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St. Clair And The Court — Catch 22

By STEVE AUSLANDER

I authorize and give up my right of governing myself, to this man (the King), or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner . . . This is the generation of that great Leviathan, or rather (to speak more reverently) of that Mortal God, to which we owe under the Immortal God, our peace and defense.

—Thomas Hobbes in Leviathan (1651)

Sure there's a catch, Doc Daneeka replied, Catch-22. Anyone who wants to get out of combat duty isn't really crazy.

There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of danger that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions . . .

Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle. "That's some catch, that Catch-22," he observed.

"It's the best there is," Doc Daneeka agreed.

—Joseph Heller in Catch-22 (1955)

One of the most dangerous arguments ever offered before the Supreme Court of the United States was made Monday last when presidential lawyer James St. Clair argued Mr. Nixon's position on executive privilege.

The logic and inspiration of it was a combination of Thomas Hobbes and Joseph Heller's Catch-22.

Hobbes was a 17th Century English philosopher who tried to legitimize monarchical absolutism, claiming that a king as sovereign was a Mortal God possessed of divine rights which served to protect the people. The king's word was absolute.

More complex is Heller's Catch-22, which prevented the main character of the novel, Yossarian, from being removed from combat.

The logic of Catch-22 was exactly what St. Clair asked the Supreme Court to accept.

St. Clair argued before the Supreme Court that executive privilege would apply absolutely even in cases involving a criminal conspiracy as illustrated in this dialog: (The questions or remarks made by justices are noted only as "Question" and the particular justice who asked or remarked is not identified in the transcript of the oral arguments released by the Associated Press).

Question: What public interest is there in preserving secrecy (through executive privilege) with respect to a criminal conspiracy?

St. Clair: The answer, sir, is that a criminal conspiracy is criminal only after it's proven to be criminal.

The essence of the President's argument is that confidentiality is absolutely necessary or his advisers will be fearful of the fact that today's conversation may become tomorrow's headline. Only the President, St. Clair argued, has the right to decide what should be kept confidential and what may be released:

St. Clair decided to use a judicial appointment as an example; it was this example that led him inexorably to Catch-22:

St. Clair: But, for example, the simple matter of appointments if I may, an appointment of a judge, it's very important to the judiciary to have good judges. It's not at all unheard of for lawyers to be asked their opinion about a nominee.

Now if that lawyer wants to be sure that he's going to be protected in giving candid opinions regarding a nominee for the bench, it's absolutely essential that that be protected. Otherwise, you're not going to get candid advice.

Now this isn't a state secret, it isn't national defense; I suggest it's more important because that judge may sit on the bench for 30 years.

Question: Well, don't you think it would be important if the judge and the President were discussing how they were going to make appointments for money?

St. Clair: I'm sorry sir, I didn't understand your question.

Question: Don't you think it would be important in a hypothetical case if an about-to-be-appointed judge was making a deal with the President for money?

St. Clair: Absolutely.

Question: But under yours it couldn't be. In public interest you couldn't release that.

St. Clair: I would think that that could not be released, if it were a confidential communication. If the President did appoint such an individual, the remedy is clear, the remedy is that he should be impeached. . .

Question: How are you going to impeach him if you don't know about it?

St. Clair: Well, if you know about it, then you can state the case. If you don't know about it, you don't have it.

This argument was thus summarized by one of the Justices:

Question: If you know the President is doing something wrong, you can impeach him; but the only way you can find out is this way; you can't impeach him, so you don't impeach him. You lose me some place along there. (Laughter)

No wonder. Even Yossarian, who lived in a world of Catch-22 logic, had trouble understanding it. For a Supreme Court justice whose world is one of steadfast reason, the President's Catch-22 would certainly be tricky.

Thomas Hobbes would also have been proud of St. Clair's argument. He, too, saw the need to invest absolute power in the sovereign because the sovereign — the king — was the protector.

Absolute executive privilege would mean that the President could do anything illegal and so long as he merely stonewalled it, he would be immune from the judicial process.

The absurdity is that Catch-22 is a tragicomedy and Thomas Hobbes was a philosophical mouthpiece for government by all-powerful monarchs.

Are they to become reality?