The Tapes and History (cont.)

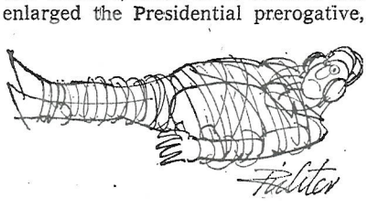
Lee Lorenz

By Arthur Schlesinger Jr.

Charles L. Black Jr., the Luce Professor of Jurisprudence at Yale Law School, wrote an impassioned and perhaps unduly dogmatic column on the Op-Ed page Aug. 3 entitled, "Mr. Nixon, the Tapes and Common Sense." Professor Black says that Mr. Nixon is everlastingly right in sitting on his tapes, that, if he lets anyone outside the executive branch hear them (Mr. Haldeman presumably excepted), the Presidency is doomed and that the President is therefore serving the cause of "his successors for all time to come."

Everything Professor Black claims about a President's right and duty to protect his own "consultative and decisional processes"—abominable adjectives, but one sees what he means—is right on one condition. That condition was clearly stated by Andrew Jackson in 1833 when he declined to give the Senate a paper he had read to his Cabinet justifying his decision to remove the Government deposits from the Second Bank of the United States. "I have yet to learn," Jackson wrote the Senate, "under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of Departments acting as a Cabinet council. As well might I be required to detail to the Senate the free and private conversations I have held with those officers *on any subject relating to their duties and my own.*"

I have italicized the last ten words, because this is the heart of the matter. Jackson, much as he relished and enlarged the Presidential prerogative, never supposed he could extend it beyond the performance of official duties. As he put it on another occasion, cases could arise "in which it may be indispensable to the proper exercise of [Congress'] power that it should inquire into and 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 argument for protecting confidential Presidential conversations and papers, in other words, prevails *only as long as those conversations and papers are connected with the performance of official duties.*



It is the President's official duty, in the words of the Constitution, to "take care that the Laws be faithfully executed." It is not the President's official duty to break laws. To take the familiar example: would Professor Black seriously contend that, if Presidential tapes contained evidence of a murder committed at the order of a President, the President would be serving the cause of his successors for all time to come by denying the tapes to Congress and the courts?

The line between carrying out the law and breaking it is marked by a fine old British word—malversation, which is to say corrupt behavior in a position of trust. The Luce Professor of Jurisprudence would appear to contend that, even in cases of malversation, refusal of his papers is not only the President's "lawful privilege but his duty as well, for it is a measure necessary to the protection of the proper conduct of his office." Few Presidents have been more stubborn defenders of Presidential prerogative than James K. Polk, but Polk in plain and conclusive words disposed of the extraordinary thesis propounded by Professor Black.

If members of the House of Representatives had any reason to believe there was malversation in office, Polk said in a special message in 1846, then "all the archives and papers of the Executive Departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation." Above all, if the House was looking into executive misconduct with a view to the exercise of its constitutional power of impeachment, "The power of the House in the pursuit of this object would penetrate into the most secret recesses of the Executive Departments. It could command the attendance of any and every agent of the government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge."

Jackson and Polk, it may be supposed, cherished the Presidency no less than Professor Black and conceivably understood the Constitution a little better. But Professor Black is curiously contemptuous of history. "There are no precedents, judicial or otherwise," he writes, "covering this case" of the tapes. Obviously neither Jackson nor Polk had electronic tapes in mind when one conceded the constitutional right of Congress to inquire into Presidential conduct and the other said Congress could in cases of suspected malversation penetrate into "all the archives and papers of the Executive Departments." But the principles they stated cover the case at hand.

Because Professor Black can find no precedents, he says that "we must have recourse to common sense." His argument runs counter to common sense as well as to history. Jackson and Polk were robust champions of the Presidency, but they believed in strong Presidents *within the Constitution.* They were surely expressing the common sense of the question when they restricted claims of Presidential confidentiality to the performance of constitutional duties. No past President has ever extended those claims to the question of suspected malveration. This, not the performance of constitutional duties, is the issue in the case of President Nixon and his precious tapes.

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