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Disputing Mr. St. Clair on the

By Paul M. Bator

CAMBRIDGE, Mass. — President Nixon's lawyer, James D. St. Clair, has raised a jurisdictional issue against the request by the special prosecutor, Leon Jaworski, for tapes of 64 White House conversations relating to the Watergate coverup.

Just what is this issue? The argument apparently is that Mr. Jaworski cannot sue the President for evidence because he is the President's subordinate, whom the President can dismiss at will. The President is the sole embodiment of the executive branch, and the Jaworski reqpest for the tapes, for use in the cover-up trial, is made on behalf of the executive branch. But one cannot create a "justiciable controversy"—a case that the Constitution permits the Federal courts to adjudicate—by suing himself. The matter is an internal quarrel within the executive branch, over which the President is exclusive arbiter.

How seriously should we take this jurisdictional argument? It apparently did not trouble the courts that decided the suit for tapes that Archibald Cox as special prosecuter brought against the President last fall, and last week United States District Judge John J. Sirica dismissed it as a "nullity."

But Prof. Alexander M. Bickel of Yale Law School, in his article of May 23 on this page, tells us that this is all wrong, that we have been seeing "Hamlet" without a Prince of Denmark —that the jurisdictional issue is a cat that will not stay in anyone's bag. Indeed, Mr. Bickel said, Mr. St. Clair is "correct" about it as a "matter of law."

By submission is that Mr. St. Clair's jurisdictional issue, in spite of surface plausibility, is without substantial basis in Anglo-American law and history. Its fundamental premise appears to be that the courts must think of the executive branch as an indivisible constitutional entity.

But in fact our constitutional tradition has never insisted on such tidyness. For years, different agencies of the United States have taken different positions in the same lawsuit. On occasion, the Solicitor General himself presents to the Supreme Court these various views. Sometimes specific Government departments are authorized to sue in their own names and to appear through their own counsel.

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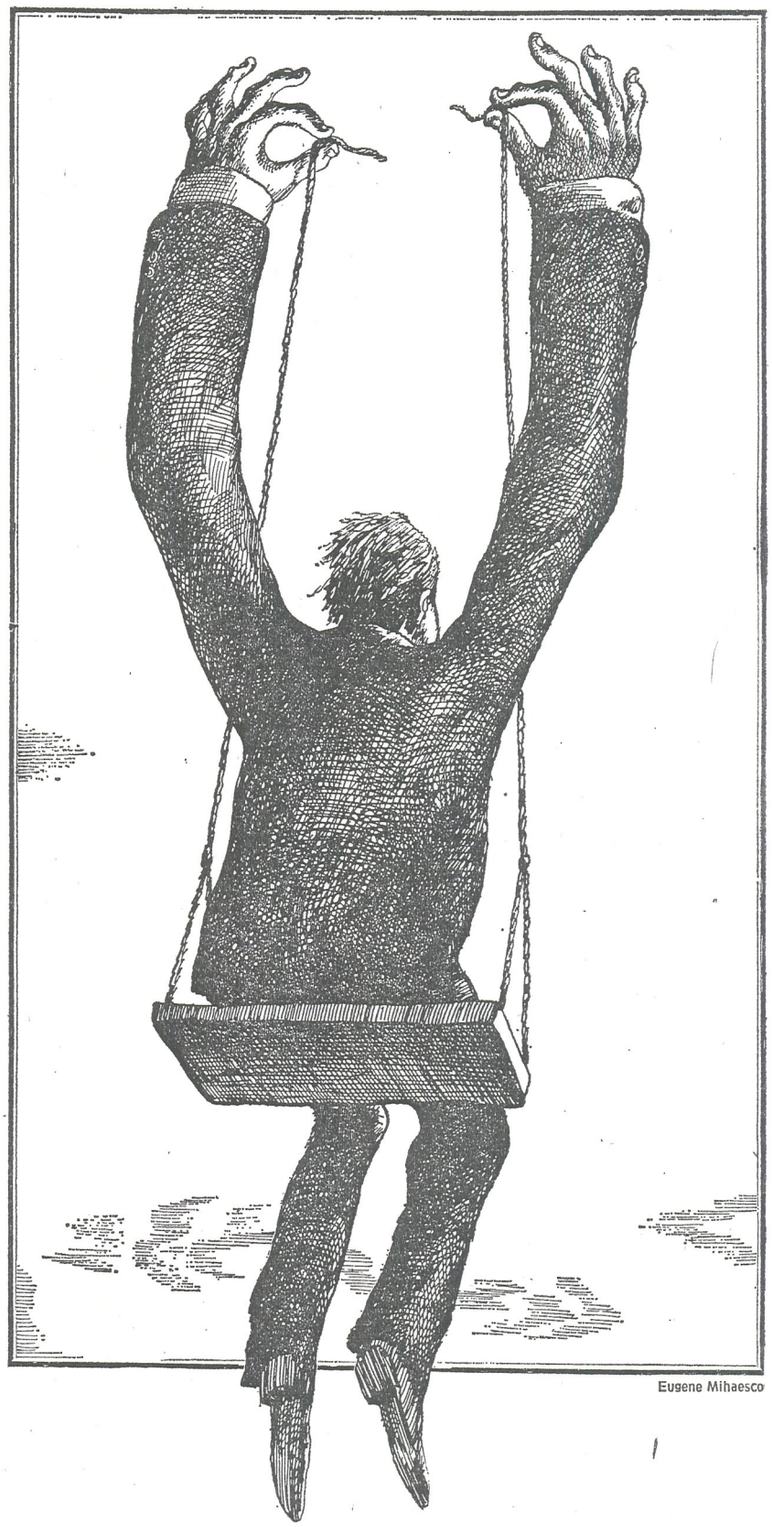
On one celebrated occasion, the Supreme Court held that the United States, as a shipper by railroad, could sue itself in order to set aside an order issued by its own Interstate Commerce Commission; on another, the Court decided a case called "Secretary of Agriculture v. United States"!

How can all this be? The answer is that the test of what cases are justiciable in a Federal court is a pragmatic one: There must be a genuine controversy between adverse parties with truly opposing interests. The Government does not have to be conceived as a single, indivisible entity. For in fact it is a complex conglomeration of many groups, individuals, interests and agencies.



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Does this mean chaos, with no control over who may appear in court on behalf of the Government? Of course not. The authority of a given official to bring suit on behalf of the United States must be duly conferred by law. And the President can keep order through his constitutional prerogative to hire and fire. But nothing in our Constitution requires us to treat the Government as one indivisible litigating entity.

The trouble with Mr. St. Clair's argument goes deeper. The reason it has been rejected by our legal tradition is not only that it is impractical and unnecessary but that long ago it proved incompatible with our ideals of Government under law. For that is the real issue: How can law be used to control Government, given the fact that Government makes and applies the law?

Let's start with the question whether in this suit we must necessarily conceive of the defendant, Mr. Nixon, as embodying the executive branch? The courts are often asked to determine whether Government officials exercizing official power are, in so doing, themselves justified by law. Can the courts do so without violating the principle that the Government cannot be sued in its own courts, at least without consent?

The answer, developed by the English judges during the historic seventeenth-century struggles against arbitrary royal rule, was to reject the notion that the executive must be conceived of as an indivisible sovereign entity. An official, even though acting in an official capacity and at the King's own command, does not embody sovereignty; if the court finds that he was acting without legal justification, he is awensrable in court in his individual capacity, like the ordinary private citizen.

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This notion—that Government officials can be ordered as *individuals* to square their *official* conduct with the law—has been called an illogical fiction; but it is deeply ingrained in our law and has played a decisive role in the evolution of our constitutional democracy.

In 1952, President Truman ordered his Secretary of Commerce to seize the steel mills. The mill owners sued the Secretary, and the Supreme Court held the seizure unconstitutional and ordered the mills returned. How can we explain the Court's right to act, given the fact that the issue in the case was the constitutional prerogative of the Government, which may not be sued without consent? The explanation is this: Officials acting beyond constitutional rules, as defined by the courts, cannot claim sovereign prerogative.

So with Richard Nixon. The legal issues in the pending suit are whether he is privileged, as President, to withhold the tapes, and whether he is immune, as President, from subpoena. Are the courts disabled from passing on these issues? The answer the law gives is clear: The suit is to be conceived as having been brought against Mr. Nixon, individual citizen, who embodies no sovereign prerogative unless and until the courts find that the Constitution validates his claims of privilege and immunity.

But, it is argued, this case is different: Here the suit is on behalf of the United States, and the only person authorized to represent the United States as a prosecutor or plaintiff is the President, in whom is vested the executive power.

But what principle tells us that Mr. Jaworski cannot constitutionally be given lawful authority to bring this action on behalf of the United States? True, the courts may eventually rule that the President is by law immune from suit or subpoena. But this would be a ruling on the merits of the President's claim, not a holding that the Constitution precludes the courts from passing on it because no one can be vested with standing to submit it to adjudication!

The statute books teem with provisions that grant particular departments and officials authority to go to court. I have never heard it suggested that such statutes are unconstitutional because the power to sue is exclusively Presidential.

More particularly, the Attorney General is explicity authorized by statute to prosecute crimes on behalf of the United States; this includes the authority to invoke court process to secure evidence for trial. The Attorney General has delegated a portion of this authority to Mr. Jaworski by valid regulations still in effect. The President has taken no steps to repeal the regulations or even to order Mr. Jaworski to desist.

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Mr. Jaworski is, therefore, duly authorized by law, unless the Constitution commands that we deem the authorization void because the suit is against the President and must therefore be presumed to have been brought without his authority.

But I know of nothing in constitutional text or history that suggests such a rule. And why should we adopt a rule so inconvenient and undesirable, particularly as applied to a case where the President himself should be deemed disqualified by personal interest from determining whether the suit should be brought?

I assume here that the President has the power to end Mr. Jaworski's authority to sue (in fact this, too, can be questioned) by finding an Attorney General who is willing to repeal the regulations and dismiss Mr. Jaworski.

But the political power to abort the suit must be exercised politically, by taking the political risks involved in a second "Saturday night massacre." And there is no reason why the mere existence of this power, unexercised, should render the suit nonjusticiable.

To conclude: Mr. St. Clair's jurisdictional arguments rest on assumptions about justiciability that are contrary to the fundamental genius of our law. To say that the suit, Jaworski v. Nixon, involves the sovereign executive branch suing itself is to fall victim to an unnecessary and long-discarded conceptual conundrum.

Professor Bickel tells us that if the courts exercise jurisdiction in this suit, we will be making bad law. Why? For three centuries, English and American courts have enforced the law against high Government officials. A duly authorized prosecutor now invokes the courts to enforce the law against Richard Nixon. Why would it be bad law to allow him to do so?

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