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Privilege, Precedent and Mr. Dean

Senator Sam Ervin sounded very resolute, although a bit overdramatic, a week ago Sunday when he declared that he would ask the Senate to order the arrest of any White House aide who refuses to testify before the select committee probing the Watergate case and related political espionage. Most of Senator Ervin's colleagues on the special panel, Republicans as well as Democrats, seem equally determined not to be put off by President Nixon's sweeping claims of executive privilege as a shield for any and all activities by present and former members of his staff. The Senate's attitude is encouraging, because the list of questions for Mr. Nixon's aides, especially presidential counsel John W. Dean III, is getting longer every day.

Lawyers love precedent, and some instructive precedents can be found in the record of a tilt over executive privilege 11 months ago, during the Senate Judiciary Committee's hearings on the ITT affair and the nomination of Richard G. Kleindienst to be Attorney General. Then, as now, the names of presidential aides kept coming up in other people's testimony. Then, as now, Senator Ervin and others demanded that White House personnel appear; the list last year included Peter Flanigan, William Timmons and John Ehrlichman. Then, too, executive privilege was invoked, not by Mr. Nixon himself but by Mr. Dean in a letter to the committee chairman. But after several days of maneuvering, a compromise of sorts was reached. Mr. Flanigan agreed to testify—provided the questioning would be confined to four specified points. He did appear, but the most interesting matters proved to be beyond the boundaries agreed upon, and very little was learned.

After this experience, Senator Ervin and his colleagues seem to have recognized the folly of any concessions which enable the White House to get off the hook by sending up a witness but holding back the facts. There is a second lesson, too; as lawyers might expect, it appears in a footnote of sorts, a letter written by Mr. Dean to an interested citizen who had happened to inquire about the scope of the executive privilege which the White House had claimed. In this letter, written on the day Mr. Flanigan testified—and reprinted For the Record on the opposite page today—Mr. Dean cited the Flanigan appearance, along with "precedent and tradition," as evidence that no recent president, including President Nixon, "have ever claimed a 'blanket immunity' that would prevent his assistants from testifying before the Congress on any subject."

What makes this letter worth recalling is the fact that, in his efforts to keep Mr. Dean and others from Senate interrogation, President Nixon has not only claimed such a "blanket immunity" this month, but has tried to legitimize that novel doctrine by reference to traditions which, according to his own counsel, did not exist 11 months ago. There is no better evidence of the slippery, spurious nature of Mr. Nixon's current claim. There is no better illustration of the ways in which principles can be bent, twisted and stretched to suit the immediate needs of politics, especially the politics of self-defense.

Mr. Nixon has tried mightily to portray the approaching confrontation with Senator Ervin's select committee as a kind of constitutional high noon. In fact it is a political showdown between lawmen with questions to ask, and administration men desperately intent on suppressing the answers. Mr. Nixon's stance is not only bad law; it is increasingly bad politics as well. The course of wisdom and prudence would be to dispatch Mr. Dean and his present and former associates to testify right now. If the White House fails to set the wisdom of volunteering, Senator Ervin and his colleagues should be a lot more steadfast and persistent than they were in the Flanigan case in pressing their insistence that White House aides appear to testify on matters which in no way could compromise their confidential relationship with the President. After all, have we not been told repeatedly that Mr. Nixon has had no hand in the matters which come under the general heading of "Watergate"?