

REVIEW & OUTLOOK

Impeachment and the Courts

We do not see how Congress can vote on the substance of a case for impeachment unless it first encourages the courts to handle questions of evidence and executive privilege, which otherwise will be intractable procedural snarls. While the House Judiciary Committee has so far refused to seek adjudication, we hope and trust the matter is not yet closed.

As one straw in the wind, we note that Senate Majority Leader Mansfield has asked the Supreme Court to forego its usual summer recess, holding itself ready to decide questions affecting Watergate. In allowing Special Prosecutor Leon Jaworski to skip the usual appellate level and scheduling a July hearing on his subpoena of Oval Office tapes, the Court not only took the majority leader's advice but expressed its own willingness to involve itself in Watergate proceedings.

We are at a bit of a loss to understand the Rodino committee's adamant opposition to invoking the court. But we have been increasingly impressed by its general handling of the impeachment probe, and we would be far from surprised if it yet decided to go to court in the face of presidential refusals to yield more evidence. Surely the committee can understand that the nation deserves a vote on the substance of alleged presidential wrongdoings, not on the prerogatives of Congress versus the prerogatives of the Executive.

The committee's refusal to go to court would be easier to understand if it had been less careful generally, for the quickest explanation is that it feels it needs the procedural issue to make a case against the President. The House could find no grounds on which to impeach Andrew Johnson, for example, until it forced him into an impasse on prerogatives. Similarly, we now learn, when Tammany Hall Democrats impeached and removed a threatening New York governor, the grounds were campaign fund violations and refusing to cooperate with the impeachment panel.

As we have said before, we think the committee's demand for further evidence is entirely justified by the ambiguity of the transcripts so far released; we think the President ought to accede or at least ask the courts to rule and accept the outcome. But it is also true that by demanding more and more the committee can keep the procedural issue alive forever, regardless of any issue of substance. It can unilaterally create its own grounds for impeachment.

If the committee allowed the courts to arbitrate, procedural is-

ues would be grounds for impeachment only if the President decided to defy both branches. In that case they would be good grounds indeed. But by allowing the courts to impose limits on its demands, the committee would lose the one option through which it can assure itself of grounds for impeachment. No doubt a fear that the substantive case alone will not be enough is the reason some partisans paint the whole idea of adjudicating as something of a Nixon plot, but the committee itself ought to be above that kind of thinking.

There are of course more solid fears about involving the court, as the discussion nearby shows. To rule on evidence, the courts would have to decide in their own minds what constitutes an impeachable offense. But surely the argument that they cannot do this without asserting the power to overrule Congress' eventual decision strains at gnats and swallows elephants.

We also doubt that the Congress really wants to argue that the courts have no place because impeachment is a purely political matter anyway. It is of course true that public opinion will eventually be decisive, but the public is too sensible to see the impeachment issue as one of prerogatives of the branches of government. We should think that all branches should try to meet the real issue, which is whether or not the President is guilty of wrongdoing.

Obviously a great many people have already made up their minds, both pro and con, on the President's guilt. But there are also those of us who find the current evidence quite ambiguous and are interested in trying to establish the truth about so serious a matter. The truth will not be established by impeaching the President for refusing subpoenas or citing him for contempt of Congress. Going to the courts is the best route for forcing out the relevant evidence; Congress' function is to then render its judgment on where the truth lies.

In accepting the Jaworski appeal, the Supreme Court has moved some way towards accepting its part of those tasks, though the issues in that case will still be far from those that would arise in the full context of an impeachment probe. Congress' next step ought to be a suit putting the issue squarely, even at the risk of giving up sweeping but ultimately empty claims of unilateral jurisdiction. In deciding whether to take that course, Congress needs to ask which is more important, rhetorically defending its prerogatives, or arriving at the truth about Watergate.