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WASHINGTON STAR
JUL 15 1973

EXCEPTION TO THE 'PRECEDENT'

Roosevelt Testified

By Taylor Pensoneau
St Louis Post-Dispatch

An almost forgotten incident undermines

ALTHOUGH IT IS NOT KNOWN whether or not Roosevelt appeared in response to a summons, there is little doubt, accord-

OF SOME SIGNIFICANCE may v the fact that Roosevelt's appearance while he was at the peak of an unsh

THROUGH THE LOOKING GLASS BRIGHTLY:

NOTES ON INSTANCES OF PRESIDENTIAL RECOGNITION OF THE INVESTIGATIVE AUTHORITY OF CONGRESS AND THE COURTS

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The viewpoints expressed in this article are those of the authors' alone.

THROUGH THE LOOKING GLASS BRIGHTLY: NOTES ON INSTANCES OF PRESIDENTIAL RECOGNITION OF THE INVESTIGATIVE AUTHORITY OF CONGRESS AND THE COURTS

At the moment the Nation is peering into the looking glass, examining itself. Scandals involving some of the principal officers of the Federal Government and complications involving the constitutional separation of powers concept attendant upon investigation of their misdeeds have thrust the American public into a dark mood. The gloom would be entirely unrelieved were the citenzry content to trust to instincts alone. The people, fortunately, continue to support the guarantees according due process to the accused, and remain confident that historical precedent will guide the tripartite system in reconciling information exchange to a sufficiency that will permit the just conclusion of legislative inquiries and court proceedings.

The conflict currently complicating congressional and judicial investigations of alleged wrongs by those within or tangentially attached to the Executive stems from a dispute of long standing: the propriety of the President withholding information sought by another branch of the government. President Washington addressed the matter in 1792 on the occasion of a request from a special committee of the House of Representatives seeking documents regarding an ill-fated military expedition under the command of Gen. Arthur St. Clair. A troop of approximately 1500 men had set out in September of 1791 to explore a

region of northwestern Ohio and to establish defenses against Indian attacks. The expedition from the first was sorely vexed by dissension, desertion, and dereliction of leadership, and ultimately suffered a crushing defeat at the hands of an Indian band markedly inferior only in number. Constitutionally charged with the task of raising and supporting an army, Congress had a vital interest in these events.

When Secretary of War Henry Knox received a committee request for original letters and instructions pertaining to the St. Clair expedition, he deferred to the judgment of President Washington on the question of their surrender to the legislative branch. The Chief Executive, in turn, called a Cabinet meeting on the last day of March, 1792, whereupon it was decided that additional time for pondering the matter was necessary.[1] The Cabinet--consisting of Secretary of State Thomas Jefferson, Secretary of the Treasury Alexander Hamilton, Attorney General Edmund Randolph, and Knox--met again on April 2. The decision, according to notes kept by Jefferson, was premised as follows:

> We had all considered, and were of one mind 1. that the house was an inquest, & therefore might institute inquiries. 2. that they might call for papers generally. 3. that the Executive ought to communicate such papers as the public good would permit, & ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion. 4. that neither the committee nor House had a right to call on the Head of a deptmt, who & whose papers were under the Presidt alone, but that the committee shd instruct their chairman to move the house to address the President...Note; Hamilt. agrd with us in all these points except as to the power of the house to call on heads of departmts.[2]

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[1]Paul Leicester Ford, ed., The Writings of Thomas Jefferson, Vol. I (New York: G.P. Putnam's Sons, 1892), p. 189.

[2]Ibid., pp. 189-190.

Consequentially, "It was agreed in this case, that there was not a paper which might not be properly produced; that copies only should be sent, with an assurance, that if they [the Committee] should desire it, a clerk should attend with the originals to be verified by themselves."[3] Thus agreed, the documents requested were transmitted.

The occasion for refusing papers to Congress came a short time later, in 1796, when the House again requested documents possessed by the Executive. The matter prompting the demand was the so-called Jay Treaty normalizing various controversies left over from the settlement of the Revolution. Obligated to appropriate funds in order that the agreement might be implemented, the House sought to obtain the instructions to Jay for negotiating the treaty, together with the correspondence and documents relative to it as well. Washington refused to provide the requested material, his stated reasons being that

> it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light, and as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.[4]

This was the first instance of a document denial to Congress by the Executive. The Senate, however, had received certain of the papers sought by the House. The justification for this distinction

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[3]Ford, The Writings of Thomas Jefferson, Vol, I, p. 189.

[4]James D. Richardson, ed., A Compilation of the Messages and Papers of the Presidents, Vol. I (New York: Published by Bureau of National Literature, Inc., 1897), p. 188.

was, apparently, that the upper chamber was duly recognized by the President as requiring such materials in order to carry out its treaty ratification function.

Thus established, the practice of the Executive refusing information to Congress began to be refined. In 1877 the Secretary of the Treasury, John Sherman, declined to testify before a congressional committee.[5] The refusal doctrine thereby came to include not only document denial but testimony as well. When Deputy Attorney General William P. Rogers, late Secretary of State in the Nixon Administration, referred, in a 1956 memorandum on the withholding practice, to the President's "undoubted privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy,"[6] the press coined the term "Executive privilege" as a referent for the withholding of information. By that time a variety of executive branch officials were asserting a right to deny the public and/or other entities of the Federal Government requested material.

But what of the other dimension of this situation? When have Presidents cooperated with the other branches, particularly when duly

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[5]A copy of Secretary Sherman's response is found in: U.S., Congress, Senate, Congressional Record, 49th Cong., 1st sess., 1886, 17, pt. 3: 2332.

[6]U.S., Congress, House, Committee on Government Operations, Availability of Information from Federal Departments and Agencies, Hearings, 84th Cong., 2d sess., 20 and 22 June 1956, p. 2892; see also U.S., Congress, Senate, Committee on Judiciary, Freedom of Information and Secrecy in Government, Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate on S. 921 and the Power of the President to withhold Information from the Congress, 85th Cong., 2d sess., 6 March 1958, pp. 62-146.

authorized investigators, empowered with subpoena authority, have sought Executive information? Although the 1807 treason trial of Aaron Burr is often cited as the principal precedent involving judicial solicitation of presidential documents, other historical bench marks in this policy area are equally as important and noteworthy. At least four other Presidents or former Presidents--James Monroe, John Tyler, Harry S. Truman, and Richard M. Nixon--have been served a subpoena, and three of the four so served responded, if only partially, to the order.[7]

In addition, President Washington met during the first session of the First Congress with a select committee of the Senate on two different occasions to impart information. Former President John Quincy Adams forwarded a deposition to a select committee of the House investigating misconduct by a member of the Cabinet. President Grant filed a deposition in a court case involving criminal action by his confidential secretary. Theodore Roosevelt, as a former Chief Executive, gave testimony before two congressional panels. President Harding transmitted a signed report to the legislature on the matter of naval oil leases at issue in the Teapot Dome investigation.

Yet, ironically, perhaps the two most often cited instances of presidential cooperation--Jefferson's response to the Burr subpoena and the alleged appearances of Lincoln before congressional inquisitors--have not been accurately portrayed. A closer examination of those occasions when a Chief Executive or former President has been willing

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[7]Of the four Presidents or former Presidents who have been subpoenaed only John Tyler refused to respond at least partially. For a copy of the text of his refusal see: New York Times, 13 November 1953: 14.

to accommodate congressional or judicial inquiries is now warranted, both for reasons of clarifying the historical record and obtaining guidance in constitutional disputes among the three Federal branches when information surrender is at issue.

George Washington

President Washington's cooperation in the investigation of the ill-fated St. Clair expedition of 1791, discussed above, was a significant occasion in relations between the Executive and Congress. It should be noted, however, that this instance was not the first such gesture on his part.

Earlier in Washington's initial term, only a few months after Congress first convened in 1789, Senators Ralph Izard, Rufus King, and Charles Carroll were appointed to "be a committee to wait on the President of the United States, and confer with him on the mode of communication proper to be pursued between him and the Senate, in the information of treaties, and making appointments to offices."[8] Through this forum a precedent-setting discussion of the proper manner of communication between the President and the Senate was undertaken. President Washington's letter book under the dates of August 8,[9] and August 10, 1789[10] indicates his thinking as expressed at two conferences

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[8]U.S., Congress, Senate, Journal of the Executive Proceedings of the Senate, 1st Cong., 1st sess., 6 August 1789, p. 16.

[9]John C. Fitzpatrick, ed., The Writings of George Washington from the Original Manuscript Sources 1745-1799, Vol. XXX: June 20, 1788 - January 21, 1790 (Washington: U.S. Government Printing Office, 1939, pp. 373-374.

[10]Ibid., pp. 377-379.

with the Senate Committee on Treaties and Nominations. In a persuasive compendium Washington proposed that:

> ...the Senate should accommodate their rules to the uncertainty of the particular mode and place that may be preferred, providing for the reception of either oral [or] written propositions, and for giving their consent and advice in either the presence or absence of the President, leaving him free to use the mode and place that may be found eligible and accordant with other business which may be before him at the time.[11]

On August 21, 1789, a Senate resolution sanctioned the President's suggested procedure.

The following day the Chief Executive accompanied by Secretary of War Henry Knox, entered the Senate Chamber to obtain the advice and consent of the Senate on the terms of a treaty to be negotiated with the Southern Indians. However, only after meeting with the Senate on that Saturday and the following Monday was the President finally able to obtain approval for the first treaty under the Constitution.[12] Initially the Upper Chamber, in deliberating the matter, refused to commit themselves to any agreement in Washington's presence. Moreover they disliked having to rely solely on information supplied by his Secretary of War. Although Washington agreed to return two days later and the Senate subsequently gave its advice and consent to the treaty, the experience convinced him that personal consultation with the Senate on treaties was ill-advised.[13] Thereafter, discussions

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[11]Fitzpatrick, The Writings of George Washington, Vol. XXX, pp. 378-379.

[12]U.S., Congress, House, Annals of Congress, 1st Cong., 24 August 1789, pp. 69-71.

[13]Louis Fisher, President and Congress (New York: The Free Press, 1972), p. 43.

between the President and the Senate on treaty negotiations were conducted by written communication, rather than by personal consultation.

Thomas Jefferson

The Richmond, Virginia trial of Aaron Burr on charges stemming from his plan to withdraw the Western States from the Union, and to make war on the Spanish territories, had entered its third week when Burr shocked the courtroom with a request that the court issue a subpoena for certain papers held by the President.[14] It was Burr's intention to secure as evidence in his behalf a letter and other papers which the President had received from General James Wilkinson, under date of October 21, 1806, and documents containing instructions for the army and navy "to destroy" Burr's "person and property."[15]

On June 13, 1807, after considerable debate, Burr's motion was granted. Chief Justice John Marshall, sitting as the trial judge, held that the President was as subject to a subpoena as any other citizen.[16] But if the President's duties required his full attention, Marshall conceded that he could submit the papers instead of personally appearing before the court.[17]

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[14]David Robertson, Reports of the Trials of Colonel Aaron Burr for Treason and for a Misdemeanor, Vol. I (Philadelphia: Published by Hopkins and Earle. Fry and Krammer, Printers, 1808), pp. 113-114.

[15]Ibid., p. 114.

[16]Ibid., p. 181.

[17]Ibid., p. 182; see also Thomas Perkins Abernethy, The Burr Conspiracy (Gloucester, Massachusetts: Peter Smith, 1968), p. 238; and Robert K. Faulkner, "John Marshall and the Burr Trial," The Journal of American History, v. 53, no. 2, September 1966: 257.

Marshall's decision did not catch the President by surprise. On the same day that Burr introduced his motion, John Hay, the chief government prosecutor at the trial, wrote to Jefferson of the proceedings in Richmond.[18] Subsequent correspondence between Jefferson and Hay reveals at least two separate communications in which papers relevant to the trial were forwarded to Hay.[19]

In an explanatory letter to Hay of June 17, 1807, Jefferson presumed that these documents and those carried to Richmond the previous March by Attorney General Caesar A. Rodney "substantially fulfilled the objective of a subpoena from the District Court of Richmond." If, however, additional information was deemed necessary by the defendant, the President stated that he and the Heads of the Departments would be willing to submit a deposition "through any persons whom the court shall authorize to take our testimony at this place [Washington]."[20] He felt this was a suitable alternative to a personal appearance at the trial.

The October 21, 1806 letter from General Wilkinson to President Jefferson, however, did not turn up for some time. On three separate occasions, twice in letters to Hay and once in a letter to Wilkinson, Jefferson explained that the subpoenaed letter could not be found.

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[18]George Hay to Thomas Jefferson, June 9, 1807, Thomas Jefferson Papers, Manuscript Division, Library of Congress.

[19]Thomas Jefferson to George Hay, June 12 and June 17, 1807, Ford, The Writings of Thomas Jefferson, Vol. IX, pp. 55-57.

[20]Both quotes are from a letter: Thomas Jefferson to George Hay, June 17, 1807, Ford, The Writings of Thomas Jefferson, Vol. IX, pp. 56-57.

The President thought that perhaps the letter was contained in the collection of documents he had turned over to Caesar A. Rodney in March of 1807. In any event, Jefferson declared, in a letter of June 23, 1807, to Hay that "No researches shall be spared to recover this letter, and if recovered, it shall immediately be sent to you."[21] The question then emerges at this point--does the case of the missing letter really reflect an exercise in executive privilege?

Although such rationale is plausible, the historical evidence does not support such reasoning. A three-volume work by T. Carpenter, a stenographer at the trial, refutes any such contention. Carpenter's report, entitled The Trial of Aaron Burr, published in 1808, contains the only complete account of Burr's second trial (a misdemeanor trial), and it cites testimony before the court wherein emerges the little-known fact that a complete and authenticated copy of the October 21st letter was given to the Grand Jury prior to Burr's treason trial[22] and was submitted to the court by Hay during the subsequent misdemeanor trial.[23] Although it is not

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[21]Thomas Jefferson to George Hay, June 23, 1807, Ford, The Writings of Thomas Jefferson, Vol. IX, p. 61.

[22]General Wilkinson testified on September 29, 1807 that a copy of his October 21, 1806 letter to President Jefferson had been given to the Grand Jury. For the text of that disclosure see: T. Carpenter, The Trial of Col. Aaron Burr on an Indictment for Treason before the Circuit Court of the United States, held in Richmond, (Virginia) May Term 1807: Including the Arguments and Decisions on all Motions and Trial, and on the Motions for an Attachment Against Gen. Wilkinson, Vol. III (Washington City: Printed by Westcott and Co., 1808), p. 254.

[23]Carpenter, The Trial of Col. Aaron Burr, Vol. III, pp. 38-46. For a complete copy of the letter see: James Wilkinson to Thomas Jefferson, October 21, 1806, U.S. Department of State: Letters in Relation to Burr's Conspiracy 1806-1808, Manuscript Division, Library of Congress.

clear how Hay managed to acquire the letter, in his testimony before the court on September 4, 1807 Hay stated that "[h]e had a copy of the letter of the 21st of October."[24]

Apparently, misconceptions have arisen over the Wilkinson letter of October 21, 1806 because of two basic research failings. First, the work most frequemtly consulted in reviewing the Burr trials--stenographer David Robertson's Reports of the Trials of Colonel Aaron Burr--does not examime in totality Burr's second trial on a misdemeanor charge, and thus fails to note the recovery of the letter of October 21.[25] Second, most studies of the trials have omitted mention of Burr's demand on September 4, 1807, during the course of the second trial, for another letter from Wilkinson to Jefferson, dated November 12, 1806;[26] consequently, data and assertions appropriate to one letter have been attributed mistakenly to the other.

Almost immediately after Burr's motion for the November 12th letter, District Attorney Hay argued that the President had devolved upon him the authority, which constitutionally belonged to the President, to withhold those portions of the correspondence not relevant to the case now being tried.[27]

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[24]Carpenter, The Trial of Col. Aaron Burr, Vol. III, p. 39.

[25]Neither Robertson's Reports of the Trials of Colonel Aaron Burr, nor the records of the Burr trial held by the Virginia State Library of Richmond, Virginia accurately describe events after September 9, 1807. Only the out-of-print three-volume work by T. Carpenter, The Trial of Col. Aaron Burr, details the events of Burr's misdemeanor trial into October of 1807.

[26]Robertson, Reports of the Trials of Colonel Aaron Burr, Vol. II, p. 504.

[27]Ibid., p. 514.

This contention Burr's attorneys did not accept. They argued that the President's power of discretion could not be passed to another individual.[28] Shortly thereafter Chief Justice Marshall upheld the position the defense had assumed on the issue. Marshall stated that "In this case...the president had assigned no reason whatever for withholding the paper [the letter of November 12] called for. The propriety of withholding it must be decided by himself, not by another for him."[29] Four days later, after corresponding with the President, Hay provided the court with a copy of the letter of November 12, 1806 as prepared by Jefferson.[30] Submitted with the letter was a certificate in which Jefferson stated that he was transmitting a correct copy of all those portions of General Wilkinson's letter which he felt could be made public. "Those parts not communicated..." he explained were "in nowise material for the purposes of justice on the charges of treason or misdemeanor depending against Aaron Burr...."[31]

Shortly thereafter Marshall concluded consideration on the letter with the following words: "After the president had been consulted, he could not think of requiring from General Wilkinson the exibition of those parts of the letter [of November 12] which the president was unwilling to disclose."[32]

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[28]Robertson, Reports of the Trials of Colonel Aaron Burr, Vol. II, p. 512.

[29]Ibid., p. 536.

[30]Carpenter, The Trial of Col. Aaron Burr, Vol. III, p. 46.

[31]Thomas Jefferson to George Hay, September 7, 1807, Ford, The Writings of Thomas Jefferson, Vol. IX, pp. 63-64.

[32]Carpenter, The Trial of Col. Aaron Burr, Vol. III, p. 254.

Jefferson, like many of our Chief Executives, believed it was "the necessary right of the President to decide independently of all authority, what papers coming to him as President, the public interest permits to be communicated."[33] But in the Burr trials he did assist the court materially in its pursuit of justice. Although a complete record of the papers he forwarded to Richmond apparently is not extant, it is incontestable that Jefferson willingly submitted a number of papers to the court, and a majority of these were received intact.

James Monroe

In November of 1817, Dr. William P. C. Barton, a navy surgeon, was appointed to the Philadelphia Naval Hospital.[34] Shortly after Dr. Barton's assignment, Dr. Thomas Harris, who had been displaced by Barton's appointment, brought charges of intrigue and misconduct in the matter. Dr. Harris accused Barton of planning his removal, and alleged President Monroe's cooperation had been obtained in the intrigue.[35] Barton counteracted the charges by explaining that he had met with the President in early November regarding the appointment, but in their conversations he had at no time attempted to state his case under false pretenses.

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[33]Thomas Jefferson to George Hay, June 7, 1807, Ford, The Writings of Thomas Jefferson, Vol. IX, p. 55.

[34]Benjamin W. Crowinshield to William P. C. Barton, November 7, 1817, Records of General Court Martials and Courts of Inquiry of the Navy Department, 1799-1867 (May 13, 1817 - February 10, 1818) Microfilm M273, roll 10, Records of the Office of Judge Advocate General (Navy), Record Group 125, National Archives Building (hereafter cited as Records of the Office of Judge Advocate General (Navy), RG__, NA).

[35]Thomas Harris to Benjamin W. Crowinshield, December 3, 1817, Records of the Office of the Judge Advocate General (Navy), RG 125, NA.

President Monroe was subsequently summoned on January 3, 1818, to appear at a Naval Court Martial in Philadelphia as a witness in behalf of the defendent in order that Dr. Barton might "have every opportunity to vindicate himself,"[36] and clarify the facts surrounding his appointment. On January 12, 1818, Secretary of State John Quincy Adams at the direction of the President, forwarded a copy of the subpoena to Attorney General William Wirt for an opinion so "that a return may be made upon the summons such as shall be proper in the case."[37]

Attorney General Wirt returned his opinion to Secretary Adams on the following day stating that a general "subpoena may be properly awarded to the President of the U.S."[38] His reasons for this opinion, he explained, "are those stated by the Chief Justice of the U.S. in the case of Aaron Burr." The remaining and major portion of Wirt's opinion was devoted to the concept that the President could submit a written endorsement as a substitute for a personal appearance at the court martial. Wirt wrote that:

> If the presence of the chief magistrate be required at the seat of government by his official duties, I think those duties paramount to any claim which an individual can have upon him, and that his personal attendance [at] the court ought to be, and must, of necessity, be dispensed with....[39]

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[36]George M. Dallas to Benjamin W. Crowinshield, January 18, 1818, Records of the Office of the Judge Advocate General (Navy), RG 125, NA.

[37]John Quincy Adams to William Wirt, January 12, 1818, Attorney General's Papers: Letters received from the State Department, Record Group 60, National Archives Building (hereafter cited as Attorney General's Papers, RG__, NA).

[38]William Wirt to John Quincy Adams, January 13, 1818, Opinions, Attorney General's Office, Vol. A, November 17, 1817 to June 19, 1821, Record Group 60, NA (hereafter cited as Opinions, Attorney General's Office, RG__, NA).

[39]Ibid.

This position he explained was based upon Jefferson's response to the subpoena issued by Mr. Marshall in the Burr case, and earlier responses by three members of the Cabinet to similar subpoenas issued during the trials of William S. Smith and Samuel G. Ogden in New York. Wirt continued by arguing that in neither the Burr trial nor the trials of Smith and Ogden had the courts expressed an opinion "on their power to compel the attendance of the President or the officers of the executive departments to give evidence."[40]

Realizing, however, that the dilema facing the President was "a question of great delicacy and importance and one rather of constitutional than municipal law," Wirt suggested to the President that a written response would be appropriate. Although he realized that Chief Justice Marshall, in the Burr decision, had inferred that a sworn oath by the President regarding his inability to be present in court was a prerequisite for nonattendance, he contended such a formality was unnecessary "when the excuse is written on the face of the Constitution and founded on the fact that Mr. Monroe is the President of the U.S. and that Congress is now holding one of its regular sessions, during which his presence is so peculiarly necessary at the seat of government."[41]

On January 21, 1818, President Monroe, in a manner similar to that suggested in his Attorney General's opinion, returned the summons to Judge Advocate Dallas with an endorsement. On the back of the

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[40]William Wirt to John Quincy Adams, January 13, 1818, Opinions, Attorney Generals Office, RG 60, NA.

[41]Ibid.

summons the President stated: "My official duties render it impracticable, for me to attend the naval court martial at the navy yard in Phil; I shall however be ready & willing, to communicate, in the form of a deposition any information which I may possess, relating to the subject matter in question."[42]

By the 14th of February 1818, a list of eleven interrogatories had been received by the President and returned to the court martial. President Monroe's answer's, however, arrived after the court had dismissed the case against Dr. Barton.[43] An explanation as to why the court did not delay its decision until receiving the President's reply is not evident in the surviving records of the court martial,[44] however, the fact that the President did respond is significant in and of itself.

John Adams and John Tyler

On April 27, 1846 Congressmen Robert Cushing Schenck and John Pettit in a unique demonstration of parliamentary procedure utilized the authority of one resolution to establish two distinct select committees to investigate one incertitude.[45] Although unusual, this imaginative legislation seemingly met the needs of the House as it

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[42]President James Monroe to George M. Dallas, January 21, 1818, Records of the Office of Judge Advocate General (Navy), RG 125, NA.

[43]William Paul Crillion Barton to Secretary of the Navy, Samuel L. Southland, October 4, 1823, Records of the Judge Advocate General (Navy), RG 125, NA.

[44]Although there was some discussion at the court martial concerning the propriety of awaiting the President's response prior to reaching a verdict, the court arrived at a decision on February 11, 1818, without benefit of President Monroe's answers, Records of the Office of Judge Advocate General (Navy), RG 125, NA.

[45]U.S. Congress, House, Congressional Globe, 29th Cong., 1st sess., 1846, 15, pt. 1: 733-735.

sought to determine the authenticity of Representative Charles J. Ingersoll's claim that he could furnish proof of Daniel Webster's "fraudulent misapplication and personal use of public funds" while Secretary of State.

Initially the House had passed a resolution calling upon President James K. Polk to produce information relative to his predecessor's administration of the State Department foreign intercourse fund known as the "Secret Service Fund." But the President considered it inappropriate to respond to a request that would require him to produce the public papers of his predecessor. He explained that: "An important question arises, whether a subsequent President, either voluntarily or at the request of one branch of Congress, can without a violation of the spirit of the law revise the acts of his predecessor and expose to public view that which he had determined should not be 'made public.'"[46]

The action of Representatives Schenck and Pettit apparently evolved from the unsuccessful attempt to obtain information from the President that would have clarified Representative Ingersoll's charges against Mr. Webster. Schenck proposed that a select committee be appointed to investigate how Ingersoll obtained the information which he communicated to the House. Pettit amended the resolution by providing for another select committee of five members to inquire into the validity of the charges made by Ingersoll. The resolution, as amended, was agreed to and adopted.[47]

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[46]Richardson, A Compilation of the Messages and Papers of the Presidents, Vol. V, p. 2283.

[47]Congressional Globe, 29th Cong., 1st sess., 1846, 15, pt. 1: 735.

Former President John Tyler as the officer having ultimate responsibility for the "Secret Service Fund" during Webster's service as Secretary of State, was by implication, a party to Ingersoll's attack on Webster. Against this setting Tyler was subpoenaed by the Select Committee (the Committee proposed by Pettit and chaired by Samuel Vinton) appointed to investigate the Ingersoll charges.[48] Initially the Schenck Committee merely intended to examine the former President through interrogatories, but on May 25, 1846 learned of the subpoena that had already been issued by the other Committee and "concluded to await his arrival, and until he should be through with the [Vinton] Committee, so as to have him personally present before this [Committee]."[49] Shortly thereafter former President Tyler was examined by both of the Select Committees.[50] Secretary of State James Buchanan, who himself would be President within a decade also was subpoenaed and subsequently appeared before the Schenck Committee.[51] Former President John Quincy Adams filed a deposition with the same panel.[52]

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[48]Allan Nevins, ed., Polk the Diary of a President (New York: Longmans, Green and Co., 1952), pp. 105-106. (Wednesday, 27 May 1846 entry)

[49]U.S. Congress, House, Select Committee appointed to inquire into the violation of "the seal of confidence" of the State Department, and how information was obtained by Charles J. Ingersoll from secret papers and accounts in that department, which the President had declined to communicate to the House, in answer to a resolution and request of the House, Violation of the Seal of Confidence of the State Department, 29 Cong., 1st sess., 1846 (?), H. Rept. 686, pp. 22-23.

[50]For examination by Schenck Committee see: Ibid., pp. 24-25. For examination by the Vinton Committee see: U.S., Congress, House, Select Committee, of the House of Representatives appointed to investigate certain charges made by the Honorable Charles J. Ingersoll against the Honorable Daniel Webster, for official misconduct while he held the office of Secretary of State of the United States, Official Misconduct of the Late Secretary of State, 29 Cong., 1st sess., 1846 (?), H. Rept. 684, pp. 8-11.

[51]House, Select Committee of the House..., Official Misconduct of the Late Secretary of State, 29th Cong., 1st sess., 1846 (?), H. Rept. 684, pp. 4-7.

[52]Ibid., pp. 27-29.

With the conclusion of testimony, the Vinton Committee reported that it was satisfied that Mr. Webster was innocent of any wrongdoing. The Schenck Committee report, issued three days later, "expressed no opinion at all as to Mr. Ingersoll's method of obtaining his information, but spoke of the implication of one or more of the subordinate officers of the State Department with Mr. Ingersoll and recommended the publication of the evidence which they had taken. This report was also voted to the table, and there the whole matter rested."[53]

Abraham Lincoln

In December of 1861 the New York Herald published long and verbatim excerpts from President Abraham Lincoln's forthcoming message to Congress, a document that was supposed to be secret until its delivery.[54] Almost immediately, suspicions arose that "Chevalier" Henry Wikoff, a charming, unprincipled adventurer and social dilettante, and the President's wife were co-conspirators in the premature release of the message. Mrs. Lincoln had supposedly given the document to Wikoff, a paid informer for the Herald, who in turn sent it by telegraph to New York for publication in that newspaper.[55]

Within two months the controversy over the Herald's disclosure reached the House Judiciary Committee, and encompassed the White House. Upon his appearance before the House Committee on February 4, 1862, Wikoff admitted that he had telegraphed the printed portions of the

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[53]George Ticknor Curtis, The Life of Daniel Webster, Vol. II (New York: D. Appleton and Company, 1870), p. 283.

[54]Justin G., and Linda Levitt Turner, Mary Todd Lincoln: Her Life and Letters (New York: Alfred A. Knopf, 1972), pp. 97-98.

[55]Ibid.

President's message to the Herald, but was unwilling to divulge the source of his information. There upon he was arrested by the Sergeant-at-Arms for contempt and placed under lock and key in the Capitol.[56]

The events following his arrest and subsequent release are unauthenticated. The New York Tribune of February 14, 1862 reported that "President Lincoln today (the 13th) voluntarily appeared before the House Judiciary Committee and gave testimony in the matter of the premature publication in the Herald of a portion of his last annual message. Chevalier Wikoff was then brought before the committee and answered the question which he refused to answer yesterday, stating, as is rumored, that the stolen paragraph was furnished to the Herald by Watt, the President's gardener...."[57] Ben "Perley" Poore, a Washington correspondent of the period, states in his two-volume work, entitled Perley's Reminiscences of the National Metropolis, that President Lincoln "visited the Capitol and urged the Republican members of the Committee to spare him disgrace...." Wikoff shortly afterwards was released and the improbable Watts story was accepted.[58]

Mr. Poore indicates that President Lincoln met informally with the Republican members of the Committee. The New York Tribune and at least four other contemporary newspapers[59] suggest that the President appeared

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[56]Philadelphia Inquirer, 14 February 1862: 2.

[57]New York Tribune, 14 February 1862: 1.

[58]Ben: Perley Poore, Perley's Reminiscences of Sixty Years in the National Metropolis, Vol. II (Philadelphia: Hubbard Brothers, Publisher, 1886), pp. 142-143.

[59]The other newspapers were: New York Times, 17 February 1862: 8; Philadelphia Inquirer, 14 February 1862: 1; New York Herald, 14 February 1862: 1; and Boston Morning Journal, 18 February 1862: 4.

before the whole committee. From a historical viewpoint, the basic discrepancy between the two versions, plus the lack of primary documentation through diaries, letters, memoirs, or detailed newspaper accounts, leaves unanswered the question of exactly whom Lincoln met with. A review of the unpublished hearings of the 37th Congress does not clarify the authenticity of either side of the argument.[60] However, Mr. Poore did appear before the Committee on February 7, 1862[61] and against this background his version seems plausible, though inconclusive. As Carl Sandburg aptly wrote in recalling an account of President Lincoln defending his wife before another Congressional committee -- "So the story goes, though vaguely authenticated."[62]

At least ten other accounts have placed President Lincoln before Congressional committees. Although each appearance has been cited at least as a historical precedent, primary sources reveal that each is without firm foundation. In chronological order these accounts follow: December 31, 1861. It has been stated that on this date President Lincoln conferred for an hour and a half with the Joint Committee on the Conduct of War. Actually, the Committee met with the Cabinet and the President on this date. The Cabinet and the President did not

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[60]The unpublished volume of the original hearings before the House Judiciary Committee of the 37th Cong., 3d sess., are found in: Manuscript Hearings Judiciary Committee. Record Group 233, National Archives Building.

[61]Ibid.

[62]Carl Sandburg, Abraham Lincoln the War Years, Vol. II (New York: Harcourt, Brace and Company, 1939), p. 199.

appear before the Committee.[63]

January 6, 1862. The Joint Committee on the Conduct of the War met with the Cabinet and the President on this date. The Cabinet and the President did not appear before the Committee.[64]

January 25, 1862. A subcommittee (of two members) of the Joint Committee on the War met with the President apparently at the White House. Understandably, this does not constitute an official appearance of the President before a committee of Congress.[65]

February 15, 1862. The Committee on the Conduct of the War merely requested an 8:00 p.m. interview with President Lincoln. If the meeting did take place, and there is no indication that it did, it was obviously the Committee meeting with the President, not the President meeting with the Committee.[66]

March 4, 1862. The Philadelphia Daily News of March 5, 1862 stated that "The President [Lincoln] and General [David] Hunter appeared before the Committee on the Conduct of the War, this morning, to answer inquiries about Kansas affairs."[67] The Report of the Committee

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[63]Roy P. Basler, ed., The Collected Works of Abraham Lincoln, Vol. V (New Brunswick, New Jersey: Rutgers University Press, 1953), p. 88; see also U.S., Congress, Senate, Joint Committee on the Conduct of the War, Report of the Joint Committee on the Conduct of the War, Vol. I, 37th Cong., 3d sess., 1863, Rep. Com. 108, p. 72.

[64]T. Harry Williams, Lincoln and the Radicals (Madison, Wisconsin: University of Wisconsin Press, 1941), p. 83.

[65]Senate, Joint Committee on the Conduct of the War, Report of the Joint Committee on the Conduct of the War, Vol. I, 37th Cong., 3d sess., 1863, Rep. Com. 108, p. 78.

[66]Benjamin F. Wade to Abraham Lincoln, February 14, 1862, Robert Todd Lincoln Collection of the Papers of Abraham Lincoln, Manuscript Division, Library of Congress.

[67]Philadelphia Daily News, 5 March 1862: 2.

on the Conduct of the War, however, shows that only General Hunter appeared before the Committee on the date mentioned.[68] The Journal of the Committee shows that the Committee actually met with Mr. Lincoln the previous evening.[69]

April 4, 1862. It was reported that the President received Senator Benjamin F. Wade and made an appointment for the Joint Committee on the Conduct of the War to meet with the President that evening. The Journal of the Committee indicates, however, that the meeting was not in any way an official appearance.[70]

May 28, 1862. Edwin McMasters Stanton, President Lincoln, and other officials are reported to have examined a 400-foot bridge built across the Potomac by Col. Herman Haupt with nothing but cornstalks and beanpoles. The biography which cites this story is actually vague as to who if anyone appeared before the Joint Committee to describe this feat.[71] Neither the Journal nor the Report of the Committee makes any reference to the story.

Late 1862 or early 1863. Carl Sandburg in his popular volumes on President Lincoln recounts both the premature publication of the President's message in 1862 (see Wikoff account), and an account of the President appearing before the Joint Committee on the War to defend

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[68]Senate, Joint Committee on the Conduct of the War, Report of the Joint Committee on the Conduct of the War, Vol. III, 37th Cong., 3d sess., 1863, Rep. Com. 108, pp. 234-238.

[69]Ibid., Vol. I, p. 88.

[70]Ibid., Vol. I, p. 93.

[71]Frank Abial Flower, Edwin McMasters Stanton (Akron, Ohio: The Saalfield Publishing Company, 1905), p. 225.

his wife on a spy charge late in 1862 or early in 1863. As Mr. Sandburg himself asserts, the account is of a questionable nature.[72] A review of the Report and Journal of the Joint Committee has failed to verify the story. Likewise a review of the unprinted records of the Committee at the National Archives Building left the documentation for the story unsubstantiated.

April 4, 1863. On this date the Evening Star (Washington) reported that the President "was waited on this morning by several members of the Committee on the Conduct of the War." The very language of this news release eliminates this occasion as a possible formal meeting.[73]

March 3, 1864. President Lincoln is said to have conferred with the Joint Committee on the Conduct of the War on this date. The Report of the Committee, however, shows that only two members of the Committee met with the President and Secretary of War.[74]

Until documentation to the contrary is discovered, it would seem that Lincoln made no formal appearances before any congressional committees. While he may have conferred informally with some segment of a panel, such a consultation was not original with Lincoln and, of course, has no precedence in terms of an Executive response to a claim by another branch upon information possessed by the President.

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[72] Sandburg, Abraham Lincoln the War Years, Vol, II, p. 200.

[73] The Evening Star (Washington, D.C.), 4 April 1863: 2.

[74] Senate, Joint Committee on the Conduct of the War, Report of the Joint Committee on the Conduct of the War, Vol. I, 38th Cong., 2d sess., 1865, S. Rept. 142, p. XIX.

Ulysses S. Grant

Under the direction of Treasury Secretary Benjamin Bristow and his assistant, a force of Department agents, on May 10, 1875, seized the records and operations of more than thirty distilleries and rectifying houses. It had been suspected for years that a number of distilleries working together in combinations had been defrauding the Federal Government of millions of dollars. But "until Secretary Bristow entered the Treasury there had been no real effort to apprehend the criminals...."[75]

Bristow's dramatic action uncovered corruption in Milwaukee, St. Louis, and Chicago. "Most important of these rings, however, both from the amount of its stealings and the extent of its political influence, was that in St. Louis."[76] The disclosures which followed led to the indictments of two of President Grant's closest friends. General John McDonald, "head and center of all the frauds"[77] while advantageously employed as collector of internal revenue in St. Louis, was subsequently convicted of conspiring to defraud the government. The President's confidential secretary, General Orville E. Babcock, however, was acquitted.

According to testimony given by Attorney General Edwards Pierrepont before the House Select Committee probing the whiskey frauds, he personally heard President Grant on at least five or six occasions state

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[75]William B. Hesseltine, Ulysses S. Grant: Politician (New York: Frederick Ungar Publishing Co., 1957), p. 378.

[76]Ibid., p. 380.

[77]Ibid.

that "if Babcock is guilty, there is no man who wants him so much proven guilty as I do, for it is the greatest piece of traitorism to me that a man could possibly practice."[78] Yet, thanks to Babcock's persuasive tongue President Grant became convinced on insufficient grounds of Babcock's innocence.[79]

President Grant sought first to get Babcock's trial transferred from a civil to a military tribunal, and then later announced to his Cabinet on the day Babcock's trial opened that he proposed to go to St. Louis to testify in person in behalf of his secretary. Dissuaded by the St. Louis grand jury in the first instance and by his Cabinet in the second,[80] he settled upon a legal deposition. This deposition, given four days later before Chief Justice of the Supreme Court Morrison R. Waite, Secretary of the Treasury Bristow, Attorney General Pierrepont, the counsel, and stenographers, occupied three hours and was strongly in favor of General Babcock. President Grant stated that Babcock had never talked to him about the whiskey frauds, and had not seen or heard anything in any way connecting General Babcock with the whiskey rings.[81]

> Whether or not Babcock would have been found guilty without Grant's deposition is a debatable point. It is perfectly possible that there was insufficient evidence for conviction. Still, for the President of the United

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[78]U.S., Congress, House, Select Committee Concerning the Whiskey Frauds, Whiskey Frauds: Hearings, 44th Cong., 1st sess., 22 May 1876, p. 11.

[79]Hesseltine, Ulysses S. Grant: Politician, pp. 384-386.

[80]John A. Carpenter, Ulysses S. Grant (New York: Twayne Publishers, Inc., 1970), p. 152.

[81]New York Times, February 13, 1876:1; and February 14, 1876:1.

> States to go so far in injecting himself into a legal proceeding such as this must have had some bearing on the outcome.[82]

Theodore Roosevelt

On two separate occasions after leaving the office of the presidency, Theodore Roosevelt testified before congressional committees. In 1911 he appeared before a special House panel conducting an investigation of the United States Steel Corporation, and in 1912 he came before a Senate Subcommittee that was investigating contributions to his 1904 campaign.

Roosevelt had been out of the presidency for two years when called to the witness stand on August 5, 1911 to give testimony regarding the circumstances involving the questionable acquisition of the Tennessee Coal and Iron Company by the United States Steel Corporation in 1907. As Senator Augustus O. Stanley, Chairman of the Special Committee on the Investigation of the United States Steel Corporation, stated, President Roosevelt had "not been subpoenaed to appear before the committee, and as far as the chairman is concerned, would not have been subpoenaed."[83] Advised that his appearance would be appreciated, Roosevelt immediately responded in a positive manner. The ensuing cross-examination covers 24 pages concluding with the following exchange between the Chairman and President Roosevelt:

> The CHAIRMAN. Col. Roosevelt, I was on the point of saying that I wish to extend to you the sincere thanks of the committee for your kindness in appearing before them

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[82]Carpenter, Ulysses S. Grant, p. 152.

[83]U.S., Congress, House, Special Committee on the Investigation of the United States Steel Corporation, United States Steel Corporation, Hearings, 62d Cong., 1st sess., 5 August 1911, p. 1369.

and in answering so fully and completely every question that has been propounded.

Mr. ROOSEVELT. Mr. Stanley, an ex-President is merely a citizen of the United States, like any other citizen, and it is his plain duty to try to help this committee or respond to its invitation, just as anyone else would respond. I thank you for your courtesy, gentlemen.[84]

Thirteen months later, on October 4, 1912, President Roosevelt appeared before a Senate Subcommittee of the Committee on Privileges and Elections. His willingness to give testimony before the Committee is evident throughout the record as he reviewed the propriety of certain corporate contributions to his Presidential campaign of 1904.[85]

Interestingly Roosevelt's appearance came while he was at the peak of his unsuccessful campaign to regain the presidency only 30 days prior to the election.

However, his letter to Senator Moses Edwin Clapp, Chairman of the Subcommittee, seemingly underplays any anxiety which the investigation may have caused him personally and his election bid in general. In his letter of August 28th to Clapp he commented that: "In one sense, of course, these statements [two witnesses had specifically testified that they questioned certain corporate contributions to Roosevelt's 1904 campaign] need no answer. As far as they concern me, they are merely repetitions of what a dead man is alleged to have said about me."[86]

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[84]House, Special Committee on the Investigation of the United States Steel Corporation, United States Steel Corporation, Hearings, 62d Cong., 1st sess., 5 August 1911, p. 1392.

[85]U.S., Congress, Senate, Committee on Privileges and Elections, Campaign Contributions, Hearings on S. Res. 79 and S. Res. 386, 62d Cong., 1st sess., 16 October 1912, pp. 177-196 and pp. 469-527.

[86]Elting E. Morison, The Letters of Theodore Roosevelt, Vol. VII (Cambridge, Massachusetts: Harvard University Press, 1954), pp. 602-625.

Warren G. Harding

During the month of April 1922 the United States Senate approved two resolutions which ultimately led to the revelations of the infamous Teapot Dome scandal.

Senator John B. Kendrick's resolution of April 15, 1922 proposed that the Secretaries of the Navy and Interior Departments "inform the Senate, if not incompatible with the public interest," about "all proposed operating agreements" upon the Teapot Dome reserve. The resolution was agreed to without comment.[87]

On April 21, less than a week later, Senator Robert M. LaFollette introduced in the Senate the resolutions which authorized the Committee on Public Lands and Surveys "to investigate the entire subject of leases upon naval oil reserves," and also asked that the Secretary of the Interior be directed to send to the Senate all the facts about the leasing of Naval Oil Reserves to private citizens and corporations.[88] As with Kendrick's resolution, the Senate offered no objection.[89]

In response to LaFollette's resolution, Secretary of the Interior Albert Fall forwarded a veritable mountain of materials to the Senate Committee on Public Lands and Surveys. The degree of Secretary Fall's cooperation is manifest in his correspondence to Senator Reed Smoot, the Chairman of the Committee:

> I am sending you by special messenger in mail sacks, photostatic or other copies of all documents, papers, data, etc., called for in Senate Resolution No. 282. These documents number approximately 2,300. They are contained in separate files but each file

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[87] U.S., Congress, Senate, Congressional Record, 67th Cong., 2d sess., 1922, 62, pt. 6: 5567-5568.

[88] Ibid., 5792.

[89] Ibid., 6096-6097.

> pertaining to naval reserve No. 1, 2, or 3, as the case may be, except the fourth, which includes documents and information relative to the general subject and not contained upon the other files. My casual estimate of the number of pages being forwarded you is that the aggregate will be between ten and fifteen thousand pages. I think that possibly the more nearly accurate figure would be 12,000 pages.[90]

Skeptics might argue that Secretary Fall's willing and colossal response was self-serving and intended to confuse rather than clarify. But the fact remains that the documents were sent to the Committee. Secretary Fall's public expression of why he forwarded the documents is found in his correspondence to President Harding of the same date. In the concluding remarks of his comprehensive report to the President on the Naval Oil Reserves, Secretary Fall states that it is his "frank desire that those entitled to know, and the public generally, who are, of course so entitled to know, may have an explanation frankly and freely and fully given of the acts, policies, and motives of at least one, and speaking for the Secretary of the Navy, of two members of"[91] the President's official family. In apparent concurrence, President Harding forwarded Secretary Fall's report to the Senate under his signature. President Harding's concluding paragraph is noteworthy. He wrote:

> I am sure I am correct in construing the impelling purpose of the Secretary of the Interior in making to me this report.

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[90] U.S., Congress, Senate, Committee on Public Lands and Surveys, Leases Upon the Naval Oil Reserves, Hearings, 68th Cong., 1st sess., 15 April 1924, pp. 3142-3145.

[91] U.S., Congress, Senate, Naval Reserve Oil Leases; Message from the President of the United States transmitting in response to a Senate resolution of April 29, 1922, a communication from the Secretary of the Interior, submitting information concerning the Naval Reserve Oil Leases, 67th Cong., 2d sess., 1922, S. Doc. 210, pp. 26-27.

> It is not to be construed as a defense of either specific acts or the general policies followed in dealing with the problems incident to the handling of the naval reserves, but is designed to afford that explanation to which the Senate is entitled, and which will prove helpful to the country generally in appraising the administration of these matters of great public concern. I think it is only fair to say in this connection that the policy which has been adopted by the Secretary of the Navy and the Secretary of the Interior in dealing with these matters was submitted to me prior to the adoption thereof, and the policy decided upon and the subsequent acts have at all times had my entire approval.[92]

Overview

The Constitution of the United States establishes three coequal branches of government, with each awarded autonomy in certain areas while sharing functions of state in comprehensive divisions such as public finance and law enforcement. This was desirable, as Madison so aptly stated the case in Federalist paper No. 47, because: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointive, or elective, may justly be pronounced the very definition of tyranny." The encroachment of one branch upon another, in terms of power arrangements, was to be vigorously protested and opposed.

But when might demands of one branch upon another be honored? How might a President respond to congressional or judicial investigators probing grave matters of misconduct and impropriety? The record presented here attempts to respond to these questions with historically accurate precedents.

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[92]Senate, Naval Reserve Oil Leases; Message from the President of the United States transmitting in response to a Senate resolution of April 29, 1922, a communication from the Secretary of the Interior, submitting information concerning the Naval Reserve Oil Leases, 67th Cong., 2d sess., 1922, S. Doc. 210, pp. 26-27.

Certainly constitutional concepts have not gravely suffered as a consequence of deviations from a strict separation of powers doctrine with regard to information exchange. As Deputy Attorney General William P. Rogers' memorandum of 1956 observed, "our Presidents have established, by precedent, that they and members of their Cabinet have an undoubted privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy." Such a requirement might be precipitated by so-called "witch hunts," "loyalty probes," and similar such paranoid forays.

What is reflected in the instances of presidential recognition of the investigative authority of Congress and the courts as presented here is a belief that certain crisis confrontations, which contain a potential separation of powers conflict, require immediate and candid presidential resolution. During the early days of the Republic, a President's refusal to supply information in investigations of alleged criminality by incumbent or former high Executive officials might have suggested presidential complicity in the misdeeds under inquiry. Such a stigma has been attached, in many circles, to a President's decision to withhold information in similar cases today. Also, according to prevailing contemporary judicial policy, a President's refusal to release requested information for use in a court proceeding might mitigate against due process. If such information-withholding should contribute to the acquittal of a government official due to lack of evidence, justice and equity alike may be subverted. Not only is the public trust undermined by such conduct, but also the official in question is burdened with a cloud of suspicion surrounding his every act.

Perhaps it may be well to recount these instances of cooperation between the Executive and the other Federal branches if only to devise formulas employing such degrees of collaboration as would strengthen public confidence in government and otherwise promote the common good of the public and its servants. During crises of confidence arising from allegations of criminal conduct by government officials, the separation of powers doctrine, if strictly embraced, might well serve to mitigate against and otherwise despoil the larger value of the rule of law applied to all, regardless of their political station. As this record indicates, Chief Executives of the past have, on appropriate occasions, forsaken claims of privilege of office and constitutionally guaranteed independence to cooperate with congressional and judicial investigations and have, in providing requested information, elected to serve justice.

93D CONGRESS
2D SESSION

H. RES. 1370

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 17, 1974

Mr. CONYERS submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Resolved, That the President is directed to furnish to the House of Representatives the full and complete information and facts upon which was based the decision to grant a pardon to Richard M. Nixon, including—

(1) any representations made by or on behalf of Richard M. Nixon to the President;

(2) any information or facts presented to the President with respect to the mental or physical health of Richard M. Nixon;

(3) any information in possession or control of the President with respect to the offenses which were al-

legedly committed by Richard M. Nixon and for which a pardon was granted;

(4) any representations made by or on behalf of the President to Richard M. Nixon in connection with a pardon for alleged offenses against the United States.

The President is further directed to furnish to the House of Representatives the full and complete information and facts in his possession or control and relating to any pardon which may be granted to any person who is or may be charged or convicted of any offense against the United States within the prosecutorial jurisdiction of the Office of Watergate Special Prosecution Force.

93D CONGRESS
2D SESSION

H. RES. 1370

RESOLUTION

Directing the President to furnish to the House of Representatives the information on which he based his decision to grant a pardon to Richard M. Nixon and certain other information.

By Mr. CONYERS

SEPTEMBER 17, 1974

Referred to the Committee on the Judiciary

Calls made Monday night, September 30, 1974, in re Hungate Committee

Harlow -- football game

Byrnes -- not home

Laird -- will support

Rhodes -- respects decision

Devine -- favorable

Michel -- great

Anderson -- good move

Dennis -- great, good decision, will support

Scott -- very fine, favors some type of appearance before Congress to clear up this thing

Griffin -- OK

Brock -- favorable

Rockefeller -- great, gutsy, courageous

Les Arends -- appreciated call

Goldwater -- not available

Haig -- favorable

Hogan -- football game

Mann -- "great," "that won't hurt him"

Mayne -- "that's fine," "best way"

Waggonner -- delighted and will support

M

UP-037

(PARDON)

WASHINGTON (UPI) -- PRESIDENT FORD WILL MAKE A HISTORIC APPEARANCE BEFORE A HOUSE SUBCOMMITTEE INVESTIGATING HIS PARDON OF FORMER PRESIDENT NIXON AT 10 A.M. TUESDAY THE SUBCOMMITTEE ANNOUNCED TODAY.

THE HEARINGS WILL BE HELD IN THE SAME JUDICIARY COMMITTEE ROOM IN THE RAYBURN HOUSE OFFICE BUILDING WHERE THE IMPEACHMENT PROCEEDINGS WERE CARRIED OUT AGAINST NIXON. THOSE PROCEEDINGS LED TO NIXON'S RESIGNATION AND FORD BECOMING PRESIDENT.

CHAIRMAN WILLIAM HUNGATE OF THE CRIMINAL JUSTICE SUBCOMMITTEE HAS SAID THAT IF THE TELEVISION NETWORKS WANT TO, THEY MAY TELEVISE THE HEARING LIVE. HE SAID A MAJORITY OF HIS NINE-MEMBER SUBCOMMITTEE WOULD ALLOW THE TELEVISION COVERAGE.

FORD WILL BE ASKED AT LEAST 14 QUESTIONS INCLUDED IN TWO RESOLUTIONS OF INQUIRY SEEKING A FULL EXPLANATION OF THE REASONING BEHIND FORD'S PARDON OF NIXON ON SEPT. 8.

THE QUESTIONS ASK WHAT FORD MAY HAVE KNOWN OF NIXON'S PHYSICAL OR MENTAL CONDITION OR CHARGES WHICH MAY HAVE BEEN BROUGHT AGAINST HIM, WHETHER THE PARDON HAD BEEN PART OF A DEAL BEFORE NIXON RESIGNED, WHETHER ANY OF THE CURRENT OR PAST WHITE HOUSE AIDES LOBBIED FOR THE PARDON AND WHETHER FORD DISCUSSED IT BEFOREHAND WITH HIS ATTORNEY GENERAL AND SPECIAL PROSECUTOR.

HUNGATE HAS SAID THAT THOSE 14 QUESTIONS WILL FORM THE "PARAMETERS" OF THE QUESTIONING ALLOWED OF FORD. FORD WAS EXPECTED TO MAKE AN OPENING STATEMENT ANSWERING THOSE QUESTIONS AND THEN SUBMIT TO QUESTIONS FROM THE NINE SUBCOMMITTEE MEMBERS.

UPI 10-02 10:56 AED

UP-038

ADD MIDEAST, CAIRO (UP-019)

ISRAELI PRIME MINISTER YITZHAK RABIN WAS QUOTED TODAY BY ISRAELI

THE WHITE HOUSE

WASHINGTON

October 10, 1974

Dear Mr. President:

This information may be useful to you when you "go to the hill" on the Pardon subject.

Obstruction of Justice:

There were 42 Federal convictions on this score last year.

Of those 45% received probation only.

It is the opinion of experts in the Justice Department (per Earl Kulp) probation was given to those without previous criminal records or involving threat of violence.

Conclusion: Ordinary, laymen involved in obstruction of justice cases are treated leniently.

Hoodlums, professional crooks who make threats of physical violence are treated more harshly (maximum) 5 years.

By these standards had Nixon been charged, tried, and convicted on a comparable basis, it is likely he would have gotten no more than probation.

Therefore, pardon constituted not only an act of mercy but of common sense and justice on your part. A trial would have in effect constituted double jeopardy and added needless prosecution expenses to an already vast amount of money spent by Congress and the Justice Department in pursuit of proof of Nixon's alledged wrong doing. (If you like with a little research help Earl Kulp can document further statistics on this matter.)

Sincerely,

Jack

John R. Stiles

THE WHITE HOUSE

WASHINGTON

October 14, 1974

MEMORANDUM FOR: PHIL BUCHEN

FROM: KEN LAZARUS

SUBJECT: House Judiciary Subcommittee Hearing On Pardon: Anticipated Questions For The President.

Set forth below are a number of questions which I anticipate may be raised at the hearing on Thursday and some rather cryptic notes which may be of assistance to you in this regard. Hopefully, the President will have the opportunity to consider these and all other questions which may be anticipated prior to his appearance.

I. QUESTIONS OF LAW

A. Basis of the Pardon Power

1. What is the Constitutional basis of the President's pardoning power?

Article II, section 2, cl. 1: " . . . and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

2. Who has the power to pardon and is the exercise of that power exclusive?

a. Only the President may exercise the power to pardon.

(1) Ex Parte Wells, 59 U.S. (18 How.) 307 (1855): at p. 309 "Under this power, the President has granted reprieves and pardons since the commencement of the present government . . . No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases, the President has acted exclusively under the power as it is expressed in the constitution."

(2) Ex Parte Garland, 4 Wall. 333, 380 (1867): "This power of the President is not subject to legislative control. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

(3) Ex Parte Grossman, 267 U.S. 87, 120 (1924): "The Executive can reprieve or pardon all offenses . . . conditionally or absolutely, and this without modification or regulation by Congress."

(4) The Laura, 114 U.S. 411, 414 (1885): The President's ". . . constitutional power in these respects cannot be interrupted, abridged, or limited by any legislative enactment."

(5) See also, United States v. Klein, 13 Wall. 128 (1872) and Knote v. United States, 95 U.S. 149 (1877), both stating that the President has the power to grant a full pardon.

(6) Thompson v. Duehay, 217 Fed. 484, 487 (W.D. Wash. 1914) affd. 223 Fed. 305 (9th Cir. 1915); Bozel v. United States, 139 F.2d 153 (6th Cir. 1943); United States v. Kawkita, 108 F. Supp. 627 (S.D. Cal. 1952); United States v. Jenkins, 141 F. Supp. 499 (S.D. Ga. 1956).

(7) 20 Op. A.G. 668 (1893), stating that ". . . the pardoning power of the President is absolute, and is not a subject of legislative control."
41 Op. A.G. 251 (1955), stating "Nor do I believe that the parole laws and regulations can be regarded as a limitation upon the President's pardoning power vested in him by the Constitution. The books are replete with statements that Congress can neither control nor regulate the action of the President in this regard." At p. 254.

b. May the President delegate his power to pardon to other officials or agencies within the Executive Branch?

(1) In light of the above cases, it would appear that the power to pardon is nondelegable. To support this premise, 19 Op. A. G. 106 (1888) states that "This grant of power to pardon offenses against the United States to the President alone forbids the exercise of it by any one else . . . But it is to be presumed Congress passed law (permitting an officer to pardon after general court-martial) in subservience to and not in violation of the Constitution." Since the ability to remit punishment was limited solely to punishment and not to the offense itself, which is the essential object of a pardon, the President's pardoning power was not impinged. The Opinion went on to state, however, "But when the law has finally pronounced its judgment /and an offense has been established/, it /Congress/ could not and did not intend to grant the power to pardon the offense against the United States." At p. 108 "If the power of the officer to pardon existed at any time after the final judgment, and could be exercised after the offender had paid a large part of the penalty of the law, he might be again prosecuted, convicted, and twice punished for the same offense." At p. 109.

(2) But see dictum in Solesbee v. Balkcom, 339 U.S. 9 (1950) which states that the "power of executive clemency has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom has this power of executive clemency been subjected to review by the courts."

(3) I believe that 41 Op. A. G. 251 (1955) disposes of the issue that the parole statutes in any measure detract from the President's pardoning power. Viewing the dictum stated above as relating solely to the act of parole, it is clear that judicial review of the decision to parole has been denied the courts.

c. Does the Congress have any power to pardon?

(1) From a reading of the Debates of the Constitutional Convention, it appears that the Framers of the Constitution specifically omitted the Congress from participation in the exercise of the President's pardoning power. By a vote of 1 to 8 the following clause including the Senate

in the participation of the Executive's pardoning power was omitted: " , . . . power to grant reprieves . . . and pardons with consent of the Senate." (emphasis supplied) 2 M. Farrand, Records of the Federal Convention of 1787, 419 (1937).

In one of the debates, Rufus King of Massachusetts made the following observation: "It would be inconsistent with the constitutional separation . . . of powers to let the prerogative /of pardon/ to be exercised by the legislature -- a legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment." 2 M. Farrand, supra, at p. 626.

(2) The power to pardon has been committed exclusively by the Constitution to the President of the United States. See Ex Parte Wells, supra; Ex Parte Garland, supra; Ex Parte Grossman, supra.

(3) In 22 Op. A. G. 36 (1898), it is stated that:

"The power thus conferred is unlimited with the exception stated (except in cases of impeachment). It extends to every offense known to the law, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."

(4) Cases of general grants of amnesty or immunity from prosecution can be distinguished from the exercise of the pardoning power reposed exclusively in the President.

In Brown v. Walker, 161 U.S. 591 (1896), the Court held that a statute granting witnesses testifying before the Interstate Commerce Commission immunity from prosecution was virtually a grant of amnesty and therefore a witness could not be excused from testifying on the ground that he might incriminate himself. The granting of immunity to witnesses before prosecution on a quid pro quo basis seems readily distinguishable from the grace concept intrinsic in amnesty. Immunity statutes

have the limited and special purpose of obviating the constitutional privilege against self-imcrimination. Brown should not be read as support for the proposition that Congress can pass a general amnesty statute which in effect is an exercise of the pardoning power. See distinction discussed in Burdick v. United States, 236 U.S. 79, 94-95 (1915).

In The Laura, 114 U.S. 411 (1885), the Supreme Court upheld the remission of a fine by the Secretary of the Treasury acting pursuant to Congressional authorization. the Court observed that the President's power to pardon offenses and remit penalties is not exclusive, the case indicates that the statutory authority accorded the Secretary of the Treasury was placed wholly within his discretion and that a remission could not have occurred without his concurrence. Under such circumstances, the degree of Congressional encroachment on the Executive's power to pardon was minimal, given the predominant role accorded Executive discretion by the statute.

d. Does the judicial branch have the power to pardon?

(1) This issue has been addressed by the Supreme Court in Ex Parte United States, 242 U.S. 27 (1916). In this case, the Court held that courts possess the right to impose punishment provided by law. But this right affords no ground for the contention that " . . . the power to enforce begets inherently a discretion to permanently refuse to do so. Authority to define and fix punishment is legislative and includes the right to bring within judicial discretion in advance elements of consideration which would be otherwise beyond the scope of judicial authority; but that the right to relieve from the punishmen fixed by law, belongs to the executive department."

3. Must the recipient of an offer of pardon accept it?

a. Yes, without acceptance, an offer of pardon lapses.

(1) United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833) which states that a pardon is a "deed" to the validity of which delivery is essential and is not complete without acceptance.

(2) Burdick v. United States, 236 U.S. 79 (1915), holding that acceptance is essential to a pardon's validity.

(3) Biddle v. Perovich, 274 U.S. 480, 486 (1927), distinguishes a commutation which needs no acceptance from a pardon which does.

(4) 11 Op. A.G. 227 (1865) at p. 230 states that "After the pardon has been accepted, it becomes a valid act, and the person receiving it is entitled to all its benefits." See also 41 Op. A.G. 251, 254-258 (1955).

(5) In re DePuy, 7 Fed. Cas. 507 (Cas. No. 3814, 1869); Ex Parte Perovich, 9 F.2d 124 (D. Kan. 1925).

4. Does acceptance of a pardon imply an admission of guilt?

a. Yes.

b. 6 Op. A.G. 20 (1853) states that a pardon before trial and conviction is proper " . . . because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime by process of law. But there must be satisfactory evidence of some kind as to the guilt of the party. And it has been held unwise and inexpedient, as a general rule, to interpose the pardoning power in anticipation of trial and condemnation, although particular circumstances may exist to justify such an exceptional act on the part of the President. Mr. Wirt's opinion, March 30, 1820; Mr. Berrien opinion, October 12, 1829; Mr. Taney's opinion, December 28 1831." 6 Op. A.G. at 21.

11 Op. A.G. 227, 228 (1865) states that "There can be no pardon where there is no actual or imputed guilt. The acceptance of a pardon is a confession of guilt, or of the existence of a state of facts from which a judgment of guilt would follow."

Burdick v. United States, 236 U.S. 70 (1915) states that a pardon carries an imputation of guilt; acceptance a confession of it. But legislative immunity has no such imputation or confession, being the unobtrusive act of the law given protecti against a sinister use of the witnesses' compelled testimony.

5. May a pardon be void ab initio?

a. Yes.

b. 11 Op. A.G. 227 at 229 (1865) states that "A pardon procured by fraud or for a fraudulent purpose, upon the suppression of the truth or the suggestion of falsehood, is void. It is a deed of mercy given without other fee or reward than the good faith, truth and repentance of the culprit. On the other hand, as an act of grace freely given, when obtained without falsehood, fraud, and for no fraudulent use, it should be liberally construed in favor of the repentent offender."

6. May the President grant a pardon without first investigating the facts upon which the pardon operates to relieve an individual from punishment?

a. Yes.

b. 1 Op. A.G. 359 (1820) stating with respect to the suggestion that the President must either grant a new trial because of the petitioners' submission of new facts upon which to base the pardon or to accept without question the explanation of the petitioners that "I do not think that the power of pardon either requires or authorizes him to do the one or the other of these things; but that, on the contrary, to do either would be an abuse of that power." Distinguish that right to do something from the judgment whether something which one has the right to do should be done in a particular manner.

B. Form of the Pardon

1. Must a pardon have a particular form or designation?

a. Yes.

b. Ex Parte Wells, 59 U.S. (18 How.) 307, 310 (1855)

"Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special, or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course."

c. It appears that there is a difference between a full and unconditional pardon for an offense which has been specified in the preamble of the pardon statement, and a "general" pardon.

See Stetler's Case, 22 Fed. Cas. (Cas. No. 13,380, 1852) where the Court distinguished between a full and unconditional pardon, which was there involved, and a general pardon. The Court held that the pardon which was full and unconditional was valid for the offense recited in the preamble but that this was not a general pardon for other crimes.

8 Op. A. G. 281 (1857) also made specific reference to the fact that the form of the pardon was significant. As an example, the Opinion stated "a 'general' pardon restores the competency of a party as a witness but that effect may not follow a special remission merely of the residue of a sentence i.e., commutation."

d. President Ford referred to Mr. Nixon's pardon as "full, free and absolute" and covering the period of his term in office.

2. Must the form of the pardon include a statement which indicates the intent of the President with respect to the offenses encompassed by the pardon?

a. Stetler's Case, supra, states that the "effect of the preamble /of the pardon statement/ reciting a single offense limits the general words of the grant of pardon."

b. Where the scope of the pardon is ambiguous, 11 Op. A. G. 227 at 229 (1865) suggests that since the pardon is essentially an act of grace, "when obtained without falsehood, fraud, and for no fraudulent use, it should be liberally construed in favor of the repentent offender."

3. If there is any ambiguity regarding the President's intent in specifying the offenses which are the subject of the pardon, may he be required to specify his intent?

a. No.

b. So long as the offenses covered or which may be covered are in some manner treated by the terms of the pardon, i.e., "during the period from January 20, 1969 through August 9, 1974."

c. Somewhat bearing on this consideration is the comment in 11 Op. A. G. 227, 232-233 (1865) which suggests that it would be proper for the judiciary to determine in each

particular case the adequacy of the repicients' acceptance of the terms of a pardon. Apparently, ambiguity with respect to acceptance is a subject of judicial determination, permitting a court to review the expression of intent in a pardon as the way of gauging the adequacy of the acceptance.

C. Timing of the Pardon

1. May a pardon precede indictment and conviction?

a. Yes.

b. During the debates of the Constitutional Convention, a motion was made to insert the words "after conviction" after the words "reprieves and pardons". Mr. James Wilson of Pennsylvania objected to this proposal on the grounds that "pardon before conviction might be necessary in order to obtain the testimony of accomplices." The motion was then withdrawn. 2 M. Farrand, supra, at 422, 426.

c. 6 Op. A. G. 20, 21 (1853) permits the offer of a pardon before trial and conviction " . . . because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime by process of law."

d. Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1866) states that the pardoning power may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.

e. 8 Op. A. G. 281 (1857) states "He may pardon before trial and conviction. He may pardon at any time either anterior to prosecution or pending the same or subsequent to the executions -- subject in the latter case only to the limits of legal, moral, or physical possibilities.

f. Stetler's Case, supra, states that "the President has constitutional authority to pardon an offense so long as any of its consequences remain."

2. May a pardon include offenses which have neither been discovered, nor listed in the pardon statement at the time of its issuance?

a. Yes.

b. If the pardon statement designates that the pardon will be general or if by its terms the pardon states that it includes "all" offenses which have been committed by the recipient, knowledge of the precise types of crimes involved is irrelevant. A pardon is essentially directed to the nullification of the legal consequences flowing from an offense. Such an effect is not dependent on knowledge or enumeration of the offenses involved. 22 Op. A. G. 36 (1898) Since the Congress cannot limit the President's power to pardon, "the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

D. Challenge and Review of a Pardon

1. Who has standing to challenge the pardon?

a. The President

Matter of DePuy, 7 Fed. Case. No. 3814 (1869) states that the President has the right to arrest a pardon, but only before it has been delivered and accepted by the grantee.

b. Leon Jaworski, Special Prosecutor, has standing to challenge the pardon. Ordinarily, of course, a prosecutor is subject to the President's control, so the basis of his challenge would not be that the incumbent President acted improperly. But here, the understanding between the Department of Justice, the President and the Special Prosecutor contained in Order No. 551-73 (Nov. 2, 1973), 38 Fed. Reg. 30738, provided

"that the President will not exercise his constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given." The President further agreed not to remove him from his duties except for extraordinary improprieties on his part and without the President's first consulting the majority and the minority leaders and chairmen and ranking minority members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action."

Note the decision in Nader v. Bork, ___ F. Supp. ____ (D. D. C. 1973) 42 L. W. 2262, which apparently does not address the standing question, but did hold that Acting Attorney General Bork's firing of Special Prosecutor Cox was illegal.

From newspaper reports of September 9, 1974, Mr. Jaworski had decided not to challenge the pardon. New York Times, p. 1 col. 4 states that "The special prosecutor 'accepts the decision' . . . . 'He thinks it's within the President's power to do it. His feelings is that the President is exercising his lawful power, and he accepts it.'"

The challenge would have to be based on the grounds discussed above -- notably, fraud in the inducement. There is no Federal case law which will indicate that obtaining it by inducement contrary to public policy (e.g., a "deal" for Nixon's resignation) would constitute invalidating fraud. Obviously, however, care should be taken to eliminate any such speculation. It is difficult to argue that the pardon violates the agreement with Jaworski. It does not "effect /his/ discharge" or "limit his independence" or "remove him from his duties." But obviously, questions can be expected on this point.

2. May the President revoke a pardon once it has been accepted?

a. No.

b. In re DePuy, 7 Fed. Cas. 507 (Cas. No. 3814, 1869). In reviewing a pardon by the President, the Court stated that "when a pardon is complete there is no power to revoke it, any more than there is power to revoke any other completed act." Once a pardon has been accepted, it becomes a completed act and cannot be revoked.

c. This situation should be distinguished from the case where the pardon is conditional and the recipient fails to fulfill the terms of the condition. See Lupo v. Zerbst, 92 F. 2d 362 (5th Cir. 1937).

3. Can Congress challenge a pardon?

   a. No.

   b. United States v. Klein, 13 Wall. 128, 143, 148 (1872): "Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law."

4. See discussion of fraud as a basis for challenging a pardon, supra at (A)(5) of the outline discussing 11 Op. A. G. 227 (1865).

5. May courts review a grant of a pardon?

   a. Yes.

   b. Judicial review may not extend to the propriety of the President's exercise of the pardoning power. However, the courts have reviewed such issues as whether the offense pardoned falls within the category of an offense against the United States (Ex Parte Grossman, supra); whether the conditions imposed are valid (i.e., Hoffa v. United States (most recent example); Ex Parte Wells, supra; United States v. Klein, supra); whether the grantor of the pardon has the authority to issue the pardon (The Laura, supra; 22 Op. A.G. 36, supra; 19 Op. A.G. 106, supra); whether the terms of the pardon are ambiguous; and whether at the time of the issuance of the pardon the President was constitutionally able to exercise the pardoning power by reason of the Twenty-fifth Amendment.

6. Can a recipient of an invalid pardon claim estoppel if he is prosecuted for an offense covered by a pardon allegedly granted to him?

   a. Yes, However, there is no case law on this point.

   b. It is reasonable that if in reliance on the grant of a pardon (where the pardon might be phrased in ambiguous terms), the recipient "waives" his Fifth Amendment protection against self-incrimination by making incriminating statements, subsequent prosecution would be estopped. The recipient because of his reliance on the pardon in making those statements would effectively be prevented from obtaining a fair trial by an impartial jury, guaranteed him by the Sixth Amendment.

E. Extent of the Pardoning Power

1. Can the pardoning power affect either state criminal jurisdiction or civil liability to third parties?

   a. No.

   b. (Angle v. Chicago, St. P.M. &O.R. Co., 151 U.S. 1 (1893); Osborn v. United States, 91 U.S. 474 (1875). As to third parties (see also 5 Op. A.G. 532 (1852)), stating "this power of granting pardons does not confer an unlimited power . . . . The power of granting pardons does not extend to the release of the portion of fines, penalties, and forfeitures which, by United States law, are directed to be distributed by the individual. Such would deprive individuals of their interests . . . and they would suffer loss."

   c. Ex Parte Grossman, supra, at page 121 which states "neither in this country nor in England can /a pardon/ interfere with the use of coercive measures to enforce a suitor's rights."

   d. Look to the express terms of Article II, Section 2, cl. 1 which limits the power to offenses against the United States.

2. What are offenses against the United States?

   a. Ex Parte Grossman, supra

      (1) A pardon of the president is meant to operate on offenses against the United States as distinguished from offenses against the States.

      (2) Offenses against the United States include, but are not limited to, crimes and misdemeanors defined and announced by Congressional acts.

      (3) The words of the pardon clause were not meant to exclude therefrom common law offenses in "the nature of contempts against the dignity and authority of United States courts." Criminal, but not civil, contempts are subject to pardon.

      (4) The term offenses is used in the Constitution in a more comprehensive sense than are the terms "crimes" and "criminal prosecution".

b. A state felony (i.e., assault and violation of traffic regulations) is not an offense against the United States. In re Bocchiaro, 49 F. Supp. 37 (W.D.N.Y. 1943)

c. The pardon power is sufficient to remit a fine imposed on a citizen for contempt for neglecting to serve as a juror. 4 Op. A.G. 317 (1844)

d. The pardon power extends to all penalties and forfeitures, as well as other punishments. 8 Op. A.G. 281 (1857)

e. Proceedings instituted by the United States for punishment of criminal contempt committed by a violation of an injunction is an offense against the United States. United States v. Goldman, 277 U.S. 229 (1928).

F. Equal Protection Argument

1. Can others who allegedly have committed the same offenses as co-conspirators or accomplices sustain a claim that they have been denied equal protection when one of their number has been pardoned?

a. No. The act of pardoning is essentially an act of executive grace, specifically directed usually at one particular person. Moreover, there is no equal protection argument possible where there is a rational basis upon which a distinction can be made.

Even if equal protection considerations were raised, it is arguable that considerations, other than those strictly legal, may validly distinguish one co-conspirator from another, i.e., health, position, effect of a trial on the national conscience and morale, as well as the extent of the recipient's participation.

Since this power is ultimately designed to function as a stress point in our Constitutional fabric to which no citizen has a right, failure to accord the grace to all involved in a particular offense does not violate equal protection.

2. May the pardon of Mr. Nixon be considered in the sentencing by judges presiding over trials involving Watergate-related offenses?

a. Yes. The sentencing power of the judge is wholly discretionary and subject to very little review so long as the terms of the sentences are within the statutory limits.

G. Prospective Application of the Pardoning Power.

1. Can a Presidential pardon be prospective in application to offenses against the United States committed after the offer of the pardon?

a. No. 22 Op. A.G. 36, 39 (1898).

H. Effect of Pardon.

1. Can President Nixon refuse to testify in future Watergate trials by claiming his Fifth Amendment right against self-incrimination?

a. No. He has been granted immunity from federal criminal prosecution. He may refuse to testify on matters which would involve State criminal liability since he has not been given immunity with respect to State liability. Jaworski could give him such immunity.

2. If Nixon testifies at Watergate trials and is shown to have lied under oath and if he is then charged with perjury can he raise President Ford's pardon as a bar to liability for perjury? No. A pardon is limited in this case to crimes completed as of the date of Mr. Nixon's resignation, August 9, 1974.

3. Does Nixon face the possibility of criminal tax liability for tax fraud in California? Yes.

4. Would Nixon be subject to civil suits? Yes.

I. Executive Privilege: Congressional Demands.

1. How does Executive Privilege operate in response to Congressional demands?

Congressional demands for material may be grouped into four categories:

a. Some Presidents have acknowledged that a demand for material pursuant to an impeachment inquiry would require production for any and all executive material. See Washington's statement, 5 Annals of Congress 710-12 (1796).

b. Particularized Congressional demands for materials pursuant to a legislative mission may be rejected on the basis of Executive Privilege where it is deemed by the President that the production of such material would be detrimental to the functioning of the Executive Branch.

c. Particularized Congressional demands for sensitive materials have at times been met with certain restrictions on access, e.g., examination by only the Chairman and ranking Republicans on a committee.

d. Non-particularized claims for general access with no compelling indication of need are routinely rejected.

2. Does a former President have the authority to invoke Executive Privilege for materials or conversations arising during his Presidency?

Yes. The rationale behind the privilege and the interest it serves compels an affirmative response. The invocation of Executive Privilege is not so much to protect the content of the particular discussions demanded as it is to protect the expectation of confidentiality which enables future discussions to be free and frank. Principle recognized as early as 1846. Richardson, Messages and Papers of the Presidents, Vol. IV, 433-34.

Former President Truman in 1953, having returned to public life, asserted privilege in response to House committee subpoena concerning matters which transpired while he was in office. The House committee accepted the letter and did not attempt to enforce the subpoena.

3. Does the Congress itself protect a sphere of confidentiality in its internal deliberations?

Yes. At least four precedents can be given in this regard.

a. In 1962, certain staff members of the Senate Rackets Committee were allowed to testify in a criminal proceeding against Jimmy Hoffa but they were forbidden from making available

any documents in the hands of the Senate and from testifying about information that they gained while employed in the Senate. 108 Cong. Rec. 3626 (1962). In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of government which it wishes to protect." Id. at 3627.

b. In 1970, the House Committee on Armed Services refused to comply with a request from counsel for Lieutenant William Calley for the production of testimony given to the committee by Calley in closed session. The chairman of the committee, Rep. Hebert, indicated that " . . . only Congress can direct the disclosure of legislative records." See 116 Cong. Rec. 37652 (1970).

c. In 1972, the United States Senate by resolution refused a judicial subpoena for documentary evidence in the criminal case of United States v. Brewster, then pending in the D. C. District Court. 118 Cong. Rec. 766 (1972).

d. In 1974, the Senate passed a resolution allowing a Senate staff member to testify in a criminal proceeding but limited the scope of the testimony by providing that " . . . he shall respectfully decline to provide information concerning any and all other matters that may be based on knowledge acquired by him in his official capacity . . ." S. Res. 338, passed June 12, 1974.

II. QUESTIONS OF FACT

A. Introductory Notes: This hearing presents a real opportunity for the President. At the same time, however the open-ended nature of the factual inquiry must be limited to ensure a responsible search for the truth regarding the pardon. Although the President need not assume a defensive posture, potential for political mischief must be minimized.

1. Ground Rules. The ground rules which have been agreed upon with the subcommittee may be summarized as follows:

a. Opening Statement. No time limitations but statement should be responsive to each of the formal inquiries raised by H. Res. 1367 and H. Res. 1370.

b. Scope of Inquiry. The understanding has been reached that the inquiry shall be limited by the scope of the two formal resolutions of inquiry.

c. Time Limitations. Each of the nine members sitting with the subcommittee shall have the opportunity to question the President for two periods of five minutes each. Thus, there will be a total of 90 minutes of questioning.

d. Television. Consent has been given to live television coverage of the hearing.

2. Thoughts on ground rules. In my opinion, further consideration should be given to the ground rules in the following respects:

a. Time Limits. If possible, the agreement reached on the period for questioning should be reopened and substantially reduced. Perhaps, a total of 1/2 hour to be controlled by and divided between the chairman and ranking Republican. Alternatively, only 5 minutes per member might be allowed for a total of 45 minutes. Ninety minutes is simply too long.

b. Order of questioning. The order of questioning should alternate from Democrat to Republican and form senior to junior. The Democrats should not be allowed to exhaust their time prior to the allotment of time to the Republicans.

c. Nixon-GSA Agreement. It should be clearly understood that the tapes agreement is beyond the scope of this inquiry except to the extent that it might impact upon the grant of the pardon.

d. Prior Executive's Discussions and Materials which are presumptively privileged. It should be understood that President Ford will not infringe upon any claim of Executive Privilege which former President Nixon may want to assert with regard to materials or conversations arising prior to

August 9th. This position can be substantially strengthened by a letter to Jack Miller, counsel to the former President, inquiring as to whether he intends to assert a privilege on behalf of the former President. Assuming Miller will not consent to any waiver, documentation of this position will then be available.

e. Presumptively Privileged Discussions and Materials Arising after August 9th Two ground rules should be established in this regard:

(1) President Ford will not make available members of the White House staff for further examination on the subject of the pardon; and

(2) Formal requests or demands for documents of the Ford Presidency will not be complied with unless of a public nature -- this is not to say, however, that such materials may not be made available pursuant to informal requests by the committee The point in this latter regard is that release in this context is a Presidential prerogative.

f. Role of the Chairman. Chairman Hungate should assume the following responsibilities:

(1) Channel all appropriate informal requests for materials to the White House;

(2) Strictly enforce time limitations and ground rules on relevancy and privilege; and

(3) Rule clearly repetitious questions out of order.

3 Need For Certainty. If equitable ground rules for this hearing cannot be firmly established prior to Wednesday, the President might give thought to postponing his appearance until an agreement reflecting a good faith effort on both sides can be reached.

B. Individuals Involved In Grant of Pardon.

1. Who were the individuals representing Mr. Nixon during the course of any pardon discussions or negotiations?

   a. What was the scope of authority of Mr. Miller, counsel of record so to speak, in the pardon discussions?

   b. Was Fred Buzhardt involved in any way?

   c. Was Alexander Haig involved in any way?

   d. When did Messrs. Buzhardt and Haig leave the White House payroll?

   e. Was any representative of H. R. Haldeman privy to the discussions?

   f. Did Mr. St. Clair represent Mr. Nixon in any way relative to the pardon?

2. Who were the individuals representing your interests during the course of any pardon discussions or negotiations?

   a. Did anyone other than Messrs. Marsh, Hartmann, Buchen and Becker, represent you in any way during these discussions?

   b. How did you happen to enlist the assistance of Mr. Becker?

   c. Were you aware of the fact that Mr. Becker is currently under investigation for income tax evasion by the Department of Justice?

   d. Was Mr. Becker paid for his efforts?

   e. Does Mr. Becker currently provide you any assistance, legal or otherwise?

   f. With the nation's finest and most highly respected lawyers and the Department of Justice presumably available to assist you in this regard, why were they not utilized?

g. Do you have any personal logs or minutes of your meetings with individuals representing your interests in this regard?

h. May the subcommittee review these materials?

i. Would you object to our receiving testimony from those who assisted you on the pardon?

C. Considerations In Granting Pardon.

1. Did you have any hard evidence of the frailty of Mr. Nixon's physical or mental health?

2. With the benefit of hindsight, what is your view of the pardon today in terms of healing the nation's wounds?

3. What factors under consideration by you with respect to the pardon of Mr. Nixon would not impact equally on other Watergate defendants?

4. Since in ordinary legal proceedings the leading member of a criminal group is most actively prosecuted, what prompted you to turn this notion on its head?

5. Prior to granting the pardon, did you consider the impact it could have on the independence of the Special Prosecutor and any pending criminal matters?

6. Did you consider discussing these matters with the Congressional group referred to in Mr. Jaworski's charter?

7. Do you consider Mr. Nixon's statement upon acceptance of the pardon to constitute an appropriate "statement of contrition"?

8. Did you make any notes or review any staff recommendations as you formulated your views on the necessity for a pardon?

9. May the subcommittee review these materials?

D. Timing and Secrecy of Pardon.

1. In terms of setting "Watergate" to rest, might it not have been preferable to take your case to the people prior to the grant of the pardon?

2. Didn't your precipitous action reduce the possibility of ever achieving a complete record of "Watergate" which presumably is in the public interest?

3. Why wasn't a complete record of the former President's involvement in the cover-up made public prior to the grant of the pardon as was done prior to the acceptance of a guilty plea on behalf of former Vice President Agnew?

4. You have indicated that your Administration would be one of "openness" -- how does the handling of the pardon square with that notion?

5. Did you feel any pressure to grant the pardon from any former Nixon aides?

6. Did you feel any pressure from any Congressional sources to grant the pardon?

7. In terms of public reaction, did you consider that your actions could be interpreted as a quid pro quo for assuming the Presidency?

E. Relationship of Pardon to Tapes Agreement.

1. Do you have any reason to believe that any conversations which you may have had with the former President during your service in the House or as Vice President were secretly tape recorded?

2. Did you meet frequently with him in the Oval Office, the EOB or the Cabinet Room where secret recording devices were installed?

3. Were many of these conversations of a confidential nature?

4. Did many of these conversations involve only yourself and the former President?

5. Were any White House aides, other than H. R. Haldeman or John Ehrlichman frequently in attendance at these meetings?

6. After the existence of the tape recording devices became known, did you ever discuss with anyone their possible content as it might reflect on you?

7. Has anyone ever expressed to you their fears regarding the content of the tapes as they might affect you or others close to you?

8. Is anyone other than the former President and Mr. Haldeman aware of the content of the tapes as they may reflect on you?

9. Did Mr. Haldeman, to your knowledge, ever attempt to exercise any leverage over the former President or yourself with respect to the tapes in order to secure a pardon?

10. Can you confirm or deny published reports to the effect that, during the course of hearings on your nomination to be Vice President, Mr. Buzhardt reviewed tapes covering certain days when you had met with the former President?

11. Did any of your representatives participate in the development of the Nixon-GSA tapes agreement with representatives of GSA or Mr. Nixon?

12. Did you give these individuals any directives?

13. Paragraph 10 of the tapes agreement provides you with access to the tapes -- how did this provision find its way into the agreement?

14. The same paragraph provides Mr. Nixon with access -- however, no one else can access these materials. Does this strike you as salutary?

15. What arrangements are being made to ensure the security of the tapes?

#

WILLIAM L. HUNGATE
9TH DISTRICT, MISSOURI

SELECT COMMITTEE ON SMALL BUSINESS
CHAIRMAN, SUBCOMMITTEE ON ENVIRONMENTAL PROBLEMS

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JUDICIARY COMMITTEE
CHAIRMAN, SELECT SUBCOMMITTEE ON REFORM OF FEDERAL CRIMINAL LAWS

Congress of the United States
House of Representatives
Washington, D.C. 20515

November 27, 1974

Dear Jack:

I thought you and Phil would like to see the enclosed - just in case you missed it.

Thanks for your many courtesies and with best wishes, I remain

Sincerely yours,

William L. Hungate

The Honorable John O. Marsh, Jr.
Counsellor to the President
The White House
Washington, D.C. 20500

Send T/U for news clip.

M

GSM 11/11/74

Post-Watergate: no time for era of suspicion

Washington

By Godfrey Sperling Jr.

support — and votes — if he engaged

EYES ONLY

THE WHITE HOUSE

WASHINGTON

12/12/74

To: John Marsh

From: Phil Buchen

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

December 10, 1974

Philip W. Buchen
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Buchen:

The Subcommittee on Criminal Justice of the Committee on the Judiciary has several legislative proposals pending before it requiring the full and complete disclosure of facts relating to the pardon of Richard M. Nixon, Watergate and Watergate related matters.

To assist the Subcommittee in its consideration of these proposals, the Subcommittee requests that Alexander Haig appear before it to testify on his knowledge of and involvement in the events leading to the pardon of the former President.

President Ford's testimony before the Subcommittee on October 17, 1974, was essential and of great assistance to the Subcommittee in developing the facts concerning the issuance of the pardon. President Ford's testimony, however, highlighted the significant role played by General Haig in the pardon discussions. Subcommittee Members believe, therefore, that General Haig's testimony is vital to the complete and final resolution of the pardon issue.

The Subcommittee Members are aware of the Senate Armed Services Committee's recent vote to hear the testimony of General Haig at the beginning of the 94th Congress. The Subcommittee is hopeful that General Haig's schedule will permit him to appear before the Subcommittee at some mutually convenient time during the remaining days of the 93rd Congress or in the early days of the next session of Congress.

Sincerely yours,

William L. Hungate
Chairman
Subcommittee on Criminal Justice

WLH/bts
cc: Hon. Henry P. Smith, III

JUN 10 1976
9:39

June 9, 1976

Dear Henry:

Jane Fogarty has forwarded copies of the two letters pertaining to matters pending before the Hungate Subcommittee.

I appreciate your thoughtfulness and will bring the letters to the attention of the appropriate staff here at the White House.

Many thanks, and with cordial regard, I am

Sincerely,

Max L. Friedersdorf
Assistant to the President

Honorable Henry J. Hyde
House of Representatives
Washington, D. C. 20515

MLF:nk

bcc: Jack Marsh w/incoming for appropriate handling
Phil Buchen w/incoming - FYI
Judy Berg-Hansen - FYI

D - send P/B per to IRS

HENRY J. HYDE
6TH DISTRICT, ILLINOIS

COMMITTEES:
JUDICIARY
BANKING, CURRENCY
AND HOUSING

1206 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
(202) 225-4561

Congress of the United States
House of Representatives
Washington, D.C. 20515

JUN 7 1976

June 4, 1976

Mr. Max Friedersdorf
Assistant to the President
The White House
Washington, D. C. 20501

Dear Max:

On his way out the door, Mr. Hyde asked me to send you these two letters.

He has returned to Chicago and will not be back until Monday, but he thought you might want to get in touch with Mr. Wiggins. I believe you and Mr. Hyde discussed this possibility several weeks ago.

It was good to see you at the Army-Navy Club last week.

Sincerely,

Jane Fogarty

Enc.

June 3, 1976

Honorable Edward H. Levi
The Attorney General
Department of Justice
Constitution Avenue
Washington, D.C. 20530

JLWS 6-3-76

Dear Mr. Attorney General:

As you may know, the Subcommittee on Criminal Justice has jurisdiction over matters related to the Presidential pardon of Richard M. Nixon. Last February, the Subcommittee voted 4 to 3 to table, without prejudice, a motion to conduct a further inquiry into the issuance of the pardon. The membership of the Subcommittee has changed since then, with Representative Robert F. Drinan replacing Representative Martin Russo.

Three Members of the Subcommittee — Representatives Holtzman, Mezvinsky and Drinan — have written me to request that the Subcommittee make additional appropriate inquiries into the issuance of the pardon. The Subcommittee will meet in the very near future in order to decide how to respond to their request.

In order to assist the Subcommittee in deciding how to respond to their request, it would be helpful if we had information pertaining to criminal investigations involving Alexander Haig, Philip Buchen, Benton Becker, and Charles Colson.

I am writing to ask you to furnish the Subcommittee with the following information. With regard to each person, please indicate whether he has been the subject of a criminal investigation by the Department of Justice since January 1, 1970. For each such investigation, please indicate the statute(s) involved, the nature of the allegation, and the disposition of the matter. If the disposition was to prosecute, please indicate the outcome of the prosecution. If the disposition was other than to prosecute, please indicate what action was taken and the reasons for taking it.

Since this matter will be taken up by the Subcommittee in the very near future, I would appreciate it if you would get this information to me by Monday, June 21.

With best wishes,

Sincerely,

William L. Hungate
Chairman
Subcommittee on Criminal Justice

WLH/thb

June 3, 1976

Honorable Donald C. Alexander
Commissioner
Internal Revenue Service
1111 Constitutional Avenue, N.W.
Washington, D.C. 20224

JLH 6-3-76

Dear Mr. Commissioner:

As you may know, the Subcommittee on Criminal Justice has jurisdiction over matters related to the presidential pardon of Richard M. Nixon. Last February, the Subcommittee voted 4 to 3 to table, without prejudice, a motion to conduct a further inquiry into the issuance of the pardon. The membership of the Subcommittee has changed since then, with Representative Robert F. Drinan replacing Representative Martin Russo.

Three Members of the Subcommittee — Representatives Holtzman, Mezvinsky and Drinan — have written me to request that the Subcommittee make additional appropriate inquiries into the issuance of the pardon. The Subcommittee will meet in the very near future in order to decide how to respond to their request.

In order to assist the Subcommittee in deciding how to respond to their request, it would be helpful if we had information pertaining to criminal investigations involving Alexander Haig, Philip Buchen, Benton Becker, and Charles Colson.

I am writing to ask you to furnish the Subcommittee with the following information. With regard to each person, please indicate whether he has been the subject of a criminal investigation by the Internal Revenue Service since January 1, 1970. For each such investigation, please indicate the statute(s) involved, the nature of the allegation, and the disposition of the matter. If the disposition was to prosecute, please indicate the outcome of the prosecution. If the disposition was other than to prosecute, please indicate what action was taken and the reasons for taking it.

Since this matter will be taken up by the Subcommittee in the very near future, I would appreciate it if you would get this information to me by Monday, June 21.

With best wishes,

Sincerely,

William L. Hungate
Chairman
Subcommittee on Criminal Justice

WLH/tbb