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CONGRESS MOVES TO CURB JUSTICES

Challenges Power to Change
Rules Without Legislation

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WASHINGTON, Jan. 31 — Congress took the first step today to challenge the Supreme Court's authority to order basic changes in the nation's criminal justice system without legislation.

The Senate Judiciary Committee, moving with unusual speed, unanimously cleared for floor action a measure postponing for at least two years the effective date of a new set of rules of evidence the high court promulgated two months ago.

Senator Sam J. Ervin Jr., Democrat of North Carolina, sponsor of the delaying action, has been assured by the Senate Democratic leadership that it will come to a floor vote within a week. Little opposition is expected, partly because a major issue of legislative-branch prerogative is involved.

Next week, the House Judiciary Committee will open hearings on the 40-page evidence code that the Supreme Court approved by an 8-to-1 vote. The committee will explore whether the Court can go beyond revising procedure to rewrite legal substance without giving Congress anything more than veto power.

Controversial Provisions

Before the controversy is over, the Supreme Court may be called upon to decide a test case that hinges on the validity of its own rules and whether the justices exceeded their power in approving them. Some authorities believe such a gov-

ernmental collision is now all but inevitable.

Among controversial provisions of the new evidence code are those creating a new "secrets of state" classification for keeping Government papers private and abolishing the traditional privilege of private communication between husbands and wives and doctors and patients.

On Nov. 20, the Supreme Court announced its approval of the new code for all federal courts, the first ever drafted. It was based largely on a seven-year study by a committee of the United States Judicial Conference, the administrative agency of the Federal court system.

The Court specified that the new code would go into effect automatically on July 1. Under the law that gave the justices authority to set procedural rules, Congress has 90 days from the time it receives the proposed changes to veto them.

Basis of Dissent

The dissenter in the 8-to-1 vote was Justice William O. Douglas, who said his colleagues were exceeding their authority.

The 90-day veto period has not begun to run because Chief Justice Warren E. Burger has not yet officially submitted the code to Congress. He was prepared to send it across Capitol Hill when Congress convened early this month but was reportedly dismayed by newspaper accounts of impending opposition.

Although the Court is the

official sponsor of the evidence code, none of its members is scheduled to testify at the House hearings. Traditionally, the constitutional doctrine of separation of powers prevents such exchanges of information and viewpoint.

Congress has never attempted before to block rules promulgated by the Supreme Court, and the entire subject is clouded with legal uncertainty.

Partial Veto Uncertain

No one knows whether Congress must veto the entire code or can disapprove sections separately. The authorities differ as to whether both the Senate and the House must disapprove to constitute a veto or whether action by one house is sufficient.

There is general agreement, however, that Congress could let the new rules go into effect automatically and then pass legislation changing them. Senator Ervin prefers to take no chances and postpone the effective date of all the rules until the end of the 93d Congress, or about December, 1974.

Few in Congress challenge the Court's right to make procedural rules for the Federal courts, determining, for example, how many days are allowed for filing certain papers. But some critics complain that the proposed code makes numerous substantial changes in the rights of defendants, without the benefit of any of the public hearings, debate or amendment process Congress would normally provide for such material.