[*Assignment 17*]

G. IMPEACHMENT: "THE PRESIDENT . . . SHALL BE REMOVED FROM OFFICE ON IMPEACHMENT . . . AND CONVICTION"

Art. II, § 4: The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

The Impeachment Clause makes clear that the president, unlike the king of England, is removable from office by impeachment. The only methods for getting rid of the English king were to kill him, force him to abdicate, or drive him into exile. Each method was used from time to time, but none was free of inconvenience.

Indeed, at the convention in Philadelphia, Benjamin Franklin expressly compared impeachment to alternatives rather more violent:

> History furnishes one example only of a first Magistrate being formally brought to public Justice. Every body cried out agst this as unconstitutional. What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character. It wd. be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., 1911); see also Josh Chafetz, *Impeachment and Assassination*, 95 Minn. L. Rev. 347 (2010).

Three presidents in American history have faced a serious challenge from the impeachment power. Two of them, Andrew Johnson and Bill Clinton, were impeached by the House of Representatives but then acquitted by the Senate. The other one, Richard Nixon, was never actually impeached by the House; he resigned when it was clear that if he did not, he would be impeached.

The following sources consider each of these episodes. On the impeachment of President Johnson, there is an excerpt from Professor David Currie narrating the indictment and trial, and showing the constitutional arguments used on both sides. On the impeachment of President Nixon, there is *United States v. Nixon*, 418 U.S. 683 (1974), a decision which required the president to turn over evidence, an act that would quickly lead to his resignation. On the impeachment of President Clinton, we present two competing statements about the standard for impeachment and the House's proper constitutional role. As you read these materials, ask yourself what the circumstances are in which a president should be impeached and removed from office. Can the impeachment power be used to preserve the balance of power between the branches, by disciplining and constraining the president? Or can it be used to undermine the balance of power between the branches, allowing Congress to dominate the president? Or both? Can we have the sweet without the bitter?

David Currie on the Impeachment of Andrew Johnson

The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 437–452 (2008)

Andrew Johnson was not a temperate man. Nor was he the least bit sympathetic toward congressional plans for Reconstruction. It was not long before influential members of Congress decided it would be best if he returned to private life.

Unfortunately for them, the United States did not have a parliamentary system in which a president could be deposed by a simple majority vote of no confidence. The only available weapon was impeachment for and conviction of "treason, bribery, or other high crimes and misdemeanors," which required an accusation by the House of Representatives and a two-thirds vote in the Senate. It was accordingly to the impeachment provisions that Johnson's enemies turned.

1. Failure in the House.

As early as January 1867, before the first Reconstruction Act was adopted, no fewer than three resolutions were introduced in the House urging that President Johnson be impeached. The most detailed of the three was that submitted by Representative James Ashley of Ohio, which specified the crimes and misdemeanors he attributed to the President:

> I do impeach Andrew Johnson, Vice President and acting President of the United States, of high crimes and misdemeanors.
>
> I charge him with a usurpation of power and violation of law:
>
> In that he has corruptly used the appointing power;
>
> In that he has corruptly used the pardoning power;
>
> In that he has corruptly used the veto power;
>
> In that he has corruptly disposed of public property of the United States;
>
> In that he has corruptly interfered in elections, and committed acts which, in contemplation of the Constitution, are high crimes and misdemeanors.

This resolution was shipped off to the Judiciary Committee, which heard reams of evidence and took until November to report. When it did it recommended that the President be impeached—but only by a vote of 5–4.

The crux of Ashley's indictment, the majority declared, was "usurpation of power, which involves, of course, a violation of law." . . . President Johnson had had the gall to attempt to reconstruct the former Confederate states on his own.

The remainder of the report was a bill of particulars nearly sixty pages long. It accused the President, among other things, of having set up new governments in the former Confederate states; of having created offices, filled them, and paid those who held them, all without senatorial or congressional approval; of having returned to their original owners certain railroads seized by the government; of having granted indiscriminate pardons, employed the veto excessively, obstructed the execution of laws, and abused the appointing power by removing officers on political grounds and reappointing nominees after the Senate had rejected them; of having employed federal workers for electioneering purposes while they were being paid a government

salary; of having tried to dissuade the people of the rebellious states from accepting the terms of congressional reconstruction; of having encouraged a bloody riot in New Orleans; and of having endeavored to bring Congress itself "into odium and contempt."

It may well be doubted whether any impeachable acts were shown. The dissenting members of the committee thought not. Among other things, they insisted, crimes were violations of penal laws; both crimes and misdemeanors meant indictable offenses. This conclusion, they argued, followed from the words of the Constitution itself: "[c]rimes" and "[m]isdemeanors" were "terms of art, and we have no authority for expounding them beyond their true technical limits." Other constitutional provisions, the dissenters contended, confirmed this interpretation. Article I provided that a party impeached and convicted would still be subject to indictment and punishment in the ordinary courts; "[h]ow can this be if his offence be not an indictable crime?" Article II empowered the president to pardon offenses against the United States "except in cases of impeachment"; Article III, with the same exception, required a jury trial of all crimes. Both of these clauses, the dissenters suggested, implied that impeachable offenses were indeed crimes in the narrow technical sense—as in their view the term "high crimes and misdemeanors" already made clear. The principal dissent went on to maintain that (with the exception of Judge Pickering's case, which it described as "disreputable") previous impeachments had invariably charged the respondents with indictable crimes, and that (although not all the precedents could be reconciled) the better English cases had recognized the necessity of an indictable offense before the Constitution was adopted. Along the way the dissent quoted Blackstone for good measure: "[A]n impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law."

The reader may have perceived that the above summary says nothing about the views of American commentators. In fact the dissenters barely mentioned them, and then in an effort to show they were not so opposed to the dissenters' own position as might at first glance appear. Not surprisingly, the majority report made considerable hay out of the American observers. In most prominent place stands no less an authority than Alexander Hamilton, who explained to the people of New York when the Constitution was being considered that "[t]he subjects of [a court of impeachment's] jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust." Not a word was said about indictable offenses; the crux of impeachment was abuse of the public trust. . . .

[Then] the report turns to Justice Joseph Story, whose writings explicitly repudiate the minority's position:

> The offences to which the power of impeachment has been, and is ordinarily applied as a remedy, are of a political character. Not but that crimes of a strictly legal character fall within the scope of the power, but that it has a more enlarged operation, and reaches what are aptly termed political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests in the discharge of the duties of political office. . . . [N]o one has as yet been bold enough to assert that the power of impeachment is limited to offences positively

> defined in the statute book of the Union as impeachable high crimes and misdemeanors. . . .

The issue whether an indictable offense was necessary for impeachment would arise again in President Nixon's case a century later. I agree with the prosecution in both cases that it was not. The text of the Constitution does not answer the question; "high crimes and misdemeanors" is a term of art. British precedents are in disarray. The virtual unanimity of early American commentators, beginning with the knowledgeable Hamilton, goes a long way to demonstrate what the Framers must have had in mind. Congressional practice is equally probative of the original understanding, for in none of the earlier impeachments did the House allege the infraction of particular statutory provisions, even when it could easily have done so. Finally, the narrow interpretation urged by President Johnson's defenders left so much heinous conduct outside the pale of impeachment that the constitutional provisions could not serve their intended purpose—such as Judge Humphreys's abandonment of his duties or a president's deliberate usurpation of congressional power.

More important for present purposes than what I think constitute high crimes and misdemeanors is what the House thought in 1867, and significantly not all Republicans agreed at the time that no crime in the technical sense had to be alleged. The dissenters from the Judiciary Committee's report included two Republicans, James Wilson of Iowa and Frederick Woodbridge of Vermont. We must allege specific crimes, said Wilson on the floor of the House; "a bundle of generalities" would not suffice. Indeed, Wilson added, it really didn't matter whether indictable crimes had to be charged; even on the majority's test no impeachable offense had been shown The Constitutional Convention, as Ohio Democrat Philadelph Van Trump pointed out, had at Madison's suggestion rejected a proposal to provide for impeachment on grounds of mere "maladministration"; "[s]o vague a term," Madison had argued, "will be equivalent to a tenure during pleasure of the Senate." The majority's recommendation was roundly defeated; the House found no cause for impeachment.

2. Defeat in the Senate.

That was in December 1867. Then, on February 21, 1868, President Johnson sent the following message to his Secretary of War, Edwin M. Stanton:

> Sir: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States, you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon the receipt of this communication. . . .

Johnson had played right into the House's hands, giving it the smoking gun it had been looking for. The President, crowed Representative Rufus Spalding of Ohio, had violated the Tenure of Office Act, which requires Senate consent to discharge a member of the Cabinet; and the statute makes violation of its provisions a misdemeanor punishable by law. Wilson and Woodbridge, who had dissented when impeachment was first proposed, were convinced: now the President had willfully offended the law of the land.

New York Democrat James Brooks had three answers for the committee: the Tenure Act was inapplicable to Stanton, who had been appointed not by Johnson but by his predecessor, Abraham Lincoln; Congress could not limit the president's authority to discharge a member of his Cabinet, as Congress had decided in 1789;

and in any event the president could not be impeached for an honest difference of opinion as to the validity or interpretation of the law.

After an ample measure of repetition of the arguments on both sides the House voted 126–47 that President Johnson should be impeached. Articles of impeachment were duly drafted and approved.

There were eleven articles in all. As Representative Boutwell informed the House when he offered the committee's draft, most of them were based upon the firing of Stanton. . . . The ninth article alleged that Johnson had told a certain General Emory that the appropriations rider requiring the president to issue orders through the general of the army was unconstitutional, with the intent of inducing Emory to accept orders directly from the president in violation of law. The tenth charged Johnson in a series of "intemperate, inflammatory, and scandalous harangues" had "attempt[ed] to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States" and in so doing had "brought the high office of the President of the United States into contempt, ridicule, and disgrace." The final article in essence accused the President of attempting to obstruct the execution of the Tenure of Office Act, the Reconstruction Act, and the rider concerning the general of the army.

The President's answer admitted that he had removed Stanton . . . but denied that he had broken the law. It conceded he had told Emory the rider was unconstitutional but denied he had asked him to disobey it. It denied that in his addresses he had meant to bring Congress into disrespect or to call its legitimacy into question and invoked his constitutional freedom of speech. And it denied that he had sought to impede the enforcement of the laws.

The trial began on March 30 with the opening statement of Massachusetts Representative Benjamin Butler, one of the managers for the House. Butler was at pains to insist once more that no indictable crime had to be proved . . .

It was not necessary, he said again, that the act be in violation of some positive law.

The crucial question, said Butler, was whether the president had the right to remove and replace his secretary of war. If he had, then the first eight articles would collapse. But he had no such authority. The precedents were conflicting: if the First Congress had decided that Cabinet officers served at the president's pleasure, the Congress that enacted the Tenure of Office Act had decided they did not. The constitutional clause vesting executive power in the president did not give him all powers that could be classified as executive; it was more plausible to conclude that removal followed the power of appointment, which in relevant cases required Senate consent. And even if the president possessed the power of removal, Congress could regulate it under the Necessary and Proper Clause—as it had done by requiring Senate approval in the case of the comptroller of the currency in 1863 and a court-martial for military or naval officers in 1866.

The Tenure of Office Act, Butler continued, was yet another exercise of that congressional power, and it applied to the case at hand. What it said was that Cabinet officers should remain in office "for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate." Secretary Stanton, said Butler, had been appointed by President Lincoln, whose term ran until 1869; he was

thus still in office and could be removed only with the Senate's blessing. . . . Finally, the President had no right to disobey the Tenure of Office Act even if it was unconstitutional, for his authority to pass on its validity was "exhausted" when Congress passed it over his veto.

Former Supreme Court Justice Benjamin R. Curtis, author of the principal dissent in the *Dred Scott* case, made the opening statement for the defense. The Tenure of Office Act, he argued, was inapplicable to Stanton. The Secretary had been appointed by President Lincoln, not by his successor; and Lincoln's first and second terms had both expired. The reason for providing that a Cabinet officer held office only during the term of the president who appointed him was to allow a new president to choose his own Cabinet; and both the House and the Senate had been told when the statute was being debated that it would not require Johnson to keep his predecessor's advisers. Besides, Congress in 1789 had recognized the president's constitutional right to remove the secretary of war; and if he thought a law unconstitutional it was his duty to disobey it—as any ordinary citizen would be free to do—in order to provoke a judicial test of its validity. . . .

The Senate decided to vote separately on each article without debate, with leave to file written opinions within the next two days.

Presumably because it was thought to pose the strongest case for conviction, the Senate began with Article XI, which dealt largely with alleged efforts to impede execution of the laws. . . . The Senate acquitted President Johnson of this charge by a vote of 35–19. The shift of a single vote would have meant conviction.

The Senate then suspended the impeachment proceedings for ten days to reconnoiter. When it returned it voted on Articles II and III, which turned on the assignment of [Stanton's replacement]; the results were exactly the same. Recognizing that there was no point in proceeding further, the Senate adjourned the trial *sine die*. The attempt to remove President Johnson had failed.

Edmund Ross, Republican of Kansas, is commonly credited with having courageously rescued Johnson from conviction and removal. But Ross was not alone; at least seven Republicans joined opposition senators in voting not guilty on all three counts. Those seven included not only such predictable dissenters as Dixon of Connecticut and Doolittle of Wisconsin but, more dramatically, the influential mainstream Republicans Lyman Trumbull and William Pitt Fessenden.

Both Trumbull and Fessenden wrote opinions explaining their vote and how they would have ruled on the remaining articles. Both concluded that the Tenure of Office Act left the President free to discharge Stanton, for reasons that had been urged by lawyers for the defense. Even if Johnson had been mistaken, Trumbull added, it would have been wrong to convict him for mere misconstruction of a doubtful law. . . . Both Trumbull and Fessenden concluded that the evidence did not support the allegation that Johnson had attempted to induce General Emory to violate the law; that the President's speeches, while discreditable, were not grounds for impeachment; that the effort to keep Stanton from resuming his office was lawful because Johnson had the right to remove him; and that the other charges of obstructing the enforcement of statutes had not been proved.

Each of these opinions closed with an admonition not to be overzealous in wielding the fearsome weapon of impeachment. It was an instrument, wrote Fessenden, that "might be liable to very great abuse, especially in times of high party

excitement." It was "a power to be exercised with extreme caution [if at all] when you once get beyond the line of specific criminal offenses." . . .

Wise words. Those of Senator Trumbull were even better:

> Once set the example of impeaching a President for what, when the excitement of the hour has subsided, will be regarded as insufficient causes and no future President will be safe who happens to differ with a majority of the House and two thirds of the Senate on any measure deemed by them important, particularly if of a political character. Blinded by partisan zeal, with such an example before them, they will not scruple to remove out of the way any obstacle to the accomplishment of their purposes, and what then becomes of the checks and balances of the Constitution, so carefully devised and so vital to its perpetuity? They are all gone. In view of the consequences likely to flow from this day's proceedings, should they result in conviction on what my judgment tells me are insufficient charges and proofs, I tremble for the future of my country. I cannot be an instrument to produce such a result.

Other senators who voted for acquittal went beyond the purely statutory arguments of Fessenden and Trumbull to find constitutional grounds for their conclusion. Old Reverdy Johnson, the best of the congressional Democrats and a former Attorney General, concluded that the Tenure of Office Act was unconstitutional and that Article II, by vesting executive power in the president and constraining him to ensure execution of the laws, empowered him to assign someone to a vacant office to prevent a void in enforcement. . . .

What then do we learn about the Constitution from the disreputable effort to remove Andrew Johnson from the presidency? With respect to the meaning of the impeachment provisions themselves the bottom line is equivocal. For although the House's rejection of the original "bundle of generalities" suggests that a majority thought it necessary to allege some violation of law, its later approval of a count based exclusively on the President's irascible speeches suggests the contrary; and in the Senate the issue turned in the end on substantive questions of presidential power, not on the definition of an impeachable act. There was a reprise of constitutional arguments about the president's right of removal, but that was all old hat and nothing novel was added. The argument that the Constitution itself authorized the president to avoid a vacuum in office may have been new, and I find it persuasive. But the real lesson of the Johnson impeachment was the result, for it established for all time the salubrious constitutional principle that no one should be impeached because he disagrees with the congressional will.

NOTES

1. The charges against President Johnson included arguments that he had wrongly exercised or abused many powers discussed in this chapter, such as the suspending power, the removal power, the directing power, the appointment power, and the war power. Which of these powers is most liable to abuse? (Are all of them presidential powers?) Should members of Congress be allowed to remove the president from office whenever they disagree about the scope of those powers? When they disagree really strongly? When the stakes are high?

2. If impeachment is not an appropriate remedy for a constitutional disagreement between Congress and the president, what else is Congress supposed to do? What else can it do?

United States v. Nixon

418 U.S. 683 (1974)

■ MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This litigation presents for review the denial of a motion, filed in the District Court on behalf of the President of the United States . . . to quash a third-party subpoena duces tecum issued by the United States District Court for the District of Columbia, pursuant to Fed. Rule Crim. Proc. 17(c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17(c). The President appealed to the Court of Appeals. We granted both the United States' petition for certiorari before judgment, and also the President's cross-petition for certiorari before judgment, because of the public importance of the issues presented and the need for their prompt resolution.

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals[3] with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator. On April 18, 1974, upon motion of the Special Prosecutor, a subpoena duces tecum was issued pursuant to Rule 17(c) to the President by the United States District Court and made returnable on May 2, 1974. This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts or other writings relating to certain precisely identified meetings between the President and others. . . . *[The Court then recounted the procedural history of the case, which culminated in the district court ordering the president to produce the documents, which the president appealed.—Editors]*

I

JURISDICTION

The threshold question presented is whether the May 20, 1974, order of the District Court was an appealable order . . . Since the appeal was timely filed and all other procedural requirements were met, the petition is properly before this Court for consideration if the District Court order was final. . . .

In applying this principle *[of finality—Editors]* to an order denying a motion to quash and requiring the production of evidence pursuant to a subpoena duces tecum, it has been repeatedly held that the order is not final and hence not appealable. This Court has

[3] The seven defendants were John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan. Each had occupied either a position of responsibility on the White House staff or the Committee for the Re-election of the President. Colson entered a guilty plea on another charge and is no longer a defendant.

> consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal. *United States v. Ryan*, 402 U.S., 530, 533 (1971).

The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. . . .

Here too, the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying criminal action for which his evidence is sought. These considerations lead us to conclude that the order of the District Court was an appealable order. . . .

II

JUSTICIABILITY

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965), it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case. Although his counsel concedes that the President has delegated certain specific powers to the Special Prosecutor, he has not "waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer." Brief for the President 42. The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under *Baker v. Carr*, 369 U.S. 186 (1962), since it involves a "textually demonstrable" grant of power under Art. II.

The mere assertion of a claim of an "intra-branch dispute," without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a

surface inquiry. In *United States v. ICC*, 337 U.S. 426 (1949), the Court observed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."

Our starting point is the nature of the proceeding for which the evidence is sought—here a pending criminal prosecution. It is a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign. Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C. § 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533. Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure.[8] The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties.

So long as this regulation is extant it has the force of law. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations. . . .

Here, as in *Accardi*, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it. Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney

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[8] The regulation issued by the Attorney General pursuant to his statutory authority, vests in the Special Prosecutor plenary authority to control the course of investigations and litigation related to "all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General." 38 Fed.Reg. 30739, as amended by 38 Fed.Reg. 32805. In particular, the Special Prosecutor was given full authority, inter alia, "to contest the assertion of 'Executive Privilege' . . . and handl(e) all aspects of any cases within his jurisdiction." *Id.*, at 30739. The regulations then go on the provide:

> 'In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.'

General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress. . . .

In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision.

III

RULE 17(c)

[The Court concluded that the special prosecutor had satisfied the requirements of Rule 17(c) to get a subpoena.—Editors]

IV

THE CLAIM OF PRIVILEGE

A

Having determined that the requirements of Rule 17(c) were satisfied, we turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." App. 48a. The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that "(i)t is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177.

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. *Powell v. McCormack*, 395 U.S. 486 (1969); *Youngstown, Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In a series of cases, the Court interpreted the explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause, U.S. Const. Art. I, § 6. [E.g.,] *Gravel v. United States*, 408 U.S. 606 (1972). Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers. . . .

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the

Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47. We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case. *Marbury v. Madison*, at 177.

B

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, *Humphrey's Executor v. United States*, 295 U.S. 602, 629–630 (1935); *Kilbourn v. Thompson*, 103 U.S. 168, 190–191 (1881), insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to

provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. . . .

C

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President. *United States v. Burr*, 25 F.Cas. 187, 190, 191–192 (C.C. Va. 1807).

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. . . .

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. . . . *[The Court proceeded to "weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice" and concluded that the materials should be produced to the district court and examined* in camera.*—Editors]*

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

■ MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

NOTES

1. *United States v. Nixon* presents a number of separation of powers questions, starting with the title. How can the United States litigate against the president, who is the head of the executive branch that represents the United States in court? How far could a suit against the president go? If the president disobeys an injunction or another court order, could the president be held in contempt and ordered to prison, like ordinary litigants?

2. Then there are the issues of justiciability and judicial power. Are the Court's arguments for why it can and must adjudicate the claims of privilege persuasive? What would happen if the issue were left to the political branches? Would the process be better or worse?

3. The Court doesn't address this issue as squarely, but what view does it seem to take about the president's control over the executive branch? Does the president control the attorney general? Does the attorney general control the special prosecutor? What is the legal status of the regulation that created the special prosecutor? Is it a law?

4. At the time *Nixon* was decided, it was not clear whether President Nixon would obey an adverse court decision. Indeed, at oral argument, Justice Thurgood Marshall spent considerable time pressing Nixon's lawyer on this point. But Nixon did obey. Why? Did he have to? For further discussion of the president's obligation to obey court orders, see 403.

5. Professor Paulsen argues:

> The *Nixon* case . . . suggests a corollary to the maxim that great cases make bad law: bad Presidents make bad law. . . . By "bad law" I mean here constitutional decisions of the courts harmful to the institution of the Presidency and destructive of its proper constitutional powers. President Nixon was a bad President—Richard Nixon was a crook—and it is therefore not surprising that *United States v. Nixon* is bad law.

Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337, 1343 (1999). Do you agree?

Law Professors' Letter on the Clinton Impeachment

Nov. 6, 1998

Dear Mr. Speaker, Mr. Gephardt, Mr. Hyde and Mr. Conyers:

Did President Clinton commit "high Crimes and Misdemeanors" warranting impeachment under the Constitution? We, the undersigned professors of law, believe that the misconduct alleged in the report of the Independent Counsel, and in the statement of Investigative Counsel David Schippers, does not cross that threshold.

We write neither as Democrats nor as Republicans. Some of us believe that the President has acted disgracefully, some that the Independent Counsel has. This letter has nothing to do with any such judgments. Rather, it expresses the one judgment on which we all agree: that the allegations detailed in the Independent Counsel's referral and summarized in Counsel Schippers's statement do not justify presidential impeachment under the Constitution.

No existing judicial precedents bind Congress's determination of the meaning of "high Crimes and Misdemeanors." But it is clear that Members of Congress would violate their constitutional responsibilities if they sought to impeach and remove the President for misconduct, even criminal misconduct, that fell short of the high constitutional standard required for impeachment.

The President's independence from Congress is fundamental to the American structure of government. It is essential to the separation of powers. It is essential to the President's ability to discharge such constitutional duties as vetoing legislation that he considers contrary to the nation's interests. And it is essential to governance whenever the White House belongs to a party different from that which controls the Capitol. The lower the threshold for impeachment, the weaker the President. If the President could be removed for any conduct of which Congress disapproved, this fundamental element of our democracy—the President's independence from Congress—would be destroyed. It is not enough, therefore, that Congress strongly disapprove of the President's conduct. Under the Constitution, the President cannot be impeached unless he has committed "Treason, Bribery, or other high Crimes and Misdemeanors."

Some of the charges raised against the President fall so far short of this high standard that they strain good sense: for example, the charge that the President repeatedly declined to testify voluntarily or pressed a debatable privilege claim that was later judicially rejected. Such litigation "offenses" are not remotely impeachable. With respect, however, to other allegations, careful consideration must be given to the kind of misconduct that renders a President constitutionally unfit to remain in office.

Neither history nor legal definitions provide a precise list of high crimes and misdemeanors. Reasonable people have differed in interpreting these words. We believe that the proper interpretation of the Impeachment Clause must begin by recognizing treason and bribery as core or paradigmatic instances, from which the meaning of "other high Crimes and Misdemeanors" is to be extrapolated. The constitutional standard for impeachment would be very different if different offenses had been specified. The clause does not read, "Treason, Felony, or other Crime" (as does Article IV, Section 2 of the Constitution), so that any violation of a criminal statute would be impeachable. Nor does it read, "Arson, Larceny, or other high Crimes and Misdemeanors," implying that any serious crime, of whatever nature, would be impeachable. Nor does it read, "Adultery, Fornication, or other high Crimes and Misdemeanors," implying that any conduct deemed to reveal serious moral lapses might be an impeachable offense.

When a President commits treason, he exercises his *executive powers*, or uses information obtained by virtue of his *executive powers*, deliberately to aid an enemy. When a President is bribed, he exercises or offers to exercise his *executive powers* in exchange for corrupt gain. Both acts involve the criminal exercise of presidential powers, converting those awful powers into an instrument either of enemy interests or of purely personal gain. We believe that the critical, distinctive feature of treason and bribery is grossly derelict exercise of official power (or, in the case of bribery to obtain or retain office, gross criminality in the pursuit of official power). Non-indictable conduct might rise to this level. For example, a President might be properly impeached if, as a result of drunkenness, he recklessly and repeatedly misused executive authority.

Much of the misconduct of which the President is accused does not involve the exercise of executive powers at all. *If* the President committed perjury regarding his sexual conduct, this perjury involved no exercise of presidential power as such. *If* he concealed evidence, this misdeed too involved no exercise of executive authority. By contrast, *if* he sought wrongfully to place someone in a job at the Pentagon, or lied to subordinates hoping they would repeat his false statements, these acts could have involved a wrongful use of presidential influence, but we cannot believe that the President's alleged conduct of this nature amounts to the grossly derelict exercise of executive power sufficient for impeachment.

Perjury and obstructing justice can without doubt be impeachable offenses. A President who corruptly used the Federal Bureau of Investigation to obstruct an investigation would have criminally exercised his presidential powers. Moreover, covering up a crime furthers or aids the underlying crime. Thus a President who committed perjury to cover up his subordinates' criminal exercise of executive authority would also have committed an impeachable offense. But making false statements about sexual improprieties is not a sufficient constitutional basis to justify the trial and removal from office of the President of the United States.

It goes without saying that lying under oath is a very serious offense. But even if the House of Representatives had the constitutional authority to impeach for any instance of perjury or obstruction of justice, a responsible House would not exercise this awesome power on the facts alleged in this case. The House's power to impeach, like a prosecutor's power to indict, is discretionary. This power must be exercised not for partisan advantage, but only when circumstances genuinely justify the enormous price the nation will pay in governance and stature if its President is put through a long, public, voyeuristic trial. The American people understand this price. They demonstrate the political wisdom that has held the Constitution in place for two centuries when, even after the publication of Mr. Starr's report, with all its extraordinary revelations, they oppose impeachment for the offenses alleged therein.

We do not say that a "private" crime could never be so heinous as to warrant impeachment. Congress might responsibly take the position that an individual who by the law of the land cannot be permitted to remain at large, need not be permitted to remain President. But if certain crimes such as murder warrant removal of a President from office because of their unspeakable heinousness, the offenses alleged in the Independent Counsel's report or the Investigative Counsel's statement are not among them. Short of heinous criminality, impeachment demands convincing evidence of grossly derelict exercise of official authority. In our judgment, Mr. Starr's report contains no such evidence.

Sincerely,

[Signatures of 430 law professors]

Charles Canady, Statement on Impeachment of President Clinton

House of Representatives, Dec. 19, 1998

. . . The argument has been made that in essence, we in the House should, in carrying out our responsibility, look to the Senate, and make a guess about how the proceedings would turn out in the Senate, to determine how we exercise our responsibility under the Constitution.

I would suggest to you, I don't think that's a proper way for us to proceed. I believe that we have an independent responsibility, under the Constitution, to make a judgment concerning the conduct of the president, and whether he should be impeached or not. And it would be in derogation of our constitutional responsibility to attempt to count noses in the Senate. I will have to say that it's a very difficult thing to count noses in the Senate anyway, and in a proceeding like this, it's hard to predict the outcome.

But aside from that, I just don't think that's a proper undertaking for us to be involved in. And I'd also point out that the very structure of the Constitution indicates that. In the Constitution, the framers provided that the House could impeach with a simple majority. They provided that conviction in the Senate would have to be by a two-thirds majority.

Now, I would suggest to you that that structural feature of the Constitution suggests that the framers would have contemplated circumstances in which the House might very well impeach, but the Senate would not convict. Now, I think that's

obvious on the face of the documents. Some of these arguments I think have to be brought back to the text of the Constitution and evaluated in that light.

But on this issue of prosecutorial discretion, let me pose a scenario here, which I think is very analogous to what we have before us. Suppose the chief executive of a Fortune 500 corporation, a major national corporation in the United States, was accused of sexual harassment, and the corporation had been sued—sexual harassment or any other civil rights offense. And in the course of the discovery in that case, the chief executive of that major national corporation lied under oath to impede that civil rights action.

Now, I believe that the fact that the chief executive of a major national corporation was engaged in that type of conduct, would be a relevant consideration for the prosecutors who were evaluating the case and whether to bring it, because of the impact of that conduct.

Now, I do believe that bringing prosecutions have a deterrent impact. And that is one of the considerations that has to be factored into prosecutorial discretion.

So, I think if we step back from this situation—and again, we can argue about the weight of the facts, and I understand you disagree with the evaluation some of us may have made about the weight of the facts here. But if the president of the United States did engage in obstruction of justice, and committed multiple acts of lying under oath, I think that we have to look at that conduct, in light of the consequences that it has, and the message it sends, just as we would look at the conduct of the chief executive of a major national corporation who was the defendant in a civil rights case brought against that corporation.

NOTES

1. Do you find the arguments in the law professors' letter persuasive? If so, why do they concede that some private crimes could still be "high Crimes and Misdemeanors"?

2. If the president cannot be impeached for private crimes, can the president be prosecuted for them? Who would do the prosecuting? Federal prosecutors, controlled by the president? An independent counsel? State prosecutors? Do any of these seem like good options?

3. What do you make of Representative Canady's theory of the House's responsibility? What would happen in the long run if more of our presidents were impeached, but acquitted?

[*Assignment 18*]

III. ARTICLE III: THE JUDICIAL POWER

We turn next to Article III of the Constitution, the article vesting "the judicial Power" of the United States in the federal courts. This article describes the structure of the federal judiciary, and enumerates the categories of "Cases" and "Controversies" to which the federal judicial power extends.