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Proper Court for Tapes

By Susanna McBee
Washington Post Staff Writer

A constitutional law expert who has been advising the Senate Watergate committee said yesterday that he thinks it may have trouble getting a court to accept jurisdiction in its case against President Nixon.

The expert, Prof. Alexander M. Bickel of the Yale Law School, strongly recommended last Friday in a strategy meeting that the committee seek a statute giving the U.S. District Court here specific jurisdiction.

Another consultant, Prof. Philip B. Kurland of the University of Chicago, who attended the same meeting, did not agree that the jurisdiction problem would be critical. Nor did he offer any recommendation.

But Kurland said in a telephone interview yesterday that he would proceed, as the committee is expected to do, to seek a court ruling forcing Mr. Nixon to turn over five tape recordings of his conversations with his aides about the Watergate scandal.

Nevertheless, the problem remains, and led the committee's chairman, Sen. Sam J. Ervin Jr. (D-N.C.), to refer briefly to it in a Sunday television interview.

"It's quite possible the Supreme Court would hold adversely to the committee," Ervin said then, "because there are three things necessary for the court to proceed.

"One is that the court shall have jurisdiction; the second, that the committee shall have standing to sue, and the third is that there should be a controversy arising under the Constitution.

"There's no doubt in my mind that the committee has the . . . standing to sue under a Senate resolution adopted in 1928, or that there's a controversy. I'm not so certain about the question of jurisdiction."

Ervin attended the Friday meeting with Sen. Howard H. Baker Jr. (R-Tenn.), committee vice chairman; Samuel Dash, the committee's chief counsel; Fred D. Thompson, its minority counsel; Arthur Miller, a consultant and a George Washington University law professor; Bickel, and Kurland.

Bickel's recommendation was that the committee seek congressional passage of a statute saying the U..S. District Court here shall have authority to enforce subpoenas issued by a legally constituted committee of Congress.

His reasoning was that federal district courts get their jurisdiction to hear different types of cases through specific statutes.

Because Congress has passed only one law giving its committees the right to initiate court action—an 1857 statute making contempt of Congress a crime—the federal courts might decide that they have no power to hear any other type of committee-initiated action, Bickel argued.

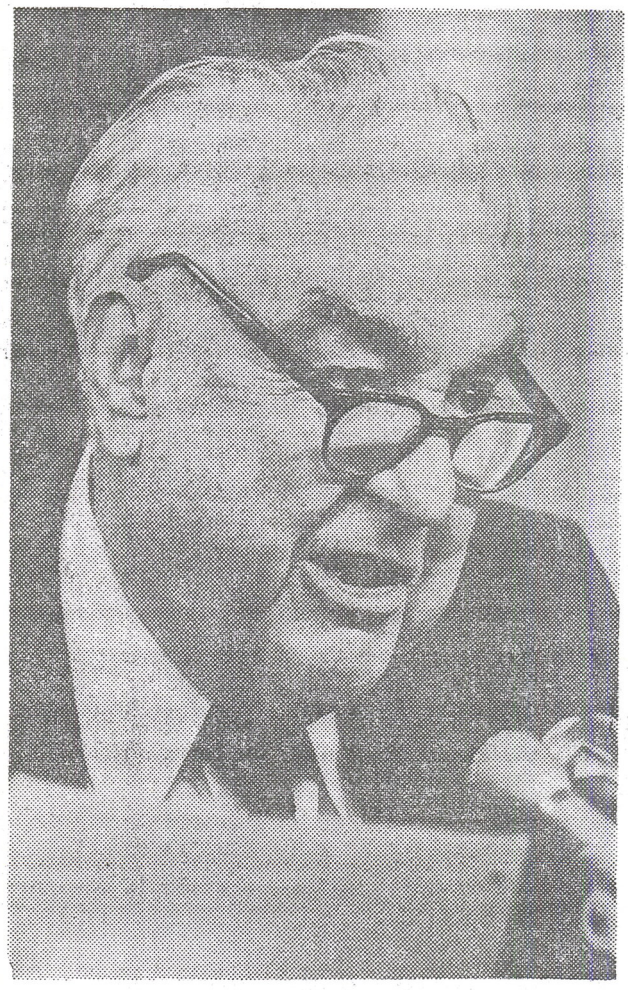
Kurland agreed that passing a new statute would be the ideal procedure. "If that were a quick and easy solution," I'd be for it, too," he said. But neither he nor any other person at the meeting thought it would be politically feasible.

The others concurred that getting such a law through Congress would participate a full-dress battle over presidential powers and Mr. Nixon's involvement or non-involvement in the Watergate affair.

"They thought it would be messy and involve extraneous debate," Bickel said. "I can't deny that. They also thought the President would veto such a bill, but I think that's inconceivable. Politically, I don't see how he could veto it."

Other constitutional law experts questioned yesterday disagreed that such a law is absolutely necessary.

One who declined to be identified conceded that the jurisdiction issue "is a tough



By Bob Burchette—The Washington Post

Holding notes, Sam Ervin questions H. R. Haldeman.

Case Argued

problem, but that's not to say it cannot be beaten."

Another, who also asked to remain anonymous, suggested that the District Court could take the case under Section 1331 of Title 28 of the U.S. Code granting such courts jurisdiction in civil actions arising under the Constitution or laws or treaties of the United States.

Bickel, however, contended that the section "refers to private people claiming a violation of their constitutional rights. The Congress has no constitutional rights, and the President has no constitutional rights."

He noted that since the early 1800s the courts have recognized the doctrine that the Executive Branch of the federal government has the inherent right to go into court and seek enforcement of laws to help it function.

The Eugene Debs case in 1894 was the first major modern case where the Executive Branch came into court, Bickel said. In that case President Grover Cleveland succeeded in getting court approval to stop the Pullman strike.

In 1971 the Executive Branch followed the same doctrine when it went to court to prevent The New York Times and The Washington Post from publishing the Pentagon Papers about U.S. involvement in Southeast Asia.

"The Watergate committee could argue that since the Executive Branch can seek court enforcement of the laws, so can Congress," Bickel said.

Kurland said if he were handling the case, he would have the committee bring suit in the District Court for any of three remedies — a declaratory judgment defining the rights of the committee vis-a-vis the President concerning the tapes, a mandatory injunction ordering the President to produce them, or a writ of mandamus compelling him as an officer of the United States to perform his official duty, which in this case would, again, be to produce the tapes.

The committee is expected to seek such remedies in the next 10 days. Bickel said he agrees with the action in view of the decision not to seek a new statute. But with all the uncertainty, it's like telling your client, "You pray, and I'll litigate," he joked.

Kurland said, "I do not think this litigation is all that important. The issue of the tapes is not the central issue of the Watergate hearings. Getting the tapes is merely a means of securing corroborating evidence."

Referring to the case that special Watergate prosecutor Archibald Cox is pursuing to get nine tapes which Mr. Nixon has denied him, Bickel said:

"I would not try to argue, as Cox may, that the President has waived his right to executive privilege by allowing his aides to testify about the case. If you argue that he's waiving a privilege, you're conceding that he has it, and I don't think he does regarding tapes and documents that refer to criminal activity."

Bickel predicted that the courts will refuse to rule in Cox's case. "I think they ought to refuse," he added.

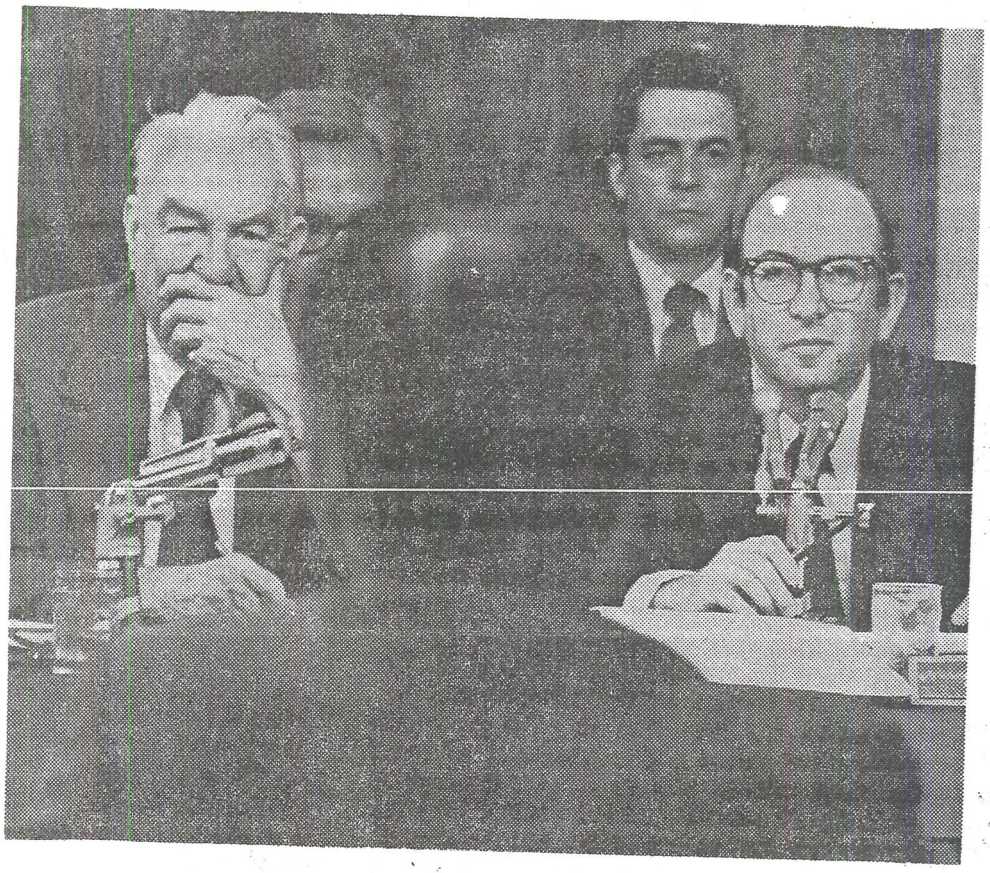
"Cox is an employee of the President, who can discharge him," the Yale professor said. "It is a case of a superior officer and his employee arguing over whether the tapes should be made available to the grand jury. Once the courts begin arbitrating diffenences of opinion within the Executive Branch, there will be a basic change in the governmental system as we know it.

"Suppose Cox wins, and the President says, 'You're fired.' What happens then? Attorney General (Elliot L.) Richardson might step in and take Cox's stand. The President could say, 'You're fired, too.'"

Bickel cited President Andrew Jackson, who served from 1829 to 1837, and his differences with several Secretaries of the Treasury.

"He wanted them to withdraw government funds on deposit in the Bank of the United States because he wanted it abolished," Bickel continued. "Two or three secretaries said they couldn't withdraw the funds because that would be illegal.

"Jackson kept firing them till he found one who would do his bidding, and that was Roger B. Taney, who did so well at that job that he ended up as Chief Justice."



By Bob Burchette—The Washington Post

Chairman Sam Ervin, left, and counsel Samuel Dash, peer intently as former White House chief of staff H. R. Haldeman leans forward in response to a question.