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Letters to the E

Lawful Powers of the President

To the Editor:

In a May 23 Op-Ed article I examined the contention of Special Prosecutor Leon Jaworski that by recently raising the jurisdictional issue of his standing to sue the President the White House violated the promise of independence that was made to Mr. Jaworski. I remarked in passing that in my judgment the White House position on the jurisdictional issue—although not necessarily on the propriety of raising it now—is correct as a matter of law. In an Op-Ed article you published on May 30, Prof. Paul M. Bator of Harvard plunges deep into the history of the English-speaking peoples and emerges with the enthusiastic conclusion that I am dead wrong. Perhaps I am, but I should like to explain briefly how I got that way.

Mr. Jaworski is a Federal prosecutor about to go to trial. He does not at this stage even represent the grand jury. He seeks certain materials from another agency of the Federal Government, which happens to be the White House. Whatever the political realities of the moment, which are not immutable, the President has the ultimate legal power to decide whether or not Mr. Jaworski shall have what he seeks, because the President has the legal power to repeal the promises he made to Mr. Jaworski, and then discharge him. And the President will retain the legal power to discharge Mr. Jaworski and get himself a more

congenial and less tape-thirsty prosecutor even should the Supreme Court hold that Mr. Jaworski has standing to sue and is entitled to the tapes.

The President would not be defying any judicial decree in this fashion. He would be exercising the lawful powers of his office, which he may do until removed upon impeachment and conviction. Whether it would be politically feasible for him to exercise his powers in this fashion is another question, and not relevant. Jurisdiction cannot rest on judicial and professorial estimates of shifting political conditions, any more than it may properly rest on the consent of the parties to submit to jurisdiction where there is none.

If I am right this far, then the existence of the President's power, though as Mr. Bator says it is so far unexercised, means that a Supreme Court decision against the President could be lawfully frustrated by him—not illegally disobeyed, but lawfully nullified. Such a decision would therefore not constitute the final determination of a case or controversy. Rather it would be an opinion merely proffering advice to those who do have the legal power to conclude the controversy. The Constitution forbids Federal courts to issue advisory opinions.

ALEXANDER M. BICKEL
New Haven, May 30, 1974

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