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## Secrecy in a Free Society

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us out," apparently because they carried leaflets handed to them by the protesters. A 35-year-old housewife and her fourth-grade son were ejected when a marshal saw them speaking to a long-haired youth through a window.

A Quaker Sunday school class of 12- and 13-year-olds who'd come to see their Quaker President, the 16-year-old daughter of a superior court judge and two grandchildren of a former Charlotte mayor received the same treatment. "Of course they had on blue jeans," said the mother of the latter two in an angry letter to the editor of the *Charlotte Observer*. "Of course his hair is long. Isn't your son's?" By the time it was all over, five youths had been arrested.

"It wasn't the Secret Service," said Deputy White House Press Secretary Gerald Warren. "It must have been local people." Local officials said, however, that the Secret Service gave the orders.

Charlotte Chamber of Commerce President Charles Crutchfield, the initiator of the Graham Day program, said the decision to bar people from the Coliseum was based on

intelligence reports that "several hundred young people who had long hair and [who would be] dressed like hippies . . . would take over the stage and disrupt the program." He added that "the Secret Service instructed the police to examine very carefully all people with long hair and beards." One of the demonstrators said later that Crutchfield was crediting them with more organization than they ever dreamed of.

Few people would deny that the Secret Service should act when the President is directly threatened. But the arbitrary actions in Charlotte show that it was more interested in preventing embarrassment than harm to Mr. Nixon. Such actions are taking on a pattern. Similar ones occurred when he appeared in Dayton in September.

Former Secret Service agent Rufus Youngblood, who protected Lyndon Johnson in Dallas when John Kennedy was shot, says agents today have to be "Nixon men" to get anywhere. Perhaps that explains a lot.

WILLIAM ARTHUR, JR. and POLLY PADDOCK

## EXECUTIVE PRIVILEGE

# SECRECY IN A FREE SOCIETY

**SEN. SAM J. ERVIN, Jr.**

*Senator Ervin (D., N.C.) is chairman of the Subcommittee on Separation of Powers of the Senate Judiciary Committee.*

*Washington*

I am alarmed, as are my colleagues in the Congress, by the increasing frequency with which the executive branch withholds from Congress information vital to its legislative functions. Congress' decision-making role cannot be denied, but by the invocation of "executive privilege," the President, in effect, excludes the legislature from meaningful participation in that process. This dangerously expanding trend toward government by secrecy negates the constitutional principle of "accountability" as envisioned by the founding fathers, and does violence to the principle of separation of powers upon which our system of government is based.

The term "executive privilege," as currently used, most commonly refers to a situation in which the executive branch refuses to divulge information requested by the Congress. It is a term employed more often by members of the legislative branch and by scholars than by the members of the executive branch who willfully withhold information. As I use the term, it refers to the executive branch's denial of any kind of information to any person, be he a member of the Congress or of the taxpaying public.

The recent controversies surrounding the publication of the so-called "Pentagon Papers"; the court fight for the release of the Garwin Report on the SST; Representative Mink's pending suit against the Environmental Protection Agency, seeking release of the report on the AEC's proposed nuclear test on Amchitka Island, and the denial to Senator Fulbright of access to the five-year foreign military assistance plans have brought the issue sharply into focus in the public mind.

At issue in any consideration of executive privilege are three conflicting principles: (the alleged power of the President to withhold information, the disclosure of which he feels would impede the performance of his constitutional responsibilities; the power of the legislative branch to obtain information in order to legislate wisely and effectively; and the basic right of the taxpaying public to know what its government is doing.)

These opposing principles have clashed in almost every administration since the legislative branch undertook an investigation of the St. Clair Expedition during George Washington's first term as President. Without questioning the propriety of the investigation, President Washington asserted:

First, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.

In spite of his contention that the executive possessed the discretionary power—or duty—to refuse to communicate any information "the disclosure of which would injure the public," all of the St. Clair documents were turned over to the Congress.

There is ample precedent for the view that Congress has the power to institute inquiries and exact evidence. "The power to legislate carries with it by implication ample authority to obtain information needed in the right exercise of that power and to employ compulsory

process for the purpose. . . ." *McGrain v. Daugherty* 273 U.S. 165 (1927).

Although the Constitution is silent with regard to the existence of executive privilege, its exercise is now asserted to be an inherent power of the President. Its constitutional basis allegedly derives from the duty imposed upon the President under Article II S.3 to see that the laws are faithfully executed. The President claims the power on the ground that he must have it in order to provide the executive branch with the autonomy needed to discharge its duties properly. Inasmuch as "the President alone and unaided could not execute the laws . . ." but requires "the assistance of subordinates"—*Myers v. U.S.* 272 U.S. 117 (1926)—the alleged authority to exercise executive privilege has been extended in practice to the entire executive branch.

In theory, the release of information from the executive branch is governed in part by Executive Order No. 10501, issued by President Eisenhower, and amended by him in Executive Order No. 10816, and by President Kennedy's Executive Order No. 10964. These orders establish a system of security classifications for information on defense matters whose release might injure or embarrass our national defense or our relations with foreign nations. Such orders are not authority to assert executive privilege; they simply forbid or restrict disclosure of classified material.

President Kennedy attempted to end the practice of delegating to employees of the executive branch the authority to claim executive privilege. In a letter to the House Foreign Operations and Government Subcommittee in 1962, he stated that the basic policy of his administration would be that "Executive privilege can be invoked only by the President and will not be used without specific Presidential approval." Presidents Johnson and Nixon reaffirmed this policy. Thus, theoretically, procedures instituted in the executive branch would place with the President the ultimate decision and responsibility for the exercise of executive privilege. However, throughout my years in the Senate, I have learned that there is a great discrepancy between theory and practice, a discrepancy demonstrated, among other ways, by Congress' continuing inability to obtain information from the executive branch.

The asserted doctrine of executive privilege has developed unrestrained. In the absence of any Congressional statutory authority or constitutional grant of the power, the will of each succeeding President has been substituted for legislation in the field. A contest of political power between the President and Congress has superseded the proper administration of federal functions by the President under the restraints that would be provided by effective legislative oversight. Nor have the courts given any definite guidance on the issue, although the *Reynolds* 345 U.S. 1 (1953) and *Curtiss-Wright* 299 U.S. 304 (1936) cases do contain some dicta relating to the problem.

The assertion of executive privilege, or the power to withhold information, written and spoken, from Congress and the public under the assumed "inherent executive power," must I think be viewed in the context of the slowly but steadily increasing power of the executive—a development

that has been duly noted by numerous political and legal scholars. This increased power has enabled the executive branch to make crucial decisions without answering to any system of formal "accountability" for the exercise of such powers beyond the Presidential election every four years. Because the President has been able to act through Executive Orders without the inconvenience and restraints of Congressional authorization or delegation of power, the principle of the separation of governmental powers has been seriously eroded.

In all candor, we in the legislative branch must confess that the shifting of power to the executive branch has resulted from our failure to assert our own constitutional powers. Other than issue sporadic complaints, members and committees of the Congress have done little to prevent the executive branch from withholding information when, in its sole discretion, it determined that secrecy was necessary—or politically desirable. Moreover, through the almost unlimited delegation of authority to the bureaucracy, Congress has actively encouraged the aggrandizement of executive power. The executive branch has access to information which the Congress cannot possibly match, and it has asserted the discretionary authority to employ that data in performing its myriad tasks. I fear that the steady increase of executive power has come close to creating a "government of men, not of laws."

The practice of executive privilege, it seems to me, clearly contravenes the basic principle that the free flow of ideas and information, and the open and full disclosure of the governing process, are essential to the operation of a free society. Throughout history, rulers have imposed secrecy on their actions in order to enslave the citizenry in bonds of ignorance. By contrast, a government whose actions are completely visible to all of its citizens best protects the freedoms embodied in the Constitution.

Moreover, it is clear that the invocation of executive privilege is contrary to the spirit, if not the letter, of the *Freedom of Information Act* (5 U.S.C. 552), which Congress passed with the express purpose of expanding to the fullest practical extent the full disclosure to the public of the actions of the government. While it provides for nine specific exceptions, it likewise specifies that none of those exceptions constitutes authority to withhold information from the Congress. Section (4)(c) of the Act explicitly states, "This section is not authority to withhold information from Congress."

It also can be argued with some cogency that the practice contravenes the philosophical thrust of the 1952 Supreme Court case of *Youngstown Sheet & Tube Co. v. Sawyer*, 342 U.S. 579, where the Court invalidated President Truman's seizure of the steel mills by Executive Order. The several majority opinions in that case indicate that Congress is a co-equal branch of the government, and that its prerogatives may not be usurped or impeded by actions of the executive.

Beyond the penchant for maintaining secrecy through the invocation of executive privilege, a more generalized attempt is made to withhold information through the classification system, the infirmities of which were so clearly reflected in the recent furor over the Penta-



gon Papers, and in the general failure or refusal to disclose data which are of potential interest to the public. When the people do not know what their government is doing, those who govern are not accountable for their actions—and accountability is basic to the democratic system. By using devices of secrecy, the government attains the power to “manage” the news and through it to manipulate public opinion. Such power is not consonant with a nation of free men. Thus the exercise of the assumed power of executive privilege is of basic importance to our governmental system, and the ramifications of a growing policy of governmental secrecy is extremely dangerous to our liberty.

The Senate Judiciary Subcommittee on Separation of Powers, of which I am chairman, was mindful of these dangers when it initiated its study on the subject, and recently held hearings on executive privilege. It found that the nation's history contains many examples of Congressional demands for information that have been countered with the invocation of executive privilege or some other bureaucratic excuse for failing to reply. These practices include delaying tactics which continue for so long that the information, when submitted, is no longer pertinent, and the placing of security classifications upon information that is supplied, thereby preventing any meaningful use of the data. Such practices reflect a certain contempt for Congressional requests for information and an apparent disdain for the right of the American people to be informed fully about the operations of their government.

As chairman of another subcommittee—the Senate Judiciary Subcommittee on Constitutional Rights—I have for some time attempted to obtain information pertinent to a study of Army surveillance and data bank programs which infringe on the privacy and First Amendment rights of citizens. While some of my requests for information and for the appearance of witnesses have been granted,

the most important have been denied for the following stated reasons:

... we are precluded by consistent Executive branch policy from releasing to the public. (*J. Fred Buzhardt, General Counsel, Department of Defense*)

Inappropriate to authorize the release of these documents. (*Melvin Laird, Secretary of Defense*)

This information is solely for your use in conducting your inquiry. (*R. Kenly Webster, Acting General Counsel, Department of Army*)

The records ... cannot be obtained without an inordinate expenditure of time and effort. (*R. Kenly Webster, Acting General Counsel, Department of Army*)

No useful purpose would be served by a public report on the materials. ... (*J. Fred Buzhardt, General Counsel, Department of Defense*)

I do not believe it appropriate that the general officers in question appear before your Subcommittee, but that any “desired testimony” ... should be furnished by my designated representative. (*Emphasis added.*) (*Melvin Laird, Secretary of Defense*)

Implicit in these rebuffs to me and the subcommittee is the assumption of these officers of the executive branch that they are entitled to dictate what may appropriately be investigated and the scope of any such “appropriate” investigation.

In action, our system of government is not one of strictly separated powers, but a government based upon the concept of separate but balanced powers, divided along functional lines. For obvious reasons, such a system could not and does not operate in strict conformity to the underlying principle.

The founding fathers fully understood that governmental responsibility must be shared in order to make the whole fabric of government viable. Yet they knew that each branch must maintain a basic respect for the duties and prerogatives of the other branches and that such divisions are mandatory in order to avoid the undue accre-

mans are assailing him for having “sold out” Germany in his negotiations with Moscow and Warsaw. Brandt rules by virtue of a coalition of his Social Democrats with the small Free Democratic Party, which fared badly in a recent by-election. He has a margin of only six in the Bundestag of 496. In Bonn's upper house, the Bundesrat, his coalition is in the minority. If the Bundesrat rejects the treaties, Brandt must get an absolute majority in the Bundestag—249 votes. At present he has only a paper-thin margin by which to override the upper house—251 votes—and he has no assurance of holding all 251. He might pick up some defections from the opposition Christian Democratic Union, but that is speculation.

Brandt's best hope lies in popular support in West Germany. Older Germans remember Hitler, and educated young Germans have some idea of what went on after the Nazis came to power in 1933. In 1935 the Nobel Peace Prize went to the Junker pacifist, Carl von Ossietzky, who was to die slowly in a Nazi concentration camp. Brandt is the first German since Ossietzky to receive the peace prize—and the first to deserve it. What course the West Germans will take is of overriding international importance. If the treaties are turned down, the well-founded Soviet phobia about Germany will revive in full force. Men of good will everywhere will rejoice at the honor bestowed on Willy Brandt, but its political effect remains to be seen.

## The Nominator

In an obscure newspaper item, we noticed that among those who had nominated Willy Brandt for the Nobel Peace Prize was Dr. Wolfgang Yourgrau, a professor of the history of science at Denver University. Pleased to see that someone in this country had had something to do with a nomination of which we heartily approved, we aroused him out of a Sunday nap by telephone, and learned the following:

Dr. Yourgrau was born in Germany of a Belgian father and a German-Jewish mother. He attended the University of Berlin, majoring in physics. He was one of the organizers of a small splinter offshoot of the Socialist Party, opposed to the Communists and the Social Democrats alike, and of course anti-Fascist. He was recruited by and served with the American OSS during the war, and subsequently came to the United States. He has been at Denver for the past eight years.

He remained politically active to the extent of lecturing from time to time in Sweden and Norway, at the University of Oslo and elsewhere. He has also lectured in both East and West Germany. He feels that it is important to try to explain some aspects of U.S. policy in both camps and to keep in touch with German opinion, East and West. In August 1970, and again in November, he wrote letters to the nominating committee, suggesting Brandt as a suitable recipient of the Nobel Peace Prize.

Yourgrau has never met Brandt and has no ties whatsoever with him. He nominated him because he thought that what Brandt had done and was doing was of the greatest importance. Yourgrau is in the fortunate (and rare) position of being able to talk to East and West without being subservient to either. His basic loyalties are

firm. Operating from a base in the United States and with his war record, he is in a position to be impartial and to speak candidly to both sides. Brandt, it seemed to Yourgrau, was a key figure for somewhat the same reasons, although, since he occupies a high official position, there are differences in their respective approaches. Nonetheless, Brandt is the only statesman Yourgrau knows about who can journey to Moscow and to Washington, and in each capital say exactly what he thinks and what needs urgently to be said.

Yourgrau does not know whether, on balance, Brandt's status as a Nobel laureate will harm or help him in the internal politics of Germany. There were both long and short-term reasons for nominating him. In practical politics one must take chances. There were five Brandt nominators besides Yourgrau but the fact that Yourgrau, an American, is known in Sweden and Norway may have helped. Regardless of the amount of influence Yourgrau's initiative may have exerted, it is good to know that someone in this country saw what needed to be done, and did it.

## Nursing Nixon

The Secret Service, charged with protecting the President, appears to be also engaged in the political role of selecting his audiences for him. When Mr. Nixon appeared at Billy Graham Day ceremonies in the Charlotte, N.C. Coliseum on October 15, local policemen, Secret Service men and unidentified “marshals” barred from the building long-haired males and persons in “hippie” attire, even if those persons had tickets.

The affair had been widely advertised as a “nonpolitical” event by the Charlotte Chamber of Commerce. Free tickets were available from local banks on a first-come-first-served basis. Some 13,000 persons filled the Coliseum to see Nixon and Graham pay tribute to each other. A private reception for Graham, complete with cruciform sandwiches, was attended later by President and Mrs. Nixon.

Many anti-Nixon protesters—including members of a local organization, the Charlotte chapter of Vietnam Veterans Against the War, and a number of college students—were turned away from the public ceremony. There was a large, well-mannered contingent from nearby Davidson College, a small Presbyterian institution. More came from other local colleges, and a group of about twenty-five made the 125-mile trip from the University of North Carolina at Chapel Hill.

At first ushers told the students they could not enter with banners, but explained to newsmen that everyone would be “welcomed without banners.” It soon became evident, however, that the youths weren't going to be admitted under any circumstances—and during the course of the afternoon more than 100 were denied admission. Some were tossed out bodily with no explanation; others were informed that their tickets were “counterfeit,” and many had their tickets ripped up.

But the broad broom used by the “marshals” also swept away many innocent and unsuspecting citizens—including some Nixon supporters. Three off-duty newsmen from WBT radio—one of whom had worked actively in Nixon's Presidential campaign—said the marshals “literally threw



Vadillo, Siempre (Mexico)



tion of power in any one branch of the federal government. As Madison observed in the *Federalist No. 48*, "After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each. . . ."

However overlapping the functions of the three branches may be, and however imprecisely the system may seem to work, the doctrine of separation of powers itself is based upon good and sound grounds and the ends it was designed to serve 200 years ago are at least as important today. Legislative remedies being considered by the Subcommittee on Separation of Powers would afford

the legislative and executive branches an opportunity to seek together some common ground that would more clearly define the powers, duties and prerogatives of the two branches in this sensitive area. We must remember at all times that cooperation between the Congress and the executive is essential, if the government is to operate efficiently. That pressing requirement makes it mandatory that we seek and find an amicable settlement to the problems involved in the use of executive privilege to prevent Congress and the American people from knowing the details of executive actions. To paraphrase Woodrow Wilson, warfare between the legislative and the executive branches can be fatal. □

## Pakistan: What Never Gets Said

### PAUL DEUTSCHMAN

*Mr. Deutschman has been a foreign editor of Life, an official in the Marshall Plan and in AID, and a foreign correspondent covering Europe, Asia and Africa. His first novel is scheduled for publication by Dial Press next year.*

There are very large aspects to the present troubles in Pakistan and the entire Indian subcontinent about which nothing is ever said. Both press coverage and public speculations concentrate on what is readily visible—the genocidal war waged by the Pakistani Army against the people of East Pakistan; the independence movement there; the terrible plight of the millions of refugees who in the past several months have crossed over into India; revelations about the possible malfeasance, stupidity or just plain bumbling bureaucracy involved with the delivery of those shiploads of military hardware; the economic aid cutoffs recently voted through Congress, etc.

At the risk of seeming to lack compassion, I think the time is long overdue to mention some of the unmentionables. They may give some clues as to what our government may well be contemplating within the closed chambers where all those top-secret papers are composed and contingency tactics mocked up. It may also reveal a possible way out of the present impasse. And if a way out is not found, the public must prepare itself for some really rude future shocks in the next few weeks.

There is, to begin, the background of unspoken emotional and psychological realities. For example:

(1) The subcontinent is beset by harsh tribal differences and enmities. At the time of partition, the two chief "warrior tribes" of the area, Punjabis and Sikhs (joint mainstays of the old British Indian Army), arrayed themselves on opposite sides and formed the mainstays of the Pakistani and Indian Armies.

Further, the Moslems of West Pakistan (fantasizing themselves as descendants of the Mogul conquerors) feel disdain for all the Hindus—those within their own borders (both "wings"), certainly, and also those in India. They make an exception, perhaps, for the Sikhs, whom they simply hate—a sentiment that is staunchly reciprocated. Further still, far down the line in subcontinental "tribal"

esteem—on both sides of the borders—are the supposedly meek and energyless Bengalis. Both nations tend to disregard and look down upon their respective Bengalis, whether of Moslem or Hindu religion.

(2) The religious differences are well known, but the outside world is insufficiently aware of the crucial fact that these differences are reflected in rival philosophies of statehood. *In principle*, Pakistan is a theocratic state and India a secular one. In India, the Moslems are a strong and integrated minority, part of the socio-political mainstream; in Pakistan, it is not unfair to say that Hindus are a merely "tolerated" minority—as peripheral to the mainstream there as, perhaps, Jews are in Morocco or Protestants in Italy.

This difference causes certain unmentioned problems: India can barely tolerate the *idea* of Pakistan, based, as it is, on religion, and thus the antithesis of its own premise for sovereign existence. Pakistan, meanwhile, cannot accept for very long the idea that some of the subcontinent's 60 million Moslems are not included within its borders—thus contradicting its premise for sovereign existence.

(3) We all "know" about the "fatalism" toward life in Asia. About the "grinding poverty"; about how the "people-hunger balance" teeters most dangerously there—the increasing production of grain and other basic foodstuffs, despite all efforts, being continuously outstripped by the increasing production of people. But unless you have personally immersed yourself in certain parts of Asia—have, for example, strolled along the back streets of Calcutta at sundown in summertime, or through downtown Dacca during the rainy season—you cannot understand how little difference there can be, truly, between life and death for so many Asians. And it is completely ironic, therefore, that the geographical cockpit of this present dispute encompasses both Calcutta and Dacca, undoubtedly the two most luxuriant cesspools of human misery on this planet.

Also, compassion aside, the East Pakistan refugees should be viewed in terms of living conditions they left behind them as well as those in which they now find themselves. We've seen photos of hungry, brutalized refugees living in cramped sections of sewer pipe in bare Indian fields. But we might also wish to see how the people down