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MEMORANDUM

Re: Presidential Immunity from Coercive Congressional Demands for Information

7/24/73 C 5:40pm

During the early years of the Republic, Chief Justice Marshall asserted in the Burr cases 1/ that the courts had the power to direct a subpoena to the President personally. He conceded, however, that there are limitations on judicial authority to enforce such a subpoena when the President, as to certain types of information, interposes a plea of nondisclosure in the public interest. That subpoena power has since been occasionally claimed but never again been exercised by the courts. 2/ In contrast, Congress has never in the past deliberately claimed the power to direct its coercive processes at the President. 3/ The following historic precedents demonstrate that this failure is not based on considerations of courtesy but on an awareness of an absence of power.

1/ United States v. Burr, 25 Fed. Cas. 30, No. 14,692 (C.C.D. Va., 1807)[Treason]; United States v. Burr, 25 Fed. Cas. 187, No. 14,694 (C.C.D. Va., 1807)[Misdemeanor].

For further discussion of the Burr case, and the breadth of the precedent established, see section II infra.

2/ It will be shown in Part II infra, that possession by the courts of the power to subpoena the President does not mean that Congress as a co-equal branch of the Government necessarily possesses the same power.

3/ For the inevitable exception in which, due to a procedural error, Congress sought information from the President in mandatory form, see infra note 6.

cc: Buzhardt, Wh. Haw. 7/24/73

I.

Historical Precedents 4/

A. The use of the term "request" when Congress seeks to obtain information from the President.

Until about 30 years ago the usual way in which Congress sought to obtain information from the Executive branch was the passage of a resolution of inquiry by the house which sought the information. Such resolutions of inquiry, if addressed to the President, have always taken a precatory form.

1. An early example of such a resolution of inquiry occurred in 1794. In response to a Senate resolution of inquiry requesting certain information connected with the relations between the United States and France, President Washington stated:

> "United States, February 26, 1794.
>
> "Gentlemen of the Senate: I have caused the correspondence, which is the subject of your resolution of the 24 day of Jany. last, to be laid before me. After an examination of it, I directed [copies] and translations to be made; except in those particulars, which, in my judgment, for public considerations, ought not to be communicated.
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> "These copies and translations are now transmitted to the Senate; but the nature of them

4/ It has been attempted here to present the more significant instances in which Congress sought to obtain information from the President which have some bearing on the issue whether Congress has the power to compel the President to furnish information. Obviously it is neither possible nor desirable with the format of the memorandum to set forth all the instances in which Congress sought information from the President. For a more complete compilation and listing of pertinent incidents see Hinds' Precedents in the House of Representatives Vol. 3, pp. 166-167, 193-199.

manifests the propriety of their being received as confidential." 1 Richardson, Messages and Papers of the Presidents 152. (Emphasis supplied).

There is no indication in the Senate Journal that this response was considered inadequate (see 1 Senate Executive Journal 147). Indeed, the following memorandum from Secretary of State Randolph to President Washington suggests strongly that "Congressional leadership" conceded that the President was acting within the scope of his responsibility in withholding the particulars, "which in his judgment, for public consideration ought not be communicated."

> "E. Randolph has the honor of informing the President, that the message of to-day, appears to have given general satisfaction. Mr. M--d--n in particular thinks it will have a good effect. He asked me, whether an extract could not have been given from Mr. Morris's letter; upon my answering, that there were some things interwoven with the main subject, which ought not to be promulgated, he admitted, that the discretion of the President was always to be the guide. 3/ --Randolph to Washington, Feb. 24, 1794. Randolph's letter is in the Washington Papers. The Writings of George Washington (Bicentennial Edition) Vol. 33, p. 282, fn. 8.

2. The practice of using the term "request" in resolutions of inquiry addressed to the President was formalized in 1820. At that time the House of Representatives adopted a rule that resolutions of inquiry were to use the formula of "requesting information from the President of the

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3/ It will be noted that Mr. M--d--n (presumably James Madison) used the term "discretion," the same one which has been employed in the well-known cabinet discussion held two years earlier on the question whether the Secretary of War should comply with a request for information on the St. Clair expedition. The Writings of George Washington, supra, Vol. 32, p. 15, fn. 41.

United States, 6/or directing it to be furnished by the heads of either of the Executive departments or by the Postmaster General . . ." 7/ House Journal, 16th Cong., 2d Sess., pp. 67, 70 (Emphasis supplied). An 1822 amendment

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6/ We are aware of only one instance in which Congress used mandatory language in an attempt to obtain information from a President who was in office and that apparently was due to a procedural error. On June 1, 1868, Congressman Miller introduced a resolution directing the President to furnish information with respect to the return of John C. Breckinridge to the United States. Congressman Blaine objected on the ground that the resolution should read "requested" rather than "directed." Mr. Miller agreed to modify the resolution in that way. Nevertheless, it was adopted in the form in which it was originally introduced. Congressional Globe, 40th Cong., 2d Sess., p. 2756; House Journal, 40th Cong., 2d Sess., pp. 785, 786.

7/ The distinction between resolutions of inquiry requesting the President and directing the heads of departments was discussed by Senator Teller, 40 Cong. Rec. 22, and also in United States v. Curtiss-Wright Corp., 299 U.S. 304, 321 (1937).

On the other hand, President Theodore Roosevelt strongly objected to the use of the term "directed" in a resolution of inquiry addressed to the Attorney General: "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 from him 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." Message of January 6, 1909, 43 Cong. Rec. 527, 528. For similar reasons the Secretaries of the Army and the Air Force returned subpoenas served on them during the 1955 investigation of the Federal Employees' Security Program and indicated their willingness to appear voluntarily before the Committee at a mutually convenient time. See Kramer & Marcuse, Executive Privilege--A Study of the Period 1953-1960, Part II, 29 George Washington Law Review 827, 862-864.

of that rule retained the distinction. See Annals of Congress, 17th Cong., 1st Sess., col. 756.

3. On December 11, 1833, the Senate adopted a resolution introduced by Senator Clay:

> "That the President of the United States be requested to inform the Senate whether a paper under date of the 18th day of September, 1833, purporting to have been read by him to the heads of the several departments, relating to the deposites of the public money in the treasury of the United States, and alleged to have been published by his authority, be genuine or not; and if it be genuine, that he be also requested to cause a copy of the said paper to be laid before the Senate." Debates in Congress, 23d Cong., 1st Sess., col. 30.

President Jackson declined to comply with the resolution and, choosing to read the word "requested" as "required," registered a strong protest which included the following passage:

> "The Executive is a co-ordinate and independent branch of the Government equally with the Senate; and I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of departments acting as a cabinet council. As well might I be required to detail to the Senate the free and private conversation I have held with those officers on any subjects relating to their duties and my own." Id. at col. 37 8/ (Emphasis supplied).

8/ For an instance in which a President fully complied with a similar request for information as to the authenticity of reports concerning a cabinet meeting, see President Andrew Johnson's Message to the House of Representatives of July 20, 1867, Richardson, Messages and Papers of the Presidents Vol. 6, p. 527.

The subsequent development is indicative of the pitfalls involved in a Presidential refusal to comply with a congressional request for information. Senator Clay took the position that inasmuch as the President had refused to avail himself of the opportunity to confirm or deny the authenticity of the paper allegedly read by him at the cabinet meeting, he [Senator Clay]--

> "* * * by all the dictates of common sense, and according to all the rules of evidence respected here or elsewhere, was at liberty to use the best evidence in his power; and he should hereafter use, on all fit occasions, a copy of the document referred to, as published in the current newspapers of the day." Id. at col. 38.

4. In January 1837, the House of Representatives established a Select Committee to investigate the Executive departments, commonly called the Wise Committee, with power to send for persons and papers. H. Rept. 194, 24th Cong., 2d Sess., Journal Appendix, p. 3. On January 21, 1837, Congressman Wise offered a resolution which would have provided among others:

> "That the President of the United States and the heads of the several Executive Departments be required to furnish this committee * * *." Id. at 4 (Emphasis supplied).

As the result of a number of amendments (id. at 5-9), the resolution was finally adopted in the following form:

> "That the President of the United States be requested, and the heads of the several Executive Departments be directed, to furnish the committee * * *." Id. at 9.

President Jackson's response to this resolution, dated January 26, 1837, was true to form:

> "* * * The heads of departments may answer such a request as they please, provided they do

not withdraw their own time, and that of the officers under their direction, from the public business, to the injury thereof. To that business I shall direct them to devote themselves, in preference to any illegal and unconstitutional call for information, no matter from what source it may come, or however anxious they may be to meet it. For myself, I shall repel all such attempts as an invasion of the principles of justice, as well as of the constitution; and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish inquisition." Id. 17, at 18.

5. In the fall of 1953, Chairman Velde of the House Un-American Activities Committee, caused to be served on former President Truman a subpoena directing him to appear before the Committee. President Truman refused to comply with the subpoena on the assumption that the Committee would seek to examine him with respect to matters which related to the performance of his functions as President. He explained that the reasons for exempting a President from the compulsory processes of Congress while in office, applied with equal force after the expiration of his term:

"It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.

"The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

"If your intention, however, is to inquire into any acts as a private individual either before or after my Presidency and unrelated to any acts as President, I shall be happy to appear." 9 Weekly Compilation of Presidential Documents 892.

According to contemporary newspaper reports Congress did not pursue this matter any further. New York Times November 13 and 17, 1953.

B. The use of clauses such as "if not incompatible with the public interest" in requests for information addressed to the President.

A resolution of inquiry addressed to President Jefferson in 1807 requesting information relating to the Burr conspiracy contained the clause "except such as he may deem the public welfare to require not to be disclosed." Annals of Congress, 9th Cong., 2d Sess., cols. 335, 357-359. 9/ Again in 1813, Daniel Webster introduced in the House of Representatives a resolution of inquiry which requested certain information from the President "unless the public interest should in his opinion forbid such communication." Annals of Congress, 13th Cong., 1st Sess., col. 150.

From then on this clause appears to have been used more regularly in the House as well as in the Senate. A Senate resolution of inquiry dated March 2, 1816, requested the President to lay before the Senate "such information as he may deem proper." 3 Senate Executive Journal 33. The President furnished the requested information of March 6, 1816. Ibid.

Requests for information which include a clause to this effect clearly are not of a mandatory nature. The importance of the clause for the purpose of this memorandum, however, flows from the occasional congressional discussions as to whether plain requests for information which lack this attenuating formula are intended to have a compulsory effect. The

9/ This resolution of inquiry is discussed in greater detail infra III;A:1. For similar earlier clauses of this type dating back to 1798, see id. at col. 345.

answer has always been to the effect that the presence or absence of this clause does not change the legal nature of the request.

1. In 1826, a motion was made in the House of Representatives to eliminate from a resolution of inquiry relating to U.S. participation at the Conference of Panama the clause "not incompatible with the public interest to be communicated." Register of Debates in Congress, 19th Cong., 1st Sess., cols. 1208, 1212. Daniel Webster it is true objected to the elimination of the language, on the ground--

> "* * * that, in all calls for information which is in the possession of the President, it was usual and proper to limit the call, in the first instance, by the insertion of this clause; and it was very obvious that when such a limitation was introduced, the call ought to be made at as early a period in the session as is practicable; and then, if the reply to it does not contain all that gentlemen wish, the residue can be supplied in a confidential communication afterwards; but it was a thing, he believed, entirely without a precedent, to call on the President for all the information in his hands, on a given subject, without leaving it discretionary with him to withhold such part of it as he may suppose the public good forbids to be communicated." Id. at cols. 1212-1213.

At a later stage of the debate, Congressman Sprague of Maine, however, observed:

> "Suppose, then, we request the President, in the most unqualified terms, to send us all the information; and he, with the whole before him, shall firmly believe that, to disclose it, would be of essential injury to the public interests, or violate our faith to foreign nations--would he not be bound, in the discharge of his duty, to withhold it? If, then, the President shall perform his duty, and I firmly believe

that he will, conscientiously and independently, the same information will be communicated whether the qualifying clause shall be stricken out or not. The extent of information to be obtained does not depend upon the terms of the resolution." Id. at col. 1274 (Emphasis supplied).

Congressman Mitchell of South Carolina similarly stated:

"* * * that, in some respects, he considered this amendment in the same light with the gentleman from Maine. He held, that each branch of the Government is responsible for its own acts, and each had its own distinct rights and powers. The Executive is possessed of the information which is asked by this House; but, if he does not think proper to communicate it, he has the right of refusing. The amendment, therefore, in its effect, must be perfectly nugatory, and, in that view, he was unwilling to vote for it." Ibid.

Congressman Forsyth of Georgia took the opposite position:

"A gentleman from Maine (Mr. SPRAGUE), who addressed the House, Mr. F. believed, for the first time to-day, has spoken of the impropriety of asking any thing of the President which he might be possibly disposed to withhold--we having no right to do more than request, and the President not being bound to obey. When the House request information from the President, the phrase is used from courtesy; not because the House have no right to demand information, or that the President has any right to withhold it. By the Constitution, the President is the organ, by which information of exterior interest is obtained--not for his use only, but for that of the Senate and of the House of Representatives. Whenever, in the exercise of our Constitutional authority, any thing is wanted from the President, we have the right to demand, and the power

to compel the production of it. * * * Strange, indeed, would it be, if the House of Representatives, whose right it is, and whose duty it may become, to impeach those who gave, or those who obeyed instructions, should be without the power to compel the production of them. The House has the right to demand of the President, any information it may Constitutionally want, and, by the ordinary process of its Sergeant-at-Arms, to take it, if treacherously withheld from them. * * *." Id. at col. 1278.

The motion to strike the "not incompatible" clause was rejected 98 to 71 and a resolution of inquiry which contained a clause to that effect was adopted by a vote of 125 to 40. Id. at cols. 1301-1302.

2. A similar discussion occurred in 1905. Senator Teller of Colorado had introduced the following resolution:

"Resolved, That the President is hereby requested to send to the Senate, for use in executive sessions, copies of the instructions given to Commodore Dillingham and Minister Dawson, or either of them, regarding Dominican affairs, and copies of all correspondence and telegrams relating to Dominican affairs, or relating to any proposed agreement, protocol, or treaty between the United States and Santo Domingo, from July 1, 1904, to the 1st of March, 1905." 40 Cong. Rec. 24.

Thereupon the following colloquy took place:

"* * *

"Mr. ALLISON [of Iowa]. Before the resolution is referred, I ask the Senator from Colorado to modify it still further by saying 'if, in his judgment, it is not incompatible with the public interest.' I do not know of any case where we have asked the President for information without that qualification.

"Mr. TELLER. I have no objection to the amendment, but I have said on this floor many and many a time that that clause is not necessary, as the President has that right without our so instructing him.

"Mr. ALLISON. I know that the Senator from Colorado has said that, but it is the usual rule to insert the clause.

"Mr. TELLER. We do not have to give the President the right to withhold. That right belongs to him.

"Mr. ALLISON. Undoubtedly.

"Mr. TELLER. I think the resolution in its present form is very much better, but if the Senator from Iowa moves to amend it, I shall make no objection.

"The VICE PRESIDENT. The question is on agreeing to the amendment proposed by the Senator from Iowa. Without objection, the amendment is agreed to." Ibid.

During the debate on the merits of the resolution, Senator Lodge of Massachusetts made the following pertinent observation:

"* * * Nor do I think there is any doubt of the President's right to refuse to send in documents which he may think it incompatible with the public interest to send, whether that phrase occurs in the resolution or does not." 40 Cong. Rec. 25. 10/

10/ There have been several instances in which Presidents failed to comply with resolutions of inquiry requesting information which did not contain the qualifying clause "if not incompatible, etc." or even where the clause was deliberately omitted. See, e.g., Senate Executive Journal, Vol. 6, pp. 208, 309, 331, and pp. 431-432, 438, 446-447.

C. Legal Analysis.

History thus shows that Congress has never deliberately attempted to direct its compulsory processes to the President. It always has used the precatory form of a request when it sought information from him, and even that was usually attenuated by clauses such as "if in his judgment not inconsistent with the public interest."

Such congressional forbearance going back to the earliest days of the Republic constitutes more than a mere courtesy which may be withdrawn at will. It has at least acquired the status of a constitutional custom from which departure is permissible only if it appears that it is clearly incompatible with the Constitution. Field v. Clark, 143 U.S. 649, 691 (1892); see also Ex parte Quirin, 317 U.S. 1, 41-42, 43 (1942); Inland Waterways v. Young, 309 U.S. 517, 525 (1940); United States v. Curtiss-Wright Corp., 299 U.S. 304, 328 (1936); United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1913).

This, however, is not merely a situation in which a custom originally adopted out of courtesy toward the President has hardened into customary law now binding upon Congress. The various debates referred to above indicate clearly the full awareness of Congress that its use of "requests" in dealing with the President was not a matter of comity but one of law, and that Congress intrinsically lacks the power to issue compulsory process against the President. A careful examination of the issue was made in 1879 in connection with an investigation conducted by the House Committee on Expenditures of the State Department. The question then arose whether documents in the custody of the Department of State were subject to a congressional subpoena duces tecum. The House Judiciary Committee, to which this matter was referred, answered this question in the negative, basically on the ground that all Government documents were ultimately under the control of the President and that the President was not subject to the coercive powers of Congress. The Committee Report (H. Rept. 141, 45th Cong., 3d Sess.) stated in pertinent part (at 3):

> "* * * Certainly that can be done, and, in proper cases, ought to be done; but, in contemplation of law, under our theory of government,

all the records of the executive departments are under the control of the President of the United States; and, although the House sometimes sends resolutions to a head of a department to produce such books or papers, yet it is conceived that, in any doubtful case, no head of department would bring before a committee of the House any of the records of his office without permission of, or consultation with his superior, the President of the United States; and all resolutions directed to the President of the United States to produce papers within the control of the Executive, if properly drawn, contain a clause, 'if in his judgment not inconsistent with the public interest.' 11/ And whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate."

This approach is very closely related to the one taken by Senator Stennis in his ruling upholding President Kennedy's claim of Executive privilege during the 1962 Senate investigation on Military Cold War Education and Speech Review Policies:

11/ However, as has been shown supra, the President's discretion is not dependent upon the insertion of this clause in the request for information.

"* * * I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files--and I do not think either one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field." 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., p. 512.

It is concluded therefore that Congress lacks the power to direct a subpoena to the President. This in turn means that the President has full discretion as to whether he chooses to comply with a congressional inquiry; thus the question whether he may invoke a privilege does not even arise. Even if it were assumed arguendo that, as the major premise, a subpoena may be directed by Congress to the President, it would not follow that he must comply with every demand for information. In that event, as conceded by Chief Justice Marshall in the Burr cases, supra, the President would still be able to invoke a privilege against disclosure, presumably in the same situations as those in which privilege has been claimed traditionally with respect to congressional demands for information directed at officers of the Government inferior to the President.

II.

The Possession by the Courts of the Power to Direct a Subpoena to the President does not Necessarily Lead to the Conclusion that Congress has the Same Power.

At first blush the conclusion that the President is not subject to congressional compulsive processes appears to be in startling contrast with Chief Justice Marshall's statement in the Burr cases, supra, that the President is subject to the judicial subpoena power.

To begin, it should be noted that the effectiveness of that asserted power was greatly undermined by Chief Justice Marshall's concessions (a) that the courts would not proceed against the President as if he were an ordinary individual, and (b) that the President could certify that the disclosure of the information sought in the subpoena would be contrary to the public interest. President Jefferson availed himself of that privilege and refused to release a part of the subpoenaed documents. Chief Justice Marshall took the President's certificate at its face value. Id. at pp. 37, 192, 193. Subsequent decisions in related legal fields suggest strongly that a Presidential claim of privilege in the fields of foreign relations and national defense is conclusive on the courts. United States v. Reynolds, 345 U.S. 1.8, 10 (1953); Environmental Protection Agency v. Mink, 410 U.S. (1973). 12/

Still analogy and symmetry would seem to require the result that if the President can be subpoenaed by the courts, subject to the limitations delineated above, he is equally liable to the subpoenas of the other co-equal branch of the Government. Even short consideration will show that this argument by analogy is not operative in this area. If it were correct the existence of the judicial subpoena power vis-à-vis the Executive would mean that each of the three branches could issue their compulsory processes to the other. This obviously is not the case. The fact that the courts may direct a subpoena to the President, while Congress may not, is due partly to the historical setting in the early formative period of our Republic, as explained below, and partly due to the entirely different scope of the functions and powers of the Judiciary and the Congress.

During the trial of United States v. Cooper, 25 Fed. Cas. 631, at 633, No. 14865 (C.C.D. Pa., 1800), Mr. Justice Chase had refused to issue a subpoena to President Adams. His failure to do so had been strongly attacked by the Jeffersonian party and was said to be one of the reasons which led to his

12/ As a practical matter there may not be much difference between a total lack of power to subpoena and a power which is virtually naked because it is subject to a Presidential claim of privilege which in many areas is not reviewable.

impeachment (Warren, The Supreme Court in United States History, Vol. I, p. 273), even though it was not included in the formal Articles of Impeachment. Annals of Congress, 8th Cong., 2d Sess., cols. 85-88. Chief Justice Marshall's ruling in the Burr case that the President was subject to the subpoena power--although possibly influenced in part by the personal enmity between Jefferson and Marshall 13/ therefore met with approval in Jefferson's own party. Beveridge, The Life of John Marshall, Vol. I, p. 450.

There is an essential difference between vesting the subpoena power in the courts, the most passive and least dangerous branch of the Government (The Federalist No. 78 (Hamilton)), and in the Legislature which has a powerful tendency "to absorb all power into its vortex" (James Madison in the Constitutional Convention, July 20, 1787, and in The Federalist No. 48).

The purpose of using the subpoena power also would be different. In granting a subpoena the courts do not seek to broaden their power, but perform their function of acting as the disinterested custodians of the legal and indeed the constitutional rights of the litigants. Marbury v. Madison, 1 Cranch 137, 170 (1803). The judicial subpoena process may be limited by concepts of standing, justiciability, relevance to particular litigable issues, and the like. Moreover, the rarity in which this power has been exercised, the many defenses and privileges available to the President--as demonstrated in the Burr cases--show clearly that the ability of the courts to subpoena the President does not constitute a serious danger to the independence of the Executive branch.

On the other hand, in a contest between the two political branches of the Government the ability of Congress at any time and for any investigatory reason to subject the President to its compulsory powers would constitute a valuable tool in its "tendency of aggrandizement at the expense of the Executive" (The Federalist No. 49 (Madison), see also No. 73 (Hamilton)). In the words of President Truman's statement, supra, the

13/ Warren, The Supreme Court in United States History (Rev. Ed.) Vol. I, p. 315.

President "could easily become a mere arm of the Legislative Branch of the Government" should he become subject to a congressional subpoena. 14/

III.

Information Relating to Criminal Offenses

It has been frequently stated that Presidents will freely supply Congress with information relating to criminal offenses, especially those committed by Government officials. There is little actual support for that contention. To the contrary, the need to guarantee the fair trial and other constitutional rights of alleged malfactors has frequently been cited as a ground for denying information to Congress.

A. Historical Precedents.

1. On January 16, 1807, the House of Representatives adopted the following resolution asking for particulars

14/ In this context it should be remembered that congressional requests although couched in terms of seeking information from the Executive frequently seek to influence Executive action. See in this context Senator Schoeppel's observation on the occasion of the Senate's refusal in 1959 to confirm Admiral Strauss to be Secretary of Commerce:

> "Mr. President, none of us was born yesterday. We all know the technique, very common on Capitol Hill, of stridently demanding information when what we really want is to influence a course of action. A part of the game is to disclaim the true intent and to wax indignant when challenged.
>
> "* * * All of this is a stylized performance in the never ending tug-of-war between the legislative and executive branches.
>
> "Knowing this, we have to understand that most of the criticisms of Admiral Strauss for refusal to supply information must be taken for what they are--criticisms of his unwillingness to let this or that committee chairman dictate to him on matters of policy not spelled out in the law." 105 Cong. Rec. 9979-9980.

concerning the alleged Burr conspiracy:

> "Resolved, That the President of the United States be, and he hereby is, requested to lay before his House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together with the measures which the Executive has pursued for suppressing or defeating the same." Annals of Congress, 9th Cong., 2d Sess., cols. 335, 357-359.

President Jefferson responded to this resolution in his message of January 22, 1807, addressed to both the Senate and House of Representatives. Id. cols. 39-43. He limited the information, however, to the activities of Aaron Burr for the following reason:

> "* * * The mass of what I have received in the course of these transactions, is voluminous; but little has been given under the sanction of an oath, so as to constitute formal and legal evidence. It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions, as renders it difficult to sift out the real facts, and unadvisable to hazard more than general outlines, strengthened by current information, on the particular credibility of the relater. In this state of the evidence, delivered sometimes too under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question."

2. On January 4, 1825, the House of Representatives adopted a resolution requesting the President to submit information concerning the conduct of the officers of the Navy in

the Pacific Ocean and of other public agents in South America. 15/ President Monroe responded on January 10, 1825, that such a communication could not then "be made consistently with the public interest or with justice to the parties concerned." Debates in Congress, 18th Cong., 2d Sess., cols. 164-165; see also Richardson, op. cit., Vol. 2, p. 278. He explained:

> "In this stage the publication of those documents might tend to excite prejudices which might operate to the injury of both [viz., the officials involved, Commodore Stewart and Political Agent Prevost] * * * * It is due to their rights and to the character of the Government that they be not censured without just cause, which can not be ascertained until, on a view of the charges, they are heard in their defense, and after a thorough and impartial investigation of their conduct. Under these circumstances it is thought that a communication at this time of t those documents would not comport with the public interest nor with what is due to the parties concerned."

3. On February 2, 1835, the Senate passed the following resolution of inquiry:

> "Whereas the causes which may have produced the removal of the surveyor of the lands of the United States south of the State of Tennessee may contain information necessary to the action of the Senate on the nomination of his successor, and to the investigation now in progress respecting frauds in the sale of the public lands: Therefore, Resolved, That the President of the United States be requested to communicate to the Senate copies of the charges, if any, which may have been made to him against the official conduct of Gideon Fitz, late surveyor general south of Tennessee, from office." Senate Executive Journal, Vol. 4, pp. 465-466.

15/ The text of that resolution is not available.

In his message dated February 10, 1835, Richardson, op. cit., Vol. 3, pp. 132-134, President Jackson refused to submit the information to the Senate on the ground that the inquiry interfered with the removal power exclusively vested in the President. An additional basis for his refusal to release the charges against Mr. Fitz was that the Senate would utilize them in an executive nominating session as distinguished from a public legislative session, thereby depriving Fitz of one "of his valuable securities--that which is afforded by a public investigation in the presence of his accusers and witnesses against him." President Jackson, however, made what appears to be a limited concession:

> "* * * The intimation that these charges may also be necessary 'to the investigation now in progress respecting frauds in the sales of public lands,' is still more insufficient to authorize the present call. These investigations were instituted, and have thus far been conducted by the Senate in their legislative capacity, and with the view, it is presumed, to some legislative action. If the President has in his possession any information on the subject of such frauds, it is his duty to communicate it to Congress, and it may undoubtedly be called for, by either House, sitting in its legislative capacity, though even from such a call all matters properly belonging to the exclusive duties of the President must of necessity be exempted."

4. On April 9, 1846, the House of Representatives adopted the following resolution:

> "Resolved, That the President of the United States be requested to cause to be furnished to this House an account of all payments made on President's certificates from the fund appropriated by law, through the agency of the State Department, for the contingent expenses of foreign intercourse since the 4th of March, 1841, until the retirement of Daniel Webster from the Department of State, with copies of all entries, receipts,

letters, vouchers, memorandums, or other evidence of such payments, to whom paid, for what, and particularly all concerning the northeastern boundary dispute with Great Britain; also, copies of whatever communications were made from the Secretary of State during the last session of the 27th Congress, particularly February, 1843, to Mr. Cushing and Mr. Adams, members of the Committee of this House on Foreign Affairs, of the wish of the President of the United States to institute a special mission to Great Britain; also copies of all letters on the books of the Department of State to any officer of the United States, or any person in New York, concerning Alexander McLeod: Provided, That no document or matter is requested to be furnished by the foregoing resolution, which, in the opinion of the President, would improperly involve the citizen or subject of any foreign power.' House Journal, 29th Cong., 1st Sess., pp. 653-654.

President Polk refused to comply with that request in his message of April 14, 1846, 4 Richardson, op. cit., Vol. 4, pp. 431-436. His principal reason for withholding the information was the conclusion that he could not overturn the determination of any of his predecessors in office that certain expenditures were of a confidential nature and should not be disclosed.

The message contained a paragraph dealing with the power of Congress to inquire into the misuse of public funds. He tied that authority closely to the impeachment power of Congress and even in that situation he indicated the Executive branch "would adopt all wise precautions to prevent the exposure of all such matters the publication of which might injuriously affect the public interest, except so far as this

might be necessary to accomplish the great ends of public justice." Id. at 434-435. 16/

5. In 40 Op. A.G. 45 (1941), an Attorney General's opinion, written with the approval of and at the direction of President Franklin D. Roosevelt, indicated that investigative reports of the Federal Bureau of Investigation normally withheld from Congress "would be supplied in impeachment proceedings" (at 51). 17/

16/ This paragraph reads in full:

> "It may be alleged that the power of impeachment belongs to the House of Representatives, and that, with a view to the exercise of this power, that House has the right to investigate the conduct of all public officers under the Government. This is cheerfully admitted. In such a case the safety of the Republic would be the supreme law, and the power of the House in the pursuit of this object would penetrate into the most secret recesses of the Executive Departments. It could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge. But even in a case of that kind they would adopt all wise precautions to prevent the exposure of all such matters the publication of which might injuriously affect the public interest, except so far as this might be necessary to accomplish the great ends of public justice. If the House of Representatives, as the grand inquest of the nation, should at any time have reason to believe that there has been malversation in office by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the Executive Departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation."

17/ In 1962 President Kennedy made FBI investigative reports in the Billy Sol Estes case available to Congress even in the absence of actually pending impeachment proceedings, possibly in view of the potential disclosure of serious misconduct by government officials which might occur in such proceedings. Public Papers of the Presidents: John F. Kennedy 1962, p. 400, at 404.

6. A similar observation was made by Attorney General Brownell in connection with the Army-McCarthy dispute. A memorandum of law submitted to the Subcommittee stated that normally security board members were to be protected from the dangers inherent in the congressional review of their action. Thus the Department of the Army would not permit board members to be interrogated, and would not allow them to respond to congressional subpoenas relating to matters having to do with the loyalty security program. The report continued:

> "To this statement Mr. Brownell added one qualification. He stated that if a congressional committee indicated a bona fide intention to interrogate security board members about fraud or misconduct in the performance of their official duties, the board members would probably be required to respond to subpenas, although they should be instructed to refuse to answer any questions relating to their participation in the loyalty program." Special Senate Investigation, Hearing before the Special Subcommittee on Investigations of the Committee on Government Operations, U.S. Senate, 83d Cong., 2d Sess., p. 822 at 823.

B. Legal Analysis.

The preceding incidents contain some language to the effect that Presidents would be more responsive to congressional inquiries where criminal activities are involved. The only occasions in which Presidents actually did supply some information, however, appear to be the Aaron Burr case where President Jefferson disclosed information relating to his arch-enemy and withheld it with respect to all others involved, and the Billy Sol Estes investigation.

In the other situations which involved allegations of criminal misconduct, the Presidents actually relied on that very circumstance to withhold the information on the ground that its release to a congressional committee would interfere with the accused person's rights.

Most of the instances in which Presidents indicated that they would apply more liberal disclosure standards in connection with criminal charges thus were dicta and even they usually related to formal impeachment proceedings. It may be observed, however, that those Presidential statements are relatively old and antedate the more modern practice of utilizing the less formal process of congressional investigation by either House in lieu of the more cumbersome impeachment procedure. See Galloway, The Investigative Function of Congress, 21 American Political Science Review 41, 50, 64 (1927). Hence, it may be that Presidents will now be more ready to release evidence of criminal wrongdoings to congressional committees other than the House Judiciary Committee, which traditionally is charged with the initiation of impeachment proceedings. 18/ On the other hand, of course, there remains the fundamental consideration and the bitter lesson of the 1950's that the criminal courts, rather than Congress, are the proper forum to investigate criminal offenses.

IV.

Conclusion

Our earlier memorandum on the President's amenability of judicial subpoenas came to the conclusion that the courts could direct subpoenas to the President, but that this power was of limited practical value in view of the broad array of privileges and defenses available to the President. In the field covered by this memorandum it appears that Congress, in the light of the historical precedents, does not possess a corresponding power over the President. This is due partly to historic circumstances, but above all to the consideration that the power of Congress is so much greater than that of the courts that the doctrine of the separation of powers would be severely jeopardized if Congress could direct subpoenas at the President. In any event, if the President should be subject to a congressional power of subpoena, the efficacy of that power would be greatly curtailed, as in the case of the judicial subpoena, by the defenses and privileges available to the

18/ The Billy Sol Estes investigations were not conducted by the House Judiciary Committee.

President. Of course, both in regard to judicial and congressional demands for information, the President has discretion to waive potential defenses, if that course is in the public interest, and provide the requested information in whole or in part.

Finally, the actual Presidential responses to congressional requests for information relating to allegations of criminal conduct contradict the frequently made assertion that in this situation Congress possesses a broader power to seek information from the President.

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