JUN 25 1973

MEMORANDUM

Re: Presidential Amenability to Judicial Subpoenas

I.

Historical Precedent--the Aaron Burr Prosecutions for Treason and Misdemeanor.

The best documented instances of a judicial subpoena directed to the President and the best discussion of the underlying problems occurred during the treason and misdemeanor trials of Aaron Burr before Chief Justice Marshall, then sitting as a Circuit Justice.

A. During the prosecution of Aaron Burr for treason the defense moved for a subpoena duces tecum directing President Jefferson to produce certain documents in court. United States v. Burr, 25 Fed. Cas. 30, No. 14,692 (C.C.D. Va., 1807). The prosecution apparently conceded that the President could be subjected to an ad testificandum subpoena, but not to a subpoena duces tecum. Id. at 34.

Chief Justice Marshall nevertheless believed it necessary to determine whether he had the power to issue any kind of process directed against the President. Noting that the English King was not subject to judicial process, Marshall nevertheless held that the President, being the Chief Magistrate rather than the sovereign, was summonable. 1/ The Chief

1/ The Chief Justice stated: "If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the President, that decision is unknown to this court." 25 Fed. Cas. at 34. Seven years earlier, Mr. Justice Chase sitting as a Circuit Justice had refused to issue a subpoena directed to President Adams. United States v. Cooper, 25 Fed. Cas. 631 at 633, No. 14,865 (C.C. Pa., 1800). The reason for that refusal does not appear from the reports of the case. Justice Chase's notorious "prejudiced and passionate conduct" of the

(Continued)

Justice conceded that the official duties of the President might make it difficult, if not impossible, for him to comply with the judicial subpoena. This point, however, was a matter to be shown upon the return of the subpoena as a justification for not obeying the process; it did not constitute a reason for not issuing it. "The guard furnished to this high officer to protect him from being harrassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have been issued; not in any circumstance which is to precede their being issued." Id. at 34. Marshall also ruled that he had the power to issue a subpoena duces tecum. If the President should feel that the document contains matters that should not be disclosed, i.e., if he should claim Executive privilege, that again would be a matter to be determined on the return of the subpoena, but not prior to its issuance. Id. at p. 37. The court accordingly issued the subpoena duces tecum. 2/ Id. at p. 38.

President Jefferson's response to the subpoena appears in his letter of June 17, 1807, to George Hay, the United States Attorney. United States v. Burr, 25 Fed. Cas. 55, No. 14,693 (C.C.D. Va., 1807). Jefferson did not broadly challenge the power of the court to issue the subpoena. He did, however, refuse to comply with the requirement that he appear in person in Richmond. Instead he offered to testify in Washington by way of deposition. Significantly, he claimed the right to determine which information should be disclosed with respect to some of the subpoenaed documents; and, consistent with a cooperative waiver theory he forwarded some of the documents to the prosecutor, for release to the court. There is no indication that Chief Justice Marshall took any further steps in the matter. The jury subsequently found Burr not guilty on the treason charge. Beveridge, The Life of John Marshall Vol. 3, p. 513.

1/ (Continued) Cooper trial was said to be one of the reasons which led to his impeachment (Warren, The Supreme Court in United States History, Vol. I, p. 273), but it was not included in the formal Articles of Impeachment. Annals of Congress, 8th Cong., 2d Sess., cols. 85-88.

2/ For the text of the subpoena, see 8 Wigmore Evidence (McNaughton Rev.) § 2371 fn. 3.

B. A similar situation arose during the subsequent misdemeanor trial of Burr in 1807. Chief Justice Marshall again issued a subpoena duces tecum at the request of the defense commanding the President to appear in person in Richmond. Jefferson, in a letter written from Monticello, returned the subpoena to the prosecutor asserting that because he did "not believe that the district courts have a power of commanding the executive government to abandon superior duties and attend on them, at whatever distance, I am unwilling, by any notice of the subpoena, to set a precedent which might sanction a proceeding so preposterous." Again, consistent with a cooperative waiver theory, he instructed the prosecutor to communicate to the court those documents which in the prosecutor's judgment could be communicated without injury. The Writings of Thomas Jefferson (Memorial Edition) Vol. XI, p. 365.

When the United States Attorney made a limited disclosure, Burr's counsel moved to stay the prosecution until there had been full compliance with the subpoena duces tecum. United States v. Burr, 25 Fed. Cas. 187, 190, No. 14,694 (C.C.D. Va., 1807). Marshall denied the motion. His opinion contained the following observations:

> "* * * That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted. * * * The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. * * * I can readily conceive that the president might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure. The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on. Id. at pp. 191-192.

* * * * *

"In no case of this kind would a court be required to proceed against the president as against an ordinary individual. The objections to such a course are so strong and so obvious, that all must acknowledge them." Id. at p. 192.

The Chief Justice was troubled in that case because the President had not claimed privilege himself and given his reasons therefor, but had delegated to the United States Attorney the determination of what should be withheld. Id. at p. 192.

Subsequently President Jefferson authorized the partial release of the document at issue, deleting certain passages, and attached a certificate to the effect that his duties and the public interest forbade him to make that passage public. The Writings of Thomas Jefferson (Ford Ed.) Vol. 9, pp. 63-64. The letter and the certificate were thereupon presented in court. 25 Fed. Cas. at 193. See Moore Federal Practice (2d Ed.) 26.61 [6-4], p. 26.322. The report of the case does not contain any discussion by the court of the effect given to that certificate.

In short, it would seem that the President asserted full power to decide what could and could not be disclosed safely, but in fact gave the court most of the requested material. Marshall inconsistently asserted full power in the premises, but immediately qualified the assertion with an indecisive comment that the court would never "proceed against the President as against an ordinary individual."

## II.

## Legal Analysis

Chief Justice Marshall's handling of subpoenas to the President in the Burr cases indicates that such process involves three problems: First, the amenability of the President to the judicial process at all; second, the question whether the President must attend court in person, and what other protective devices are available to the President; and, third, the President's power to invoke Executive privilege.

A. Modern legal discussion of the power of the courts to subpoena the President still adheres to Chief Justice Marshall's view that the President is not exempt from judicial process, in particular the judicial power to compel anyone to give testimony.

Wigmore, the classic commentator on the law of evidence, starts with the proposition that everyone is duty-bound to give testimony in a judicial proceeding, and that any exemption from that principle must be express either through a constitutional or statutory provision. Wigmore Evidence [McNaughton Rev.] section 2192.

This principle was reaffirmed by the Supreme Court as recently as Branzburg v. Hayes, 408 U.S. 665, 688 (1972), and held "particularly applicable to grand jury proceedings."

This duty to give evidence applies no matter how high the rank of the prospective witness may be. In support of this statement, Wigmore quotes the following well-known statement from Jeremy Bentham:

> "* * * Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves,--are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary,--they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a half-pennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

The Supreme Court quoted that passage in Branzburg v. Hayes, 408 U.S., supra, at 688-689, fn. 26 (1972), and added that in the Burr case Chief Justice Marshall "opined that in proper circumstances a subpoena could be issued to the President of the United States."

Analogous State cases appear to be rare. Thompson v. German Valley R. Co., 22 N. Eq. L. 111 (1871), specifically holds that a State Governor is subject to the subpoena power of the courts; 3/ City of Buffalo v. Hanna Furnace Co., 305 N.Y. 369, 373 (1953), holds that--

> "there appears to be no principle of testimonial privilege or basic consideration of policy exempting any officer or agent of the state from the duty of giving such testimony as may be required in a duly held judicial investigation."

However, the question whether the Governor of a State and the President stand on the same plane in this regard was not discussed.

The Executive branch of the Federal Government and several nisi prius courts have taken the position that under the doctrine of the separation of powers the President as the head of the Executive branch of the Federal Government is not subject to suit. Immunity from suit in a court, however, does not necessarily carry with it an exemption from the duty to testify in

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3/ The ultimate ruling of the court in the Thompson case was that the judicial branch was bound by the Governor's certificate that his official duties precluded him from releasing the information.

Appeal of Hartranft, 85 Pa. 433 (1877), which reversed an order directing the attachment of a State Governor for failure to comply with a grand jury subpoena, is ambiguous. It is not apparent whether the decision was based on the ground that the Governor is exempt from the processes of the courts, or whether it was based on the theory that the courts could not reexamine the Governor's determination to withhold the information sought to be elicited by the subpoena.

a judicial proceeding. Thus, while in England certain members of the nobility could be tried only in the House of Lords, or before a jury of their peers, they could be summoned as witnesses before any judicial tribunal. The Countess of Shrewsbury's Case, 12 Coke 94, 77 Eng. Rep. 1369 (1613).

Moreover, the view that the President is not subject to suit is usually based on the decision in Mississippi v. Johnson, 4 Wall. 475 (1867). A careful analysis of that case, however, cautions us not to overestimate the scope of the ruling. As shown in Appendix A, infra, the decision stands at most for the proposition that courts will not grant relief of a mandatory or injunctive nature against the President in connection with matters relating to his faithful execution of the laws, or that the Supreme Court will be reluctant to assume its discretionary jurisdiction where political questions are involved. Moreover, recent lower court decisions noted in the Appendix are indicative of a judicial trend permitting a proceeding directly against the President if he is the only person who has the power to grant the relief requested by the litigant.

It therefore appears questionable whether there is adequate precedent for the proposition that the constitutional doctrine of the separation of powers precludes vel non the issuance of judicial subpoenas to the President.

B. As Chief Justice Marshall indicated in Burr, the existence of judicial power to subpoena the President does not mean that a court is required to proceed against him without regard to his overriding duties to the public at large. 4/

1. One of those considerations is that high government officials are frequently given the privilege not to attend

4/ In City of Buffalo v. Hanna Furnace Corp., supra, the New York Court of Appeals held that while public officials do not have a blanket exemption from complying with a testimonial duty "any question of undue oppression or annoyance may be dealt with, as it may arise in individual cases, by the courts of first instance." 305 N.Y. at 377. One of those protective measures would be, as suggested by the court, to limit his examination to the county in which he resides or has an office.

court and to testify instead by way of deposition (Wigmore, op. cit. supra, section 2371), usually at their official station.

President Jefferson claimed that privilege in the Burr case, supra. It has been stated that in 1818, when President Monroe had been subpoenaed to attend a court-martial in Philadelphia, Attorney General Wirt suggested that the President return the subpoena with the endorsement that his official duties would not permit his absence from the seat of the Government, and to offer to testify by way of deposition. Cummings & McFarland, Federal Justice, p. 64, fn. 31. 5/

More recent decisions indicate a practice of taking the testimony of high government officials not by way of oral depositions but by written interrogatories, even if the litigation is pending at the seat of the Government. Thus, in Peoples v. United States Department of Agriculture, 427 F. 2d 561, 567 (C.A. D.C., 1970), the court observed, "subjecting a cabinet officer to oral deposition is not normally countenanced." To the same effect, Capitol Vending Machines v. Baker, 36 F.R.D. 45, 46 (D.C. D.C., 1964). That practice, applicable to cabinet officers, of course, should be applicable all the more to the President. 6/

5/ In United States v. Smith, 27 Fed. Cas. 1192, No. 16,342 (C.C.D. N.Y., 1806), the defendants had subpoenaed the Secretaries of State and of the Navy to appear at a criminal trial in New York City. The witnesses advised the court that the President had directed them not to attend the trial in person because their official duties could not be dispensed with. Instead they suggested that a commission issue to take their testimony. 27 Fed. Cas. at 1194. The court was equally divided as to whether an attachment to enforce the subpoena should be granted. 27 Fed. Cas. at 1232-1233.

6/ We are not aware of any federal authority which specifically discusses the use of depositions at interrogatories before grand juries. Nevertheless it is established that direct testimonial evidence may be dispensed with where a witness who could testify from personal knowledge cannot be produced in court. United States v. Umans, 368 F. 2d 725, 730 (C.A. 2, 1966), certiorari dismissed as improvidently granted, 389 U.S. 80 (hearsay evidence); In re Grand Jury Investigation of Banana Industry, 214 F. Supp. 856, 860 (D.C. Md., 1963) (transcript of proceedings before another grand jury).

2. Another method of protecting high government officials from harassing subpoenas is to subject the latter to greater scrutiny than those addressed to ordinary citizens. Thus, in Rex v. Baines, [1909] 1 K.B. 258, 261-262, subpoenas issued against the Prime Minister of Great Britain and the Home Secretary were quashed as an abuse of process on the basis of affidavits that the prospective witnesses did not hear and could not have heard anything material to the litigation.

Similar considerations apply in this country when the subpoenaed officer can either show that he has no relevant knowledge, 7/ or that the information he has is privileged. Overholser v. De Marcos, 149 F. 2d 23, 26 (C.A. D.C., 1945), certiorari denied, 325 U.S. 889, held that when the subpoenaed Superintendent of St. Elizabeth's Hospital asked to be excused from testifying on the basis of lack of personal knowledge, it was error for the trial court to assume that it had no discretion and must insist on the witness' attendance. Instead, a district court should require the subpoenaing party to set forth the evidence he expects to obtain, and should not insist upon a witness' attendance if it appears that he cannot give any relevant testimony. In May v. United States, 175 F. 2d 994, 1010 (C.A. D.C., 1949), certiorari denied, 338 U.S. 830, the Court of Appeals upheld as "eminently proper" a trial court ruling against the calling of the Secretary of State and people "similarly circumstanced" as witnesses for the defense, until the court had been informed what testimony would be expected of them.

Again in the case of high government officials, subpoenas may be quashed upon a showing that all the information sought to be elicited would be privileged, although with respect to others that factor would not result in the quashing of a subpoena. See Moore, Federal Practice (2d Ed.) ¶ 26.60 [3], p. 26-250, 251. Thus, in a case in which the Chairman of the Federal Trade Commission had been subpoenaed to be questioned about the motives and considerations which induced him to take

7/ Normally a subpoena will not be quashed on the basis of an allegation that a witness does not know anything about the matter involved. Moore, Federal Practice (2d Ed.) ¶ 26.69, p. 26-496-497.

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. Bert Schwartz, International Textiles, Ltd., U.S.D.C. for the District of Columbia, Misc. No. 39-57, December 9, 1959 (unreported).

And where subpoenas are issued only upon request, and not as of course, e.g., under Rule 17(b), Federal Rules of Criminal Procedure, the courts will subject requests for the subpoena of high government officials to especially careful scrutiny. See, e.g., Lee v. State of Alabama, 406 F. 2d 466, 472 (C.A. 5, 1968), certiorari denied, 395 U.S. 927; Hartman v. United States, 290 F. 2d 460, 470 (C.A. 9, 1961).

The rules generally protecting high government officials are, of course, a fortiori applicable to the President.

C. In his ruling in the Burr misdemeanor case, supra, Chief Justice Marshall recognized that the President--

> "May have sufficient motives for declining a particular paper, and those motives may be such as to restrain the court from enforcing its production. * * *.

"I admit that in such a case, much reliance must be placed on the declaration of the President.

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"The President may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons." 25 Fed. Cas. at 191-192. 8/

The State cases referred to above, Thompson v. German Valley R. Co. and Appeal of Hartranft, both concluded that a determination by a Governor that his official duties precluded the release of the information was binding on the courts.

We are not aware of any federal case subsequent to Burr dealing directly with the question of an invocation of an evidentiary privilege by the President himself.

In cases involving the invocation of an evidentiary privilege by agency heads, some of the lower federal courts had claimed the power to examine the documents in camera as of course and to determine for themselves de novo whether the privilege had been properly claimed. Environmental Protection Agency v. Mink, 310 U.S. ____; 37 L. Ed. (2d) 119 at 133, fn. 15 (1973). The ruling of the Supreme Court in Mink seems to indicate a return to the principle announced in United States v. Reynolds, 345 U.S. 1, 8, 10 (1953), that in the area of national security, i.e., foreign relations and defense, a department head's certification is normally conclusive, lest the court's reexamination of the validity of the claim of privilege jeopardize the very security which the claim is designed to protect. Even in the other areas covered by a Department head's evidentiary claim of privilege, especially the fields of intra-agency communications and advice to superior officers, the opinion in Mink indicates that in camera inspection of the documents involved is not to be made as a matter of course. Id. at 135-136.

8/ It will be remembered that this opinion was written before President Jefferson himself had certified that the public interest precluded the release of certain parts of the documents involved. See supra.

These rules limiting the scope of judicial reexamination of a claim of evidentiary privilege by the heads of departments are, of course, applicable a fortiori to a claim of privilege made by the President himself either on an evidentiary basis or on the sometimes overlapping constitutional basis of the separation of powers. As indicated above, there appears to be no recent authority on the issue of whether or not the President's constitutional claim of privilege is conclusive in judicial proceedings.

A special situation exists with respect to claims of privilege where charges of official wrongdoings are concerned. There appears to be no pertinent precedent as to whether a President can claim privilege in judicial proceedings in that situation. There have been, however, several statements made by Presidents and Attorneys General that privilege will not be invoked vis-à-vis Congress where charges of official wrongdoing are involved. See, e.g., President Polk's Message to the House of Representatives of April 20, 1846, 4 Richardson Messages and Papers of the Presidents 431, 435; and Attorney General Brownell's statement during the Army-McCarthy Investigations. Special Senate Investigation, Hearing before the Special Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 83d Cong., 2d Sess., p. 822 at 823. Significantly those statements have usually been made in context with the Congressional power of impeachment.

President Polk's statement, supra, referred to inquiries made by the House of Representatives "as the grand inquest of the nation"; President Jackson also indicated that a claim of privilege would not be made in connection with officers under impeachment proceedings. Message to the Senate of February 10, 1835, Richardson, op. cit. Vol. 3, p. 132 at 133. In 40 Op. A.G. 45, 51, an Attorney General's opinion written with "the approval of and at the direction of" President Franklin D. Roosevelt, Attorney General Jackson pointed out that FBI reports, with respect to which Executive privilege is usually claimed vis-à-vis Congress, would be supplied in connection with impeachment proceedings. In 1962 President Kennedy made FBI investigative reports in the Billy Sol Estes

case available to Congress, in the absence of actually pending impeachment proceedings; he did this possibly in view of potential disclosure of serious misconduct by government officials which might culminate in such proceedings. Public Papers of the Presidents, John F. Kennedy 1962, p. 400 at 404.

Thus it may well be that a President will not or even may not claim privilege where Congress performs its specific constitutional responsibilities in the field of impeachment. That consideration, however, may not be applicable where Congress investigates merely for the purpose of disclosure criminal misconduct, which normally is dealt with by the courts. Similarly it could be argued that a President will not or cannot claim privilege where official misconduct is the subject matter of grand jury proceedings or of a criminal prosecution.

## Conclusion

In sum, the subpoenaing of a President involves a number of complex issues depending on the circumstances in which and the purposes for which the subpoena is issued. It is no answer to say with Chief Justice Marshall that the court's power to subpoena the President is not disputed. As the Chief Justice himself pointed out, even assuming the existence of that power, the courts still would not proceed against the President in the same manner "as against an ordinary individual." The real problem therefore lies not in the existence vel non of the basic subpoena power, as in fashioning rules which properly take into consideration the President's special status and the particular circumstances of the case.

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APPENDIX I

The Executive branch commonly takes the position that under the doctrine of the separation of powers the President, as the head of the Executive branch of the Government, is not subject to the compulsory powers of either of the other two branches, hence, that he cannot be a party defendant in judicial proceedings. */ In support of that argument the Executive usually relies on the decision in Mississippi v. Johnson, 4 Wall. 475 (1867), where the Court denied the State of Mississippi leave to file an original bill in equity seeking to enjoin President Johnson from enforcing the Reconstruction Act.

The argument of the Attorney General in that case was based on the notion that for acts done in his official capacity the President is not subject to the jurisdiction of any court, except the Senate, on trial for impeachment (see, e.g., 4 Wall. at 484, 491). The opinion of the Court adopted more limited approach. It held, first, that the absence of any prior attempt to enjoin the enforcement of a statute on the ground that it was unconstitutional was strong evidence that the Court lacked jurisdiction to entertain

*/ There have been some indications that Presidents have been involved in judicial proceedings which, however, did not involve them in their official capacity. Kane, in Facts about the Presidents, describes two petty criminal proceedings in which Presidents were involved in order to refute the "misconception that the President may not be summoned to court and is immune from arrest" (at p. 321). He relates that President Pierce, having run down a woman while driving his carriage had been arrested by a Constable, "but the case was dropped as Pierce was not proved guilty." Again, President Grant, when driving his carriage, was stopped for speeding by a police officer. When the officer learned of the identity of the driver, he hesitated before issuing the ticket. President Grant, however, accepted the ticket, put up collateral, and forfeited it. He also commended the police officer to his superior for his obedience to duty. We have no present means of checking the authenticity of these accounts.

such litigation. Second, the Court concluded that if it enjoined the President from enforcing the statute, he would be liable to contempt if he violated the order; conversely that he could be subject to impeachment if he obeyed the mandate of the Court; and that an unseemly collision between all three branches of the Government might ensue if the Court sought to arrest the impeachment proceedings in order to protect the President should he comply with the decree of the Court. The Court therefore held that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties."**/

In Colegrove v. Green, 328 U.S. 549, 556 (per Frankfurter, J., 1946), Mississippi v. Johnson was interpreted to mean merely that the "duty to see that the laws are faithfully executed cannot be brought under legal compulsion." The Court also suggested that the case is indicative of its policy to decline to accept original jurisdiction in situations which would embroil it in "political questions." Ohio v. Wyandotte Chemical Corp., 401 U.S. 493, 496 (1971).

Nevertheless, as indicated above, the Executive branch has frequently relied on Mississippi v. Johnson as supporting the broad proposition that under the doctrine of the separation of powers the President, as head of the Executive branch, is totally exempt from the jurisdiction of the courts. Some nisi prius decisions have taken the same position. See, e.g., Grace Line v. Panama Canal Company, 143 F. Supp. 539, 550 (S.D.

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**/ The reasoning of the Court has lost much of its validity. The courts now enjoin federal officers inferior to the President from enforcing unconstitutional statutes, and the officers are not concerned about the possibility that they might be impeached should they comply with the mandate of the court.

N.Y. 1956); reversed on other grounds, 243 F. 2d 844 (C.A. 2, 1957); reversed 356 U.S. 309 (1958); Reese v. Nixon, 347 F. Supp. 314, 316-317 (C.D. Cal., 1972); National Ass'n of Internal Revenue Employees v. Nixon, 349 F. Supp. 18, 21 (D.C.D.C., 1972); see also San Francisco Redevelopment Agency v. Nixon, 329 F. Supp. 672 (C.D. Cal. 1971).

Other recent decisions, however, have moved in the opposite direction and suggest that the President may not even be immune from the judicial processes in the area covered by Mississippi v. Johnson. Atlee v. Nixon, 336 F. Supp. 790 (E.D. Pa., 1972), involved an action brought against the President and the Secretary of Defense seeking a permanent injunction against the prosecution of the hostilities in Southeast Asia. The court dismissed the action against the President. It opined, however, in a strong dictum, that the President's immunity from suit is not absolute. Basically, the courts are reluctant to disturb the President in the performance of his duties, especially in a situation where the plaintiff may obtain complete relief by proceeding against a cabinet officer or other subordinate official, i.e., where the President is not a necessary party. The court, however, pointed out that a "difficult issue" would arise "where the President is alleged to be acting in violation of the Constitution, and there is no agent who participated in this action who may be restrained." Because in the case at bar a decree against the codefendant, the Secretary of Defense, appeared to afford full relief, the court dismissed the President as a party "without prejudice to the rights of plaintiffs to move at some future stage of the action that he is needed as a necessary party, if alleged prohibited conduct appears to the plaintiffs to be entirely unilateral." In Meyers. v. Nixon, 339 F. Supp. 1388, 1391 (S.D. N.Y., 1972), the court stated that it agreed with the views on Presidential immunity from the jurisdiction of the courts expressed in Atlee v. Nixon, supra.

The "difficult issue" aluded to in Atlee, arose in Minnesota Chippewa Tribe v. Carlucci et al., D.C. D.C. 175-73 (1973) (unreported). Among other things, plaintiffs sought an order directing the President to activate the National Advisory Council on Indian Education by appointing its members. The Government suggested that the complaint should be dismissed as against the President because any claim against the person

of the President was barred by the separation of powers doctrine. The court (June L. Green, J.) rejected that suggestion relying on the dicta in Atlee and Meyers, supra. It pointed out that usually a person complaining of governmental action can obtain relief by suing a member of the President's cabinet, and that the President consequently in the usual situation was not a necessary party in this type of litigation. Here, however, the President was a necessary party because he was the only one who had the power to appoint the members of the Council: the plaintiffs' only remedy therefore was a suit against the President. The President subsequently appointed the members of the Council, whereupon the complaint against him was dismissed as moot.

National Association of Internal Revenue Employees v. Nixon, supra, was recently argued in the Court of Appeals for the District of Columbia. That case involved the question whether the President should have complied with the Federal Pay Comparability Act by providing for a pay increase of federal employees as of October 1, 1972, or whether the provisions of that act had been superseded by the Economic Stabilization Act. Plaintiffs asked for declaratory and injunctive relief. The district court had dismissed the complaint for lack of jurisdiction over the person of the President. During the argument on appeal (June 7, 1973), the bench suggested that while it had reservations about the issuance of relief of a mandatory or injunctive nature against the President, those considerations did not necessarily apply to a declaratory--non-compulsory-judgment. Until the case is decided, it is, of course, impossible to predict whether the questions from the bench were merely of a probing nature or whether they are indicative of the mood of the panel which heard the appeal.