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## Censure of the President by the Congress

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## **ABSTRACT**

Exploring a possible compromise between an impeachment and taking no congressional action, certain Members of Congress and congressional commentators have suggested a congressional “censure” of the President to express the Congress’ disapproval of the President’s conduct which has been the subject of an ongoing independent counsel investigation. This report provides an overview and discussion of the legal basis and congressional precedents regarding a congressional “censure” of the President.

# Censure of the President by the Congress

## Summary

There is no express constitutional provision which authorizes Congress to “censure” the President or any other executive branch official. A censure of the President does not appear to be, and has not traditionally been, part of the impeachment process, which involves an impeachment in the House and a trial and conviction in the Senate. A censure of the President is clearly not part of Congress’ express authority to “punish” its own Members (Article I, Section 5, clause 2), nor would it be in most cases within the inherent contempt powers of legislatures to protect the dignity, privileges and proceedings of the institution and its Members. Rather, a “censure” has been and would most likely be in the nature of “sense of the Congress,” or sense of the Senate or House, resolutions which have developed in congressional practice as vehicles to state opinions or facts in non-binding, nonlegislative instruments. The House and Senate have, on infrequent occasions, and mostly in the 19<sup>th</sup> Century, expressed their disapproval, reproof or censure of executive officials, including the President, or certain of their actions in simple resolutions. Precedents indicate that one action of the Senate (Andrew Jackson in 1834, although expunged in 1837) and two actions of the House (Tyler in 1842 and Buchanan in 1860) may be categorized in a broad definition of a congressional “censure” of a President.

Similar to a censure of the President, there is no express constitutional authority to “fine” the President or any other individual outside of Congress, or to require anyone outside of Congress to make a monetary restitution. However, unlike a censure or other “sense of” the House or Senate resolution used to express an opinion, a *mandatory fine legislated* by Congress against a particular individual may run afoul of the “Bill of Attainder” Clause of the Constitution, as well as, if directed at the President, raise issues concerning the constitutional prohibition on diminishing the salary of the President. Also, unlike censure or other statement of disapproval formally expressed by Congress, there have been found no precedents for the Congress to legislate or formally adopt a resolution expressly directing a specified individual, who is not a Member of Congress, to pay a fine or a restitution to the Government.

It may at least be theoretically possible for an agreement to be reached between the President and the Congress for the President to voluntarily “accept” a congressional statement, suggestion and/or direction concerning particular restitution or other act of contrition, and not to challenge the authority or constitutionality of any such legislative statement or act. In such a case, as a practical matter, it may be difficult for anyone other than the individual actually aggrieved or harmed (that is, the President), to possess the requisite legal standing to challenge in court such an arrangement on the basis of an alleged absence of legislative authority or violation of constitutional precepts. Such legal questions of authority, power and standing aside, however, there may be implications for policy and precedent which the Congress may wish to consider and weigh in adopting a congressional response to alleged wrongdoing by an executive official, particularly the President, when such response is other than through impeachment, and is not provided for in the Constitution.

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# Censure of the President by the Congress

Exploring a possible compromise between an impeachment and taking no congressional action, certain Members of Congress and congressional commentators have suggested a congressional “censure” of the President to express the Congress’ disapproval of the President’s conduct which has been the subject of an ongoing independent counsel investigation. This report provides an overview of the legal basis and congressional precedents regarding a congressional “censure” of the President.

## Background/Summary

A “censure” is commonly defined in modern parlance to mean: “The formal resolution of a legislative, administrative, or other body reprimanding a person, normally one of its own members, for specified conduct.”<sup>1</sup> In Congress, censures are most typically known as simple resolutions of the House or Senate formally adopted by a vote of that body, and expressing some form of disapproval or other term of rebuke or condemnation concerning a Member’s conduct which bears generally on a “breach of the rights and privileges” of the institution.<sup>2</sup> These censures of Members are implemented under the express authority in the Constitution, at Article I, Section 5, clause 2, for each House of Congress to “punish” one of its own Members.

A House, Senate or congressional “censure” of the President, unlike a congressional punishment of one of its own Members, or an impeachment and trial of the President in the legislature,<sup>3</sup> does *not* have an express constitutional basis. Although there is no express constitutional provision regarding censure of an executive officer, there is also no express constitutional impediment for the Congress, or either House of Congress, to adopt a resolution expressing its opinion, reproof, disapprobation or censure of an individual in the Government, or of the conduct of the individual, and, in fact, each House of Congress has on infrequent occasions adopted such resolutions in the past. Resolutions expressing the House’s or Senate’s disapproval, censure or reproof of an individual or of his or her conduct have on occasion been adopted, for example, by the Senate (although later expunged)

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<sup>1</sup>*Black’s Law Dictionary*, at 224, 6<sup>th</sup> Edition (1990).

<sup>2</sup>*Deschler’s Precedents of the U.S. House of Representatives*, Volume 3, Ch. 12, § 16; Riddick & Fruman, *Riddick’s Senate Procedure*, 270-273 (1992).

<sup>3</sup>*United States Constitution*, Article I, Section 2, clause 5; Article I, Section 3, clauses 6 and 7; Article II, Section 4. For a discussion of impeachment procedures and precedents, see CRS Report 98-186, “Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice,” February 27, 1998.

regarding President Jackson in 1834, and by the House in 1860 with regard to President Buchanan. Although not a resolution, a statement of very strong criticism finding abuse of power by President Tyler was issued by a select House Committee in the form of a report, which was then formally adopted by the full House of Representatives in 1842. Simple or concurrent resolutions disapproving of conduct or censuring the President or other executive official, like similar “sense of the Congress” resolutions, or sense of the House or Senate resolutions, would have no particular legal or constitutional consequence,<sup>4</sup> but may have political and/or historical import.

In discussing a potential “censure” or other statement of disapproval directed at the President by the Congress, some have also suggested a “fine” of the President, or a requirement for the President to make monetary restitution for the costs of the independent counsel investigation since January of 1998. Like a censure of the President, there is no express constitutional authority to fine the President or any other individual outside of Congress. However, unlike a censure or other sense of the House or Senate resolution used to express an opinion, a *mandatory* fine *legislated* by Congress against a particular individual may run afoul of the “Bill of Attainder” Clause of the Constitution, and in the case of the President may raise concerns under the diminution of salary provision in the Constitution. It is at least theoretically possible that an agreement might be arranged between the President and the Congress for the President to voluntarily “accept” a congressional statement, suggestion and/or direction concerning particular restitution or other act of contrition, and not to challenge the authority of any such legislative statement or act. In such a case, as a practical matter, and regardless of the potentially significant implications for policy or precedent, it may be difficult for anyone, other than the individual actually aggrieved or harmed (that is, the President), to possess the requisite legal standing to challenge in court such an arrangement on the basis of an alleged absence of legislative authority or violation of constitutional precepts.

## Censure

The issue of the propriety and the authority of the Congress or of either House of Congress to censure or otherwise formally reprimand an executive official, including the President, in the form of a simple resolution has been debated and questioned from time to time in the House and the Senate.<sup>5</sup> In early congressional considerations some Members of Congress, in their opposition to resolutions which declared either an opinion of praise or disapproval of the executive, cited the lack of express constitutional grant of authority for the House or the Senate to state an opinion on the conduct or propriety of an executive officer in the form of a formal

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<sup>4</sup> *Deschler's Precedents, supra* at Volume 7, § 5 (Concurrent Resolutions), and § 6 (Simple Resolutions); Brown, *House Practice*, 104<sup>th</sup> Cong., 2d Sess. at 161 (1996).

<sup>5</sup> *II Hinds' Precedents of the House of Representatives*, §1569, p. 1029: "While the House in some cases has bestowed praise or censure on the President or a member of his Cabinet, such action has at other times been held to be improper."

resolution of censure or disapproval.<sup>6</sup> Others argued that impeachment was the proper, and exclusive, constitutional response for the Congress to entertain when the conduct of federal civil officers is called into question, rather than a resolution of censure.<sup>7</sup> Concerning judicial officers, precedents indicate that the House has on occasion either rejected or not dealt with attempts to consider a “censure” motion of federal judges offered by the Judiciary Committee as an alternative to articles of impeachment, and parliamentarians have noted an apparent disinclination of the House to consider censure as part of the impeachment procedure.<sup>8</sup>

Both the House and the Senate have, however, in fact adopted resolutions or statements in the past expressing their opinion, disapproval, or censure of a Government official other than a Member of Congress. Such an expression of censure of a federal officer by the House, the Senate or the Congress is not an “impeachment” of that civil officer under Article I, Section 2, clause 5 and Section 3, clause 6 of the Constitution,<sup>9</sup> nor is it a “punishment” of one of the House’s or Senate’s own Members under Article I, Section 5, clause 2. Furthermore, a censure would also not, in most cases, be within those inherent or implicit authorities, in the nature of contempt, typically imputed to democratic legislative assemblies to protect the dignity and integrity of the institution, its members and proceedings.<sup>10</sup>

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<sup>6</sup> II *Hinds’ Precedents*, *supra* at §1569, pp. 1029-1030: “It was objected that the Constitution did not include such expressions of opinion among the duties of the House ....” (Citing debate and vote on a resolution of approval of the President’s conduct, which was laid on the table, 20 *Annals of the Congress*, 11<sup>th</sup> Cong., 2<sup>nd</sup> Sess., at 92 -118, 134-151, 156-161, 164-182, 187-217, 219 (1809)).

<sup>7</sup>Note discussion of House resolution in 1867 expressing opinion on the unfitness for the office of Mr. Henry Smyth (II *Hinds’ Precedents*, *supra* at §1581, pp. 1035-1036), and 1924 Senate resolution indicating its sense that the President “immediately request the resignation” of the Secretary of Navy. 65 *Congressional Record*, 68<sup>th</sup> Cong., 1<sup>st</sup> Sess., 2223-2245 (1924). Both of these resolutions were objected to by some Members as interfering with the President’s prerogatives in appointments and removals of executive officials, and the latter action as labeling with a “brand of shame” an individual in the Government without conducting impeachment proceedings. See discussion in Fisher, “Congress and the Removal Power,” in *Congress & the Presidency*, Volume 10, at 67-68 (1983).

<sup>8</sup>The censure of U.S. District Court Judge Harold Louderback, recommended in a Judiciary Committee report in 1933 instead of impeachment, was objected to, for example, by Rep. Earl Michener of Michigan, who explained: “I do not believe that the constitutional power of impeachment includes censure.” The recommendation was not approved, and the House adopted as a substitute an amendment impeaching the judge. 3 *Deschler’s Precedents*, *supra* at Ch. 14, §1.3, p. 400. In other instances recommendations of censure of judges, as alternatives to impeachment, were made by the Judiciary Committee, but not acted on by the House. *Id.* at 400-401; III *Hind’s Precedents*, *supra* at §§ 2519, 2520.

<sup>9</sup>See 3 *Deschler’s Precedents*, *supra* at Ch. 14, § 1.

<sup>10</sup>As to inherent contempt authority, see *Anderson v. Dunn*, 19 U.S. 204 (1821). Note, generally, Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America*, 245-255, 255-272 (1856). Since such action does not bear upon the proceedings and privileges of the House, and is not part of impeachment, such a resolution would generally not be considered to be a privileged resolution. See 3 *Deschler’s Precedents*, *supra* at Chapter 14, § 1, p. 401.

It has, however, become accepted congressional practice to employ a simple resolution of one House of Congress, or a concurrent resolution by both Houses, for certain nonlegislative matters, such as to express the opinion or the sense of the Congress or of one House of Congress on a public matter, and a resolution of censure as a concurrent or simple resolution would appear to be in the nature of such a “sense of Congress” or sense of the House or Senate resolution.<sup>11</sup> The absence of express constitutional language that the Congress, or the House or the Senate individually, may state its opinion on matters of public import in a resolution of praise or censure is not necessarily indicative of a lack of capacity to do so, or that such practice is *per se* unconstitutional. It is recognized in both constitutional law and governmental theory that there are, of course, a number of functions and activities of Congress which are not expressly stated or provided in the Constitution, but which are nonetheless valid as either inherent or implied components of the legislative process or of other express provisions in the Constitution, or are considered to be within the internal authority of democratic legislative institutions and elective deliberative bodies generally.<sup>12</sup> The practice of the House, Senate, or Congress to express facts or opinion in simple or concurrent resolutions has been recognized since its earliest days as an inherent authority of the Congress and of democratic legislative institutions generally, and the adoption of “sense of” the House or Senate resolutions is practiced with some frequency in every Congress.<sup>13</sup> A censure of the President, of course, may raise issues additional to and different from those concerning congressional capacity to state opinions in resolutions on other matters.

## Censure Precedents

Periodically during the nineteenth century Congress debated and considered the censure of a President of the United States. In the instances reviewed, the considerations have been in one House of Congress only, rather than concurrently in

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<sup>11</sup>“Simple resolutions are used in dealing with nonlegislative matters such as expressing opinions or facts .... Except as specifically provided by law, they have no legal effect, and require no action by the other House. Containing no legislative provisions, they are not presented to the President of the United States for his approval, as in the case of bills and joint resolutions.” *Deschler’s Precedents*, Volume 7, § 6. “[Concurrent resolutions] are not used in the adoption of general legislation. ... [They] are used in ... expressing the sense of Congress on propositions .... A concurrent resolution does not involve an exercise of the legislative power under article I of the Constitution in which the President must participate.” *Id.* at § 5. Brown, *House Practice*, *supra* at 161: “Simple or concurrent resolutions are used ... to express facts or opinions, or to dispose of some other nonlegislative matter.” See also Riddick & Fruman, *Riddick’s Senate Procedure*, 1202 (1992).

<sup>12</sup>The most common example of inherent or implied authority of Congress is the oversight and investigatory authority of either House, including the power to compel attendance of witnesses and production of documents. Such authority is not expressly provided in the Constitution, but the ability to collect facts and opinions, and to publish such opinions and facts, are considered inherent in the authority to legislate. *McGrain v. Daugherty*, 272 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178, 187, 200 (1957).

<sup>13</sup>See note 11, *supra*; Cushing, *supra* at 314. In the 105<sup>th</sup> Congress, for example, the House unanimously adopted a resolution to “condemn” as a “racist act” the alleged actions of three expressly named individuals in Texas who were arrested in connection with what is reported as a racially motivated homicide (H.Res. 105-466, 105<sup>th</sup> Cong ).



both the House and Senate. The Senate adopted a resolution in 1834 stating that certain conduct of President Andrew Jackson, involving a policy dispute concerning the removal of the Secretary of the Treasury and the question of the availability of certain documents, was “in derogation” of the Constitution or the laws of the nation.<sup>14</sup> President Jackson issued and sent to the Senate a strong protestation of the censure concerning both the prerogatives of his office and the powers of the Senate to censure.<sup>15</sup> The President's protest concerning a vote and a proceeding in the Senate was found by the Senate, in formal resolutions adopted by the body, to be "inconsistent with the just authority of the two Houses of Congress," a "breach of the privileges of the Senate," and was not allowed to be entered on the Journal.<sup>16</sup> Three years later, however, upon the President's political allies regaining control of the Senate, the Senate expunged the original censure resolution.<sup>17</sup> The Senate resolution concerning President Jackson did not expressly contain the word “censure” or other specific word of condemnation, and some critics of Congress' authority to adopt such resolutions of censure have categorized the 1834 resolution as one other than a “censure” of the executive.<sup>18</sup>

In 1860, the House of Representatives adopted a resolution stating that the President's conduct was deserving of its “reproof,” in a matter concerning the conduct of President Buchanan and his Secretary of the Navy in allowing political considerations and alleged campaign contribution “kickbacks” to influence the letting of Government contracts to political supporters, rather than the lowest bidder.<sup>19</sup> After debating both the substance of the charges and the authority of the House to adopt such a resolution, characterized by one Member as “censur[ing] indiscriminately the

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<sup>14</sup>The resolution of March 28, 1834, read as follows: “*Resolved*, That the President, in the late executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both.” Note II *Hinds' Precedents*, *supra* at §1591, p. 1040.

<sup>15</sup>Register of Debates, 23<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 1317-1336, April 17, 1834.

<sup>16</sup>Register of Debates, 23<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 1712, May 7, 1834, see II *Hinds' Precedents*, *supra* at §1591.

<sup>17</sup>Register of Debates, 24<sup>th</sup> Cong., 2d Sess. 379-418, 427-506 (1837), see discussion in Fisher, *Constitutional Conflicts Between Congress and the President*, 54-55 (4<sup>th</sup> ed.1997).

<sup>18</sup>*Congressional Globe*, 36<sup>th</sup> Congress, 1<sup>st</sup> Session, 2938-2939, June 13, 1860. Referring to the Senate resolution concerning President Jackson, Representative Bobock noted: “You will observe that in this resolution there is no direct declaration of censure, and no impeachment of the motives of the President. It was simply a declaration that his act was not in conformity with the Constitution and the laws of the land.”

<sup>19</sup>“*Resolved*, That the President and Secretary of the Navy, by receiving and considering the party relations of bidders for contracts with the United States, and the effect of awarding contracts upon pending elections, have set an example dangerous to the public safety, and deserving the reproof of this House.” *Congressional Globe*, 36<sup>th</sup> Congress, 1<sup>st</sup> Sess., 2951, June 13, 1860.

President of the United States and the Secretary of Navy,”<sup>20</sup> the House adopted the resolution 106-61.<sup>21</sup>

It may also be noted that, although not a *resolution* of censure, the House in 1842 adopted a report from a select committee, to which the President’s veto message had been referred, which strongly criticized the actions of President Tyler for “gross abuse of constitutional power and bold assumption of powers never vested in him by any law”; for having “assumed ... the whole Legislative power to himself, and ... levying millions of money upon the people, without any authority of law”; and for the “abusive exercise of the constitutional power of the President to arrest the action of Congress upon measures vital to the welfare of the people ...”<sup>22</sup> Similar to the instances in the Jackson censure, President Tyler sent a protestation of the House’s action to the House, which then adopted three resolutions of similar wording and import as the Senate’s resolutions in the Jackson case, stating that the President’s protest would not be accepted and was in derogation of the rights and privileges of the House.<sup>23</sup>

Other resolutions of disapproval or censure of a President have been debated on the floor of the House or Senate. The House debated the issue of a resolution criticizing President John Adams in 1800 because of a communication from the President to a judge, which the President’s critics deemed to be a “dangerous interference of the Executive with Judicial decisions,” concerning a celebrated deportation case.<sup>24</sup> A resolution which originally would have congratulated General Zachary Taylor for his conduct in the Mexican War was amended, in a procedural motion on the House floor to refer the resolution to the Committee on Military Affairs, to include as an amendment to an amendment of the referral a disapprobation of President Polk’s waging of an “unnecessarily and unconstitutionally begun war.”<sup>25</sup> Although the amendment to the referral was adopted, research has not indicated that the underlying resolution was ever passed by the House after referral to the committee. The Senate in 1862 also debated, and tabled a motion for censure of James Buchanan, who had recently been President of the United States, for alleged failures while President to take the necessary action to prevent the secession from the Union of several southern states.<sup>26</sup> More recently, a censure resolution concerning

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<sup>20</sup>*Id.* at 2951, Mr. Clark of Missouri.

<sup>21</sup>*Id.* at 2951.

<sup>22</sup>*Journal of the House of Representatives*, 27<sup>th</sup> Cong., 2d Sess., 1343, 1346-1352, August 17, 1842.

<sup>23</sup> II *Hinds’ Precedents*, *supra* at §1590, pp. 1039-1040.

<sup>24</sup>10 *Annals of Congress* 532-33, 542-578, 584-619 (1800), discussed in Neuman, “Habeas Corpus, Executive Detention, and the Removal of Aliens,” 98 *Columbia Law Review* 961, 995-996 (1998).

<sup>25</sup>*Congressional Globe*, 30<sup>th</sup> Congress, 1<sup>st</sup> Session 95, January 3, 1848.

<sup>26</sup> II *Hinds’ Precedents*, *supra* at §1571, p. 1030, citing *Congressional Globe*, 37<sup>th</sup> Congress, 3<sup>rd</sup> Sess. pp. 101-102, December 16, 1862.

President Richard Nixon was introduced in the House in 1974 but received no floor consideration.<sup>27</sup>

The House or the Senate has also from time to time censured or expressed its disapprobation of other executive officers, or of their conduct, in the form of a resolution adopted by the body.<sup>28</sup> The earliest attempt found thus far concerned a series of resolutions proposing the censure and disapproval of Secretary Alexander Hamilton in 1793, the texts of which were considered by historians to have been drafted by Thomas Jefferson for introduction by Representative William Branch Giles of Virginia.<sup>29</sup> Some congressional resolutions over the years have merely found misconduct on the part of an executive officer and urged the President to seek the officer's resignation, without expressing a specific term of censure or condemnation. For example, after having conducted investigations into the conduct of the administration of the New York custom-house by Mr. Henry Smyth, and finding that "there is not sufficient time prior" to adjournment to finish the matter, the House expressed in a resolution "Henry A. Smyth's unfitness to hold the office," and recommended that he "should be removed from the office of collector."<sup>30</sup> Similarly, the Senate in 1924, during the Teapot Dome investigation passed a resolution indicating its sense that the President "immediately request the resignation" of the Secretary of Navy.<sup>31</sup>

The Senate adopted a resolution in 1886 in which it expressed its "condemnation" of President's Cleveland's Attorney General A.H. Garland

<sup>27</sup> See H.Res.93-1288, 93rd Congress, 2d Session. See discussion at 120 *Congressional Record* 26820, August 5, 1974. The resolution stated:

Whereas the people have the right to expect from the President of the United States high moral standards and personal example, as well as great diligence in the exercise of official responsibilities and obligations;

And whereas, Richard M. Nixon, in his conduct of the office of President - despite great achievements in foreign policy which are highly beneficial to every citizen and indeed to all people of the world - (1) has shown insensitivity to the moral demands, lofty purpose and ideals of the high office he holds in trust, and (2) has, through negligence and maladministration, failed to prevent his close subordinates and agents from committing acts of grave misconduct obstruction and impairment of justice, abuse and undue concentration of power, and contravention of the laws governing agencies of the Executive Branch;

Now, therefore, be it resolved by the House of Representatives that Richard M. Nixon should be and he is hereby censured for said moral insensitivity, negligence and maladministration.

<sup>28</sup>The precedents and incidents provided are intended to be examples of congressional actions, and are not designed to be a definitive list of all resolutions of disapproval of executive officials that may have been adopted or considered by either House.

<sup>29</sup> Sheridan, Eugene R., "Thomas Jefferson and the Giles Resolutions," *William and Mary Quarterly*, Third Series, Volume 49, Issue 4, at 589-608 (Oct. 1992). The resolutions did not pass.

<sup>30</sup> *Congressional Globe*, 40<sup>th</sup> Cong., 1<sup>st</sup> Sess., pp. 255-256, 282-285, 394-395 (1867).

<sup>31</sup> 65 *Congressional Record*, 68<sup>th</sup> Cong., 1<sup>st</sup> Sess., 2223-2245, February 11, 1924. See discussion in footnote 7, *supra*.

concerning his refusal to provide certain records and papers to the Senate about the removal from office of a district attorney by the President.<sup>32</sup> In 1896, the House adopted a resolution where it found that a United States Ambassador, by his speech and conduct “has committed an offense against diplomatic propriety and an abuse of the privileges of his exalted position,” and therefore, “as the immediate representatives of the American people, and in their names, we condemn and censure the said utterances of Thomas F. Bayard.”<sup>33</sup>

## Fines

As a general proposition it may be stated that there is no authority for the Congress, or either House of Congress, to levy a mandatory fine against an individual (or to otherwise “punish” an individual or person) absent some recognized legislative power, such as the express constitutional authority in Article I, Section 5, clause 2 of the Constitution allowing either House of Congress to “punish” one if its own Members.<sup>34</sup> The noted parliamentary and legislative authority, Luther Stearns Cushing, in discussing the general and traditional powers of legislative institutions in the United States, explained in his 1856 treatise:

In England, both houses of parliament were anciently in the practice of imposing the payment of a fine by way of punishment; and this is understood, at the present day to be the practice of the lords; but the commons have appeared to long since waived or abandoned this form of punishment, and it has even been laid down that they now have no such power. In this country, with one or two exceptions, in which there is a special constitutional provision to that effect, the legislative assemblies are not authorized to impose a fine by way of punishment.<sup>35</sup>

In addition to the general absence of authority and practice of a legislative institution in the United States to fine persons who are not members of that legislature, the levying of a fine or other such punishment, such as loss of pay,

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<sup>32</sup> 17 *Congressional Record*, 49<sup>th</sup> Cong., 1<sup>st</sup> Sess., pp. 1584-1591, 2784-2810, March 26, 1886: “*Resolved*, That the Senate hereby expresses its condemnation of the refusal of the Attorney-General, under whatever influence, to send to the Senate copies of papers called for by its resolution of the 25<sup>th</sup> of January, and set forth in the report of the Committee on the Judiciary, is in violation of his official duty and subversive of the fundamental principles of the Government and of a good administration thereof.”

<sup>33</sup> 28 *Congressional Record*, 54<sup>th</sup> Cong., 1<sup>st</sup> Sess., p. 3034, March 20, 1896.

<sup>34</sup> “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.” Under this authority each House of Congress has disciplined its own Members (in addition to expulsion, censure, or [in the House] reprimand) by way of fines or the ordering of monetary restitution. See, for example, S.Rept. 101-382, 101<sup>st</sup> Cong., 2d Sess., at 14-15 (1990); H.Res. 91-2, 91<sup>st</sup> Cong. (1969), discussed in *Deschler’s Precedents, supra*, at Ch.12, § 17, pp. 203-204; H.Rept. 96-351, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 20 (1979); H.Rept. 101-610, 101<sup>st</sup> Cong., 2d Sess., at 55 (1990); H.Rept. 105-1, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 2-3 (1997). Note also Rules, House Committee on Standards of Official Conduct, Rule 25(e), 105<sup>th</sup> Cong. (1997).

<sup>35</sup> Cushing, *The Law and Practice of Legislative Assemblies in the United States of America* [*Lex Parliamentaria Americana*], Section 676, at 266-267 (Boston 1856).

pension or other remuneration or benefits, may directly implicate the Bill of Attainder Clause of the Constitution, as discussed below.

## Constitutional Issues

### Bills of Attainder

No specific “penalty” or “punishment” necessarily follows the adoption of a resolution which merely expresses a “censure” or states another term of disapproval or condemnation of an individual, other than the statement itself and the potential collateral or incidental political damage that might be incurred as a result of Congress’ expression of its opinion. Furthermore, it is questionable under the Bill of Attainder Clause of the Constitution (Article I, Section 9, clause 3), whether Congress may, in any event, inflict a mandatory “penalty” or “punishment” upon the President, or upon any other specified executive official, by means of a legislative act, other than through impeachment.<sup>36</sup> The provision of the Constitution forbidding Congress from adopting “bills of attainder” is directed at what are generally described as legislative punishments.<sup>37</sup> It may be instructive to note that in discussing the impeachment provisions of the Constitution at the Convention of 1787, George Mason had recommended expanding the grounds for impeachment beyond merely “treason” and “bribery,” to “maladministration,” indicating that without such broadening of the grounds for impeachment, the Bill of Attainder Clause of the Constitution might otherwise bar Congress from dealing with many

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<sup>36</sup> In the case of impeachment and conviction, the Constitution provides that the punishment of a civil officer by the Congress may extend to removal from office, and additionally, a disqualification from holding federal office. Article I, Section 3, clause 7. (It may also be worthy of note that removal of the President from office under the impeachment process has collateral statutory consequences such as the loss of benefits under the Former Presidents Act, 3 U.S.C. § 102 note.) In addition to impeachment (and discipline of its own Members), there is a recognized, inherent authority for the Congress, like other democratic legislative institutions, to take measures, such as in contempt proceedings, to protect the safety, integrity and privileges of the institution, its Members and proceedings.

<sup>37</sup> Article I, Section 9, clause 3: “No Bill of Attainder or ex post facto Law shall be passed.” A bill of attainder is “a law that legislatively determines guilt and inflicts punishment upon an identified individual without the provisions of the protections of a judicial trial.” *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977); *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984); see discussion in *Constitution of the United States of America, Analysis and Interpretation*, Senate Document No. 103-6, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess., at 347-350 (1996). A law that is punitive, that is, intended to punish an individual or specified individuals, rather than intended as a regulatory, prophylactic measure to protect the public, falls within the bill of attainder prohibition. See *United States v. Brown*, 381 U.S. 437 (1965), and discussion in *SBC Communications, Inc. et al. v. US West Communications Inc.*, No. 98-10140 (5<sup>th</sup> Cir., September 4, 1998). In addition to bill of attainder issues, an additional or increased “penalty” or “punishment” imposed by the legislature for an act which has already been committed might raise questions under the *ex post facto* provision. See *Hiss v. Hampton*, 338 F. Supp. 1141, 1153 (D.D.C. 1972).

“great and dangerous offenses” which do not rise to or constitute bribery or treason.<sup>38</sup> Under the Bill of Attainder Clause, the Congress may generally not levy a legislative punishment, such as a mandatory fine, upon a specified individual (who is not a Member of Congress), nor adopt a punitive measure, for example, in the form of a legislative prohibition on the payment of salaries to certain specified officials in the Government.<sup>39</sup>

There may be some argument that a public rebuke, such as a censure, because of the potential for damage to one’s reputation and possible political or other public aspirations may, in itself, constitute a “punishment” by the Congress, and thus, since not expressly authorized, would fall within those legislative punishments prohibited by the Bill of Attainder Clause.<sup>40</sup> It may be argued that the intent of such a censure would appear to be clearly punitive and not remedial. However, it does not appear that a censure adopted in its traditional form as a simple (or even a concurrent) resolution, with no binding effect and stating only an opinion, qualifies as a “bill of attainder,” - since it is *not* in the constitutional and congressional context a “bill,” as it does not become law nor is it a measure that has the force or effect of law.<sup>41</sup>

A censure which would take a less traditional form than a simple or concurrent resolution and would be included, for example, in a joint resolution presented to the President would, however, clearly be a “bill,” since it is a vehicle which would become a public law. As such, it would then raise the legal and constitutional issue

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<sup>38</sup> 2 Farrand, *The Records of the Federal Convention of 1787*, at 550, September 8, 1787: “Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. ... As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.” The suggested language was opposed by James Madison, who argued that the term “maladministration” was “so vague” that it would be “equivalent” to the President having only “tenure during pleasure of the Senate.” *Id.* at 550. The compromise language of “other high crimes & misdemeanors” was substituted by Col. Mason, and adopted. *Id.* at 550.

<sup>39</sup> In *United States v. Lovett*, 328 U.S. 303 (1946), an appropriations rider was struck down by the Supreme Court as a bill of attainder where the legislative language forbade the use of money to pay the salaries of three persons in an agency whom the House had wanted removed from Government service because they were thought “subversive.”

<sup>40</sup> See, for example, James Madison’s discussion of a legislative “denunciation” as a punishment for constitutional purposes, 4 *Annals of Congress* 934, cited in *US West Communications Inc.*, *supra*, at note 17.

<sup>41</sup> A “bill” as used in the constitutional context “refers to the chief vehicle employed by the Congress in the enactment of laws under its legislative powers.” *Deschler*, *supra* at Volume 7, Chapter 24, § 2. See Article I, Section 7, clauses 1-3 of the Constitution concerning the requirements for “Bills.” In *Nixon v. Administrator of General Services*, *supra* at 468, the Supreme Court described a bill of attainder as “a law that legislatively determines guilt and inflicts punishment upon an identified individual ....” (emphasis added). In *United States v. Lovett*, *supra*, the Supreme Court noted that bills of attainder are “legislative acts, *no matter what their form*,” that inflict legislative punishments on individuals. 328 U.S. at 315 (emphasis added). The Court there made this point to explain that the Clause applies to appropriations acts (passed by both Houses of Congress and signed by the President), as well as to a permanent law. 328 U.S. at 315-316.

of whether a formal, public expression of opinion and disapproval by the legislature in that law directed at a specified individual is a legislative “punishment” contemplated by the Bill of Attainder provision. The Supreme Court has explained in *Nixon v. Administrator of General Services*, *supra*, that there are three tests for determining whether a law directed at a specific individual is a prohibited legislative “punishment”: the historical test, the functional test, and the motivational test.<sup>42</sup> The “historical” test looks to determine if the punishment inflicted is one which has been traditionally considered a punishment as either a bill of attainder or bill of pains and penalties. As succinctly summarized in a lower federal court, the historically recognized “punishments” include: “the death sentence; imprisonment; banishment; confiscation of property; and barring individuals and groups from participating in specified employment or vocations.”<sup>43</sup> Since the Supreme Court recognized the “possibility that new burdens and deprivations” might be legislatively fashioned in the future, two further and additional tests were provided for any such “new burdens and deprivations” created by the legislature.<sup>44</sup> The “functional” test looks to determine if there are non-punitive, regulatory or remedial legislative purposes that are advanced by the new legislative “burdens imposed.”<sup>45</sup> The “motivational” test inquires into “whether the legislative record evinces a congressional intent to punish.”<sup>46</sup>

A mere “censure” of the President or other executive official in a law enacted by a joint resolution would not appear to meet the “historical” test as specified by the Supreme Court, as it is neither a death sentence, imprisonment, banishment, confiscation of property, nor barring of individuals and groups from participating in specified employment or vocations. Although the “function” and “motivation” for a censure might, in fact, be able to be convincingly argued to be punitive in nature, it is clear from the Supreme Court’s explanation that the act of the legislature must as a threshold matter place some sort of “burden or deprivation” upon the subject of the legislation. There is thus an issue as to whether an expression of censure or condemnation in a law is, in itself and without further disabilities or penalties, a

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<sup>42</sup>*Nixon v. Administrator of General Services*, *supra* at 473-482.

<sup>43</sup>*Springfield Armory, Inc. v. City of Columbus*, 805 F. Supp. 489, 494 (S.D. Ohio 1992), reversed in part on other grounds, 29 F.3rd 250 (6th Cir. 1994), explaining *Nixon v. Administrator of General Services*, *supra* at 473-474. Note historical judicial construction of “punishment.” *Ex Parte Garland*, 71 U.S. 333 (1866); *Cummings v. Missouri*, 71 U.S. 277, 320 (1866): “the deprivation of any rights, civil or political, previously enjoyed ...”

<sup>44</sup>*Nixon v. Administrator of General Services*, *supra* at 475. There might be some argument made that since “censure” was a procedure known to and practiced by the Parliament, as well as colonial legislatures and early Congresses, that it is not a “new” deprivation or burden fashioned by the legislature, and thus since not considered part of the punishments included in the bills of attainder or pains and penalty historically, there is no need to apply the further functional or motivational tests.

<sup>45</sup>*Id.* at 475-476; “Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.”

<sup>46</sup>*Id.* at 478.

"burden or deprivation" in fact or in law upon the subject of the censure.<sup>47</sup> As can be seen by the foregoing analysis and discussion, enacting a censure in a non-traditional (and unprecedented) format of a "bill" (such as a joint resolution) would provide at the very least an opportunity for a constitutional argument of "bill of attainder" that would not exist if a censure were adopted in a non-"bill" vehicle, that is, a simple or concurrent "sense of" resolution.

As to *finis* and bills of attainder (and *ex post facto* laws), it may be noted that in some instances the courts have found that certain civil fines and forfeitures were "remedial" measures and not "punitive," so as not to violate the *ex post facto* provision or the Excessive Fines Clause.<sup>48</sup> It may be possible under this analysis to argue that certain fines or required "restitutions" of funds to the Government may also not be punitive under the Bill of Attainder Clause, as long as they merely "reimburse the government for investigative and prosecutorial cost."<sup>49</sup> Any argument of this nature in the instance at hand, however, would also face the seemingly difficult task of overcoming the "motivational" test, considering the express statements by individual Members concerning the appropriate "punishment" in this particular case, as well as the inference that a mandatory "fine" or required restitution that accompanies or is coupled with an express "censure" or other explicit statement of disapproval, directed at one specified individual, would appear in that context to be indicative of a punitive legislative intent, rather than merely a remedial one.<sup>50</sup>

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<sup>47</sup>Justice Stevens, concurring in *Nixon v. Administrator of General Services*, appeared to suggest that humiliation or injury to one's reputation may implicate the Bill of Attainder Clause. Legislation denying President Nixon custody of his papers "subjects a named individual to this humiliating treatment [which] must raise serious questions under the Bill of Attainder Clause. Bills of attainder were typically directed at once powerful leaders of government. By special legislative Acts, Parliament deprived one statesman after another of his reputation, his property, and his potential for future leadership." *Id.* at 484. The humiliation and loss of reputation noted by Justice Stevens in both the Nixon and the parliamentary Acts, however, were collateral results to the other deprivations of liberty or property that such legislative acts inflicted, and not the sole penalty. It is not clear whether mere publicity or publication is such a "burden or deprivation" as to raise bill of attainder or *ex post facto* problems (note generally, *EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241 (D.C. Ill. 1980) and discussion of "publication" as punishment in *Artway v. Attorney General of New Jersey*, 876 F. Supp. 666, *aff'd in part, vacated in part*, 81 F.3d 1235, 1253-1263 (3<sup>rd</sup> Cir.), *rehearing den.*, 83 F.3d 594 (3<sup>rd</sup> Cir. 1996)). The question of whether any "deprivation or burden" results from a censure may also particularly be raised in a case where the facts are already widely and publicly known, and public admissions of wrongdoing already made by the subject. Finally, it may be possible that the wording of any resolution may be relevant as to whether it is a deprivation or burden upon one's reputation.

<sup>48</sup>*United States v. Halper*, 490 U.S. 435, 445-446 (1989); *Karpa v. C.I.R.*, 909 F.2d 784 (9<sup>th</sup> Cir. 1990), noting the non-penal nature of fines which are not "overwhelmingly disproportionate" to the damages caused to the Government and thus not so "divorced from the Government's damages and expenses to constitute punishment." 909 F. 2d at 788, citing *Halper, supra*; *Austin v. United States*, 509 U.S. 602 (1993); *U.S. v. Certain Funds Contained in Account Nos.*, 96 F.3d 20 (2<sup>nd</sup> Cir. 1996), *cert. den.* 117 S.Ct. 954 (1997).

<sup>49</sup>*Karpa, supra* at 788, citing *Halper, supra* at 445-446, n. 6.

<sup>50</sup>See discussion of congressional intent and "intent of Members of Congress who voted its (continued...)



It would appear to be within the realm of possibility, although without apparent precedent, that the President might voluntarily agree not to challenge the authority and constitutionality of a particular legislative action or statement, and might voluntarily agree to pay a “suggested” monetary amount as a fine or restitution along with a “censure,” or to accept some other form of contrition or expiation suggested by Congress in a sense of Congress resolution. If the payment of restitution or a fine is merely incorporated into a legislative vehicle such as a simple or a concurrent resolution, which is merely a statement of opinion by or “sense of” the Congress, and which therefore is not binding and does not have force or effect of law, it may be argued, as discussed above, that such a legislative measure would not be a “bill of attainder,” since it is not a “bill,” a law, nor is it mandatory or enforceable.<sup>51</sup>

In any event, if the President agrees to abide by the “suggestion” or opinion, or even if such formulation were incorporated into a mandatory fine or other legislative vehicle with the force and effect of law with the President’s agreement, the question could still be ultimately raised as to who, if anyone, would have legal standing to challenge the act as beyond the powers and authority of the legislature if the person affected or aggrieved by the act does not challenge it. This is not to suggest that the President, or any subject of a legislative act, has the ability to “waive” a constitutional incapacity of the legislature to act, but rather it is a practical question to be raised if such legislative act does in fact take place. Standing to challenge a congressional act in the courts requires a showing that the plaintiff has an injury in fact as a result of the challenged action.<sup>52</sup> A Member of Congress does not necessarily have any additional standing beyond a member of the public to challenge a legislative act based merely on an arguable institutional injury or loss of political power, unless there is some personal injury to the legislator, such as where a legislator’s vote would be “completely nullified.”<sup>53</sup>

## Diminution of Salary

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<sup>50</sup>(...continued)

passage,” in determining whether a measure is punitive or merely remedial or regulatory in *Nixon v. Administrator of General Services*, 433 U.S. *supra* at 473-484. Also in *United States v. Lovett*, *supra* at 313, the Court looked not only to the “section’s language,” but “the circumstances of its passage” as well, as indicative of Congress’ intent.

<sup>51</sup> See footnote 41, *supra*.

<sup>52</sup> *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 152 (1970). “In order to meet the standing element of the case-or-controversy requirement, appellees must allege a personal injury that is particularized, concrete, and otherwise judicially cognizable.” *Raines v. Byrd*, 117 S.Ct. 2312, 2313 (1997), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Allen v. Wright*, 468 U.S. 737 (1984). Standing does not turn on the merits of complaint, but whether the plaintiff has a legal right to a judicial determination of the issues raised. *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>53</sup>In *Raines v. Byrd*, *supra*, plaintiff Senators alleged that the line-item veto alters the “constitutional balance of powers” between the President and Congress, as well as altering the “legal and practical effect” of their votes, and divests Members of their constitutional role in the repeal of legislation. 117 S.Ct. at 2316. The Court found, however, that plaintiff Senators did not have legal standing to challenge the legislation, as there was no personal injury, but only a “loss of political power.” 117 S.Ct at 2318.

It has also been postulated that a provision of law which fines, or requires monetary restitution from the President might, in effect, be a diminution of the salary of the President, in contravention of Article II, Section 1, clause 7, of the Constitution.<sup>54</sup> Proponents of this theory cite to the cases concerning the similar constitutional limitations on the diminution of salary of federal judges during their tenure in office, which have demonstrated that even some “indirect” lessening of judicial compensation, such as by the imposition of a *new* tax *after* judges have taken office, may work to diminish the over-all compensation of those federal judges as contemplated by that provision of the Constitution.<sup>55</sup> There is no precedent which makes it clear or provides a definitive ruling as to whether a mandatory “fine” or required “restitution” directed at a particular officer would be a diminution of salary under the Constitution. It may be noted that the fine or restitution to the Government could be paid out of funds other than the President’s salary or compensation (such as from private contributions or loans); however, it would be a *new* financial obligation to the United States Government placed by the Congress upon the funds available to the President during his term (and *not* an application of a pre-existing provision of law or regulation, or merely an increase in current, existing financial obligations), and would be a reduction which is applied directly and solely to the President by the Congress.

## Separation of Powers and Policy Implications

Critics of a congressional “censure” of the President or of other executive officials often argue that such congressional action violates the principles of “separation of powers” within the constitutional framework of separated powers. Many of the arguments forwarded, however, appear in their nature to be policy arguments of why it would or would not be a good policy, practice or precedent for the House, Senate or Congress to censure, or for the President to agree to a censure. As important and significant as such policy arguments are, they do not necessarily address the legal or constitutional capacity or incapacity, as interpreted by the Supreme Court, of the House or Senate to adopt such resolutions. Very briefly, those types of congressional actions which the Supreme Court has found to violate the principles of “separation of powers” within the Constitution have been those which aggrandize the powers of one branch at the expense of the powers of the other, or that independently interfere with or impermissibly undermine the powers of another branch, by preventing that branch from carrying out its constitutional duties.<sup>56</sup> As stated by the Supreme Court: “[I]n determining whether the Act disrupts the proper

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<sup>54</sup> “The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected ....”

<sup>55</sup> *Evans v. Gore*, 253 U.S. 245 (1920); *Hatter v. United States*, 64 F.3d 647 (Fed. Cir. 1995), *affirmed*, *United States v. Hatter*, 117 S.Ct. 39 (1996); on remand to the Federal Court of Claims, the court found, as a factual matter, that subsequent increases in judicial salaries had made up for any diminution of over-all compensation of federal judges caused by application of new Social Security and Medicare taxes on salaries of sitting federal judges. 38 Fed.Cl. 166 (1997). As to the President, see 13 Ops. Atty. Gen. 161 (1869).

<sup>56</sup> *United States v. Nixon*, 418 U.S. 683, 711-712 (1974); *Commodity Futures Trading Commission v. Shor*, 478 U.S. 833 (1986); *Morrison v. Olson*, 487 U.S. 654, 695 (1988).

balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions."<sup>57</sup> The issue may thus need to be framed as to whether statements of censure of the House or the Senate, or the Congress concurrently, would be found to impermissibly undermine the authority of the President by interfering and preventing the carrying out of the executive's constitutional duties and functions.

Legal and constitutional issues and questions of legal standing aside, there are also potentially important policy implications which the Congress may wish to consider. On the one hand, an agreement or deal where the President of the United States voluntarily accepts a "censure" vote of the Congress (either through a simple or concurrent resolution, or through a joint resolution which the President signs to indicate his acceptance), or a censure "plus" some other act of contrition, might arguably provide for an appropriate public consequence to the acts of a President which, while found either highly offensive or even illegal, might not be considered by Congress to constitute "treason," "bribery" or other "high crimes or misdemeanors." It might be argued that a censure and/or other "punishment" recommended and agreed to by the President would allow for a formal, public statement by the representatives of the American people indicating strong disapproval of such conduct, without subjecting the country to as wrenching and disruptive a process as impeachment and an attempt to remove a democratically elected President. If crimes were committed by the President, the President would be subject to criminal indictment and prosecution in the normal judicial process after leaving office.

However, on the other hand, it might be argued that action of this nature, even merely a "censure" of a President, is an extra-constitutional measure not contemplated by the express provisions nor the design of the Constitution. The sole method in the Constitution for dealing with serious Executive wrongdoing is the impeachment provision. As to legislative "punishments" outside of impeachments, it may be noted that the Bill of Attainder Clause was an intentional limitation on congressional powers to punish specified individuals, based on due process and separation of powers concerns. Additionally, the diminution of salary provision was adopted within the Constitution's separation of powers framework, and among its checks and balances, to ensure the independence of the Executive from the Congress.<sup>58</sup> It has thus been argued that even if not technically a bill of attainder nor a diminution of salary, and/or even if unchallenged by the subject of the fine or similar congressional "punishment," such action might establish a precedent for future actions, threats of large monetary fines, or "agreements" (into which a

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<sup>57</sup>*Nixon v. Administrator of General Services*, 433 U.S. *supra* at 443.

<sup>58</sup>See Story, *Commentaries on the Constitution of the United States*, Vol 2, at §1486, pp. 311-312 (1873): "It is obvious that, without due attention to the proper support of the President, the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over his salary and emolument, would soon render him obsequious to their will. ... The legislature, upon the appointment of a President, is once for all to declare what shall be the compensation for his services during the time for which he shall have been elected. This done, they will have no power to alter it, either by increase or diminution.... They can neither weaken his fortitude by operating upon his necessities, nor corrupt his integrity by appealing to his avarice."

President may be pressured by the specter of impeachment proceedings) which could tend to interfere with or upset to some degree the balance contemplated in the Constitution in the relationship between the Executive and the Congress.

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