

NYTimes AUG 8 1973

Mr. Nixon And Burke's Law

By James Reston

WASHINGTON, Aug. 7—If President Nixon were merely faced by a legal tangle over letting the courts and the Congress see the relevant parts of his Watergate tapes, his argument before the United States District Court here, might help him in his present predicament, but that is not really or even mainly his problem.

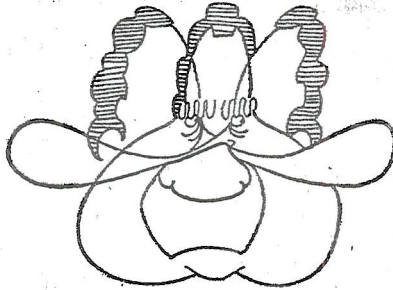
His problem is not primarily legal but moral, psychological and political. He is faced by a troubled and divided nation, seething with doubt and suspicion over the current scandals. The people are asking him to relieve their anxieties, to clear away their doubts by the records in his possession, to do what is right, and he has answered with a mystifying proclamation on his legal rights.

During the great struggle with the British before the founding of the Republic, King George III and Lord North had many legal rights on their side, but Edmund Burke, arguing in his famous second speech on conciliation with America said: "It is not what a lawyer tells me I may do, but what humanity, reason and justice tell me I ought to do."

This has been the missing principle in the President's defense of his Administration all along. He has taken refuge in narrow legalities, giving ground to truth only when compelled to do so, and not always then, and the result is that each grudging statement, including his legal brief on the tapes, merely perpetuates the mistrust which is crippling his Government.

"The issue here is starkly simple," the President's lawyers argued. "Will

WASHINGTON



the Presidency be allowed to continue to function?" This is precisely right, but it is not functioning now as it should and is not likely to function until some kind of confidence is restored in the good faith and effective cooperation of the three branches of the Government.

Even those parts of the tapes dealing with charges of criminal action cannot be released, the President argued, because of "the paramount need for frank expression and discussion among the President and those consulted by him in the making of Presidential decisions."

This is a better point, but after listening to the testimony of Messrs. Kleindienst, Gray, Walters, Magruder, Dean and even Ehrlichman and Halde- man, one wonders how much "frank expression and discussion" there was at the top of this Administration over the last couple of years.

It is conceded in the President's brief that Mr. Nixon could voluntarily make available relevant parts of the tapes, but this he refused to do, thus confronting the Congress and even his own prosecutor with the problem that he won't give the tapes voluntarily and that they can't compel him to give them up.

Unfortunately, this only makes the outlook even darker than it was before. For his argument seems to be that to submit to decisions of the court would make the Presidency subservi-

ent to the judiciary, and this implies that even if the Supreme Court ordered him to hand over portions of the tapes, he would defy that order.

The reference to impeachment in the President's brief is even more ominous. "The President of the United States," the brief states, "is not above the law. He is liable to prosecution, and punishment in the ordinary course of law for crimes he has committed but only after he has been impeached, convicted and removed from office." Meanwhile, the brief argues, the President, and the President alone, must be the sole judge of what private papers he discloses, even if he knows they contain evidence of criminal action.

This is interesting, for there is one body of opinion here that only by absolute candor or, paradoxically, by absolute defiance can the President break the present dilemma. Candor he seems to have ruled out, but he could argue that he has denied all guilt, that the hearings and the charges go on, that they are poisoning his character and interfering with the conduct of his Administration, and therefore, that he demands a bill of impeachment to vote the issue up or down.

On the basis of all the evidence here, the Congress has no heart for such a struggle. It is doubtful that such a bill of impeachment would ever be passed by a majority of all members and sent on to the Senate for judgment. But it would divide the country even more than it is.

Accordingly, the hope here is that he will not take the route of defiance, but will, again in Burke's words, recognize that "all government, indeed every human benefit and enjoyment, every virtue and every prudent act is founded on compromise. . . ."

There is, however, no sign of compromise in his legal argument. He is reversing Burke's principle. He is following what "a lawyer tells me I may do" rather than "what humanity, reason and justice tell me I ought to do."