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# 'Grand Inquest of The Nation'

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By Anthony Lewis

When President Nixon received the grand jury subpoena for Watergate tapes and documents last summer, his lawyers predicted national disaster if he were ordered to comply. They spoke of "irreparable" damage to the Presidency.

Making a President respond to court orders, they argued, "would effectively destroy the status of the executive branch as an equal and coordinate element of government." If he had to produce records of his conversations, "from that moment on it would be simply impossible for any President of the United States to function."

Even with due allowance for rhetorical overkill, those statements look pretty silly now. The courts held that the President, like everyone else, was obliged to respond to a judicial demand for possible evidence of crime. He eventually did, and the Presidency is still there.

That lawsuit has not in the least inhibited Mr. Nixon from vetoing legislation, conducting foreign policy or otherwise exercising Presidential power. His problem is something else—the loss of public belief in his word.

The faded forecast of doom is worth recalling as the courts prepare to pass on more Nixon claims of "executive privilege." This time he asserts the right to ignore a subpoena from the Senate Watergate committee.

No doubt the Senate committee has been disappointing. The main burden of investigating the Nixon Administration's crimes is now borne by others: Special Prosecutor Leon Jaworski and the House Judiciary Committee in its impeachment inquiry. But the legal test over the Senate subpoena is still highly significant.

Control of information has played a crucial part in the rise of the imperial Presidency. Congress often has simply not had the facts to challenge Presi-

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## ABROAD AT HOME

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dential action effectively. That whole recent trend could be altered or accelerated by a judicial decision on the claimed right to withhold information from Congress.

As a matter of history, there is much irony in the fact that recent Presidents have enlarged their power by keeping secrets from Congress. For the men who founded the United States feared executive power and relied on Congressional scrutiny to keep it down.

At the Constitutional Convention of 1787 the House of Representatives was referred to as "the grand inquest of the nation." The phrase came from English history. Just fifty years earlier, for example, William Pitt the Elder had used it in launching an investigation of Robert Walpole's ministry. He told his fellow members of the House of Commons:

"We are called the grand inquest of the nation, and as such it is our duty to inquire into every step of public management, either abroad or at home, in order to see that nothing has been done amiss."

The English and American history is set out in Raoul Berger's forthcoming book, "Executive Privilege: A Constitutional Myth." One interesting item is an act of the First Congress, dated Sept. 2, 1789, creating the office of Secretary of the Treasury. It obliged him to "make reports and give information to either branch of the Legislature, in person or in writing (as may be required), respecting all matters that may be referred to him by the Secretary of the House . . ."

Over the first hundred years of the United States and more, Presidential attempts to withhold information from Congress were rare. Lincoln, like Washington, supplied details of military campaigns, even embarrassing ones. It is only lately that there have been wholesale refusals—and the effort to give them the cover of a principle.

The very phrase "executive privilege" was first officially used in 1958. Liberals bear a heavy responsibility for legitimizing the doctrine. Confusing ends with means, they foolishly cheered when President Eisenhower refused information to Senator Joseph McCarthy.

Of course, Presidents need some confidentiality in their work, but our system provides ample political protection for that without legal overkill. Congressional committees do not lightly seek access to Presidential records; they respect the Presidency too much, and want to work with it.

No legitimate interest, of the Presidency or any other office, requires an absolute privilege to withhold evidence of wrongdoing. Recognizing the historic duty of Congress to inquire and check abuse would hardly threaten the immense institutional strength of the American Presidency.

The Framers of our Constitution put their faith in institutions, not in men. They made even Presidents subject to impeachment, a process seen as the ultimate Grand Inquest. Mr. Nixon's claim of privilege in the Senate case will doubtless be followed by an attempt to withhold information from the impeachment inquiry. The time to stop that unconstitutional course is now.