

Nixon-Congress Battle

President's Executive Privilege View Brings Issue Closer to the Crisis Stage

NYTimes By JAMES M. NAUGHTON MAR 14 1973

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WASHINGTON, March 13—The President and Congress are headed once again for an impasse over executive privilege, the unwritten doctrine under which the executive branch has kept secrets from the legislative branch since 1796.

No Congress in all that time has had the nerve to go to court to test the President's asserted right to withhold some information from Congress. But the

mood between the second Nixon Administration and the 93d Congress was acrimonious even before the President declared in a 1,000-word statement yesterday that it would be "inappropriate" for his aides, past or present, to be subject to Congressional questions.

As Mike Mansfield, the cautious Democratic leader, said today on the Senate floor, "the question of executive privilege may be approaching a crisis stage."

Legislation to set limits on use of executive privilege is pending in Congress. Two Senate subcommittees will begin joint hearings next Monday on Administration policies on secrecy. And the Senate Judiciary Committee voted unanimously this afternoon to try to question John W. Dean 3d, Mr. Nixon's White House counsel, about the fitness of L. Patrick Gray 3d to become permanent director of the Federal Bureau of Investigation.

Nixon and Ervin Views

"No President could ever agree to allow the counsel to the President to go down and testify before a committee," Mr. Nixon said at his news conference March 1. His policy statement on executive privilege yesterday merely codified that attitude.

But Senator Sam J. Ervin Jr., Democrat of North Carolina, countered that Mr. Nixon's policy on Mr. Dean's unavailability "represents the essence of the conflict." And Senator Mansfield said today that Mr. Nixon was seemingly trying to extend executive privilege to "cover too much territory."

George Washington refused in 1796 to tell Congress all about the Jay Treaty with Great Britain and virtually all of his successors have refused to give some information to the Senate or the House of Representatives. Congress has often objected and has occasionally confronted the White House, but it has never resolved the issue.

The problem now, according to Senator Ervin and others, mostly Democrats, is that while previous Presidents have withheld information from Congress, Mr. Nixon is withholding witnesses.

According to Mr. Nixon's declaration yesterday, the President is not accountable for his use of his executive powers under the Constitution and it is therefore "equally inappropriate" to question his aides "for their roles are in effect an extension of the Presidency."

View Called Unfounded

Arthur Bestor, professor of history at the University of Washington, told a Congressional study conference last week that such an assertion of executive privilege was unfounded and that Congress would be well advised to disregard it. He theorized that Presidents had resorted to the custom of citing executive privilege as a response to the Congressional use of investigative power.

Similarly, Raoul Berger, the Charles Warren Senior Fellow of Harvard Law School, told the conference at the Capitol that Congress had been "too bashful about asking for what belongs to you" and that when an official refused to testify Congress should "stop being sissy about it—just clap him in jail."

No one in Congress has gone that far in opposing President Nixon's use of executive privilege. Senators Ervin and Mansfield concede that the President has a right to maintain confidentiality over his private discussions with intimate advisers. But they contend that the right does not extend to dealings between White House officials and third parties.

The Senate Judiciary Committee is asking to examine Mr. Dean not on his personal advice to the President but on his dealings with Mr. Gray during the bureau's investigation of the Watergate case last year.

Testimony Last Year

The situation appears to be comparable to one that involved Sherman Adams, President Eisenhower's closest aide, in 1958. Although General Eisenhower refused to allow the Senate to question Mr. Adams about his role in the Dixon-Yates power controversy of 1955, he permitted a House panel to interrogate Mr. Adams three years later about his relationship with Bernard Goldfine, the Boston industrialist. At the time, Mr. Nixon was Vice President.

There is an even more recent precedent for the interrogation of Mr. Dean. Last year, Mr. Nixon agreed to limited questioning of Peter M. Flanigan, a White House aide, in Senate confirmation hearings on the nomination of Richard C. Kleindienst to be Attorney General.

The Constitution does not specifically give Congress the power to demand information, nor does it give the President authority to deny information.

Senator Ervin's solution is to try to write rules for the use of executive privilege. His proposal would require an Administration official at least to show up, with a written excuse from the President, to claim the privilege when called before a Congressional committee. The committee would then judge the validity of the request. If it refused, it could insist on the information and, denied it anyway, could seek a citation for contempt of Congress.

President Nixon is certain to veto such a proposal if Congress sends it to him, and enactment of it over his veto would pose a constitutional issue for the courts to decide. No one on Capitol Hill appears to want matters to go that far.

Senator Robert C. Byrd, Democrat of West Virginia, noted today that Mr. Nixon intended to apply executive privilege even to former White House aides. He said that, with Congress and the President already arguing over war powers and spending authority, the White House attitude would "only heighten the pitch of the battle."

Senator Mansfield said he would prefer to "reach an accommodation" with the President over executive privilege. Senator Edmund S. Muskie, Democrat of Maine, said in a speech last night in Texas that "the best political medicine" to such constitutional disputes was "compromise."