

# Losing by Winning in Court

Hmmm. Hours after we learn that Mr. Agnew is being investigated in connection with criminal charges, Mr. Nixon's lawyers are in court arguing that Mr. Nixon is "accountable under law, but only in the manner prescribed by the Constitution." That is, Mr. Nixon can ignore court rulings until he is removed from office by impeachment. Nice timing, that.

But Mr. Nixon may win his court fights, and that will really fix his wagon.

The courts may affirm his interpretation of the separation of powers, and say that executive privilege makes it impossible for anyone to compel him to release tapes of conversations relevant to the Watergate investigation.

The law of averages being one law immune to repeal by Mr. Nixon's "inherent powers," it was probably in-

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evitable that, eventually, Mr. Nixon would be correct about something. He probably is correct about his right to keep his tapes.

The issue before the courts is not what Mr. Nixon ought to do. Rather it is what the branches of government can do to each other. Mr. Nixon believes the principle involved in the tape test is whether one branch of government can coerce another. Separation of power assumes that the three "powers" of government correspond to the discreet functions of government (legislat-

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ing, executing, judging) and that concentration of these powers in a single dominant body is tyranny. Mr. Nixon, believe it or not, is on the side of the angels, this time.

Like it or not, the Constitution is an exercise in "rule utilitarianism." It is a tapestry of doctrines and institutions that are useful, "as a rule." Relaxing the rule of separation of powers to order release of the tapes would fracture the administration, but that is not an adequate reason for doing so. The fact that Mr. Nixon's bumptious enthusiasm for the doctrine is opportunistic is not relevant. Nor is the fact that the mischievous Nixon administration may temporarily seem to benefit from a doctrine designed to prevent mischief.

The truth, however, is that Mr. Nixon cannot win. If he loses in court, he loses. If he wins in court then he is really in the soup.

For if he wins in court, the President *will have protected* the prerogatives of the office for future presi-

dents. And he will thus be free to make the most statesmanlike move of his career. He will be free to surrender the tapes, uncoerced and without prejudice to the privacy of any future presidential dealings.

If he wins in court, and lays to rest the idea that he can be compelled, then he must release the tapes voluntarily. Otherwise it will be clear that he is protecting himself, not the office.

That is the real drama of the court test: the President is trapped by his reiterated pledges to leave no pumpkin unopened in his relentless drive for public exposure of the truth about Watergate.

If he wins in court and still refuses to release the tapes, Mr. Nixon will lose everything but Air Force One. Sure, he can lean back and smirk, like A. D. Lindsay, late Master of Balliol College, Oxford, who, when outvoted by the faculty 20-2, laconically observed "We are obviously deadlocked." That is, with his *de jure* power affirmed by the courts, he can risk what remains of his *de facto* power—his public support—by suppressing the taped evidence for reasons that are obviously self-serving and obstructive of justice. And he may even feel as Churchill once felt: "Nothing in life is so exhilarating as to be shot at without result." But the exhilaration will be shortlived.

Perhaps Mr. Nixon already realizes his dilemma. Sen. Sam Ervin and Special Prosecutor Archibald Cox were assured of favorable results just by firing the shots—the subpoenas—that drove Mr. Nixon into court to protect his tapes.