NYTimes MAY 23 1974

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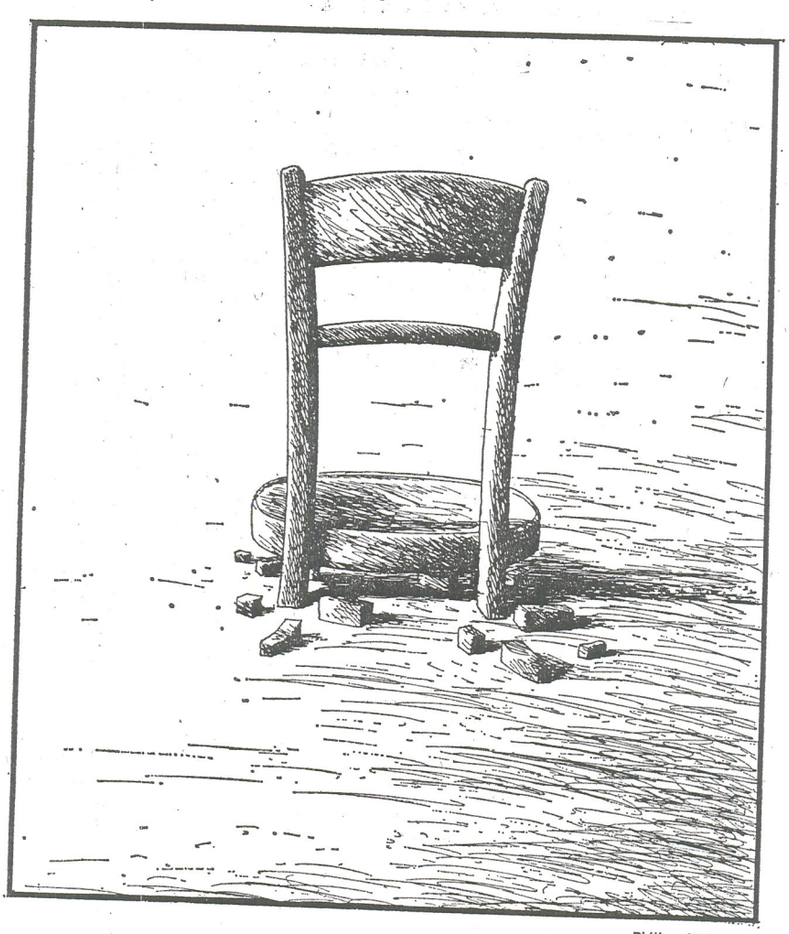
On Mr. Jaworski's



Philippe Weisbecker

By Alexander M. Bickel

NEW HAVEN—Special prosecutor Leon Jaworski's complaint to the Senate Judiciary Committee that the White House is threatening his independence naturally reminds everyone of the quarrel the White House picked with Archibald Cox, Mr. Jaworski's predecessor, and of the consequent "Saturday night massacre." But the present quarrel, which Judge John J. Sirica has resolved in Mr. Jaworski's favor for the time being, is at once narrower and more complicated than the earlier one with Mr. Cox.

In violation of an explicit promise of independence for the special prosecutor, Mr. Nixon issued a directive to Mr. Cox to cease litigating about White House tapes, and when Mr. Cox disobeyed, as he could not but do, the President dismissed him.

No such thunderbolt has descended upon Mr. Jaworski or is apparently impending. Rather, in response to Mr. Jaworski's subpoena for 64 tapes of White House conversations relating to Watergate, the President's lawyer, James D. St. Clair, made the legal argument, among other ones, before Judge Sirica that the special prosecutor lacked what is called "standing" as a litigant, and that the court, therefore, had no jurisdiction to enforce Mr. Jaworski's subpoena.

If this contention should ultimately prevail, says Mr. Jaworski, the result would be quite the same as if Mr. Jaworski were directed by the President to cease litigating and were discharged for disobeying. In presenting this contention, therefore, the President through Mr. St. Clair violated the pledges of independence that were made to Mr. Jaworski and, what is more, violated quite specific public promises that Mr. Jaworski was to be left free to go to court as he saw fit in order to enforce demands for evidence against the President.

But the issue of the special prosecutor's standing to sue and of a Federal court's jurisdiction to enforce his subpoenas against the President is not one that could have been determined by agreement between the President and Mr. Jaworski.

The question is whether a suit

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against the President by a special prosecutor, who under the Constitution is nothing but a subordinate of the President, gives rise to the sort of case or controversy that alone falls within the jurisdiction of Federal courts. This is ultimately a constitutional question. And since it is jurisdictional—a question, not of what it is that the parties are bringing before the court for adjudication, but of whether the court may hear the parties at all—courts will often raise and decide it as necessary whether or not the parties argue it.

The jurisdictional issue was passed over in the litigation over tapes that Mr. Cox conducted before his discharge but its nature and its relevance to any further litigation and its potentially decisive impact have been no secret. Yet no promise concerning the jurisdictional problem nor any mention of it appears in the materials Mr. Jaworski adduces to substantiate his claim that by raising it now the White House is breaking its promise to allow him free access to court.

The pledges made to Mr. Jaworski need be construed to mean no more than that directives would not be issued to him concerning performance of his function, and that he would be dismissed only under the conditions specified, namely after consultation with certain Congressional leaders.

If any commitment was intended concerning the jurisdictional issue of the special prosecutor's standing to litigate against the President, would it not have been mentioned by lawyers who must have been aware of it? Was it not consciously passed over rather, as the courts in the District of Columbia had themselves just recently passed it over? A commitment not to argue it would in any event have had to be a qualified one, since as noted a court might raise the issue on its own initiative and direct White House counsel to brief and argue it.

No doubt a decision against the special prosecutor on the jurisdictional issue would bar his further access to court in the quest for White House evidence as effectively as would his discharge. But so would a decision against him on the White House claim —made and lost in the Cox litigation, but now made again with an eye to presenting it before the Supreme Court —that the scope and applicability of executive privilege are not subject to judicial review at all, in any degree, but must be accepted by courts exactly as asserted by the President.

Mr. Jaworski does not say that the White House is breaching any promise to him by again making this general and absolute claim rather than being content to rely on more specific arguments applicable to specific tapes or documents.

All this having been said—and there is great force in it—Mr. St. Clair's action in raising the jurisdictional question of standing remains troublesome, even for one like myself who believes that as a matter of law his position on it is correct, and that Judge Sirica's rejection of it as a "nullity"—whatever that may mean—is wrong.

For the promises made to Mr. Jaworski are not to be read as if they were the small print in a bond indenture, written by lawyers for lawyers. These were political pledges made to the public at large as the price of escape from a fierce political crisis.

Reasonable inferences that commend themselves to the lay mind form part of such promises. Not, to be sure, if as a matter of legal judgment they make no sense. But that is not quite the case here. It is possible for parties to a lawsuit to stipulate that they agree on and will not dispute a given issue, even a jurisdictional issue that a court may then raise on its own initiative, thus causing the parties to have to argue it after all.

Since everyone concerned passed over the jurisdictional issue in the Cox litigation, which formed the background of Mr. Jaworski's appointment, and since it seemed clear that the White House was promising to treat Mr. Jaworski more indulgently than it had treated Mr. Cox and not in any respect more grudgingly, the inference of a tacit understanding not to raise the jurisdictional issue seems fairly reasonable.

This is especially so since ultimately the claim that Mr. Jaworski has no standing means that he is the President's subordinate and that the President can discharge him if he chooses, which the President has plainly promised not to do.

Yet in the end it is all a tempest in a teapot, not raising for anyone concerned the great personal moral issues of the "Saturday night massacre." The complaint essentially is that Mr. St. Clair has let the cat out of a bag the White House had promised to keep tied up. But there was nothing in that bag. The cat has been out all along. Mr. St. Clair at most pointed his finger at it. This litigation is heading for the Supreme Court. The jurisdictional issue was not going to be long suppressed. And Mr. Jaworski may yet win on it. Great cases often make bad law, as everyone has occasion to remark at one time or another.

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