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Executive Privilege and Strict Construct

Cynical though it may sound, there seems only one logical reason to explain the extreme position taken by the Nixon administration on executive privilege and the right to enforce secrecy throughout government: the answer is the United States Supreme Court.

Consider the sequence of events. President Nixon's aides refuse to testify before Sen. Sam Ervin's committee that is investigating the Watergate case. Whether Ervin goes through with his threat to try to arrest them or not, their defiance will bring citations of contempt. This will be appealed to the courts with at least two to three years intervening before it reaches a decision in the Supreme Court. By that time it can be safely assumed the President will have not four of his own "strict constructionist" justices but five. The court will be his stone wall of defiance to the Congress.

As recent surveys have shown, the four Nixon justices have voted with remarkable consistency in any case involving presidential powers. They have been joined by either Justice Byron White or Justice Potter Stewart with few exceptions to make a majority. This leaves Justices William O. Douglas, William J. Brennan Jr. and Thurgood Marshall repeatedly in a minority.

The only possible explanation of Attorney General Richard Kleindienst's unprecedented proposal for executive privilege for the entire executive establishment is the confidence that the Nixon court will sustain any challenge on this score. In his press conference on March 15 the President said:

"Perhaps this is the time to have the highest court of this land make a definitive decision with regard to this matter (executive privilege)."

In campaigning both in 1968 and in 1972 for "strict constructionist" judges, Mr. Nixon was in effect campaigning against the Supreme Court. He has never given any legal definition of what he means by "strict constructionist."

There is nothing in the Constituiton about executive privilege. When his aides are pressed to say what this authority derives from, they cite the separation of powers. But the Kleindienst sweep covering everyone from the door clerk to the Attorney General himself is to infer authority that the founding fathers never dreamed of.

A Supreme Court decision in 1957 overruled a contempt of Congress conviction of a witness who refused to divulge names of alleged Communists before the House Un-American Activities Committee. The opinion written by Chief Justice Earl Warren sustained the defense of the witness, a United Auto Workers official, John T. Watkins, based on his reliance on the First Amendment. The Chief Justice cited an earlier ruling to the effect that "an investigation (by Congress) into individual affairs is invalid if unrelated to any legislative purpose." "There is no congressional power to expose for the sake of exposure."

But as those familiar with the Watkins opinion and its significance point out the "legal purpose" in the Watergate investigation is clear enough. It is to expose wrongdoing so that laws may be drafted to prevent future subversion of the political process.

Directly involved are men convicted of serious crimes. Officials holding influential positions in the government and subsequently in the Nixon re-election committee stand accused of violating laws governing political contributions. Either those alleged to have been participants must face public interrogation or the public will be denied knowledge of what actually happened and Congress will lack the background to draft appropriate laws.

The Supreme Court is literally the court of last resort. Impeachment is a proceeding within the purview of the Constitution. Impeachment was voted by the House of Representatives against Justice Samuel Chase at the time that Thomas Jefferson was feuding with Chief Justice John Marshall. But the Senate refused to find Chase guilty of high crimes and misdemeanors as provided in the Constitution. It is obviously not a recourse when ideological issues are involved.

Franklin Roosevelt, frustrated by a conservative majority repeatedly outlawing New Deal measures, sought to add six new justices of a liberal persuasion. His "court packing" plan drew wide opposition and was rejected by the Senate as the controversy disclosed how deep was respect and even veneration for the Court. But if President Nixon now fills it with "strict constructionists" by his definition, putting it in position as a politcal barricade, that respect may not long survive.

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