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Mr. Nixon's Refusal of Subpoenas:

By Raoul Berger

CAMBRIDGE, Mass.—The American people must be alerted: By refusing to comply with the subpoenas of the House Judiciary Committee, President Nixon is setting himself above the Constitution. He would nullify the constitutional provision for Presidential accountability that was designed to prevent dictatorial usurpations.

The issue far transcends a confrontation between the President and the House; it is a confrontation with the nation. "All officers of the Government, from the highest to the lowest," said the United States Supreme Court in 1882, "are creatures of the law and are bound to obey it"; no officer of the law may set that law at defiance with impunity." A people that tolerate such defiance by the President is sowing the seeds of its own destruction.

The Presidential claim of constitutional right to withhold information from Congress is labeled "executive privilege." A limited power of secrecy was given to Congress, not to the President. No word about "executive privilege" or "confidentiality" is to be found either in the Constitution or its history. On the other hand, the Supreme Court recognized that parliamentary inquiry was an established "attribute" of legislative power and held that it was conferred upon Congress by the grant of "legislative power." No minister challenged the right of Parliament to inquire into executive conduct; no member of the executive branch has ever summoned a pre-1789 "precedent" for executive refusal to honor legislative subpoena; and so far as my own search of parliamentary record goes, there are none.

James Wilson, second only to James Madison as an architect of the Constitution, wrote admiringly that in "the character of grand inquisitors of the realm," the House of Commons "have checked the progress of arbitrary power," and that the "proudest ministers . . . have appeared at the bar of the house, to give an account of their conduct." This inquisitorial function was known as the "Grand Inquest of the Nation;" and the Grand Inquest alone, said Lord Justice Coleridge, was entrusted with the determination of what falls within the limits of its power of investigation. References to that function were made in four or five of the United States Constitution's ratifying conventions, with never a word that the power must be cut down for the protection of the President. The absence of such remarks is but another example of the pervasive distrust and fear of executive usurpation that found expression in convention after convention, and that lies at the root of Congressional power to impeach the President.

Thus, the President's reiterated incantation—the separation of powers—lays claim to a power that was not given to him. The purpose of the separation of powers said John Adams, was to prevent encroachment by one branch on the powers of another. Before separation of powers comes into play, therefore, it is first necessary to demonstrate that a power was granted to the President to withhold information that a legislature traditionally could demand. Such proof simply cannot be made; Mr. Nixon's claims are merely based on self-serving assertions.

The case for Congressional inquiry as a prelude to impeachment stands even stronger, for arguments that impeachment violated the separation of powers were summarily brushed aside by the Framers themselves. In the Convention, Rufus King and Charles Pinckney protested that the proposed impeachment provision would destroy the independence of the President and violate the separation of powers — the very arguments Mr. Nixon now interposes to the subpoenas. Notwithstanding, they were voted down, 8 to 2, because, as George Mason said, "No point is of more importance than that the right of impeachment should be continued." Note that Mason took for granted that it was the familiar, established "right of impeachment" that would thus be "continued."

Apart from the total lack of historical warrant for the President's attempt to set the bounds of inquiry by the House Judiciary Committee, Mr. Nixon insists on a prerogative to which no other suspect can lay claim before any investigative body. His insistence that he can dictate the rules of the inquiry exhibits contempt for the common sense of the American people. A series of Presidents, from Washington through Polk and Buchanan to Mr. Nixon himself, have recognized the paramountcy of the Grand Inquest of the Nation. Polk put the matter

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most forcibly; given an inquiry into executive misconduct, the "power of the House . . . would penetrate into the most secret recesses of the Executive Departments."

The House's need for all the facts surrounding suspected Presidential offenses cannot of course be circumscribed by an executive determination of what is relevant. Long since, Chief Justice Marshall declared that what is relevant cannot be left to the determination of the executive. The Constitution does not change according to whose ox is gored.

In the discussion of the alternatives open to the House and the people, there has been a sense of helplessness that does not benefit a great people. The starting point is that Mr. Nixon is in violation of the Constitution, that he "shall take care that the laws be faithfully executed," of which the Constitution is the "supreme law." Just as the sole power of impeachment conferred on the House is not subject to limitation by the President, so he cannot lay down the ground rules for the preliminary investigation that is required for the informed and effective exercise of the power. If the people understand that, then they must exercise that right that John Adams enshined in the 1780 Massachusettts Constitution, the "right to require of their lawgivers and magistrates an exact and constant observance" of the "fundamental principles of the Constitution." Let the people require of Congress and the President that a halt be called to Presidential attempts to thwart the investigatory function of the House. President Nixon can understand the voice of the people, as his retreat in open court after the Archibald Cox firestorm illustrated. In acting as Grand Inquest, the House is no less entitled to respect than the courts; indeed the powers to impeach and convict the President are perhaps the most important powers conferred by the Constitution. Defiance of the Constitution, the people must tell Mr. Nixon, is intolerable.

It is open to the House Judiciary Committee to ask the House to cite and hold Mr. Nixon for contempt in disobeying the subpoenas of the committee. Such a contempt is plainly an impeachable offense; on a number of occasions the House of Commons brought impeachments for encroachments upon its prerogatives or for thwarting its orders.

When Representative Don Edwards of California stated that the committee cannot force its will upon Mr. Nixon because "he's got the Army, Navy and Air Force and all we've got is Ken Harding" (the sergeant-at-arms) he did not say that the Supreme Court also doees not have the ability to call on the armed forces.

The Supreme Court has always assumed that its decrees would be obeyed, and they have been, as when President Truman surrendered the steel plants during the Korean war. If we pursue the Edwards approach, it may be asked what reason there is to believe that Mr. Nixon will surrender his office if he is impeached and convicted.

The Commander in Chief was not given command of the armed forces in order to defy the law but to enforce it. In 1788 James Wilson assured the Pennsylvania Ratification Convention that "not a single privilege is annexed" to the President. And in 1791, Wilson, then a Justice of the Supreme Court, stated: "the most powerful magistrates should be amenable to the law. . . . No one should be secure while he violates the Constitution and the laws." We are not yet a banana republic; the American people will not allow Mr. Nixon to defy the law.

The times call upon us to return to the egalitarianism of the Founders and once and for all to strip away the pernicious mystique with which we ourselves have surrounded the President. We too must regard him as but a man, all the more when he is suspected of impeachable offenses, even of crimes, and firmly maintain that he is subject to the law in all its manifestations, including, if need be, arrest. Finally, I would recall to the nation the words of a great statesman, Edward Livingston, in the early days of the Republic: "No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin and . . . slavery . . . only because the means of publicity had not been secured." That was a lesson the Founders had learned.

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