

Probers' 'Safest Path' on Tapes

By Lawrence Meyer

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The Senate select Watergate committee was warned three months ago by its own legal consultants that it was going to have a problem persuading a federal judge that he could legally take jurisdiction in its suit against President Nixon to gain access to his tape recordings.

Despite that advice, the committee decided that the safest legal path to the courts—seeking statutory authority from the Congress

for the suit—would be a disaster politically.

Chief committee counsel Samuel Dash was described by one participant in the committee's legal deliberations as having been "cockeyed sure" that Chief U.S. District Judge John J. Sirica would find that he had jurisdiction over the committee's suit and would proceed to consider the merits of the case.

Sirica ruled yesterday that he did not have jurisdiction over the case, a rul-

ing that precluded him from addressing the merits of the committee's contentions.

"It just didn't seem to worry the members of the committee or the staff that

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Judge Sirica wouldn't find jurisdiction in a case this momentous," this source said.

Another informed source agreed that the committee staff generally felt that Sirica would not dismiss the case on jurisdictional grounds. Asked what the ba-

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sis of the staff's belief was, this source said, "They had their radar out, but the signals weren't very good."

The decision to go to court in the first place, voted unanimously by the committee on July 26, was taken with virtually no discussion. Committee chairman Sen. Sam J. Ervin Jr. (D-N.C.) informed the committee that President Nixon had written him that day saying that he would not honor the committee's subpoena seeking access to the tapes.

Almost immediately, com-

mittee vice chairman Sen. Howard H. Baker Jr. (R-Tenn.) offered a motion for the committee to take Mr. Nixon to court. As one staff member said, "Just all of a sudden," Sen. Baker said, "Let's vote on it. Right here."

This staff member said that Ervin remarked after the session that he would have preferred more time to study the matter before voting on a court suit. Ervin, according to the staff member, had serious doubts at the outset about going to

court until the jurisdictional matter was resolved. Ervin admitted three days after the committee vote that, "I'm not so certain about the question of jurisdiction."

On July 27, Ervin, Baker and Dash met with some of the consultants to the committee—Prof. Alexander M. Bickel of the Yale Law School, Prof. Philip Kurland of the University of Chicago Law School and Prof. Arthur Miller of the George Washington University Law School. Fred D. Thompson, the committee's minority counsel, and deputy chief counsel Rufus Edmisten also attended the meeting.

At that meeting, Bickel was reportedly adamant that the committee should seek statutory authority for the suit before going to court.

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 reportedly agreed with Bickel that it would be preferable to have a law passed but agreed with others at the meeting that such legislation was not politically feasible.

Baker reportedly argued

that if legislation authorizing the suit were presented in the Senate, it would be filibustered and that it would be "impossible" to get such a bill through Congress as a result.

Seeking a contempt of Congress citation was never really considered by the group, according to one participant in the meeting, because it would have been a "mini-impeachment proceeding." Another participant agreed that if the committee had sought a contempt citation against Mr. Nixon, it would have caused a "furore" in the Senate.

As a result of these considerations, sources said, the committee was left with no alternative but to go to court without seeking additional legislation in spite of the questions the consultants raised concerning the jurisdictional issue.

Dash, who supervised the preparation of the briefs and argued the case in court, was out of town yesterday and not available for comment. Ervin's office said he would not comment until he had studied Sirica's decision.

Edmisten said yesterday that he believed the committee would appeal Sirica's ruling and that the appeal would be successful. A constitutional law expert disagreed, however, saying that he was "dubious" that the committee would be successful in having Sirica's ruling reversed.