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Commentary and Analysis  
The Clinton Crisis

CLINTON AND THE IRRESISTIBLE URGE OF HISTORY

PRECEDENT AND PRACTICE WOULD NOT LET HIM IGNORE STARR'S SUBPOENA

Eric M. Freedman

The question of whether a sitting president may be indicted is controversial and unsettled. The question of whether a sitting president may be compelled to give testimony in judicial proceedings is not.

As the lawyers for both President Bill Clinton and Independent Counsel Kenneth Starr plainly recognized last week in coming to an agreement for the president to testify in response to a grand jury subpoena that Starr had served (and then withdrew as part of the agreement), the governing rule has been solidly established by repeated court precedent and presidential practice.

The courts have the power to compel presidential testimony. They will exercise that power in a way maximally protective of the executive's official functioning, but will ultimately require production of the information needed for just adjudication.

In 1807, Aaron Burr stood trial for treason. In substance, the charges were that, following his term as vice president, he had sought to separate some of the country's newly acquired western territories from their allegiance to the United States. During the course of the trial proceedings, Burr demanded that President Thomas Jefferson produce a letter that Jefferson had characterized (in a message to Congress) as one in which Burr's "guilt is placed beyond question."

Chief Justice John Marshall, who was presiding at the trial, distinguished the president from the king, and ordered issuance of the subpoena. He stated that once the document had been produced, he would review it in camera to redact any irrelevant material implicating matters of state.

On receiving the subpoena, Jefferson wrote the government's trial counsel promising to send the letter and requesting that counsel furnish the defense with the material sections. The government's counsel accordingly turned over those portions of the letter to the defense, while offering to submit the entire document to the court.

Burr objected that this was insufficient, and Marshall delivered another opinion, this one stating that he would not even consider permitting redactions unless they were personally requested by

the president. Since the trial had in the meantime been progressing very favorably to Burr, he apparently accepted the redacted version, and did not pursue the matter further prior to his acquittal.

By that time, however, Jefferson had written the court a letter from Monticello stating that should "the defendant suppose there are any facts within the knowledge of the heads of departments or myself, which can be useful for his defence, from a desire of doing anything our situation will permit in furtherance of justice, we will be ready to give him the benefit of it, by way of deposition ... at this place."

In keeping with this precedent, President James Monroe in 1818 sent interrogatory answers to the court martial of his appointee, Dr. William Barton. Monroe, who had been served with a subpoena by the defense, was advised by the attorney general that he was required to provide information, although not necessarily to attend the trial. Similarly, President Ulysses Grant provided deposition testimony from the White House in a case arising over alleged corruption in his administration.

By the time of Watergate, some commentators, who had forgotten (or perhaps never learned) this history, considered the president's amenability to process at least doubtful. But in October 1973, the en banc U.S. Court of Appeals for the D.C. Circuit upheld a subpoena from the Watergate grand jury for tape recordings of presidential conversations. President Richard Nixon chose not to appeal the decision.

Any remaining doubts about the president's obligation to respond to judicial testimonial demands were convincingly dispelled nine months later by the unanimous opinion of the Supreme Court in *United States v. Nixon*. The Court relied heavily on Marshall's decision in the Burr case to uphold a subpoena that, subject to a series of safeguards, compelled the president to surrender tapes and documents for use in the Watergate prosecutions of various of his key aides and political operatives.

Despite some prejudgment hints that he might not comply with an adverse ruling—a course of action that he recognized would surely have resulted in his immediate impeachment and conviction—President Nixon produced the materials, and was forced to resign as a result of the disclosures in them.

Applying this ruling the following year, a U.S. District Court overruled the government's objections and directed enforcement of a subpoena issued to President Gerald Ford by a criminal defendant accused of attempting to assassinate him. But the court made sure to minimize any inconvenience to the president: The lawyers traveled to Washington, and Ford gave his testimony on videotape in his office.

In the Iran-Contra affair, the courts followed this same pattern in ruling on requests for evidence from Presidents Ronald Reagan and George Bush. While accommodating the executive in issuing threshold rulings on evidence and imposing logistical conditions on its actual production, the courts required that the presidential information be made available. As a result, the U.S.

District Court for the District of Columbia conducted an in camera review of a diary that President Reagan had kept while in office; and, after he had left the White House, Reagan was deposed about his conduct in office.

#### TESTING THE LIMITS

Against this background, it is hardly surprising that the discussions between the lawyers for President Clinton and those from Starr's office were not about whether the president would respond to the grand jury's subpoena in the Monica Lewinsky affair, but about how much to limit the areas of testimony and how to make reasonable logistical arrangements. The president's lawyers knew that outright defiance would be as untenable a strategy legally as it was politically.

Legally, there is little doubt that the court could have enforced its order through some appropriate sanction, whether the contempt citation and fines that Judge John Sirica was prepared to impose on President Nixon, or an order deeming facts favorable to the prosecution to have been established, or any one of a number of other creative possibilities. Of perhaps greater practical importance was the risk of political sanction. Like Nixon, Clinton, after losing in court, would quite appropriately have faced a powerful threat of impeachment.

Of course, this leaves the uncomfortable problem that, no matter what arrangements are made, the substance of Clinton's testimony may place him at legal risk. Most obviously, if he were to admit an affair with Lewinsky, he might be admitting as well that he had lied under oath when denying one during discovery in the Paula Jones civil trial. On the other hand, if he were again to deny such an affair, he might be again lying under oath--this time in a context in which a perjury prosecution could be a viable possibility.

Similarly, if Clinton were to admit that he had ordered a cover-up of the affair, he might be admitting to obstruction of justice or subornation of perjury. But if he were to deny it, he might face perjury charges--presumably ones supported by the testimony of the now immunized Monica Lewinsky, and perhaps that of her mother as well.

These problems, though, have nothing to do with presidential immunity. Criminal defendants routinely face similar issues, and have at hand the protective shield of the Fifth Amendment, which is designed precisely to require the prosecution to prove its case by means other than the defendant's own testimony.

To be sure, the president does not want to take the Fifth Amendment. It would be embarrassing and could have negative consequences in other legal contexts. But that too is true for all criminal defendants.

And the clear teaching of our history--reaffirmed by the events of last week--is that, while accommodations to convenience will be made, ultimately the president when called as a witness stands in no different position from any other citizen.

Eric M. Freedman is a professor of constitutional law at Hofstra University School of Law. He has discussed this subject at greater length in "The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?" 20 Hastings Const. L.Q. 7 (1992).

