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The Kleindienst Doctrine

Attorney General Kleindienst has gone to extraordinary lengths to tell Congress that the President is in the driver's seat—and to defy the legislators to challenge him. "If the President so commands," Mr. Kleindienst said in answer to a question by Senator Muskie, any member of the executive branch—defined to mean all 2.5 million administrative employes of the Federal Government—may disregard a call to testify before Congress. This amounts to a translation of executive privilege into terms of regal authority. Brushing aside all the customary niceties, the Attorney General told the Senators, in effect, that the Administration was confident that it had the popular support to humiliate Congress in any showdown on that issue. A Senate lawyer rightly summed up the position of the Justice Department chief as a "blueprint for government by the Presidency," with Congress and the judiciary relegated to outer space.

The first thing to be said about the blunderbuss extension to all governmental employes of the Kleindienst distortion of executive privilege is that it is just bad law. There is no basis for it in the Constitution or in historical precedent.

As far back as 1912, in the Lloyd-La Follette Act, Congress prohibited interference with the right of civil service employes to testify before Congressional committees or to supply information to individual members. As repassed in 1966, the law covering governmental employes still says: "The right of employes, individually or collectively, to petition Congress or a member of Congress, or to furnish information to either House of Congress, or to a committee or member thereof, may not be interfered with or denied."

The other half of the equation challenged by Mr. Kleindienst—the right of Congress in the exercise of its investigative function to call for information from Federal agencies and employes, whether willingly given or not—goes back to the Founding Fathers and beyond to old English parliamentary law.

It is set forth in extremely broad terms in half-century-old laws defining the authority of the Controller General, as Congressional watchdog over executive spending, and of the House and Senate Governmental Operations Committees. A 1948 law makes it a crime for anyone to threaten or otherwise intimidate any person, in or out of Government, called to testify before a Congressional committee. And the Supreme Court, in the Teapot Dome decision of 1926, gave sweeping affirmation to the right of Congress to compel the attendance of any witness needed to supply it with information.

Quite apart from that clear conflict with law, there is an incredible arrogance—even as applied to Mr. Nixon's inner circle of associates—in the Attorney General's blunt suggestion that the President can do what he wants simply because he thinks he can get away with it politically. That is clearly the meaning of Mr. Kleindienst's repeated suggestion—really a taunt—that Congress, if it did not like the President's attitude, could cut off executive funds, impeach Mr. Nixon or ask the voters to express their disapproval.

Even apart from the fact that the voters will not have another chance to react to the way in which Mr. Nixon is interpreting Presidential power in his second term, it is clear that impeachment is not a realistic threat and the withholding of funds would hurt the Senators' constituents more than the Administration. Mr. Nixon's antispending vetoes should make it evident that Mr. Kleindienst was indulging in a not very subtle game of irony when he told Congress that it could punish Mr. Nixon by cutting him off without a penny.

But it would be the height of irresponsibility to look on this contest between the Administration and Congress as an amusing exercise in political gamesmanship. The Kleindienst doctrine proclaims Presidential powers which, because they are to be beyond question or scrutiny, threaten to become ever more overbearing and, in the end, absolute.