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## Policing the Executive Privilege

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## POLICING THE EXECUTIVE PRIVILEGE

In many instances presidential administrations have claimed an "executive privilege" to withhold from Congress testimony or written information requested of members of the executive branch.<sup>1</sup> Recently, this privilege has become the focus of considerable controversy. During its deliberations on the foreign military assistance bill, the Senate Foreign Relations Committee requested the Nixon administration to supply certain information on long-range plans for foreign military aid. President Nixon refused, contending that the requested information involved only "tentative planning data" and to provide such "internal working documents" to the Committee would not be in the public interest.<sup>2</sup> In like manner, the United States Information Agency refused to supply the Committee with memoranda used in drafting the Agency's budget. Emphasizing that the refusal was the result of an "executive decision," the Director of the Agency argued

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<sup>1</sup> When in 1792 Congress inquired into the failure of an expedition by General St. Clair in the Northwest Territory, President Washington at first refused to supply certain documents on the ground that they were of a secret nature. Later, in 1796, when he denied Congress access to papers used in the negotiations of the Jay Treaty, President Washington said:

"as it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request."

*Hearings on S. 1125 Before the Subcomm. on the Separation of Powers of the Comm. on the Judiciary*, 92d Cong., 1st Sess. 429-30 (1971) (statement of Mr. Rehnquist, quoting from 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 196 (1907)) [hereinafter cited as *1971 Hearings*].

During the trial of Aaron Burr, President Jefferson frustrated the subpoena of Chief Justice Marshall by not permitting certain officers of his administration to testify. Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1044, 1103 & nn.316-17 (1965).

Presidents Truman and Eisenhower used the executive privilege frequently. Although the House Committee on Education and Labor twice subpoenaed John Steelman, an assistant to President Truman, on the orders of the President he refused to appear because of his duties as a confidential advisor. For similar reasons Sherman Adams, an assistant to President Eisenhower, refused to testify before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee. *1971 Hearings* 474 (statement of Secretary of State Rogers).

President Kennedy once directed the Secretaries of Defense and State not to disclose names of certain officials during a congressional investigation of military cold war education and speech review policies. In a letter to the Secretaries, he stated:

"It would not be possible for you to maintain an orderly Department and receive the candid advice and loyal respect of your subordinates if they, instead of you and your senior associates, are to be individually answerable to the Congress, as well as to you, for their internal acts and advice."

*1971 Hearings* 433 (statement of Mr. Rehnquist, quoting from an unidentified letter of President Kennedy.)

<sup>2</sup> N.Y. Times, Sept. 1, 1971, at 1, col. 4.

that the documents were unevaluated working papers that did not represent official policy.<sup>3</sup> In both instances, the administration relied upon the executive privilege in refusing to disclose the information.

No case has authoritatively determined the extent to which Congress may compel the production of testimony or documents from the executive branch of government,<sup>4</sup> and thus the constitutional status of the executive privilege remains unclear.<sup>5</sup> Nevertheless, advocates of the privilege assert that the discretionary power of an administration to withhold information or testimony, although not explicitly authorized by the Constitution, is an implicit presidential prerogative based upon the constitutional doctrine of separation of powers.<sup>6</sup> On the other hand, critics of the privilege assert that separation of powers entitles Congress to secure all information necessary to the performance of its legislative function.<sup>7</sup>

In response to the increasing number of confrontations over the

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<sup>3</sup> N.Y. Times, March 21, 1972, at 13, col. 1.

<sup>4</sup> One reason advanced for the lack of litigation in this area has been the historical absence of conflict between legislative and executive branches of government. The two branches of government have emphasized cooperation, albeit an often tenuous cooperation. 1971 *Hearings* 421.

<sup>5</sup> The executive privilege is replete with constitutional issues. At the threshold is the question of whether there is a constitutional basis for the privilege. There appears to be general agreement that the privilege is implicit in the constitutional doctrine of separation of powers. Nevertheless there is no clear Supreme Court decision to that effect. Other constitutional issues are briefly discussed in note 24 *infra*.

For a thorough analysis of the constitutionality of executive privilege, see Berger, note 1 *supra*. See also Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957).

<sup>6</sup> *United States v. Reynolds*, 345 U.S. 1 (1952), is usually cited as judicial support for the executive privilege. In that case the Supreme Court upheld the authority of the President to withhold information from compulsory subpoena. While serving as Assistant Attorney General, William Rehnquist noted that although *Reynolds* is not a *carte blanche* for executive privilege, "the Court's description of the extent of judicial review of the propriety of the claim indicates that such a review would be a narrow one." 1971 *Hearings* 421.

<sup>7</sup> In *McGrain v. Daugherty*, 273 U.S. 135 (1927), the Supreme Court held that a witness could be placed in custody to insure that he would appear when subpoenaed to testify before a Senate investigatory committee. The Court found that the power to legislate implies the power to subpoena and requires testimony from witnesses in order to obtain information necessary to carry out the legislative function.

Senator Ervin has interpreted *McGrain* to mean that Congress is entitled to "adequate information" for the exercise of its legislative powers and duties. 1971 *Hearings* 418. Assistant Attorney General Rehnquist conceded that the case stands for that proposition, stating that "the power to legislate implies the power to obtain information necessary for Congress to inform itself about the subject to be legislated, in order that the legislative function may be exercised effectively and intelligently." 1971 *Hearings* 421.

Nevertheless, the case did not involve the use of the executive privilege, and the Court was not required to balance the need of the Congress to receive enough information to legislate and the need of the executive branch to protect the privacy of its internal deliberations. Therefore, the decision does not clarify the constitutional status of the privilege.

use of the executive privilege,<sup>8</sup> Senator William Fulbright has placed before the Senate a bill<sup>9</sup> designed to avoid the confusion that now exacerbates the tension between the legislative and executive branches of government. This relatively uncomplicated bill defines procedures for the assertion of the executive privilege and provides sanctions to be imposed when these procedures are abused or ignored.<sup>10</sup> This note reviews the nature of the controversy between the two branches of government which has contributed to the introduction of the proposed legislation, and then proceeds to examine the provisions of the bill.

## I. THE NATURE OF THE CONTROVERSY

The controversy over the executive privilege is a manifestation of the fundamental conflict between the need of Congress for information essential to the performance of its legislative function and the desire of the executive branch to conduct its internal deliberations without undue disruption. The controversy involves three separate issues. The first is *when* may the privilege be invoked to withhold from Congress information requested of the executive branch; more precisely, what types of information may be withheld, and under what circumstances. The second is *who* in the executive branch may invoke the privilege. And the third issue is *how* may the privilege be invoked, that is, what is the appropriate procedure for these members of the executive branch to follow when they choose to withhold requested information from Congress.

Institutional modifications have heightened the conflict between

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<sup>8</sup> In addition to the controversies involving the foreign military assistance program and the United States Information Agency budget (*see* text accompanying notes 2-3 *supra*), the executive and legislative branches of government have clashed over executive privilege in such diverse situations as whether Presidential Assistant and National Security Advisor Henry Kissinger can refuse to testify before congressional committees, and whether the Congress is entitled to receive briefings from the Central Intelligence Agency similar to those furnished the President. N.Y. Times, Sept. 3, 1971, at 2, col. 2.

<sup>9</sup> S. 1125, 92d Cong., 1st Sess. (1971) [hereinafter cited as S. 1125]. The bill as originally introduced on March 5, 1971, contained only section 306. Amendments introduced on July 29, 1971, added section 307.

<sup>10</sup> Some observers believe that the limits of the privilege, whatever they may be, have been abused in the past. Senator Fulbright has stated that although executive privilege in its contemporary form was born honorably out of an intent to protect officials of the executive branch from personal attack, it has developed into something else:

a highly effective means of nullifying the investigatory function of Congress. In neither logic, law, or practice can there exist simultaneously an effective power of legislative oversight and an absolute executive discretion to withhold information. Inevitably, one must give way to the other and the only question is which one is to be dispensed with.

1971 Hearings 24.

the needs of Congress and the desires of the executive branch.<sup>11</sup> In recent decades there has been an obvious shift in the relative powers of the legislative and executive branches. An example of this shift is the tendency toward the use of executive agreements where a formal treaty requiring approval of the Senate would formerly have been deemed necessary.<sup>12</sup> There has also been a reorientation of the decision-making process within the executive branch itself. The most notable instance of this change involves the increased responsibilities which the President has given to his "personal advisors." The large staffs and budgets which such advisors now oversee have led observers to conclude that these officials have become de facto agency chiefs who should not in every instance be immune from congressional demands for testimony.<sup>13</sup>

The administration's increased use of lower level officials to testify at congressional hearings and investigations has also intensified the controversy. Often such officials are not authorized to answer questions that are posed, or, more often, they may simply not know the answer.<sup>14</sup> Further, whether lower level officials may constitutionally invoke the executive privilege without specific presidential authorization is unclear.<sup>15</sup>

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<sup>11</sup> A respected public official has suggested that the institutional conflict between legislature and executive can be intensified by continuing disagreements between the members of both branches. *1971 Hearings* 263-68 (remarks of Mr. Acheson).

<sup>12</sup> *1971 Hearings* 268 (remarks of Prof. Kurland).

<sup>13</sup> Traditionally, personal advisors to Presidents have claimed a blanket immunity from congressional demands for testimony on the ground that everything they say or do in their unique role as presidential confidants is properly covered by the executive privilege and thus is at all times immune from inquiry.

However, a former advisor to President Johnson, George Reedy, testified:

I do not think that a man who is in control of some 140 people, with 40 of them being very substantive people indeed and the others being various types of clerical help and clerical support, is any longer a personal advisor. He is a man who is administering policy, who is administering it on the somewhat impersonal staff level that at one point we would have expected from the State Department . . . .

*1971 Hearings* 457.

<sup>14</sup> *1971 Hearings* 322-23 (remarks of Mr. Bundy).

As a General Accounting Office official notes of that office's experience:

The response we usually get at the working level is that they do not have the authority to release them, and they will have to clear it with higher headquarters. And this just starts up the chain until it gets back to the Pentagon and State Department. No; they don't actually refuse us access; we just don't get it.

*1971 Hearings* 315 (remarks of Mr. Duff).

<sup>15</sup> President Nixon has seemingly precluded executive employees from using the privilege without his direct authorization. On March 24, 1969, he issued the following memorandum:

The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which

Advocates of the executive privilege argue that disclosure of staff level discussions can often be damaging to the policy-making process, especially in the area of foreign affairs, and with respect to this policy-making apparatus even more protection is needed for documents and opinions than is now available.<sup>16</sup> Those who advocate the privilege believe that by embracing the concept of separation of powers the framers of the Constitution recognized the need for private deliberations to facilitate the formulation of government policy.<sup>17</sup>

The legislation proposed by Senator Fulbright recognizes the several aspects of the controversy and attempts to accommodate the interests of both the legislative and executive branches of government. As Senator Fulbright himself has said, the function of the bill

is not to eliminate but to restrict the practice of "executive privilege," by reducing it to bounds in which it will cease to interfere with the people's rights to know and the Congress's duty to investigate and oversee the execution of the laws.<sup>18</sup>

Thus, despite the warnings of its detractors,<sup>19</sup> the bill has modest ambitions. It does not place any restraints upon the information that the administration may claim as privileged. Indeed, rather than control the invocation of the privilege, the bill only regulates the procedures to be followed when the executive branch decides to use it.

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would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval.

Memorandum for the Heads of Executive Departments and Agencies (Establishing a Procedure to Govern Compliance with Congressional Demands for Information), March 24, 1969, in *1971 Hearings* 36-37.

The constitutional aspect of who may assert the privilege is briefly discussed in note 24 *infra*.

<sup>16</sup> *1971 Hearings* 320. Senator Ervin has noted that the executive branch often hesitates to send information to Congress on the ground that it is not in the public interest to make the documents available. The Senator points out, however, that information in the hands of congressional committees does not mean it will necessarily become public information. *1971 Hearings* 244.

<sup>17</sup> Assistant Attorney General Rehnquist asserted that any intrusion into the deliberations of the executive branch would be a "departure from the distribution of powers contemplated by the Constitution. . . ." He further argued that the President must face the electorate at the end of his four-year term to justify his action, and given that critical review, he should be entitled to faithful and confidential advice from his subordinates. *1971 Hearings* 425.

<sup>18</sup> *1971 Hearings* 20.

<sup>19</sup> See note 17 *supra*.

## II. THE PROPOSED LEGISLATION

### *A. Invoking the Privilege*

The proposed legislation provides that no employee<sup>20</sup> of the executive branch may refuse to appear before a congressional committee<sup>21</sup> on the ground that he intends to assert the executive privilege. Prior notice to the committee that any employee intends to invoke the privilege is not sufficient to excuse an *appearance* before a committee.<sup>22</sup> Any employee who wishes to invoke the privilege may do so only if he appears before the committee and produces a statement signed by the President requiring the employee to assert the privilege and deny access to the information sought.<sup>23</sup> Thus the bill is apparently premised upon the assumption that any constitutional power to assert the executive privilege is limited to the President himself and may not be delegated to other officials in the executive branch.<sup>24</sup>

The requirement that all witnesses must appear before the congressional committee irrespective of whether they intend to invoke the executive privilege is an attempt to prevent executive branch employees from summarily refusing to respond to all questions posed by the committee. Since any information for which the privilege is claimed would be precisely identified by the question posed at the hearing, there would be no confusion as to what information is being claimed as privileged and the possibility of taking an "informal privilege," that is, merely ignoring the

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<sup>20</sup> S. 1125, § 307(b)(2) defines "employee" as "(A) an employee in or under an agency; and (B) a member of the uniformed services." For the definition of "agency," see note 32 *infra*.

<sup>21</sup> The bill generally applies to requests for testimony and written information from the executive branch by Congress, any joint committee, committee, or subcommittee thereof, as well as the General Accounting Office. S. 1125, § 307(c). The term "committee" is used in this note to encompass all of these bodies.

<sup>22</sup> *Id.* § 306(a).

<sup>23</sup> *Id.* §§ 306(b), 307(d).

<sup>24</sup> Assuming the existence of the privilege, a constitutional question immediately arises as to who may assert it. The privilege may either be personal to the President or available to him as well as others in the executive branch. Again, there is no Supreme Court decision resolving the issue. Nevertheless, it seems that if the privilege is available to the President as well as others in the executive branch, the proposed legislation, by limiting assertion of the privilege to the President, may be viewed as an unconstitutional attempt by Congress to limit the rights of the executive branch. Even if the privilege is personal to the President, however, there is another constitutional question that must be considered: whether the President may delegate to others in the executive branch the power to assert the privilege. If the President may so delegate the privilege, then arguably the Fulbright bill, by recognizing the privilege only when asserted under the signature of the President, is unconstitutional.

request, would necessarily be curtailed.<sup>25</sup> Although the procedure might be more efficient if Congress would accept a written statement from the President that a witness would be required to invoke the privilege should he appear,<sup>26</sup> prospective witnesses presumably possess information for which the privilege would not be claimed, but which would never be discovered if no appearance were made. The requirement that an appearance be made, therefore, has sufficient fact-finding potential to outweigh this possible inefficiency.

The bill establishes a procedure for executive employees to obtain a statement of the President invoking the privilege.<sup>27</sup> When an employee receives a request for information from a committee, the head of the agency in which he is employed must determine whether there is a strong need to invoke the executive privilege, and if there is, he is required to inform the committee immediately. He must then confer with the Attorney General concerning the question of whether to seek invocation of the privilege by the President.<sup>28</sup> The agency head and the Attorney General have thirty days to reach a decision and must either present the requested information to the committee or refer the matter to the President.<sup>29</sup> If the matter is referred to the President, he too has thirty days either to invoke the privilege, in which case he must set forth his reasons in writing, or to make the information immediately available to the committee.<sup>30</sup>

The proposed legislation delineates the nature of the information to which Congress may demand access. Information under the custody of any government agency is to be made available to the extent necessary for Congress to

exercise, in an informed manner, the authority conferred upon it by article I of the Constitution to make laws necessary and proper to carry into execution the powers vested in the Congress and all other powers vested in that government or any department of office thereof.<sup>31</sup>

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<sup>25</sup> Professor Swan of the University of Chicago identified the anticipated effect of the bill on use of the "informal privilege." He suggests that by requiring the executive official to appear at a hearing, the committee forces him to defend precisely the grounds on which he thinks the privilege should be based. If, in fact, the privilege is based on a matter of "internal opinion and advice and part of the internal deliberative process," then that basis will be respected and the privilege recognized. *1971 Hearings* 252.

<sup>26</sup> *1971 Hearings* 354 (remarks of Mr. Harriman).

<sup>27</sup> S. 1125, § 307(e).

<sup>28</sup> *Id.* § 307(e)(1).

<sup>29</sup> *Id.* § 307(e)(2). The bill fails to provide for the possibility that the agency head and the Attorney General may not agree on the proper course of action. In the event that these parties reach an impasse, the matter would most likely be referred to the President.

<sup>30</sup> *Id.* § 307(e)(3).

<sup>31</sup> *Id.* § 307(a).

Although this statement asserts no new congressional power, it at least expresses in statutory form the position of the legislative branch with regard to the executive privilege. The bill puts the executive branch of government on notice that Congress demands access to all information necessary to conduct its legislative function.

### B. Sanction

Perhaps the most controversial aspect of the bill is the sanction it establishes. If the information is not released or the privilege formally invoked in writing within the sixty day statutory period, all funding of the agency<sup>32</sup> involved will be terminated seventy days after the employee of the agency first received the request. Thereafter, funding will resume only when the President personally invokes the privilege or the information is made available to the committee.<sup>33</sup> Presumably, the ten day gap between the expiration of the sixty day period and the funding halt on the seventieth day is a grace period during which the President can reconsider his decision and preparations can be made to stop the flow of funds.

From the congressional perspective, the proposed sanction no doubt reflects the frustration congressmen experience in attempting to secure needed information.<sup>34</sup> However, the sanction is heavy-handed and has been the subject of widespread criticism.<sup>35</sup> Some contend that such a harsh measure would create an initially antagonistic and hostile situation where one need not necessarily exist,<sup>36</sup> while others argue that the sanction would never be an effective deterrent, since Congress would be reluctant to use so drastic a measure.<sup>37</sup>

An alternative enforcement procedure would refer all questions of non-compliance to the courts. The judiciary could order the executive to produce any information when the privilege is not

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<sup>32</sup> *Id.* § 307(b)(1) defines "agency" as "(A) an executive agency; (B) a military department; and (C) the government of the District of Columbia."

<sup>33</sup> *Id.* § 307(f).

<sup>34</sup> When congressional requests are submitted to an agency they may be transferred from official to official. It is impractical for Congress to identify the source of any resulting delay.

<sup>35</sup> For example, Representative Moss, although strongly opposed to the executive privilege, does not believe that the termination of funds is an adequate solution. While he is certain Congress has the power to invoke such a measure, he has termed it "a very far fetched thing to do." *1971 Hearings* 336. See also *id.* at 362 (remarks of Mr. Harriman).

<sup>36</sup> *1971 Hearings* 379 (remarks of Mr. Dorsen).

<sup>37</sup> *Id.* at 380.

invoked in the proper statutory method.<sup>38</sup> In any event, Senator Fulbright agrees that the bill is not a final solution and that the courts must be the source of the ultimate answers. Speaking of the impact of the bill in general, he said:

Even if this legislation is enacted, we will have to accept the principle that the question of whether the President in any given instance has asserted executive privilege reasonably or arbitrarily would be a judicial question.<sup>39</sup>

Perhaps closer to the spirit of the legislation is the suggestion by the Chief Counsel of the Subcommittee on Separation of Powers that rather than suspend the agency's funding on non-compliance, Congress should reduce the number of top-grade administrative positions in an agency or department by one-half.<sup>40</sup> That would allow the agency to continue functioning while placing rather direct pressure on those top-level officials in the department who would most likely control the information. But to reduce the number of key executive personnel or to suspend funding of agencies like the State or Defense Department is an awkward tool for enforcing congressional policy and would be surely as damaging to the interests of Congress and the nation as to the executive branch of government. The strength of either approach must rest more in the *threat* of its execution rather than in its actual application. The resulting paradox is, however, that the credibility of such a drastic threat would be so low as to make it ineffective, and the only way to raise that credibility would be periodically to execute the threatened action. Crude as such measures may be, Congress can make them effective by clearly showing its resolve to use them when necessary.

### *C. Personal Advisors*

Another issue that has sparked much of the past controversy over executive privilege is the ability of presidential personal advisors to avoid testifying before congressional hearings on the ground that as personal confidants of Presidents, their advice should not be subject to inquiry.<sup>41</sup> Senator Fulbright's bill does

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<sup>38</sup> For a discussion of whether a dispute between the executive and legislative branches of government concerning the executive privilege is a justiciable issue, see Berger, *supra* note 1, at 1333-60. He contends that such a dispute is a justiciable "case or controversy," and concludes that the general conflict over the executive privilege can be finally resolved only in the courts.

<sup>39</sup> 1971 *Hearings* 211.

<sup>40</sup> *Id.* at 380.

<sup>41</sup> See note 13 *supra*.

not specifically exempt personal advisors from its provisions, yet even the Senator admits that "[n]o one questions the propriety or desirability of allowing the President to have confidential, personal advisors."<sup>42</sup> Observers have called for an amendment which would recognize this relationship.<sup>43</sup> The most difficult aspect of this problem arises in attempting to distinguish between strictly personal advisors and the department chiefs who oversee large, operational agencies. The position of Henry Kissinger as an advisor to President Nixon with a sizable and important staff exemplifies the problem. A former advisor to President Johnson has suggested that the President alone should make the distinction; although he admits that such a policy would give the President complete control over who might be exempt from congressional inquiry, he sees no alternative.<sup>44</sup>

However, if the bill were to exempt executive branch employees whom the President classifies as personal advisors, the basic objectives of the bill might be undermined. If the President wished to extend personal advisor status to lower level executive employees who control information, they would be protected from congressional inquiries. Congress would be providing a loophole which it could not close without further legislation. No doubt Senator Fulbright recognized this situation in designing the bill without a formal personal advisor exclusion, because he declared in introducing his legislation:

No one questions the propriety of executive privilege under certain circumstances; what is and must be contested is the contention that the President alone may determine the range of its application and, in so doing, also determine the range of the Congress' power to investigate.<sup>45</sup>

#### *D. Criticism and Alternative Solutions*

The strongest critics of executive privilege argue that the bill provides precedent and statutory strength for a privilege whose legitimacy is still a matter of doubt.<sup>46</sup> For example, Representa-

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<sup>42</sup> 1971 *Hearings* 21.

<sup>43</sup> Former Secretary of State Dean Rusk has called for an amendment to the bill which would recognize the confidential nature of the relationship between the President and his personal staff. He noted that this relationship is common to staffs in all three branches of the federal government and thus is not just an "executive" privilege. 1971 *Hearings* 339. See also *id.* at 427 (remarks of Mr. Rehnquist).

<sup>44</sup> *Id.* at 460 (remarks of Mr. Reedy). Admitting the existence of the privilege, Mr. Reedy notes "I do not mind conceding it too much, simply because I do not think there is anything that can be done about it."

<sup>45</sup> 1971 *Hearings* 31.

<sup>46</sup> See note 5 *supra*.

tive Moss has stated that executive privilege is an "arrogant claim of the President of the United States" and Congress should refuse to recognize it.<sup>47</sup> More specifically, critics object to the bill because it allows the President absolute discretion in deciding whether grounds for the invocation of the privilege exist.<sup>48</sup> They would permit the use of the executive privilege only insofar as it is necessary to protect executive branch employees from inquiries into the substance of their confidential advice to superiors.<sup>49</sup> Without this protection, employees may be less willing to offer their candid opinions on issues facing the executive branch of government.

Some of those persons who object to executive privilege are willing to accept its statutory recognition because the bill shifts the duty of deciding whether to invoke the privilege from low-ranking officials to the President, and thereby eliminates the delaying tactics often used in lieu of executive privilege.<sup>50</sup>

Insofar as it suggests that the executive branch is concealing information from the electorate, too frequent use of the executive privilege can be damaging to an administration's public image. Therefore, the provision forcing the decisions to the top ranks of the administration is one of the major strengths of the bill. High level political appointees, who under the bill would be forced to seek a written authorization of the President in order to invoke the privilege, are less likely to want to use the privilege than more politically immune civil servants because of the potentially bad public image it may create.<sup>51</sup> Additionally, restricting the use of the privilege to the President will remove a major source of

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<sup>47</sup> 1971 *Hearings* 332. Proponents of the legislation—critics themselves of executive privilege—respond that it is somewhat late to be arguing whether or not the right of executive privilege exists. As Deputy Comptroller General of the United States Robert Keller notes, the bill "assumes the fact of its existence and realistically makes an effort to restrict its exercise to the President or by his written direction." 1971 *Hearings* 308.

<sup>48</sup> 1971 *Hearings* 364–65 (remarks of Mr. Dorsen).

<sup>49</sup> *Id.* at 365.

<sup>50</sup> 1971 *Hearings* 308 (remarks of Mr. Keller). Mr. Keller also expressed some doubt whether executive privilege should be recognized as such by statute, but finally acquiesced in the bill's approach, because "at least from our viewpoint it would cut out the delaying tactics, and the decisions not to disclose records being made at a lower level." 1971 *Hearings* 310.

<sup>51</sup> 1971 *Hearings* 337 (remarks of Prof. Winter). Representatives of the executive branch seem to be satisfied with such a provision. Former Secretary of State Dean Rusk believes that it is only good judgment for a President not to delegate such decisions in order to be "personally in touch with the constitutional relationships between himself and the Congress." 1971 *Hearings* 340.

Similarly, former Assistant Secretary of State William Bundy sees the effect of the bill as being "to tighten and stiffen" the manner in which the executive branch deals with congressional requests, "so that you don't get captious or self-protecting invocations of the privilege, but you do get clear lines, and everybody would understand what you were doing." 1971 *Hearings* 327.

irritation among congressional staffs and officials — the blockage of information by inaccessible, lower level executive employees.<sup>52</sup>

Alternate solutions beyond this proposed legislation are as numerous as the complaints about the executive privilege itself. One critic has suggested that existing laws can be easily modified to control any abuse of discretion.<sup>53</sup> Others believe that Congress can best limit these abuses by presiding over a complete revision of the procedures that determine which information will be "classified."<sup>54</sup> Finally, it has been suggested that the entire focus of the *executive* privilege should be changed to the problem of *advice* privilege. Proponents of this view believe that there is no basis, constitutional or otherwise, for giving the executive branch a special privilege. Rather, new legislation should fashion the privilege as a means to protect all confidential advice, whether given to the executive, legislative, or judicial branch.<sup>55</sup> This position fails to recognize that while all branches do have communications which need protection, the executive branch controls more information of this nature than the other branches. For this reason, the terms for the use of the privilege by the executive branch must be clearly articulated.

### III. CONCLUSION

Despite its onerous sanction, the proposed legislation represents a reasoned approach to the executive privilege. In no way does the bill prohibit assertion of the privilege, rather it merely establishes a well-defined procedure for the executive branch to respond to congressional requests for information. If enacted, the bill would surely serve to relieve the tension that now exists between the executive and legislative branches of government. The measure would eliminate unnecessary delay in executive

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<sup>52</sup> Prof. Ralph Winter, consultant for the Subcommittee on the Separation of Powers, expressed this irritation by saying that

the previous practices of lower officials in invoking executive privilege have been superceded by a practice of their just refusing to divulge the information without specifically mentioning executive privilege. Executive privilege is alive and well in the discretion of lower officials.

*1971 Hearings* 337.

<sup>53</sup> Prof. Berger suggested that a 1928 statute, 5 U.S.C. § 2954 (1970), could be amended to provide adequate protection for the Congress. As presently drafted, the statute requires the executive agency to furnish the House or Senate Committees on Government Operations all information requested of it relating to any matter within the jurisdiction of the committee. By changing the statute to include requests by all congressional committees, Congress would theoretically have all needed information at its disposal. *1971 Hearings* 288-89. However, the ambiguity as to what relates to a matter within the jurisdiction of a committee would doubtless result in frequent controversy and litigation.

<sup>54</sup> *1971 Hearings* 322 (remarks of Mr. Bundy).

<sup>55</sup> *1971 Hearings* 365 (remarks of Mr. Dorsen).

response to requests for information, and would discourage evasion of such requests by lower echelon executive employees. Shifting the focus of the executive privilege to the politically most sensitive official, the President, would certainly effect a more responsible use of the privilege.

To the extent that the bill is an attempt to respond to a larger tension between the executive and legislative branches, that is, an attempt by Congress to maintain a position equal to and competitive with the executive, the bill will fall short of its goal, for it is doubtful whether any legislation can return to Congress its once central position in the federal structure. The bill can achieve only the more limited goal of easing that tension between these branches of government which is traceable to the executive privilege. In any event, the ultimate success of the bill will depend upon the commitment of Congress and the executive branch to a spirit of cooperation, not competition, in performing their assigned functions of government.

— *Keith Borman*