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ENFORCING SUBPOENAS AGAINST THE PRESIDENT: THE QUESTION OF MR. JAWORSKI'S AUTHORITY

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A grant of accelerated review has brought the new Watergate tapes controversy to the Supreme Court for decision this summer. The main dispute is over Special Prosecutor Jaworski's need for additional presidential tapes to prepare for Watergate-related trials and President Nixon's reliance on executive privilege in resisting a subpoena. But with the President's surprise attack on Mr. Jaworski's authority to sue the President, new and relatively unexplored issues have been raised. Two authorities, Professors Bickel and Bator, have exchanged conflicting views on the issue in the *New York Times*.¹ Although providing a framework for discussion, these articles, we believe, indicate a need for a response and a fuller analysis than Op Ed columns allow.

Professor Bickel reluctantly concludes that the President's defense is valid, because the Special Prosecutor is simply another government attorney, a subordinate to the President, who alone has final legal authority to resolve the controversy over the tapes regardless of what the Court does. Professor Bator reaches the opposite conclusion, in part by analogizing this case to other law suits between government agencies and invoking the tradition of regarding public officials as private individual wrong-doers. The issues lend themselves to a clearer and different exposition. Mr. Jaworski's authority to sue the President poses two distinct questions: (1) whether his competency to represent the United States against the President is properly confirmed by law, and (2) if so, whether such a law constitutionally can confer such authority.

The first issue is not difficult. A Justice Department regulation,² which assuredly has the force of law as well as solemn political commitment, grants the Special Prosecutor powers and responsibilities that compel recognition of

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1. Bickel, *On Mr. Jaworski's Quarrel With Mr. Nixon*, N.Y. Times, May 23, 1974, at 41, col. 1; Bator, *Disputing Mr. St. Clair on the Jurisdictional Issue*, N.Y. Times, May 30, 1974, at 37, col. 1; Bickel, Letter to the Editor, N.Y. Times, June 3, 1974, at 30.

2. 38 Fed. Reg. 30738 (1973).

his authority to enforce subpoenas against anyone in possession of relevant evidence, including the President. The Special Prosecutor's express powers include "full authority for investigating and prosecuting offenses" related to Watergate, including "allegations involving the President, members of the White House staff or Presidential appointees." It also empowers him "to contest the assertion of Executive Privilege," to review "documentary evidence available from any source" and to apply for subpoenas or other court orders. It is clear from preceding events that the power to contest executive privilege primarily refers to lawsuits against the claimant of the privilege, the President,³ lest we are to believe that the provision merely endorses debates with the President over evidence, and that the powers of investigation and prosecution are virtual nullities without compulsory process to obtain relevant evidence. The authority claimed by Jaworski is thus squarely within his expressly delegated powers.⁴

The real question therefore concerns the constitutional effectiveness of this delegation, and it is this question that we shall address in some detail. That the delegation is from the Attorney General and therefore the Special Prosecutor is, like the Attorney General, a member of the executive branch creates the occasion for this issue, but does not, contrary to Professor Bickel's suggestion, resolve it. Nor does it help to avoid it, as Professor Bator does, by invoking the tradition that the President stands as a private wrong-doer who has invaded the legal rights of the complainant. We turn first to this argument.

I. THE PRIVATE WRONG-DOER FICTION

The private wrong-doer fiction allows a plaintiff to challenge an official's claim of immunity for government action by a threshold showing that were the defendant a private person, his conduct would be a private wrong, an interference with interests protected by common law, say a tort or breach of

3. Conceivably officials other than the President might invoke executive privilege for evidence in their possession. But President Nixon had announced that executive privilege would not be asserted without his personal approval. *Hearings On Executive Privilege: The Withholding of Information by the Executive Before The Senate Subcommittee on Separation of Powers*, 92d Cong., 1st Sess. 36-37 (1971). Moreover, much of the evidence relevant to the Watergate investigation was in the White House and the President had left little doubt that he would exercise control over material that he deemed privileged, thereby rendering himself the only available defendant in a lawsuit to contest executive privilege. By virtue of the first controversy over the tapes, all of this was well known at the time the new regulation concerning Mr. Jaworski was promulgated. *See generally, Hearings on The Special Prosecutor Before The Senate Committee On The Judiciary*, 93rd Cong., 1st Sess., pts. 1 & 2 (1973) [hereinafter cited as *Hearings on The Special Prosecutor*].

4. Then Acting Attorney General Robert Bork testified before the Senate Judiciary Committee that:

Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that he has the power to use judicial process to pursue evidence if disagreements should develop. *Hearings on The Special Prosecutor*, *supra* note 3, at 450 (emphasis added).

contract. Thereupon the burden shifts and the defendant must justify his action by showing that it was authorized by law.⁵ Thus Professor Bator correctly notes that the doctrine has the effect of denying a defendant his official identity and defenses for the purpose of establishing a plaintiff's standing to sue, a convenient fiction where the defendant's attack on the plaintiff's authority to sue is based on his office. But Professor Bator fails to recognize that the President's attack on Mr. Jaworski's authority to sue cannot be answered by reference to a violation of the private law, for the simple reason that Mr. Jaworski himself sues as a public official asserting a claim on behalf of the United States. Suing in his official capacity as prosecutor, he cannot make the threshold showing that the President has invaded his common law rights. Since the President has committed no private wrong, he cannot be stripped of his official character. Someone must claim that an individual has committed a tort before the Court can proceed to regard him as a tortfeasor. Thus the President's claim regarding Mr. Jaworski's lack of authority to sue him, which of course emanates from his position as President, remains intact, and the threshold constitutional issues remain unresolved.

The objections to Mr. Jaworski's authority urged by Professor Bickel arise out of constitutional limitations in either article II, establishing the executive branch, or in article III, limiting the judicial power to cases and controversies. Claims under one or the other are not easily separable, so that, for example, a defect in executive power might render the dispute beyond the case-or-controversy requirement. The focus of the arguments under these articles differ, however, and hence we shall discuss them separately, beginning with the "executive power."

II. ARTICLE II CONSTRAINTS

A. *Intra-Executive Disputes*

The meagre textual provisions of article II enumerate the powers and duties of the executive branch and by way of introduction vest the executive power in a President. This, it may be argued, establishes one officer who "shall take Care that the Laws be faithfully executed" and thus contemplates the executive branch as a single indivisible entity, a unitary family headed up by the President, from whom all executive authority is derived. In this view, Mr. Jaworski, along with the Attorney General and other executive officers, exercise the President's authority. The prosecutor's disagreement with the President over the tapes is a dispute within the President's family, to be resolved there and nowhere else.

5. *E.g.*, *Tennessee Electric Power Co. v. T.V.A.*, 306 U.S. 118, 137-38 (1939); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620-23 (1912). See also Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *YALE L.J.* 425, 432-438 (1974).

Other constitutional provisions, history, and the realities of modern government ought to guide us around this metaphorical trap. Article II itself belies the contemplation of such a neat hierarchy by providing that "the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."⁶ "Inferior officers" include, at the least, all executive personnel save for diplomatic representatives and cabinet members. This provision also confers authority in Congress to limit the removal power to the appointing officer and, in case of non-presidential appointees, to impose restrictions on removal.⁷ Indeed, it was pursuant to legislation (presumably enacted under this constitutional grant of power) that vests the functions of the Justice Department and the issuance of regulations for its governance in the Attorney General, that he, and not the President, established the Office of Special Prosecutor, appointed Mr. Jaworski, and specified his term of office. And the controlling effect of such an arrangement was apparently recognized earlier when the President, instead of directly dismissing Special Prosecutor Cox, sought to find an Attorney General to remove him from office.

Similarly, although article II charges the President with the faithful execution of the laws, it is well accepted that Congress may impose on "presidential" officers powers and duties to make decisions and carry out programs which are not subject to the President's control.⁸ It is also familiar learning that Congress may establish "independent" administrative agencies to carry out major legislative programs without accountability to the President and without presidential control over the terms of office of their heads.⁹ Why are these not part of the "President's family," since, under any interpretation of the term, they exercise considerable executive power? The answer seems to be that the combination of functions and the subject matter they regulate render insulation from presidential control functionally justified. These agencies may be empowered to sue or be sued by "classically executive" departments, hardly corroborating the proposition that it's all in the family.¹⁰ Conversely, even the Department of Justice, the litigating arm of the United

6. U.S. CONST. art. II, § 2. See also, *Ex parte Siebold*, 100 U.S. 371 (1880).

7. It has been assumed that the official with the power to appoint has the power to remove, see *Myers v. United States*, 272 U.S. 52 (1926), but that Congress may restrict removal of non-presidential appointees, see *United States v. Perkins*, 116 U.S. 483 (1886).

8. *E.g.*, *Kendall v. United States*, 37 U.S. (12 Pet.) 522 (1838); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973). See also L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 540-41 (1965). The President may direct his subordinate's performance only within the range allowed by statute. When Congress reduces or eliminates discretion, the power of direction is without force. For a discussion of legislative specificity, see COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, CONCLUDING REPORT 5-9 (1949).

9. *E.g.*, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958). See also L. JAFFE, *supra* note 8, at 21 & 541.

10. *E.g.*, *United States v. ICC*, 396 U.S. 491 (1970); *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953); *United States v. ICC*, 337 U.S. 426 (1949). See also L. JAFFE, *supra* note 8, at 541-42, where Professor Jaffe argues against:

the impression that the *Chapman* case is simply a corollary of the independent-

States, may be required to execute the laws by seeking relief before specialized quasi-executive agencies rather than the regular courts.¹¹

Intra-governmental suits cannot be permissible for "administrative" agencies but not for executive departments, since these bodies cannot be generically distinguished by plausible separation of powers principles. The former "execute" congressional mandates and the latter may engage in rule-making, enforcement and adjudication. Agency heads are presidential appointees and some enjoy no greater legal protection from summary removal than many executive officials. Executive influence over the two types of bodies does not differ significantly. In sum the executive branch comprises a variety of public bodies and officials representing diverse interests. Some intra-executive disputes may be inappropriate for the courts, as when an official or decision is by law subject to the President's discretion. But it is implausible to view article II as a general bar against adjudication of legal disputes among these bodies.

There remains, of course, the question of Mr. Jaworski's particular delegated authority to so litigate. Under article II, its validity seems to depend on the answers to two questions: First, does the authorization by the Attorney General of the power to investigate and prosecute in the name of the United States unlawfully delegate the "executive power"? Second, if this delegation is lawful, does it cease to be so when Mr. Jaworski takes action inconsistent with the President's desires or implicit directives, assuming for this analysis that the President could cause his discharge or the abolition of his office?

B. *Excessive Delegation of Executive Power*

We may allow that by virtue of the exclusivity of the impeachment clause, the Attorney General lacks power to prosecute—to seek a criminal conviction of—the President, and consequently he may not delegate such authority. Perhaps a delegation by an executive official contrary to a statutory prohibition, or in some circumstances one without statutory authorization, or even, distending our imagination, of some awesome and wide-ranging power (even with statutory authorization) unsupportable by a cogent justification might raise significant constitutional issues. But any horrors that we might imagine to test the outer limits of executive delegation under article II are not remotely approximated in the case at hand. And, as a general rule, the executive power as understood by the Framers and reflected in our history is basically com-

agency doctrine, so that were it abandoned the ground of the case would fall completely away. "The public interest," as much as it is the end product of official action, is seen as the process of accommodating the interests pressing for representation. This tends to proliferate centers of authority. . . . The public interest no longer can be limited to one mask worn by the Attorney General. The United States may incestuously sue itself.

11. *E.g.*, *Far East Conference v. United States*, 342 U.S. 570 (1952).

prised of management, administration and enforcement functions—all of which contemplate delegated responsibilities.¹²

The Attorney General has clear statutory authority to investigate and prosecute all officialdom on behalf of the United States,¹³ and to delegate functions to others.¹⁴ While it is not legally relevant, since the Attorney General, not the President, is statutorily authorized to prescribe regulations for the Justice Department, it is worth noting that the regulation establishing and delegating responsibilities to the Special Prosecutor was clearly approved by the President, as reflected in the regulation itself.¹⁵ The authority delegated by the Attorney General to the Special Prosecutor is precisely defined and limited by subject matter and time, and in light of all these circumstances, there is simply no good reason to regard it as an unlawful delegation of executive power. Moreover, here, as in other instances impugning the metaphor of the indivisible executive family, the arrangement is functionally justified: the exercise of the Attorney General's delegation power is uniquely appropriate in a special area where he has reason to believe that he, other high government officials, and the President himself may have interests inconsistent with the fair administration of justice. And nothing in or reasonably inferable from article II suggests that the delegated functions cannot extend to all appropriate and reasonably necessary modes of executing the laws in this special area, thus encompassing the power to enforce subpoenas against executive officials, the President included.

C. *Effect of the President's Disapproval of the Special Prosecutor's Actions*

Mr. Jaworski's authority to sue the President does not become defective under article II because, we may again assume, the President has implicitly or explicitly instructed him to cease and has the lawful power to cause the At-

12. With regard to the notion of "excessive executive delegation" in general, though, we would surely want to avoid replicating the history of article I's "delegation doctrine," not only because of the doctrine's proven unworkability, but also because however cogent its rationale for legislative power, for the above reasons it is quite inapplicable to executive power.

13. See 28 U.S.C. §§ 509, 515(a), 535 (1970). The recent prosecution of former Vice President Agnew rather pointedly illustrates the reach of these powers.

14. 28 U.S.C. §§ 510, 515(a) (1970); 5 U.S.C. § 301 (1970).

15. *Hearings on The Nomination of William B. Saxbe To Be Attorney General Before The Senate Committee on the Judiciary*, 93rd Cong., 1st Sess., 24-25, 30-35, 44, 84-86 (1973).

The regulation provides in pertinent part:

In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect a discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and the Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.

38 Fed. Reg. 30738. See also the testimony of then Acting Attorney General Robert Bork, *Hearings on The Special Prosecutor*, *supra* note 3, at 450, 492-93.

torney General to discharge him or abolish his office. These alleged powers of discharge and abolition are not relevant. The President's potential conflict of interest is one of the justifications for the delegation, not a source of its invalidity. Had he chosen, or should he later choose, to exercise these powers, it would be clear to all that he had changed his mind again, that he no longer agreed that the Special Prosecutor could contest executive privilege. In challenging the constitutional authority of Mr. Jaworski to enforce subpoenas against him, however, the President has chosen *not* to exercise these powers of revocation. Instead, under the claim asserted, the President would presumably have to concede the apparent grant of authority but would say that such a grant is unlawful under the Constitution. That is a considerably different legal as well as political proposition from rescinding Mr. Jaworski's authority.

If Mr. Jaworski's authority becomes defective under article II because the President does not wish to be sued and has the unexercised power to work his will, it would follow that presidential firing and revisory powers render *any* executive official's action beyond the scope of the official's constitutional authority whenever the President disagrees with such action. This would be patently absurd, since it would transform the President's unexecuted wishes into law. Imagine, for example, a private lawsuit turning on a regulation duly issued by the Secretary of the Interior, who was authorized by statute to issue such a regulation. The defendant claims that the regulation is unconstitutional under article II because the President has made a public statement deploring it and threatening to fire the Secretary, who refuses to rescind it. The validity of this defense obviously turns on the question whether the "law" governing the case is the duly promulgated and unrescinded regulation or the President's public statement, and the answer is obvious.¹⁶ Similarly a presidential directive to the Attorney General to drop proceedings against a particular defendant (like ITT) would not, should the Attorney General take a different view of his responsibility, count as a legal defense to the charge.

Perhaps both of these decisions are, and should be, within the President's political authority, which can be asserted by his reserve power to remove cabinet members and at times to issue executive orders. As far as article II is concerned, however, presidential wishes and unexercised powers simply cannot impair the legality of executive action of which he disapproves. The customary norms of executive department cooperation and coordination, coupled with the President's executive regulations and firing powers, obviously enable him to keep his "family" in order without more in the ordinary operations of the executive branch. Mr. Jaworski's suit does not arise out of the ordinary functioning of the executive, but this is no reason to read article II as con-

16. L. JAFFE, *supra* note 8, at 364. Cf. *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (The Attorney General could not direct the Board of Immigration Appeals how to decide a particular matter, although the regulations under which the Board operated were promulgated by him and its members served at his pleasure.)

ferring on the President the most extraordinary of powers, transforming his ultimate reserve authority into law. Mr. Jaworski has not been fired, nor has his authority been lawfully rescinded. That is all there is to it.

To this point we have assumed the President's lawful power to cause Mr. Jaworski's firing or the abolition of his office. The terms and character of the delegation make clear, however, that the Special Prosecutor was *not* intended to be just another attorney in the Justice Department; his office is an institution with substantial operating independence from Justice and the Presidency, and his tenure is purportedly granted special protections. If the President should attempt to have Mr. Jaworski fired or the regulation rescinded, and if someone should then claim that either of these actions was beyond his powers, a more difficult article II claim might arise.¹⁷ But that is not this case.

III. ARTICLE III CONSTRAINTS

We have explored the extent to which article II is a barrier to the judicial resolution of intra-executive lawsuits. Where, as here, a delegation authorizes lawsuits, litigation pursuant to such authority, like all other litigation, must also satisfy the complex of doctrines which define the subject matter of proper judicial business, summed up in the article III provision restricting judicial power to "cases or controversies." Several of these doctrines have been suggested as a bar to Mr. Jaworski's suit, but the nature of the defect is elusive.

A. *Standing*

Professor Bickel has suggested a lack of "standing," the shorthand term generally used to denote the requirement that there be something at stake between the parties to a lawsuit, that they have an interest in the outcome of the proceeding. There is obviously no lack of adverse interest or concreteness in this litigation. Simply put, Mr. Jaworski wants the subpoena for the tapes enforced, Mr. Nixon wants a presidential privilege and his tapes, and the Court's judgment determines who gets what. That is a textbook instance of constitutional standing.

B. *Finality*

More recently Professor Bickel has suggested that the "finality" element of case or controversy is not satisfied because the President's legal authority to fire Mr. Jaworski or revoke the promises made to him affords the President the ultimate power of decision. The opinion of the Court would be advisory. As with many elements of case or controversy, the rationale behind the finality requirement is not entirely clear.¹⁸ It may be seen to relate to the insulation

17. See *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957). See also note 14 *supra*.

18. Professor Bickel has himself acknowledged elsewhere that the finality requirement

and independence of article III courts, in a way analogous to the Constitution's guarantees of life tenure and an irreducible salary. Subjecting court rulings on particular issues to review by the executive or Congress would expose the judiciary to another form of pressure or influence, arguably no less offensive because indirect.¹⁹ The requirement also serves to maintain courts as the forum of last resort for the resolution of disputes, thus efficiently allocating judicial resources and impressing upon the judiciary the responsibility of final decision. Since non-final decisions may be disregarded or nullified by a revisory authority, the requirement may also be seen as resting on some of the policies that are thought to make advisory opinions objectionable.²⁰ But there is no need for elaboration here. None of these considerations are implicated by the lawsuit over the tapes.

1. *The Finality Cases*. Finality objections have been rare and at times have been improper substitutes for other jurisdictional doctrines, such as political question.²¹ Given the generality and elusiveness of the underlying rationale, we would expect to find that the cases are replete with ambiguity, fine distinctions and apparent inconsistency. But some themes can be discerned. The clearest and most effective finality objection historically occurred when a court was asked to decide a case in which judgment or decision would be without the force of law *unless or until* a non-judicial official approved.²² Where such executive or legislative review was or might have been necessary in order to implement a judicial resolution, the courts seemed to regard the judicial exercise as "advisory," that is, as amounting simply to a recommendation to some other official not only with final authority but final responsibility to act. A decision would also likely be regarded as non-final when the revisory authority extends to the very issues to be determined by the court, or to matters inextricably intertwined with these issues. Historical examples include situations where judicial judgments awarding war damages were to be credited by an executive official if "just and equitable"²³ and where judicial pension awards were to be

"is a matter of degree," "the least . . . important or maintained element of case or controversy." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 117 (1962).

19. See *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *D. CURRIE, FEDERAL COURTS* 6-7 (1968).

20. A. BICKEL, *supra* note 18, at 117.

21. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), see text accompanying note 25 *infra*, seems a rather clear example. See L. JAFFE, *supra* note 8, at 102.

22. This appears to be the rationale of early cases denying judicial participation in the adjudication of damage claims against the United States. *E.g.*, *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864) (Mr. Justice Taney's statement on announcing the opinion is set out in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 97 (2d ed. 1973), and his full draft opinion at 99); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852). See also *District of Columbia v. Eslin*, 183 U.S. 62 (1901). These cases appear to have been restricted by more recent decisions. See *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); *United States v. Jones*, 119 U.S. 477 (1886). It also seems to be the basis of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), discussed briefly in note 24 *infra*.

23. *United States v. Ferreira*, 54 U.S. (13 How.) 40, 45 (1852).

disregarded if based on a "mistake."²⁴ More recently the Court suggested finality as a barrier to review of Civil Aeronautics Board recommendations of awards of foreign air routes, since such awards are subject to a final unreviewable approval by the President on foreign policy grounds.²⁵ But judicial enforcement of Mr. Jaworski's subpoena obviously does not fail as non-final under these precedents.

2. *Permissibility of Nullifiable Final Judgments.* Should Mr. Jaworski win in the Court, the President could, arguably at least, lawfully nullify that victory by causing the firing of Mr. Jaworski, or abolition of his office. But the constitutional doctrine of "finality" does not require that the party prevailing on a claim ultimately obtain that which he seeks in the lawsuit. Legions of cases establish that the party who prevails may in the end *and for lawful reasons* not receive the fruits of success. The victory may be nullified by subsequent judicial, legislative or executive action. Thus the courts exercise jurisdiction over naturalization proceedings although the decree awarding citizenship may be cancelled in a subsequent denaturalization proceeding brought by the Government, even where the grounds for denaturalization were known to the Government and argued unsuccessfully in the earlier naturalization proceeding.²⁶ To the same effect, courts may review a Patent Office denial of a patent and order its issuance, though the validity of the patent later may be impeached in a private infringement suit.²⁷

The rule is not different because the event altering or nullifying the effect of a judgment is within the discretion of a non-judicial branch of government. The Court has reviewed the Attorney General's statutory authority to suspend deportation despite the objection that, since the effectiveness of an order suspending deportation for more than six months is conditioned on approval by Congress, such orders are only recommendations to Congress.²⁸ Substantial exercises of congressional control over judicial judgments have neither been held to be invalid as an undue interference with judicial power nor to deprive the courts of jurisdiction. That Congress has to enact a special act of appropriation for any judgment against the United States for over \$100,000 did not prevent acceptance of the Court of Claims as an article III court. Mr. Justice Harlan found that disputes resolved there were not beyond the judicial power,

24. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The relevant sections of the Act there involved are set out in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 22, at 86. Section 4 authorized the Secretary of War to deny pensions to judicially approved applicants if he suspected "imposition or mistake."

25. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

26. *See, e.g., Tutun v. United States*, 270 U.S. 568 (1926); *United States v. Ness*, 245 U.S. 319 (1917). *But cf. Chaunt v. United States*, 364 U.S. 350 (1960).

27. *Brenner v. Manson*, 383 U.S. 519 (1966); *Hoover Co. v. Coe*, 325 U.S. 79 (1945). The Court had earlier ruled that such suits could not be heard in its appellate jurisdiction, *see Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 698-70 (1927).

28. *E.g., McGrath v. Kristensen*, 340 U.S. 162 (1950).

even though "Art. I, § 9, cl. 7, vests exclusive responsibility for appropriations in Congress," thus making judicial enforcement dependent on congressional authority.²⁹ The Court has also afforded acts of Congress the effect of reopening and modifying judicial judgments.³⁰ And court rulings have upheld private bills favoring individual litigants by nullifying final judgments that ruled in favor of a public right, such as judgments against taxpayers in favor of the Treasury,³¹ or requiring the removal of obstacles to navigation.³² Acts of Congress impugning specific decisions of the Court of Claims have also been given effect.³³

There are analogous instances within the executive branch. A party challenging an administrative or executive determination in a federal court may establish that the agency illegally deprived him of a benefit, yet face a remand so that the agency can determine whether there are other, lawful, grounds on which to deprive him of the same benefit. For instance, the almost unlimited and unreviewable discretion of the Attorney General to subsequently deny suspension of deportation does not preclude judicial review of whether the challenged denial rests on an erroneous legal foundation.³⁴ The Court might have held that since the Attorney General could, after judicial intervention, come to any conclusion he chose, judicial action was merely advisory. But, as Professor Jaffe points out, judicial review of legal questions relevant to the exercise of highly discretionary power is well accepted.³⁵

Nor do the President's own general powers over executive officials affect finality. Let us assume that the hypothetical private lawsuit in which the legal issue turned on a dispute between the Secretary of the Interior and the President involved only a claim for prospective injunctive relief. The "reserve" powers of the President to work his will (most readily by firing the Secretary) would, rather clearly, not place the suit outside federal jurisdiction as "non-final," any more than the circumstance that the Secretary himself might later change his mind and the regulations. Similarly, the President's unexercised reserve authority can have no greater or different effect on finality solely because he appears as the litigant in a lawsuit.³⁶ Finality simply requires that

29. *Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962).

30. *See, e.g.*, 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199, *modified*, 331 U.S. 795 (1947), *on remand*, 79 F. Supp. 413 (S.D.N.Y. 1948); *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947); *Pope v. United States*, 323 U.S. 1 (1944).

31. *E.g.*, *Commissioner v. Church*, 335 U.S. 632 (1949).

32. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). *Cf. Bonnar v. United States* 438 F.2d 540 (Ct. Cl. 1971).

33. *E.g.*, *Pocono Pines Assembly Hotels Co. v. United States*, 73 Ct. Cl. 447, *pet. for writ of mandamus or prohibition denied*, 285 U.S. 526 (1932); *District of Columbia v. Eslin*, 183 U.S. 62 (1901). *But cf. United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

34. *E.g.*, *Foti v. INS*, 375 U.S. 217 (1963); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), 349 U.S. 280 (1955); *Wong Wing Hang v. INS*, 360 F.2d 715 (2d Cir. 1966).

35. L. JAFFE, *supra* note 8, at 103.

36. Finality decisions do not treat party status as relevant; in some cases lacking finality, revisory power was not lodged in a party and in others satisfying the require-

the *particular* legal controversy to be decided in court not be susceptible of lawful revision or review in another agency of government. The Supreme Court's resolution of the controversy over executive privilege is plainly not subject to review or revision by the President, even on the assumption that its judgment might be nullified by subsequent presidential action.

3. *Problems Raised by Attaching Legal Significance to the President's Power to Nullify.* There are multiple difficulties in attaching legal significance to the President's power to have Mr. Jaworski fired or the regulation rescinded. The effect of subsequent presidential action on the lawsuit over the tapes cannot be ascertained without an assessment of variables, factual and legal, that are both complex and speculative. A firing of Mr. Jaworski or change in the regulation is manifestly contingent on a variety of future acts, on the part of both the President and the then Attorney General, that are not overwhelmingly probable. These events also have potential legal effects which, though hardly determinable in the abstract, are considerably less predictable than Professor Bickel seems to assume. *Service v. Dulles*,³⁷ for example, casts considerable doubt on the legality of an attempted discharge in violation of the regulation, and an attempted rescission of the regulation as well, at least if done by the President acting alone. The revised regulation purports to present considerable legal barriers to dismissal, and contains its own expiration date requiring the Special Prosecutor's concurrence.³⁸ And existing case law does, after all, declare the dismissal of Special Prosecutor Cox unlawful.³⁹

Further, a removal of Mr. Jaworski or rescission of the regulation under the President's sponsorship would not necessarily defeat the enforceability of the subpoena (should, for example, a new special or regular Justice Department prosecutor refuse to desist). Nor is it clear that the courts are without power to enforce valid subpoenas, despite these presidential actions, unless the pending prosecutions to which the subpoenas relate are dismissed.⁴⁰ And

ment a power to affect the ultimate result was within a litigant's authority. Given the policies behind the finality requirement, the authority in another official truly to revise the Court's decision should defeat jurisdiction whether or not that official is a party, while the different power to nullify the effect of a decision ought to be irrelevant no matter where lodged.

37. 354 U.S. 363 (1957). See also *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

38. The Special Prosecutor will carry out these responsibilities with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

38 Fed. Reg. 30738 (1973). See also note 15 *supra*.

39. *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

40. The likelihood of a dismissal (by the government or court) obviously depends in part on whether non-compliance with the subpoena can be credibly thought to frustrate the defendants' rights to exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). Quite apart from this, however, the trial judge may well have power to himself subpoena the tapes (putting aside the executive privilege issue). Rule 614(a) of the Federal Rules of Evidence empowers Federal District Judges to call witnesses on their own motion, acknowledging the many cases holding this option within their discretion. See cases cited in *Estrella-Ortega v. United States*, 423 F.2d 509, 510-11 (9th Cir. 1970), and *Annot.*, 67 A.L.R.2d 538 (1959). There would seem no compelling reason to distin-

finally, of course, the congressional response to this supposed presidential course is not foreseeable, any more than the legal effect of a variety of measures that might be enacted to "ratify" the Office of Special Prosecutor, or perpetuate the effect of his actions to date. In light of all these contingencies, the likelihood of presidential action would seem to impeach the finality of a court order enforcing the subpoena about as much as the possibility that Mr. Jaworski will change his own mind or resign.

The Court, were it to adopt Professor Bickel's broad notion of finality, would have to resolve the legality of these possible executive, judicial and congressional responses before it could properly determine their effect on its judgment in the case; it could not avoid such decision on the ground that the issues presented are not reviewable. At best such a claim raises further preliminary questions. The reviewability of one such issue, which has the principal place in the finality argument, the President's authority to fire Mr. Jaworski, is rather clearly established. There are simply too many cases in which the Court has reviewed the lawfulness of removals of government personnel, including dismissals by the President, to entertain the argument that Mr. Jaworski's job tenure is within the President's unreviewable prerogatives.⁴¹

Professor Bickel's view of finality would preclude the Court from deciding important and no doubt difficult substantive issues presented by the case, like the scope of executive privilege. But his view of jurisdiction would also require the Court, in these politically charged days, to reach out and resolve a variety of novel and difficult issues connected with events that have not yet occurred and may never. The Court, for sound reasons, would normally avoid adjudication until these issues were "ripe" and decision unavoidable. For instance, the questions raised by the possibility of the district court maintaining the subpoenas after Mr. Jaworski has been replaced are plainly hypothetical ones which should not be decided in the abstract. The traditional approach would require, for example, a case in which Mr. Jaworski was fired, the district court continued the subpoena in force, and the President appealed that court's contempt citation. This was almost the situation when Judge Sirica let his order stand after the firing of Mr. Cox. The President, instead of challenging the order on appeal, chose to comply. The courts were never required to decide the issue, because, for good political reasons, the incipient controversy did not

guish between subpoenaing witnesses and objects, since the court's discretion in both instances is based on the rather elementary notion that "Federal Judges are not referees at prize-fights but functionaries of Justice." *Johnson v. United States*, 333 U.S. 46, 54 (1948) (Mr. Justice Frankfurter, dissenting). We assume, of course, that the government could block this option by dropping the prosecution, though some have wondered whether this form of discretion is itself absolute. *E.g.*, Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 *YALE L.J.* 1297 (1965).

41. See *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926). See also cases cited in note 37 *supra* and *Peters v. Hobby*, 349 U.S. 331 (1955); *United States v. Perkins*, 116 U.S. 483 (1886).

become concrete. And this illustrates one of the reasons for the tradition against premature decisions—issues presented in the abstract are often misperceived because of the political context in which they are presented, and may well be decided differently from the way they would in concrete cases. The effect of Professor Bickel's suggested expansion of standards for finality would be to frustrate those traditional rules of restraint which serve the principal objective of case or controversy requirements: the adjudication of live issues between adverse parties in a concrete context.

Finally, let us put the most extreme possibility, by assuming that the President in his argument in the pending case declares his intent to fire Mr. Jaworski or abolish his office, that the Court rules that he would have lawful authority to do so, but also rules for the Special Prosecutor on the executive privilege issue. The Court's order might then read that, "the President is to comply with the subpoena unless within thirty days he discharges Mr. Jaworski or rescinds the regulation establishing his office." While the propriety of this order may be questionable, it surely would not lack finality. No existing authority could revise the judgment, and judicial orders in the alternative are by no means unknown.⁴² The order following a successful habeas corpus application, for example, will typically order the prisoner released *unless* the prosecutor determines to re prosecute, a matter within his, and not judicial discretion. Similarly, a ruling that a student was denied admission or expelled from a public university for a constitutionally invalid reason might be enforced by an order requiring the student's admission or reinstatement *unless* he or she were excludable for some valid reason, like academic qualification.⁴³ In sum, finality is not really an issue in Mr. Jaworski's suit.

IV. PRESIDENTIAL IMMUNITY AND EXECUTIVE PRIVILEGE

Quite possibly, the President will argue that he is both immune from suit and the exclusive judge of executive privilege, and he may characterize these issues as "jurisdictional." The immunity claim is that a President is totally beyond the reach of judicial process, regardless of the identity of the plaintiff or nature of the suit. And the broad assertion of privilege is that the Constitution delegates to the President unreviewable authority to withhold evidence from the courts. These broad claims are obviously both central to the merits of this lawsuit and raise different issues from those we have discussed. The distinction may be blurred, however, because a privilege or immunity adjudication has the effect of defining the limits, and at the extreme entirely ousting, judicial power, thus making the issues appear to be "jurisdictional." But such a view of these issues is not clarifying; their resolution is neither preliminary

42. *E.g.*, *Burton v. State Farm Mutual Automobile Insurance Co.*, 335 F.2d 317, 320, 324-25 (5th Cir. 1964). *See generally* C. WRIGHT AND A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* 2651 (1973).

43. *E.g.*, *Papish v. University of Missouri Curators*, 410 U.S. 667, 671 (1973).

nor related to the factors establishing Mr. Jaworski's authority to sue, or to finality.

Rulings sustaining a broad immunity or privilege would not be based upon defects in standing, finality or Mr. Jaworski's delegation, but rather on distinct inferences from the President's constitutional role and the separation of powers. Ultimately such a determination would entail a textual and structural interpretation of the Constitution, involving considerations quite different from those underlying the issues we have discussed. Further, executive privilege and immunity are not rulings that would avoid the important substantive issues in the case. They *are* the broad constitutional questions presented, the very substance of the case. However the Court might decide them, it would have adjudicated on the merits actual issues necessarily presented by the case and not dealt with the shadows of justiciability.

CONCLUSION

No doubt *United States v. Nixon* is a novel case and perhaps even a great one. But it need not satisfy the old saw of making bad law, either in respect to settled notions of proper judicial business or the less settled ones, such as immunity and executive privilege. And legalisms aside, our resolution of the questions respecting Mr. Jaworski's authority to maintain this suit comports with common sense, political expectations and a preferable distribution of power within the federal government.

Following the dismissal of Special Prosecutor Cox, Congress explored and considered exercising its legislative powers to create an Office of Special Prosecutor, with independence from the President and authority to sue any executive official, including the President. Had it ignored the President's commitments and proceeded in this manner, different constitutional questions would arise concerning legislative competency to create and insulate a department of government which arguably might be thought "inherently executive." Based on Congress' broad power to establish quasi-executive agencies and its express constitutional authority to vest the appointing power in the courts, such legislation in all likelihood would have been sustained. But one need not be Burkian to recognize that this would be a novel and greater exercise of power, with more substantial implications for the separation of powers than the executive delegation ultimately agreed upon. The precedent would have been more far-reaching and perhaps troublesome in its implications. Congress refrained in reliance on the President's endorsement of the independence of the Special Prosecutor and of his authority to obtain evidence. We know of no persuasive reason to resolve the issue of his authority negatively. To the contrary, respecting the terms of the delegation and the commitment to Congress allows a sensible flexibility in our institutions of government: the executive's own discharge of executive responsibility, without the comparatively greater

costs and ramifications of a direct congressional mandate establishing the prosecutor's office.

Finally, although political expectations and the understanding of the American people cannot determine the issues in this lawsuit, the Court should certainly avoid artificial rationales which flout our collective sense of justice. Had the President chosen (or should he later choose) to exploit one of the weaknesses of the compromise by attempting to rescind the regulation or fire Mr. Jaworski, he would have indeed incurred the sanction of public opinion and ultimately increased the risk of impeachment, as the Congress, the people and the President well understand. Everyone also appreciates this would have been a very different course from the jurisdictional challenge. It is this distinction that the Court must maintain. To uphold this attack in reliance on the President's hypothetical and unexercised power to fire Mr. Jaworski would be to obscure the difference between a constitutional defense and a repudiation of unequivocal commitments. That would be to relieve the President of the responsibility for exercising his own powers, and to do so for no good reason.