

THE POLITICS OF EXECUTIVE PRIVILEGE

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THE IMPEACHMENT POWER

In the struggle over information and documents, Congress has especially strong leverage when it unleashes the impeachment process. Presidents concede that when interbranch conflicts reach that level, traditional arguments used to deny lawmakers information have no credibility. Congressional access is compelling not only when a President is personally accused of an action that may merit removal from office, but extends more broadly to malfeasance in the administration, including corruption, criminal activity, unethical conduct, and personal wrongdoing by agency officials. Although impeachment was used once against a Cabinet official—Secretary of War William Belknap in 1876—it is reserved now for the President and federal judges. To sanction departmental heads and other executive officials who withhold documents or refuse to testify, Congress relies on the powers of subpoena and contempt.

Presidential Policies

When President Washington denied the House the papers it requested on the Jay Treaty, he said that the only ground on which the House might have legitimately requested the documents was impeachment, “which the resolution has not expressed.”¹ Presumably, if Congress had requested the documents on that basis, Washington would have acquiesced. In the midst of the debate over the Jay Treaty, Rep. William Lyman said that the impeachment power “certainly implied the right to inspect every paper and transaction in any department, otherwise the power of impeachment could never be exercised with any effect.”² The power of impeachment, said President James Polk, gives to the House of Representatives

1. Annals of Cong., 4th Cong., 1st Sess. 759 (1796).

2. *Id.* at 601.

the right to investigate the conduct of all public officers under the Government. This is cheerfully admitted. In such a case the safety of the Republic would be the supreme law, and the power of the House in the pursuit of this object would penetrate into the most secret recesses of the Executive Department. It could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge.³

President Ulysses S. Grant advanced a peculiar theory in 1876, after the House adopted a resolution requesting information on how many times he had been out of the nation's capital conducting official business. The resolution permitted him to withhold the information if he considered it "incompatible with the public interest," but he chose to cite constitutional reasons for withholding the information. One reason, poorly considered, was that if the House sought the information with impeachment in mind, the Constitution recognized a guaranty that "protects every citizen, the President as well as the humblest in the land, from being made a witness against himself."⁴ Other Presidents, facing possible impeachment, have not sought refuge behind the Self-Incrimination Clause. It's a theoretical possibility, but politically unappealing.

Even short of impeachment, reliance on executive privilege is likely to be impolitic when lawmakers make serious charges of administrative malfeasance. The Supreme Court has noted that the power of Congress to conduct investigations "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."⁵ Attorney General William Rogers told a Senate committee in 1958 that the withholding of documents from Congress "can never be justified as a means of covering mistakes, avoiding embarrassment, or for political, personal, or pecuniary reasons."⁶ In 1982, Attorney General William French Smith said that he would not try "to shield [from Congress] documents which contain evidence of criminal or unethical conduct by agency officials from proper review."⁷ During a news conference

3. 5 Richardson 2284 (April 20, 1846).

4. 9 Richardson 4316 (May 4, 1876).

5. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

6. "Freedom of Information and Secrecy in Government," hearing before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 5 (1958).

7. Letter of November 30, 1982, to Congressman John Dingell, reprinted in H. Rept. No. 968, 97th Cong., 2d Sess. 41 (1982).

in 1983, President Reagan remarked: “We will never invoke executive privilege to cover up wrongdoing.”⁸

White House Counsel Lloyd Cutler, in a memo of September 28, 1994, provided guidance for congressional requests to departments and agencies for documents. Congressional requests would be complied with “to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.”⁹ Although the doctrine of executive privilege would be asserted to protect “the confidentiality of deliberations within the White House,” in circumstances that involve communications “relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings.”¹⁰

Andrew Jackson Fights Back

President Andrew Jackson, a jealous defender of executive prerogatives, found himself at times assailed by both Houses. He was censured by the Senate in 1834 on the ground that he had violated the Constitution, and was charged three years later with possible corruption by a special committee of the House. Both chambers seemed to imply that he might have committed impeachable offenses. In each case, to prevent legislative encroachment and a narrowing of presidential power, Jackson had to define and defend the rights of his office.

The Senate Resolution

The first dispute turned largely on the issue of whether the Secretary of the Treasury functioned as an executive officer or a legislative agent. Could Congress delegate to the Secretary, rather than the President, the duty of placing government money either in the U.S. Bank or in state banks? President Jackson removed the Secretary of the Treasury in order to find someone willing to follow his instructions, not those of Congress. The Senate responded by passing a resolution of censure: “*Resolved*, That the President, in the late Execu-

8. Public Papers of the Presidents, 1983, I, at 239.

9. Memorandum for all Executive Department and Agency General Counsels from Lloyd N. Cutler, Special Counsel to the President, “Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege,” September 28, 1994, at 1.

10. *Id.*

tive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both.”¹¹

Essentially, the Senate charged Jackson with committing an impeachable act. In a lengthy and impassioned defense, Jackson insisted that the Secretary of the Treasury was “wholly an executive officer” and could be removed at will by the President.¹² He was outraged that the Senate could censure him on the basis of unspecified charges and without an opportunity to be heard: “Without notice, unheard and untried, I thus find myself charged on the records of the Senate and in a form hitherto unknown in our history, with the high crime of violating the laws and Constitution of my country.”¹³ He advised the Senate to follow constitutional procedures. If Senators thought he had violated the Constitution, they had to first wait for the House to impeach, after which the Senate could vote to convict. There was no constitutional warrant, he said, for the Senate to hide behind a resolution of censure. Three years later the Senate ordered its resolution of censure expunged from the record.¹⁴ As discussed later in this chapter, both the House and the Senate considered censure resolutions against President Clinton in the midst of impeachment proceedings, but dismissed the resolutions as inappropriate.

The House Investigation

The second dispute came toward the end of Jackson’s second term in office. What seemed to kick off the controversy was a presidential compliment to executive agencies. In his eighth annual message of December 5, 1836, Jackson said that it was “due to the various Executive Departments to bear testimony to their prosperous condition and to the ability and integrity with which they have been conducted.” It had been his aim “to enforce in all of them a vigilant and faithful discharge of the public business, and it is gratifying to me to believe that there is no just cause of complaint from any quarter at the manner in which they have fulfilled the objects of their creation.”¹⁵

Such sentiments seem innocent, even innocuous, but Jackson’s enemies in Congress seized the moment to turn presidential flattery into an open-ended legislative search for agency wrongdoing. Rep. Henry A. Wise, a Jackson De-

11. S. Journal, 24th Cong., 2d Sess. 123–24 (April 14, 1834).

12. 3 Richardson 1301.

13. *Id.* at 1289.

14. Cong. Debates, 24th Cong., 2d Sess. 379–418, 427–506 (1837).

15. 4 Richardson 1478.

mocrat about to turn Whig, took sharp offense at Jackson's message. He was convinced that all of the executive departments had become "hideously corrupt, disordered, and dangerous."¹⁶ On December 13, 1836, Wise offered a resolution to create a select committee to investigate the truthfulness of Jackson's appraisal of the agencies. Wise spoke with heavy sarcasm, explaining how Jackson had earned the "title of Hero" with his military victories. "Hail, second Savior!" Wise said, was "shouted from the lips of every grateful heart."¹⁷ Once elected to the White House, Jackson became "the favorite pet of the people, who was to scourge bribery and corruption, whose name was to be the terror of all evil-doers, whose policy was to be retrenchment and reform, by whom the independence of Congress of executive patronage was to be maintained."¹⁸

Jackson's use of patronage stoked Wise's ire: "His ruthless proscription for opinion's sake turned faithful public servants out of their employment, and snatched from the mouths of their families their bread."¹⁹ Wise charged that congressional independence had "been totally destroyed by corrupt bribes and the power of appointing members to office." Nothing mattered but "the will of the President." Hundreds of thousands of dollars had been lavished on the White House, producing "all the regalia of a palace."²⁰ Was Wise hurling invective at the President? Perish the thought. He dismissed such speculation: "let no one infer that I am indulging in any tirade against the President, or that I am venting any spleen whatever." He wished Jackson a long life, "to witness the effects of his errors, if errors he has committed, to acknowledge and repent of them."²¹

Wise insisted that Congress investigate the truth of Jackson's claim that "the various executive departments have been conducted with ability and integrity, and that they are in a prosperous condition."²² He wanted a committee of nine members,

with power to send for persons and papers, and with instructions to inquire into the condition of the various executive departments, the ability and integrity with which they have been conducted, into the manner in which the public business has been discharged in all of them, and into all causes of complaint, from any quarter, at the man-

16. Henry A. Wise, *Seven Decades of the Union* 155 (1871).

17. Cong. Debates, 24th Cong., 2d Sess. 1058 (1836).

18. *Id.*

19. *Id.* at 1059.

20. *Id.* at 1060.

21. *Id.*

22. *Id.* at 1065.

ner in which said Departments, or their business or offices, or any of their officers or agents, of every description whatever, directly or indirectly connected with them in any manner, officially or unofficially, in duties pertaining to the public interest, have fulfilled or failed to accomplish the objects of their creation, or have violated their duties, or have injured or impaired the public service and interest;...²³

Wise's resolution was adopted by the Committee of the Whole, 86 to 78.²⁴ Considering that Jacksonian Democrats controlled the House by a large margin, 145 to 98, the vote here is surprising. However, Wise directed some of his venom not at Jackson but at his successor, Martin Van Buren: "I hold Mr. Van Buren responsible for most mischief that has been done, and most that is now doing:..."²⁵ Democratic control of the House would virtually disappear under Van Buren, dropping to a margin of only 108 to 107.

Having passed the Committee of the Whole—an intermediate stage—the Wise resolution now had to be accepted by the full House. The House agreed to most of the resolutions that allocated parts of Jackson's annual message to different committees, but continued to debate the Wise resolution.²⁶ Rep. Dutee Pearce, a Democrat from Rhode Island, opposed the resolution, partly on the ground that all of the substantive parts of Jackson's message had already been assigned to standing committees fully capable of evaluating how well the agencies had conducted their business.²⁷ In a position later adopted by Jackson, Pearce challenged Wise or any other member to come forward with specific—not general—charges.²⁸ His amendment, requiring the select committee "to inquire into any specific causes of complaint which may be alleged against the integrity of the administration of any of the departments or their bureaus," and giving the committee power to send for persons and papers,²⁹ was never acted on. Weeks of debate dragged on. Finally, on January 17, 1837, the House went directly to the Wise amendment and it passed by the remarkable margin of 165 to 9.³⁰

Yet it was scarcely a victory for Wise. With the House consuming a month in debating his resolution, only six weeks remained in the Congress to conduct the inquiry. Named chairman of the select committee, Wise complained that

23. *Id.* at 1057.

24. *Id.* at 1067.

25. *Id.* at 1066.

26. *Id.* at 1068.

27. *Id.* at 1082.

28. *Id.* at 1083–84.

29. *Id.* at 1084.

30. *Id.* at 1410–11.

his colleagues “now propose to give me this Herculean task” and that it was “too late for any investigation.”³¹ On January 24, Wise wrote to Jackson, requesting the departments to furnish the committee with a list of all officers or agents, or deputies, who had been appointed during Jackson’s two terms in office. The committee wanted to know from those individuals of “any innovations, not authorized by law, (if such exist,)” and when and why the changes originated.³²

Within two days, Jackson penned a stinging reply. He first noted that Wise, in his speech to the House, “preferred many severe but vague charges of corruption and abuse in the executive departments.” Under the resolution, Jackson said, the President and departmental heads were not expected “to answer to any specific charge; not to explain any alleged abuse; not to give information as to any particular transaction; but, assuming that they have been guilty of the charges alleged, calls upon them to furnish evidence against themselves!”³³ Jackson advised Wise to reduce his general charges to specifications, allowing the committee to investigate agency wrongdoing, if it existed. Instead, what Wise had done was to ask Jackson and his Cabinet “to become our own accusers, and to furnish the evidence to convict ourselves; and this call purports to be founded on the authority of that body in which alone, by the constitution, the power of impeaching us is vested!” Jackson vowed to repel such legislative inquiries “as an invasion of the principles of justice, as well as of the constitution; and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish inquisition.”³⁴

Jackson now turned the tables on Wise. If Wise, after issuing accusations against the administration, was unwilling to bring specific charges, the committee should call him and any other member who claimed that corruption existed, and ask them under oath “whether you or they know of any specific corruption or abuse of trust in the executive departments; and, if so, what it is.” Jackson said that if any member could “point to any case where there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove shall be interposed to prevent the fullest scrutiny by all legal means. The offices of all the departments will be opened to you, and every proper facility furnished for this purpose.”³⁵ The gauntlet had been thrown at Wise: either come up with something specific or shut up.

31. *Id.* at 1409, 1410.

32. Cong. Debates, 24th Cong., 2d Sess., vol. 13, part 2, Appendix, at 201; also at H. Rept. No. 194, 24th Cong., 2d Sess. 29 (1837).

33. Cong. Debates, 24th Cong., 2d Sess., vol. 13, part 2, Appendix, at 202.

34. *Id.*

35. *Id.*

Jackson closed by expressing “astonishment” that Congress would have authorized the Wise inquiry. Under House rules “there are six standing committees... whose special duties are to examine annually into all the details of those expenditures in each of the executive departments.”³⁶ Investigations of that nature need time and attention. What could possibly be achieved, Jackson implied, from a rushed investigation by a newly established select committee in the closing weeks of a Congress?

The select committee asked Senator Hugh Lawson White to testify. However, he advised the committee that he would hold himself “disgraced” by sharing “intimate and confidential” conversations and correspondence he had with Jackson. Upon hearing of White’s dilemma, Jackson wrote to the select committee on January 31, 1837, stating that he absolved White “from all obligations of confidence in regard to any thing that has passed between us.” Jackson wanted every conversation with White, “on all and every subject, faithfully disclosed, with the time when, and the place where; and I hope the committee will interrogate him as to every point or matter of confidence that ever existed between us.”³⁷

Wise issued the report of his committee on the last day of the 24th Congress, March 3, 1837. The committee called 28 witnesses.³⁸ As to its task, the committee majority viewed its inquiry “in no other light than a preliminary measure to ascertain whether there were sufficient grounds to justify a process of impeachment.”³⁹ To engage in an investigation of this nature, they said, could be justified only under the constitutional clause that gave the House “the sole power of impeachment.” The majority asserted: “It follows, therefore, that the only constitutional power under which the House of Representatives, as a co-ordinate branch of the Government, could constitute a committee to inquire into alleged ‘corrupt violations of duty’ by another co-ordinate branch of the Government, (the Executive,) is the ‘power of impeachment.’”⁴⁰

Following Jackson’s suggestion, the committee called Wise and asked him, under oath, if he knew of any executive act that was either corrupt or a violation of duty. Wise supplied no evidence. When the committee asked for the names of those who had informed him of executive abuse or corruption, Wise refused to respond.⁴¹ Under these conditions, the majority recommended language that repudiated Wise:

36. *Id.*

37. *Id.* at 208.

38. *Id.* at 189.

39. *Id.*

40. *Id.* at 190.

41. *Id.* at 195.

Resolved, That, so far as has come to the knowledge of the committee from the results of this investigation, the condition of the various executive departments is prosperous, and that they have been conducted with ability and integrity; that the President has aimed to enforce, in all of them, a vigilant and faithful discharge of the public business; and that there is no just cause of complaint, from any quarter, at the manner in which they have fulfilled the objects of their creation.⁴²

The members of the minority on the committee simply noted that Jackson had declined to give the committee the documents and papers it had requested, and that in the absence of information the committee had no way of determining the truth or falsehood of allegations that had been made of abuses and neglect of duty in the executive departments.⁴³ On that note the House investigation ended with a whimper.

Impeaching Andrew Johnson

Unlike the impeachments of Richard Nixon and Bill Clinton, both involving charges of cover-up and obstruction of justice, the impeachment of Andrew Johnson did not raise any issue of access to executive branch documents. Republicans in Congress, locked in a battle with Johnson over Reconstruction policies, had been looking for a way to impeach him. The opportunity came with the Tenure of Office Act of 1867, which gave the Senate a role in the suspension and removal of federal officers. If the Senate refused to concur in the President's decision to suspend an official, including a member of his own Cabinet, the suspended officer would resume the functions of his office. Johnson vetoed the bill, claiming that it violated the Constitution and the construction placed upon it by the First Congress.⁴⁴ Both Houses promptly overrode the veto and the bill became law on March 2, 1867.⁴⁵

Johnson hoped that the thorn in his Cabinet, Secretary of War Edwin Stanton, would resign. No such luck. Unwilling to wait any longer, Johnson wrote to Stanton on August 5, 1867 to say that "your resignation as Secretary of War will be accepted."⁴⁶ Stanton didn't take the hint. A day later he replied that he would not resign. Johnson suspended Stanton on August 12 and replaced him

42. *Id.* at 198.

43. *Id.* (third point under "Views of the Minority").

44. 8 Richardson 3690–96.

45. 14 Stat. 430 (1867).

46. 8 Richardson 3782.

with Ulysses S. Grant, to serve as Secretary of War ad interim.⁴⁷ Johnson thought that the constitutionality of the Tenure of Office Act would be taken to the Supreme Court, where it would be struck down. No such luck again.

On January 13, 1868, the Senate refused to concur in the suspension.⁴⁸ At that point Grant resigned, locked his office, and left the key with a military aide. Stanton walked over, picked up the key, and reentered his old office.⁴⁹ On February 21, Johnson removed Stanton and replaced him with Lorenzo Thomas.⁵⁰ Those actions led directly to impeachment proceedings.

The House charged Johnson with many offenses, ranging from usurpation of power to corrupt interference in elections.⁵¹ Members of the House first took aim at “the special acts of mal-administration” involving Johnson’s “great overshadowing purpose of reconstructing the shattered governments of the rebel States in accordance with his own will.”⁵² The House had no problem in gaining access to documents and hearing testimony from administration officials.⁵³ When the House on February 10 requested extensive correspondence between Johnson and Grant, Johnson supplied it the next day.⁵⁴ By the time the House agreed to articles of impeachment, most related to Stanton and the Tenure of Office Act.⁵⁵ In the Senate, the effort to remove Johnson fell one vote short of the two-thirds majority needed.

Watergate

During his impeachment proceedings, Richard Nixon insisted on the right to withhold information from a congressional inquiry if he determined that the release of such documents would violate the constitutional doctrine of executive privilege. Faced with subpoenas from the House Judiciary Committee, Nixon argued that the release of presidential conversations to Congress would undermine the independence of the executive branch and jeopardize

47. *Id.* at 3754.

48. 16 Senate Executive Journal 130 (1887).

49. Albert Castel, *The Presidency of Andrew Johnson* 159 (1979).

50. 8 Richardson 3861.

51. H. Rept. No. 7, 40th Cong., 1st Sess. 1 (1867).

52. *Id.* at 2.

53. Impeachment Investigation: Testimony taken before the Judiciary Committee of the House of Representatives in the Investigation of the Charges Against Andrew Johnson, 39th Cong., 2d Sess. and 40th Cong., 1st Sess. (1867).

54. 8 Richardson 3800–18.

55. *Id.* at 3907–12.

the operations of the White House. A line had to be drawn somewhere, he told the committee, and he would be the one to do it. The committee would get some documents, but not all, and Nixon would decide whether the documents needed to be edited before release.⁵⁶ The committee denied that a President had any authority to determine what kind of evidence to share with a Congress conducting an impeachment inquiry.⁵⁷

In June 1972, five people were arrested while trying to burglarize the headquarters of the National Democratic Committee at the Watergate complex. It was quickly established that others were involved and they could be traced to the Republican Committee to Re-elect the President (CRP). In August, President Richard Nixon offered advice that would later come back to haunt him: “What really hurts in matters of this sort is not the fact that they occur, because overzealous people in campaigns do things that are wrong. What really hurts is if you try to cover it up.”⁵⁸

When Congress started to investigate, Nixon issued a statement on March 2, 1973, objecting to the appearance of White House Counsel John Dean at congressional hearings. Nixon said that “no President could ever agree to allow the Counsel to the President to go down and testify before a committee.”⁵⁹ He later elaborated on the reasons for refusing to allow White House aides to testify: “Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency.”⁶⁰ As explained in Chapter 10, White House aides often testify before congressional committees.

In a statement on March 15, Nixon offered other reasons for denying Congress the right to question Dean at legislative hearings: “Mr. Dean is Counsel to the White House. He is also one who was counsel to a number of people on the White House Staff. He had, in effect, what I would call a double privilege, the lawyer-client relationship, as well as the Presidential privilege.”⁶¹ Nixon reiterated that members of the White House staff “will not appear before a committee of Congress in any formal session.”⁶²

56. John R. Labovitz, *Presidential Impeachment 201–06* (1978).

57. *Id.* at 205.

58. *Public Papers of the Presidents, 1972*, at 828.

59. *Public Papers of the Presidents, 1973*, at 160.

60. *Id.* at 185.

61. *Id.* at 203.

62. *Id.* at 211.

Political pressures made it impossible for Nixon to adhere to those legal doctrines. On April 17, he agreed to allow White House aides to testify before the Senate Select Committee on Presidential Campaign Activities, provided they followed four ground rules: White House aides would appear, in the first instance, in executive session, if appropriate; executive privilege would be expressly reserved and could be asserted during the course of the hearing to any question; the proceedings could be televised; and all members of the White House staff would appear “voluntarily” and testify under oath to “answer fully all proper questions.”⁶³ Reference to the voluntary appearance enabled Nixon to retain some semblance of his separation of power theory, but basically the White House capitulated while insisting that it didn’t have to.

On July 7, Nixon further relaxed the guidelines. He directed that the right of executive privilege concerning possible criminal conduct “no longer be invoked for present or former members of the White House staff.”⁶⁴ He also agreed to permit “the unrestricted testimony of present and former White House staff members” before the committee.⁶⁵ Beginning on May 17 and continuing until September 23, 1975, a number of White House aides testified before the committee, including John Dean, Jeb Magruder, Alexander Butterfield, Herbert Kalmbach, John Ehrlichman, H.R. Haldeman, Patrick Buchanan, Leonard Garment, and Gen. Alexander M. Haig, Jr.⁶⁶

Special Prosecutor Archibald Cox urged Sam Ervin, chairman of the Senate Watergate Committee, not to hold televised hearings. Cox feared that the pretrial publicity would jeopardize his prosecution efforts and that the committee would grant immunity to key witnesses. Undeterred, Ervin went ahead. Cox later conceded that the hearings “certainly were a contribution to the public good as it turned out. None of them did interfere in any way with prosecution, and they may have produced some evidence...that might not otherwise have come out.”⁶⁷ The hearings disclosed to the public a remarkable fact about White House operations. Alexander Butterfield, administrator of the Federal Aviation Administration, told committee staff about the existence of listening and recording devices in the Oval Office.

63. *Id.* at 299.

64. *Id.* at 636–37.

65. *Id.* at 637.

66. The complete list appears in Louis Fisher, “White House Aides Testifying Before Congress,” 27 *Pres. Stud. Q.* 139, 141–42 (1997), and is discussed in Chapter 10 of this book.

67. Ken Gormley, Archibald Cox: Conscience of a Nation 270–73 (1997).

After much legal maneuvering, some of these tapes wound up in the hands of Judge John Sirica. They revealed unmistakable evidence of a cover-up, such as Nixon's remark at a March 22, 1973 meeting: "And, uh, for that reason, I am perfectly willing to—I don't give a shit what happens. I want you to stonewall it, let them plead the Fifth Amendment, cover-up or anything else, if it'll save the plan."⁶⁸ Other tapes, released as a result of the Supreme Court's decision in *United States v. Nixon* (1974), demonstrated that Nixon had agreed that the CIA should put a halt to the FBI investigation.⁶⁹ With the release of the tapes, Nixon recognized that a House vote of impeachment "is, as a practical matter, virtually a foregone conclusion."⁷⁰ He announced his resignation on August 8, 1974, effective the next day.

The House Judiciary Committee prepared three articles of impeachment. The first charged that Nixon "prevented, obstructed, and impeded the administration of justice." Article I included "withholding relevant and material evidence or information from lawfully authorized investigative officers." Article II focused on Nixon's abuse of the IRS, the FBI, and the CIA to violate the constitutional rights of citizens. In Article III, the committee stated that Nixon had failed to produce "papers and things as directed by duly authorized subpoenas" issued by the committee, and that he had "willfully disobeyed such subpoenas."⁷¹

In elaborating on Article III, the committee explained that eight subpoenas sought tape recordings, notes and other writings relating to 147 conversations, a list of Nixon's meetings and phone conversations for five specified periods, papers and memos relating to the Watergate break-in, and copies of Nixon's daily news summaries for a 3½ month period in 1972. The committee informed Nixon that those materials were necessary for the committee to investigate the Watergate matter, domestic surveillance, possible connections between campaign contributions from certain diary cooperatives and governmental decisions on price supports, the conduct of ITT antitrust litigation, and the alleged abuse of the IRS. In response to the subpoenas, Nixon produced edited transcripts of all or part of 33 subpoenaed conversations and six conversations that had not been subpoenaed, edited copies of notes taken by Ehrlichman during meetings with Nixon, and copies of certain White House news summaries. The committee received no handwritten notes by Nixon and none of the tapes of 147 subpoenaed conversations. Article III passed the

68. John J. Sirica, *To Set the Record Straight* 162 (1979).

69. H. Rept. No. 93-1305, 93d Cong., 2d Sess. 53 (1974).

70. *Public Papers of the Presidents*, 1974, at 622.

71. H. Rept. No. 93-1305, 93d Cong., 2d Sess. 1–4 (1974).

committee by a vote of 21 to 17.⁷² Nixon's refusal to comply with the subpoenas, said the committee, "is a grave interference with the efforts of the Committee and the House to fulfill their constitutional responsibilities..."⁷³

The committee concluded that the edited transcripts of 33 conversations, provided by Nixon, were untrustworthy and unreliable. In comparing the edited transcripts with recordings it had found omissions, material added, attributions of statements by one speaker when they were made by another, statements the White House called unintelligible when the committee could hear the words, and statements that "were inaccurately transcribed, some in a manner that seriously misrepresented the substance and tone of the actual conversation."⁷⁴ After the Supreme Court decision, the White House informed Judge John Sirica that the tape of an April 17, 1973 conversation between Nixon, Haldeman and Ehrlichman contained a gap of approximately five minutes. The edited transcript given to the committee did not indicate any gap.⁷⁵ These and other disclosures convinced the committee that not only had Nixon failed to comply with the terms of the subpoenas, the edited transcripts "do not accurately and completely reflect the conversations that they purport to transcribe."⁷⁶

Iran-Contra

The Iran-Contra story broke to a startled nation in November 1986, revealing that the Reagan administration had sold arms to Iran and had sent funds to the Contra rebels in Nicaragua in violation of statutory restrictions. White House officials learned from Watergate that worse than the deed was the cover-up. Attorney General Edwin Meese, III, thought that the merging of assistance to the Contras with the sale of arms to Iran could cause the possible "toppling" of Reagan, unless the administration made facts publicly available and got them "out the door first."⁷⁷ Presidential aides worried about the vulnerability of President Reagan to impeachment.⁷⁸ Getting facts out quickly would prevent opponents from charging a cover-up.⁷⁹ Because Reagan made

72. *Id.* at 187–88.

73. *Id.* at 188–89.

74. *Id.* at 203.

75. *Id.* at 204.

76. *Id.* at 205.

77. Theodore Draper, *A Very Thin Line: The Iran-Contra Affairs* 521 (1991).

78. Lawrence B. Walsh, *Firewall: The Iran-Contra Conspiracy and Cover-up* 9, 355, 358–59, 360 (1997).

79. *Id.* at 189, 379.

documents and executive officials available to Congress and waived executive privilege, members of Congress never took seriously the thought of impeaching Reagan.⁸⁰

President Reagan permitted his two former National Security Advisers, Robert McFarlane and John Poindexter, to testify before Congress,⁸¹ allowed his Cabinet officials, including Secretary of State George Shultz and Secretary of Defense Caspar Weinberger, to discuss with Congress their conversations with the President,⁸² and made available to Congress thousands of sensitive, classified documents.⁸³ Shultz told the Iran-Contra committee that, as instructed by President Reagan, he had made available to the committee and other investigative groups “my records, cables, memoranda, my notes of my personal recollections made contemporaneously with events, all of the material that I have has been made available and you have it.”⁸⁴ In his previous 10½ years as a Cabinet officer, he had always taken the position that his conversations with the President were “privileged, and I would not discuss them. This is an exception, and I have made this material available at the President’s instruction...”⁸⁵ Similarly, Weinberger testified that he would never discuss “any conversations, any advice, any opinions, any meetings that I have had with the President. I have never done that until early this year, I guess it was. When—at the President’s directions, I spoke very fully and very frankly of all the statements made in meetings with the President in connection with this special matter...”⁸⁶

Through his cooperation with Congress, Reagan hoped to avoid any risk of impeachment. He also directed Attorney General Meese to go the special panel and request an independent counsel. The panel appointed Lawrence Walsh, whose efforts to uncover the full scope of the scandal were regularly thwarted by the administration’s strategy of withholding information, denying the release of classified documents, and issuing presidential pardons.

80. William S. Cohen and George J. Mitchell, *Men of Zeal: A Candid Inside Story of the Iran-Contra Hearings* 45–50 (1988).

81. Draper, *A Very Thin Line*, at 498.

82. *Id.* at 540.

83. Report of the Congressional Committees Investigating the Iran-Contra Affair, H. Rept. No. 100-43 and S. Rept. No. 100-216, 100th Cong., 1st Sess. xvi (1987).

84. “Iran-Contra Investigation,” Joint Hearings before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran (Part 100-9), 100th Cong., 1st Sess. 1–2 (1987).

85. *Id.* at 2.

86. *Id.* (Part 100-10), at 132.

As part of the investigation, Walsh looked into the activities of Joseph Fernandez, the CIA station chief in Costa Rica who helped Col. Oliver North supply the Contras in violation of the Boland Amendment. On June 20, 1988, a grand jury indicted Fernandez for false statements and obstruction and for conspiring with North and others to carry out the covert action. The conspiracy count was later dropped. Nevertheless, the pursuit of Fernandez would illuminate the CIA's role and probably lead to others in the administration who worked with Fernandez. However, that line of inquiry was snuffed out when Attorney General Richard Thornburgh refused to release classified information needed for the trial.⁸⁷

On June 16, 1992, a grand jury indicted Weinberger for five felonies, including one count of obstructing a congressional investigation, two counts of making false statements, and two charges of perjury. Here was an opportunity to learn about the involvement of a Cabinet officer. Moreover, President George Bush was likely to be called to Weinberger's trial to testify. Although Bush had denied knowing that Weinberger and Shultz had opposed the sale of arms to Iran, a supplemental indictment of Weinberger revealed that Bush, as Vice President, had attended the White House meeting where Reagan overrode Weinberger and Shultz.⁸⁸

Once again Walsh hit a stone wall. On December 24, 1992, President Bush pardoned six people involved in the Iran-Contra affair. Heading the list was Weinberger, but the pardon order also covered three members of the CIA involved in Iran-Contra: Duane Clarridge, Alan Fiers, and Clair George. Clarridge had been indicted on seven felony counts; Fiers, facing indictment for a felony count, had agreed to plead guilty to two misdemeanors and cooperate with Walsh; George was charged with lying to three congressional panels and a federal judge. George's case ended in a mistrial, but a retrial found him guilty of two felony counts of lying to Congress.⁸⁹ The pardons wiped out the last chance to learn the extent of CIA involvement.

Clinton's Impeachment

President Clinton was investigated by two outside counsel. After the independent counsel statute expired in 1992, Attorney General Janet Reno invoked her own authority a year later to appoint Robert Fiske as special prosecutor to

87. Walsh, *Firewall*, at 210–11, 218–19.

88. *Id.* at 415, 419.

89. *Id.* at 285–86, 313, 423, 446.

investigate several issues, including the involvement of Bill and Hillary Clinton in a real estate investment that became known as Whitewater. When Congress reauthorized the independent counsel statute in 1994, Reno asked the special panel of three judges to appoint an independent counsel. They selected Kenneth Starr.

Starr inherited some of the issues that Fiske had explored, including Whitewater and the death of White House aide Vincent Foster. Starr's jurisdiction expanded in 1996 to include the firing of staff from the White House Travel Office and charges that the White House had misused confidential FBI files. In 1998, Starr was assigned the task of investigating allegations of subornation of perjury, obstruction of justice, and intimidation of witnesses surrounding the affair between Clinton and White House intern Monica Lewinsky.

Starr managed to prevail on a series of legal disputes after the White House had placed one hurdle after another in his path. Presidential aides insisted that they could not be compelled to testify at the grand jury. Hillary Clinton believed that her discussions with a government attorney were privileged. The Secret Service argued that the agents responsible for protecting the President should not be forced to testify about matters of Clinton's conduct. On all those matters and others, Starr won at every level: from the district court through appellate courts. Efforts by the administration to take the issues to the Supreme Court were unsuccessful. These court victories for Starr came at substantial cost, however, for the investigation dragged on and gave some the impression that Starr was out to "get the President."

On September 11, 1998, Starr forwarded to the House of Representatives a report on the Lewinsky matter, concluding that Clinton may have committed impeachable offenses, including lying under oath at a deposition, lying under oath to a grand jury, and obstruction of justice. Starr also found "substantial and credible" information that Clinton's actions since January 17, 1998, regarding his relationship with Lewinsky, "have been inconsistent with the President's constitutional duty to faithfully execute the laws."⁹⁰

This latter charge had several parts, including Starr's conclusion that Clinton had "repeatedly and unlawfully invoked the executive privilege to conceal evidence of his personal misconduct from the grand jury."⁹¹ Starr drew attention to the 1994 opinion by White House Counsel Lloyd Cutler that executive privilege would not be invoked for cases involving personal wrongdoing by an

90. The Starr Report 244 (New York: Public Affairs, 1998).

91. *Id.* at 247.

executive official.⁹² Yet Clinton invoked executive privilege to cover the testimony of five witnesses (Bruce Lindsey, Cheryl Mills, Nancy Hernreich, Sidney Blumenthal, and Lanny Breuer) and acquiesced in the Secret Service's attempt to create a new protection function privilege, to prevent Secret Service officers from testifying. All such efforts by Clinton failed.⁹³

The House Judiciary Committee considered Starr's recommendations and reported four articles of impeachment: perjury in the grand jury, perjury in the civil case, obstruction of justice, and abuse of power. The latter two did not repeat Starr's claim that Clinton had unlawfully invoked executive privilege. Instead, the committee in Article III charged that Clinton had "prevented, obstructed, and impeded the administration of justice" and had engaged in a "course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony" related to the Paula Jones suit.

Article IV charged that Clinton had engaged in conduct that resulted in "misuse and abuse of his high office," impaired the conduct of lawful inquiries, and "refused and failed" to respond to written questions submitted to him by the committee.⁹⁴ On November 5, 1998, the committee presented Clinton with 81 requests for admission, allowing him to dispute or affirm sworn evidence held by the committee. Clinton responded on November 27. Similar to the judgment of the House Judiciary Committee in 1974 regarding Nixon's response, the committee concluded that several of Clinton's answers were "clearly perjurious, false, and misleading." In responding in that manner, the committee said, Clinton "exhibited contempt for the constitutional prerogative of Congress to conduct an impeachment inquiry."⁹⁵ The committee found that his answers were "a continuation of a pattern of deceit and obstruction of duly authorized investigations."⁹⁶

Article IV originally included a paragraph charging that Clinton had "frivolously and corruptly asserted executive privilege...for the purpose of delaying and obstructing a Federal criminal investigation and the proceedings of a Federal grand jury."⁹⁷ Rep. George Gekas (R-Pa.) offered an amendment to strike three paragraphs from Article IV, including the one on executive privilege. His amendment was adopted 29 to 5. Rep. Bob Goodlatte (R-Va.) explained the purpose of the Gekas amendment. While those voting in favor of the amendment believed that Clinton had "improperly exercised executive

92. *Id.*

93. *Id.* at 248–50.

94. H. Rept. No. 105-830, 105th Cong., 2d Sess. 4 (1998).

95. *Id.* at 77.

96. *Id.*

97. *Id.* at 85.

privilege,” they didn’t believe this conduct by Clinton represented an impeachable offense.⁹⁸

The House impeached Clinton on the articles dealing with perjury and obstruction, not on abuse of power. The Senate declined to remove Clinton from office, voting 50 to 50 for the obstruction article and 45 to 55 for the perjury article, far short of the necessary two-thirds majority. However, several Senators who voted “not guilty” explained in their floor statements that Clinton was actually guilty of one or both counts. For example, Senator Robert C. Byrd (D-W.Va.) voted “not guilty” on both articles although he thought that Clinton’s behavior constituted “an impeachable offense, a political high crime or high misdemeanor against the state.”⁹⁹ Not wanting to remove Clinton, Byrd voted “not guilty.” Other Senators, including Susan Collins (R-Me.), Olympia Snowe (R-Me.), James Jeffords (R-Vt.), Fred Thompson (R-Tenn.), Ted Stevens (R-Alas.), and Slade Gorton (R-Wash.), concluded that Clinton was guilty on one or both articles but voted “not guilty” because they thought removal was unwarranted.¹⁰⁰ Senator Snowe put it his way; “Acquittal is not exoneration.”¹⁰¹ John Breaux, a Democrat from Louisiana, voted against the articles but cautioned that his vote “is not a vote on the innocence of this President. He is not innocent.”¹⁰² Bob Kerrey, Democrat from Nebraska, added: “While there is plenty of blame to go around in this case, the person responsible for it going this far is the President of the United States.”¹⁰³

Is Censure an Option?

As an alternative to impeachment, the House considered and rejected a motion to censure Clinton, raising some of the same issues faced by the Senate in 1834 when it censured President Andrew Jackson. Draft language by House Democrats stated it to be the sense of Congress that Clinton had “violated the trust of the American people, lessened their esteem for the office of President and dishonored the office which they have entrusted to him.” Staying away from the explosive charges of perjury and obstruction of justice, the draft censure resolution nevertheless came close by charging that Clinton had “made

98. *Id.* at 84.

99. 145 Cong. Rec. S1636 (daily ed. February 12, 1999).

100. *Id.* at S1568, S1546–47, S1669–71, S1595, S1554–55, S1559, and S1462–64.

101. *Id.* at S1546.

102. *Id.* at S1501.

103. *Id.* at S1505.

false statements concerning his reprehensible conduct with a subordinate” and “wrongly took steps to delay discovery of the truth.” Clinton, “by his conduct has brought upon himself and fully deserves the censure and condemnation of the American people and the Congress; and by his signature on this joint resolution, the President acknowledges this censure.”¹⁰⁴

Clinton was ready to sign the resolution if presented to him: “Should they determine that my errors of word and deed require their rebuke and censure, I am ready to accept that.”¹⁰⁵ However, the Republicans on the House Judiciary Committee concluded that the Constitution “contains a single procedure for Congress to address the fitness for office of the President of the United States—impeachment by the House, and subsequent trial by the Senate.”¹⁰⁶ The framers, by requiring a majority vote in the House and a two-thirds vote in the Senate, intended to make impeachment “into such an awesome power that Congress could not use it to harass executive officials or otherwise interfere with operations of coordinate branches.”¹⁰⁷

The Republicans on the Judiciary Committee also decided that a censure resolution would violate the Constitution’s prohibition on bills of attainder, which the British Parliament had used to punish individuals. By prohibiting that procedure, the framers intended to prevent “legislative exercise of the judicial function, or more simply trial by legislature.”¹⁰⁸ Would Clinton’s agreement to sign the censure resolution erase its punitive nature? The Republicans said it would not, pointing to legislative history that a resolution of censure is either an action to punish the President or not, and if it is intended to punish, it is a bill of attainder. If it does not punish the President, “it is meaningless.”¹⁰⁹

When the resolution containing the articles of impeachment reached the House floor, Rep. Rick Boucher (D-Va.) offered a motion to recommit the resolution to House Judiciary with instructions to report it back with a resolution of censure. The chair held that the motion to recommit with instructions was not germane. When a member attempted to appeal the chair’s ruling, the House voted 230 to 204 to lay the appeal on the table.¹¹⁰

Senate Democrats drafted a censure resolution as a way of expressing bipartisan rebuke to Clinton. His “inappropriate relationship with a subordi-

104. Washington Post, December 13, 1998, at A28.

105. Public Papers of the Presidents, 1998, II, at 2158.

106. H. Rept. No. 105-830, at 137.

107. *Id.*

108. *Id.* at 138 (citing *United States v. Brown*, 381 U.S. 437, 442 (1965)).

109. *Id.* at 138–39 (citing Rep. Edward Pease (R-Ind.)).

110. 144 Cong. Rec. H12031-39 (daily ed. December 19, 1998).

nate in the White House... was shameless, reckless, and indefensible.” He “deliberately misled and deceived the American people and officials in all branches of the United States Government.” The reference to all branches meant that he misled and deceived the courts, a point made explicit by stating that he “gave false or misleading testimony and impeded discovery of evidence in judicial proceedings.” Senate Democrats were much more blunt here than House Democrats. Impeding discovery of evidence in a judicial proceedings seems indistinguishable from obstruction of justice. Other portions of the censure resolution stated that Clinton had brought “shame and dishonor to himself and to the Office of the President” and had “violated the trust of the American people.”¹¹¹ Facing a possible filibuster, the Senate put the censure resolution aside.¹¹²

Other than President Grant’s curious comment in 1876, Presidents and their administrations recognize that when the impeachment machinery starts up, arguments about executive privilege, confidential communications, and other traditional arguments for withholding information from Congress look too much like obstruction of justice to seriously entertain. Of course, a President’s assurance that he will “fully cooperate” with the inquiry does not mean that he and the White House will not try every conceivable roadblock. In the end, the House will get the information it needs to pursue impeachment and it can expect support from the courts if an administration decides to block legislative access.

Whether an impeachment of a President will succeed depends on the emergence of bipartisan support. In the case of Nixon, a number of Republicans on the House Judiciary Committee joined with Democrats in agreeing that impeachment was justified. That development, along with the Supreme Court’s opinion in *United States v. Nixon* (1974), was sufficient ground for Nixon to resign. With Clinton, the committee broke along party lines. Just as one can accuse the Republicans on the committee for voting in partisan manner, so one can make the same argument about the Democrats who defended Clinton. Either way, the lack of bipartisan support in the House doomed any prospect of removal by the Senate.

111. New York Times, February 6, 1999, at A8.

112. Eric Schmitt, “In the End, Senate Passes No Harsh Judgment on Clinton,” New York Times, February 13, 1999, at A8; Edward Walsh, “Senate Puts Censure Resolution on Hold—Indefinitely,” Washington Post, February 13, 1999, at A32; Eric Schmitt, “Threat of Filibuster Makes a Vote on Censure Nearly Impossible,” New York Times, February 12, 1999, at A16.

