committee that *this Administration is dedicated to insuring a free flow in information to the Congress and the news media—and, thus, to the citizens.* You are, I am sure, familiar with the statement I made on this subject during the [1968] campaign. Now that I have the responsibility to implement this pledge, I wish to reaffirm my intent to do so. *I want open government to be a reality in every way possible.* [Emphasis added.]

As with so many presidential pronouncements, the words are beautiful. The promises, however, are not kept. Our skepticism over political truthfulness deepens. President Nixon's memorandum set forth a procedure whereby government agencies would comply "to the fullest extent possible" with congressional requests for information. Information was to be withheld only if the Attorney General and the appropriate department head agreed, and even then the questions would be referred to the counsel to the President (then John Ehrlichman), "who will advise the Department Head of the President's decision."

This was clear enough: only the President could make the decision to withhold information. The President had said the privilege was to be "very narrowly construed." In prac-

tice, however, officials of the Nixon Administration have blatantly ignored the President's memorandum, time and again refusing to release information upon congressional request. The President's highest advisers have permitted this practice to continue, and indeed have often practiced it themselves under circumstances which indicated Presidential acquiescence and approval.

The advice of President Washington's Cabinet that "the Executive ought to communicate such papers as the public good would permit" remains valid today. Recent Presidents simply have ignored that principle. "Intragovernmental discussions" and "internal memoranda" have been withheld from public and congressional knowledge for the sole purpose of avoiding official embarrassment or of promoting executive-branch policy. I would like now to set forth some examples of this conduct, which again represents a distortion of our system of government rather than reflecting its constitutional requirements.

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The SST: A Classic Case in Presidential Deceit

WHEN THE NEW REPUBLICAN ADMINISTRATION took office in January 1969, we had high hopes for a return to truth in government. The Johnson Administration's secrecy and lack of candor had been of some importance in the national campaign. President Nixon had said, "Let us *begin* by committing ourselves to the truth . . ."

The first test of the President's sincerity made a mockery of his words. It disclosed to the nation that he, like his predecessor, had no intention of permitting the truth to escape—even to the Congress—when such truth would be embarrassing or adverse to his political desires.

The test arose over the proposed supersonic transport, or SST.

Though the SST had been on the drawing boards for some years, the fiscal crisis of 1968—a war-budget deficit exceeding $25 billion—caused the Johnson Administration to delete funding for development of prototype models in the budget proposal for President Nixon's first full year in office.

Shortly after President Nixon assumed office in January 1969, he received a report on the SST from a panel of scientists headed by industrialist-physicist Richard L. Garwin. The "Garwin Report" was not made public, but on