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Why Executive Privilege Won't Kill You

By ROGER C. CRAMTON MARCH 23, 1973

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Executive privilege is one of those subjects that is long on rhetoric and short on substance. It is not one of the central issues of our time, but merely a moderately interesting question that has attained importance largely because of other issues of conflict between the executive and the legislature.

The argument that Congress is incapable of exercising its legislative prerogatives because the executive branch does not provide it with sufficient information is a staggering misconception. The practical fact is that Congress gets most of the information that it wants from the executive branch. It would be hard to overestimate the vast outpouring of data, reports, letters, and testimony which flow from the executive to Congress, to say nothing of the leaks and confidences from disgruntled officeholders that regularly stream to Congress.

Except possibly in the foreign and military area, Congress is not hindered in making legislative judgments by the failure of the executive to provide relevant information. The failure of Congress to establish decisive national policy on many issues is a failure of choice and will and resources on its part, not a result of lack of

information from the executive.

Discussions of executive privilege have focused primarily on its use to preclude Congressional exploration of the decision-making process of the executive branch. Here as elsewhere there is a core area of general agreement surrounded by a large grey area of uncertainty. This area of controversy is by far the most recent, largely because of the changing nature of Congressional hearings and the manner in which committees request information from the executive.

Requests for the personal appearance of high-level advisers have been declined. Refusals of this type were made by John Steelman, a Presidential assistant during the Truman Administration (investigation of strike of Government employes); Sherman Adams, a Presidential assistant during the Eisenhower Administration (Dixon-Yates contract); and DeVier Pierson, a Presidential assistant, and Under Secretary of the Treasury Joseph Barr during the Johnson Administration (Fortas confirmation). During the Nixon Administration, probably because the executive and the legislature are under the control of different political parties, refusals of this type have been more frequent, with Henry Kissinger, John Erlichman; H. R. Haldeman, Peter Flanigan and John W. Dean 3d as the principal targets.

Even in Congress there is widespread, if not universal, acceptance of the principle that an intimate adviser of the President should not be questioned concerning his conversations with or advice to the President. Thus Senator Mansfield, in recently communicating to the President a resolution of the Senate Democratic Caucus which proposed a procedure for the invocation of executive privilege by executive branch witnesses, issued a statement explaining that his support for this procedure did not mean that the President's most intimate advisers could be required to answer questions.

Presidential advisers are not subject to interrogation any more than a law clerk can be asked about the factors or discussions that preceded a decision of his judge or a legislative aide asked about conversations with his Congressman. The effective performance of the executive function requires that the President receive advice from his official family which is uninhibited by fear that the views stated will be subject to subsequent disclosure or second-guessing. Just as the integrity of the judicial or legislative process would be impaired by the invasion of privacy of their offices, so also the integrity of the executive's decision-making process would be hampered by a similar invasion of the executive office.

The clamor for access to the decisional process within the White House usually rests upon a desire on the part of those who oppose the ultimate Presidential decision to demonstrate that the President received conflicting advice or that his determination rested partly on political rather than purely rational considerations. While it is obvious to the sophisticated that this is almost invariably the case, routine revelation of the opinions, options and policies that were presented to the President may have the effect of limiting the candor and fullness of the advice he receives. Public discussion should be focused on the decision he has reached and not on the mental process on which it was based. It is the President who is responsible for the decision and the electorate has a periodic opportunity to evaluate his stewardship.

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