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Two Ways to Argue Executive Privilege

This city has more constitutional lawyers than most and many of them have been searching their minds and their libraries for the last few days to come up with an answer to the challenge which President Nixon has posed.

The President has said he will not permit any member of the White House staff—presently or formerly employed—to testify before senators investigating charges that sabotage and espionage were conducted on his behalf.

The President's challenge means there can be no proper investigation. Some of the higher-ups implicated in the case were employed in the White House. If the higher-ups will not testify, what legislative purpose will the investigation serve? How can legislation be drawn on the basis of facts if the legislators are prevented from getting the facts?

Mr. Nixon's challenge is not directed solely to the legislative branch of the government. It is directed also to the judicial branch. He has expressed his willingness to see the matter taken to the Supreme Court and has confidence that the court will uphold him in his assertion of "executive privilege."

Does he have such a privilege in law? Constitutional lawyers say the court has never decided this question. They doubt that it ever will. One such lawyer, a former Cabinet officer in a Democratic administration, put it this way:

"If I were arguing this case on behalf of the Congress, I should say that the President has extended the custom of executive privilege beyond reasonable and historical bounds. I should then make three points:

"(1) The President is not saying that his own orders and conversations are privileged as his predecessors have maintained. He is saying that everyone in his expanded White House staff is as privileged as he.

"(2) He is extending the privilege to former employees.

"(3) He is extending it to cover not only conversations which have to do with the policies and decisions of government but to conversations which have to do with criminal conduct."

So much for the anti-Nixon argument. The same man went on to say how he would argue the President's case.

"I would say that the executive privilege necessarily extends to anyone employed in the President's office because everyone employed in the President's office is doing the executive work of government. That would answer my arguments one and two. My answer to my argument three would be that criminal conduct has not been proved. Are we to barge into the executive branch and ask for information about who said what to whom every time somebody charges criminal conduct?"

Finally, the same lawyer defined the problem Mr. Nixon has posed to the court: "If I had to sit on this case as a member of the court, I would try to find a way to avoid decision. Because the court must avoid confrontation with the great weakness in our system of separation of powers. Remember that in the case of the Bank of the United States, the Supreme Court told President Andrew Jackson what he could not do. Remember Jackson's rejoinder: 'The chief justice has rendered his decision. Now let him enforce it.' That's the point at which this government has no law. If the court ever tells a President that he must do a deed certain, our system of checks and balances is in danger."

It's one man's opinion, but it's an opinion other constitutional lawyers in this city respect. It seems to suggest the possibility that the Watergate affair will never be run aground because President Nixon is willing to risk a crisis in government rather than permit it to be run aground.

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