The original documents are located in Box 67, folder "White House - Staff Testimony Before Congress (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Jan 6, 1977
4:30

T. Bobbie:

From: Eva

Please return.

Bobbie borrowed to make copy of the tabs

rec'd. 1/8/77

THE WHITE HOUSE
WASHINGTON

Aug. 8, 1975

To: Dawn
From: Eva

Attached is the
May 29 memo you
wanted to borrow
to xerox.

Thanks!

dw

THE WHITE HOUSE

WASHINGTON

May 29, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: KEN LAZARUS

SUBJECT: Power of Congressional Committees to Compel Appearance or Testimony of Presidential Assistants

This is in response to your request for a discussion of historical precedents and policy on appearances or testimony before congressional committees by Presidential assistants not confirmed by the Senate.

Introductory Note

In his press briefing of April 25, regarding Senator Kennedy's request to have Ambassador Brown testify before a Judiciary Subcommittee, Ron Nessen stated: " . . . traditionally appointees of the President who are not subject to confirmation by the Senate are not called to testify." Actually, a complete reading of the transcript (Tab A) makes clear that Ron was talking about a narrower category of Presidential "assistants" rather than "appointees".

On May 2, 1975, Senator John Sparkman sent a letter to the President in order ". . . to keep the record straight." (Tab B) He noted:

* * *

> "Among the Presidential appointees not confirmed by the Senate who have testified before congressional committees are Peter Flanigan, Richard Goodwin, Sherman Adams, Robert Cutler, Robert E. Merriam, Gerald D. Morgan, Lawrence F. O'Brien, General E. R. Quesada, Roger L. Stevens, Dr. Stafford L. Warren, and Dr. Jerome Wiesner."

* * *

Historical Precedents

There have been numerous instances in which White House Staff members declined to appear before congressional committees.

1. On two occasions during the administration of President Truman, a subcommittee of the House Committee on Education and Labor issued subpoenas to John R. Steelman, who held the title "Assistant to the President". In both instances he returned the subpoena with a letter stating that "In each instance the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee."

2. In 1951, Donald Dawson, an Administrative Assistant to President Truman, was requested to testify before a Senate Subcommittee investigating the Reconstruction Finance Corporation, one aspect of which concerned Mr. Dawson's alleged misfeasance. Although the President believed that this request constituted a violation of the constitutional principle of the separation of powers, he nevertheless "reluctantly" permitted Mr. Dawson to testify so that he could clear his name.

3. In 1944, Jonathan Daniels, an Administrative Assistant to President Roosevelt, refused to respond to a subcommittee subpoena requiring him to testify concerning his alleged attempts to force the resignation of the Rural Electrification Administrator. He based his refusal on the confidential nature of his relationship to the President. The subcommittee then recommended that Daniels be cited for contempt. Thereupon Daniels wrote the subcommittee that although he still believed that he was not subject to subpoena, the President had authorized him to respond to the subcommittee's questions.

4. During the Eisenhower Administration Sherman Adams declined to testify before a committee investigating the Dixon-Yates contract because of his confidential relationship to the President. However, at a later date in the administration he

volunteered to testify concerning his dealings with Bernard Goldfine who was charged with violations of federal criminal statutes.

5. During the hearings on the nomination of Justice Fortas as Chief Justice the Senate Judiciary Committee requested W. DeVier Pierson, then Associate Special Counsel to the President, to appear and testify regarding the participation of Justice Fortas in the drafting of certain legislation. Pierson declined to appear, writing the Committee as follows:

> "As Associate Special Counsel to the President since March, 1967, I have been one of the 'immediate staff assistants' provided to the President by law. (3 U.S.C. 105, 106) It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government. I must, therefore, respectfully decline the invitation to testify in the hearings."

6. Similar incidents occurred during the Nixon Administration in connection with attempts of Congressional Committees to obtain the testimony of Dr. Kissinger and Mr. Flanigan. It is my recollection that Kissinger never testified as a Presidential assistant, but that Flanigan did appear during the course of the Kleindienst nomination with the approval of the President and under certain ground rules limiting the scope of the inquiry to his personal role in the ITT-Hartford merger.

It thus appears that at least since the Truman Administration Presidential Assistants have appeared before congressional committees only where the inquiry related to their own private affairs or where they had received Presidential permission. In the Dawson case both conditions were met.

Relevant Doctrine

Although I am not aware of any judicial pronouncements on this issue, two areas of Constitutional doctrine are relevant.

1. Executive Privilege. While an assertion of Executive Privilege with respect to specific testimony or documents on the subject of advice given by a staff member to the President would be entirely proper, the propriety of invoking the privilege to direct the staff member not to appear at all would be questionable.

Requests to the White House to furnish official documents in its custody to a congressional committee clearly can be resisted on the basis of Executive Privilege (notwithstanding Nixon v. Sirica). But the claim of privilege for documents would not appear to be co-extensive with the claim of personal immunity from subpoena. A claim for official documents in the custody of the Executive Branch necessarily involves Executive business, whereas it cannot be said to a certainty in advance that a White House adviser will necessarily be interrogated only on matters pertaining to his official duties.

2. Separation of Powers. A more persuasive rationale for denying the appearance or testimony of Presidential assistants before congressional committees is the doctrine of separation of powers. An immediate assistant to the President in the normal situation acts as an agent of the President in implementing Presidential functions. If a congressional committee could compel the attendance of a Presidential adviser for the purpose of inquiring into the discharge of functions constitutionally committed to the President, the independence of the Presidency would be impaired for the same reason that such congressional power to compel the attendance of the President himself would impair that independence. As President Truman said in a radio address on the occasion of his refusal to appear pursuant to a request of the House Un-American Activities Committee, if a President or former President could be called and questioned about his official duties, "the office of President would be dominated by the Congress and the Presidency might become a mere appendage of Congress." New York Times, Nov. 17, 1953 at p. 26.

The issue at hand is treated comprehensively in the attached Memorandum on Power of Congressional Committee to Compel Appearance or Testimony of Presidential Assistants -- Constitutional and Statutory Aspects (Tab C) and the Statement

of William H. Rehnquist, Assistant Attorney General, before the Subcommittee on Separation of Powers, Committee on the Judiciary, United States Senate (Tab D).

Recommendation

I would suggest that you not respond to the letter of Senator Sparkman at this time. In this regard, it would be best to leave sleeping dogs lie.

TAB
A

Q How did he say Israel could be more flexible? How? Give away the oil fields? Give away the Mitla and Gidi passes, or how? If you can, spell it out. I would be very interested in knowing.

MR. NESSEN: I am not able to, Les.

Q Today, in Senator Kennedy's refugee committee, Philip Habib said Ambassador Brown could not appear because of an exercise of Executive privilege. I believe that is the first time in the Ford Administration that Executive privilege has been exercised, and I wondered if you could explain why?

MR. NESSEN: The Office of the White House Counsel indicates the White House did not invoke Executive privilege. The office of the legal counsel told members of Senator Kennedy's staff who called last night and inquired whether Ambassador Brown could testify that traditionally appointees of the President who are not subject to confirmation by the Senate are not called to testify.

The legal counsel's office told the staff members of the Kennedy subcommittee that he didn't want to start a precedent of having Presidential advisers in the nonconfirmed category begin to testify before Congressional committees, and that whatever information Ambassador Brown might have available, that would be available from other State Department sources.

The Ford Administration has never invoked Executive privilege, and I think perhaps, just by way of explanation, I believe that Phil Habib did not understand the legal distinction that Executive privilege is a specific legal invocation and that did not take place.

Q What is the difference?

MR. NESSEN: As I say, one is an informal explanation to the committee that the legal counsel's office didn't think a precedent should be started by having nonconfirmed Presidential appointees testify, and there was no legal invocation of Executive privilege.

Q Would that happen only if they went ahead and subpoenaed him and he refused to appear?

MR. NESSEN: I don't want to project ahead what might happen, Adam.

Q Is that the distinction between the informal thing you are talking about and the Executive privilege?

MR. NESSEN: No, the Executive privilege, which has never been invoked by the Ford Administration, requires the President to invoke his Executive privilege to prevent any aide from testifying. That did not happen. It was done in an informal way, with an explanation that it would set a precedent that the White House didn't feel it wanted to set.

Q Executive privilege itself is a creation that arose in the beginning on an informal basis.

MR. NESSEN: But it has now been sanctioned by the Supreme Court.

Q Is this not a substitute for Executive privilege, perhaps deserving a different name, but accomplishing the same result?

MR. NESSEN: I don't know that I can answer that question.

Q Further, Kennedy said during the Biafran war, a personal representative of President Nixon was up before his committee countless times talking about methods of getting refugee relief accomplished and no such privilege was ever invoked formally or informally.

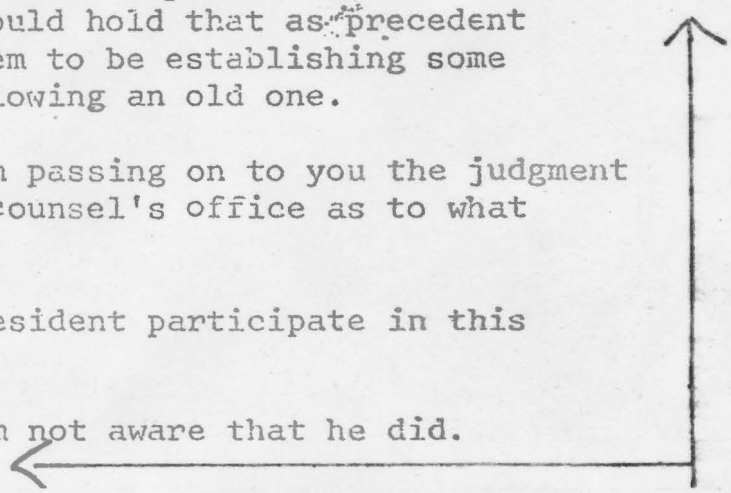
MR. NESSEN: No privilege has been invoked in this case, either.

Q The point is that the witness did testify, that a noncomfirmed appointee of the President, special representative of the President, did testify on Biafran relief, and this is a parallel situation and I wonder, since you could hold that as precedent for this incident, you seem to be establishing some precedent rather than following an old one.

MR. NESSEN: I am passing on to you the judgment of the President's legal counsel's office as to what happened.

Q Did the President participate in this decision himself?

MR. NESSEN: I am not aware that he did.



TAB
B

THE WHITE HOUSE

WASHINGTON

May 8, 1975

MEMORANDUM FOR: PHILIP W. BUCHEN

FROM: MAX L. FRIEDERSDORF M.L.

SUBJECT: Senator Sparkman's letter to the President

The attached letter is self-explanatory. However, our research shows that the remarks he attributes to Jack Hushen were in fact made by Ron Nessen in the April 25 press briefing. Since it appears that your office was involved at one point, we are not sending the usual acknowledgment letter and would appreciate it if you would handle for us. I would appreciate receiving a copy of the reply.

Many thanks.

14

5-7

United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, D.C. 20510

May 2, 1975

encl

MF

Dear Mr. President:

I call your attention to the enclosed statement, just to keep the record straight.

With best wishes and kindest personal regards, I am

Sincerely,

John Sparkman

John Sparkman
Chairman

Enclosure:

Page S7347 from
Congressional Record

√ cc: Mr. John Hushen

The President
The White House

policy together with the arming of the workers in state-owned firms created a constant threat to the stability of the nation and to the armed forces in particular. The continuous disregard for the Constitution and even open violation of it and of the laws of the land could not be tolerated indefinitely.

When the judicial branch of government and the Chamber of Deputies requested the resignation of the President, their petitions were totally ignored by Allende. The only remaining force capable of restoring order and normality to the country was the armed forces, and it is to them that the people of Chile turned in their hour of danger. If the military had not taken the initiative, the armed rebellion which was being prepared by the Popular Unity coalition would have put an end to democracy in Chile and established a dictatorship of the proletariat.

In the author's opinion, the action of the armed forces in the military intervention of September 11, 1973 saved Chile from a communist takeover. It is now the duty of the armed forces to prove to the world that their intentions were simply to carry out a mandate of the people and restore the democratic process to Chile. The road ahead is not going to be easy, because the forces of communism will not stop in their endeavors to create trouble for Chile both on the international and on the national level. In addition, the chaotic economic situation inherited from the Allende era will not be easily solved, but it is the author's opinion that the Chilean people will rally around the military government and work for the betterment of their country until one day—hopefully soon—the damage of the Allende interlude is repaired and the situation is once again ripe for the restoration of the democratic process.

LAW DAY

Mr. FANNIN. Mr. President, today is Law Day. It is a time for us to pause to reflect on the fact that ours is a nation of rule by law, not rule by men. The Casa Grande Dispatch carried an editorial earlier this week pointing up the importance of our legal system and the significance of Law Day. I ask unanimous consent to have this editorial printed in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

STRENGTH OF OUR LAWS

Like other good things in life, we tend to take the law for granted—until we no longer have it. When our legal system breaks down—for even a short time—anarchy results.

In our nation, we are fortunate to have witnessed relatively infrequent, isolated examples of chaos. Others living under less stable governments are less lucky. Today, in many parts of the world, the "law" is made by the leaders who have the power, the arms, and the money at any given moment.

Ours, by comparison, is a government of laws, not men. Our Republic has been tested often and has proved strong enough to withstand wars, depressions, and official misconduct.

There can be no guarantee the United States will last forever, even though we now have the longest lasting government with a written constitution. The one way to help assure that next year's Bicentennial will be the forerunner of many similar celebrations to come is to educate our children in the meaning and spirit of American justice.

The American Bar Association and its nationwide affiliates again this year have designated May 1 as "Law Day." All of us would do well to join the celebration. Make a date with justice on May first—Law Day 1975!

TESTIMONY BEFORE CONGRESSIONAL COMMITTEES

Mr. SPARKMAN. Mr. President, on April 25, Ambassador Dean Brown, the coordinator of the Vietnam refugee program, failed to appear before the Senate Refugee Subcommittee. The Washington Star quoted John Hushen, assistant White House press secretary, as explaining:

It is traditional that presidential appointees not confirmed by the Senate not be called to testify before Congress.

Mr. Hushen is mistaken, and I would not want his statement to stand unchallenged. Among the Presidential appointees not confirmed by the Senate who have testified before congressional committees are Peter Flanigan, Richard Goodwin, Sherman Adams, Robert Cutler, Robert E. Merriam, Gerald D. Morgan, Lawrence F. O'Brien, General E. R. Quesada, Roger L. Stevens, Dr. Stafford L. Warren, and Dr. Jerome Wiesner.

CPL. CHARLES McMAHON, JR.

Mr. BROOKE. Mr. President, our tragic involvement in Vietnam has finally and thankfully come to an end. But the end did not come without personal tragedy for a family in Woburn, Mass., and indeed for the Nation.

That tragedy occurred on Monday, April 28, during the final stages of the American evacuation from Saigon, when an enemy rocket attack took the life of Marine Cpl. Charles McMahon, Jr. Corporal McMahon had been assigned to protect American and Vietnamese evacuees at the Tansonnhut airport near Saigon. He was only 21 years old and had been in Vietnam just 2 weeks.

Corporal McMahon's life was typically and solidly American: He was by all accounts a model citizen. This was best exemplified by his long and devoted affiliation with Woburn's Boys Club, where he was always pitching in and lending a helping hand. In recognition of this great community contribution, the Boys Club named him Boy of the Year in 1971.

As a Marine, Corporal McMahon attended the Marine Embassy School here in Washington, D.C. He graduated at the top of his class and became one of the 120 Marines to be given the very sensitive and very difficult assignment of protecting the U.S. Embassy in Saigon throughout the last agonizing hours of the war. His courage, skill, and professionalism helped make our last-minute exodus as safe and orderly as possible. For this our country is in his debt.

Mr. President, it is always a deep, personal tragedy when a child predeceases his mother and father. War, by its ugly nature, provides too many opportunities for such tragedy. And this, perhaps more than anything else, underscores its true cost.

For Corporal McMahon's mother and father, Edna and Charles, for his older sister, Susan, for his younger brothers, Scott and Michael, no words can possibly relieve the burden of grief they now bear. But I do want to extend my deepest sympathy to each of them and offer my most heartfelt prayers that God see them through these difficult days.

VIETNAM

Mr. FANNIN. Mr. President, our country's military involvement in Vietnam has come to a close. Our Armed Forces and our officials have been withdrawn. President Ford has observed that we have come to the end of an era in our efforts in Southeast Asia.

Yet we cannot close the books on our interest in Southeast Asia. We still do not know what happened to 1,363 American servicemen who were listed as prisoners of war or missing in action. We know that many of these men were alive after capture, but they were not accounted for as required in the Paris Peace Agreement of January 27, 1973. It is my understanding that the remains of only 23 of over 1,100 Americans known dead on Communist soil have been returned to the United States.

The Hanoi government blatantly disregarded the Paris agreement in its drive to defeat South Vietnam militarily, and the Communists likewise refused to provide the promised help in accounting for U.S. POW's and MIA's.

Mr. President, North Vietnam had a legal and moral obligation to abide by the agreement that government made at Paris. The United States had a legal and moral obligation to see that North Vietnam abided by the agreement. We all know that North Vietnam did not live up to the agreement.

The United States is not omnipotent nor omnipresent. Other free world nations—including nations we unselfishly helped save from Fascist enslavement in World War II—chose to ignore Southeast Asia and declined to give any support to our position in regard to the Paris agreement.

Mr. President, the families and friends of those Americans still missing and unaccounted for in Southeast Asia continue to suffer greatly. The missing men fought valiantly for their country and for the freedom of a people half way around the world. We cannot abandon them or their families because of the events of the past several weeks.

Perhaps it is too early to say exactly what future course should be pursued in our efforts to complete the task of accounting for all of our servicemen, but we must renew our pledge to get this accomplished at the earliest time possible.

One would hope that the Communists, having achieved their military objectives, would want to demonstrate to the world that they do have some humanitarian instincts. It would appear to be to their advantage to clear the books, to help account for our MIA's and POW's.

Mr. President, if the Hanoi government will not do this voluntarily, we must find a new means of putting pressure on the Communists. We must make them keenly aware of the fact that these 1,363 missing Americans are extremely important to us, and that it will be in their interest to help account for them—to release any prisoners they may still hold; to locate and return the remains

TAB
C

April 19, 1973

MEMORANDUM

on

POWER OF CONGRESSIONAL COMMITTEE TO COMPEL APPEARANCE OR TESTIMONY OF PRESIDENTIAL ASSISTANTS -- CONSTITUTIONAL AND STATUTORY ASPECTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Summary

This memorandum discusses the legal issues that might arise in the course of a dispute between Congress and the Executive concerning the appearance of members of the President's personal staff before congressional committees. The memorandum is divided into three sections.

The first section is a general analysis of the application of the doctrine of Executive privilege to Presidential Assistants. It concludes that, based on Executive practice and precedent and on the constitutional doctrine of Separation of Powers, the appearance of immediate staff members is solely a matter of Presidential discretion. Because the privilege is that of the President and not the assistant, the decision whether an assistant should or should not appear is to be made by the President.

The second section is a brief narrative of the events which might occur upon the issuance of a subpoena by a congressional committee and non-appearance by the witness. It discusses the alternative routes along which the house involved might then choose to proceed: (1) certification of the contempt to the U.S. Attorney for prosecution under 2 U.S.C.

§§ 192 and 194; or (2) commencement of summary contempt proceedings in the affected house.

Finally, the third section discusses several legal issues attendant to contempt proceedings. It concludes that in a criminal contempt proceeding, the issue of Executive privilege could be raised as a defense to the contempt charge while in a summary contempt proceeding, judicial review of the defense of Executive privilege could probably not be obtained until the House involved cited the Presidential Assistant in contempt and ordered an officer of the House to arrest him. It also concludes that in a criminal proceeding, a U.S. Attorney could not be directed by either the House involved or the court to prosecute the contempt charge.

This memorandum should be read in conjunction with the attached copy of the testimony on Executive privilege by Attorney General Kleindienst on April 10, 1973 before the Separation of Powers Subcommittee of the Committee on the Judiciary and the Intergovernmental Relations Subcommittee of the Committee on Government Operations, United States Senate.

I. Application of the doctrine of Executive privilege to Presidential Assistants

In general, the investigative power of congressional committees is extremely broad--as extensive as the power of Congress to enact legislation. Barenblatt v. United States, 360 U.S. 109 (1959). And the power to investigate carries with it the power to compel a witness to appear before a committee and to respond to questioning. These powers are well established by decisions of the Supreme Court. In McGrain v. Daugherty, 273 U.S. 135 (1927), the Court stated (p. 174):

> We are of opinion that the power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function.

Thus, if a Presidential assistant is exempt from appearing and testifying before a congressional committee, it is because he has some special immunity or privilege derived from the constitutional doctrine of separation of powers that is not available to others. (Of course, a Presidential Assistant who does appear may invoke all appropriate privileges in response to particular questions in addition to Executive privilege. However, because the attorney-client privilege is of doubtful relevance, and the privilege against compulsory self-incrimination may be unavailable or

in any event inappropriate, the Executive privilege is the primary ground for non-response to particular questions.)

The non-appearance question is not one of Executive privilege as it is commonly known but rather one of the immunity of the President or a member of his immediate staff from appearing before a congressional committee. Both concepts are grounded on the doctrine of separation of powers; and, in our view, the immunity is a logical extension of the doctrine of Executive privilege. But in the interest of clarity in this memorandum, the term Executive immunity is used to denote the separation of powers principle which carries with it the concept that a member of the President's personal staff need not appear in response to an invitation or subpoena from a congressional committee provided that the President directs him not to.

The primary underpinning of the doctrine of Executive privilege as applied to staff advice to the President is that frank and candid advice to the President is essential to the effective discharge of Executive responsibilities and that the President will receive such advice only if it is kept confidential. This rationale, while justifying the refusal of Presidential assistants to answer congressional requests

for information relating to the discharge of Executive responsibilities, does not apply of its own force to excuse immediate staff members from appearing at all. However, a corollary of this rationale--based more on policy than on constitutional law--is that Presidential advisers need not appear, if so directed by the President because all of their official responsibilities are subject to a claim of privilege.

A more persuasive rationale, grounded on the doctrine of separation of powers, is that an immediate assistant to the President in the normal situation acts as an agent of the President in implementing Presidential functions. If a congressional committee could compel the attendance of a Presidential adviser for the purpose of inquiring into the discharge of functions constitutionally committed to the President, the independence of the Presidency would be impaired for the same reason that such congressional power to compel the attendance of the President himself would impair that independence. As President Truman said in a radio address on the occasion of his refusal to appear pursuant to a request of the House Un-American Activities Committee, if a President or former President could be called

and questioned about his official duties, "the office of President would be dominated by the Congress and the Presidency might become a mere appendage of Congress." New York Times, Nov. 17, 1953 at p. 26.

President Nixon recognized the force of that rationale when he said in his March 12, 1973 statement on Executive privilege:

> Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of government. If the President is not subject to such questioning it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency.

Past Presidents who have addressed themselves to the rare requests for the appearance of immediate staff members uniformly have considered the appearance to be a matter of Presidential discretion. See generally, Statement of Richard G. Kleindienst, Attorney General Before the Separation of Powers Subcommittee of the Committee on the Judiciary and the Intergovernmental Relations Subcommittee of the Committee on Government Operations, United States Senate, April 10, 1973. It is a right which may be asserted or waived by the President. On two occasions during the administration of President Truman, a subcommittee

of the House Committee on Education and Labor issued subpoenas to John R. Steelman, who held the title "Assistant to the President". In both instances he returned the subpoena with a letter stating that "In each instance the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee." Investigation of the GSI Strike, Hearings before a Special Subcommittee of the Committee on Education and Labor, House of Representatives, 80th Cong., 2d Sess., pp. 347-53.

In 1951, Donald Dawson, an Administrative Assistant to President Truman, was requested to testify before a Senate Subcommittee investigating the Reconstruction Finance Corporation, one aspect of which concerned Mr. Dawson's alleged misfeasance. The President believed that this request constituted a violation of the constitutional principle of the separation of powers. While affirming his belief that immediate staff members werenot subject to congressional subpoena because of this principle, he nevertheless exercised his discretion to permit Mr. Dawson to appear and testify so that he could clear his name. Study of the Reconstruction Finance Corporation, Hearings before

a Subcommittee of the Committee on Banking and Currency, United States Senate, 82d Cong., 1st Sess., pp. 1709, 1795, 1810. See also New York Times, May 5, 1951, p. 75; May 11, 1951, pp. 1, 26; May 12, 1951, pp. 1, 12.

In 1944, Jonathan Daniels, an Administrative Assistant to President Roosevelt, refused to respond to a subcommittee subpoena requiring him to testify concerning his alleged attempts to force the resignation of the Rural Electrification Administrator. He based his refusal on the confidential nature of his relationship to the President. The subcommittee then recommended that Daniels be cited for contempt. Thereafter Daniels wrote the subcommittee that although he still believed that he was not subject to subpoena, the President had authorized him to appear and respond to the subcommittee's questions. Administration of the Rural Electrification Act, Hearings before a Subcommittee of the Committee on Agriculture and Forestry, U.S. Senate, 78th Cong., 1st Sess., pp. 615-629, 695-740.

During the Eisenhower Administration Sherman Adams declined to testify before a committee investigating the Dixon-Yates contract because of his confidential realtionship to the President. However, at a later date in the

administration he volunteered to appear and testify concerning his dealings with Bernard Goldfine who was charged with violations of federal criminal statutes. Investigation of Regulatory Commissions and Agencies, Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 2d Sess., pp. 3711-3740.

During the hearings on the nomination of Justice Fortas as Chief Justice the Senate Judiciary Committee requested W. DeVier Pierson, then Associate Special Counsel to the President, to appear and testify regarding the participation of Justice Fortas in the drafting of certain legislation. Pierson declined to appear, writing the Committee as follows:

> As Associate Special Counsel to the President since March of 1967, I have been one of the "immediate staff assistants" provided to the President by law. (3 U.S.C. 105, 106) It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a Congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government. I must, therefore, respectfully decline the invitation to testify in the hearings.*

*It does not appear whether or not this action was taken with the specific approval of the President.

Nominations of Abe Fortas and Homer Thornberry, Hearings before the Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess., pp. 1347, 1348.

To the extent that generalizations can be drawn from the precedents it can be said that as a matter of principle the President may properly regard a high level Presidential Assistant to be absolutely immune from testimonial compulsion. The President may not only invoke Executive privilege to authorize his immediate staff members to refuse to answer questions posed by a congressional committee but may also direct his assistants not even to appear before the committee. This "Executive immunity" is based on the separation of powers doctrine and is a logical extension of the principle that the President cannot be compelled to appear before another branch of the government for the purpose of inquirig into the President's performance of his executive duties. Simply stated, the same inroad on separation of powers and independence of the Presidency that would result if the President were subject to testimonial compulsion would occur if an immediate staff assistant to the President, despite the wishes of the President, could be called before a committee for the avowed or apparent purpose of questioning him about his duties on behalf of the President.

II. Subsequent Proceedings for Failure to Appear or Testify Before a Congressional Committee

Should a congressional committee persist in its efforts to obtain the testimony of a Presidential assistant, it can, of course, direct him to appear by serving him with a subpoena. If the assistant ignores the subpoena the committee may vote to recommend that its parent house cite him for contempt of that house. At this stage, the house could proceed by one of two routes. It could (1) certify the contempt to the U. S. Attorney for prosecution under 2 U.S.C. §§ 192 and 194; or (2) proceed summarily against the contemnor. The first is the route followed ordinarily. However, concern about delay or fear that the U. S. Attorney would not prosecute might motivate the house to select the second route. Also if a contempt citation pursuant to section 194 was not promptly prosecuted, the second route might then be taken.

A. Criminal proceedings under 2 U.S.C. §§ 192 and 194.

Section 192 of Title 2, U.S.C., imposes criminal sanctions on any witness who refuses to testify or produce papers upon any matter pertinent to the question under inquiry. Section 194 provides in relevant part:

> Whenever a witness summoned as mentioned in section 192 fails to appear to testify . . . or . . . refuses to answer any question pertinent to the subject under inquiry before . . . any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and shall so certify, the statement of facts . . . to the appropriate United States Attorney . . . .

This section has been interpreted in practice by the Congress to mean that the whole Senate or House, if in session, will vote on a resolution directing its presiding officer to certify the committee report of the facts of the contempt to the U. S. Attorney. Consideration of such a resolution has customarily been initiated by the committee before which the contempt occurred by favorably reporting such a resolution to the full chamber and setting forth the facts constituting the asserted contempt. If the resolution is passed by the full chamber, the report is then certified to the United States Attorney for prosecution. Questions may then arise as to whether the U. S. Attorney is under a mandatory duty to (a) present the matter to the grand jury, (b) recommend indictment to the grand jury after presenting it,

(c) sign the indictment if it is returned, and (d) move the case to trial. Questions also arise as to whether the Executive branch ought, or may be compelled either by Congress or the courts, to appoint a special prosecutor to handle the prosecution. Finally, assuming that prosecution is pursued there are questions about what may be urged to support a motion to dismiss an indictment and what defenses might be available to a member of the President's immediate staff at the trial. Assuming that a conviction results, there is the possibility of a Presidential pardon. These questions are discussed below (Point III, C).

B. Summary Contempt Proceedings

A committee can also initiate summary contempt proceedings against a witness who either refuses to answer questions or to appear without resort to 2 U.S.C. §§ 192 and 194. It is clear that Congress can summarily punish a contumacious witness, although it has not done so since the 1930s.*/ One graphic example of this method involved

*/The last case was apparently that of L. H. Britten by the Senate in 1934. See C. Beck, Contempt of Congress 213 (1959).

Mally S. Daugherty, the brother of Harry M. Daugherty, who had been Attorney General from March 5, 1921, until March 28, 1924, when he resigned. Late in that period various charges of misfeasance and nonfeasance in the Department of Justice were brought to the attention of the Senate. The Senate then adopted a resolution authorizing and directing a select committee to investigate the failure of Daugherty to perform his duties. In that connection the committee issued and caused to be served on Mally S. Daugherty, Harry's brother, a subpoena commanding him to appear and testify before the committee. He failed to appear and offered no excuse.

The committee then made a report to the Senate, which adopted a resolution directing the President of the Senate pro tempore to issue his warrant commanding the Sergeant at Arms or his deputy to take Mally into custody and bring him before the bar of the Senate to answer such questions as the Senate might propound. The Sergeant at Arms issued the warrant and directed his deputy to execute it, which was done. Mally then petitioned a federal district court for a writ of habeas corpus, which was granted. Upon direct

appeal to the Supreme Court, that court reversed. McGrain v. Daugherty, 273 (U.S. 135 (1927), supra. The Court brushed aside several technical objections to the procedure followed (pp. 154-59), and stated as the principal question "whether the Senate--or the House of Representatives, both being on the same plane in this regard--has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution" (p. 160). It held that either House had such power. The authority of McGrain has never been quetioned, so far as we are aware.

In 1935, in Jurney v. McCracken, 294 U.S. 125, the Court expressly held that R. S. § 102 (the predecessor of 2 U.S.C. § 192) did not impair the power of either House of Congress to punish for contempt. As the Court said:

> The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses. 294 U.S. at 151.

If Congress proceeds summarily against a contumacious witness, the question may arise as to whether the witness

can successfully seek judicial review prior to his actual arrest and detention. If the witness is imprisoned, a question may arise as to whether he can successfully seek judicial review in habeas corpus proceedings.

Before discussing these legal questions it should be emphasized that Congress, as far as we know, has never used its contempt power against an officer of the Executive branch for refusing to testify before Congress. Each time such a confrontation has threatened, either Congress or the President has backed down. If a showdown is considered unavoidable here, it will be necessary to make a fundamental decision at the outset. That decision is whether the Executive privilege issue should be submitted to the courts for judicial resolution, or whether an effort should be made to keep it out of the courts. As our description of the possible sequence of events indicates, there are a number of ways the Executive privilege issue might get into court. The advantages of a court resolution are obvious. A submission of the issue to the courts would be more conciliatory and orderly, and would avoid the dangers and possible embarrassment that could result from the use of self help

by both Congress and the President.*/ On the other hand judicial review runs the risk of an adverse or limiting court resolution of an issue that has heretofore been kept in the province of Executive discretion guided by Executive precedents. And, depending on how the matter finds it way into court, the proceedings may be a matter of considerable risk and inconvenience to the Presidential assistant and to the White House.

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*/For example, congressional efforts to arrest a Presidential assistant or summarily imprison him countered by evasion of arrest or resistance; attempts to personally serve the assistant countered by evasion of process; refusal to take action by the U. S. Attorney after a certification; conflict over the appointment of a special prosecutor. It would also reduce the dangers of the dispute being fought out over appropriations, appointments, or other matters.

III. Legal Questions That May Be Presented at Various Junctures in Contempt Proceedings.

This section of the memorandum contains a discussion of some of the legal questions that might arise during a confrontation over appearance of a member of the President's staff. Because few of those numerous questions have ever been addressed by a court, no definitive answers are possible.

A. Assuming that the parent house decides to proceed pursuant to 2 U.S.C. §§ 192 and 194, at what point in the proceedings can a Presidential assistant obtain a court test of whether Congress can compel him to appear despite the doctrine of Executive privilege?

If a judicial resolution of whether a Presidential assistant can be compelled to appear in response to a congressional subpoena is sought, it would appear desirable to seek it at as early a stage as possible. If Congress proceeds pursuant to sections 192 and 194 of title 2, we doubt that a court will rule on the issue of Executive privilege prior to the time the criminal indictment is signed by the prosecutor. Although we have found no precedents directly in point, we do not believe a court would intervene prior to that time by declaring void or enjoining enforcement of a congressional subpoena-either before a Presidential assistant's scheduled appearance or after he has failed to appear. The case that

is most nearly in point is Pauling v. Eastland, 288 F.2d 126 (D.C. Cir. 1960). See also Mins v. McCarthy, 209 F.2d 307 (D.C. Cir. 1953). In the Pauling case, Linus Pauling, while testifying before a Senate subcommittee, was directed by the subcommittee chairman to appear at a later date and bring with him certain documents. Faced with a choice between compliance and a refusal that would render him liable to a citation for contempt, Pauling brought a civil action for a declaratory judgment that the directive was void, and an injunction against enforcement of the directive and against possible prosecution for failure to comply. He also asked for an interlocutory stay pendente lite. The Court of Appeals denied all relief without reaching the First Amendment issues which Pauling sought to present. The court said:

> It seems quite clear that as a matter of basic general principle a court cannot interfere with or impede the processes of the Congress by proscribing anticipatorily its inquiries. This is so not only from the viewpoint of the Constitutional separation of powers between the two branches of the Government but also from the practical viewpoint of simple procedural efficiency. (288 F.2d at 128-29).

The court noted that the ordinary rule was that judicial review was available in a criminal case only after indictment.

In concluding that the circumstances before it did not bring Pauling's case within the exceptions to the rule that courts will not enjoin criminal prosecutions or consider their validity in actions for declaratory judgment, Judge Prettyman, writing for the court, said:

> The separation of powers principle is one of the basic concepts of the Constitution. The courts have no power of interference, unless and until some event, such as arrest, indictment or conviction, brings an actual controversy into the sphere of judicial authority. The courts cannot interfere merely upon the petition of a person potentially liable to some such event. It is clear to me that the doctrine of the separation of powers prevails here. (Id. at 129).

He pointed out that habeas corpus review was not available until Mr. Pauling was arrested and detained. Finally, Pauling argued that even if an injunction would not issue because it would interfere with the legislative process, a declaratory judgment should be available. The court answered that it must assume that Congress would not attempt to enforce a directive after a federal court had held it unconstitutional and void. The court then restated its holding:

> . . . a declaratory judgment respecting the validity of contemplated Congressional action would violate the doctrine of the separation

of powers and would be an illegal impingement by the judicial branch upon the duties of the legislative branch. (Id. at 130).

In the course of its opinion, the court cited (in note 4) a number of cases which held that a federal court could enjoin criminal prosecutions or consider its validity in a declaratory judgment in certain circumstances. Those circumstances do not appear to be applicable in a contempt of Congress proceeding. All of the cases cited and their progeny (Dombrowski v. Pfister, 380 U.S. 479 (1965), Younger v. Harris, 401 U.S. 37 (1971), Perez v. Ledesma, 401 U.S. 82 (1971)) involved federal court action to enjoin state criminal prosecutions or to test their validity by seeking declaratory relief. Consequently, the cases can be distinguished on the ground that the notion of "comity"--that is, a proper respect for state functions--pervades the reasoning in the cases. This barrier may be overcome by arguing that the underpinnings of the principle of comity are just as applicable where the federal courts are asked to intervene in proceedings conducted by the legislative branch. Here the principle of comity is normally addressed in terms of separation of powers. If a court can be convinced that the rationale of these cases

are applicable, it must be shown that the criminal prosecution in question--the contempt proceeding--meets the criteria which justify judicial intervention at that point in the proceeding.

In Dombrowski v. Pfister, supra, the Supreme Court indicated that state criminal proceedings which were contemplated but not yet pending could be enjoined by federal courts where (1) state officials threatened in bad faith to invoke the criminal process or (2) the officials threatened to prosecute under a statute that is so broad and vague that it is unconstitutional on its face. In neither instance would a defense of the state's criminal prosecution assure adequate vindication of the complainant's rights. The Court found that irreparable injury in the nature of a substantial loss or impairment of freedom of expression would have occurred if the complainants had to await the state court's disposition and ultimate review in the Supreme Court of any adverse determination.

It is extremely doubtful that a Presidential assistant could secure judicial intervention in the first instance because it is unlikely that a court would make the factual

finding that the case was one of "proven harassment" or constituted a prosecution "undertaken by . . . officials in bad faith without hope of obtaining a valid conviction." Perez v. Ledesma, 401 U.S. 82, 85 (1971). In this respect, it is important to note that the courts have said that congressional proceedings are entitled to a presumption of regularity. See Barry v. U.S. ex rel. Cunningham, 279 U.S. 597 (1929). It is also unlikely that an immediate staff member could prevail under the second principle developed by the Supreme Court in Dombrowski. Although sections 192 and 194 may be unconstitutional when applied to the facts of a case involving a Presidential assistant who is protected by Executive privilege they do not appear to be unconstitutional on their face, as Dombrowski requires. Moreover, the touchstone justifying federal judicial intervention in a criminal proceeding, non-pending (Dombrowski) or pending (Younger v. Harris, supra), is that the defendant in the proceeding is unable to present adequately his defense in the proceeding and that he will suffer irreparable injury thereby. Certainly if the house of Congress certifies the contempt to the U.S. Attorney, a Presidential assistant can be expected

to receive adequate consideration of his claims by a federal court should an indictment follow. He would presumably also be able to present his constitutional claims in a contempt proceeding brought summarily before the house. In several previous contempt proceedings, the contemnor was afforded counsel and was permitted to assert his defense. And, as the court in Pauling said, the principle of separation of powers prohibits the courts from interfering with "the processes of the Congress by proscribing anticipatorily" the congressional action. 288 F.2d at 128-29. Of course, if the house did choose to cite the witness in contempt and imprison him, habeas corpus would be available.

There is some question whether a person found in contempt of Congress can seek a court test of the constitutionality of the congressional contempt power before the sergeant-at-arms or other congressional officer directed by the house to execute the arrest warrant actually arrests him. Of course, it would be a matter of timing to file suit in court to enjoin the sergeant-at-arms before the arrest but after the house has voted to authorize the official to arrest the contemnor. At this moment, the congressional response would

no longer be anticipated. Instead, the contempt citation and the Congressional action directing the sergeant-at-arms to arrest the individual would seemingly bring an actual controversy into the sphere of judicial authority. The decision in Pauling would no longer control because the Congressional action would no longer be in contemplation. We have not found any authority on this question and therefore can only conclude that a civil action in the nature of a declaratory judgment and injunction against the congressional officer directed by the house involved to execute the warrant is an approach that might be available.

B. If the Senate proceeds summarily, at what point can a Presidential assistant obtain judicial resolution of the Executive privilege issue?

It is clear that Congress may punish summarily for contempt, although it has not chosen to do so in any case that has reached a court subsequent to Jurney v. McCracken, 294 U.S. 125 (1935). If Congress chooses to follow this route, we do not believe, for the reasons set out above, that a court will rule on the Executive privilege issue prior to the time the Presidential assistant is actually found in contempt and an arrest warrant is issued at the direction

of the house. See Pauling v. Eastland, 288 F.2d at 129-30, supra. In the leading habeas corpus cases involving persons who were arrested and detained for questioning at the bar of the Senate, or who were imprisoned following summary proceedings for contempt, the petitioner appears to have been incustody at the time of the petition. See Jurney v. McCracken, 294 U.S. 125 (1935); McGrain v. Daugherty, 273 U.S. 135 (1927); Barry v. United States, ex rel. Cunningham, 279 U.S. 597 (1929); Marshall v. Gordon, 243 U.S. 521 (1917); Kilbourn v. Thompson, 103 U.S. 168 (1880) (pior proceeding in same matter). Thus, while we have not found any cases in point, we do not believe declaratory or injunctive relief could be available prior to the contempt citation and arrest warrant issued against the immediate staff member.

On a number of occasions, however, the courts have ordered a person charged with contempt of Congress released from detention upon his writ of habeas corpus. Habeas corpus relief has generally been granted where the court finds that a Congressional committee exceeded its constitutional powers, did not have jurisdiction over the subject matter or exceeded its legislative grant of jurisdiction, or engaged in an

unreasonable search into the private affairs of the witness which was unrelated to a legislative purpose. See, e.g. Kilbourn v. Thompson, 103 U.S. 168 (1880); In re Chapman 166 U.S. 661 (1897).

There is language in some of the decisions which suggests that a court's inquiry in habeas action by a recalcitrant congressional witness is very narrow indeed. Justice Brandeis, writing for the Court, said in Jurney v. McCracken (294 U.S. at 152): "The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination it proposes." In Barry v. United States ex rel. Cunningham, Justice Sutherland (for the Court) concluded (279 U.S. at 619-20):

> The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority. . . .
>
> Here the question under consideration concerns the exercise by the Senate of an indubitable power; and if judicial interference can be successfully invoked it can only be upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law . . . .

We do not believe that the Court in the McCracken and Cunningham cases was focusing on the possibility that a separation of powers dispute between Congress and the President would be raised in habeas proceedings. Nor did the Court in those cases have the occasion to determine whether the Congressional committee exceeded its constitutional powers. It is this theory on which a court would probably consider the issue of Executive privilege in a habeas corpus proceeding--viz., whether Congress exceeded its constitutional powers and thereby breached the principle of separation of powers in proceeding summarily against an Executive official on whose behalf the President has invoked Executive privilege. Also, as a matter of policy, a court would likely consider the issue of Executive privilege. If Congress could summarily detain and imprison presidential aides for refusals to testify based on assertion of the Executive privilege without judicial review on habeas corpus, there would appear to be no way to challenge summary congressional action in court -- except perhaps after the fact in a damages action. See Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821); Kilbourn v. Thompson, 103 U.S. 168 (1880).

Moreover, if a court believes that Executive privilege applies to exempt a Presidential assistant from the duty to appear at all, it is difficult to see how it could indulge a presumption of constitutional regularity after he has been summarily imprisoned.

We believe that, in view of subsequent developments in the availability of habeas corpus*/ and the inadequacy of alternative methods of testing the constitutionality of a summary detention or imprisonment by Congress, a court would consider the Executive privilege issue in habeas proceedings.

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*/ See, e.g., Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391 (1963).

C. Contempt prosecution under 2 U.S.C. §§ 192 and 194.

(1) Must the U. S. Attorney present the matter to the grand jury as section 194 appears to require? If he does not, can a court require him to do so? Can someone else, for example, a member of the public or a Senator, present it instead? Even if required to present the matter to the grand jury, is the U. S. Attorney required to sign an indictment and move to trial?

We are not aware of any precedents whereby mandamus would lie to compel a U. S. Attorney to present a certified contempt to the grand jury as distinct from signing an indictment.*/ However, even if mandamus were available to require presentment there are authorities indicating that a U. S. Attorney cannot be compelled to sign an indictment and prosecute.**/ See United States v. Cox, 342 F.2d 167 (5 Cir. 1965).

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*/A presentment of a case to the grand jury is to be distinguished from the signing of an indictment and subsequent prosecution of the case before a petit jury. Presentment refers to the act of presenting the case to the grand jury for their consideration as to whether there is sufficient evidence to indict the accused. If the grand jury indicts, then the U. S. Attorney has the opportunity to decide whether or not to sign the indictment. If he does not sign the indictment, the case is, in effect, nolle prosequi. If he does sign the indictment, then he normally prosecutes the case, unless he enters a nolle prosequi at some subsequent time.

**/United States v. Morgan, 222 U.S. 274 (1911), described the prosecutor's relation to drug law enforcement, and did not involve an instance of prosecutor nonaction.

While section 194 does purport to make presentation to the grand jury mandatory, it gives no mandate to the prosecutor to sign the indictment or to prosecute. The courts have repeatedly held that at least in the absence of a specific direction by the legislature, a court may not compel the exercise of prosecutorial discretion. The leading Supreme Court authority in the area is the Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868), where the Court said:

> "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in the court they are so far under his control that he may enter a nolle prosequi at any time before the jury is impanelled for the trial of the case, except where it is otherwise provided in some act of Congress."

In the Confiscation Cases, an informer who had instituted a libel for confiscation of property used in aiding the rebellion unsuccessfully sought to prevent dismissal of an appeal to the Supreme Court at the request of the United States. In Cox, the Court of Appeals noted that the U. S. Attorney has traditionally had the power to enter a nolle prosequi of a criminal charge at any time after the indictment and

before trial, without leave of court. The Federal Rules of Criminal Procedure now provide that leave of court is required to file a dismissal, but the court in Cox said that requirement was designed to prevent harassment of the defendant by charging, dismissing, and recharging. The court continued:

> [The U. S. Attorney is] an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions. 342 F.2d at 171.

Although it appears that a mandamus action to compel the U. S. Attorney to prosecute, as distinct from presenting the case to the grand jury, he could, of course, be removed by the President or impeached.

(2) Can the House involved direct prosecution in a particular case?

Although we have not found any authority directly on

point, we believe that it can be argued, by analogy to the Cox case, supra, that Congress cannot interfere with the free exercise of the discretionary powers over prosecutions that are vested in U. S. Attorneys, who are Executive officials of the Government. The same rationale also seemingly precludes similar action by the Legislative branch.

(3) Should the President appoint a special prosecutor in a particular case? Can he be compelled to appoint a special prosecutor by Congress or court? Can Congress or a court appoint a special prosecutor itself?

The answer to the first question obviously depends on considerations of policy, such as (a) whether bias or susceptibility to accusations of bias should be avoided, (b) whether appointing a special prosecutor would be widely seen as an admission of bias, (c) whether control over the progress of the prosecution is desired, and (d) whether the appointment would be an implicit acknowledgment that there is probable cause to believe that criminal laws have been violated.

With respect to the second question we have been unable to find any precedents. We do not believe that a court is empowered to compel the President or the Attorney General to appoint a special prosecutor, although it might in

certain circumstances be able to disqualify a particular prosecutor. It is conceivable that Congress would pass legislation directing the appointment of a special prosecutor, although it is difficult to see what the legal remedy would be if the President refused to do so. Assuming that the President signed the legislation, it might be politically difficult not to implement it.

We believe that the answer to the third question is relatively clear. Neither Congress nor a court can itself appoint a special prosecutor. The Constitution provides that the President shall nominate and, by and with the advice and consent of the Senate, shall appoint all officers of the United States whose appointments are not otherwise provided for in the Constitution. (Art. II, § 2, cl. 2). That the Senate or Congress may not originate an appointment was early recognized in Marbury v. Madison, 1 Cr. 137, 155-56 (1803), and reaffirmed on numerous occasions thereafter. For example, Attorney General Butler, in an opinion in 1837, held:

> "The Senate has no power to originate an appointment; its constitutional action is confined to a simple affirmation . . . . Whenever the Senate disagrees to such a nomination, it fails . . . . (3 Ops. A.G. 188, 189).

See also, 13 Ops. A.G. 516, 518; 18 Ops. A.G. 18, 27. It seems equally clear that a court cannot originate an appointment.

During the Teapot Dome scandal, President Coolidge apparently was given word that Congress was considering an attempt to force him to appoint a special prosecutor. However, he appointed one himself before the attempt was launched. See B. Noggle, Teapot Dome, 91, 97, 114 (1962).

Whether Congress could undertake to prosecute a case itself in the courts without an Executive branch official as prosecutor apparently turns on the question whether criminal prosecution in the courts is an Executive function confided exclusively in the President by the Constitution. We believe that prosecution of violation of the criminal laws in the courts, like other law enforcement functions, is exclusively an Executive function.

D. The power of the President to pardon a Presidential Assistant if (a) Congress proceeds summarily and imprisons the Assistant, or (b) he is convicted under 2 U.S.C. § 192.

The attached memorandum considers the question whether the President may pardon a contempt of Congress when Congress has exercised its power of contempt directly against

a federal official. The memorandum concludes that he probably cannot. On the other hand, if a conviction under 2 U.S.C. § 192 has been obtained, the President presumably could pardon a contempt of Congress. In fact, President Roosevelt did so in the case of Dr. Francis Townsend in 1938.

APPENDIX A

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May 18, 1956

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DCS:agg

Power of President to Pardon Contempts of Congress.

This is in response to your request for my views as to the soundness of the recent claim that there is no power in the President to pardon contempts of Congress when that body exercises its power of contempt directly against a Federal official. 1/ Although it cannot definitely be said that the President cannot exercise his power of pardon in such a case, there is no precedent for such an exercise of the pardon power.

The involvement of an executive official is not considered significant with respect to the President's pardon power. As a practical matter, however, it would embarrass the President to exercise his pardon power in favor of a Federal official imprisoned by Congress for refusing to furnish information requested by the Congress. Presumably such refusal would be pursuant to direction of the President or his subordinates. An exercise of the pardon power would be an admission that the refusal was an "offense against the United States" within the meaning of the pardon clause.

The claim asserted by the staff of the House Committee on Government Operations does not encompass statutory convictions for contempt of Congress but only those contempts which Congress proceeds against directly as a coercive measure. The staff study (p. 26) limits its claim as follows:

> "If Congress exercises its power of contempt directly against a Federal official he may be imprisoned until he complies with the request from Congress but his imprisonment may not extend beyond the session of the Congress in which the contempt was committed. In event of the exercise of the legislative power of contempt the only recourse to the judiciary is in cases clearly outside the authority of Congress. Similarly there would be no power in the President to pardon since this is not an offense against the United States within the meaning of the constitutional power of pardon."

1/ Study by the staff of the House Committee on Government Operations entitled "The Right of Congress to Obtain Information from the Executive and from Other Agencies of the Federal Government," May 3, 1956, 84th Cong., 2d sess. (Comm. Print).

The nature of the asserted Congressional power is described by Eberling: 2/

> "The common law power of Congress to punish for contempt in cases of contumacy of witnesses is really not a punitive power at all; it is a coercive power. In other words, neither the House of Representatives nor the Senate has, in a sense, the power to punish witnesses for contempt who refuse to testify or appear before their committees, but they do have the power to imprison a contumacious witness until he does testify, or until adjournment of the session. This is obviously coercion. There has never been a case where a contumacious witness of either House of Congress has been kept in custody after he has agreed to testify and purge himself of contempt.
>
> "Hence neither House of Congress has the inherent or common law right to sentence a contumacious witness to, say, one year in jail or give him a heavy fine. This is an exercise of punitive power which can be used by Congress only through the enactment of appropriate legislation entrusting such power to the courts."

Article II, Section 2 of the Constitution provides that the President

> "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."

The broad terms in which the pardon power is granted and the specific exception of impeachment cases argues against a narrow interpretation of Presidential authority under this clause. In Ex parte Garland, 71 U.S. 333 (1866), 380, the Supreme Court emphasized the broad scope of the power granted as follows:

> "The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."

In considering whether a direct exercise of the contempt power by Congress is subject to the pardon power it is pertinent to observe

2/ Congressional Investigations, New York, 1928, p. 318-9. Eberling's views find support in Marshall v. Gordon, 243 U.S. 521 (1927), involving a contempt by an officer of the Executive Branch.

that such exercise is subject to judicial review. "This question of the power of the courts to review proceedings in contempt was settled, fully and decisively by the United States Supreme Court in the case of Kilbourn v. Thompson, 3/ which decision . . . decided that the courts had power to inquire into the exercise of the power of Congress to punish for contempt." 4/

Criminal contempts of court 5/ are "offenses against the United States" within the meaning of the pardon clause. Ex Parte Grossman, 267 U.S. 87 (1924). This decision was made in the face of the argument that exercise of such a power by the President would constitute executive interference with judicial proceedings, that "to construe the pardon clause to include contempts of court would be to violate the fundamental principle of the Constitution in the division of powers between the Legislative, Executive and Judicial Branches, and to take from the federal courts their independence and the essential means of protecting their dignity and authority." (267 U.S. at 108.) It was also argued that the contempt was sui generis and, therefore, not an "offense against the United States." (267 U.S. at 117.)

In disposing of these arguments the opinion of Chief Justice Taft in the Grossman case, although devoted solely to criminal contempts of court, affords strong support by way of analogy for the view that the President may pardon criminal contempts of Congress. There is no reason justifying an application of the pardoning power to contempts of court that does not apply with equal force to criminal contempts of Congress. 6/ "The question is naturally suggested by the Grossman case whether the President could pardon contempts of Congress. The general argument against the suggestion on the ground of the principle of separation of powers is logically invalidated by the holding." 7/

3/ 103 U.S. 168 (1880). Kilbourn was imprisoned for 45 days in the common jail of the District of Columbia by order of the House after refusing to give information requested by its committee.

4/ Eberling, Congressional Investigations, New York, 1928, p. 335.

5/ There have been several published opinions of the Attorney General upholding the power of the President to pardon in criminal contempt of court cases. 3 Op. 621 (1841), 4 Op. 317 (1844), 4 Op. 450 (1845), 5 Op. 579 (1852), 19 Op. 475 (1890). Also see unpublished opinions of Attorney General Wickersham, 4/16/1909, of Attorney General Hoar in the Alexander McKenzie case in 1901 (Pardon Files, U. 41), and of Attorney General Daugherty in 1923.

6/ Cf. Argument for Respondent, 267 U.S. at 100.

7/ Corwin, The President's Veto Power 1948. See also Attorney General's Survey of Release Procedure, 1939, Vol. I, p. 76, and Vol. III, p. 100-101.

It is important to note that the Grossman case involved punishment for contempt. Petitioner had been enjoined for maintaining a nuisance by the sale of liquor. Thereafter he sold liquor in violation of the injunction, whereupon he was found guilty of contempt and sentenced to imprisonment for one year and to pay a fine. Chief Justice Taft was careful to distinguish between remedial and punitive contempt sentences:

> "In the Gompers case this Court points out that it is not the fact of punishment but rather its character and purpose that makes the difference between the two kinds of contempts [civil and criminal]. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions." (267 U.S. at 111.)

The contempt in the Grossman case was in the latter category. Years prior to his opinion in this case, the Chief Justice had discussed the above distinction as follows:

> "There is a question whether the President's power of pardons extends to the case of one sentenced to imprisonment for contempt by a Federal Court. It is objected that this power of contempt is used by the court to enforce its judgments, and that if the President could intervene and paralyze the instrument in the hands of the Court to enforce its judgment, he would not be pardoning a crime but would be obstructing the Court in its administration of justice. I think it is possible to smooth out this difficulty by pointing out a distinction between the two ways in which a court exercises its power of contempt. Where a court is seeking to enforce a decree or a judgment against a contumacious party and puts him in prison for the purpose of compelling him to comply with the judgment or decree, then I do not think the President could pardon a man or relieve him from the effect of such an order because he would really be obstructing the cause of justice. But where the court is merely vindicating its own authority by punishing a man for a past contempt, and where an imprisonment is not a continuing duress for the purpose of compelling obedience, it seems to me that the punishment inflicted is for an offense against the United States, to wit, a defiance of its judicial authority, and therefore that it does come within the range of the power of pardon by the President." (Our Chief Magistrate, New York, 1916, p. 120-1.)

Although the former President was considering only contempts of court, it is reasonable to suppose that, if the occasion arose, he would extend his conclusions to contempts of Congress and hold that a coercive exercise of the contempt power by Congress would not be subject to the President's pardoning power.

Although the Attorney General has approved the pardon of contempts of court on several occasions, 8/ research discloses none concerning contempts of Congress. 9/ Nevertheless, in 4 Op. 453 (1845), Attorney General Mason, advising the President that he could remit fines imposed by federal judges on defaulting jurors, quotes approvingly from Rawle and Story to the effect that the President cannot pardon contempts of the legislature. The obvious occasion for the reference to their views on legislative contempts was to demonstrate that since "the elementary writers on the Constitutional law" considered that only two exceptions existed to the President's pardoning power, one being express (impeachments) and the other being implied (contempts of Congress), therefore contempts of court must be within the pardoning power.

Rawle is quoted by Attorney General Mason as follows (p. 469-1):

> "The power to grant pardons extends to all cases, except impeachments. * * In respect to another jurisdiction, it may be doubted whether he possesses the power to pardon. It seems to result from the principle on which the power to punish contempts of either house of legislature is founded, that the executive authority cannot interpose in any shape between them and the offender. The main object is to preserve the purity and independence of the legislature for the benefit of the people, &c. In all other than these two cases, the power is general and unqualified. It may be exercised as well before as after a trial, and it extends alike to the highest and the smallest offences. * * * The constitution nowhere expressly prescribes any mode of punishment. The powers of Congress as to this are express in four cases, and in others is derived from implication only; but it is necessary, to carry the constitution into effect, and is embraced in the general provision to pass all laws which may be necessary and proper. The pardoning power is as extensive as the punishing power, and applies as well to punishments imposed by virtue of laws under this implied authority as to those where it is expressed. The only exceptions are the two cases already mentioned; in one of which the power of pardoning is expressly withheld, and in the other it is incompatible with the peculiar nature of the jurisdiction."

8/ For a judicial citation of these opinions, see Ex parte Grossman, 267 U.S. 87, 118. Also see footnote 5/, p. 3 of this memorandum.
9/ Although 2 Op. A.G. 655 (1834) dealt with the punishment of Gen. Houston by the House of Representatives for contempt, the opinion did not relate to a pardon.

Story's views are expressed in his Constitution, Vol. 2 (5th ed), § 1503, pages 336-7, as follows:

> "It would seem to result from the principle on which the power of each branch of the legislature to punish for contempts is founded, that the executive authority cannot interpose between them and the offender. The main object is to secure a purity, independence, and ability of the legislature adequate to the discharge of all of their duties. If they can be overawed by force, or corrupted by largesses, or interrupted in their proceedings by violence, without the means of self-protection, it is obvious that they will soon be found incapable of legislating with wisdom or independence. If the executive should possess the power of pardoning any such offender, they would be wholly dependent upon his good-will and pleasure for the exercise of their own powers. Thus, in effect, the rights of the people intrusted to them would be placed in perpetual jeopardy. The Constitution is silent in respect to the right of granting pardons in such cases, as it is in respect to the jurisdiction to punish for contempts. The latter arises by implication; and to make it effectual, the former is excluded by implication."

If Story and Rawle are speaking of the punishment by Congress itself of criminal contempts of that body, rather than coercive exercises of its contempt power, their reasons for exempting contempts of Congress from the pardoning power apply as well to criminal contempts of court, which are, of course, within the pardon power. On the other hand, insofar as the reasoning applies to coercive measures, their views are consistent with Taft's opinion of the pardon power.

Corwin, although conceding that the Grossman case points to a power in the President to pardon contempts of Congress, observes that a coercive exercise of the contempt power by Congress is analogous to a civil contempt not pardonable by the President. 10/ Corwin's statement follows:

> "And suppose that one of the Houses should order the incarceration of a Cabinet officer until he complied with its subpoena to testify or to produce certain papers. By analogy at least this would seem to be a case of 'civil contempt,' to which consequently the President's power to pardon would not extend." (Corwin, The President, New York, 1948).

10/ In re Nevitt, 117 F. 448 held that a civil contempt is not pardonable. However, the case did not involve an attempted exercise of the pardon power. The pardon power of the English Crown did not extend to civil contempts. Ex parte Grossman, 267 U.S. 87, 111. The discussion in the Nevitt case of the President's pardon power as to criminal contempts was discredited by the Supreme Court in the Grossman case at p. 119.

Chief Justice Taft in the Grossman case mentions specifically Rawle's opinion that the pardoning power did not extend to contempts of a House of Congress. As in the opinion of Attorney General Mason, referred to earlier in this memorandum, this reference obviously was included only to show that Rawle did not state that contempts of court were beyond the pardoning power. The Chief Justice treated the opinion thus:

> "In 1830, Attorney General Berrien, in an opinion on a state of fact which did not involve the pardon of a contempt, expressed merely in passing the view that the pardoning power did not include impeachments or contempts, using Rawle's general words from his work on the Constitution. Examination shows that the author's exception of contempts had reference only to contempts of a House of Congress."

Introduced by Chief Justice Taft for a negative purpose, the above reference is not entitled to significance other than to indicate his acknowledgment of Rawle as an authority. However, Taft's failure, although unnecessary to his decision, to cast doubt upon Rawle's statement, possibly has added significance.

Of greater significance is what Corwin terms "the silence of precedent," which he considers a "strong counter-consideration" against application of the Grossman case to contempts of Congress. 11/ The Assistant Pardon Attorney, Mr. Kenneth V. Harvey, reports informally that executive clemency has not been exercised in any case of contempt of Congress punished directly by that body. 12/

Since a coercive exercise by Congress of its contempt power has been analogized to a civil contempt not pardonable by the President, it is important to observe the distinction drawn between civil and criminal contempt. In Nye v. United States, 313 U.S. 33, 42 (1941), the Supreme Court referred to the difference thus:

> "As we recently stated in McCrone v. U.S., 307 U.S. 61, 64, 'While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public.'"

11/ Corwin, Addy, p. 497.

12/ In 1938 President Roosevelt granted a pardon to Dr. Francis Townsend, who had been found guilty of contempt in refusing to testify before a congressional investigating committee. However, this was a pardon for the statutory offense of contempt of Congress under 2 U.S.C. 192.

The Supreme Court had previously stated in Gompers v. Bucks Stove Co., 221 U.S. 418 (1911) at 441:

> "Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both' Bessette v. Conkey, 194 U.S. 329."

The tenuous distinction between civil and criminal contempts is emphasized in the case of In re Nevitt, 117 F. 448, which held that the President cannot pardon civil contempt. The discussion at page 453 refers to the case of one Mullee, 13/ who, being imprisoned for contempt, applied to the President for a pardon since the judge had no jurisdiction to relieve him from the imprisonment because the order committing him was criminal, rather than civil. After Mullee's petition for a presidential pardon was denied, the judge abandoned his theory that the commitment was criminal and admitted the defendant to bail on the theory that the proceeding was civil. The Federal court concluded inter alia that since that day there has been no substantial dissent from the rule and practice that an order committing a defendant for civil contempt "does not fall within the pardoning power of the President." Two Supreme Court decisions which the court cites apparently in support of this and other conclusions make no reference to the Presidential pardon power. The occasion for the Nevitt court's distinction between the two types of contempt was the petition of defendants for a stay of proceedings and leave to apply to the President for release on the theory that their offenses were "distinct and substantive offenses against the United States." The "offense" was their refusal, as county judges, to obey a writ of mandamus from a Federal court directing them to levy a tax to make a partial payment upon a judgment which an individual had recovered against the county.

Although a coercive exercise by Congress of its contempt power is remedial, it serves the purposes of the public insofar as the power is exercised legitimately and thus is unlike a civil contempt. Whether such an exercise is "intended as a deterrent to offenses against the public" is arguable although in effect it would seem to be such. 14/

Moreover, it would seem that an offense against the United States is involved regardless of whether punishment is exercised coercively.

13/ See 17 Fed. Cas. 901 and related cases cited at p. 453 of Nevitt case.

14/ "It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority." Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911), 443.

by Congress or punitively by the courts. Wilful refusal of a witness to testify or produce papers upon a matter under inquiry before either House or its committees constitutes a criminal offense against the United States under 2 U.S.C. 192 and is admitted to be pardonable by the study of the Committee on Government Operations (p. 26). (This offense has been pardoned. 15/) It would not seem to be any the less an offense against the United States merely because Congress, under its inherent powers to punish certain contempts, proceeds coercively rather than under the statute. 16/ As Judge Sanborn said in In re Hewitt, 117 F. 456, denying that the President could pardon civil contempt:

> "Congress has undoubted authority to punish recalcitrant witnesses for contempt of its authority. The offenses of such witnesses are as much offenses against the United States as the offenses of witnesses, jurors or parties who disobey the orders, writs or processes of the courts." 17/

Chief Justice Taft in Ex parte Grossman recited the history of the pardon clause in the Constitutional Convention of 1787 "to show that the words 'for offences against the United States' were inserted . . . presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the States," 18/ The Chief Justice also said that:

> "We can hardly assume . . . that the words of the pardon clause were then used to include only statutory offenses against the United States and to exclude therefrom common law offenses in the nature of contempts against the dignity and authority of United States courts . . . Nothing in the ordinary meaning of the words 'offences against the United States' excludes criminal contempts. That which violates the dignity and authority of federal courts such as an intentional effort to defeat their decrees justifying punishment violates a law of the United States (In re Neagle, 135 U.S. 1, 59 et seq.) and so must be an offense against the United States." 19/

15/ Reference is to pardon of Dr. Francis Townsend in 1938.

16/ Only in a technical sense may it be conceded that the offense punished directly by the Congress is an offense merely against the jurisdiction of the Congress and not against the United States. See 2 Op. A.G. 655 (1834), holding that punishment by the House is no bar to an indictment under the statute. See also In re Chapman, 166 U.S. 661, 672 (1897) on the relationship between the two offenses.

17/ "Every reason advanced by Mr. Justice Story for excluding the power of the Executive to pardon contempts of the legislature applies with equal, if not greater, force to the right to pardon contempts of court." Thomas J. Johnston, Law Notes, 12, p. 126.

18/ 267 U.S. 87, 113. For a case in point, see In re Shechtman, 49 F. Supp. 37 (1943).

19/ 267 U.S. 87, 115.

This broad view of the scope of the pardoning power is reflected in a study of the governor's pardon power in Pennsylvania: 20/

> "Nor can a court prescribe any disciplinary or corrective punishment, such as fine or imprisonment for contempt, which cannot be pardoned, for the offense is against the State and not merely against the personnal of the court. By analogy it would also seem that any fine imposed by the legislature upon its members or others for contempt of privilege might also be pardoned."

It is significant that punishment for contempt by the House is no bar to an indictment under the statute for the same act. 2 Op. A.G. 655 (1834). In this opinion the Attorney General advised the President that General Houston could be fined under the statute for the same act of contempt for which he had been punished by the House and that this would not be double jeopardy since "technically" there were two offenses. From this opinion it may be argued that in a technical sense the offense against the Congress is not an offence against the United States. Indeed, it is upon this distinction that the opinion is based. Nevertheless, the concession that the same act which is an offense against the House may be proceeded against as an offense under the statute (and, thus, an offense against the United States) constitutes an admission, in the broad sense, that the act independently proceeded against by the House is an offense against the United States, and it is manifest from the Grossman case that the term "offenses against the United States" is to be construed broadly, not technically.

The decision of the Supreme Court in Ex Parte Grossman is based largely on the power of the King of England in exercising his pardon power for contempt. Since the Court considered the President's pardon power coextensive with that of the British King, it is instructive to consider the extent of the King's pardon power.

It is clear, as pointed out in the Grossman case, that civil contempt was not pardonable by the King. (267 U.S. 87, 111.) The Court's opinion does not indicate the application of the pardon power to contempts of the legislature. However, the offenses listed in Blackstone and Hawkins as non-pardonable do not include legislative contempts. 21/

20/ Smithers, Executive Clemency in Pennsylvania, Phila., 1909, p. 72, citing, Potter Dwarris on Statutes, 629.

21/ Hawkins, Pleas of the Crown, 6th ed., 1787, II, 549, 553, 556; Blackstone Comm. IV, 285, 397, 399, 399.

Hawkins, Pl. Cr., 2, 1787, p. 553, views the pardon power thus:

> "Whether there be any offence which cannot be pardoned after it is committed: I take it to be a settled rule (b), That the king may pardon any offence whatever, whether against the common or statute law, so far as the publick is concerned in it, after it is over . . . But while a publick nuisance continues unreformed, it seems (d) agreed, That the king cannot wholly pardon it, because such pardon would take away the only means of compelling a redress of it."

It would seem that a continuing offense is not pardonable (and into this category would seem to fit a contempt insofar as it is proceeded against coercively). This appears to follow from the phrase "after it is over" and also from the reference to a continuing public nuisance. However, the reference is not clear.

According to Blackstone, Comm. IV, 398: "The king may pardon all offences merely against the crown or the public, excepting . . .". [One of the exceptions is parliamentary impeachments.] [400] "But, after the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged; for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon."

The reference to the King's pardon of the impeached lords indicates that the pardon power extended to impeachments by the Parliament. 22/ The argument may be made that this indicates the King could reach lesser judicial decisions of the legislature, i.e., contempt convictions. On the other hand, the King could not exercise the pardon power during the impeachment proceedings, and from this it may equally well be argued that he could not touch coercive contempt proceedings within the Parliament.

Nevertheless, because of the wide authority of the House of Commons to punish for contempt 23/ without the intervention of courts, including the right to fix a prolonged term of punishment (Marshall v.

22/ Semble, that the King could pardon a party attainted of high treason, by a Bill of attainder in Parliament. See (f) footnote, Chitty, Prerogatives of the Crown, London, 1820, p. 92.

23/ The power of the House of Commons to commit for contempt results from its constituting a branch of the High Court of Parliament, and its consequent possession of judicial power. Kilbourn v. Thompson, 103 U.S. 168.

Gordon, 243 U.S. 521, 533), it seems reasonable to suppose that the King's right of pardon extended to Parliamentary contempt convictions. 24/ Quaere, whether it is reasonable to suppose that the right extended to coercive exercises of the contempt power. 25/

The broad area of application of the King's pardon power prior to the adoption of our Constitution is seen in the following reference by the Supreme Court 26/ to English authority:

> "A pardon is said by Lord Coke to be a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical (3 Inst. 233). And the king's coronation oath is, 'that he will cause justice to be executed in mercy.'"

It is also interesting to note that, according to the argument of the Attorney General in Ex parte Grossman, 27/ the royal power of pardoning at one time extended to all contempts. The argument points out,

24/ Assistant Attorney General Charles Warren, in an unpublished memorandum of November 29, 1916 (Dept. File 4-4-7-1 in Archives), p. 13, states that "it is quite possible that the King might pardon contempts of Parliament -- as Attorney General Gilpin states he did." The reference apparently is to an unnamed instance of contempt in Westminister Hall cited in 3 Op. 622 (1841), but this probably referred to a sitting of the King's Bench.

Various English commentators on the pardon power of the King make no mention of legislative contempts. See Oswald, Contempt of Court, Canadian ed., 3rd ed., 1911, p. 4; Hawkins, Pleas of the Crown, 8th ed., 1787, II, 538 et seq.; Lewis's Blackstone Com. IV, Phila., 1897, p. 1767 et seq.; Chitty, Prerogatives of the Crown, London, 1820, p. 88 et seq. However, no attempt has been made to examine Parliamentary precedents or individual cases (aside from a few selected at random).

25/ The contempt involved in The Matter of a Special Reference from the Bahama Islands, Appeal Cases (1893) 138, appears to have been in the nature of a coercive, rather than punitive, exercise of the contempt power although the opinion of the Judicial Comm. of the Privy Council describes it as "punitive." The Lords considered the contempt pardonable by the royal governor. It is interesting to note the argument being made that this was a civil contempt and not pardonable.

26/ Ex parte Wells, 59 U.S. 307, 311.

27/ 267 U.S. 87, 103.

however, that at the time of the adoption of the U. S. Constitution, the King could not pardon civil contempts. However, as recently as 1911, an English authority suggests that the King could pardon even civil contempts: 28/

> "The prerogative of pardon extends to cases of criminal contempt. In the case of contempts which are not criminal, the Crown could, perhaps, but probably would not, interfere."

Conclusion

A contempt against which Congress proceeds coercively has been analogized to a civil contempt although in fact it is not civil since the proceeding is not for the benefit of a private party. The President has never pardoned a civil contempt nor a contempt against which the Congress has proceeded coercively. President Taft, in apparent reference to civil contempts, has argued persuasively against the pardoning of coercive exercises of the contempt power. The President's pardon power is considered as extensive as that of the King of England at the time of the adoption of the Constitution. English authorities examined do not indicate conclusively whether the King pardoned contempts of Parliament, whether coercive or punitive, but the pardon power of the King did not extend to civil contempts at that time. Therefore, courts may deny the President power to pardon civil contempts and by analogy may deny him the power to pardon contempts proceeded against coercively by the Congress. A factor which would be of undoubted importance in a judicial determination of the latter power is the degree to which the existence of such power would tend to destroy the independence of the legislature.

On the other hand, the broad terms in which the pardon power is granted and the specific exception of impeachment cases support a construction of the clause which would permit a pardon of legislative contempts, whether proceeded against directly and coercively or punitively under the statute law. A contempt of Congress punished by the courts under statute actually has been pardoned, and the study by the staff of the Committee on Government Operations admits that the statutory offense of contempt of Congress is pardonable. Moreover, it is reasonable to construe a contempt of Congress as an offense against the United States within the meaning of the pardon clause and thus subject to the pardon power regardless of whether resort is had to prosecution under the criminal statute. The reasoning of the Supreme Court in the Grossman case supports such construction. That decision, which upheld the pardoning of criminal contempts of court, affords logical support for the pardoning of contempts of Congress of whatever nature.

28/ Oswald Contempt of Court, Canadian (3rd) ed., 1911, p. 4.

TAB
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Department of Justice

STATEMENT

OF

WILLIAM H. REHNQUIST
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

ON

EXECUTIVE PRIVILEGE

AND

S. 1125, 92d CONGRESS, 1st SESSION

BEFORE

SUBCOMMITTEE ON SEPARATION OF POWERS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AUGUST 4, 1971

Mr. Chairman:

I am pleased to appear before the Committee as the Attorney General's representative to testify on S. 1125, 92d Congress, 1st Session, a bill, introduced by Senator Fulbright, To amend title 5, United States Code, with regard to the exercise of executive privilege. In reading your letter of June 18, 1971, Mr. Chairman, I have formed the impression that these hearings are not to be limited to the specific provisions of S. 1125, but that they are to deal more broadly with the question of executive privilege as a whole. In your words, the purpose of these hearings is to afford the executive and the legislative branches an opportunity to come together and find some common ground that will more clearly define the powers, duties, and prerogatives of the two branches in this sensitive area.

I have tried to frame my testimony in that spirit. We are dealing not with a subject such as the law of real property where the metes and bounds are quite precisely fixed, but with a broad area of government in which both the legislative and executive branches have claims which are both legitimate and often conflicting. The historic precedents

to which I shall subsequently refer are not the equivalent of binding judicial cases from courts of last resort; they do, however, indicate past practices of one branch which have been acceded to by the other. Discussion of the subject will doubtless profit from the spirit embodied in the quotation from the Federalist referred to by Senator Fulbright in his introductory statement:

> "Neither the executive nor the legislature can pretend to an exclusive or superior right of settling the boundaries between their respective powers."

I shall first treat executive privilege in general, and then deal with the more specific question presented by S. 1125. I will, of course, to the extent of my ability, be happy to respond to questions about other matters.

The doctrine of executive privilege, as I understand it, defines the constitutional authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory

process of the legislative or judicial branch of the government. The Constitution does not expressly confer upon the executive any such privilege, any more than it expressly confers upon Congress the right to use compulsory process in the aid of its legislative function. Both the executive authority and the congressional authority are implicit, rather than expressed, in the basic charter. Thus, the Constitution nowhere sets out in so many words either the power of Congress to obtain information in order to aid it in the process of legislating, nor to the power of the executive to withhold information in his possession the disclosure of which he feels would impair the proper exercise of his constitutional obligations. Yet, both of these rights are firmly rooted in history and precedent.

It is well established that the power to legislate implies the power to obtain information necessary for Congress to inform itself about the subject to be legislated, in order that the legislative function may be exercised effectively and intelligently. McGrain v. Daugherty, 273 U.S. 135, 175 (1927) upheld this authority against a private

citizen who was the brother of a former Attorney General of the United States.

Conversely, the authority of the executive branch to withhold information from compulsory process under the doctrine of executive privilege has been sustained by the courts in the case of United States v. Reynolds, 345 U.S. 1, 8 (1953). That case involved a claim of executive privilege against compulsory process of the judicial branch, rather than the legislative branch, but it is significant that the Supreme Court there recognized the existence of such a privilege. The Court did not accord the executive carte blanche in asserting the claim of privilege, but the Court's description of the extent of judicial review of the propriety of the claim indicates that such a review would be a narrow one. The Court specifically provided that such judicial determination would have to be achieved "without forcing a disclosure of the very thing the privilege is designed to protect", 345 U.S. at p. 8, and went on to say that where the government makes a prima facie showing that the evidence involved military matters which should not be divulged in the interest of national security, "the Court should not

jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone in chambers". 345 U.S. at p. 10.

While the Supreme Court has recognized the authority of Congress to use compulsory process in aid of a legislative investigation, and has likewise recognized the authority of the executive branch to assert a claim of privilege against compulsory process where the public interest would be harmed by disclosure, there is no authoritative decision settling the extent to which Congress may compel the production of documents or testimony on the part of members of the executive branch. One of the reasons for this lack of precedent may be that the relationship between the two branches during most of our country's existence has been not that of conflict, but of cooperation, albeit a cooperation which was on occasion an uneasy one. The vast majority of requests by congressional committees for testimony from the executive branch are freely complied with, and every year hundreds of executive branch witnesses appear and testify before committees of the Congress. It is only in

the rare case -- indeed, the very rare case -- the case in which a committee of Congress after mature consideration feels that information in the possession of the executive branch is essential to the discharge of the legislative function, and where the executive feels that the constitutional principle of separation of powers would be infringed by its furnishing of such information -- that the question of executive privilege arises. Here I turn, as did the Court in McGrain v. Daugherty, to the historical usage of the two branches of the federal government in attempting to outline the nature of the privilege.

The claim of the executive to withhold information from Congress goes back to the administration of President Washington. In 1792, the House of Representatives embarked on its first effort to investigate the conduct of the executive branch in connection with the ill-fated expedition of General St. Clair into the Northwest Territory. When demand was made upon the Secretary of War for the production of all papers connected with that expedition, President Washington called upon his Cabinet for consultation "because it was the first example and he wished that as far as it should become a precedent, it should be rightly conducted . . .

He could readily conceive that there might be papers so secret a nature as they ought not to be given up."

The Cabinet concluded unanimously on April 2, 1792 that the House of Representatives had the right to institute inquiries and that it might call for papers generally and "that the executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion." The Writings of Thomas Jefferson (Ford Ed., 1892) Vol. I, pp. 189-190. President Washington determined that in this particular instance the disclosure of the papers would not be contrary to the public interest and instructed the Secretary of War to make the papers requested available to the House of Representatives. The Writings of George Washington (GPO Ed., 1939) Vol. 32, p. 15.

In 1796, in connection with the appropriation of the funds required to carry out the financial provisions of the Jay Treaty, the House of Representatives requested the President to produce the instructions to the minister who

negotiated that treaty. This time President Washington advised the House that he could not comply with its request. He explained:

> "* * *
>
> "The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolite; for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members."
>
> "* * *
>
> "As, therefore, 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." Richardson, Messages and Papers of the Presidents, Vol. I, pp. 194-196.

Since that time virtually every President has had occasion to determine whether the disclosure of information to Congress was appropriate.

The problem of executive privilege arises primarily in those areas in which congressional demands for information clash with the President's responsibility to keep the same information secret. Senator Fulbright suggested in his introductory statement that Congress cannot be expected "toabdicate to 'executive caprice' in determining whether or not the Congress will be permitted to know what it needs to know in order to discharge its constitutional responsibilities." But can the executive conversely be required to abdicate to "congressional caprice" and release to Congress information which in the view of the President should not be made public? This conflict becomes all the more serious because some members of Congress claim the right to determine not only what information should be made available to Congress, but also whether that information once made available to it should be released to the public.

Mr. Justice Brandeis observed cogently in his dissenting opinion in Myers v. United States, 272 U.S. 52, 293 (1926):

> "The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy."

The President's authority to withhold information is not an unbridled one, but it necessarily requires the exercise of his judgment as to whether or not the disclosure of particular matters sought would be harmful to the national interest. As is the case with virtually any other authority -- including the authority of Congress to compel testimony -- it has potential for abuse.

Executive privilege does not authorize the withholding of information from Congress where disclosure may prove merely embarrassing to some part of the executive branch. The privilege is limited to those situations in which there is a demonstrable justification that executive withholding will further the public interest. Frequently the objection of the executive is not to the furnishing of information to members of Congress, but to the attendant complete release of the information to all interested parties throughout the world which necessarily accompanies disclosure at a public hearing. The executive branch has on more than one occasion

made available to Congress in executive session this sort of information.

The doctrine of Executive privilege has historically been pretty well confined to the areas of foreign relations, military affairs, pending investigations, and intragovernmental discussions. I will mention some pertinent examples, and attempt to indicate the reasoning behind the claim of privilege in each of these fields.

The need for secrecy in the first two categories, foreign relations and military affairs, has been well recognized by the Judicial Branch as I have shown in the discussion of the Reynolds case. Most recently in the New York Times v. United States, decided on June 30, 1971, Mr. Justice Stewart stated in his concurring opinion:

> "Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident." ____ U.S. _____, 39 Law Week 4879, 4884 (1971).

Congress has recognized the need for Presidential discretion in the disclosure of information in the field of foreign relations.

A report of the Foreign Relations Committee pointed out as early as 1816 that:

> "The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends upon secrecy and dispatch. (Quoted in United States v. Curtiss-Wright Corp., 299 U.S. 304 at 319 (1927). (Emphasis supplied.)

Congressional recognition of the power of the executive branch to withhold information in the field of foreign relations is also evidenced by the time-honored formula of resolutions of inquiry. Such resolutions normally direct or require a department head to submit the requested information to Congress. Resolutions of inquiry directed to the Department of State in matters of foreign relations, however, request the Secretary to furnish the information "if not incompatible with the public interest." See Cannon, Procedure in the House of Representatives, H. Doc. 610, 87th Cong., 2d Sess., p. 219; Curtiss-Wright, supra, at 321. In the Senate, this practice goes back to the days of Daniel Webster. (See 38 Cong. Rec. 1307, Sen. Collum.)

This formula constitutes a courteous recognition of the authority of the executive branch to withhold from Congress in the fields of foreign relations information the disclosure of which would be inconsistent with the public interest. It has been conceded that the executive would have the same power if that clause were missing. Senator Teller, in discussing such a resolution in 1905, said:

> "* * * But the President is not bound at all by a failure to put in that phrase. If he thinks it is incompatible with the public interest, it is his right so to state to the Senate, and the Senate has always bowed to such a suggestion from the Executive." 40 Cong. Rec. 22.

In 1906, a debate arose on the floor of the Senate prompted by what Professor Corwin termed President Theodore Roosevelt's "adventurous foreign policy." Senator Spooner of Wisconsin sided with the Administration while Senator Bacon of Georgia strongly argued for the privileges of the Senate. During that debate, Senator Bacon made the following statements:

> "Mr. Bacon. * * *
>
> "Of course, I recognize the fact that the question of the President's sending or refusing to send any communication to the Senate is a matter not to be judged by legal right, but a question which has always been recognized as one of courtesy between the President and this body, and which the Senate -- except, perhaps,

in the case in which the Senator took a very notable part and to which I have had occasion heretofore to allude -- has always yielded to the judgment of the President in the matter and has never made an issue with him about it.

"* * *

"Mr. Spooner. I am talking upon the principle. The Senator says 'legal right' or 'legal duty.' I admit that we have a right to pass resolutions calling for any information from the President; but does the Senator say it is the legal duty of the President to send it?

"Mr. Bacon. I do not dispute the fact that there may be occasions when the President would not.

"Mr. Spooner. Who is the judge?

"Mr. Bacon. The President, undoubtedly. Nobody has ever controverted that; and the very resolution concerning which the Senator is animadverting was expressly conditioned upon the President viewing the transmission of the information requested as being compatible with the public interest." 40 Cong. Rec. 2142. (Emphasis supplied.)

The congressional recognition of executive privilege, of course, is not restricted to foreign relations. In 1906, Senator Spooner explained on the floor of the Senate that cases in which the President is authorized to withhold information from Congress were not limited to foreign relations but included among others military information which could be of use to an enemy, and confidential

investigations in the various departments of the government. 41 Cong. Rec. 97-98.

More recently, in 1944, the Chairman of the Select House Committee in an investigation of the Federal Communications Commission, recognized in principle that:

> "for over 140 years a certain exemption [from the duty to testify before Congress] has been granted to the executive departments, particularly where it involves military secrets or relations with foreign nations." Hearings before the Select House Committee to Investigate the Federal Communications Commission, 78th Cong., 1st Sess., p. 2305.

And, in connection with the U-2 incident, the Senate Foreign Relations Committee recognized that with respect to intelligence operations:

> "the administration has the legal right to refuse the information under the doctrine of executive privilege." S. Rept. 1761, 86th Cong., 2d Sess., p. 22.

There is another category of situations in which Congress has recognized the validity of claims of executive privilege. They include the confidentiality of conversations with the President, of the process of decision-making at a high governmental level and the necessity of safeguarding frank internal advice within the executive branch. Here, too, I will advert to some examples.

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During the investigation into the circumstances surrounding the dismissal of General MacArthur held by the Senate Committees on Armed Services and Foreign Relations in 1951, General Bradley refused to testify about a conversation with President Truman in which he had acted as the President's confidential adviser. The late Senator Russell, the Committee Chairman, recognized that claim of privilege. When that ruling was challenged, the Committee upheld it by a vote of eighteen to eight. Military Situation in the Far East, Hearings before the Committee on Armed Services and the Committee on Foreign Relations, United States Senate, 82d Cong., 1st Sess., pp. 763, 832-872.

During an investigation conducted in 1962 into Military Cold War Education and Speech Review Policies, President Kennedy, by letters dated February 8 and 9, 1962, directed the Secretaries of Defense and State not to disclose to the Committee the names of any individual with respect to any particular speech reviewed by him. He explained that the changes made in those speeches were made under the Secretaries' policies and guidelines and that the

Secretaries had accepted responsibility for those changes. In these circumstances

> "it would not be possible for you to maintain an orderly Department and receive the candid advice and loyal respect of your subordinates if they, instead of you and your senior associates, are to be individually answerable to the Congress, as well as to you, for their internal acts and advice."

The Chairman of the Subcommittee, Senator Stennis, upheld the claim of privilege. Military Cold War Education and Speech Review Policies, Hearings before the Special Preparedness Subcommittee of the Committee on Armed Services, United States Senate, 87th Cong., 2d Sess., pp. 508-513, 725.

Finally the executive branch has repeatedly withheld from Congress what may generally be referred to as "open investigative files," compiled by the executive in taking care that the laws enacted by Congress be faithfully executed. The principal precedent for such withholding is the refusal of Attorney General Jackson made "with the approval of and at the direction of the President" to comply with a request from Chairman Carl Vinson of the House Committee on Naval Affairs that the Committee be furnished with all "future reports, memoranda, and correspondence of the Federal Bureau of Investigation, and the Department of Justice in connection with 'investigations made by the Department of Justice'" pertaining to

labor disturbances taking pace in industrial establishments which had naval supply contracts.

The Attorney General's refusal of the Committee's request was based on the consideration that the supplying of such information could seriously prejudice law enforcement, by allowing a prospective defendant to know how much or how little information the government had about him, and what witnesses or sources of information it was proposing to rely upon. In addition, the Opinion cited the serious prejudice to the future usefulness of the government's information-gathering agencies, since much of the information was (and is) given in confidence and can only be obtained upon a pledge not to disclose the source. Finally, Attorney General Jackson said that disclosure "might also be the grossest kind of injustice to innocent individuals," since the reports included "leads and suspicions, and sometimes even the statement of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that the correction never catches up with an accusation."

The privileged nature of investigatory information was recognized during the Army-McCarthy hearings of 1954 by Chairman Mundt's ruling:

> "The Chair is prepared to rule. He unhesitatingly and unequivocally rules that in his opinion, and this is sustained by an unbroken precedent so far as he knows before Senate investigating committees, law-enforcement officers, investigators, any of those engaged in the investigating field, who come in contact with confidential information, are not required to disclose the source of their information. The same rule has been followed by the FBI and in my opinion very appropriately so." Special Senate Investigation, Hearing before the Special Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 83d Cong., 2d Sess., p. 770.

In 1970, the President through the Attorney General invoked executive privilege in response to a request of a Subcommittee of the House Committee on Government Operations for certain investigative reports prepared by the Federal Bureau of Investigation which had been furnished to the Department of Health, Education and Welfare for the purpose of evaluating scientists nominated to serve on advisory boards. The Attorney General respectfully declined the Subcommittee's request, and stated in his letter, as provided for in President Nixon's Memorandum of March 24, 1969:

"This invocation of privilege is being made with the specific approval of the President."

The reasoning behind the claim of executive privilege in these four classical categories seems to me to be as thoroughly defensible in principle as it is well established by precedent. In the field of foreign relations, the President is, as the Supreme Court said in the Curtiss-Wright case, the "sole organ of the nation" in conducting negotiations with foreign governments. He does not have the final authority to commit the United States to a treaty, since such authority requires the advice and consent of the United States Senate; but the frequently delicate negotiations which are necessary to reach a mutually beneficial agreement which may be embodied in the form of a treaty often do not admit of being carried on in public. Frequently the problem of overly broad public dissemination of such negotiations can be solved by testimony in executive session, which informs the members of the committee of Congress without making the same information prematurely available throughout the world. The end is not secrecy as to the end product -- the treaty -- which of course should be exposed to the fullest public scrutiny, but only the confidentiality as to the negotiations which lead up to the treaty.

The need for extraordinary secrecy in the field of weapons systems and tactical military plans for the conducting of hostilities would appear to be self-evident. At least those of my generation and older are familiar with the extraordinary precautions taken against revelation of either the date or place of landing on the Normandy beaches during the Second World War in 1944. The executive branch is charged with the responsibility for such decisions, and has quite wisely insisted that where lives of American soldiers or the security of the nation is at stake, the very minimum dissemination of future plans is absolutely essential. Such secrecy with respect to highly sensitive decisions of this sort exclude not merely Congress, but all but an infinitesimal number of the employees and officials of the executive branch as well.

I have summarized earlier in my testimony the reasons given by Attorney General Jackson, and reaffirmed by Attorney General Mitchell, as to the need for confidentiality of open investigative files.

Finally, in the area of executive decision-making, it has been generally recognized that the President must be

free to receive from his advisers absolutely impartial and disinterested advice, and that those advisers may well tend to hedge or blur the substance of their opinions if they feel that they will shortly be second-guessed either by Congress, by the press, or by the public at large, or that the President may be embarrassed if he would have to explain why he did not follow their recommendations. Again, the aim is not for secrecy of the end product -- the ultimate Presidential decision is and ought to be a subject of the fullest discussion and debate, for which the President must assume undivided responsibility. But few would doubt that the Presidential decision will be a sounder one if the President is able to call upon his advisers for completely candid and frequently conflicting advice with respect to a given question.

The recent episode of the publication of the so-called "Pentagon Papers" by the press has focused public attention on the executive decision-making process. It has been urged in some quarters that the spotlight of publicity be focused, not upon the responsible head of the executive branch who must bear the ultimate responsibility for the

decision, but upon his subordinate advisors, in order that they may be subjected to the various cross-currents of public opinion in formulating their recommendations to the President. Any decision to move in this direction would represent a sharp departure from the distribution of powers contemplated by the Constitution. The executive branch of the federal government has one head, and that is the President of the United States. It is he, and he alone, who must face the electorate at the end of his four-year term in order to justify his stewardship of the nation's highest office. The notion that the advisors whom he has chosen should bear some sort of a hybrid responsibility to opinion makers outside of the government, which notion in practice would inevitably have the effect of diluting their responsibility to him, is entirely inconsistent with our tripartite system of government. The President is entitled to undivided and faithful advice from his subordinates, just as Senators and Representatives are entitled to the same sort of advice from their legislative and administrative assistants, and judges to the same sort of advice from their

law clerks. The notion that those engaged in directly advising members of any of the three branches of the government should have their work filtered through a process of analysis and criticism by columnists, newspaper reporters, or selected members of the public before that advice reaches their constitutional superior is entirely at odds with any system of responsible popular government.

I would add, finally, that the integrity of the decision making process which is protected by executive privilege in the executive branch is apparently of equal importance to the legislative and judicial branches of the government. Committees of Congress meet in closed session to "mark up" bills, and judges of appellate courts meet in closed conference to deliberate on the result to be reached in a particular case. In each of these instances, experience seems to teach that a sounder end result -- which will be the fullest object of public scrutiny -- will be reached if the process of reaching it is not conducted in a goldfish bowl. Indeed, if additional precedent were warranted, the decision of the Founding Fathers to conduct in secret all of its deliberations at the Constitutional Convention of 1787, appears to be very much in point.

While reasonable men may dispute the propriety of particular invocations of executive privilege by the various Presidents during the nation's history, I think most would agree that the doctrine itself is an absolutely essential condition for the faithful discharge by the executive of his constitutional duties. It is, therefore, as surely implied in the Constitution as is the power of Congress to investigate and to compel testimony.

I now turn to the specific provisions of S. 1125. The bill provides in a nutshell first that where an employee of the executive branch is summoned to testify or produce documents before Congress as a committee or subcommittee, he shall not refuse to appear on the ground that he intends to assert executive privilege and, second, that executive privilege may be claimed only on the basis of a written instruction of the President that the employee assert executive privilege. Senator Fulbright's introductory statement indicates that the bill has been prompted, at least in part by the refusal of Presidential Assistant Kissinger to appear before the Senate Foreign Relations Committee.

Dr. Kissinger's position, of course, is not unprecedented. There have been a number of instances in which Presidential advisers have failed to appear before Congressional committees on the ground that the only information they could furnish resulted from conversations with, or advice given to, the President.

Refusals of such type were made by Presidential Assistant John Steelman during the Truman Administration (Investigation of the GSI Strike, Hearings before a Special Subcommittee of the Committee on Education and Labor, House of Representatives, 80th Cong., 2d Sess., pp. 347-353); Presidential Assistant Sherman Adams during the Eisenhower Administration (Power Policy, Dixon-Yates Contract, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 84th Cong., 1st Sess., pp. 676, 779); and Presidential Assistant DeVier Pierson and Under Secretary of the Treasury Barr during the Lyndon Johnson Administration (Nominations of Abe Fortas and Homer Thornberry, Hearings before the Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess., pp. 1347, 1348).

Presidential Assistants, of course, have testified with respect to their private affairs. Donald Dawson did during the Truman Administration in connection with an investigation of the RFC, and Presidential Assistant Sherman Adams did during the Eisenhower Administration (Investigation of Regulatory Commissions and Agencies, Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 2d Sess., pp. 3711-3740).

The circumstance that these examples are all of relatively recent date, beginning in the 1940s, does not mean that the executive branch has become less cooperative with Congress. To the contrary, it is the result of new Congressional investigative techniques which have departed radically from the normal procedures which prevailed during the first 150 years of our life under the Constitution.

Beginning with the St. Clair investigation of 1792, to which I have referred above, until about 1940, Congress and its committees normally obtained their information from the executive branch not by way of live testimony of the Department heads, but through resolutions of inquiry in

which the appropriate official was requested or directed to communicate information or documents to Congress. Hinds, Precedents in the House of Representatives Vol. III, pp. 178-179. Hinds, which was published in 1907, stated(at p. 179) that "cabinet officers frequently appear before committees of the House," but he could give only three instances of that practice. Moreover, virtually all, if not all, of the incidents in which executive privilege was claimed prior to 1940 resulted from resolutions of inquiry rather than oral testimony of representatives of the executive branch.

In addition, Hinds' Precedents discloses a most significant limitation on resolutions of inquiry in the House of Representatives. In the absence of a similar collection of Senate precedents, we do not know whether corresponding rules prevailed in that body. A resolution of inquiry had to be limited to facts, i.e., whether or not certain action had been taken by the executive, and could not call for opinions, or the reason why the executive had taken a certain course of action. Hinds, op. cit. Vol. III, p. 174; Vol. VI, pp. 590-597.

The constitutional and practical significance of the limitation of resolutions of inquiry to facts appears from an incident during the Administration of President

Theodore Roosevelt. A resolution of inquiry directed the Attorney General to inform the Senate whether certain anti-trust proceedings had been instituted and, if not, to state the reason for that omission. The President advised the Senate:

> "* * * I feel bound, however, to add that I have instructed the Attorney-General not to respond to that portion of the resolution which calls for a statement of hisreasons for non-action. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department or to demand fromhim reasons for his action. Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever." 43 Cong. Rec. 527, at 528.

The resolutions of inquiry thus resembled the method in which the courts take evidence from high government officials. There, too, such testimony is usually taken by interrogatories. "Subjecting a cabinet officer to oral deposition is not normally countenanced." People v. United States Department of Agriculture, 427 F. 2d 561, 567 (C.A.D.C., 1970); Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.C.D.C., 1964); see also 25 Op. A.G. 326, 331 (1905).

Similarly, the courts do not permit an inquiry into the reasons or the mental processes of an administrative officer which were the basis of his decision. Morgan v. United States, 304 U.S. 1, 18 (1938); United States v. Morgan, 313 U.S. 409, 422 (1940).

Beginning with the 1940s, Congressional committees have departed from the 150-year constitutional custom of seeking information for the executive branch by way of resolution of inquiry and have required the personal appearances of Cabinet members at their hearings. Information is no longer obtained in a formal manner by asking for papers from a coordinate branch but rather by way of examining and cross-examining cabinet members and other high officers of the executive branch, frequently as if they were hostile witnesses. Moreover, oral

examination encourages the probing into issues such as motive, consultations among decision makers, discussions with the President, and advice received from subordinates. Questions of that type require the invocation of Executive privilege and thus are bound to increase the friction between those two branches of Government.

The manner of claiming Executive privilege is basically a matter of procedure. It is up to the President to determine how he will raise it and up to each House of Congress or each committee under their rulemaking powers how it is to be presented before them. If there should be a conflict between those rules, an appropriate compromise between the two branches of the Government will have to be worked out. Moreover, the bill deals largely with matters of Congresssional procedure allocated by Article I, section 5, clause 2 to each House, rather than legislation. Hence it would be necessary to include in it a reservation similar to the one in section 101 of the Legislative Reorganization Act of 1970, recognizing the full power of each House to modify the provisions of the bill.

The bill would provide <u>first</u> that no Government witness may refuse to appear before a committee on the ground that

he intends to assert Executive privilege and second that Executive privilege may be asserted only on the basis of a statement personally signed by the President requiring that the officer assert Executive privilege.

We have one objection to the terminology of the bill which may appear to be a matter of form but to us is fundamental. The bill is drafted as if the Government witness were to assert Executive privilege. The Executive privilege, however, is the President's, not the witness' privilege; the President, not the witness, asserts it.

The first paragraph of the bill would require every witness to appear before a committee even if Executive privilege is claimed with respect to all the testimony he is supposed to give or all the documents he is supposed to produce. According to Senator Fulbright's explanatory statement, this provision is designed--

> "to require an official such as the President's Assistant on National Security Affairs to appear beforean appropriate congressional committee if only for the purpose of stating in effect:
>
> 'I have been instructed in writing by the President to invoke executive privilege and here is why . . .'."

We realize, of course, that in judicial proceedings a witness who claims privilege must normally appear in court and claim it in person. But there are exceptions to that rule. Subpoenas have been quashed where it appeared that all the testimony to be elicited from a witness would be privileged, especially where the witness was the head of a Government agency. In a case in which the Chairman of the Federal Trade Commission had been subpoenaed to be questioned about his motives and considerations which induced him to take certain discretionary actions, Judge Holtzoff quashed the subpoena on the following grounds:

> "The Chairman of the Federal Trade Commission would be entirely within his rights if he appeared at the taking of the deposition and declined to answer such questions. However, it is very burdensome to insist that the head of a government agency respond in person to subpoenas such as this, if it appears that the matters to be inquired into are not subject to interrogation, because it is contrary to the best interest of the public to require the heads of government departments to fritter their time away appearing at the taking of depositions merely for the purpose of declining to answer. The burden that would be placed upon heads of departments and heads of agencies would completely interfere with the transaction of public business." Federal Trade Commission v. Bart Schwartz, International Textiles, Ltd., U.S.D.C. for the District of Columbia, Misc. No. 39-57, December 9, 1959.

These considerations, of course, multipy when the Government witness is subpoenaed not to testify but only to produce documents. Under this bill the committee chairman would not even have the power to excuse a witness from appearing in person in these circumstances. We believe that any legislation should distinguish between those few Executive Branch witnesses whose sole responsibility is that of advising the President, on the one hand, and the witness whose responsibilities include the administration of departments or agencies established by Congress, and from whom Congress may quite properly require extensive testimony. The former should not be required to appear at all, since all of their official responsibilties would be subject to a claim of privilege; the latter may be required to appear and to invoke Executive privilege where appropriate only in response to particular questions.

The bill would further provide that Executive privilege can be claimed only on the basis of a statement personally signed by the President requiring that the officer assert Executive privilege as to the testimony or document sought. The bill thus would impose upon the President a requirement

as to the form in which he claims privilege. I realize that Presidents have at times cast their claim of privilege in the form of a letter to a department head prohibiting the giving of testimony. Examples are President Eisenhower's letter to the Secretary of Defense during the Army-McCarthy dispute and President Kennedy's letters to the Secretary of Defense and the Secretary of State during the Speech Censoring Investigation to which I already have referred. But it will be noted that President Nixon's Memorandum of March 24, 1969, provides for an oral claim of privilege. I seriously question whether Congress should go further than to satisfy itself that the claim is made with the authorization of the President.

The bill does not cover a situation which arises occasionally in the course of testimony before a committee. A Government witness may feel that a specific question, especially an unanticipated one, or a specific demand for a document raises a question of Executive privilege. President Nixon's memorandum provides that in such a situation the witness shall request the Committee to hold the demand for information in abeyance until the President can

make his determination as to whether he will or will not invoke Executive privilege. The memorandum enjoins the witness to indicate that the purpose of such request is to protect the privilege pending that determination and that the request does not constitute a claim of privilege. The bill can be construed as requiring a witness to testify forthwith unless he can produce a claim of privilege signed by the President himself and that nothing else will excuse him. We believe that legislation which seeks to cover the relation between the two branches of the Government should at least eliminate this source of potential conflict.

This would not only protect the witness but probably assure the Congressional committee of more answers in the long run. The witness himself, if allowed to claim privilege, may resolve all doubts in favor of such claim. The President, knowing that the claim of Executive privilege is an unpopular one both within and without Congress, may be much more circumspect in lending his authority to the claim. The bill should provide for an opportunity for the witness to present the questions to the President for the latter's determination.

The Department of Justice opposes the enactment of this bill as presently drafted.

* * *