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Ervin Panel Felt Backed Into Corner

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Most members of the Senate select Watergate committee indicated yesterday that President Nixon had backed them into a corner and forced them to issue subpoenas for tapes of his conversations and other White House documents and papers.

Only Sen. Howard H. Baker (R-Tenn.), according to accounts of an hour-long committee meeting, continued to urge some kind of amicable compromise to avoid a constitutional confrontation.

But Watergate committee Chairman Sam J. Ervin Jr. (D-N.C.) is reported to have posed what became the operative question at the beginning of the meeting: "The President has put down the gauntlet; now what do we do?"

Later, Sen. Edward Gurney (R-Fla.), regarded by many as the strongest White House defender on the committee, explained the action to a reporter: "The President said he wasn't releasing the tapes. The subpoena was the next move."

In choosing to exercise its powers to serve a subpoena for the documents and tapes on the White House, Senate Watergate committee members did so with the clear knowledge that the action would in all probability lead to a protracted constitutional confrontation that would ultimately end up in the Supreme Court.

Ervin, responding to reporters' questions, said that if the President refused to comply with the subpoena he favored the idea of having the committee seek special authority from the full Senate to go to court to force the President to obey the subpoena.

The committee action followed weeks of maneuver-

See SUBPOENA, A18, Col. 1

SUBPOENA, From A1

ing by Senate committee members and a request for a confidential meeting between Ervin and Mr. Nixon to avoid any such battle.

Mr. Nixon's refusal yesterday to provide either the documents or tapes, his continued insistence that the doctrine of separation of powers required that he guard the secrecy of the papers and tapes and the very tone of his letter to the committee, senators indicated, seemed firmly to rule out such a compromise.

Ervin called it a "remarkable letter".

"If you will notice, the President says he has heard the tapes or some of them, and they sustain his position. But he says he's not going to let anybody else hear them for fear they might draw a different conclusion," Ervin said drawing laughter in the hearing room.

Said another senator privately: "For us there was no choice. That's why it (the vote to subpoena the documents, papers and tapes) was unanimous. We were hoping that it could be done amicably—if that's the proper word. We're not on a fishing expedition. We just want those tapes indicated in the testimony."

The proposal that Baker made that was rejected by other members was to ask Mr. Nixon to approve the formation of a special panel of respected citizens, such as former Chief Justice Earl Warren or former U.S. Sen. John Sherman Cooper (R-Ky.). The panel would screen the tapes of his conversations to determine which of them should be made available to the committee.

Baker's proposal was rejected without a vote and the committee, according to one persons who attended the meeting, moved on to discuss technical questions on how the subpoena would be drawn, and whether the President would be named.

Those discussions came to an end when Sen. Herman L. Talmadge (D-Ga.) reportedly made an effort to sum up matters and press for some decision.

"Now look, the question is whether we are going to go on with these hearings," Talmadge is reported to have said.

The committee then reportedly decided unanimously then and there to issue the subpoenas and to name the President.

"They didn't even have to call the roll," said one person at the meeting.

The Senate committee's decision to issue the subpoenas was made during a lunch break meeting in Ervin's office that began shortly after 2 p.m. and delayed the afternoon session of the televised hearings until 3:20 p.m. When Ervin returned to the hearing room, word of the committee's decision had already circulated and Ervin was greeted by spectators who stood and applauded.

Though Ervin and other committee members have made firm claims on what they say are the rights of the Watergate committee to the tapes, documents and papers, there nevertheless remained some uncertainty as to how the whole struggle would end.

"Obviously it (the dispute over authority) is something that has to be litigated," Gurney said. "Frankly I don't know what the law is. I don't think anyone does."

The decisions by the Select Committee and by Watergate Special prosecutor Archibald V. Cox to subpoena the President's tape recordings seem certain to set the stage for two major constitutional confrontations: one between the executive and legislative branches of government and the other between the White House and a theoretically independent special prosecutor.

There are very few precedents in American legal history for resolving either confrontation.

Subpoenas, of course, are merely pieces of paper routinely issued every day in court cases and legislative investigations.

In both criminal and civil federal court cases, all parties prosecutors, plaintiffs, defendants — are entitled to subpoena evidence supporting their points of view. The evidence generally takes the form of live testimony or documents.

Ordinarily, blank subpoena forms bearing the signature of a federal court clerk are merely filled in by the party seeking to obtain the evidence and then served by that party or by a U.S. marshal on the person who has the evidence.

Under the Legislative Reorganization Act of 1947, the power to issue subpoenas was delegated to committees of both the House and the Senate and to the chairmen of subcommittees.

The full membership of each house of Congress need not vote on the matter for a subpoena to be issued and served.

This would be the normal course of events in the case of a subpoena issued by Cox's special prosecution force:

The President or his representatives, in declining to produce the documents, would file a motion to quash the subpoena before its return date with U.S. District Court here.

Alternatively, if no immediate response to the subpoena is forthcoming from the White House, Cox could conceivably file a motion with the same court seeking to force compliance with the subpoena.

A federal district judge — probably Chief U. S. District Court Judge John J. Sirica, who has jurisdiction over grand jury matters here — would then hold a hearing on the dispute and issue his decision. But he would probably grant a stay of its enforcement to provide time for an appeal by the side that lost.

The U.S. Court of Appeals here would then hold a hearing after receiving appellate briefs from both sides. In a case of such major constitutional proportions, all nine judges of that court would probably convene in an *en banc* session, on their own initiative, rather than assign the case to a three-judge panel, as is normally done.

That court too could be expected to postpone enforcement of its decision to give the losing party time for a final appeal to the U.S. Supreme Court.

The issue would then be in the hands of the high court, which could give the case emergency priority — perhaps involving a special session — if its nine justices saw fit to do so.

If the Supreme Court's decision went against Mr. Nixon, and he refused to comply, it would then be up to Cox to decide whether to seek a contempt-of-court citation, again starting at the bottom of the federal court ladder.

Cox, even if he won at that stage, would have no enforcement powers of his own. He could not himself punish the President for resisting the subpoena. That would be up to the Congress, through the process of impeachment.

Charles Alan Wright, the constitutional law professor consulting with the White House on Watergate-related matters, suggested in his letter to Cox yesterday that the special prosecutor could really do very little to work his will on Mr. Nixon.

"If you are an ordinary prosecutor, and thus a part of the executive branch as well as an officer of the court," Wright wrote Cox, "you are subject to the instructions of your superiors, up to and including the President, and can have access to presidential papers only as and if the President sees fit to make them available to you."

When Attorney General Elliott L. Richardson appointed Cox, he made it clear that the special prosecutor, while independent, would be part of the Justice

By Bob Burchette—The Washington Post

Watergate committee counsels Rufus Edmisten, left, and Terry Lenzner arrive at White House to serve subpoenas.

Department, which is, of course, part of the executive branch and ultimately responsible to the President.

One question that is posed by the conflict is whether Mr. Nixon, if Cox sufficiently angered him, could fire the special prosecutor and end the dispute there.

There are several possible scenarios that could evolve from the Ervin committee's subpoena of the presidential tapes, if the President refuses to comply.

The common procedure is for a congressional committee, after hearing out the recalcitrant witness's point of view, to reaffirm its decision and then vote a contempt-of-Congres citation. It would be necessary in that event for the full Senate to endorse the citation.

Once such a citation is voted, there are two options: as it did in centuries past, the Congress could enforce the citation itself, imprisoning the contemptuous witness in the prison beneath the House chambers—an unlikely choice.

Normally, another course is chosen: the Senate refers the citation to the Justice Department for criminal enforcement.

Such enforcement requires the return of a grand jury indictment, and the trial of such an indictment is on narrow issues—such as whether the witness really refused to comply with the congressional subpoena.

It is generally only on appeal of a conviction that a person charged with contempt of Congress is entitled to contest the constitutionality of the contempt citation.

As Ervin undoubtedly realized yesterday, such a contempt process is also fraught with difficulties, since the agency responsible for bringing the indictment and prosecuting the case is the Justice Department.

Once again, the entire process could be dramatically ended by the President's directing that the Justice Department not follow such a course of action.

The procedure apparently favored by Ervin—seeking a declaratory judgment against the President in the courts—would avoid the contempt dilemma as well as the unseemly situation of a court injunction against the nation's chief executive.

One recent precedent is the 1952 steel seizure case, in which the Supreme Court ruled that President Truman had acted improperly when he ordered the Secretary of Commerce to take over and operate most of the nation's steel mills in order to avert a strike that would cripple the nation's economy.

Associated Press

Gordon Strachan, right, talks to his attorney, John Bray, during hearings.

That case, however, involved a dispute between the executive branch and private parties, rather than between two coequal branches of government.

Taken by itself, Wright's response to Cox yesterday, on the President's behalf, threatens to undermine all future Watergate prosecutions and to provide a basis for a reversal of all convictions thus far obtained in the scandal.

Under existing legal precedents, all the convicted conspirators and potential defendants could claim that the President, by withholding the tapes, had denied them evidence that would tend to exculpate them, or establish their innocence.

Wright noted that under the Jencks Act, passed by Congress in 1957, the government may decline to produce material ordered by a court and instead drop its prosecution of a criminal case.