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'The Tapes Should Be Destroyed'

The instant President Nixon proclaimed, "I am not a crook," he probably knew he had armed posterity with words it would delight in turning against his historical standing. But he could not have anticipated that in 1975 the U.S. government would proclaim, in effect, that he was, is, and is likely to remain a crook.

The government recently did that in a court here, where Mr. Nixon is waging an uphill battle to gain custody of his presidential tapes and documents. The Justice Department argued that "Mr. Nixon would not be a trustworthy custodian, even temporarily," of those materials.

Mr. Nixon is challenging the constitutionality of a statute enacted last December to make those materials government property.

In a recent deposition Mr. Nixon seemed truculently anxious to show that he still adheres to the standards of candor and civility that reduced him to reluctantly giving depositions. With the help of counsel, he implied that he doesn't know the meaning of the word "wrongdoing" and didn't know what, besides a building, the word "Watergate" denotes.

But to the Justice Department, new evidence of Mr. Nixon's character is unnecessary. His untrustworthiness is a reasonable inference from his compartment while occupying the highest position of public trust. The department cited (among other things) the destruction of 18½ minutes of subpoenaed tape and what the department politely called "material differences" between Mr. Nixon's transcripts and what the tapes actually contained.

The department said, with nice understatement, that when Congress took control of Mr. Nixon's materials it took a reasonable precaution against "Mr. Nixon's propensity to distort the historical record."

Obviously Mr. Nixon has a First Amendment right to distort history to his heart's content in those million dollar memoirs, on those million dollar television shows and elsewhere. If the Constitution permitted the public to get injunctive relief from distortion, there would be no political memoirs and precious little history written. But government has a bounden duty to prevent politicians from controlling and mutilating the evidence.

Mr. Nixon's argument is, at bottom, this: All previous Presidents enjoyed an absolute property right in their presidential materials, a right that evolved over the years as a result of the nation's indifference to the disposition of such materials. But that argument is not quite accurate and is quite irrelevant.

The somewhat haphazard practices of the past do not confer an inalienable right on Presidents. Government never forfeited for all time its right to make explicit, in law, its irregular but recurrent concern for the protection of presidential materials.

Congress first manifested this concern by making appropriations for the purchase of documents of Washington, Jefferson, Madison and Monroe. Since the 1930s—the advent of presidential government and presidential libraries—the government's concern has become more important and systematic.

Mr. Nixon argues (among other things) that the new statute deprives

him of property without due process. The Justice Department argues that presidential materials "are affected with a unique public interest" and that the statute is a reasonable exercise of Congress' authority to protect them.

The statute is called the Presidential Recordings and Materials Preservation Act. The trouble with the dispute between Mr. Nixon and the government is that both sides seem to share the assumption, implicit in the statute's title, that all such "recordings and materials" should be preserved.

The 42 million pages of documents should be preserved, if only so we can discover how a President generated such a blizzard of paper. (Lyndon Johnson generated a mere 17 million pages). But the tapes of 5,000 hours of conversations are another matter.

Except when Mr. Nixon was talking to H. R. Haldeman, the taping was surreptitious and was (as Justice Holmes said of another form of electronic surveillance, wiretapping) "a dirty business." The tapes are splendid symbols of the Watergate culprits' indifference to other people's sensitivities and right to privacy.

The tapes should be destroyed.

These tapes, unethically made, have no ethical use, other than as necessary evidence in judicial proceedings. That is, they can be properly used only for making justice, not for making best sellers, doctoral dissertations or even serious historical studies.

Historical scholarship is a serious matter, but like another serious matter, national security, it is not an excuse for snooping on innocent Americans.