Is the President Legal Chief?

The *United States* v. *Richard Nixon* —the very title of the unprecedented case now before the Supreme Court suggests a legal conundrum, a theoretical exercise for law professors. The U.S. as party to a lawsuit has always been represented by a lawyer subordinate to the President. So how can the President's own man be suing Richard Nixon? That critical question is a vital element of Nixon's defense.

Special Prosecutor Leon Jaworski wants the Supreme Court to require the President to supply 64 specific tapes considered relevant to the Watergate investigation. The President contends that his refusal to hand over the tapes on the ground of Executive privilege transcends the needs of the criminal process. Besides, says White House Counsel James St. Clair, the court should not even consider that question because Nixon is the country's chief law-enforcement officer, head of the Executive household and ultimately Jaworski's boss. As such, St. Clair explains, the President has final authority to settle what is essentially an internal matter. Yale's respected constitutional law professor, Alexander Bickel, supports that argument. The President, says Bickel, has the power to end the legal confrontation simply by firing Jaworski. "Courts can't take on cases for the purpose of rendering advisory opinions that can be lawfully voided by one of the parties to the dispute."

Realistic Fact. Harvard Jurisdictional Expert Paul Bator disagrees vigorously. He concedes the President's firing power but adds, "There is no reason why the mere existence of this power, unexercised, should render the suit nonjusticiable ... For years, different agencies of the United States have taken different positions in the same lawsuit." For example, the Supreme Court once decided a case that was originally called *United States* v. *United States.** The reason such suits can be maintained, says Bator, is the realistic fact that "the Government does not have to be conceived as a single, indivisible entity." Another law professor illustrates the point with the example of a police officer who gives his chief a speeding ticket. The chief cannot defend against the traffic charge in court by claiming that the ticketing officer works for him.

Who is right? Is the President the head of household who is entitled to run his own family without interference from the courts, or is he the police chief who must endure the unwanted exercise of his subordinate's authority? The Constitution gives only faint help. Article II, Section 3 prescribes that the President "shall take care that the laws be faithfully executed." There is no mention of any other law-enforcement officer, including the Attorney General. Thus many experts—including a top Justice Department official—believe that the "ultimate" legal authority belongs to the President.

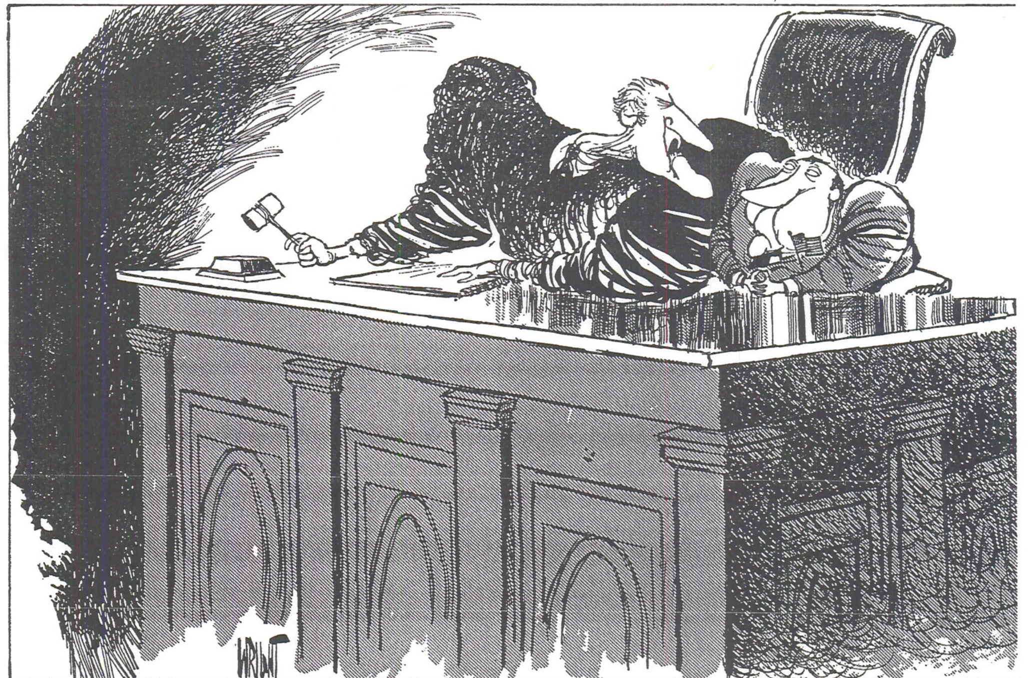
Others contend that the Attorney General is the "chief law officer"; in fact, the official U.S. Government Manual currently describes him in exactly that way. In Britain, after a 1924 furor in Parliament over political interference with the Attorney General, the now well-established rule gives law enforcement authorities complete insulation and independence (except, of course, that they may not sue the Crown).

Former U.S. Attorney General Ramsey Clark says that during his term of office he resolved the dilemma by distinguishing between policy and legal matters. The President, says Clark, "can use discretion with respect to policy, but he cannot interpret the law to suit his own needs, politics, even judgments. The power of the President in legal matters is the power of dismissal, not the power of superseding his legal judgment for that of the Attorney General." That power could thus be used to fire Jaworski if the President were willing to face the consequences.

Clark finds support for his view in *The Jewels of the Princess of Orange,* an advisory opinion written in 1831 by Attorney General Roger Taney, who later became Chief Justice. That ruling involved President Andrew Jackson, who wanted a reluctant U.S. District Attorney to put an end to a case involving the princess's stolen jewels, which had been seized by U.S. customs officials; for diplomatic reasons, Jackson wanted to help the princess get the jewels back quickly. If the district attorney refused to drop the case, wrote Taney, "the prosecution, while he remained in office, would still go on, because the President himself could give no order to the court ... [Instead] the removal of the disobedient officer and the substitution of one more worthy in his place" was the best solution. In other words, prosecutors have authority all their own; the President may not exercise that authority himself but can influence it through his hiring and firing power. The Clark-Taney view would therefore support Jaworski's right to sue until and unless he is removed from office.

There are additional difficulties resulting from the President's stance as chief law enforcer. One important example: Did mounting his own investigation when he heard about the cover-up meet Nixon's responsibility? Scott Bice, associate dean of the University of Southern California law school, argues that "there is at least a responsibility to start the machinery of prosecution." Ex-

DON WRIGHT—MIAMI NEWS



"No, dammit, the *<u>other</u>* *side!"*

*The Government as a railroad customer was suing the Interstate Commerce Commission to upset an I.C.C. ruling that meant higher shipping costs. The Attorney General thus appeared for the Government as both plaintiff and defendant. And Justice Hugo Black concluded for the Court that "the established principle that a person cannot create a justiciable controversy against himself has no application here."

perts generally agree that dispatching a couple of White House aides was not an adequate reaction. "He should have immediately informed the Department of Justice and professionalized the investigation," says former Deputy Attorney General William Ruckelshaus. A top lawyer in the Justice Department elaborates: "Let us suppose the Attorney General learned the same facts. We would all expect him to turn that information over to the criminal division immediately." By those standards, the Justice official says, "if the President did not have a reasonable motive for withholding his knowledge of the cover-up, then he could be guilty of an obstruction of justice." And he would be guilty partly because he was the head of the legal system, not in spite of that fact. As former Attorney General Elliot Richardson puts it, "The President, like anyone else in law enforcement, is subject to the requirements of the law."

The President's claim to be legal chief presents still another kind of problem in the current case against the White House plumbers who staged the break-in at the office of Dr. Lewis Fielding, Daniel Ellsberg's psychiatrist. Federal Judge Gerhard Gesell, who sits in Washington, D.C., says that he may dismiss the case if Nixon fails to comply with subpoenas from his court. Such a failure could infringe a defendant's right to any evidence the Government may have that could be of use to him.

Possible Solution. There is even a precedent ready at hand for Gesell's view. Government misconduct—including both the break-in and slow production of other evidence that the defense was entitled to see—caused dismissal of the prosecution of Daniel Ellsberg; it did not matter that the attorneys who were prosecuting Ellsberg were not connected themselves with all the improper activity. Trouble is, says Berkeley Criminal Law Professor Phillip Johnson, "there is no legal doctrine developed to deal with a situation where evidence is in the hands of the chief of Government and where he and the prosecutor, to say the least, do not share a common interest. I would hope the courts would be realistic enough to say this would not be grounds enough to dismiss."

One possible solution for many of the legal problems involved in the President's position as legal chief has been suggested by Harvard's Bator. Why face such difficulties at all, he asks, in a situation "where the President himself should be deemed disqualified by personal interest?" If a court were to rule that the creation of the special prosecutor meant, in fact, that the President was excusing himself from the case, it would merely be acknowledging a practical reality. Even Yale's Bickel, while maintaining the technical correctness of the presidential argument in Jaworski's cover-up case, has concluded that the President's actions and statements mean that Nixon can no longer use the de-

fense of being the U.S. legal chief when he is charged with obstruction of justice. Says Bickel: "The President who maintains the innocence of his severed right and left arms—Haldeman and Ehrlichman—is not speaking as the chief law-enforcement officer. For prosecutors do not go forward with indictments of people who they believe are innocent." Bickel, who is convinced that the President is indeed chief law-enforcement officer, is equally certain that by his behavior Richard Nixon has stripped away for good "the fiction of the President as chief law-enforcement officer in the Watergate case."