Ervin Panel on Precarious

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News Analysis

By deciding yesterday to ask the federal courts for a declaratory judgment requiring President Nixon to provide tapes of his conversations with aides, the Senate Watergate committee may have embarked on a course that is politically safe but legally precarious.

That was the tentative reaction in Washington's legal and judicial community to the committee's preference of a civil legal action rather than seeking to have the President declared to be in contempt of Congress.

The political basis for the committee's decision is obvious: any committee effort for a contempt citation against the President would require a vote of the full Senate, and many senators fear that the debate on that issue might sound like a "mini-impeachment."

At the same time, it might create the impression that the Senate is trying to prosecute the President before all the facts are in, because a contempt-of-Congress case, before going to trial, requires a grand jury indictment of the person resisting the congressional subpoena.

The legal argument in favor of a declaratory judgment action is more complex.

One government lawyer who felt the Watergate committee had acted wisely argued that the civil suit would be a "cleaner and faster" way to resolve the constitutional dispute than a contempt proceeding.

Another observed that "the committee is not looking to put a man in jail [the ultimate punishment upon conviction for contempt], but just to get some information. There would be a tremendous rhubarb over contempt."

But other well-placed attorneys insisted that a contempt proceeding would be "the only way to get the tapes from the President."

Since the courts have no power to issue an injunction against the President himself, they pointed out, any declaratory judgment the committee obtained would probably be a general and theoretical ruling that would not necessarily deal with the specifics of the situation.

One observer suggested that the courts might duck the issue by refusing to rule and complaining that the committee is asking them to reach out too far into a "political question."

He predicted that some judges might say, either publicly in an opinion or privately in their conferences "Why should we get into this if the will of the full Senate has not been clearly expressed and a grand jury has not passed on the question?"

Even if the committee wins in court and obtains a declaratory judgment, a contempt-of-court proceeding might then become necessary, if the White House refuses to comply on the basis of loopholes in the judgment or outright definace of the court order.

In any event, it became clearer yesterday that it may be some time perhaps not until late September—before the Supreme Court is called upon to enter the controversy as posed by both the Watergate Committee and special prosecutor Archibald Cox.

Chief U.S. District Court Judge John J. Sirica gave the White House two weeks, for example, to respond to Cox's demand that the tapes be produced.

Once Sirica makes his decision, appeals could take several more weeks, unless one side or the other attempts to bypass the U.S. Circuit Court of Appeals here, as has been done rarely on extraordinary occasions.

Under the "related case" rule of the federal district court here, Sirica will also have automatic jurisdiction over any legal action initiated by the Senate committee, It will be up to him to set the initial schedule for all proceedings and to decide at a later date whether the two challenges to the President's authority should be consolidated.

Although Sirica took an aggressive role in the original Watergate comspiracy trial last January, his views on the executive privilege claimed by the President are not clear and may depend, in part, on other similar cases currently pending in U.S. District Court here.

Some legal observers suggested that the President had already made a substantial — and ultimately damaging — concession yesterday when he agreed to provide Cox with two internal White House documents, while withholding the tapes.

Mr. Nixon noted in his letter to Cox that he was "voluntarily" submitting the documents, rather than obeying the subpoena, but one attorney noted that the President seemed to be "submitting to the process" and had thereby potentially weakened his legal case.

If that view were accepted, the argument in the courts might eventually center on the President's right to "pick and choose" which materials to provide to a prosecutor and an investigative committee.

The Nixon administration goes into court on the subpoena controversy at a time when its track record on major legal issues is at a significant low.

Both its civil court effort to prevent publication of the Pentagon papers and its attempt to convict Daniel Ellsberg of criminal offenses for disclosing the documents were notable failures.

The Supreme Court last year rejected the administration view that it was entitled to wiretap without a court order in "national security" cases, and recently judges have ruled against presidential impoundments of federal funds and thrown a monkey wrench into the dismantling of the Office of Economic Opportunity.

And the Justice Department goes before a federal appeals court in New York today in an effort to overturn a lower court ruling that continued military operations in Cambodia are illegal and unconstitutional.

Legal Tack