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Legal Sidebar

Obtaining Witnesses In an Impeachment Trial: Compulsion, Executive Privilege, and the Courts

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The Constitution grants the Senate wide-ranging discretion in the exercise of its "sole Power to try all Impeachments." Beyond the requirements that the Constitution expressly sets forth (Senators sitting in an impeachment trial must be under oath; a two-thirds vote is required to convict; and the Chief Justice presides over a presidential impeachment), the remaining details of any impeachment trial largely lay with the Senate.

One procedural choice in the impending trial of President Donald Trump that has received sustained attention is whether the Senate will hear from witnesses, and if so, how many and in what form. The past presidential impeachment trials provide two very different approaches. During the trial of Andrew Johnson, the Senate took live testimony from more than 40 witnesses, subjecting most to examination by House Managers (acting as prosecutors in the impeachment trial) and the President's counsel. In contrast, the Senate took a more constrained approach in the trial of President Bill Clinton, choosing to hear from three witnesses, and then only through videotaped depositions rather than through live questioning on the Senate floor.

If the Senate chooses to seek testimony or documents from witnesses in the upcoming trial, it may—much as the House did during its impeachment investigation—find some potential witnesses to be uncooperative. The Senate's chief tool for compelling the disclosure of information is the subpoena. If a witness refuses to comply with an impeachment trial subpoena, the Senate has at least two available mechanisms to enforce its demands. Historically, and as explicitly provided under the Senate's existing impeachment rules, the Senate may "punish in a summary way contempts of, and disobedience to, its authority" by directing the Sergeant-at-arms to "employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders." The Senate has relied on this authority on various occasions. For example, during the 1933 impeachment trial of Judge Harold Louderback the Senate authorized, and the Sergeant-at-arms carried out, the arrest and detention of a non-compliant witness, who was then brought before the Senate and ultimately testified.

More recently, the Senate has chosen to use the courts to compel compliance with its impeachment trial subpoenas. During the trial of Judge Alcee Hastings, the Senate authorized the Senate Legal Counsel to

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bring a civil lawsuit to enforce a trial committee subpoena issued to William Borders, a key witness in the Judge's impeachment. The Senate filed that case and successfully obtained a court order directing Borders to testify. Borders nonetheless refused, in violation of the court order, and spent the rest of the trial in jail.

It is worth noting that the lawsuit filed in connection to the Hastings trial was brought under 28 U.S.C. § 1365, which grants the federal courts' jurisdiction over suits brought by the Senate or one of its committees to enforce a subpoena. But that provision includes an important limitation, in that it generally does not apply to enforcement of a subpoena issued to an executive branch official asserting a governmental privilege. As discussed in an earlier CRS Report, this does not necessarily bar courts from hearing Senate subpoena enforcement suits against executive branch officials, as the Senate may be able to rely on other jurisdictional provisions.

Executive Privilege in an Impeachment Trial

Because the Senate has rarely been forced to confront non-compliant witnesses, there is little certainty as to how the current Senate may resolve challenges to its authority to obtain documents and testimony in an impeachment trial. This is especially true with regard to the treatment of privileges, including executive privilege. The procedural aspects of that issue may be helpfully explored in the context of hypothetical testimony from former National Security Advisor John Bolton.

Reports suggest that Bolton is willing to testify in a Senate trial if subpoenaed. Yet, the President has suggested that he views Bolton's testimony, including direct communications Bolton may have had with the President about Ukraine, as implicating executive branch confidentiality interests. In light of the Trump Administration's position during the House impeachment investigation, the President's stance could be based on a belief that executive privilege shields Bolton from responding to specific questions or that presidential advisers like Bolton are absolutely immune from congressional testimony as a matter of the separation of powers (a line of reasoning recently rejected by a federal district court, but on appeal). As such, if the Senate chooses to hear from Bolton, it is possible that the President's counsel could attempt to exclude his testimony through a motion *in limine* or raise an objection to a specific line of questioning during the evidentiary portion of the trial.

It does not appear that a President has previously raised executive privilege or adviser immunity in a Senate impeachment trial, and as a result, either assertion could trigger some unique scenarios. For example, if a privilege objection is raised by the President's counsel during questioning of a witness, it is possible that the Chief Justice, who presides over a presidential impeachment trial, could make an initial ruling on that objection. But he is not required to make such a ruling. The Senate Impeachment Rules provide that "the Presiding Officer on the trial may rule on all questions of evidence … or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate." As such, the Chief Justice could choose to refer the matter directly to the Senate for its vote. If the Chief Justice chose to rule on the objection, the Senate Impeachment Rules provide little substantive guidance on the standards he would apply in resolving the objection.

In any event, Senate rules and historical practice suggest that the Chief Justice's ruling would not necessarily be the final decision on that matter. The Senate (by majority vote) retains the right to decide the privilege question either directly or on an appeal of the Chief Justice's ruling. In casting their vote and exercising their own independent constitutional judgment, individual Senators may consider important questions such as whether executive privilege is applicable in an impeachment trial and, if so, how to balance the Senate's interest in obtaining information necessary to an impeachment trial with the President's qualified interest in confidentiality. The application of executive privilege in the impeachment context is discussed in greater detail in a previous CRS report.

Judicial Review of Matters Arising From an Impeachment Trial

A Senate denial of a privilege or immunity claim could also tee up the issue of the proper role of the Judiciary, if any, in these matters. For example, if the Senate directs a witness to testify and the witness still refuses, the Senate could potentially respond through either of the enforcement mechanisms described above, including going to court. If on the other hand, the witness complies with the Senate ruling and agrees to testify, it is conceivable that the Administration may attempt to bring suit against the witness to obtain a court order blocking the witness's testimony. These two different types of lawsuits are in some ways linked, as a suit to quash a legislative subpoena could be viewed as "merely the flip side of a lawsuit that argues that a legislative subpoena should be enforced."

Outside of the impeachment trial context, courts have previously entertained House and Senate suits to enforce subpoenas, as well as executive branch suits to quash congressional subpoenas (so long as that suit is brought against the third party recipient of the subpoena and not the House, Senate, Members of Congress, or congressional staff in violation of the Speech or Debate Clause). Indeed, during the 116th Congress, the federal courts have found both types of claims to be justiciable—leading to rulings favorable to the House's investigatory powers both in a House suit to enforce a subpoena against Don McGahn, as well as in suits brought by the President against his accounting firm and bank to enjoin those entities from complying with House subpoenas for the President's financial records. Each of these cases, however, have been stayed pending further appeals.

Within impeachment, however, the judicial role has previously been quite limited. For example, if faced with a case dealing with a subpoena that arises directly from a Senate impeachment trial, a reviewing court may need to address the Supreme Court's decision in *Nixon v. United States*. There, the Court refused to review a challenge—brought by Judge Walter Nixon—to the Senate's use of an impeachment trial committee to gather evidence. The key holding of the case was that the Judge's claim was a non-justiciable political question because the Constitution's use of "the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate."

Whether *Nixon* plays any significant role in limiting the Judiciary's authority to hear cases arising from a Senate impeachment trial subpoena depends on how one interprets the breadth of the Court's holding. It may be that subpoena-related suits are not the types of claims impacted by *Nixon's* restriction on judicial review. The challenge in *Nixon* was to the method used by the Senate to gather evidence and convict Judge Nixon–namely that he was tried not by the Senate, as the Judge asserted the Constitution required, but by a trial committee. Thus, the focus of the case was Senate trial *procedures*. Language in the *Nixon* opinion reflects this focus. The Court, for example, expressed concern over "opening the door" to "judicial review" of "the procedures used by the Senate in trying impeachments…." A suit to either enforce or block a Senate impeachment trial subpoena, especially one centering on an interbranch dispute over executive privilege, may not bear a similarly direct relationship to Senate trial procedures. For example, a court would not necessarily be forced to review the process or methods adopted by the Senate for conducting a trial, but would instead need to address more generally the Senate's authority to compel testimony and the substantive reach of any asserted privilege. Courts have yet to confront this question directly, but in the context of the House's arguably analogous "sole Power of Impeachment," the recent district court opinion on the McGahn subpoena did not view *Nixon* as a bar to judicial review of a suit to enforce a House subpoena issued for impeachment-purposes.

But *Nixon* could be interpreted more broadly, to suggest a prohibition on judicial review of *any* Senate action taken within an impeachment trial. For example, there is dicta from the opinion suggesting that "the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments"; that there is no historical evidence "that even alludes to the possibility of judicial review in the context of the impeachment powers"; and that the Constitution's use of the word "sole" in vesting the power to try all impeachments exclusively with the Senate "indicates that this authority is reposed in the Senate and

nowhere else." It may be these passages that led the D.C. Circuit to suggest, also in non-binding dicta, that "whether Congress can abrogate otherwise recognized privileges in the course of impeachment proceedings may well constitute a nonjusticiable political question." Judge Nixon's counsel warned against this view, asserting in oral arguments that the Framers did not intend to establish the Senate impeachment trial as an "island, unreachable by any other entity." But if the Senate's "sole Power to try all Impeachments" is in fact free from judicial supervision, then suits arising from "the Senate's use of that power," perhaps including claims relating to an impeachment trial subpoena or a privilege determination made by the Senate as part of the trial, would be much more likely to be found non-justiciable.

However *Nixon* is interpreted, there are distinctions to be made between judicial efforts to *enforce* a Senate subpoena and efforts to *quash* such a subpoena. Judicial review of a subpoena enforcement suit filed by the Senate facilitates rather than impedes the Senate's exercise of its impeachment powers. In contrast, a suit brought to quash an impeachment trial subpoena after the Senate has rejected a privilege assertion would conflict with the Senate's own independent constitutional determination made as part of the impeachment trial and would arguably represent a significant interference in the Senate's institutional prerogatives. The strength of these distinctions, at least for purposes of justiciability, is debatable given that the *Nixon* opinion appears to have defined "sole" in the Senate's "sole Power to try all Impeachments" as "functioning…independently and without assistance or inference." This language arguably could be construed to mean that judicial review is inappropriate whether or not the aid of the courts is being sought to assist or obstruct the Senate in conducting a trial.

But as noted, at least one federal district court has entertained a Senate suit to *enforce* an impeachment subpoena. That order, however, occurred prior to the Supreme Court's decision in *Nixon*. Courts have also issued numerous statutory immunity orders, both before and after *Nixon*, prohibiting witnesses from refusing to testify before Senate impeachment trial committees on the basis of the Fifth Amendment privilege against self-incrimination In a separate example of the courts facilitating access to information, a federal district court issued an emergency court order directing Monica Lewinsky to submit to an interview by the House Managers prior to her deposition in President Clinton's impeachment trial. That order was issued to enforce the terms of an immunity agreement she had entered with the Independent Counsel, and, therefore, was not directly tied to the Senate's constitutional impeachment powers. Through an exchange of letters, and in response to the court's order, a Senator asked the Chief Justice to issue an order prohibiting that questioning. In support of his request, the Senator cited *Nixon* and asserted that "[i]t is up to the Senate, not the independent counsel or any Article III District Judge, to determine the procedures under which the House Managers or White House counsel may interview witnesses" during the Senate trial. The Chief Justice declined the Senator's request.

As with many other impeachment questions, the scope of the judiciary's role in any forthcoming impeachment trial is relatively unsettled. In the end, if *Nixon* is interpreted broadly it could pose a barrier to judicial review of questions relating to impeachment trial subpoenas. If interpreted more narrowly, to cover only Senate procedural choices, it may not.

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