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The Other Case of Privilege

President Nixon's idea of executive privilege seems to get broader and more radical with each successive challenge. He has been claiming that privilege to withhold the celebrated tapes currently sought by both his own special counsel and the Senate committee in the Watergate case. But there is still a third case concerning presidential privilege now moving through the courts here and, while the question of the tapes carries by far the greater political attention, it is this third case—the case of the milk fund—that has the wider legal significance.

Two years ago, the administration raised milk price supports. It is also true that the dairy industry contributed $422,500 to President Nixon's re-election campaign. Several consumer organizations, led by Ralph Nader and his Public Citizen, Inc., charge that there is a connection between those two facts. They have brought a suit attacking the price support increase, and they want to look at the documents surrounding that decision. The consumers' groups got a subpoena for certain White House records. Last month Mr. Leonard Garment, counsel to the President, responded with an affidavit listing 67 documents, and asserting that executive privilege covers all of them.

The affidavit is notable, and dismaying, because it offers no explanation why executive privilege should cover these papers. Everyone, including Mr. Garment, agrees that they have nothing to do with national security, or diplomatic relations. Federal Judge William B. Jones, at a hearing in late July, asked the President's lawyers to substantiate their claim of privilege. He got no answer. "The court concluded," the judge later wrote, "that it could not properly consider any claim of executive privilege on so barren a record." He told Mr. Garment to give him the disputed documents, so that he might inspect them in his chambers and see for himself whether the privilege was justified. Instead, Mr. Garment has appealed the judge's order to higher courts. As Judge Jones noted, in suspending his order during the appeal, the question will undoubtedly go to the Supreme Court.

In the case of the Watergate tapes, the issue involves the President personally. The tapes contain conversations between himself and his closest associates. The President says that they also touch subjects unrelated to the Watergate investigations. But the milk documents are another matter. They are apparently mostly memoranda, moving at a less elevated level of the administration. It is not clear that many of them actually went to or from the President personally. They involve nothing but milk prices, and the political activities of the dairy industry.

In the milk case, the President's lawyers are making the broadest possible assertion of privilege. They are saying that they do not even have to tell anyone why a document is privileged. They are saying that this unlimited privilege even covers documents that never went to the President himself. In the case of the tapes the President and his lawyers at least deign to defend their claim of privilege, arguing that presidential conversations must remain private. But in the milk case they do not deign to defend the privilege at all, or to offer any reason why it should apply to these particular papers. They claim that they do not have to offer any reason. As they put it, the simple assertion of privilege by the President ends the matter, finally and absolutely. The privilege, according to this theory, is big magic: When the sacred words are spoken, everyone is required to draw back in silent awe.

It hardly needs to be said that this version of executive privilege stands decidedly at odds with most Americans' understanding of the Constitution. It is a doctrine that asserts considerably less balance than is customary, and considerably more powers. Whether the courts will accept this concept remains, of course, to be seen.

Past Presidents have generally chosen to leave the legal limits of privilege deliberately vague. The occasional collisions have usually ended in politicians' compromises rather than judges' decisions. But Mr. Nixon is now pressing for a definition of his privileges in a hard and bitter spirit of all-or-nothing. Whatever the judges may ultimately make of the legal rules, it is already clear that this litigation is not going to strengthen the public regard for the President or, for that matter, the Presidency. It never helps a public man, or a public office, to defend official prerogatives by keeping secret those documents that have a bearing on charges of political scandal.

If the Supreme Court makes the White House give up the 67 documents, the President will have suffered another defeat. If the President wins, and is able to withhold the documents, he will have enlarged the formal definition of his powers at a terrible cost. By winning the right to withhold the evidence in a suit alleging corruption, he would have further diminished the citizen's trust and respect for his office. The real substance of the authority to govern lies in that trust and respect, not in legal definitions. If a President needs a court decision to enable him to suppress papers that may arguably be needed in the courtroom to try a political scandal, that victory will have done more harm to him and to his government than any disclosure could inflict.