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The Tapes (cont.)

By Raoul Berger

CONCORD, Mass. — In the name of common sense, Prof. Charles Black adjures the President (Op-Ed page, Aug. 3) to withhold the written or taped records of his consultations as President in order to protect the conduct of his office. I suggest that it is far from common-sensical to encourage the President to withhold evidence that may either prove or disprove charges that he was implicated in the Watergate cover-up. Rather, common sense suggests that nondisclosure feeds the suspicion that has sapped the confidence of the nation.

Against Professor Black's speculations I would oppose some grim actualities: suppression of the gnawing doubts of the inner circle as the Vietnam War was stealthily escalated; suppression of the recently disclosed secret bombing of Cambodia in 1969-70; shrouding in secrecy of the illegal incursions of the White House "plumbers," of White House collusion with I.T.T. and others to obtain campaign funds in return for braking Government suits or investigations. Common sense suggests that the actual harms that have resulted from such "confidential" discussions greatly outweigh the hypothetical harms that might ensue were there no blanket shelter for "confidences."

It is true that proceedings of the Constitutional Convention were conducted in secret, but that is no argument for Presidential power to act in secret. For when the Framers came to write the Constitution they gave the power to keep certain proceedings secret to Congress alone, not to the President. Under familiar canons of construction, it follows that the power of secrecy was withheld from him.

Even the Congressional provision met with severe criticism, and to defend it proponents of the Constitution, such as John Marshall, were driven to explain to the Ratification Conventions that "secrecy is only used when it would be fatal and pernicious to publish," instancing debates on declarations of war or military arrangement. This history repels the notion that the Founders empowered the President in his sole discretion to decide what could be disclosed to Congress and the people.

While it is true that the Constitution does not expressly confer a power of investigation on Congress nor "executive privilege" on the President, the two stand on vastly different foundations. The power of investigation does not merely rest on implication that it is "necessary and proper" but on solid historical precedent. Looking to the practice of Parliament, the Supreme Court held in 1927 that the power of inquiry was an "inherent attribute" of the legislative power, and that when the Framers conferred the "legislative power" upon Congress, both houses were given this "attribute." On the other hand, there is no historical precedent for executive withholding of information from Parliament at the adoption of the Constitution, no intimation that such "withholding" was an inherent "executive power." Instead, history shows that no Minister questioned the cross-the-board inquisitorial power. In such matters, as Justice Holmes stated, "a page of history is worth a volume of logic."

In addition, there is the fact that the President and "all civil officers" were expressly made impeachable, that from early times inquiry could precede impeachment, on the sensible ground that one does not first hang a man and then inquire whether there was just cause. On four or five occasions the Founders referred in the several Ratification Conventions to the House as "Grand Inquest of the Nation—the description of the legislative power of inquiry—without a hint that this function was in any way to be curtailed."

Professor Black doubts that it ever "occurred to the Framers that anyone would come to contend that the President had no right to take effectively private counsel . . ."

Once more history serves better than speculation. A number of British Ministers had been impeached for giving "bad advice" to the Crown, and in several Ratification Conventions delegates directed attention to the fact that the giving of "bad advice" by Ministers, i.e., by members of the Cabinet, was impeachable. A necessary preliminary would be whether such advice was given. No one thought to raise the point that the Presidency could not function if his advisers could not freely and secretly proffer advice. The reason presumably is that "ministers" and Presidential "favorites" were profoundly distrusted.

If we have to choose between investigatory abuses and Presidential secrecy, I suggest that Senator McCarthy's whip-lashing of innocent individuals, revolting as it was, was yet not nearly as damaging to the nation as the concealment of the truth about Vietnam or the cover-up of criminality in Watergate. Cozy confidential conversations, taped by the President, are bought too dear at that price.

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