Once Doubtful Executive Privilege Expanded in Scope

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For decades now, U.S. Presidents and their Attorneys General have been sprinkling the holy water of constitutional authority on the doctrine of "executive privilege."

President Nixon expanded on the tradition of high-level secrecy this month with a formal statement declaring, as have his predecessors, that it all began with George Washington.

According to the nation's leading legal scholar on the subject, however, "we've been brainwashed." And, says Raoul Berger, the Charles Warren senior fellow at Harvard Law School, "history is being manufactured under our noses."

Faced with growing congressional demands for the testimony of White House aides about the Watergate conspiracy and the investigations stemming from it, Mr. Nixon extended the cover of confidentiality March 12 to all members of his personal staff, both past and present.

"The doctrine of executive privilege," he said, "is well established. It was first invoked by President Washington and it has been recognized andutilized by our Presidents for almost 200 years since that time. The doctrine is rooted in the Constitution . . ."

The fact is the George Washington never "invoked" the privilege at all.

Jefferson's Notes

The controversy dates back to March of 1792 when the House of Representatives ordered what appears to be the first congressional investigation of conduct within the executive branch. Alarmed by the defeat of Gen. Anthony St. Clair at the hands of some stubborn American Indians, the House assigned a select committee to look into the debacle and to "call for such persons, papers and records as may be necessary to assist their inquiries.

The committee, in turn, asked the Secretary of War for documents on the St. Clair expedition, a step that prompted Washington to call a meeting of his Cabinet, apparently to make sure that no untoward precedents were set.

The first session was inconclusive. Washington told his Cabinet he never "even doubted the propriety of what the House was doing," but, according to the informal notes of Secretary of State Thomas Jefferson, which surfaced years later, the President said he "could readily conceive there might be papers of so secret a nature that they ought not to be given up."

Coming back for a second meeting, Washington and his Cabinet then agreed that the "House was an inquest" and "might call for papers generally." They also felt, Jefferson recorded that "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. Consequently were (sic) to exercise a discretion." But finally, "it was agreed in this case that there was not a paper which might not properly be produced."

Congress, however, was evidently never notified of the mental reservations involved. Instead, Washington simply instructed the Secretary of War on April 4, 1792, to hand over to the House "such papers from your Department as are requested by the enclosed resolution." According to one of Washington's biographers, "not even the ugliest line on the flight of the beaten troops was eliminated."

Jay Treaty

Despite all that, in a lengthy 1957-1958 series of memos that has come to be

the modern-day bible for advocates of executive privilege, then Deputy Attorney General William P. Rogers cited the St. Clair episode as the first example of "refusals by our Presidents, and their heads of departments, to furnish information and papers."

By that same bible, Washington is also supposed to have invoked executive privilege in 1796 when he refused a demand by the House for correspondence, documents and instructions sent to John Jay in connection with a controversial treaty with England. But in rejecting the House resolution, Washington held only that the papers were not pertinent "to any purpose under the cognizance of the House."

The first President indicated that the House, in his view, would have had a right to the paprs if it had passed a resolution on "an impeachment," but it had not. Only the Senate, the first President said, shared in the treaty-making power set out in the Constitution. And the Senate, he observed, had already been sent "all the papers affecting the negotiations."

Out of such quicksand, Berger and other critics of executive privilege protest, has the practice of withholding information from Congress and the courts been enshrined.

At most, the University of Chicago's Alan C. Swan told a Senate subcommittee in 1971, the so-called precedents from the early days of American history relfect "ambiguous action accompanied by brave words in which Congress never acquiesced."

McCarthy Era

But if Congress has never acquiesced, neither has it ever forced a showdown. From the first to the 93d, no Congress has ever resorted to the courts to challenge a President's asserted right to keep it in the dark, nor has any Congress clapped any White House aides in the Capitol guardroom to stand prosectuion. As Sen. Sam J. Ervin Jr. (D-N.C.) observed in an interview last week, the steady buildup of presidential power has been made easy, partly out of congressional laziness, partly out of congressional default.

"As somebody said," Ervin declared of Congress's shrinking role, "it's not altogether homicide. Some of it's suicide."

The modern-day exaltation of executive privilege, by the same token, was largely a response to the rampant investigations during the 1950s of the late Sen. Joseph McCarthy (R-Wis.).

It was not until then, says Sen. Charles McC. Mathias (R-Md.) that executive privilege was raised to "the level of an absolute unqualified power" that could be exercised not only by the President himself, but by subordinate officials who then began applying it "to almost any kind of information."

By 1957, as a consequence, Deputy Attorney General Rogers, now Mr. Nixon's Secretary of State, was unabashedly claiming "an uncontrolled discretion" for both the President and executive department heads "to withhold information and papers" from Congress "in the public interst."

United Press International

Amid current controversy, Nixon counsel John W. Dean III.

...rgen blames the Rogers ...mo—much of which Ber... says was lifted word for ...d from the 1949 writings ...e lowly subordinate" in ... Justice Department—for ...ch of the mischief. The ...ument. he protests. is ...aded with "the most amaz... contradictions and in...sistencies."

...ide Testified

...mong them, Berger has ...inted out, is a claim on ...e page that "the courts ...ve uniformly upheld" ...e uncontrolled-discretion ...aim and an admission on ...ther that "the legal prob...ms which are involved ...re never presented to the ...urts."

...t still another point, ...gers acknowledged the ...istence of a 1789 law mak... it the "duty" of the Sec...tary of the Treasury to ...ve information to either ...anch of the legislature ... respecting all matters ...erred to him by the Sen... or House . . ." The law, ...ever, was evidently over...ked on another page ...here, the memo asserted, ...ongress cannot, under the Constitution, compel heads of departments to give up papers and information, regardless of the public interest involved."

Despite the demolition work Berger aimed at the memo in a detailed 1965 study for the UCLA Law Review, the Harvard scholar said Friday, "It's still the bible," even for many in Congress. "It's pathetic how little they know."

As far as the Nixon administration is concerned in the field of executive privilege, the President began his first term by assuring the House Government Information Subcommittee ...privilege would... be asserted "without specific presidential approval" and issuing instructions throughout the executive branch to that effect.

But as Ervin, among others, has protested, this failed to stop the Pentagon, for example, from summarily denying Congress information on grounds like these: "Inappropriate to authorize release of the ...uments" (former Secretary of Defense Melvin Laird

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and, "No useful purpose would be served by a public report on these materials" (Defense Department general counsel J. Fred Buzhardt).

On a White House level, counsel to the President John W. Dean III in a letter assured the Federation of American Scientists last year, in response to an FAS newsletter on the issue, that "the precedents indicate that no recent President has ever claimed a 'blanket immunity' that would prevent his assistants from testifying before the Congress on any subject."

Nixon Declines

The letter was dated April 20, 1972, two days after the White House agreed to let presidential aide Peter Flanigan testify on the ITT controversy then standing in the way of Richard Kleindienst's appointment as Attorney General.

This month, however, in the wake of congressional pressures for Dean's own testimony on the Watergate investigations, Mr. Nixon declared: "A member or former member of the President's staff shall follow the well-established precedent and decline a request for a formal appearance before a committee of the Congress."

The President said he would be willing to provide "all necessary and relevant information" in response to congressional inquiries but only through "informal contacts" that would give the White House the final say on what would be made available and what would be withheld.

"Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of government," Mr. Nixon asserted. "If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the presidency."

Court rulings on that score are not unanimous. In the famous case of Marbury vs. Madison, Chief Justice John Marshall recognized that certain Cabinet communications were privileged from any outside inquiry. He later said that "the principle decided (in that case) was communications from the President to the Secretary of State could not be extorted from him."

But Marshall, who presided at the treason trial of Aaron Burr, also saw fit, in 1807, to issue a subpoena duces tecum (to produce documents) to one Thomas Jefferson, then President of the United States. "If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the President," Marshall held, "that decision is unknown to this court."

Produced Letter

Jefferson claimed that state secrets might be involved in some of the papers sought, but he did not claim immunity from subpoena, even offering to submit to a deposition.

In any event, Berger states, "he fully complied with the subpoena," forwarding a copy of the letter Burr wanted to the government prosecutor in Richmond. The prosecutor excised certain portions, but offered the entire letter to Justice Marshall so that the court—not the executive branch—could decide what should be suppressed.

The Rogers memo on executive privilege tries to dismiss that case as an aberration. But John Henry Wigmore gave it a higher rating in his classic treatise on Evidence in Trials at Common Law, an authority often cited by the Supreme Court. Quoting Marshall's ruling in the Burr case at length, Wigmore concluded, "there is no reason at all" to exclude the chief executive of a state from producing testimony needed to see justice done.

Wigmore allowed that a chief executive could be excused from actual attendance at a trial because of "the priority of his official duties," but he added: "It is less certain that a privilege exists for subordinate executive officials."

From his pronouncements on the issue, President Nixon is hardly likely to accept such a notion in the face of congressional subpoenas, at least not without a court test which he has said he would "welcome." He has voiced no doubts that he would be upheld, a notion somewhat at variance with the views he expressed on the floor of the House 25 years ago as a freshman congressman from California.

The date was April 22, 1948; the occasion, a drive by the House Un-American Activities Committee for a House resolution demanding an FBI report on Dr. Edward U. Condon. A government physicist who had been associated with the development of the atomic bomb, Condon had been branded by a HUAC subcommittee as "one of the weakest links in our atomic security" despite his emphatic clearance by a loyalty review board.

President Truman responded on March 13 to the clamor for the document by issuing a directive forbidding compliance with any subpoenas or demands for FBI and other investigative reports on the loyalty of government employees.

During the next month's House debate on the Condon resolution, Mr. Nixon, a member of HUAC, took the floor with a tightly worded assault on the President's directive.

He agrued that it was untenable "from a constitutional standpoint" and for a very simple reason. To let Mr. Truman maintain it against congressional investigations of alleged security risks, Rep. Nixon protested, would mean that Presidents could "arbitrarily" do the same thing in cases of corruption like "Teapot Dome."

Now, as President, Mr. Nixon has somewhat different recollections. Elaborating on his executive-privilege policy at a March 15 news conference, Mr. Nixon offered it as perfectly consistent with his views as a congressman back in the '40s.

Those were the days, he recalled, of congressional inquiries into espionage and Alger Hiss—cases, Mr. Nixon submitted, that should have had "complete cooperation" from the executive branch.

But the Watergate case, he said, was an entirely different matter. Congress, he maintained, "would have a far greater right and be on much stronger ground to ask the government to cooperate in a matter involving espionage against the government than in a matter like this, involving politics."