

Hope for Getting White House Tapes Shifts From the Senate Panel to Cox

8/2/73
NYT

By WARREN WEAVER Jr.
Special to The New York Times

WASHINGTON, Aug. 1 — Hope for wresting the White House tapes from President Nixon shifted today from efforts by the Senate Watergate committee to the court action started by the special prosecutor, Archibald Cox.

Attorneys for the committee, headed by Senator Sam J. Ervin Jr., expressed increasing doubt that the courts would take jurisdiction of a challenge brought against the President by a unit of the legislative branch.

"We are in pretty bad shape," one committee lawyer said. "None of us has very much confidence that we can get the courts to accept jurisdiction."

Mr. Cox, on the other hand, has a court action under way, with the President's lawyers under order to make their defense public next Tuesday, and appeared today to enjoy at least three major legal advantages over any kind of lawsuit available to the Senate committee.

¶The special prosecutor does not have to meet the argument that the legislative branch has no right to executive branch documents or the related contention that the Senate committee does not really need the tapes to draft bills that attempt to avert repetition of the Watergate offenses.

¶Conversely, Mr. Cox can buttress his demand for the White House records with the continuing requirements of a criminal investigation by a grand jury, a cause that the courts have regularly seen fit to honor.

¶The Cox court action based on a simpler and more direct legal question than those raised by the Ervin committee, can almost certainly proceed through the courts more swiftly, probably reaching the Supreme Court before the Justices are scheduled to reconvene on Oct. 1 and thus necessitating a special term.

Suit Won't Be Limited

Senate sources reported that the committee's lawsuit against the President would not be filed until Friday or Monday and would not be limited to the request for a declaratory judgment, or advisory opinion, that Senator Ervin had originally proposed.

Instead, the Watergate committee's complaint will list a number of alternative legal approaches under which the Senators may be able to challenge the President, giving the court a number of theories from which to choose.

So concerned had committee lawyers become over the apparent legal instability of their position that Samuel Dash, the chief counsel, telephoned Mr. Cox last week and asked if Senator Ervin and his colleagues could join in the prosecutor's case. Mr. Cox said no.

Experts Give Advice

Generally, the Cox staff and the Ervin staff have cooperated to the extent of providing each other with factual information on the various Watergate episodes, but little attempt has been made to integrate their legal operations or combine forces in their common pursuit of the White House tapes.

Senator Ervin has been concerned for some time about the legal problems involved in the committee's persuading the courts to hear its complaint against Mr. Nixon. He said on television last Sunday that it was "quite possible" the Supreme Court would refuse to take jurisdiction of a suit by the committee.

Prof. Alexander M. Bickel of the Yale Law School reportedly advised the committee last week that no suit based on the President's refusal to honor the committee's subpoena could

be initiated without Congressional approval of a new statute specifically giving the Federal District Court here enforcement powers.

Almost no one believed, however, that it would be politically possible to maneuver such a bill through a tired and nervous Congress, scheduled to recess for a month at the end of this week, or to win the necessary approval of President Nixon.

One of the committee's other outside legal experts, Prof. Philip B. Kurland of the University of Chicago, did not share Mr. Bickel's concern that the jurisdictional problem would be fatal to a Senate suit.

Another relative strength of the prosecutor's legal case is the prevailing assumption that the courts could not refuse to rule on the ground that a political question was involved, a move that could be much more likely if the suit pitted Congress and the President against each other.

"The Supreme Court can't duck ruling on the validity of a grand jury subpoena requiring the President to produce evidence for its investigation," one lawyer said. "The Court can duck a difference of opinion between Congress and the President over their respective rights."

Some authorities believe that Chief Judge John J. Sirica will be able to reach a decision within three weeks on Mr. Cox's request for an order to compel Mr. Nixon to produce the tapes and other documents.

It is regarded as doubtful, however, whether the special legal procedures for bypassing the United States Court of Appeals on the way to the Supreme Court will be invoked. Lawyers eager for a definitive decision in the Supreme Court, the only kind President Nixon will reportedly honor, do not want to risk an adverse ruling based on failure to observe customary appeals processes.