

Privilege and the President

IN his latest challenge to Congress, President Nixon has taken a far-out position on the question of Executive privilege. There is little in the law to support him—or not to support him. The Constitution makes no mention of the doctrine, which is a matter of tradition. The President argues that his Administration has been responsive to congressional probes, citing the fact that former Secretary of Defense Melvin Laird testified before Congress 86 times. At the same time, Nixon has decreed that none of his 100-member White House staff will appear before Congress under any circumstances, now or ever. Once they leave his service, he says, they will still be protected by Executive privilege.

Since the founding of the Republic, Presidents have decided that some matters should be kept from Congress—at least temporarily—for the sake of the national interest. They have claimed that diplomatic negotiations, or military preparations, or confidences exchanged between the Chief Executive and subordinates are privileged.

George Washington set a precedent when the House of Representatives, conducting its first full-fledged investi-

gation, demanded the records of military planning for a disastrous expedition against Indian tribes in Ohio. Washington released the documents, but he warned that never again would he turn over papers that might reveal military secrets or otherwise would be “injurious” to the public. Subsequently, Andrew Jackson turned down a Senate request to see a paper that he had read in a Cabinet meeting defending his removal of federal deposits from the Bank of the U.S. Theodore Roosevelt ignored a Senate resolution ordering him to hand over documents involved in an antitrust suit against the U.S. Steel Corp.

Executive privilege expanded in the cold war. Widening areas of federal activity were removed from congressional—or public—scrutiny. Foreign and defense policies were often deemed too sensitive to be disclosed. Congress, meanwhile, made a miserable case for the right to know. Led by Senator Joseph McCarthy, it hounded the Truman and Eisenhower Administrations for FBI files on federal employees whose politics were suspect. To keep congressional hands off, both Presidents made sweeping claims of privilege.

Richard Nixon has gone farther. He

has not merely prevented documents from reaching Congress; he has also put a ban on his White House staff members' even showing up to testify. He has thus cordoned off much of the decision-making power of his Administration. This is not without precedent. When W. DeVier Pierson, a special counsel to President Lyndon Johnson, was asked to testify at the hearings on the nomination of Abe Fortas as Chief Justice, he refused on the grounds of Executive privilege. But White House intimates cannot always avoid appearances. Though he balked initially, Eisenhower's chief aide Sherman Adams finally testified before Congress on charges that he had brought pressure on regulatory agencies to help out friends. Shortly after, Adams resigned.

Nixon is taking his firm stand on shaky ground: the Watergate affair, in which there is evidence linking members of his staff with political espionage. By no stretch of the imagination can Watergate be considered a matter of national security. Asks Republican Senator Lowell Weicker: “Can anybody tell me how the national interest is served by having these persons who are suspects not appear?” When he was a Congressman, Nixon seemed to agree. Protesting Truman's refusal to hand over files on federal employees in 1948, Nixon complained that the Teapot Dome scandal would never have been uncovered if President Harding had been allowed to hide behind privilege.

Ultimately, overuse of Executive privilege damages democratic government. The power of the White House staff has greatly expanded under Nixon, yet none of its members are accountable to Congress. The founding fathers scarcely intended such an excessive division of powers. Nevertheless, Nixon is so sure of the issue that he is willing to submit it to a court test. The Democrats want to do the same. Both branches of Government can agree on one thing: on the matter of Executive privilege, the process of accommodation and compromise has broken down.

PRELIMINARY HEARING ON WATERGATE WITH NAMES OF MISSING WITNESSES

