

Complex Issue of Nixon's Defiance

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WASHINGTON, July 30 — The facts were clear — the House Judiciary Committee had issued several subpoenas to President Nixon, and he had defied them. The only question, when the committee met today to debate the proposed Article III, was whether that defiance added up

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to an impeachable offense. To some observers, it should have been easy. It wasn't, as the debate — and the vote — showed.

The 21 members who voted in favor of the resolution cited the words of the Constitution, the words of past Presidents and the words of last week's Supreme Court ruling in the Nixon tapes case to justify their votes. But the members who voted on the other side also cited the Constitution, and the Supreme Court ruling, too.

The seemingly simple question before the committee encompassed a number of complicated issues.

Moreover, the majority vote set new law — it would set new law, if adopted by the full House. Although the vote reflected the view of many legal commentators, no one else has ever been impeached for failure to answer subpoenas issued in connection with an impeachment inquiry.

Mr. Nixon declined to comply with the committee subpoenas on the ground that the "communications" covered by the subpoenas were confidential, and protected from subpoena by "executive privilege."

2 Real Questions

The committee thus had two real questions: Was the President's claim of executive privilege justified? And what should the committee have done, or what should it do now, in the face of Mr. Nixon's claim of privilege? Underlying both of these questions were constitutional issues involving the separation of powers and the impeachment clause.

Last week, in the Nixon tapes case, the Supreme Court issued a landmark ruling on executive privilege. The Court upheld Federal District Judge John J. Sirica's order that Mr. Nixon comply with a prosecution subpoena for tapes and records of 64 White House conversations. In doing that, the Court rejected Mr. Nixon's claim that

Constitution Is Cited by Both Sides in Debate

he had an absolute executive privilege.

At the same time, though, the ruling gave constitutional stature to executive privilege for confidential communications.

It said that claims of executive privilege should be given great weight, because of the importance of confidentiality to the proper functioning of the Presidency.

Competing Needs

The Court said that sometimes the claim of privilege would have to fall, in the face of competing needs for the material at issue, but that these competing needs would have to be clear.

It also said that courts are the final arbiter of the meaning of the Constitution.

Committee members on both sides of the debate cited the Court's decision, with those on the majority saying the ruling meant that the doctrine of absolute privilege was dead, and those on the minority saying it meant that Mr. Nixon had the right to at least assert privilege and that the committee should take the question to the courts for a decision.

If the Supreme Court ruling were the only law to which the committee could look, then the draw — under the balancing test set by the Court, the President's claim of privilege would probably be deemed overridden by the committee's need for the material; under the rule that courts decide constitutional questions, the controversy would have to go to court.

Not the Only Law

But the Supreme Court decision in *United States v. Richard M. Nixon* was not the only law with which the committee could work.

There was the language of the Constitution, giving the House of Representatives the sole power to impeach and the Senate the sole power to try cases of impeachment. There also were statements by a number of past Presidents, such as John Tyler and James K. Polk, to the effect that at least in cases of impeachment, they would supply Congress with whatever Presidential material it sought.

In addition, there was the tradition — actually, the legal

rule that the courts refrain from deciding "political" questions.

Those who voted in favor of Article III appeared to interpret all of this as meaning two things: first, that the concept of "executive privilege" has no place in impeachment proceedings, in that the privilege is based in part on the concept of separation of powers and that impeachment is an exception to the separation of powers; and second, that the courts have no role in impeachment proceedings.

There is much support in the legal profession for the first proposition, at least. Legal experts cite the purpose of impeachment and the statements of past Presidents.

Common Sense

In part, the rationale is common sense — as Representative Lawrence J. Hogan, Republican of Maryland, noted today: "In every future impeachment of a President, it is inconceivable that the evidence relating to that impeachment will not be in the hands of the executive branch, which is under his controls."

There is more dispute on the second proposition, that the courts have no role in impeachment. For example, Raoul Berger of Harvard, one of the nation's leading impeachment experts, believes that impeachment decisions of Congress can be reviewed in the courts. And there are many experts who believe the opposite.

On this question, the proceedings at the Supreme Court in the Nixon tapes case may have some relevance. The decision was of course limited to the prosecution's subpoena, and in fact did not mention the word "impeach." But during the oral arguments, several Justices made it clear that impeachment issues, as one put it, "are not our problems."

One Justice, in fact, made something of a joke of the argument that Presidential material necessary to impeachment be withheld, saying to the President's lawyer at one point, "How are you going to impeach him if you don't know about it?" and, at another point, "You lose me somewhere."

And the President's lawyer, James D. St. Clair, told the Court, for his part, that it should not even consider the case of the prosecution subpoena because it might well affect impeachment; and impeachment was a job only for Congress, not the courts.