Congress and the Subpoena Power

Should the House Judiciary Committee take the President to court for refusing to honor its demands for additional Watergate tapes and evidence? Or should it avoid the courts and consider the refusal itself as a principal basis for impeachment?

Recently, five well-known authorities in the fields of law and politics took up this knotty question as part of a broader discussion of Watergate-related issues. The five were Alexander M. Bickel, professor of law and legal history at Yale Law School, who chaired the discussion; Richard M. Scammon, director of the Elections Research Center of the Governmental Affairs Institute; Harry H. Wellington, professor of law at Yale Law School; James Q. Wilson, professor of government at Harvard University, and Ralph K. Winter Jr., professor of law at Yale Law School.

The five were part of a "round table" sponsored by the American Enterprise Institute, from whose pamphlet transcript, "Watergate, Politics and the Legal Process" the following excerpts were taken. An editorial related to this subject also appears today:

Mr. Winter: . . . It seems to me that in terms of raw power, the Congress has the power to impeach and to remove for more or less whatever cause it wants to. It shouldn't do that. It should impeach only for gross abuses, in my view. It also seems to me that you can't limit it to indictable offenses. If we elect a President who one day wakes up and says—"Gosh, I've got a nice place in the islands; I'll see you guys around"—and just walks out, I think our Constitution provides a means of handling that situation. . . .

In thinking about it, I come down as follows: When the claimed impeachable offense is of a noncriminal nature, subpoenas are nonjusticiable. Where the subpoena charges an offense that is an indictable offense, a court might well say this is like a grand jury subpoena. In the latter case, impeachment of a President is a substitute for indictment of a President, and I think the need for enforcement is much greater there. But, again, it has to be specific evidence, sworn testimony that the evidence contains matters relevant to the offense. It ought not to be some kind of general claim of power to the indexes of all presidential papers and all presidential assistants' papers and the right to go through those files without restriction. That, it seems to me, is impermissible.

Mr. Bickel: . . . I generally agree. I would not draw the line at offenses that are criminal, indictable offenses.

I certainly agree—it seems to me the text of the Constitution is plain on it—that there can't be judicial review of the impeachment process, that there can't be an appeal from the impeachment judgment in the Senate to the Supreme Court, in effect, for the court to pass on the validity of the impeachment. I think the Constitution just says to the contrary.

On the other hand, that doesn't mean, as Ralph Winter says, that when it comes to a subpoena the judges are equally excluded. It doesn't mean that, for one thing, because the alternative to involving the judicial process in some measure is to force Congress to drop the atom bomb, is to force Congress to say that any denial, any refusal to accede to a request for information, is in itself an impeachable offense. That seems to me a resolution of the problem that is of a magnitude and of a violence, if you will, which is undesirable. So I think, although the inclination seems to be to the contrary in the House now, that the House ought to go to a judge with its subpoenas.

Now, what is the judge to do? Sure the case is easy if the information is relevant to an indictable offense. If it is not, it seems to me the judge cannot avoid asking himself the question, "Is the information relevant to what would properly be an impeachable offense?" You see, while as a matter of raw power the House can impeach for anything, the fact is that it shouldn't and that there ought to be limits on the impeachment power, very serious limits, because otherwise ours will become a parliamentary system of government.

A judge ought to ask that question. I think if it is plain in his mind that the information is not relevant to an impeachable offense, for example, if the House now asks for information on the President's practice of impounding funds—a dubious constitutional practice perhaps, but surely not an impeachable offense—in such an event, I think a judge ought to say, "I will not enforce that subpoena". . . .

So, I would place the judge in an arbitrating position, in order to make it less likely that Congress will enforce its subpoenas by impeachment itself, and in order to have at this preliminary stage some control over the impulse to use the impeachment power in unbridled fashion—which is an impulse, if we allow it to proceed to its satisfaction, that would destroy the separation of powers and make the President simply a creature of Congress.

Mr. Wellington: I would like to disagree in part, if I may. Certainly I don't want to disagree with the proposition that the House should be very careful and circumspect in deciding what constitutes an impeachable offense. But I am concerned about the House going to a court and asking it to enforce a subpoena. I am concerned quite simply because of separation of powers.

I can see the merit of the contrary position. It sounds like a nice accommodation. The trouble is, however, that it erodes the political question doctrine.

First, imagine, if you will, an order by a district court judge enforcing a subpoena, and imagine the order being appealed. Perhaps it will finally reach the Supreme Court. Remember that if we do have an impeachment trial, the Chief Justice of the Supreme Court sits over the Senate. This troubles me.

Second, I don't know how a court writes an opinion. What does it say about why it is or is not enforcing a subpoena that doesn't very seriously intrude on what I would take the Constitution to empower the House to decide, namely, what is an impeachable offense?

I think it is a very hard problem. I don't like saying that the court shouldn't be involved in it—it's such a nice-seeming accommodation—but it seems to me that judicial enforcement of a House subpoena in an impeachment proceeding is the paradigmatic example of the political question.

Mr. Bickel: Well, it's political enough. The Constitution says the House has the sole power to vote a bill of impeachment. And it says the Senate tries. It doesn't say anything about how you get information.

The real problem is that these two things overlap, and that you can't decide the information question without having something to say about the nature of the impeachment power. You only say that in connection with your subpoena. Whatever you say makes no inroads at all upon the House's ultimate power to impeach and the Senate's ultimate power to try, which stand as nonjusticiable.

Mr. Wellington: But doesn't it substantially influence what the House then will do—

Mr. Bickel: It may.

Mr. Wellington:—and doesn't the court then play a very important role in deciding what constitutes an impeachable offense? If so, it is contrary to the spirit of the Constitution.

Mr. Bickel: It may, but it is an accommodation, I think to which one is led by an absolute horror of the opposite result. Because the opposite result would be that you could probably turn almost anything into an impeachable offense, by asking for information, issuing your subpoena and, when the President denied it, you'd have an impeachable offense. . . .

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—Alexander Bickel

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Mr. Wilson: Why do we assume that the courts, whom we've previously described as 500 district court judges running around changing the zoning laws and appointing prosecutors to investigate the NAACP, are or should be a reasonable check on the impeachment process?

We've only had one impeachment, and that did not lead to a conviction. We have had no other serious efforts to impeach the President.

It seems to me that the principal check on the impeachment process is the political position of Congress vis-a-vis the public and the presidency. Congress, far from having rushed headlong into premature impeachment, has moved—to put it mildly—with majestic stateliness, accompanied by a good deal of frivolous bickering on the side.

What we really object to are some of the more dubious, but altogether to be expected, staff reports, public speeches, and gallery-pleasing declamations of those who would like to get Richard Nixon for everything from Tricia's wedding to the Cambodian incursion, from ITT to Watergate. But I see no support for those sentiments in the Congress as a whole. And I think that Congress, which is composed of practical men and women with substantial political experience, is aware of the enormous respect the American people have for the office of the presidency, the enormous respect they have for established procedures.

It has taken severe jolts to get public opinion to even consider that we may be in a desperate position, and there is still no general public support for the notion of impeachment. There is a support, perhaps, for a change of some sort if it could be arrived at by a process to which the word impeachment did not apply. I think that that is going to be a continuing feature of the American political system, because these attitudes to which Congress is responding—shares these attitudes—are not attitudes of the moment.

I think Dick Scammon would say that opinion polls and surveys, going back as far as we have them, indicate this enormous reservoir of deference, almost amounting—if I may shift the metaphor—to an inertial force that supports the institutions of government. It is best illustrated

in the field of foreign policy. The American public never wants to go to war. All opinion polls show we should stay out of Vietnam, stay out of Israel, stay out of Europe, stay out of the Far East. The same polls always show that the public will support the President in whatever he does, including taking us to war in any of those places. And the support will last for a long period of time—not indefinitely, but for a long period of time.

That it seems to me, is the crucial political reality around which these constitutional issues are revolving.

Mr. Scammon: I think it is basically correct that when you talk about impeachment what you are talking about is a political action with respect to the presidency that many people view with revulsion. It is not easy to bring off. It has been tried, and the public hasn't given the idea very high marks. It really is the reverential awe in which people hold the presidency as a general institution that is the best check of all.

I do think also, Alex, that your point in response to Mr. Wellington is a sound one. If you do carry through a successful impeachment, you're never going to be a virgin again. In other words, the third attempt would be a lot easier, and maybe then we would be approaching something of a parliamentary government. But one must also remember that in a parliamentary government the head of state also has the right to dissolve the legislature.

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Mr. Bickel: Well, I was going to say that I agree that the play of public opinion, that what the people are ready for, is decisive. It is decisive, I think, for the whole operation.

I don't think public opinion has the same weight on a specific request for information and the procedures by which the process goes forward or doesn't go forward. I don't think that public opinion—one way or the other, if ready for impeachment, or not ready for impeachment—is going to help you with that.

So, when it comes to a request of information in a subpoena, you've got a deadlock in the government, a deadlock which can be broken only by what I consider a rash and overreactive kind of thing. And the Congress might feel that it wants to break the deadlock that way because it's become a matter of institutional pride—you know, institutional machismo. One can see the beginning of that in the House today. . . . Maybe impeachment for not giving information. It is for that reason that I think one wants judges in there, inserted not to make policy and run school boards, but to perform what is quite properly a judicial function.

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Mr. Scammon: But I think the basis for impeachment would have to be in the minds of the majority of the members in the Congress, the men who are going to manage the trial of the President before the Senate, and those who seek his conviction and removal from office. I don't think there is a member who is going to vote frivolously on this question.

Mr. Bickel: No, but they are put up to this choice: Either they may vote an impeachment, simply because of a denial of a request for information, and they may feel hot enough about that and be supported by the country in a general way, but perhaps not in the issue itself—which would be bad. Or they may withdraw and desist—which also would be bad. It is an impasse which I think is insoluble. . . .

. . . We're talking about a judge sitting in the performance of a judicial function as a neutral agent, not self-starting, not investigating, not appointing anybody, but rather deciding what is a proper and customary judicial question: whether a subpoena is based on a sufficient claim of authority. Judges, of course, decide this question in every contempt-of-Congress case.

Mr. Wellington: Excuse me, but isn't there a difference in that the judge is not just deciding whether the subpoena is appropriate. He is also deciding what an impeachable offense is. He cannot decide whether it is appropriate to enforce a subpoena until he answers the second question of what is a constitutional ground for impeachment. I would maintain that that second question is none of his business.

Mr. Bickel: But, Harry, he doesn't conclude the second question. When he decides what is an impeachable offense, or that something is not an impeachable offense, that is not a decision that binds Congress so that Congress may not impeach for that offense.

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Mr. Wellington: I would prefer to leave the question to Congress, and I would prefer to allow the President's attorney to respond to that committee and explain why the White House would not produce the information. Let the committee then reach its conclusion about it, and put it to the House.

Mr. Bickel: Which does what?

Mr. Wellington: Does exactly what I would suppose a judge would do, but the House is empowered to do what a judge is not empowered to do.

Mr. Bickel: You've taken the House from a consideration of an impeachable offense which is obstruction of justice, and you've shifted the issue to an impeachable offense which is a failure to respond to a subpoena. And that becomes the impeachable offense, and that's what the House impeaches on. I think that is a very undesirable result.

Mr. Wilson: . . . We are speaking as if we are confronting the first case in history in which a President of the United States may refuse information to a committee of Congress. Presidents of the United States refuse information to committees of Congress every year. That's what executive privilege is. That's what the refusal to allow presidential appointees under certain circumstances to testify amounts to.

And in all of these cases, Congress gets very mad. Its machismo is offended—or whatever the female equivalent of machismo is for Mrs. Abzug. (Laughter.) The members get indignant. They denounce, and they study the records of the Federal Convention. But they don't impeach. Why don't they impeach? Because they say, "Well, look, he has turned us down. He is a rascal. But it is not an impeachable matter."

Now we're assuming that in this case, because they are asking for information in connection with a potential impeachment inquiry—we're assuming that in this case, and this case only, they will get their dander up so that, without adequate grounds and in a frivolous way, they make an impeachment turn on the obstruction of justice. I'm not yet persuaded they will flip from their normal posture of frenzied impotence—and much of their frenzy is calculated because they know they are impotent—to one in which they will become malicious, that is, to try to impeach a President on weak grounds (which I believe would be a disaster) rather than on sound grounds.

If the President is going to be impeached and convicted, let us not repeat the history of the Warren Commission in which forever after we argue about whether it was the right thing to do or not. If we're going to do it, by God, let us do it, and on the most solid ground possible.

Mr. Bickel: Well, they may not turn that way. They may turn the other way and desist, which with their tendency to frenzied impotence is more likely. But that is bad, too.

What I am saying is that this issue, if allowed to be resolved by Congress, cannot be resolved well. It will be resolved in undesirable ways.