

The President and the Missing Pieces

"We will have an answer to the committee regarding today's communication and previous ones by the Easter vacation. And that answer will be comprehensive and conclusive in terms of the President's actions.

"We are confident the answer will allow the committee to draw a prompt and just conclusion, that it will receive the support of the House and bear out the President's statement that he will cooperate consistent with his constitutional responsibilities."—Ronald L. Ziegler, the President's press secretary, answering reporters' questions, April 12, 1974.

HAVING SAID all that, Mr. Ziegler has said nothing—unless President Nixon intends either to comply entirely with the subpoena of the House Judiciary Committee, or to demonstrate convincingly that what he is withholding has no bearing on the case. For to the extent that the President's compliance is in any sense *selective*, there is no way for him to be either "comprehensive" or "conclusive," and no way for his performance to justify the trust or the support of the House. To see why, it is necessary not only to understand the weakness of the President's constitutional argument but to understand the process that leads responsible investigators (and it seems safe to assume the combined majority and minority staffs of the Rodino committee belong in that category) to seek tapes, documents and other material from the White House in the first place. No more than the Special Watergate Prosecutor, Leon Jaworski, are they on anything as simple as a "fishing expedition." They are presumably working from, among other records and documents, the volumes of testimony before the Watergate committee. Beyond that, however, they are taking their own testimony from potential witnesses, seeking to fill in blanks, follow up leads, and round out a coherent reconstruction of what actually happened, in detail. There is no other way to go about building a solid case—whether we are talking about establishing innocence or guilt.

Thus, in the absence of any persuasive evidence to the contrary, it must be assumed that there is a respectable reason for each of these requests—some grounds, for example, to believe that a particular conversation between the President and one or another of his aides has some bearing, one way or another, on the matter at hand. And it is against this background that you have to consider the attitude of the White House and that of the President himself. For what the President is saying is that a line must be drawn somewhere—without ever saying just where. He talks at one nonsensical extreme about backing up trucks and removing everything from the White House, which nobody is suggesting. And he insists, at the other extreme, that he is not claiming confidentiality for *all* of his documents and recordings, which is true enough. But it is also true that he is not acting upon his professed desire to get "the full story out." Rather, he is thoroughly obfuscating the issue by talking about "weakening of the presidency," as if there is some magic moment when the volume of material turned over to investigators suddenly begins to "weaken" his high office. In his remarks before the Executive Club in Chicago, on March 15, he even argued that he had already passed that point, and went on to say that he had the support in this respect of everyone of his White House predecessors. That, incidentally, is not so; to the extent that past presidents have been obliged to address the issue at all, they have in fact conceded the essentially unique aspect of an impeachment proceeding which

set it apart from any other investigation which might involve the confidentiality of the office of the presidency.

Still less does it make much sense in this case to talk about breaches of presidential confidentiality in terms of the inhibiting effect upon his advisers of the knowledge that they might somehow be held accountable publicly for having given a President bad advice. "He will be surrounded by a group of eunuchs insofar as their advice is concerned," the President actually argued—this from a President who tape recorded every office conversation he had with his advisers without their knowledge or consent. Quite apart from the solemn charge which is laid upon it by the Constitution and the rights and powers which derive from it, the House is examining impeachable offenses; and if you accept the President's own definition of what that amounts to, this at least gives it a license to search out evidence bearing upon indictable crime. Surely the President's cloak of confidentiality does not extend to discussions in his office with his advisers about their participation in criminal activity. And equally surely, presidential advisers inhibited from discussing the commission of crimes in the President's presence would not be reduced to "eunuchs insofar as their advice is concerned." In short, the confidentiality argument falls on its face, in the absence of a shred of evidence from the White House that the Rodino Committee's specific requests are genuinely irrelevant to the matters which the House, under its impeachment powers, is charged with looking into.

An important question remains, and that is whether the President himself ought to be allowed to determine unilaterally, and without producing any evidence, what it is among the material requested, and now subpoenaed, by the Rodino Committee that is or isn't relevant to its proper concerns. To do so, in our view, would make a sham and a shambles of the whole impeachment procedure. For the President, in a very real sense, is in the way of being a defendant in this case and it is hard to imagine how the proceedings now unfolding could conceivably be carried forward in a credible and convincing way if the defendant were to pick and choose the evidence that could be used against him.

Putting it another way, the withholding of even one document, or tape or scrap of conversation or paragraph of a memorandum from the material requested could, at least potentially, rob the rest of the material of any value. For we would have no way of knowing whether the piece that was missing might not be vital to the case. This is in the nature of the process by which a case, for innocence or guilt, is made; it is made by putting pieces together; quite often what makes it an entirely convincing case may be no more than one crucial piece of evidence.

Thus, when the White House offers, as it is currently offering, to turn over some, but not necessarily all, of the material subpoenaed by an overwhelming majority of the House Judiciary Committee, it is not being conciliatory, or reasonable, or flexible or any of these things—this is not a sweetly reasonable compromise to be applauded and encouraged. For what the White House is thereby claiming is the right of the President to determine, in a very real sense, the outcome of an investigation of the President. If the House Committee's subpoena is in fact unenforceable, he may well have the power to do just that. But what he would then be doing ought to be seen for what it is. What he would be doing is to make a farce of the impeachment process.