NYT 8/15/73

Wretched Tapes (cont.)

By Alexander M. Bickel

NEW HAVEN—The question about those wretched Presidential tapes is not whether the President requires a large measure of privacy of consultation and decision making if he is to function effectively. Of course he does, no less than do judges, or Congressional committees, or individual Senators and Congressmen. The Constitution does not say so in precise terms, but the constitutional reason of the thing does say so.

Nor is the question whether the President is indictable. I believe he is not, prior to impeachment, because in him and in his uninterrupted capacity to function is the indestructibility and continuity of the state itself. A President cannot be indicted before he has been removed and succeeded, so that there is no hiatus in the office.

But this is not remotely to say that his tapes and papers may not be relevant to the proper business of a grand jury, and all the more so of Congress. Again, the issue is not whether the President has waived his privilege to keep the tapes secret. To the extent that it exists and with respect to matter that it covers, I do not see how the privilege can be waived. Naturally, if a document or a tape is no longer confidential because it has been made public, it would be nonsense to claim that it is privileged, and nobody would trouble to subpoena it either, since it would be available.

But nature and reason of the privilege are rather to repose in the President and in him alone the subjective judgment whether to maintain privacy or release information—and which, and how much, and when, and to whom. Far from being waived, the privilege, it seems to me, is as much exercised when information is released as when it is withheld.

On the other hand, the question really cannot be whether the President has the constitutional power to withhold evidence of his own or others' crimes, except as he, like the rest of us, might wish to plead the Fifth Amendment. The position that the President has such power is not sustainable, and there is no attempt, I believe, to maintain it as in itself meritorious. The argument instead is of the slippery slope variety. If the President's privacy may be penetrated in search of alleged evidence of crime, it is said, he will soon have no privacy left at all, because the criminal code is vast, and imaginative allegations of possible evidence of crime will soon multiply, and because even matter that can plausibly be characterized as evidence of crime will be inextricably intermingled with other material that ought to remain private.

If this is the true issue, it is more procedural than substantive. The issue is how can the President's interest in privacy, and his necessary discretionary power to decide for himself how much of it he needs and when, be safeguarded to the full extent that the reason of the thing justifies; not whether he has such an interest and such a power and what their extent is. The answer to the latter question should be and pretty much is common ground among all concerned.

Obviously, if on the merest allegation of possible criminal activity the President should be required to disgorge all that he may be asked for and let it all become public, then the argument of the slippery slope would be valid and should be conclusive. If on the contrary the President's privilege is claimed as an absolute, so that he need never release anything no matter how specific the request made to him and how credible the allegation that it concerns evidence of crime, then to admit such a privilege would be to allow it to reach well beyond the valid reasons that justify its existence.

It follows that requests for Presidential documents or tapes must be specific and must be based on probable cause to believe that the documents or tapes contain evidence of crime. Such probable cause is normally derived from credible, preferably corroborated, sworn evidence.

But that is not enough. Probable cause is only that, not proof. And the problem of the intermingling of evidence of crime with other matter also remains. What should happen next, therefore, is that the specific material requested should be handed to a Federal District judge *in camera*, under seal—a procedure followed, for example, with wiretap logs that a defendant may demand from the Government in the course of a criminal trial. The judge will decide whether the probable cause to believe that the documents or tapes contain evidence of crime is in fact made out. If so, he will then edit our other, irrelevant matter. (Legitimate national security matter, incidentally, cannot both be that and constitute evidence of crime.) What remains, the judge will release, although not before an appellate process reviewing his decision has run its course.

In this fashion, all that needs to be protected will be, but no more. If the objection to such a procedure consists of some ultimate metaphysical abstractions about the separation of powers, then the proper answer to them is Burke's: "I hate the very sound of them." For they destroy governments.

Alexander M. Bickel is professor of law at Yale Law School.