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Secrecy and the Presidency

In the midst of the Senate investigation of participation by the White House staff in alleged criminal activities—branded by former Attorney General John Mitchell as "White House horrors"—President Nixon has barred access to "Presidential papers prepared or received by former members of my staff." This roster includes John D. Ehrlichman, H. R. Haldeman, John W. Dean III, Gordon C. Strachan and others, who have been implicated by testimony in possible crimes. The Nixon order would bar the possible confirmation of such testimony by documentary evidence available in White House files. The order, Mr. Nixon advised the Senate, is not based "upon any desire to withhold information relevant to your inquiry." But that is precisely its effect.

The issue rises above a jurisdictional quarrel between Congress and the President—important though such differences can be—and it presents an issue in which every American has an immediate stake. Mr. Nixon would shroud White House activities behind the very curtain of secrecy which bred the "horrors" that have brought shame upon the President and the nation. It was the Johnson administration's addiction to secrecy that made possible the stealthy and calamitous escalation in Vietnam. Executive secrecy is at war with Madison's admonition that "the right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every right." Suppression of information is a prelude to tyranny, a first step toward enslavement of the people.

The historical records fully confirm Henry Steele Commager's statement that:

> *The generation that made the nation thought secrecy in government one of the instruments of old world tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.*

Concealment thus bears a heavy burden. To defend his concealment, President Nixon relies first on the "separation of powers." He himself recognizes that it was designed to defend each branch "against *encroachments* by other branches," thus assuming that the President was given a constitutional power to withhold information from Congress, upon which Congress may not "encroach." *But the "separation of powers" does not confer power; it only protects a power otherwise conferred.* The existence of withholding power must therefore be proven, not assumed.

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No such power is to be found in the Constitution. To this, presidential advocates retort that the congressional power of inquiry likewise is not mentioned in the constitutional text. There is, however, a profound difference: congressional inquiry rests on a judicially recognized historical base. Looking to English practice at the adoption of the Constitution, the Supreme Court found that Parliament had long exercised a power of inquiry; that it was "an essential auxiliary . . . of the legislative function," an "inherent . . . attribute" of the "legislative power," which the framers intended to include in the "legislative power" committed "to the two houses." Like the Court, therefore, we may look to the parliamentary practice to ascertain the *scope* of that "attribute."

In an extensive sampling of parliamentary records stretching from 1621 to 1742, I found first that the inquiry power ran across the board, into every conceivable aspect of executive conduct. Secondly, I found not one instance of an objection by any minister to the right of Parliament to inquire or to the scope of the inquiry. The great English historian Henry Hallam confirms that no "courtier," that is, minister, "ventured to deny this general right of inquiry." It is safe to conclude that no minister claimed or enjoyed any right to withhold information from Parliament.

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A number of historical facts indicate that the founders adopted this practice. Before the convention, James Wilson, one of the leading architects of the Constitution regarded it as one of the glories of the House of Commons that the proudest ministers had appeared before it to account for their conduct. On four or five occasions the founders referred to the House as the "Grand Inquest of the Nation"—so the inquisitorial power was known—without the slightest intimation that they intended to curtail the power in any respect. From this and yet other historical data we may deduce that the "attribute" with which Congress was endowed by the framers was the untrammeled parliamentary power of inquiry. Let the executive branch come forward with contradictory evidence. Until then, we should be guided by the homely maxim: you can't beat somethin' with nutin'.

No presidential advocate has ever brought forward any pre-Constitution precedent for a claim or right to withhold information from the legislature. Nor can the President lay claim to the immunity of the king, for as James Iredell proudly boasted, the framers made the President "triable" and repudiated the principle that the king was immune. Such royal immunity was again rejected by Chief Justice Marshall on the trial of Aaron Burr, wherein he declared that President Jeffer-

son could be required to furnish a letter written to him by General Wilkinson.

Presidential claims are rested on a number of post-1787 refusals by some Presidents of relatively innocuous information. A bare assertion of a right to withhold can no more create constitutional power than a President can lift himself by his bootstraps. Presidents cannot change the Constitution by repeated self-serving assertions. The "precedent" adduced by Mr. Nixon, for example, was a refusal by ex-President Truman in 1953 to testify before a congressional committee, a very recently brewed "precedent." In sum, the Senate request for White House files does not "encroach" on presidential prerogative because no such right to withhold was conferred by the Constitution on the President.

There is powerful confirmatory evidence that the "separation of powers" was not thought to limit congressional inquiry, to mention only the Act of 1789, which made it the duty of the Secretary of the Treasury to furnish to Congress all information appertaining to his office. Drafted by Alexander Hamilton, enacted by the First Congress, in which sat a goodly number of framers and ratifiers of the Constitution, and signed by President Washington, the presiding officer of the convention, the Act demonstrates that the "separation of powers" was considered no bar to the congressional requirement of information.

Second, Mr. Nixon relies on "the indispensable principle of confidentiality of presidential papers": "no President could function . . . (unless) his personal staff be able to communicate among themselves in complete candor." Not a trace of such a "principle" is to be found in our history until 1954, when President Eisenhower first announced it more broadly in belated recoil to the excesses of Sen. Joseph McCarthy. Before long, the "principle" spread to every level of government, and lesser functionaries were denying information to Congress lest it inhibit "candid interchange" among subordinates. In April, 1973, Attorney General Richard Kleindienst made the unprecedented claim that no one of the 2.5 million federal employees can talk to Congress without the President's permission. The "principle" has become the most frequently invoked ground of refusal of information by every branch of the government; it cuts far deeper than "confidentiality of presidential papers." Before we swallow such a crippling "principle" and permit the President to redesign the Constitution by pronunciamento, we should at least be sure that it is indeed "indispensable" to good government.

That government can flourish and prosper in the absence of such a principle is demonstrated by the fact that our federal government successfully functioned from 1789 until 1954 without the benefit of the "principle." When the "principle" was invoked by a ministry against a private litigant before the House of Lords in 1967, it was all but laughed out of court. A "principle" thus dismissed by a great court can not be assumed to be self-evident. Against the assumption that "confidentiality" is "indispensable" to the operation of the entire government must be weighed the undeniable need of Congress for information, the cost of concealing confirmatory evidence of a conspiracy to corrupt the political process, and the loss of confidence in the President which has shaken the nation. Concealment in these circumstances is too high a price to pay for the preservation of "confidentiality" in the White House.

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Let President Nixon ponder the acknowledgment of the stiff-necked Andrew Jackson that:

> *cases may occur in the course of [Congress'] proceedings in which it may be indispensable to the proper exercise of its power that it should inquire or decide upon the conduct of the President or other public officers, and in every case its constitutional right to do so is cheerfully conceded.*

The nation can no more tolerate presidential withholding of documents when the executive branch is under congressional investigation than it can afford to let a bank president dictate to a bank examiner what books he may see. Unhappy are a people whose suspected officials can lay down the terms of investigation, for then the investigation becomes a dead letter.