

Senate Panel Sues President To Get Tapes

8/10/73 By Susanna McBee
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The Senate Watergate committee, arguing that President Nixon acted illegally in refusing to release tapes and documents, asked the U.S. District Court here yesterday to compel him to do so.

The committee's action marked the first time in the 184-year history of the republic that a unit of Congress has filed suit against a President of the United States. It sued him both as chief executive and as an individual.

In its complaint the seven-member select committee called Mr. Nixon's refusal to comply with two subpoenas it issued July 23 "unlawful, unwarranted, and in breach of his legal duty to respond to and to comply with such subpoenas."

It also said that "the defendant President's" refusal to turn over the items sought "cannot be excused or justified by resort to any presidential power, prerogative or privilege."

In letters to the committee July 6 and 23 Mr. Nixon cited the doctrines of executive privilege and separation of powers of the three branches of government as his reasons for declining to disclose the tapes.

Again, on July 25 he wrote committee Chairman Sam J. Ervin (D-N.C.) that he would not turn over the tapes and would consider only "specific requests" for documents.

The committee is seeking five tapes of Mr. Nixon's conversations between Sept. 15, 1972, and March 21, 1973, with his former former counsel, John W. Dean III, and documents dealing with 25 aides and former aides. Senator Ervin complained that the President was putting "a manifest impossibility" on the committee regarding the documents, since it had never seen them and thus could not make specific requests.

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The committee also filed a motion to speed up the judicial process by asking the District Court to require the White House to answer its complaint in 20 days rather than usual 60 days a federal agency is allowed.

A private citizen must reply in 20 days, and part of the reason the committee sued Mr. Nixon as an individual may be to put him in that category.

It was learned that a presidential consultant on the case, University of Texas Law Professor Charles Alan Wright, had told a committee lawyer, James Hamilton, that Mr. Nixon has 60 days to reply.

Ironically, in its motion for a quick response the committee cited a Wright treatise on federal procedure written in 1968 which says that "although the federal rules do not expressly give the court power to shorten the period, it probably has inherent power to do so in the face of special circumstances."

Asked why the committee would cite an opposition lawyer, one source said, "He's a great scholar."

Under normal procedure the White House would file an answer to the speed-up motion by next Thursday. The judge who takes the case — presumably Chief Judge John J. Sirica — could wait for a White House response and then set a hearing on the speed-up issue, or he could decide it without a response or a hearing, some experts on procedure said.

The committee's motion argued that "the parameters of the Watergate affair must be promptly determined so that the uncertainty and divisiveness that is abroad in the nation can be ended."

It said the usual 60-day rule is followed to allow all concerned government officials to be informed on the filing of a suit.

But that rule should not

apply in this case, the motion said, because "the President and his counsel have been aware that this litigation was imminent since July 26" when the committee voted publicly to bring suit.

"Surely, the Presidents counsel are well advanced in their preparation for this case and can, without undue difficulty, answer or respond to the present complaint within 20 days, the motion argued.

The committee's suit was the second extraordinary court action brought to compel the President to produce tapes and documents in the Watergate case.

The first was a motion filed July 26 by Special Prosecutor Archibald Cox for Mr. Nixon to produce nine tapes and certain documents relating to conversations between him and some of his closest advisers, including Dean, from June 20, 1972, to April 15 of this year.

Both Cox and the committee contend that the material is essential to their investigations of the Watergate scandal and its subsequent cover-up.

Judge Sirica directed Mr. Nixon to show cause why he **should not** produce the items sought by Cox. White House lawyers replied on Tuesday that a court order to disclose them would severely damage the presidency and that courts do not have the power to compel the President to produce them if he decides it would not be in the public interest to do so.

"The threat of potential disclosure of any and all conversations would make it virtually impossible for President Nixon or his successors in that great office to function," the White House brief contended.

"Beyond that, a holding that the President is personally subject to the orders of a court would effectively destroy the status of the executive branch as an equal and coordinate element of

government," it added.

Cox is to reply Monday, and the White House is to respond to that answer next Friday. A hearing is set for Aug. 22.

The White House had no comment yesterday on the committee's suit.

The complaint argued that if executive privilege exists, "such a doctrine does not extend to the protection of materials relating to alleged criminal acts and thus cannot justify the refusal of the defendant President to respond to or comply with the two subpoenas."

It also contended that if a right of presidential confidentiality exists, it "has been breached and the alleged power, prerogative or privilege has been waived in regard to certain, if not all, of the materials sought" because the "defendant President has himself partially revealed the contents of these materials and has permitted his agents and subordinates, both present and past, to reveal portions or versions of these materials."

The waiver resulted from Mr. Nixon's statement May 22 that he would not invoke the privilege for testimony

dealing with discussions of possible criminal conduct; from his allowing John Dean to summarize certain meetings and phone conversations he had with the President; and from his turning over certain tapes to H. R. (Bob) Haldeman, former White House chief of staff, when he was a private citizen.

Attached to the complaint was an affidavit filed by the committee's minority counsel, Fred D. Thompson, recalling an early June phone call he received from White House special counsel J. Fred Buzhardt, who reconstructed the Nixon-Dean conversations for Thompson.

That action meant that the President, "acting through his special counsel, has revealed alleged facts demonstrating that the subject matter of these conversations is within the select committee's jurisdiction," the complaint said.

The suit asks the court for a declaratory judgment stating that the President has

no right to refuse to comply with the subpoenas and that he has waived any claim to privilege or separation of powers.

It also asks the court to issue a writ of mandamus to compel him to perform his official duty to release the materials "and/or a mandatory injunction if it be determined that he is withholding the subpoenaed materials in his personal capacity." The mandatory injunction would also compel production of the items sought.

The committee's most difficult task apparently will be to convince the court that it has jurisdiction to hear the case.

The White House might argue that federal district courts get their jurisdiction to hear different types of cases through specific statutes and that Congress has passed only one law giving its committees the right to initiate court action—an 1857 statute making contempt of Congress a crime.

But the committee's complaint argued that the court has jurisdiction through several sections of the U.S. Code giving it the right to hear cases arising under the "Constitution, laws, or treaties of the United States," and cases dealing with mandamus actions and "controversies to which the United States (is) a party."

Another law conferring jurisdiction is the Administrative Procedure Act, the complaint argues. However, that act seems to refer only to action by a government agency, and there might be a question of whether the President is an agency. One expert, Law Professor Kenneth C. Davis of the University of Chicago, states that he is.

Finally, the complaint says the court has jurisdiction by virtue of three other sections of the U.S. Code giving it authority to issue writs and declaratory judgments.

The suit was filed by Chief Counsel Samuel Dash, Minority Counsel Fred Thompson, Assistant Chief Counsel Jim Hamilton and constitutional law experts Eugene Gressman, Sherman Cohn, Arthur S. Miller and Jerome Barron.