A Challenge of a Sort to Executive Secrecy

By Stephen S. Rosenfeld

FULL OF RAGE fine and pure, Woodrow Wilson and Lenin both demanded (separately) in 1917 that diplomacy be secret no more and that henceforth all arrangements between nations be written and implemented in public view. They got rough talk nowhere but since then in various places the idea has recurred that, just as war, is too important to be left to generals, peace is too important to be left to diplomats, whether professional or presidential. For many, Vietnam has confirmed the point.

Our problem is, of course, that the government has taken onto itself such overwhelming means of making and keeping diplomatic secrets, and has acquired such a habit of and vested interest in secrecy, that the public (Congress and press) has had a tough time breaking through. Leaks, authorized and unauthorized, are the kind of breakthrough most in the news these days. That's good enough reason to look at another kind, laws, and in particular, at a bill likely to command important attention in the session of Congress opening next week.

Drafted by Sen. Clifford Case, the bill would require the President to tell Congress within 60 days of any new executive agreement it makes with a foreign country. An agreement which a President deemed too sensitive to publish would be transmitted to the two foreign relations committees "under an appropriate injunction of secrecy to be removed only upon due notice from the President." The Senate Foreign Relations Committee approved the bill unanimously Dec. 7; a similar measure has been introduced in the House.

STUDENTS of history (and of irony) will recall that what is here being advanced as a vehicle of "liberal" challenge to the Executive is in the same spirit as that old vehicle of "conservative" challenge, the Bricker amendment. That was a strenuous but finally abortive effort led by Sen. John Bricker to fend off a perceived threat to our sovereignty from such international treaties as the United Nations. Case has noted that this bill asks no more than did a measure which Sen. William Knowland introduced for the Eisenhower administration—to defang Bricker—in 1955, except that Knowland asked only that the Senate be duly informed. His bill, passed by the Senate, languished in the House. Case, predictably, asks that both houses be informed.

If the background is old, however, the rationale is fresh. Just in the last couple of years, the Syrmington subcommittee brought to public light executive agreements made with Ethiopia in 1960, Laos in 1963, Thailand in 1964 and 1967, and Korea in 1966, plus secret annexes to the 1953 Spanish bases agreement. The various agreements on storing nuclear weapons abroad, intelligence operations, and military "contingency plans" remain highly secret. Just the other day we acquired a new base on Bahrain in the Persian Gulf through an unpublished and still unpublished executive agreement. Henry Kissinger says: "When I visited Pakistan in January, 1962, I was briefed on a secret document or oral understanding about contingencies arising in other than a SEATO context..."

As a world power, the United States makes all kinds of Executive agreements; some 4000 are said to exist. But whatever lawmakers can't, or won't, or don't want to, hold secrets; Senator Gravel is the current Exhibit A. It has cited the doctrine of the powers of the Commander-in-Chief to buttress its position, holding in ready reserve the doctrine of Executive privilege.

Case and other serious observers realize full well the real and vexing constitutional and operational problems inherent in all these issues. But in respect to his admittedly opening-wedge bill, he insists that a Congress kept in the dark, or a Congress kept informed only at the Executive's discretion, cannot exert its full potential influence and cannot discharge its constitutional responsibilities in the foreign-policy field.

SURELY his is an effort well worth making, and long overdue, but it has its troubling aspects. If enacted, his bill could precipitate a major collision with the Executive: that shouldn't be scary. But to sweeten the prospects of passage and presidential signature, the Case bill as reported out by the Foreign Relations Committee would not compel the President to disclose agreements already made, and it would let him keep some new agreements secret as long as he notified the foreign relations committees of them.

This compromise would make the Congress party to the very secrecy it is trying to break. A President so minded could spare himself congressional (and public) challenge simply by telling Congress secretly about the new agreement he wanted to conceal. Not too persuasively, Case suggests that the Congress could—without exposing secrets—use "its constitutional powers of withholding funds." How?

The real basis of Case's dilemma, it seems to me, is that he continues to grant the need of some secrets—other than "obvious" operational secrets—in foreign affairs. But are such secrets necessary? Does a foreign policy requiring secret agreements really suit our national interests? These questions are worth another column.

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