

Beware The Quagmire

By Anthony Lewis

WASHINGTON — President Nixon's flat statement that he will supply no White House tapes to the House impeachment inquiry, now or ever, has renewed talk of an alternative way to deal with the problem of evidence. That is for the Judiciary Committee or the President to take the issue to the courts.

In a country accustomed to judges settling great issues, the idea of asking the courts to decide this conflict is superficially attractive. It becomes the more tempting as the Special Prosecutor's subpoena for trial evidence goes to the Supreme Court.

But it is a simplistic notion, and a dangerous one, to analogize the issue of evidence for an impeachment inquiry to the stuff of ordinary lawsuits. To bring this matter to the courts would risk subverting the fundamental nature and purpose of the impeachment process.

There are formidable technical obstacles to begin with, for one a doubt that Federal courts have or could be given jurisdiction over such a matter. Underneath the "technicalities" on the surface there is a deeper problem of law: Judges would be asked to decide something very likely beyond the proper limits of their power—a "political question," in the Supreme Court's phrase.

Over the years the Supreme Court has refused to decide a large number of questions that it labeled "political," for example whether hostilities have terminated or whether a state has a "republican form of government." In the leading recent case defining "political questions," *Baker v. Carr* in 1962, the Court said they included issues "committed by the Constitution to another branch of government."

Impeachment has been cited by scholars—long before the current controversy—as an outstanding example of a matter committed by the very

text of the Constitution to another branch of the Federal Government, not the judiciary, for decision. Article I says the House of Representatives "shall have the sole Power of Impeachment" and the Senate "the sole Power to try all Impeachments."

The reason that courts should and do refuse to entertain "political questions" can be indicated by an example in the impeachment context. Suppose that a President should be impeached by the House and convicted by the required two-thirds of the Senate—and then went to court to complain that the evidence was insufficient or the procedure faulty. Would the country have to wait for weeks and months through judicial decisions, uncertain who was President? The question must be resolved, and finally, by the process specified in the Constitution.

It will be argued that taking the issue of evidence to the judges would not bring them all the other aspects of impeachment. But that is highly doubtful.

If the courts were going to pass on the House committee's subpoena, the President's counsel would undoubtedly argue that it asked for material not relevant to an impeachable offense. The courts would then find themselves exploring the famous question of what an impeachable offense is—and so on, endlessly.

It would be a legal quagmire. The case could go on for months. If in the end the Supreme Court held that it was not competent to decide the issue, that result might well leave Congress and the country frustrated and dispirited over the whole business.

But the real issue is not time or complexity. It is responsibility.

Many Congressmen would probably love to pass this burden on to the courts, to relax and say with all piety that they can do nothing while the issues are before the judiciary. But the whole point of the impeachment process, its place in our solar system of constitutional politics, is that it is the duty of Congress. If Congress ducks this responsibility, we shall have no hope at all of restoring the balance of powers that was meant to be our safety.

That is why the question of the House committee's right to the evidence is a fair test of our seriousness—Congress's and the country's. And it is really such an easy question.

Many Presidents have said that Congress is entitled to all evidence for an impeachment; none before Richard Nixon ever suggested the contrary. Nor can anyone who opens his eyes have any doubt that what Mr. Nixon is doing now is simply continuing the Watergate cover-up. He is flagrantly, provocatively contemptuous of the House. If members of Congress cannot understand that and cannot deal with it as the constitutional offense it is, they will finally have forfeited the country's respect—and their own.

ABROAD AT HOME

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