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# Senate

SPEECH BY SENATOR EDMUND S. MUSKIE, UNIVERSITY OF TOLEDO, OCTOBER 23, 1973

Last Saturday night I made the following statement: I believe that these events are of such gravity and consequence to our form of government that the House of Representatives should consider holding hearings on the impeachment of the President. What the President has done threatens to destroy our system of laws. Unless Congress responds in the only way provided in the Constitution for resisting such a usurpation of authority, we endanger our country's future.

I want to expand today upon that statement.

The events of last week force us to consider seriously a course of action from which we instinctively shrink. As an officer elected by all the people to govern, the President commands a respect and carries a responsibility with which no one would lightly or maliciously interfere.

But, as the executor of the laws that cement our society, the President remains ultimately subject to the law and to the procedures for its enforcement. As the Court of Appeals observed ten days ago, "Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands."

A crisis the President himself has set in motion now requires us to determine what those commands are and whether or not the President has set himself above the law. To make that determination about the President's behavior in the conduct of the Watergate investigation, I believe we must now begin the hearings in the House of Representatives which are the first step toward the presentation of formal impeachment charges.

It is possible that before that process ever culminates in a Senate trial, we might find other means of resolving our crisis. But while we search for those avenues of accommodation, we should use the instruments the Constitution provides to set limits on the conduct of the President.

I

When ordinary standards of behavior governing the relationship of citizen to citizen or of citizens to the state are violated, the offenses are investigated and, if proved, are punished. So when action by the President seems to offend our basic Constitutional standards, the other representatives of the people are obligated to examine that action, to weigh official conduct in a given case against accepted rules of conduct, and to pronounce a final judgment.

I view impeachment, then, as a means, not an end, and I speak today of the process, not of any foreordained outcome. We cannot, obviously, be commited to a verdict before knowing the charges. But we have come to a moment, in my judgment, when the mechanism of impeachment is the surest way in which we can examine the charges and determine their resolution.

The Constitution gives us but one process to enforce on a President the principle that the law is supreme. When the Executive ignores the commands of the courts and abuses the trust of the people, the impeachment process offers us the surest remedy.

By beginning that process now, the House of Representatives will have the opportunity to determine directly and openly whether there should be a trial on removing the President from office for violating the order of the courts, for dismissing the special prosecutor, or for other actions which James Madison defined as "contradiction of justice." If the House determines that a trial should be held, the Senate, with the Chief Justice of the United States presiding, undertakes to pass final judgment on the President's case.

II

In his study of the Presidency, Clinton Rossiter speaks of the political limits on the office. "The President," he wrote, "draws immense authority from the support of the American people, but only if he uses it in ways that they understand and approve, which generally means ways that are fair, dignified, traditional and familiar. . . . If he knows anything of history or politics or administration, he knows that he can do great things only within 'the common range of expectation,' that is to say, in ways that honor or at least do not outrage the accepted dictates of Constitutionalism, democracy, personal liberty and . . . morality."

In the dismissal of Archibald Cox as Special Watergate Prosecutor and the threatened abandonment of the independent investigation of the Watergate scandals, the President betrayed the expectations of many Americans and outraged those standards.

Those expectations were bolstered by the President's promise early in May that he would not claim executive privilege to prohibit testimony by White House officials concerning possible criminal conduct in the Watergate affair and the alleged cover-up. They were increased by his statement calling for a full resolution of the issues of wrongdoing *in the courts*, the corollary to his attack on the Senate Watergate hearings. And those expectations finally centered on the hope that the independent special prosecutor the President appointed, at the insistence of the Senate, would be free to pursue justice to final judgments of guilt or innocence and would, through that pursuit, allow us all to make a judgment on the President's conduct.

Now—in removing the special prosecutor—the President has undercut those hopes and the achievement of that objective.

III

No one denies the Chief Authority to fire any insubordinate official in the Executive Branch. But the role Mr. Cox filled was an exceptional one. By eliminating that role—not just the man who undertook it—the President has broken his word and his contract to Mr. Cox, to the Congress and to the country.

The office of special prosecutor represented concrete proof of a proposition that had been and is now again in doubt—the ability of the Executive Branch to investigate itself and punish its own officials. Ever since former White House officials were charged with the burglary of the Democratic Party headquarters, the country has wondered how those charges—and all the others that have grown from them—could be fully and fairly prosecuted by close personal and political associates of the suspects themselves.

The old maxim that no man can be a judge in his own case required some outside, independent investigation and prosecution of the multiplying suspicions that the highest officers in the government had engaged in the lowest political practices. Finally, this spring, when Elliot Richardson was nominated Attorney General, the Senate made the confirmation of a new Attorney General conditional on the appointment of a special prosecutor with independent authority.

In the charter creating that office Elliot Richardson, the President's nominee for Attorney General, committed himself and the President to give Mr. Cox complete freedom of action. "In particular," the order of the Attorney General declared, "the special prosecutor shall have full authority . . . for . . . determining whether or not to contest the assertion of 'executive privilege' or any other testimonial privilege. . . . the Attorney General will not countermand or interfere with the special prosecutor's decisions or actions. . . . the special prosecutor will not be removed from his duties except for extraordinary improprieties on his part." And the President himself promised, on May 9th, that "the special prosecutor . . . will have the total cooperation of the executive branch of this government."

Last Friday, the President, in effect, revoked that charter which gave the special prosecutor *independent* status, and undertook to direct him, as an ordinary employee of the executive branch, "to make *no further attempts by judicial process* to obtain tapes, notes, or memoranda of presidential conversations."

The special prosecutor rejected that direction, and the President's substitute of a personal summary of the tapes, to be reviewed by Senator Stennis, for the following reasons:

"The instructions are in violation of the promises . . . made to the Senate . . . and my pledge to invoke *judicial* process to challenge exaggerated claims of executive privilege."

"Acceptance . . . would defeat the fair administration of justice."

"It would deprive prosecutors of admissible evidence in prosecuting wrongdoers who abused high governmental office."

"It would also enable defendants to go free, by withholding material a judge ruled necessary to a fair trial."

IV

By changing the rules in the middle of the contest, the President revoked his pledge to the Senate. And he thus cancelled the commitment he had made to the whole country that the Watergate investigation would be conducted without any further political interference.

By that act he has raised the basic issue of presidential power to restrict an investigation of paramount importance to the public. Let me just remind you what the public interest in this inquiry is.

We are not confronted by questions of petty criminality.

We are faced, instead, with charges—many of them already substantiated in convincing part—of an unparalleled conspiracy to defraud the people of their right to an honest election and of a further conspiracy to defraud the courts of their power to administer justice.

Charges that spies and saboteurs were paid to disrupt a political campaign.

Charges that officially authorized burglaries were committed against a private doctor's office and a political party's headquarters.

Charges that suspects and key witnesses were offered bribes to keep them silent or promises to encourage them to lie.

Charges that journalists and government officials illegally lost their privacy to official wiretappers, acting without court warrant.

Charges that independent government agencies were pressured to abandon their impartial responsibilities in order to harass and intimidate critics of the Administration and to show favoritism to friends.

Charges that the head of the F.B.I. was ordered to destroy evidence.

Charges that top officials of the C.I.A. were ordered to violate their agency's charter against interference in internal affairs.

Charges that a Federal judge was offered promotion while presiding over a crucial and controversial case.

And charges that a secret police agency was established in the White House *with authority to break the law* in order, supposedly, to protect national security.

Some of these acts allegedly involved the direct participation and decisions of the President. Most of them involved men in the White House acting with what they took to be presidential authority and approval. Much of their behavior appears grossly improper and some of it, in the preliminary judgment of grand juries, was illegal.

V

But the overriding concern about all these actual and suspected breaches of law is the degree to which they were proper or improper exercises of presidential authority. A clearly important if not crucial means of deciding that question depended on the impartial examination of evidence in the President's custody.

VI

The President now says he will not make all of that evidence available to outside scrutiny and those portions of it which he will release will appear only in a statement prepared by him personally and authenticated by Senator Stennis. In making that decision he relies on his claim to *absolute discretion* over what information in his possession will be disclosed to the Congress, the courts and the people. That claimed discretion—only since 1958 has it been called executive privilege—is the heart of the political question we face.

For the present, the October 13 ruling of the U.S. Court of Appeals on that claim is the binding legal standard. Based on that standard, the judges ordered the delivery of the tapes to Judge Sirica and said: "The President's privilege cannot . . . be deemed absolute. . . . [A]pplication of executive privilege depends upon a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case."

The central question of the limits of presidential discretion—including executive privilege—has become acute. And the impeachment process, as I suggested, appears now the best forum in which to seek an answer to that fundamental question.

VII

The primary concern of the men who wrote our Constitution was their fear of tyranny—by a monarch or by a mob. That fear explains the unique safeguards they built against abuse of power.

Their fundamental invention was the division of power among three separate branches of government under the rule of law. That structure gave each branch enough authority to carry out its own responsibilities, but it also denied any single branch the concentrated power to evade the control of the other two or, ultimately, the control of the people.

In practice, that ingenious and delicate balance has withstand severe tests. It has given us a government responsive both to the ordinary demands of overseeing the welfare of a continental nation and to the extraordinary demands of domestic and international crisis.

But as Justice Brandeis once observed, "The doctrine of the separation of powers was adopted by the Convention of 1787, not to

promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental power among three departments, to save the people from autocracy."

VIII

In the Watergate affair, the President has laid claim to uncontrolled power. Some may challenge the claim from fear that it is made to block an inquiry that might deeply embarrass the President. But, more importantly, we must challenge the power behind the claim, because such authority—uncontested—could undo the whole balance of power that has made the American experiment with democracy uniquely successful.

Centralized power, the Framers knew, was ultimately irresponsible. Power over information—over the knowledge which is synonymous with power—is the ultimate authority. For, as President Nixon himself said in 1972, "[W]hen information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies."

More than twenty-five years ago, when President Truman refused to give Congress information it sought about alleged Communist subversion in his Administration, a California Congressman named Richard Nixon said this on the floor of the House Representatives:

"The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making that decision.

"I say that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason; that would mean that the President could have arbitrarily issued an executive order in . . . the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department, and the Congress would have no right to question his decision."

I would use that judgment of Congressman Nixon to judge last Friday's actions by President Nixon.

IX

That process of judgment was going forward in the courts. Indeed, the courts may still find that the President is not in compliance with their orders. Such a finding would constitute a formal determination that the President is in contempt of court.

But that is a legal issue. Its outcome will weigh heavily on any action Congress might take as it proceeds to explore the grounds for impeachment. Congress, however, is charged with the political judgment of whether or not the President has acted in contempt of the Constitution and the people's will.

X

There are intermediate steps toward making that determination. For instance, Congress could by statute create another independent special prosecutor, an arm of the legislative branch, and not a subordinate of the President. And such a prosecutor could carry the argument Mr. Cox was forced to drop part way through another round of judicial contest.

Such a procedure would help preserve the integrity of the ongoing criminal investigation of those involved in Watergate and associated wrongdoing. But I have little confidence that such a course can advance a final resolution of the conflict between the President and the rule of law. So while I would favor all efforts to accommodate the dispute, I think we must prepare for a final judgment in the President's case. Impeachment is just that—no more and no less than a process for measuring his claims of authority against the limits our laws and our tradition impose on the conduct of the President.

The law, ultimately, is what the courts pronounce. The Congress, in an impeachment proceeding, is a court, and for questions of the President's fitness for office, it is the final court.

Since his actions in the Watergate affair have raised those questions of fitness to the highest level of public concern, those questions must now be resolved.

It is not, ultimately, the men in office whom the people trust. It is the institutions of our democracy—the restraints of the law on those whom we put in authority—that inspire public confidence. To restore that confidence, we must now revive those institutions, which have become rusty through disuse.

The prospect of impeachment is awesome. But the prospect of government lawlessness is worse.

When only one sure remedy remains against intolerable abuse of the people's liberty, we must use that remedy or renounce our claim to the history of freedom and the legal order that protected it and us.

The process of impeachment offers us such a remedy. We must now initiate the process and, through its workings, seek a resolution of our crisis.

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EDMUND S. MUSKIE
MAINE

# United States Senate

WASHINGTON, D.C. 20510

November 13, 1973

Mr. Eliot Porter
Route 4, Box 33
Santa Fe, New Mexico 87501

Dear Mr. Porter:

Thank you very much for contacting me concerning recent events in Washington which threaten to destroy the confidence of our people in their governing institutions. Yours was one of thousands of letters and telegrams I have received during the past two weeks urging Congress to act to reestablish the principle that no office in our government -- and no office holder -- is above the law.

The crisis of confidence is worsening as the days pass -- and I share your deep concern for the future of our nation. In the midst of the turmoil in Washington, it is reassuring to know that millions of Americans still care enough to demand the truth about government wrong-doing. Without the outcry from citizens during the past two weeks, men of conscience in the Administration and outside it would not have known how profoundly their own convictions were shared by the great majority of Americans.

I believe, therefore, that the basic principle of democratic government -- responsiveness to public will -- is still at work, that men and women who individually express their opinions and their concerns acquire a collective strength no leader can ignore. I am most grateful to you for making your voice heard when it was most needed, and I hope that the events which are still to unfold will confirm in you the knowledge that your voice and that of every citizen counts in the decisions of government.

I am enclosing a copy of remarks I made recently at the University of Toledo which I hope you will find of interest.

With best wishes, I am

Sincerely,

Edmund S. Muskie

Edmund S. Muskie
United States Senator

Enclosure