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# Too Much Law, Not Enough Politics

Washington

**T**HE DAY AFTER Judge Sirica's opinion came down, a Page One headline in the Star-News summed up the state of both the weather and the law: "Smog Is the Worst Ever Recorded Here."

All over town, lawyers, pundits, clerks and cab drivers are construing the Constitution. Both newspapers have handed down concurring opinions. Senator

Sam Ervin called in to add his note of approval. The consensus is that Judge Sirica was right, and the President was wrong, in the matter of the presidential tapes.

"It is ordered," said the judge, "that respondent, President Richard M. Nixon, or any subordinate officer, official or employee with custody or control . . . is hereby commanded to produce forthwith for the court's examination in camera the subpoenaed documents or objects which have not heretofore been produced to the grand jury . . ."



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Well, I dissent. Judge Sirica's opinion was reasoned and temperate. His solution, if so it may be termed, does the least possible violence to the principle the President is defending. The principle holds that the judicial branch cannot "command" the executive branch to disclose its confidential papers. That proposition seems to me sound; and the principle, like chastity, cannot be surrendered in part. If the principle can be violated, goodbye principle. The Republic would survive, but our power structure would be significantly altered.

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**I**T IS SAID that the tapes contain, or may contain, substantive evidence of value to the grand jury still investigating the Watergate scandal. "What distinctive quality of the presidency," asked the judge, "permits its incumbent to withhold evidence?"

The answer, it seems to me, is that the presidency is in fact unique. Everything about the office is distinctive.

A good deal of demagogic blather has been heard these past few days about the President "being like other men." The argument runs that Citizen Nixon just happens to be sitting in the White House now, but he is plain old Citizen Nixon so far as the law is concerned. "He ain't no king."

The argument is specious. Patrick Henry long ago looked sourly upon the presidential office: "It squints of monarchy." Henry's vision was defective. No president is a monarch; but he is — president. Even in a purported criminal case, even if he himself were suspected of criminal conduct, a sitting president cannot be "commanded" by the courts to perform the act here demanded.

If this were not true, as Jefferson told John Marshall at the time of the Burr trial, any federal judge could order any president, under pain of contempt, to produce any paper, to appear in person, to testify at distant trials, and so on.

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**T**HE WASHINGTON smog is filled with wild surmise. Suppose Judge Sirica's order is upheld, all the way through the Supreme Court, and the President still refuses to give up the tapes. (Mr. Nixon has said he would obey a "definitive" order, but he has changed his mind before.) Would he then be cited for contempt? Would marshals be dispatched to arrest him? To drag him physically into court? Could a president then be jailed until he purged himself of contempt?

We have had quite enough hot air without this. We have had too much law and not enough politics, for Mr. Nixon's problem is not legal, but essentially political. He could win 9-0 in the high court and still lose everything in the country. Eventually he will have to yield those tapes.

The day has long passed when Andrew Jackson could say (as he probably never said), "John Marshall has made his decision — now let him enforce it."

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**I**F THE PRESIDENT loses, he will have to obey the court; if the President wins, he will have to make the tapes public as a voluntary act. Nothing less will suffice to dispel the suspicion, reflected in presidential popularity polls, that Mr. Nixon was in this up to his ears.

Another suspicion also floats in the smog, that the tapes have now been doctored and no longer contain "the truth." But it is too hot to harry that suspicion. On this issue, the President should be trusted, or the President should be impeached.

But a president, I submit, cannot be "commanded."

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