

Historian Tells Senators Meeting on Executive Privilege,

By ANTHONY RIPLEY
Special to The New York Times

WASHINGTON, April 12 — Senators examining President Nixon's use of executive privilege were told today that they needed no new laws and no further hearings, only the "gumption" to assert their "superior power" under the Constitution.

Raoul Berger, a law historian and a senior fellow at the Harvard Law School, told a joint meeting of three subcommittees that the Administration had relied on "pseudo-precedents" and "boilerplate" law to

back the "myth" of executive privilege.

"You are the superior power," he told three Democratic Senators at the hearing — Sam J. Ervin Jr. of North Carolina, Edmund S. Muskie of Maine and Edward M. Kennedy of Massachusetts.

Mr. Berger took the Senators through 12 pages of legal history that he had drawn up. They showed that there was no precedent under English parliamentary practice for the withholding of information from Congress and no precedent under the Constitution.

President Nixon has argued

that privilege is "rooted in the Constitution" and based on the separation of governmental powers among the executive, legislative and judicial branches.

Mr. Berger said that such arguments were "speculation based on no evidence," and that the President had supplied "the clincher" by instructing his staff to appear before the grand jury investigating the Watergate affair.

"He is scarcely consistent," Mr. Berger said of the President.

"The separation of powers does not bar inquiry by the

judiciary, one coordinate branch, while it does bar inquiry by another, the Congress."

He said that the legislative branch was set up as the "grand inquest" or the "highest grand jury in the land" with the power of impeachment and the power to call anyone before it. He asked:

"And why does disclosure to the grand jury of confidential communications between members of the White House staff not 'inhibit' the candor allegedly essential to performance of executive functions, whereas disclosure to Congress, accord-

'You Are the Superior Power'

ing to President Nixon, would 'weaken and compromise' the 'candor with which such advice is rendered?'"

He said that the contempt power of Congress had been clearly established.

"You don't need more hearings, you need gumption," he said.

He said that the Senators had been treated like "office boys" by some people in the Administration. "You'll be treated that way until you stand up on your hind legs and kick them in the slats," he said.

He suggested action on the

Administration's efforts to keep John W. Dean 3d, the President's legal counsel, from appearing before Congress.

"If there was ever a case that will stink in the nostrils of the court, it is the attempt to shield Dean from Congressional inquiry," he said.

He said that Attorney General Richard G. Kleindienst, in explaining executive privilege to the subcommittees on Tuesday, relied on "executive boilerplate" rather than law.

Under old English parliamentary law, he said, anyone refusing a subpoena by the legis-

lative bodies there would be thrown into the tower of London.

"Hear that, Senator Ervin?" Senator Muskie asked.

Senator Ervin has suggested using subpoena and arrest procedures to force the executive privilege matter into the courts.

Mr. Berger said, "If I had six Senator Ervins, old as I am, I'd storm the White House."

Ralph Nader, the consumer advocate, testified that he had had great difficulty in trying to dig documents out of the executive branch under the Freedom of Information Act.