

CHAPTER 7

An Arrow Aimed at Kissinger Hits the Watergate Bull's-Eye

Political chaos theory is illustrated well by an EAS editorial that caroms off Henry Kissinger one year only to produce a delayed explosion the next year at the feet of President Nixon on what is, perhaps, the most sensitive day of Watergate.

The March 1972 newsletter aimed at bolstering the information needs of Congress at a time when parliaments throughout the world were losing power to their executive counterparts.⁸⁰ Accordingly, our special report on the “Legislative Right to Know” focused on (a) the obligation of executive-branch officials to testify; (b) the use of executive privilege to deny information; (c) the executive branch’s use of information to lobby the legislative branch; and (d) selective declassification.

The question of executive privilege, in particular, was much in the air. In early 1972 the Separation of Powers Subcommittee of the Senate Judiciary Committee released about six hundred pages of hearings on executive privilege—the executive branch’s oft-invoked inherent right to withhold information from Congress. The Supreme Court had never ruled on it, even though about twenty presidents had used it. Congress was becoming restive.

The hearings were dominated by the careful and thorough research of Raoul Berger, who had published a timely book on the subject (*Executive Privilege: A Constitutional Myth*⁸¹). Berger wrote, “There is little if any historical warrant . . . for the notion that executive privilege was ever intended to be among the checks on the legislative power of inquiry.”⁸²

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I became interested in the use of executive privilege by White House employees. On investigation I learned that as many as seven officials there functioned under one "hat" as confidential advisers to the president (e.g., science adviser to the president) while under another "hat" they functioned in the executive office of the president in a position set up by statute (e.g., director of the White House Office of Science and Technology). They often testified under the second hat though not the first.

The reasoning was that Congress could compel the testimony of any officials, in the White House or elsewhere, whose positions were created by statute. In theory Congress could, if offended, just repeal the laws creating those positions. Advisers were another matter; their salaries were paid by appropriated monies, but more indirectly.

I thought Henry Kissinger's situation from 1969 to 1973 was anomalous. He was an assistant to the president for national security affairs (the confidential adviser role), but unlike the science adviser he failed to hold any second statutory position.

Worse, he should have been holding such a position because he was functioning as if he did. He was fulfilling the duties of the executive secretary of the National Security Council, since all of the staff members of that body were, in fact, reporting to him.⁸³ Therefore, I drafted an editorial entitled "To Facilitate Congressional Testimony, FAS Proposes Second 'Hat' for Henry Kissinger." It urged him to accept this second title and to testify under it.

As usual, I secured help in polishing the draft, and I obtained the endorsement of distinguished experts. In this case they included Berger, Alton Frye (who had moved to the Council on Foreign Relations), Bernard Schwartz (a distinguished professor of law at New York University), and Lee C. White, who had been a legal adviser to both President Kennedy and President Johnson.⁸⁴ Our newsletter received editorial-page attention in *The Washington Post*, and I sent two copies to the White House.^[85] Both may have had unusual effects.

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The first copy went, on March 2, to Henry Kissinger. My cover letter thanked him effusively for his “historic work” on China and denied that we were motivated by dissatisfaction with his work. But it argued that his testimony—on matters that did not involve confidential communications with the president—would be useful not only to the Senate (“vent the pressures and frustration that leading Senators feel”) but to the administration (“you would testify more effectively than anyone else”).

Henry seems to have moved fast to cut off any campaign of this kind by enhancing a relatively new innovation, private meetings with congressmen. He had already met with the Foreign Relations Committees in social formats at the homes of key legislators. Now he held a meeting with them in Blair House and proposed to make such meetings “periodic.”⁸⁶ Thus, within thirty days of my letter to him, by March 31, he was able to respond to me as follows:

I have met with Senator Fulbright and Congressman Morgan [the chairmen of the two congressional committees covering foreign affairs], and we have agreed to arrange periodic meetings with their committees in which I shall discuss with them the full range of foreign policy issues and answer their questions. The first of these meetings has been held, and I believe you will find that all participants benefited from the very frank discussion which took place.

Recognizing both the special circumstances of the present situation and the right of the Congress to be fully informed, I believe that this procedure meets these needs in a way which does not compromise the traditional right of future Presidents to safeguard the privileged nature of the relations between the President and his principal advisers.

So something *had* happened, and Henry felt obliged to write me about it presumably in the hope that FAS would not press the point.

I also sent an advance courtesy copy of the newsletter to the White House counsel, John Dean. ¶ Much like the shot-in-the-dark letter I sent to the inspector general of the Postal Service,

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which triggered an end to HTLINGUAL, this letter neither had John Dean in mind as a target nor seemed likely to have any immediate effect.

But a year later it did. The fuse of this time bomb was set on April 20, when John Dean wrote back saying he had found the newsletter “most interesting.” In answer to my attached question, he said that neither President Nixon nor any other president had “ever asserted a claim that Presidential aides have blanket immunity from testifying before the Congress on any subject.” He said this was shown by examples in my newsletter and “the testimony of [Presidential Assistant] Mr. [Peter] Flanigan before the Senate Judiciary Committee.”⁸⁷

I filed the letter away and forgot about it.

Eleven months later, however, the administration was stonewalling under the pressures of Watergate and trying to prevent the testimony of its highest officials on the grounds of executive privilege. On March 15, 1973, President Nixon said, “Members of the White House staff will not appear before a committee of Congress in any formal session.”⁸⁸ Three days later Raoul wrote asking if he could quote the Dean letter, of which I had sent him a copy a year before for an article he was writing. Only then did I realize that this was big news. On March 21 I walked over to the Senate and handed the letter to a staffer working for Senator Sam Ervin—as I recall, it was Sam Dash.

That evening I saw Senator Ervin waving this letter around on the evening news. After all, it said President Nixon had never “asserted a claim that Presidential aides have blanket immunity from testifying.” Now he was. Two days earlier, on March 19, Ervin had threatened the arrest of White House staff members who refused to testify.⁸⁹ Now Ervin had, in the FAS letter, a smoking gun. Subsequently, *The Washington Post* ran an editorial (“Executive Privilege, Precedent and Mr. Dean”) saying that there was “no better evidence of the slippery, spurious nature of Mr. Nixon’s current claim” than the letter of Dean to Stone.⁹⁰ The *Post* observed that Nixon’s position was

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the exact opposite of the one he had urged, twenty-five years before, when, as a congressman, he had wanted the testimony of Edward U. Condon.^[91]

The irony was that Dean's own letter, as White House Counsel, could be used to demand Dean's testimony and thereby scotch any White House hopes that Dean himself might be kept from center stage. In any case, the letter was, by sheer coincidence, released on the climactic day of Watergate. That morning Dean had told the president, "We have a cancer within—close to the Presidency—that's growing."⁹²

On that same day, Nixon and his chief advisers, John D. Ehrlichman and H. R. Haldeman, were, with varying degrees of bluntness, advocating that Dean prepare a report that would "give the President a public alibi if the cover-up were to collapse"—but that would clearly help Nixon hang the problem on Dean.⁹³

The next morning *The New York Times* ran an article on Watergate that contained four paragraphs about Dean's letter to me.⁹⁴ Later that morning, at 11:00 A.M., Attorney General John N. Mitchell advised Haldeman, in the words of Haldeman's notes, that "the only real problem the P has is invoking executive privilege." Incredibly, through sheer coincidence  FAS had supplied the most succinct bit of evidence against the White House on the issue that the attorney general thought was "the only real problem."

Chemists speak of supersaturated solutions that will precipitate out crystals if even slightly disturbed. FAS's effectiveness in both these cases, if any, rested on the fact that we created a small disturbance in contexts that were politically supersaturated.

As Murrey Marder of *The Washington Post* noted, the Foreign Relations Committee had had about as much as it could take of—i.e., had been supersaturated with—Kissinger's running foreign policy without testifying. Any small public disturbance concerning this issue just might precipitate out a troublesome public outcry. Thus Henry had good reason to respond to our letter and newslet-

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ter by taking preemptive defensive action. And he was wise to report this preemptive action to us, because it effectively warned us that any campaign we might otherwise mount would not have the full support of the Foreign Relations Committees, now effectively bought off. Meanwhile, his civilized letter and careful argument maximized the chances that we would just drop the subject.

In contrast, our release of Dean's letter stirred what was surely the most supersaturated context in modern American political history. Senator Ervin was threatening to arrest White House officials, and an embattled president was grappling with an aide right on the verge of turning state's evidence that would destroy his presidency. Into this situation, our letter was dropped fortuitously at the most critical moment. It is revealing that even Raoul Berger did not realize what a hot item this letter was and wanted it only to use in some pedestrian publication. What makes news important is something that, all too often, only journalists can predict. And few can tell what effects these stories will have within the bureaucratic fortresses to which they apply.