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Executive Privilege And the Public Interest

Mr. Justice Douglas: Well, we start with a Constitution that does not contain the words "executive privilege."

Special Prosecutor Jaworski: That is right, sir.

Mr. Justice Douglas: So why don't we go on from there?

—In The Supreme Court, July 8

As a lawyer, the place I would choose to go would be my local library and to Wigmore's venerable "Treatise on Evidence." There always has been something that did not make sense to me about the President's claim of executive privilege as an excuse for disobeying orders of the federal courts and Congress to turn over subpoenaed evidence. In this respect, a reading of Wigmore is revealing.

The settled policy of the law is that generally evidence required in an official proceeding and properly ordered must be submitted. Any special privileges are exceptions to the general liability of every person to provide testimony regarding facts inquired about in courts of justice. Any such exceptions—and there are some which are as respectable and time-honored as the rule itself—must be justified by a preponderance of what Wigmore called "extrinsic policy."

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Wigmore listed four conditions which must be met before any privilege should be allowed to interfere with the general rule that communications may not be kept confidential when they are ordered by a court:

1. The communications must originate in a confidence that they will not be disclosed.

2. This element of confidentiality must be essential to the maintenance of the relation between the parties.

3. This relationship must be one which in the opinion of the community ought to be sedulously fostered.

4. The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

According to Wigmore, only if all four of these conditions are present should any privilege be recognized. Maguire, McCormick, Morgan, the other respected authorities of the law of evidence concur, and legal history and the case law is consistent. The courts have been quite hesitant to expand the traditional exceptions to the rule, allowing only those departures which have long been recognized—attorneys and clients, doctors and patients, priests and penitents. The protection of privileged communications has been denied to journalists, accountants, bankers, brokers, trustees and others who have claimed that the privilege should apply in their situations.

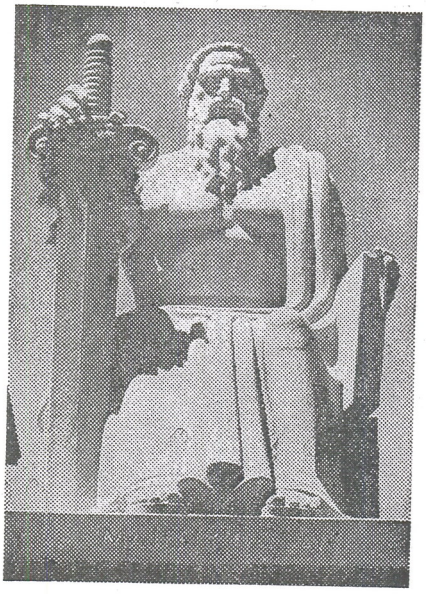
When a privilege is claimed and disputed, the policy, according to Wigmore is clear: "The privilege can be recognized, subject to the judge's discretionary right to compel disclosure whenever it seems necessary to the ascertainment of the main facts in litigation." Typically, when a claim of confidential communications is made and disputed, the presiding judge considers the claim, hears the arguments and decides according to the policies and precedents stated above. There is nothing new or exotic about this notion and it would be perverse to twist the settled policy regarding confidentiality in the autocratic way that President Nixon presently is urging. To paraphrase Jeremy Bentham—in regard to confidentiality each man's house should be his castle but he can not convert his castle into a den of thieves.

The President has not argued that his communications are covered by the attorney-client privilege, recognized in order to promote the freedom of consultation between legal advisors and their clients. But even with regard to that privilege, "it has been agreed from the beginning that the privilege cannot avail to protect the client in consorting with the attorney about a crime or evil enterprise."

Lord Hardwicke once asked the rhetorical question about the claim for executive privilege: Is there any reason why the public's right to every man's evidence should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of chief executive of a state? Wigmore's response: "There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice. The general principle of testimonial duty to disclose knowledge needed in judicial investigations is of universal force. It does not suffer an exception . . . the testimonial duty, and its equal application to the executive and subordinate officers, has perhaps never been doubted. Let it be under-

stood, then, that there is no exception for officials as such or for the executive as such from the universal testimonial duty to give evidence in judicial investigations."

There could be an exception to the duty to disclose in cases where an executive claims that the information sought is a state secret or official information which is protected by a statute, though not by agency or departmental regulations. But, Wigmore



The "Majesty of Law" sculpture at the Rayburn Building.

adds, it is up to the courts to decide the claim of state secrecy and the court should not abdicate its "inherent function of determining the facts upon which the admissibility of evidence depends," lest they "furnish to bureaucratic officials too ample opportunity for abusing the privilege."

If the evidence sought by the courts or Congress in the Watergate controversy pertained to the security precautions planned for a conference with a visiting potentate, no judge would approve disclosure. If it pertained to the commission of a crime or impeachable offense, disclosure should and would be ordered; no privilege ever was intended to shield any executive official from his wrong-doing. As Justice Lewis Powell remarked during the arguments in the tapes case before the Supreme Court, "there is no public interest in preserving secrecy with respect to a criminal conspiracy."

What is clearest is that the question of confidentiality and the considerations of public interest against which it must be balanced, are for the courts to decide. My guess is that the Supreme Court will be unanimous in upholding this important principle.