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# Swollen Privilege

In its passion for secrecy and centralized control, the Nixon Administration originally put forward an enormously swollen doctrine of executive privilege. Under the pressure of the Watergate revelations, the Administration has begun to shrink its interpretation somewhat. Yet it is still bloated beyond what previous Presidents have claimed and still looks suspiciously like an effort to cover up improper behavior.

John W. Dean 3d, who as the President's counsel was the White House expert on executive privilege until he fell into disgrace, was the author of the first bold extension of this doctrine. He asserted that a President has the inherent right to prevent present and former officials from testifying before grand juries and Congressional committees. Richard G. Kleindienst, the retiring Attorney General, then argued that a President, if he so chose, could shield all the employes of the executive branch of the Government, and Congress would have no recourse except impeachment.

On April 17, in the same statement in which he said "there have been major developments" in the Watergate case, President Nixon announced that he would permit his aides to testify before the Senate select committee chaired by Senator Ervin of North Carolina. Although he did specify in the same statement that "executive privilege is expressly reserved and may be asserted during the course of the questioning as to any questions," that reservation was widely regarded at the time as merely face-saving verbiage.

On May 3, the White House further strengthened the impression of a retreat when it prefaced a new set of guidelines with these words: "The President desires that the invocation of executive privilege be held to a minimum."

But the actual guidelines do not support this impression. Mr. Nixon is still asserting that past and present members of his staff, when questioned by the F.B.I., the Ervin committee or a grand jury, can invoke executive privilege "in connection with conversations with the President, conversations among themselves (involving communication with the President) and as to Presidential

papers. Presidential papers are all documents produced or received by the President or any member of the White House staff."

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In the past, Presidents have invoked executive privilege in specific situations to protect the confidentiality of their own staff discussions or—in the nineteen-forties and nineteen-fifties when loyalty-security programs for Government employes were in controversy—to protect the reputations of innocent persons.

But when the F.B.I. and various grand juries are investigating violations of Federal law such as have been committed in the Watergate case, why would the President want his past or present aides to be able to shield him or themselves?

The guidelines also warn witnesses not to testify on "matters relating to national security... e.g., some of the incidents which gave rise to concern over leaks."

That extraordinary claim turns out to be no idle theory. It was an attempt to prevent Egil Krogh, Under Secretary of Transportation, from telling the judge in the Ellsberg trial the full story of the White House involvement in the burglarizing of the office of Daniel Ellsberg's psychiatrist. Are there other misdeeds lurking under that all-purpose umbrella called "national security"?

There are undoubtedly situations in which a President has to invoke executive privilege in order to protect the confidentiality of his own records and his conversations with his own immediate staff from the conceivably hostile gaze of a committee of Congress. Each of those situations has to be judged in the light of the particular circumstances.

But when a grand jury or a trial judge is concerned with serious crimes such as have been committed in the Watergate scandal, it is not in the public interest for any official from the President down to withhold evidence about official wrongdoing. Mr. Nixon cannot regain public confidence for his Administration until he waives any claim to executive privilege for himself and his aides in this criminal case and any others that may flow from it.