

Hughes, Kleindienst and Verbal Hubris

“The Constitution,” said Chief Justice Charles Evans Hughes, “is what the judges say it is.” And now Atty. Gen. Richard G. Kleindienst would have it that executive privilege is what the President says it is.

Both statements are simplistic, arrogant and probably true. But Kleindienst did neither President Nixon nor the country a favor when he appeared the other day to widen the administration's definition of executive privilege to cover the 2.5 million employes of the executive branch.

The problem is that the Constitution does not define in any great detail how the three branches of government—the executive, the legislature and the judiciary—are to work together. The system can function smoothly only when all three branches exercise common sense and self-restraint.

Because he has been able to appoint four justices to the nine-member Supreme Court, men who are broadly sympathetic to his political philosophy, President Nixon does not find himself in basic conflict with the court. Because the Republicans failed in 1968, 1970 and 1972 to gain control of either house of Congress, the President does find himself in conflict with the legis-

lature, and particularly the Senate.

That this is so is exclusively the fault of neither Nixon nor the Senate; both are to blame. The President certainly can be faulted for his mishandling of his relationship with the Senate. He and his minions have chosen to confront rather than conciliate the Senate and in so doing have squandered what little good will they had on the Hill.

For their part, Nixon's ideological foes in the Senate, alarmed at his scuttling of New Frontier and Great Society programs which had become a part of the liberal doxology, have cloaked their personal and partisan dislike of the President in the guise of defending truth, decency and motherhood, going to any lengths to discredit him.

Both the executive and the legislative branches have claims in the realm of privilege which are at once legitimate and conflicting. It is clear that Congress cannot legislate effectively and intelligently if it is denied access to the information which will enable it to do so. It is equally clear that the executive branch cannot function effectively if the President's aides can be compelled to testify before Congress on the inner workings of the presidency.

The conflicting claims of the legislature and the execu-

tive in this murky area have seldom been subjected to extensive judicial review, primarily because it has always been implicitly recognized that it was in the interest of neither branch to have the problem resolved. For in the resolution of it, either one branch or the other would emerge as the dominant force in government, with the other relegated necessarily to a subordinate role.

So while friction on the question of executive privilege has existed since the foundation of the Republic, the conflict always has been muted by the degree of give-and-take and cooperation required to avoid either excessive bitterness or extensive litigation.

It is this “gentleman's agreement” which is in danger of becoming unstuck on the interrelated issues of executive privilege (on the Watergate scandal), impoundment (on budgetary matters) and war powers (on Cambodia).

These issues have not come to the fore in recent years because it has been a very long time since we have had a partisan president of one party confronting a partisan Congress of the other. This is true even of the Eisenhower years, since Ike was not, fundamentally, a partisan president.

Under Roosevelt, Truman, Kennedy and Johnson there was, inevitably, conflict between the executive branch and the legislature. But these conflicts were, in the interest both of the national weal and of the Democratic party, kept both behind the scenes and muted in their intensity. Cooperation and mutual restraint prevented any breakdown in the governmental process.

Now this gentlemen's agreement is threatened, as much by the partisanship of Congress as by the arrogance of the President and his men. And the great danger is not that Nixon will be discredited by the Watergate affair or that Congress will be revealed as powerless and incompetent.

The great danger is that the governmental process will grind to a halt while the legislature and the executive hurl charges and countercharges at each other. In the process, the entire democratic structure of the country could be undermined and called into disrepute, with unpredictable but surely unpleasant consequences for all of us and for generations of Americans yet unborn.

The Senate and the President ought to pull back from such a confrontation while they still can.