Post 5/30/74

Defining Executive Privilege

In your editorial ("Defining Executive Privilege," May 18, 1974) you criticize the two pending bills which deal with Executive Branch denial of information to Congress as likely to "encourage or legitimize claim of executive privilege." and to lead to "constant, routine resort to court" to adjudicate such claims. As sponsors of S. 2432, the Senate-passed Congressional Right to Information Act now under consideration in the House Rules Committee, we would ask you to reconsider those objections.

Like you, we hold that presidential claims of confidentiality are not absolute and self-enforcing; they are subject to congessional contest and judicial review. Indeed, what has tended to legitimize the practice has been the failure to contest the expansive and capricious exercise of such claims, particularly by this administration and by subordinate executive officials acting without apparent, formal presidential authorization. Laws to regulate claims of executive privilege give no more sanction to such claims than laws which prohibit murder give to murder. By imposing formal procedures on the manner and timing of presidential claims of confidentiality, we are merely constructing a means the Congress now lacks to respond to claims that may be abusive.

Of course, the new method—civil suit to enforce a congressional subpoena—is not the only or automatically the best way for Congress to proceed in such disputes. The committee report on S. 2432 makes it clear that such suits would be initiated only "if unavoidable." Nevertheless, without a statute conferring jurisdiction on the federal courts to hear such cases, the only manner in which to obtain judicial consideration would be through contempt citations which, leaving aside the complexities of the law governing such cases, might impose an unwarranted criminal stigma on subordinate officials bound by presidential instructions.

Since the original Watergate Committee suit for presidential tapes was dismissed because the courts lacked jurisdiction to hear such cases, it was clear that a statute was required to confer that jurisdiction.

Since officials have made it a habit to deny Congress information without explicit presidential sanction, it was clear that a statutory limitation was required to force the executive to weigh each contemplated denial seriously and soberly.

But since it is also certain that presidential instructions will be respectfully considered in the Congress, we are convinced that our legislation leaves ample room for what Representative Culver rightly calls "the process of creative accommodation" while assuring Congress an added lever to use if and when that process collapses.

SAM J. ERVIN, JR.
EDMUND S. MUSKIE.
WILLIAM V. ROTH, JR.
Members, Senate Committee on Government Operations (Subcommittee on Intergovernmental Relations).

Washington.