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# *Issues of Privilege and Watergate*

The President is essentially a public official, who holds the highest such public office in the land, as distinguished from a private citizen. Sound public policy, the doctrine of separation of powers, perhaps other constitutional considerations, all seem to grant him personal immunity from private or official inquiry or prosecution other than by the process of impeachment and, further, permit "privileged communication" status with some, largely undefined, inner circle of advisors and consultants in the conduct of his official *public* business. Such a doctrine surely does not confer on persons other than the President an immunity or privilege which can be employed as a shield to mask unpublic or criminal business or activity. The purpose of the doctrine is to facilitate only the proper, unencumbered, transaction of the public business.

While conceding that the propriety of invoking executive privilege or even national security, has some gray areas, such seems to me not to be the case with respect to the lawyer-client relationship. This is a "civilian," not a "public," concept. It is an indication of humanity, as well as a cardinal rule of justice, that society accords to persons in trouble the inalienable right to consult *in strict privacy* a lawyer, doctor, or minister of their choice. The keys to the privilege, however, are privacy and the existence of the professional-client relationship. If I confess my crimes to my own lawyer or doctor or minister in a public meeting, or in the presence of others not involved in our private relationship, I have waived my privilege. If I confess my crimes to a friend or associate, who happens to be a lawyer, but not the lawyer I have retained to protect my personal interests, the lawyer-client relationship has not been established, and I never had the privilege to waive.

Furthermore, while there may have existed an "executive" privileged relationship between the President and his staff, including Mr. Dean, at least with respect to the conduct of legitimate public business, it seems clear to me that the lawyer-client relationship cannot normally exist as between two public servants. As far as I know, the taxpayer's funds have not been, nor should they be, appropriated to the President or any other public official for the purpose of retaining private counsel, nor did the public pay Mr. Dean's salary for the purpose of rendering privileged, personal legal counsel to the President or any other White House employee with respect to their private or extra-governmental affairs. I assume, without knowing, that regulations of conflict of interest as well as legal ethics prohibited Mr. Dean from engaging in the private practice of law while on the White House payroll.

Titles like "Counsel to the President" are ceremonial. They do not confer the private lawyer-client relationship necessary to permit privileged communications. Judging from the newspaper accounts, the President understands these distinctions and, indeed, often retained private counsel for his private affairs. Presumably, his relationship to Mr. Kalmbach, for instance, in the purchase of his San Clemente residence established a lawyer-client relationship, at least with respect to that transaction. But to the extent that Mr. Kalmbach engaged in public activities of an operational rather than counselor nature, the privilege may again have disappeared.

Finally, in all cases of privilege, it should be remembered, it is the beneficiary of the advice—in this case, the President-client, not the advisor or lawyer—who has the exclusive right to invoke the privilege. And he must invoke it, in timely fashion, or he loses it. The lawyer or staff advisor to the President cannot invoke the privilege because the privilege is not his. With respect to the current issue, of course, the President has not invoked either type of privilege. The question may well be, has he not already lost the opportunity to make timely objection?

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