An Excess of Executive Privilege vs. the Truth

In his recent letter to Sen. Sam Ervin stating his intention not to testify before the Senate Watergate committee, President Nixon also threw a shroud of secrecy over his presidential papers. Later last week Deputy Press Secretary Gerald L. Warren let us know just how broad that shroud is meant to be. Mr. Warren said that former White House employees would be permitted to examine White House papers "to refresh their memories," but that they would not be permitted to make photocopies or handwritten notes.

Thus, it is fair to say that when it comes to papers, Mr. Nixon's assertion of executive privilege is at least as broad as that staked out in a May 3 White House memorandum. That document claimed the privilege could be invoked, even before grand juries, with respect to presidential papers, which were defined as "all documents produced or received by the President or any member of the White House staff in connection with his official duties." We think there is no basis in the Constitution, in the case law of the United States or in precedent for so sweeping an assertion of executive privilege. Moreover, Mr. Nixon's broad claims seem to be in neither the national interest nor his own.

The first thing to be said about executive privilege is that it has no constitutional foundation; in fact, constitutional scholars argue that the record points in precisely the opposite direction. Parliament, from which the drafters of the Constitution drew their experience, was deemed a grand inquisition which could delve freely into all executive operations. There is much persuasive history to indicate that the founding fathers viewed Congress the same way. Indeed, the Constitution mentions a narrow area in which *Congress* may keep information secret, but there is no specific grant of such authority to the executive.

There is not a single case defining or justifying the doctrine. As a matter of fact, there is a decision by Chief Justice John Marshall going the other way. The great chief justice asserted the authority of the court to subpoena a document in the possession of President Jefferson. What we have come to know, then, as executive privilege is a *practice* which has grown up in the give-and-take between the executive and legislative branches of government over the years and which in recent decades has come to be cloaked in grand language about separation of powers and fundamental constitutional principles. Basically, it is a common sense accommodation between the Congress and the executive designed to protect the national interest and to provide the President and his most intimate associates the benefit of candor and openness in their private conversations while conducting the nation's business.

That is essentially the rock upon which Mr. Nixon rested his refusal to open up "presidential papers" to the committee. The trouble is that Mr. Nixon's assertion of the privilege is so broad as to make it absurd. With the enormous growth of the White House staff in recent years, it cannot reasonably be argued that every document generated in the White House or addressed to a member of the staff involves intimate advice to the President or his own private ruminations about the public business. Only a tiny fraction of the documents can possibly be so classified. Indeed, according to what appears to be Mr. Nixon's position that he knew nothing in connection with the matters of interest to the Ervin committee, most of the documents in question could not involve the operations of his mind or advice given to him at all; presumably they relate to a secret set of illegal operations carried out by his underlings without his knowledge. For the President to assert that these documents have a close relationship to him and to decisions he was making would appear—as Sen. Ervin has suggested—to raise an inference that is not at all flattering to the proposition that Mr. Nixon was innocent of culpable knowledge of this whole mess.

Finally, Committee Counsel Samuel Dash has made it clear that the commitee is not on a fishing expedition, but, rather, has limited purposes in mind. He has proposed that he and members of his staff, together with White House lawyers, go through the papers which may be of interest and decide together which of those are relevant to the committee's inquiring. Only in cases where there is a differing judgment would the committee consider resorting to a subpoena. That would seem to be a reasonable method of doing what Mr. Nixon and his associates say he wants to do: to get to the bottom of this whole thing in the most expeditious fashion. And it would also get Mr. Nixon out of the preposterous position in which he has placed himself. For what he is arguing is that papers which relate to the commission and coverup of crimes about which he knows nothing, are somehow cloaked in the majesty of the presidency.