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The Case Of Nixon Vs. Nixon

One of the most curious features of Watergate is the way the President keeps eroding his own position. The latest example is his decision to allow his former aide, H. R. Haldeman, to use tapes of presidential conversations in preparing testimony for the Senate Watergate Committee.

That action undermines the principle Mr. Nixon had evoked in the toughest way to deny material to the Watergate committee and to Special Prosecutor Archibald Cox. It positively makes it easy for the Supreme Court to rule against the President on the matter of access to the tapes. So easy that there is some feeling that Mr. Nixon may have a joker up his sleeve.

The starting point for all this is the principle of executive privilege. In general, it has been felt that the President was entitled to receive counsel from his advisers in confidence. In particular, it has been accepted, as part of the doctrine of separation of powers, that a president was not required to release to members of the other branches of government information about confidential advice. However, because the doctrine of executive privilege is not mentioned in the Constitution, nor grounded in common law, most presidents have tried to invoke it sparingly and in a modest manner.

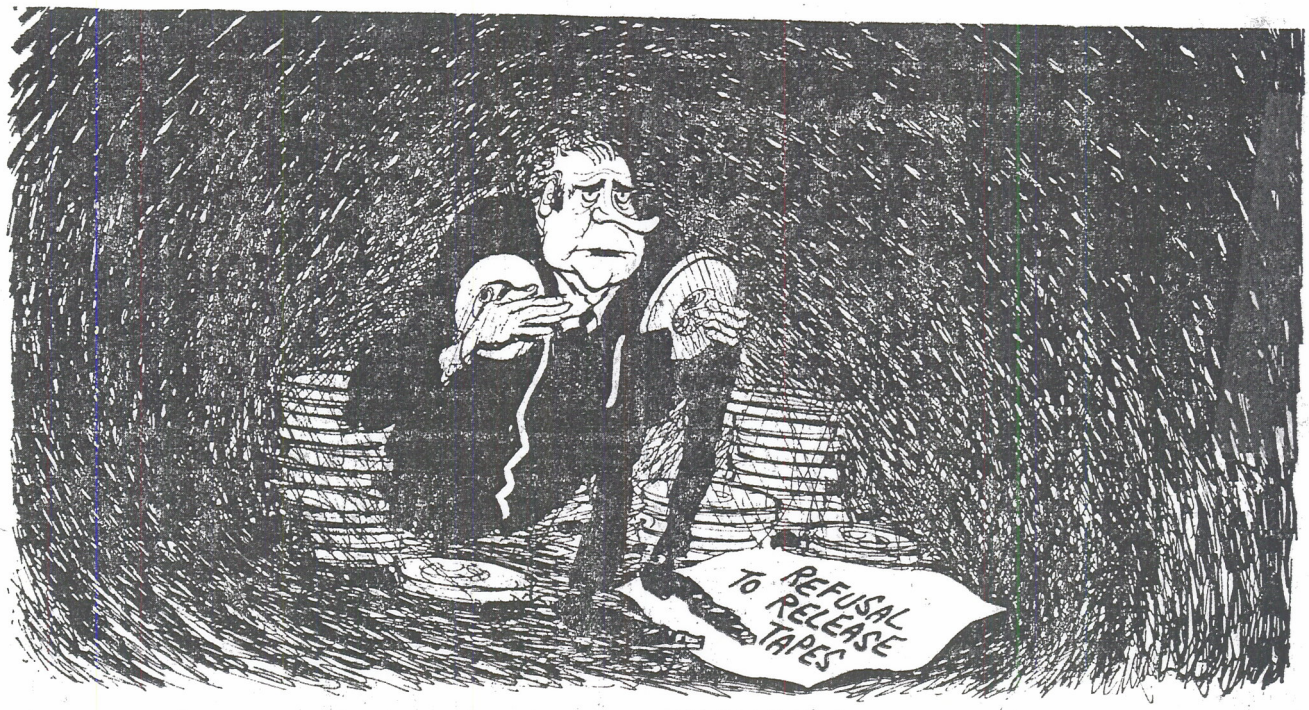
President Nixon, in contrast, enunciated in principle a very hard-line position with respect to executive privilege and its application to Watergate. He acted as though executive privilege was more a binding imperative than a matter of discretion to be used in a case-by-case manner. Mr. Nixon's position was that he would be remiss in his duties as President if he allowed even specific documents relating to the Watergate crimes to pass from the White House to the investigators. As he said in a July 6 letter to Chairman Sam Ervin of the Watergate committee:

"Such a course, I have concluded, would inevitably result in the attrition, and the eventual destruction, of the indispensable principle of confidentiality of presidential papers."

Mr. Nixon applied precisely the same logic to release of the tapes when their existence became known. In a letter of July 23 to Sen. Ervin, he said that the "principle stated in my letter to you of July 6 . . . applies with even greater force to tapes of private presidential conversations." "Accordingly," he added, "the tapes which have been under my sole personal control will remain so."

But even as he has been setting down these hard and fast principles, Mr. Nixon has been making exceptions in practice. Over and over again he has allowed, without resistance, testimony relating to presidential conversations. Former counsel John Dean, special counsel Richard Moore and Messrs. Haldeman and Ehrlichman have all testified to the committee on private meetings with the President. But now it is known that the President allowed Mr. Haldeman to use two of the tapes in preparing his case. That is a clear contradiction of the President's earlier claim, that the tapes have "been under my sole personal control."

The exceptions in practice to the principle of executive privilege are so numerous and important that it has become a question of whether the privi-



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"I'm perfectly content not to have a light at the end of my tunnel"

lege still exists. Has not the President by his actions in fact waived the privilege? Isn't he in the same boat as a witness who starts to talk and then tries to assert the Fifth Amendment privilege against self-incrimination? And isn't that a very leaky boat?

These questions are now being asked by lawyers working with special prosecutor Cox and the Ervin committee. No decisions have yet been made.

But it seems very likely that Prof. Cox and the Ervin committee will go into court and urge that they have a right to the tapes of at least some presidential conversations because Mr. Nixon has, in effect, waived the executive privilege by his own actions. That argument is especially attractive because of its appeal to the Supreme Court.

The court tends to duck constitutional issues rather than to seek them out. The justices are particularly leery of getting involved in a murky fight about the reach of such a nebulous doctrine as executive privilege. So the claim that the President has in effect waived the privilege is apt to look very good to the justices. It provides them a way of deciding the particular issue without going to the larger constitutional question. Accordingly, it is widely believed that the tapes will eventually surface, and there is a question here whether Mr. Nixon is not hoping they will eclipse all other serious issues raised by Watergate.