Committee's Move: Testing Power Balance

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WASHINGTON, April 11—With only three members dissenting, the House Judiciary Committee began today an unprecedented constitutional adventure—the subpoenaing of a President as part of an inquiry into whether or not that President should be impeached. The outcome of that adventure will add chapters to the lawbooks. But, more than that, some lawyers said today, it could affect the balance between two of the branches of government for years to come.

News Analysis

It could perhaps weaken the legislative branch, if, for instance, the President refused to honor the subpoena and Congress took no action in response to the refusal.

It could strengthen the legislative branch on the other hand, if the President refused to comply and the House cited him for contempt or if the House impeached and the Senate convicted him for his refusal.

Such possibilities exist, in large part, simply because the situation is unique—and because there is no clear language in the Constitution about the procedures to be followed when Congress decides it needs information for an impeachment inquiry.

The committee had no clear precedent on which to base its stand, no carefully drafted phrase in the Constitution, no precisely worded holding in a Supreme Court Ruling.

Forecasts Difficult

A number of constitutional lawyers, while unwilling to forecast the outcome of the committee action, willing to say that the panel, in their opinion, would be entitled to obtain the information from Mr. Nixon that it sought. But, as Dean Robert McKay of the New York University law school phrased it, "that's my feeling. I don't know how to prove it."

The statement that many lawyers make in support of this view is in fact a statement against the opposing view. As Prof. Norman Dorsen of N.Y.U. put it, "There's no affirmative support in history — in case law or in expressions of Presidents — to justify a claim of privilege" by the President against the subpoena.

Archibald Cox, the former special Watergate prosecutor, made a similar statement in a recent speech at the University of Pennsylvania.

Both he and Professor Dorsen, as well as several other constitutional experts, cite two main factors to support the view that the committee should be entitled to the information it is seeking; statements by various Presidents on the duty of a President to cooperate with impeachment inquiries, and the constitutional provisions giving the House the sole power to impeach.

Polk Is Quoted

The most commonly quoted Presidential statement on the matter is one by James K. Polk in 1846:

"If the House of Representatives, as the grand inquest of the nation, should at any time have reason to believe that there has been malversation in office by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the executive departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the executive be afforded to enable them to prosecute the investigation."

Other Presidents, too, have spoken of the special situation posed by impeachment. President Ulysses S. Grant specifically acknowledged that the House "may require as a right in its demand upon the executive" the information it needs to carry out its powers of impeachment.

George Washington, in the course of refusing information about the Jay treaty, explained himself thus: "It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives except that of an impeachment, which the resolution has not expressed."

As one Harvard law professor pointed out, the presidents who made these statements generally made them in the course of refusing to turn over information for other, nonimpeachment purposes. Their responses might have been somewhat different had they been asked for the material in connection with an impeachment inquiry.

A Principle Is Seen

The second argument—based on the House's constitutional power to impeach—may thus be stronger. Mr. Cox, in his speech, put it thus; "On principle, the House should have a right to the evidence. The House cannot serve as the 'grand inquest of the nation,' as the Constitution intends, if the very President whose conduct of his official duties is under investigation can balk the inquiry by withholding the recorded evidence of his conduct in the executive branch."

A memorandum prepared by the impeachment inquiry staff makes a similar point, contending that "implicit in the power to impeach are the power to inquire and the power to compel the giving of evidence."

It is this central fact—that the subpoena is issued in the course of an impeachment proceeding, and that the Constitution treats the impeachment proceeding in singular fashion, as a function different from other Congressional functions—that sets the present situation apart from that which developed out of the other subpoenas that have been directed against Presidents in the past.

Balancing Test Used

In the Nixon subpoena cases that have reached the courts, the President asserted an absolute executive privilege; the courts, in ruling, rejected the absolute claim and applied a balancing test for determining the situations in which privilege could be asserted.

It is possible that the White House might argue that the same rule of a balancing test should be applied to subpoenas issued in the course of an impeachment, weighing the public interests in keeping the President's communications private against the public interests in getting all possible information needed for the inquiry into whether or not impeachment is warranted.

Some constitutional experts, however, argue that the balancing test is not even relevant in an impeachment proceeding, due to the overriding need in the inquiry for all available information.

Many observers feel that the Congressional right to secure information from the executive as part of impeachment is far stronger than its right to secure information from him in non-impeachment situations. As Mr. McKay phrased it, "This is apex, the strongest point of Congressional power."