Ervin May Dust Off 1928 Law To Test 'Executive Privilege'

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Sen. Sam J. Ervin Jr. (D-N.C.) may try to stake out Congress' right to information from the executive branch this month under a 45-year-old law that appears to contradict the Nixon administration's claims of executive privilege.

The first test, Ervin has hinted, would center not on the Watergate case, but on the White House's refusal to disclose its records on tax-paid flights by administration officials during last fall's election campaign.

Counsel to the President John W. Dean III invoked executive privilege to keep the records secret last November, maintaining that they were "personal to the President and thus not the proper subject of congressional inquiry."

The episode came to light this month when officials of the General Accounting Office, Congress' watchdog agency, testified at House and Senate hearings on the privilege doctrine.

Comptroller General Elmer B. Staats said the White House stance effectively prevented GAO from determining what the White House considered "political trips" and whether the Air Force had been fully reimbursed for such travel during Mr. Nixon's re-election campaign.

As chairman of the Senate Government Operations Committee, Ervin has now offered to step into the fray, evidently with the hope of knocking down the administration's unrestrained privilege doctrine before it pops up as a roadblock in the Watergate hearings.

As a device for the test, the law that Ervin has in mind, congressional sources say, is "a perfectly drawn statute . . . about as broad as you can get." At the least, it conflicts directly with Attorney General Richard G. Kleindienst's sweeping assertion during the past week that the President has the unrestricted power to forbid the testimony of any federal employee—and the production of any adminstration document—that he chooses to withhold from Congress.

Passed in 1928, the law states, in full:

"Every executive department and independent establishment of the government shall, upon request of the Committee on Government Operations of the House, or any seven members thereof, or upon request of the Committee on Government Operations of the Senate, or any five members thereof, furnish any information requested of it relating to any matter within the jurisdiction of said committee."

Alluding to the legislation briefly during Staats' testimony Wednesday, Ervin said it would seem to give his committee—and thus Congress—every right to demand the White House flight records that Dean denied to the comptroller general.

Staats, whose agency comes directly under the Government Operations Committee's broad jurisdiction, said he was inclined to agree.

Despite White House counsel Dean's claims that the flight logs and passenger lists in question have "traditionally been considered personal to the President," the comptroller general added that such information "has been made available to the Congress in previous campaigns . . . under previous administrations."

Ervin, it is understood, has now determined to make a renewed request for those documents on the strength of the 1928 law. Another denial could bring a court test, through the North Carolina senator is said to be undecided about that.

For its part, the executive branch has long recognized the old legislation as a potential threat to the privilege doctrine, and consequently treated it with disdain. In a 1957 memo asserting the President's "uncontrolled discretion" to withhold information and papers from Congress, then-Deputy Attorney General William P. Rogers maintained that the troublesome statute was far more limited than it seemed.

Noting that the law was adopted as a replacement for many earlier statutes requiring 127 different kinds of reports from the executive branch, Rogers reasoned that "heads of departments are therefore not obliged to change their practices . . . by reason thereof."

The 1928 law, he argued, was simply meant to continue the flow of information previously available in the 127 reports, and could not be read to interfere with "the right of heads of departments to keep from public view matters which in their judgment should remain confidential."

The White House, however, may still be hard put to hold back the campaign-time travel records. Among the 127 reports that even Rogers conceded were meant to be continued, congressional sources say, was one calling for rundowns on "travels outside the District of Columbia by federal employees."