

Censure Is Not Allowed for Presidents

By *Steve Charnovitz* SPECIAL TO THE NATIONAL LAW JOURNAL

OVER THE PAST weeks, there have been numerous suggestions that President Bill Clinton and Congress "settle" the ongoing investigation by having Congress censure and perhaps fine Mr. Clinton. While it may seem an appealing way to avoid a painful impeachment, such a settlement would probably be unconstitutional.

Censure or reprimand are potential sanctions against members of Congress. These in personam sanctions arise out of the power of either the House or Senate "to punish its Members for disorderly behavior" (U.S. Constitution, Art. I, Sec. 5, cl. 2).

Congress has no inherent authority to punish or censure anyone other than its members or staff. That's a manifestation of the separation of powers between the legislative and judicial branches of government.

If the House and Senate were to pass a law punishing Mr. Clinton, that would seem to be a bill of attainder, which is prohibited by the Constitution (Art. I, Sec. 9, cl. 3). Prior decisions of the Supreme Court have not fully delineated the scope of the forbidden bill of attainder, but any special act of Congress singling out a specific individual for punishment would fit our historical understanding of such a bill.

If the House or Senate were to pass separate resolutions of censure, that might conflict with the underlying principle of the Supreme Court's 1983 decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919. *Chadha* overturned the "legislative veto" because

it was not in the form of a resolution presented to the president. The Constitution allows each house of Congress to conduct its own internal affairs, but not to take individual actions that have force outside Congress.

During the 19th century, there were a few precedents involving censure of non-members, but none is applicable to the current situation. In 1818, the House censured a man for attempting to bribe a member. In 1832, the House censured a man (Sam Houston) for assaulting a member. In 1865, the House censured a man for attempted intimidation of a member. All of these actions involved direct interference with the House and were related to proceedings for contempt of Congress. Mr. Clinton has been accused of a lot, but none of the allegations involves similar misbehavior.

No Suitable Precedent

In any event, censures of this sort have been abandoned in modern congressional practice. There are apparently no instances of censure of individuals outside the Congress during the 20th century. Censure and reprimand have been used only to discipline sitting members of Congress.

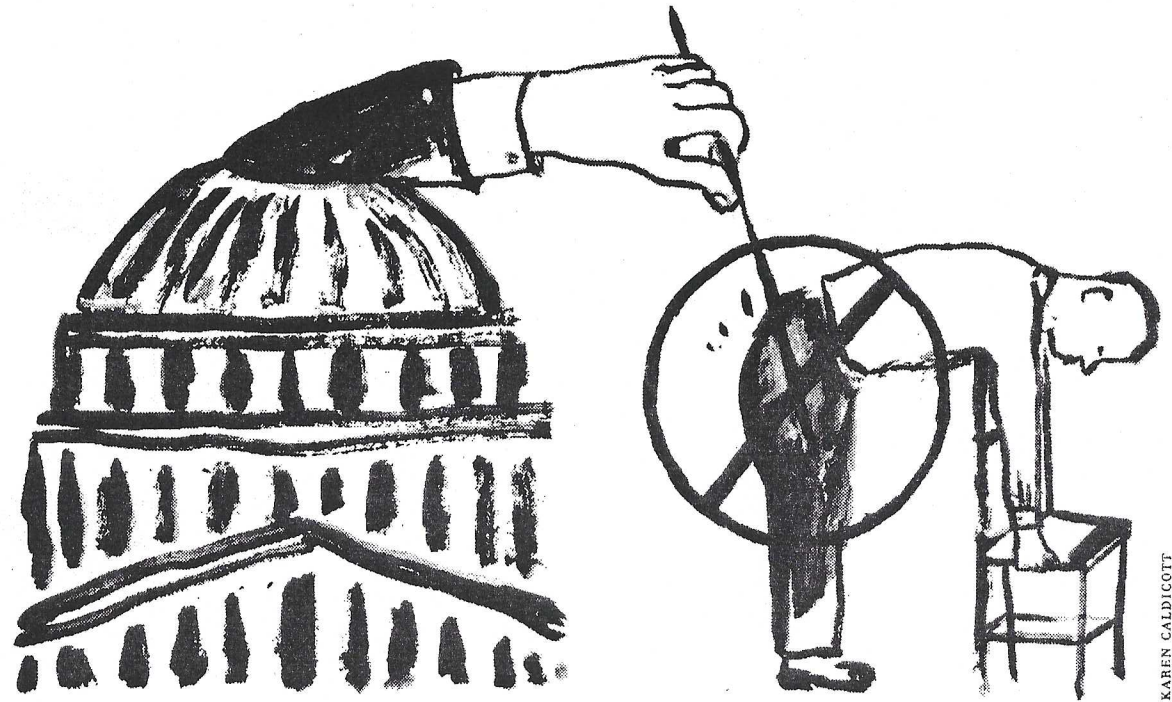
Some analysts have pointed to the U.S. Senate action against President An-

drew Jackson in 1834, but it lacks validity as a precedent. The issue was President Jackson's refusal to turn over documents involving the Bank of the United States. Actually, the word "censure" did not appear in that Senate resolution. Nevertheless, Mr. Jackson perceived it as a censure and sent a stinging message to the Senate.

According to Mr. Jackson, the Senate resolution asserted no legislative power. He declared that the Constitution provided for impeachment of a president but not for his censure by a single house of Congress. The Senate's rebuke engendered considerable sympathy for President Jackson. Three years later, the Senate expunged this ill-considered action from its record.

While the strongest argument against censuring Mr. Clinton is that it is unconstitutional, there are also strong policy arguments against it. Punishment should remain the province of independent judges, not politicians. While cynics might say that Congress punishes the public all the time with silly or wasteful laws, that is different from acting as an ad hoc disciplinary tribunal. Once Congress unsheathes the sword of censure, what will stop it from trying to jab federal judges in the future?

There is an understandable temptation to improvise a punishment that would hurt the president yet allow him to stay in the White House. But Congress should eschew any action other than those authorized in the Constitution. ■



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