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Defining Executive Privilege

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IN REFUSING to provide more evidence to the House Judiciary Committee, President Nixon is continuing to assert his own misguided personal notion of executive privilege—a notion with no grounding in either history or law. You would therefore think that this is the worst possible time for Congress to encourage or legitimize claims of executive privilege. Yet that could be precisely the effect of legislation which the Senate passed quietly in December, and which the House Government Operations Committee recently reported by a 24-16 vote.

The bills, S. 2432 and H.R. 12462, deserve especially close scrutiny because they are *not* some kind of quick and casual reaction to Mr. Nixon's latest stone-walling campaign. Instead, the legislation is a serious, bipartisan attempt by a number of thoughtful legislators—including Sens. Edmund Muskie, Sam Ervin and William Roth, and Reps. William Moorhead and John Erlenborn—to respond to accumulated congressional grievances about executive withholding of material and witnesses, especially in matters of foreign policy. The sharpest Watergate-related influence seems to have been former Attorney General Richard G. Kleindienst's fantastic statements during a Senate hearing last year that the President has total autonomy to keep information from Congress, and that "your power to get what the President knows is in the President's hands."

Of course a self-assentive Congress can already pry large amounts of information out of the executive branch by applying political pressures, delaying presidential projects, withholding funds, and ultimately holding recalcitrant witnesses in contempt. The pending bills are intended to open up another, less heavy-handed way. They would require material to be furnished to congressional committees within 30 days, and witnesses to appear within 10 days, unless the President personally orders non-compliance and submits a detailed justification of his claim. If the President fails to comply or the committee challenges the claim, the full Senate or House, by resolution, could empower counsel to bring a civil suit. The U.S. District Court here would be given explicit jurisdiction and empowered to review the contested material in camera if necessary. Finally the court would be required to order the production of all information which furthers a legitimate legislative or investigative purpose, unless the court finds "a compelling national interest" to the contrary. The House bill, reflecting current concerns, also stipulates that nothing may be withheld at all in an impeachment proceeding.

Predictably, the Justice Department opposes these bills on the familiar, though specious, ground that the ability to deny information to Congress is an inherent presidential power not subject to judicial review. But 16 members of the House committee *also* object to H.R. 12462—and on grounds directly contrary to the Justice Department view. In fact, they argue, the measure could *undercut* the power of Congress to obtain the material it needs, and would, as Rep. Jack Brooks (D-Texas) said, "enscribe" executive privilege "into law." It would also, as he put it, give every government underling, as well as the President, "the appearance of legitimacy" in withholding information. Furthermore, Rep. Brooks and his colleagues assert, the measure would compromise the legislative branch and could frustrate its work by giving the judiciary "the power to determine what information the Congress has a right to obtain."

It is not necessary to take an absolutist view on either side to see the hazards in these bills. One may believe, for instance, that some small areas of presidential privilege in public policy matters do exist—but that does not mean that Presidents should be invited to invoke the privilege more frequently. One may believe that legislative-executive clashes over information are justicable—but that does not mean that constant, routine resort to court is the wisest or most productive course. The Ervin committee has tried that technique without success in the effort to get the presidential tapes it wanted. In contrast, the threat that the more traditional club—citation for contempt—would be used against Mr. Nixon's chief of staff, Alexander M. Haig Jr., seemed enough to cause Mr. Nixon to "waive" his claim of privilege and let Mr. Haig talk to the panel this week about Howard Hughes' $100,000 gift to C. G. Rebozo. Especially with those experiences so fresh, it is hard to see why Sen. Ervin and others seem so eager to substitute a court's judgment in such matters for their own.

The basic defect in these bills was summarized by Rep. John C. Culver (D-Iowa) in his dissenting views on H.R. 12462. The boundary lines between executive and legislative power, he wrote, "were left imprecise and purposefully vague." Disputes over information "have always been resolved by a process of ad hoc accommodation . . . If that balance of uncertainty breaks down, so will the process of creative accommodation." By inviting the courts to impose arbitrary order in a traditionally blurred and shifting field, Congress could cause lasting damage to a constitutional system which is already under great pressure. A far better course would be to shelve these bills and concentrate on getting information by better use of the powers and levers which Congress already has.