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Bootstrap Doctrine

By Anthony Lewis

LONDON, July 18—The President of the United States is accused of conspiratorial involvement in serious crimes. He turns out to have a large amount of physical evidence that may bear directly on the truth of the criminal charges. He announces that he is going to keep the evidence secret, that he has a right to do so because he is President.

Stated thus baldly, the proposition sounds absurd. As a matter of law or history, it *is* absurd. Yet when someone in the White House puts the label "executive privilege" on it, we take it seriously and assume that a long tradition lies behind the theory. So reverential have we become about the American Presidency.

The tapes produced by President Nixon's surreptitious practice of recording everything said in his office may or may not be telling evidence in the Watergate inquiry. One should be skeptical that there is a magic key to the truth in such complex affairs, and the authenticity of these tapes may always be questioned.

But the notion that there is some legal right to withhold such evidence is quite another matter. It is time, it is long past time to deflate the mystique of "executive privilege." In the sense of an absolute discretion to withhold information, hallowed by the Constitution or by a long tradition, it just ain't so.

There has been a good deal of recent scholarly research on the subject, and its conclusions are in that doubting vein. In a long paper last May, Prof. Norman Dorsen of the New York University law school and John H. F. Shattuck of the American Civil Liberties Union found the idea of letting a President deny information in his own discretion was "without basis in historical or judicial precedent or in the constitutional doctrine of separation of powers." Another scholar said the doctrine was "built upon fantasy."

AT HOME ABROAD

In the first 100 years of the United States no President successfully asserted a right to withhold information from Congress. The practice was overwhelmingly the other way. In the darkest days of the Civil War, Lincoln gave critical Congressional committees all the military and diplomatic information they requested.

There were times when Presidents preferred not to disclose something to Congress. But if Congress thought the policy reasons advanced were unsound, and persisted, it prevailed. Thus in 1792 Washington asked a House committee to withdraw its request for papers about a military disaster, but when it declined he turned them over.

The idea that Presidents have an absolute right to decide what they will tell Congress has developed only in the last twenty years. It was first claimed in 1954 by Attorney General Herbert Brownell Jr. in support of President Eisenhower's decision not to let subordinate Government officials testify before Senator Joseph McCarthy.

Of course there may be good reasons to keep some information confidential. For example, almost everyone would be against disclosure of unverified and defamatory investigative files. Congress has authorized many exceptions to the rule of disclosure.

But it is another thing to say that the President should decide these issues on his own. Congress is an equal branch of the same Government, with a right and duty of inquiry that has been exercised since its very first days. These are matters to be worked out by the two branches in terms of the public interest in particular cases, not swept aside by an empty claim of absolute Presidential power.

It is no accident that the doctrine of executive privilege has flowered during the years when the power of the White House has grown. For it is an expression of power, an essential instrument in the fight by successive Presidents—and especially this one—to exclude Congress from a meaningful share in the Government of the United States.

The affair of the tapes shows how far the reach for Presidential power has gone. President Nixon orders Secret Service officers not to testify at all about his bugging system. It is as if they worked privately for him, in a private White House. But they do not. They are paid by all Americans, in sums appropriated by Congress, to perform a public function. Their oath is to preserve the Constitution, not Richard Nixon.

No serious analyst has ever propounded a theory of executive privilege that would cover direct evidence on criminal matters. That is what is involved in these tapes. And Congress is not, therefore, the only institution with a strong legal claim on them. There is also the special Watergate prosecutor, Archibald Cox.

Mr. Cox and his team are working inside the executive branch, so there can be no privilege based on separation of powers. More important, those prosecutors are presenting evidence before grand juries that under our system are presumptively entitled to all evidence of crime.

Just a year ago the Supreme Court rejected the press' claim of a privilege to keep sources secret from grand juries. Justice White, for the majority, spoke of the long-standing principle that "the public has a right to every man's evidence." And then, in a footnote, he cited the opinion of Chief Justice Marshall in 1807 that "in proper circumstances a subpoena could be issued to the President of the United States."