

William F. Buckley, Jr.

Kennedy Takes a 'Fifth'

WHAT SENATOR KENNEDY HAS done, in effect, is to plead the Fifth Amendment. Not only has he said, or rather has had it said in his behalf, that he will not ever again discuss the mystery of Chappaquiddick, he has apparently sworn his entire party to silence.

I have a letter from my friend Edgar Smith, who resides in the death cell at Trenton, New Jersey. "Thirty years the Kennedys have been attending the Edgartown Regatta, sez Teddy. And there are only two roads on that little island, so how did he take the wrong turn?" asks Smith. "Seriously, Bill, I told a better story than Teddy, and I got convicted."

THAT IS A HARSHLY-STATED version of what is nevertheless on the mind of many people who were left unsatisfied by Sen. Kennedy's public performance — not so much unsatisfied by what he said, as unsatisfied that that was to be all that he said.

It is as if the president of the Chase Manhattan Bank, deeply implicated in, let us say, the disappearance of a million dollars from the safe, were to closet himself in the Waldorf Towers, consulting only with Edward Bennett Williams and Dean Rusk, summon in the networks, announce that he had indeed been careless in handling of money, but that not one penny had been turned to his own use, that he would continue as president of Chase Manhattan, but would never again allude to the Case of the Missing Million.

Over the years there has been much controversy over the question whether it is proper to draw negative inferences from the pleading of the Fifth Amendment. There was general agreement that it is proper to do so, though Dean Griswold of the Harvard Law School challenged that assumption vigorously during the McCar-

thy days when so many people were pleading the Fifth.

The line of reasoning went roughly as follows: that by pleading the Fifth, you were not necessarily engaged in suppressing evidence that would incriminate you of the crime of which you were suspect. You might plead the Fifth, said its defenders, on the grounds that you wanted to keep hidden information that would damage someone else (granted, it is illegal to plead the Fifth in behalf of someone else: but who is going to find out?); or you might plead the Fifth in order to guard against the discovery of a completely different involvement, unsuspected by the prosecutor.

For example, if asked where you were on the night of the murder, you might plead the Fifth not because you killed her, but because at that moment it happened that you were asleep in a motel in the adulterous embraces of a lady whose existence, let alone whose name, you did not wish to bring to public attention.

JUSTICE DOUGLAS of the Supreme Court once wrote (*Beilan vs. Board of Education*) that "private citizens . . . may make such deductions and reach such conclusions as they choose from the failure of a citizen to disclose."

And a revered Chief Justice from Sen. Kennedy's home state put it most trenchantly: "When . . . It is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting would tend to sustain the charge." (*Shaw, in Commonwealth vs. Webster*).