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Stretching the Doctrine of Executive Privilege

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Within a week of the unprecedented refusal to allow his White House aides, past or present, to appear before any "formal" congressional committee, President Nixon is under heavy—but still private—criticism from leading legal scholars and politicians in his own party.

Indeed, Mr. Nixon's extraordinary claim of an "executive privilege" that covers White House aides who left his employ years ago has engendered deep unease and anger among some of those very ex-staffers.

Some feel Mr. Nixon has badly stretched and thereby endangered the fuzzy but invaluable doctrine that permits a president to conduct the nation's business without congressional harassment of intimate presidential business. That doctrine functions best by tacit mutual consent of the executive and legislative branches. But other Republican lawyers—who feel the courts ultimately would uphold the Nixon interpretation—fear its political impact is giving the nation the strong impression Mr. Nixon has much to conceal in the Watergate case.

Present presidential aides as well as Nixon allies looking into the White House from the outside concentrate

their anger against White House counsel John W. Dean III, whom they hold responsible for the spectacularly broad Nixon policy based on the separation of powers.

When the executive privilege issue heated up during confirmation hearings of L. Patrick Gray to be FBI director, Dean did a study for the President. Dean consulted with lawyers from New York and elsewhere, many of whom strongly urged a limited interpretation of executive privilege.

Nevertheless, the 34-year-old former counsel to the Republican members of the House Judiciary Committee wrote a legal brief ("competent, but not outstanding," according to one Nixon aide) suggesting that the President had legal powers to claim about as much "executive privilege" as he wanted.

But some Republicans close to the White House doubt that Dean's brief counted for much. Rather, they believe Mr. Nixon had already decided to claim the outer limits of executive privilege—but that there was no one in the White House to say no to him.

Two strong figures of the first Nixon administration, former Atty. Gen. John N. Mitchell and former presidential counselor Bryce Harlow, are both back

in their old jobs far from the Oval Office. Thus, the White House no longer has a "Mr. No" to perform the distasteful chore of telling the President he may be very wrong.

Certainly, young Dean is not "Mr. No." Moreover, the two foremost powers on the President's staff, H.R. (Bob) Haldeman and John Ehrlichman, have played little part in the debilitating struggle over executive privilege.

The reason: It apparently has been handled not as a lethal political issue, but as a technical legal question. Yet, for Mr. Nixon the danger of overplaying his hand lies not in narrow details of constitutional law but in the political danger of appearing to use executive privilege to conceal dirty facts in the Watergate and attendant scandals. As one presidential adviser told us: "The thing that is giving this whole subject such a long pair of legs is the mystery that keeps clinging to Watergate."

Other presidents have had similar problems, but none has taken so uncompromising a stand. Dwight Eisenhower's Secretary of Commerce Sinclair Weeks wanted to claim executive privilege in a case involving a new airline route. The President's counsel de-

clined against it for one reason: Never claim it unless it is vital "because if we do we'll dig up more snakes than we can kill."

This historical presidential reaction to executive privilege has been rejected by Mr. Nixon, confident of his popularity in the country and eager for combat with Congress.

What makes Mr. Nixon's position even more tenuous is his permission for aide Peter Flanigan to testify in the earlier Senate ITT investigation. So, prominent Republicans in this city are asking this: With the Watergate probe at hand, how could testimony by ex-White House aide Dwight Chapin (now a United Airlines executive) on charges he gave \$30,000 to Donald H. Segretti for political espionage in any way affect confidentiality between Chapin and the President?

The President's refusal to let Chapin testify is bound to increase speculation about White House Watergate involvement. Even Republican politicians, therefore, are wondering whether the President is really covering up White House involvement in political espionage. Such is the depressing effect among his own political allies of the President's Constitution-stretching.